



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

Criminal Appeal 64 of 2006

RAMADHAN ALI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera & Maraga

JJ) dated 6/9/2005

in

HC.CRA NO. 317 OF 2002

JUDGMENT OF THE COURT

The appellant, Ramadhan Ali, was after trial convicted of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Mombasa (Mwera and Maraga, JJ) was dismissed on 6th September, 2005. This is therefore a second and final appeal.

The particulars of the offence in respect of the charge were given as follows:-

“Ramadhan Ali: On the 22nd day of December 2001 at about 6.00a.m at Shika-Adabu Location in Mombasa District within Coast Province, jointly with others not before court being armed with knives robbed WAMBUA JOSEPH a bicycle valued at Kshs. 3,000 and cash Kshs 2,400 and at or immediately before or immediately after the time of such robbery used actual violence to the said WAMBUA JOSEPH”

The facts leading to the appellant’s conviction can briefly be stated thus. The complainant **Wambua Joseph (PW1)** was cycling to the market at about 6.30 am when he was menacingly accosted by a group of thugs who emerged from a thicket by the roadside and set upon him with kicks and assaulted him with

knives and pangas. As he struggled **PW1** lost control and fell on the ground together with the person who was attempting to snatch his bicycle. Without uttering a word the assailant tightly held **PW1** by the neck and pinned him onto the ground. The assailant knelt over him and proceeded to repeatedly stab him on the head inflicting not less than eight deep wounds. While the assailant knelt over **Pw1**, it is his (**Pw1**) evidence that he was able to notice that the assailant had a funny disfigured mouth with a small gap on the lower front jaw that constituted a natural gap or missing teeth, and; also, another gap on the upper front jaw. **Pw1** further stated that he concentrated his attention on these unusual facial physical features before he passed out. He told the court that as the day had broken out he could clearly identify his attacker as he had bared his teeth as he removed the knife from the scabbard while he knelt over him. **PW1** stated that he identified his assailant as the appellant who was in a gang of four. The other three members of the gang however just stood aside and watched the whole episode but after the attack they picked **PW1's** bicycle and rode away fast.

Inspector **John Ngumbi (PW4)** conducted an identification parade two weeks after the attack. In it **PW1** identified the appellant, and to crown it all, he asked to be allowed to look into the mouth of the appellant. He again, without hesitation, asserted that the appellant was the attacker.

In his testimony before the trial court the appellant stated that he was a matatu conductor. On the material day he left early for work via “mnazi” a local liquor brewing den, took some drink and proceeded to his place of work. As it was a Muslim Holiday, he returned to the same joint for more palm wine. As there was no change for Kshs. 100/- he and his friends left for a nearby bar where they were arrested at about noon.

It is apparent on the records of appeal laid before us that the trial magistrate considered the entire evidence before the court and came to the conclusion that the appellant had been properly identified by the complainant, **PW1**. She accordingly convicted the appellant as charged. In reaching that conclusion, the trial magistrate in her judgment stated inter alia:

“This Court finds from the evidence on record that the attack lasted only some minutes but that it was in broad daylight the time of the attack being 6.00 a.m. They grappled with each other at close proximity for a few minutes before the complainant lost consciousness. They wrestled alone without interference from other persons or impediments of any sort to hide the complainant’s observation of his assailant. The complainant knew the accused by appearance before that fateful morning and positively identified him at an identification parade three weeks late on 22/1/2002.”

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According to the complainant too, he especially identified the accused by his dental structure. The accused bared his teeth when he exerted himself to draw a knife that was held fast in its scabbard at his waist. The complainant noted that he had a small gap on the front lower jaw which could be natural or as a result of losing teeth. He noted another bigger gap on the upper front jaw which appeared to be missing several teeth.”

The main issue raised by Mr. Kateteh for the appellant is the identification of the appellant by **PW1**. Mr Kateteh contended that the identification was not free from the possibility of error and was not positive at all. He argued that the sequence of events was not consistent at all and that it was too much to expect the complainant to have been alert all the time during which the vicious attack was going on. He submitted that as no doctor was called to testify on the injuries of the appellant, the P3 from tendered in the trial court was not properly produced. Mr Kateteh further submitted that the first appellate court did not make its own evaluation of the evidence, or come to its own conclusion on the evidence after reconsidering it.

We would agree with Mr. Kateteh that it is trite that it is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice and that it is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions – **Nguji v Republic [1984] KLR 729 at page 730 paragraph 20.**

We would also agree with Mr Kateteh that where evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction. See **Republic v Eria Sebwato [1960] EA 174** cited with approval in **Kiarie v Republic [1984] KLR 739 at page 744 paragraph 3.**

The robbery took place after 6.30a.m and **PW1** described vividly how the image of the appellant was permanently imprinted in his memory and how he could identify him after leaving hospital. We find from the record that the first appellate court exhaustively appraised this evidence and came to the conclusion that the identification of the appellant by **PW1** was positive and free from error. In the circumstances we think that that court cannot be faulted. Moreover, this is a second appeal and in normal circumstances, we would loathe to interfere with the concurrent findings of fact by the lower courts.

Mr Kateteh has further argued that the two courts below erred in not finding that the charge sheet filed in the trial court was defective in that it was stated therein that **PW1** was attacked by the appellant and others before court and yet the evidence adduced in the trial court shows that **PW1** was attacked by one person only. With respect, this contention is misplaced and is without merit. The evidence shows that the three members of the gang, who fled with **PW1**'s bicycle, had actively aided and abated the appellant in robbing **PW1**. They are therefore deemed to have taken part in committing the robbery and are also, with the appellant, deemed to have been the principal offenders under **section 20** of the Penal Code.

Also, we would think that even if the words “..... **with others not before the court.....**” were omitted from the charge sheet, the irregularity, error or the omission, if any, would not occasion the appellant a failure of justice. See **section 382** of the Criminal Procedure Code. We agree therefore with Mrs. Mwangi, ADPP, that there were no fatal defects in the charge sheet.

It has also been submitted on behalf of the appellant that the identification parade was defective and irregular in that it was not shown whether the eight members of the parade were as far as possible of similar age, height and general appearance and that no steps were taken to ensure that the appellant's facial and mouth disfigurement were not taken to ensure that they were not apparent. We have considered in detail the evidence of **PW4** who conducted the identification parade. We find no fault in the conduct of the parade. **PW1** walked along the line and identified the appellant. **PW1** acted properly in asking the appellant to look up and open his mouth for any peculiar features he could recall. Again, we note that, that the appellant signed the parade form to signify that the parade was conducted satisfactorily. There was a discrepancy as to the dates on which the parade was conducted, but, this is immaterial and does not affect the validity of the parade and the fact that it was properly conducted.

The appellant has also through Mr. Kateteh argued that his defence was dismissed without it being given consideration and due weight. With due respect, this averment is without merit. The trial magistrate found the appellant's evidence in the form of escapades in a wine den sketchy, far fetched and unreasonable. She acted properly in rejecting it. The first appellate court re-valuated it and came to the same conclusion and said:

“All in all we are unable to agree that the appellant's defence was not adequately considered. It may not have been set out in the learned trial magistrate's judgment but she put it side by side with the prosecution case before she rejected it. We have done just that and come to the same ending. This ground also fails.”

The two lower court's judgments which speak for themselves show that the appellant's defence case was given due consideration.

We think that the other grounds of appeal raised by the appellant are not of any significance as to require us to consider them.

In the result, we are satisfied that there is no merit in this appeal and we dismiss it accordingly.

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