REPULIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

CORAM: CHUNGA C.J., OMOLO & SHAH, JJ.A.
CRIMINAL APPEAL NO. 173 OF 2000

BETWEEN

GILBERT KIPKORIR KEMBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

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

Mombasa (Hon. Mr. Justice Waki & Commissioner Khaminwa

Mrs) dated 24th May, 2000
in
H.C.CR.A. NO. 66 OF 2000)
****

JUDGMENT OF THE COURT

The appellant, Gilbert Kipkorir Kemboi , was, on 2nd February, 2000, convicted of the offence of robbery with violence contrary to *section 296(2)* of the ***Penal Code*** and sentenced to death as prescribed by law, by B. Maloba , Senior Resident Magistrate at Mombasa. He appealed to the superior court against both the conviction and sentence. His appeal was dismissed by Waki J and Commissioner of *Assize Mrs. Khaminwa* on 24th May, 2000. He is now in this Court by way of a secAo ndG earpmpaena l.couple *Mr. & Mrs. Kroll* who were tourists in Kenya were at the material time staying at Bahari Beach Hotel at the North Coast. On 2nd January, 2000 the couple were taking a walk along the beach. After passing the Reef Hotel *Mrs. Kroll (P.W.1)* saw a young man whom she greeted. *Mr. Kroll (P.W.I)* was then about 10 meters ahead of her on the beach. *Mrs. Kroll* was set upon by this person who grabbed her handbag. There was a struggle during which the strap of the handbag broke and the young man ran off with the bag. *Mrs Kroll* called her husband for help pointing at the assailant who was running away and jumped off a cliff. The German couple were returning to their hotel when some two young men gestured them to stop, telling them that they had caught the thief. They were escorted to some guards (referred to as K. K. Guards). The thief was not there. The couple were then taken to Bamburi Police Station where they found the appellant and the bag which was snatched from *Mrs. Kroll.* The bag contained two German Passports, an ATM Post Bank Card in the name of *Mr. Kroll* , Kshs.11,000/=, reading glasses, a key to room 107 of the hotel where the *Krolls* were staying, an instruction manual for a camera and *Mrs. Kroll's* medication.

Mrs. Kroll recognised the appellant at the Police Station on account of the yellow shirt he was wearing. *Mr. Kroll* recognized him because of the yellow shirt and the shoes the appellant was wearing. Both the *Krolls* were positive about their identification of the appellant.

Ali Samuel Charo (P.W.3) who was at the material time employed by one Bayusuf was in the vicinity of the area where the incident of robbery took place. He saw a man running some 70 meters away. He chased him. He saw the appellant being brought out of the compound of a house by a watchman. The appellant had with him a bag. He (the appellant) was then taken to the office of *K. K.* Guards and thereafter to Bamburi Police Station.

Whilst at the Police Station the snatched bag was opened and all the items therein were found intact. Although some criticism was levelled at the prosecution for not calling the watchman who arrested the appellant we discern no prejudice to the defence case as Ali Charo was positive about the appellant's arrest and as the appellant was found in possession of the handbag which contained the items belonging to the *Krolls* .

As against that unassailable evidence the appellant's defence was to the effect that whilst he was going to see his sister he saw a group of some 20 men armed with knives, stones and *"rungus"* (clubs) who inquired of the appellant the reason for running. The appellant's version of events was not accepted by the trial magistrate as well as by the first appellate court. On that issue, that is, identification of the appellant by the *Krolls* and *Mr. Charo* combined with the fact that the bag which the appellant was found with contained items belonging to the *Krolls*, we have no doubt at all that the appellant was the assailant.

What has weighed upon our minds is whether there was sufficient evidence to enable the two courts below to say that the offence committed by the appellant was that of robbery with violence. Section 29 5 defines robbery. It reads:

> ***"295. Any person who steals anything, and at or immediately after the time of stealing it, uses or threatens to us e actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

The appellant, according to the Krolls, had no weapon with him. *Mrs. Kroll* stated that the appellant was not holding anything at the time of the robbery. *Mr. Kroll* did not say that the appellant had any weapon. The fact of a machete or rather a knife came up at the Police Station. Police Constable *Mwanga ngi (P.W.4)* stated that the knife was found on the appellant. He described the knife as being with nails and other dangerous multi-purpose items. There is no evidence at all that the appellant made or threatened to make use of that offensive weapon. Certainly the Krolls did not say so and no one else said that the appellant used the knife to achieve his purpose.

To enable a Court find what is commonly known as aggravated robbery, there has to be (inter alia) evidence that the offender is armed with a dangerous or offensive weapon or instrument. It must follow that the victim had knowledge or at least an inkling that there was some such weapon which the assailant intended to or attempted to use it. Mere presence of a multi-purpose (what is often referred to as a swiss knife) knife in the pocket of an assailant without any knowledge of that fact on the part of the victim and without any indication by the assailant that he has it, is not enough to enable the court to say that robbery was an aggravated one.

Section 179(1) of the ***Criminal Procedure Code*** empowers a court to convict an accused person of a lesser offence (as opposed to the offence he is charged with) when it can be gleaned or ascertained that the particulars proved do not qualify for conviction for the greater offence.

Sub-sections (2) (3) and *(4)* of *section 361* of Criminal Procedure Code empower this Court to reconsider conviction and sentence if it may appear to the Court that the courts below could properly have found the accused person guilty of some other offence on the facts before the trial magistrate. The Court in such a case instead of dismissing the appeal may substitute for the conviction entered by the subordinate court or by the first appellate court a conviction for that other offence, and pass such sentence in substitution for the sentence passed by the subordinate court or by the first appellate court as may be justified in law for that offence.

We are of the view that as the *Krolls* were not aware of the existence of the knife in the pocket of the appellant the conviction under *section 296(2)* of the Penal Code cannot be sustained. The conviction can only be contrary to *section 296(1)* of the said Code.

To that extent we allow this appeal, set aside the conviction contrary to *section 296(2)* of the Penal Code as well as the mandatory death sentence imposed on the appellant and substitute the conviction with that of simple robbery contrary to *section 296(1)* of the Penal Code and impose a term of seven year imprisonment on the appellant. The said term will be effective from the date of conviction in the subordinate court. He is ordered to be under police supervision for 5 years from the date of his release from prison. He is also ordered to receive three (3) strokes of the cane.

Dated and delivered at Mombasa this 19th day of July, 2001.

B. CHUNGA

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CHIEF JUSTICE

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR