



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: GICHERU, LAKHA & OWUOR, J.J.A)

CRIMINAL APPEAL NO. 142 OF 2001

BETWEEN

MOHAMED RINGI ALIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Kenya at
Mombasa (Mr. Justice Hayanga & Commissioner of
Assize, Khaminwa) dated 25th July, 2001

in

H.C.CR. APPEAL NO. 278 OF 1997)

JUDGMENT OF THE COURT:

Basically, in this second appeal to this Court, there are two matters of law raised, namely; insufficiency of the identification of the appellant by recognition and the failure by the court of first instance to consider his defence at his trial in that court. At the hearing of this appeal on 23rd January, 2002, counsel for the appellant, Mr. Hamza, submitted that the identification of the appellant was through the moonlight. But as the appellant was arrested about 6 months after the offence he was alleged to have committed, it was necessary to conduct an identification parade to affirm the alleged identification by recognition.

No such parade was conducted and according to counsel therefore, the identification of evidence of **PHILIP OWIYO (P.W.1)** and **SULEIMAN MCHASA (P.W.3)** amounted to no more than dock identification of the appellant which was of little value if at all. Over and above this, the appellant's defence was neither considered by the trial court nor was it addressed by the first appellate court. These two factors rendered unsustainable the appellant's conviction for the offences with which he was charged.

Mr. Gumo for the respondent while supporting the appellant's conviction submitted that the appellant's identification by P.W.1 and P.W.3 was by recognition through the moonlight as he was well known to the two witnesses. Indeed, the Government Analyst's report that the blood stains from the scene of the robbery could have originated from the appellant as the same was of human origin group "O" as was the blood group of the appellant corroborated the evidence of P.W.1 and P.W.3 on the identification of the

appellant by recognition. According to Mr. Gumo therefore, the appellant's conviction was safe and therefore sustainable.

The appellant had been charged in the court of first instance with the offence of robbery with violence contrary to section 296(2) of the Penal Code and with two separate counts of being in possession of a firearm and ammunition respectively without a firearm certificate contrary to section 4(2) (a) of the Firearms Act , Chapter 114 of the Laws of Kenya. He was convicted on all the three counts and was sentenced to 7 years imprisonment together with 5 strokes of corporal punishment on the count of robbery with violence and a fine of K.Shs. 20,000/= or in default one year imprisonment on each of the second and third counts.

His first appeal to the superior court was on 25th July, 2001 dismissed with the sentence of 7 years imprisonment together with 5 strokes of corporal punishment being altered by that court under **section 354(3) (a) and (b) of the Criminal Procedure Code** to one of death in the manner authorized by law. It is against that dismissal that the appellant now appeals to this Court. In dismissing the appellant's appeal as is outlined above, the first appellate court held that his conviction was grounded on cogent evidence of recognition by P.W.1 and P.W.3 who had known him before. Indeed, according to P.W.1, he had known the appellant since 1970 and on the day of the robbery he had earlier seen him alighting from a "matatu" and on seeing him at the time of the robbery, he was surprised that he was a robber.

P.W.1 claimed to have known the appellant over a long time as he had at some time worked in his father's sugar plantation. He knew him well. P.W.3 had also seen the appellant earlier in a shop drinking a soda and also in the village at Wasini Island. During the robbery at Wasini Restaurant on 15th December, 1995 at about 11.30 p.m. there was bright moonlight that enabled these two witnesses to see and recognize the appellant, according to them. Although the intensity of the moonlight was challenged at the hearing of this appeal, no serious effort was made to discredit P.W.1 and P.W.3 on this aspect of their evidence at the trial of the appellant in the court of first instance.

The appellant had a firearm - a 9mm. Baretta Pistol with two rounds of ammunition. He threatened to shoot P.W.3 with it and in trying to save his work colleague, P.W.1 struck the appellant with a stool on the left side of his head and shoulder and the appellant fell down bleeding and letting go the pistol which was recovered on the following day. After striking the appellant with a stool, P.W.1 ran to the nearby Kenya Navy Barracks to report the incident. Meanwhile, the robbers broke into the Restaurant's office and stole a sum of K.Shs. 27,000/=. Inside that office was found some blood stains which, as indicated earlier in this judgment, were collected and together with the appellant's blood sample taken to the Government Analyst and both were found to be of group "O".

This piece of evidence together with the identification evidence of **P.W.1** and **P.W.3** who recognized the appellant at the time of the robbery inextricably placed him at the scene of the robbery and his conviction for the offences with which he was charged cannot be faulted. In rejecting the appellant's defence at his trial in the court of first instance, the learned trial magistrate had said that that defence together with the submissions of his counsel did not reduce the effect of the evidence of P.W.1 and P.W.3 so that there is no basis of his complaint that his defence was not considered by the learned trial magistrate. It was simply rejected on the strength of the evidence available before the learned trial magistrate.

From the foregoing, we think that the appellant's appeal to this Court is unmeritorious and the same is dismissed but with the sentences in counts 2 and 3 referred to earlier in this judgment being kept in abeyance as the appellant is to suffer death in the manner authorized by law on the count of robbery with violence contrary to **section 296(2) of the Penal Code** .

Dated and delivered at Mombasa this 27th day of January, 2002.

J.E GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR