



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: CHUNGA, C.J., OMOLO & O'KUBASU, J.J.A.)
CRIMINAL APPEAL NO. 141 OF 2001
BETWEEN

1. DUNCAN OBARE OUKO

2. MOHAMED RASHID CHEMBEA APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Mombasa (Waki, J. & Tutui, Commissioner of Assize)
dated 31st July, 2001

in

H.C.CR.A. NOs. 218 & 219 OF 1999)

JUDGMENT OF THE COURT

The two appellants (*Duncan Obare Ouko* and *Mohamed Rashid Chembea*) were charged before the Chief Magistrate's Court at Mombasa with the offence of robbery with violence contrary to **section 296(2)** of the Penal code and convicted of the same. Each of them was sentenced to death as mandatorily provided by the law. Their appeals to the High Court were dismissed and hence the two appellants are now before this Court by way of a second appeal.

The facts of the case were that on the morning of 23rd January, 1999 at about 5:00 a.m. *Samson Orimba* (PW 1) and *Bakari Abdalla* (PW 2) were riding their bicycles to work from Soweto to Likoni when they were stopped by three people who flagged them down using spot lights in the same fashion used by police officers. The two (PW 1 and PW 2) assuming the three people were indeed police officers complied only to be attacked with pangas and knives. The three who had posed as policemen turned out to be robbers. They dragged PW 1 from his bicycle and searched him taking with them his wrist watch, bicycle and K.Shs.9,000/= in cash. They stabbed PW 1 on the face with a knife and cut him on the head with a panga. PW 2 had jumped off his bicycle and stood some distance away shouting for help but he too was robbed of his K.Shs.3,000/=. PW 2 saw the robbers stab and cut his companion (PW 1). The two witnesses testified that they were attacked in an area which was well lit by a security light from a nearby building.

They went on to testify that they were able to recognize their attackers as people they had seen before within the estate where PW 1 and PW 2 lived. This incident was then reported to the police who

arrested the two appellants.

In his unsworn statement the appellant Mohamed stated that **Kennedy Odhiambo** (PW 3) had beaten him causing loss of his teeth while appellant Duncan in his unsworn statement said that he was arrested while on his way to work when police stopped him and asked him if he was known as "Dan Mr efu". When he confirmed to the police that he was known as "Dan", he was arrested and charged.

Mr. Wameyo for both appellants submitted that there was no basis to support a finding that identification by recognition was free from error. He also pointed out that an identification parade was conducted in respect of only one appellant but in his view the identification parade was not necessary.

The two appellants were convicted on evidence which the trial court was satisfied was safe in view of the fact that the offence was committed in a well lit area and on the strength that the two witnesses (PW 1 and PW 2) knew their attackers. In convicting the appellants the learned Senior Resident Magistrate stated:-

"... the court also finds that among those three people who attacked and robbed the complainant on 23.1.99 were the two accuseds (sic) in the dock. The 1st accused's defence has been discredited because the dates in his P3 come after complainant's report and the 2nd accused's defence had not massaged (sic) to cast any doubt on the prosecutions case either in light of the evidence of recognition."

When the appellants appeared before the first appellate court their appeals were carefully considered and in the end the first appellate court concluded its judgment thus:-

"The trial court did take all the issues on identification into consideration and found that the evidence of PW 1 and PW 2 on the issue of the light "corroborated" each other. It found that the Appellants were properly identified and we on our part find no reason to warrant an interference with the same. The upshot of these appeals are that they are dismissed."

The only issue raised in this appeal relates to the identification of the appellants. The incident giving rise to the offence with which the appellants were charged took place at about 5:00 a.m. The two witnesses (PW 1 and PW 2) testified that the scene was well lit by a security light from a nearby building. These witnesses said that they were able to recognize the two appellants as these were people they had been seeing within the estate where they (appellants and witnesses) lived.

What has raised anxiety in our minds is the manner in which the appellants were arrested and how their respective defences were dealt with. The two witnesses said that they knew the appellants but how the police came to know who to arrest has never been clear from the record. There was no evidence that the two witnesses gave the descriptions of the appellants to the police. Then there was the issue of identification parade held in respect of only one appellant. If the appellants were indeed known to the witnesses then what was the use of conducting an identification parade? In our view, if the witnesses claimed that they knew both appellants then the issue of identification parade did not arise.

Appellant Mohamed in his defence stated that he was not at the scene of robbery and that he had actually been beaten by one Kennedy Odhiambo (PW 3). This appellant was injured on his mouth and lost two teeth. He produced a P3 form to confirm his story about the injury inflicted on him.

Appellant Duncan Obare Ouko in his defence had told the trial court that he was arrested when he confirmed that he was "Dan". It would appear that this appellant's defence was that he was not at the scene and his arrest was on the strength of the fact that he was known as "Dan".

We have carefully considered the issue of identification and in view of the fact that the defence of each appellant was not properly considered and as we are not sure how the appellants' arrests were effected we cannot say that the evidence against the appellants can be accepted as watertight. There are

gaps in prosecution case which raise doubts in our minds.

In view of the foregoing we are of the opinion that this is a case in which the benefit of doubt ought to be resolved in favour of the appellants. Consequently, the appeals are hereby allowed, the conviction of the two appellants quashed and the sentence of death passed on each appellant set aside. The appellants are to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 25th day of January, 2002.

B. CHUNGA

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CHIEF JUSTICE

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR