

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, LAKHA & OWUOR, J.J.A)
CRIMINAL APPEAL NO. 102 OF 2001

BETWEEN
1. MOSES MAFABI)
2. CHARLES ODUOR
HANDA)APPELLANTS
AND

REPUBLICRESPONDENT
(Appeal from the Judgment of the High Court of Kenya at Mombasa (Mr. Justice Waki &
Commissioner of Assize,
Khaminwa) dated 23rd October, 2000
in
H.C.CR. APPEAL NOS. 265 & 266 OF 1998)

JUDGMENT OF THE COURT

MOSES MAFABI and **CHARLES ODUOR HANDA** were jointly charged (with another) before Mombasa Senior Resident Magistrate with one count of robbery with violence contrary to **section 296 (2)** of the Penal Code and were sentenced to death upon their conviction. Their appeal to the superior court was dismissed.

They have now appealed to this Court by way of a second appeal. The particulars of the charge were that they jointly with others not before court being armed with a wembley pistol robbed one Mahendra Premeh Khetshik of Ksh.58,181/20 and threatened to use violence against him. This was on 3rd June 1996 at Vipee Stores, Mwembe Tayari, Mombasa.

The facts insofar as they are material may be briefly stated. The complainant had just walked into his office at 7. 30 a.m. with his friend when two men burst therein, one of them armed with a pistol. The robbers, having ordered the complainant and his friend to lie down robbed the complainant of Ksh.58,181.20, entered the getaway car and drove off.

Tom (PW3) stated that he saw the car arrive and three strangers walked past him with Charles at the steering wheel. They followed the getaway car upto Majengo where it stopped outside a Swahili type house. They left for Makupa Police Station and reported to the police.

On returning to the scene with the police among them IP Jacob Muchai PW4 they did not find the car. The police party and Tom found a man hiding under a bed holding a gun. There was cash in a paper bag. The man under the bed was Moses. The cash and gun were recovered. Moses had stashed some of the cash in his trousers band. It was Cpl. Mugambi's evidence that they were then led by Charles to a place in Tudor near Tudor Paradise Bar where they recovered the said vehicle.

The sole question in this appeal was whether the identity of the appellants as the robbers was sufficiently established.

Tom (PW3) had all the time to observe and identify the robbers as it was in broad daylight and they were close to him at three stages: when they arrived and parked four metres from him, when they walked towards him and paused near the shop entrance two metres from him and inside the shop when he confronted Moses who commanded him to lie down. Fifteen minutes later Moses was arrested in the presence of Tom and the stolen money recovered. All the two appellants were therefore properly identified and proved to have been involved in the crime.

All the evidence was re-evaluated by the superior court and like the trial court it accepted the evidence of the identifying witness, Tom (PW3) without any difficulty. The evidence of Tom as regards the appellant Moses did not stand on its own. Within 15 minutes of the robbery, Moses was arrested in the presence of Tom and the stolen property was recovered. Charles led the Police to the recovery of the getaway car.

In this case we are satisfied that the charge against the appellants was proven with that degree of certainty required by the criminal law in a capital offence. It is for this reason that we dismiss the appeal of the appellants both on the conviction and sentence.

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

2002.

R.S.O OMOLO

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JUDGE OF APPEAL

A . A . LAKHA

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JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR