



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

crim app 65 of 02

BETWEEN

JOHN MWANGI KAMANDE

Alias MOHAMEDAPPELLANT

AND

REPUBLICRESPONDENT

JUDGMENT OF THE COURT

On the morning of 27th day of January, 1999 at about 5.30 a.m. at Barani village, Malindi Location within the Coast Province, one Mohamed Swaleh Nassor (P.W.1) was returning home from a night out at the casino loaded with a sum of Ksh.27,000/= and 40 US dollars. He was viciously attacked and injured by a gang of three people who were armed with two pistols. They took the money he had and ran away. Witnessing the attack was his 'askari', Jamal Athuman (P.W.2).

Notwithstanding the fact that P.W.1 was injured and bleeding profusely, accompanied by P.W.2 he went to Malindi Police Station and made a report of the robbery. Both P.W.1 and P.W.2 had identified the robbers and were sure that if they saw them again they would identify them. So, together with the police they went around looking for the robbers especially at the Bus stage in vehicles bound for Mombasa. These searches bore no fruit.

However, the following morning on 28th January, 1999 in a completely unrelated incident, the appellant was arrested having been beaten by unknown members of the public on allegation that he was a thief. Upon arrest of the appellant, P.C Andrew Mulei (P.W.5) searched the appellant who was almost unconscious and found a pistol in his clothes tucked away in his left side of the waist. The pistol was loaded with four (4) empty cartridges. The appellant was taken to Hospital where he was admitted. As at that time, nobody had made any complaint of theft. So the intention of the police was to charge the appellant with the offence relating to possession of firearm and ammunition without a firearm certificate. On the same morning, independent of each other, P.W.1 & P.W.2 heard that a thief had been arrested at Maweni village with a pistol. They went to the hospital at separate times.

Both identified and recognised the appellant as one of the people that had robbed P.W.1 the previous morning. They made their report to the police station. As a result of their reports the appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code and possession of Firearm and ammunition without certificates contrary to section 4(2) (a) as read with section 4(3) of the Firearm Act Cap 114 Laws of Kenya The appellant was tried by the Principal

Magistrate, found guilty and convicted on all the three offences and sentenced to four years on each of counts 2 and 3, and to death on the 1st count. His appeal to the superior court was dismissed, hence this second appeal to this Court. Mr. Kiarago, counsel for the appellant, has conceded and, in our view, rightly so, that there is no merit in the appeal in as far as counts (2) and (3) are concerned. The only other issue raised in the grounds of appeal filed by the appellant is in respect of his identification as one of the robbers. According to him, the identification was not free from error since there was no connection between his arrest and the actual robbery. None of the people that were involved in the arrest were called as witnesses. In the absence of this evidence, the identification by P.W.1 and P.W.2 could only have been free from error if an identification parade had been held and the appellant accordingly identified. The appellant's conviction was mainly based on the identification of the appellant by the two main witnesses, P.W.1 and P.W.2. In that regard:

"There are abundant authorities to the effect that where the only evidence against an accused person is evidence of identification or recognition, a trial court is enjoined to treat it with caution, analyze carefully after duly warning itself as to the dangers inherent in acting on such evidences, and, to act on it to found a conviction only upon being satisfied that the circumstances following a correct identification were good and free from possibility of error." See James Otieno Nyagilo vs. Republic Criminal appeal No. 22 of 1991 (UR) page 2.

The evidence of P.W.1 & P.W.2, the identifying witnesses in as far as the circumstances and conditions under which they identified the appellant so as to be able to recognise him at the hospital were very clear. P.W.1 came home at 5.30 a.m. He parked his car in the parking lot that was clearly lit with electric light and started walking to his house. Five steps to his house he was attacked. He clearly saw the three people that attacked him. The robbery lasted between 5 to 10 minutes. The appellant was one of the two people that had a pistol. He was shorter. He is the one who held him by the throat from the back, while the other person with a pistol was beating him. His money was taken by the 3rd person that was unarmed. P.W.1 was not afraid when he realised that the pistols did not have bullets.

This was the evidence that was carefully considered, analyzed by both the two courts below and upon which they both made concurrent findings that the identification of the appellant by these two witnesses at the scene of the robbery was free from any error. Indeed, they were so sure of the attackers that they joined the police in looking for them around the town. Consequently, their encounter with the appellant at the hospital was an incident of recognition based upon their identification of the appellant during the robbery.

We also note that apart from the evidence of identification of the appellant by P.W.1 and P.W.2 there was the very material evidence of the recovery of the pistol and empty cartridges from the appellant upon his arrest. P.W.1 had testified that the robbers were armed with a pistol that did not fire any bullets. It therefore could not be a sheer coincidence that the appellant was arrested with a pistol that had no bullets. We are of the view that this piece of evidence together with the evidence of identification was sufficient to sustain the appellant's conviction with the result that the appellant's appeal is without merit. The same is dismissed.

Dated and delivered at Mombasa this 24th day of January, 2003.

J. E. GICHERU

JUDGE OF APPEAL

A.A. LAKHA

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR