REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 145 of 2005

RAMADHAN ALI ……..……. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the High Court of Kenya at Mombasa (Mwera & Maraga JJ.) dated 3rd May, 2005

in

H.C.CR.A NO 100 OF 2004)

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JUDGMENT OF THE COURT

This is a second appeal from the decision of the Superior Court Mwera and Maraga JJ. in which the appellant's first appeal was dismissed. The appeal was against the conviction of the appellant for the offence of robbery with violence contrary to **section 296(2**) of the Penal Code by Mombasa Senior Resident Magistrate, Mr. Njiru. It had been alleged in the one count facing the appellant that he on 15th October 2003 at about 6.45p.m at Khadija Village in Mombasa, jointly with others not before court while armed with offensive weapons, namely pangas and knives robbed **Jared Magolo** of his Omax wrist watch and one complete spare wheel both valued at shs.6,000/= and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jared Magolo.

Jared Magolo (*Magolo)* or *(complainant*) is an advocate of the High Court practicing law in Mombasa from Electricity house on Nkrumah road. He left his offices at about 5.30 p.m. on 15th October 2003 and drove in motor vehicle registration No. **KAE 114P** to Loreto Convent Primary School to collect his daughter. At around 6 p.m. he drove from the school towards his house in Bombolulu but on crossing the

Nyali Bridge the vehicle developed mechanical problems. He stopped it at Khadija Primary School matatu stage and used his cell phone to call his mechanic. He then released his daughter to travel home by matatu while he remained inside the vehicle to await the mechanic. After about 20 minutes, Magolo saw some 10 to 12 people surrounding his vehicle. Looking around he saw 8 of them were armed with pangas and had stood on both sides of the car. Some were demanding money from him, one attempted to force the car boot open, and yet another smashed the left side door window to open the locked car doors. Sensing extreme danger, Magolo opened his door and as he came out one of the assailants held his hand and took off his Omax watch. He struggled with three others and forcibly broke away to run across the road with the assailants in pursuit. One of the assailants successfully crossed the road but two of them ran into a passing matatu vehicle and were knocked down. The matatu did not stop. One assailant managed to get up and run away but the other was injured and remained on the road. Magolo saw that person, and the injuries he sustained before he boarded a matatu which drove off. He also saw the other assailants converge on the man trying to carry the injured man away as one of them broke into the car boot and took out the spare tyre. As Magolo headed to the police to report the matter, his mechanic **Julius Odhiambo Nyambaye** (*P.W.2*) called him on the cell-phone to inform him that he had arrived and found a person carrying away his spare tyre. Julius arrived at the scene at about 6.30 p.m and saw about 8 panga-welding persons around the vehicle. One was carrying the spare tyre away. Someone was lying on the road and at first he thought it was Magolo only to realize these were thieves when one of them confronted him. He hit the assailant with a stone and he fell. Luckily, Julius saw a police officer passing by on a motor vehicle and he stopped him. The gangsters started running away when they saw the policeman and some of them carried the injured person with them. Julius and the policeman went in pursuit and the robbers abandoned the injured man. The injured man raised his up hands pleading that he was not a thief, but Julius and the policeman arrested him. The arrest was only 20 metres from the scene.

The policeman was **PC Samuel Ndiso**, a station driver at Central Police station who was heading to Bamburi Police Station. He was approached by Julius to assist in chasing the robbers and they caught up with the 10 or so people he saw heading towards Khadija Primary School. They found a man trying to hide himself beside a wall and arrested him. The injured man arrested by Julius (*P.W.2*) and PC Ndiso (P.W.3) was the appellant.

He was taken back to the scene where flying squad officers had arrived. Nyali Police Station duty officer **Cpl. John Musyoka** (*P.W.4*) had also arrived. The officer rearrested the appellant who was injured on the lip and the leg and was bleeding and limping. Magolo who had reported the robbery at the Police Dog Section also arrived at the scene. He immediately identified the appellant as the person who had earlier been knocked down by the motor vehicle as he chased him across the road. He confirmed the loss of his watch and spare tyre and showed the police his trouser pocket which was torn during the struggle with the robbers. The appellant was then charged and tried for the offence as stated earlier.

In his defence the appellant said he was a casual worker at Bombolulu and was walking home which is in Khadija area. As he walked home he was knocked down by a vehicle while crossing the road and he lost consciousness. He later found himself in Nyali Police Station and was shocked two days later when he learned he was being charged with a robbery with violence he knew nothing about.

The learned trial Judge did not believe the appellant's defence which he rejected. He believed the complainants evidence and found support for it in the evidence of Julius (*P.W.2*) and PC Ndiso (*P.W.3*). His findings were re-evaluated by the superior court which agreed with him and confirmed the conviction and sentence of death imposed.

As this is a second appeal, only matters of law can be raised. This Court would not otherwise interfere with concurrent findings of fact made by the two courts below unless those findings are based on no evidence or on a misapprehension of it. Learned counsel for the appellant Mr. Aboubakar was alive to these principles and he sought to challenge the decision of the superior court on four grounds which we now consider.

He argued, firstly, that the appellant was not properly identified since only one witness, the complainant, purported to do so and his evidence was not corroborated. In his view, corroboration as by

law understood, was necessary because that witness was not believable. He should have given a description of the appellant to the police at the first opportunity and not wait until he found the appellant having been arrested to suggest that he had seen and identified him earlier.

Mr. Aboubakar did not cite any authority, and we are not aware of any, that makes it obligatory for the Court to look for corroboration as a rule of law in all criminal trials. Corroboration is no more than some additional independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it – See **Manilal I. Purohit** [1942]9 EACA 58 citing with approval **R. v. Baskerville** [1916] 2KB 658. A plurality of witnesses is unnecessary and a court, if it carefully directs itself as to the desirability for corroboration and the danger inherent in convicting upon uncorroborated evidence of a single witness, it may nevertheless convict on uncorroborated evidence if it is certain of the truth and reliability of that evidence. Perhaps Mr. Aboubakar was alluding to the well known requirement for a caution where the conviction rests entirely on the identification of an accused by a single witness. The predecessor of this Court laid it out in **Abdullah Bin Wendo v. R**. [1953] 20 EACA 66.

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

In the matter before us, the identification evidence relied on for the conviction of the appellant was not from a single witness. The complainant testified that he saw the appellant as he stood outside his car window struggling to open the door and demanding money. He saw him at close range when he came out of the vehicle to escape. When the appellant was knocked down by a vehicle, the complainant swore that he saw him well and saw the injuries he sustained. It was shortly before 6.30 p.m. and he swears that darkness had not set in. It was daylight and all the witnesses testified to that. As the complainant fled from the scene, Julius (P.W.2) was arriving and saw the appellant lying on the road. He saw one of the robbers removing a spare tyre which the complainant also saw as he left in a matatu. PW2 witnessed and took part in the events leading to the arrest of the appellant and there is a direct nexus between his evidence and that of the complainant. Pc Ndiso also lent support to the evidence on arrest tendered by P.W.2. There was clearly no requirement for a caution or corroboration.

The same complaint was raised by the appellant before the superior court and the court delivered itself as follows:

"All evidence taken in regard, the appellant was properly identified as one of those who robbed P.W.1. He was caught and each of the identifying witnesses said that he was bleeding on the mouth. This court, like the lower one, was unable to agree that e.g. P.W.1 did not properly identify the appellant. This court does not accept that when the thugs surrounded P.W.1's car he was in such a shock that he could not positively identify his assailants. P.W.1 was emphatic that the appellant began by shouting and trying to break his right side door to get to him. He saw him when he (P.W.1) crossed the road and the appellant with 2 others tried to chase him, he noticed that a passing matatu hit two of them and the appellant was the more seriously injured; he fell down bleeding from the mouth. When P.W.2 came along the appellant was bleeding from the mouth. When P.W.4 arrived he witnessed the same. same. The appellant was arrested near the scene. Then P.W.1 returned to the scene with police and he identified the appellant. It is not suggested and we did not believe that circumstances allowed for an error on the identification of the appellant."

We respectfully agree with that finding and do not find any merit in the first ground of appeal. We reject it.

The second complaint was that the superior court did not re-evaluate the evidence and make its own conclusions as it was its duty to do on a first appeal. That ground has only to be stated to be rejected. The superior court in our view made a thorough re-evaluation of the evidence and found no reason to depart from the findings of the trial court. That there were minor contradictions between the evidence of P.W.2 and P.W.3 does not in our view vitiate the otherwise cogent evidence believed by the two courts below. The only contradictions to which our attention was drawn was the evidence by P.W.2 that P.W.3 stopped and went to the scene while P.W.3 said he was asked by one person to assist. The other is the evidence by PW2 that he showed P.W.3 the person being carried away while P.W.3 said he alighted from his vehicle and chased the gang but said nothing about the distance while P.W.2 said it was within 20 metres from the scene where they arrested the appellant. Finally P.W.3 stated that P.W.2 was the complainant. As correctly submitted by learned Principal State Counsel Mr. Ogoti, there can be no doubt from the evidence of the two witnesses that the appellant was arrested as he was being carried away by the other members of the gang who abandoned him. That P.W.3 would think P.W.2 was the complainant is not strange since it was P.W.2 whom he found at the scene and the one who reported the matter to him. That ground of appeal fails too.

The third ground argued by Mr. Aboubaker relates to failure to consider the appellants defence. That again was a matter raised before the superior court and it stated as follows:

"**There was no conclusion of what the defence was worth but by the fact that the learned trial magistrate set it out and concluded that the prosecution case proved the case against the accused, to us is sufficient view that the unsworn statement did not raise any reasonable doubt and the learned trial magistrate could not see any himself. That is our view as we evaluated the evidence."**

We have looked at the defence ourselves and cannot find any substance in it that would displace the cogent evidence of the prosecution relied on by the two courts below.

Finally a technical point that was not raised in the superior court was put forward. It is this: At the close of the prosecution case, and before the appellant was put on his defence, he was not given an opportunity by the trial court to make submissions before a ruling was made that he had a case to answer. The same omission was made at the close of the trial and before an order was made for judgment. These are both stages in the trial where the Criminal Procedure Code provides an opportunity for the court to record any submissions from the parties to the trial. They are **sections 211** and **213** respectively. We think the submissions made in this regard are academic since no indication was made by the appellant that he wished to address the court and no order was made rejecting such desire. Under **section 211** it is such "*summing up, submission or argument as may be put forward*", while **section 213** provides for the order of speeches. There is nothing to show that the appellant wanted to invoke those two provisions of the law. At all events we do not find any prejudice caused by such omission if it was one.

We are satisfied that the appellant was convicted on sound evidence and the grounds of appeal put forward have no merits.

The appeal is dismissed in its entirety.

Dated and delivered at Mombasa this 21st day of July, 2006

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR