



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

CORAM: TUNOI, O’KUBASU & WAKI, J.J.A.

Criminal Appeal 179 180 & 181 of 2004

BETWEEN

- 1. JUMA BAYA)**
- 2. KATANA MANGI)**
- 3. BAYA MAZERA) APPELLANTS**

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

These three appeals are consolidated for convenient disposal. The appellants **JUMA BAYA**, **KATANA MANGI** and **BAYA MAZERA**, the 1st, 2nd and 3rd appellants respectively, were jointly tried and convicted by the Senior Resident Magistrate, Mombasa, on 27th May, 2002, of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. Their first appeals to the High Court of Kenya at Mombasa were dismissed on 24th August, 2004 and hence this appeal.

The facts of the case are as follows. The complainant Abdalla Mohamed (PW1) lives at Gosheni within Barsheba village of Mombasa where he operates a shop. He lived together with his family at the rear part of the shop building. The 2nd appellant, Katana, was his employee. On the material night at about 9.45 p.m. he closed his business for the day. He directed Katana to fasten the front doors but instead Katana switched off the electricity lights plunging the shop in total darkness. Suddenly, two people held PW1 by the neck while demanding money. They stuffed his mouth with a piece of cloth and wrestled him onto the ground. They cut PW1 on the neck and chin. They then pushed him into the bedroom where PW1 had told them there was some money. He removed Shs.18,000.00 from the cupboard which he gave to 3rd appellant, Mazera, who in turn handed it over to the 1st appellant, Juma. PW1 testified that from the electricity lights in the bedroom which were on during the robbery he was able to recognise the 1st appellant, Juma, who was always hanging outside his shop and was related to the 2nd appellant, Katana. PW1 further testified that he had seen the 3rd appellant, Mazera earlier on before the fateful night.

The commotion in the bedroom attracted the attention of Noor Abdalla (PW2), the 15-year old son of PW1, who was watching TV in the sitting room. PW2 ran to assist his father but the 2nd appellant held him by the neck and cut him on the chin. The 2nd appellant led PW2 to his (PW2’s) bedroom where he pushed him under the bed. PW2 recognised the 2nd appellant from the electricity lights cast from the verandah. He also recognised the 1st appellant whom he had seen before the incident. The appellants

robbed PW1 of money, a wristwatch, beads, a bracelet of gold and golden bangles. PW1 and PW2 screamed while the appellants ransacked the rooms for more property. The commotion and the screams within the shop attracted PW1's neighbours who rushed and surrounded the building. They shouted and locked the shop from outside and called the Police.

As the appellants were trapped and could not escape, they climbed into the ceiling and hid themselves. Police Constables Ndangare (PW3), Chuma (PW4) and Lotodo (PW5) entered the building and ordered the appellants out of the ceiling and arrested them. From them, the Police recovered all the property forcibly taken from PW1 together with pangas and knives used to injure PW1 and PW2.

At the trial, the 2nd appellant denied participation in the robbery. He stated that he ran and hid in the ceiling to escape the robbers. He was surprised to find them also hiding in the ceiling. The 1st appellant averred that he was arrested for nothing. He was in his house when the screams drew him towards the house of PW1 where he was arrested. The 3rd appellant opted silence.

The trial magistrate accepted the prosecution evidence and rejected the defence of the appellants and convicted them. As stated earlier on in this judgment, their first appeals were rejected and hence this appeal.

The appeal to this Court is based, mainly, on six grounds; namely:-

- 1. The First Appellate Court erred in law in not finding that the evidence of a minor was taken on oath without the preliminary qualification.**
- 2. The First Appellate Court erred in law in not finding that the age of the appellant was not determined before sentencing.**
- 3. The First Appellate Court erred in law by not finding that the trial was not handled by authorised personnel.**
- 4. The High Court Judges erred in law in not finding that the record was poorly prepared and that the Appellant who had relied on the record to conduct his Appeal was highly prejudiced.**
- 5. The First Appellate Court erred in law in not finding that the identification was not free of errors.**
- 6. The First Appellate Court erred in law by not finding that the conviction was based on insufficient evidence.**

Mr. Kamoti represented the appellants before us.

The thrust of his submission as far as ground one is concerned is that PW2 who was aged 15 years when he testified was a minor and a child of tender years and his evidence should not have been taken without the preliminary qualification. But, was the witness, PW2, a child of tender years? In **R v Campbell** [1956] 2 All to E.R. p. 272 Lord Goddard C.J. in his famous dictum stated that:-

“Whether a child is of tender years is a matter of the good sense of the Court....”

and in **Kibangeny Arap Kolil v R** [1959] EA 92 the predecessor of this Court held that there is no definition in the Oaths and Statutory Declarations Act of the expression ‘child of tender years’ for the purposes of section 19 but in the absence of special circumstances, it took it to mean any child of any age, or apparent age, of under fourteen years.

As PW2 was aged 15 years at the trial, it was not a necessity for the trial court to conduct a *voire dire* procedure before taking his evidence. Moreover, the witness being under the age of 14 years during the

time of the commission of the offence charged was not of any assistance to Mr. Kamoti's submission since the issue as to whether a child is of tender years arises only at the trial but not when the offence was committed. See ***Bukenya and Another v Uganda*** [2002] EA 348.

In the result, ground one must fail.

It is contended in ground 3 of the memorandum of appeal that the trial was a nullity since the prosecution was conducted by a person not authorised to do so by law. We note from the record that the proceedings complained of were not hearings but only mentions before a G. Oyugi DM II and P.C. Asuma acting as prosecutor. At all stages of the trial the prosecutor was C.I.P. Auma and the Magistrate was J. Oseko, SRM. During the "mentions" before the DM II no trial took place and no witnesses testified. The issue of persons not qualified to prosecute attending mentions were revisited by this Court in *Ahmed Anakeya Mohamed & Another v R- Mombasa Criminal Appeal No. 161 of 2004* (unreported). We acquitted ourselves thus:-

"In this case the three "mentions" were made before the Chief Magistrate. Not even the trial magistrate. No witnesses were called by the prosecution and they could not have been called. Some of the accused persons were not even present. In sum nothing of substance took place. The Elirema case does not apply."

The third ground of appeal equally, too, must fail, in the sense that P.C. Asuma did not conduct any prosecution before the DM II whose mandate on the particular days was to mention the case for the purposes of assigning a hearing date before the proper trial magistrate, Oseko, SRM.

Mr. Kamoti further faulted the evidence of PW1 and PW2 relating to their identification of the appellants. He argued that the witnesses were unreliable and their evidence should be rejected. The sum total of the evidence of identification is as follows:- The appellant Katana, was an employee of PW1. He was known to both the witnesses, PW1 and PW2. The 3rd appellant was also a frequent visitor to their shop. All the appellants were arrested in the ceiling of PW1's shop. They gave no convincing reason for being therein with the stolen property.

It was a concurrent finding of fact that the appellants were correctly identified by PW1 and his son, PW2. The appellants were flashed out of the ceiling by the Police officers PW3, PW4 and PW5. We are thus faced with concurrent findings of fact, based on evidence, that the appellants were correctly identified by the witness as the gang that robbed PW1 in his shop and were the same gang hiding in the ceiling.

In our view, these concurrent findings of fact remove this case from the scope of such authorities as ***Wendo v R*** [1953] 20 EACA 166 and ***Roria v R*** [1967] EA 583 which were concerned with the dangers attendant upon identification by a single witness under conditions rendering identification difficult. In the result grounds 5 and 6 of the memorandum of appeal must fail.

In this case, on the concurrent findings of the trial and the first appellate courts, the appellants were properly identified and there was evidence to support those findings, which are accordingly binding on this Court.

It is also complained that the records of the appeal were poorly prepared and had greatly prejudiced the appellants in the preparations of their appeals. Though the defects on the records are visible and glaring we do not think that they have prevented the appellants to prosecute their appeals. As far as we are concerned, the records are legible, credible and correctly indexed. We are satisfied this contention is without merit. For the foregoing reasons the appeals on convictions must fail and are accordingly dismissed.

The sentences of death passed on the 1st appellant – Juma Baya and the 3rd appellant – Baya Mazera are confirmed.

However, as the 2nd appellant – Katana Mangi alleges that he was born on 15th June, 1985, and was therefore a minor. In the circumstances, the question on the confirmation of his sentence is deferred to the next session at Mombasa. In the meanwhile, the Deputy Registrar of this Court shall cause the age of the 2nd appellant – Katana Mangi to be determined at the Provincial Medical Hospital, Mombasa.

Order:

1st appellant – Juma Baya – Appeal Dismissed

3rd appellant – Baya Mazera – Appeal Dismissed

2nd appellant – Katana Mangi – Appeal against conviction dismissed. Age to be determined by the P.M.O., Mombasa, before the decision on sentence is made.

Dated and delivered at Mombasa this 22nd day of July, 2005.

P K. TUNOI

.....

JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR