



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: KWACH, BOSIRE & KEIWUA, J.J.A.
CRIMINAL APPEAL NO. 88 OF 2001
BETWEEN

BENDE DAMAU APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at
Mombasa (Hayanga & Waki JJ) dated 7th September,
2000**

in

H.C.C.R.A. NO. 457 OF 1996)

JUDGMENT OF THE COURT

Following his conviction for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code , the appellant was sentenced to the mandatory death penalty. His first appeal to the superior court against conviction and sentence was dismissed. In the appeal before us, he raises three main grounds for challenging his conviction. These are that:

1.The identification of the appellant was not proper.

2.The trial and first appellate courts failed to recognize the fact that a witness, Abdalla Swaleh (PW 4) was an accomplice and accordingly his evidence should not have been accepted and acted upon without corroboration.

3.All the ingredients of the offence were not proved. This being a second appeal, our jurisdiction is confined to dealing with questions of law only. The facts upon which the appellant's prosecution was based are short and straightforward.

On 13th December, 1995, at 3 a.m., James Mumo Mutisya, a shopkeeper at Bukuta in Kasigau Location, Taita Taveta District, was asleep in his house. Also asleep in the same house were his two wives. While they slept they were invaded by at least two robbers who after assaulting Mutisya, escaped with some money in cash, a bicycle and a radio cassette. Mutisya and his second wife called Emily testified at the appellant's trial that they were able to recognize the appellant by his voice and also his face with the aid of some light from a burning piece of paper which Emily lit to enable her get some money which the robbers demanded. Mutisya and Emily testified that they recognized the appellant as one of the robbers, and that they were able to do so, because he is a man they knew well before.He had been buying household provisions from their shop, and they in turn had been buying some meat from him.

The circumstances which led to the appellant's arrest are not quite clear. What is, however, clear is that when the police visited the appellant's home, he was able to lead them to the house of Ali Abdalla Swaleh from where Mutisya's stolen bicycle was recovered. It is also in evidence that the appellant led the police to Likoni, in Mombasa, from where Mutisya's radio cassette was recovered. As we stated earlier the radio cassette was one of the items which were stolen from Mutisya on the night of the robbery in his house. Swaleh testified that he had bought the bicycle from the appellant for KShs.2,100/= .His neighbour had introduced the appellant to him and told him that the appellant had a financial problem for which he urgently needed money. The person from whom the radio cassette was recovered did not testify, but the appellant did not challenge Swaleh and Corporal Michael Gatene, who testified that the appellant led them to Likoni area from where the radio cassette was recovered. The recoveries were made about three weeks after the robbery.

On the basis of the foregoing evidence, the trial Magistrate (J.O. Siganga), relying on the doctrine of recent possession of stolen property held that in absence of an explanation from the appellant as to how he came to be in possession of the bicycle and radio cassette, he was one of the robbers. She rejected the appellant's defence that he had been framed up, and held that the defence was but a sham.

On first appeal the superior court accepted the evidence of visual identification of the appellant by both Mutisya and his wife Emily, and additionally that they were able to recognize the appellant by his voice. Besides, the court relying on Section 31 of the Evidence Act and this Court's decision in **KENNEDY KAVAI ABDALLAH V R Criminal Appeal No. 42 of 1999** , held that the discovery of the stolen goods in the possession of the appellant, about a month or so after the theft, corroborated the identification or recognition of the appellant by Mutisya and his wife. That court then dismissed the appellant's appeal and thereby provoked the present one.

On the issue of identification, the record is not clear as to the description of the appellant Mutisya and Emily gave to the police. Both of them testified that they told the police that they were able to recognize one of their attackers and probably described him to the police. If their evidence of identification or recognition was the only evidence against the appellant his conviction would have been difficult to sustain. However, there is the evidence of recovery of the bicycle and the radio cassette which in absence of any explanation as to how he came to be in possession of the items, clearly raises a rebuttable presumption that he was one of the robbers. The presumption is one of fact by dint of the provisions of Section 119 of the Evidence Act . Being a presumption of fact it could only be displaced had the appellant offered a reasonable explanation as to how he came to be in possession of the two items.

It was submitted on behalf of the appellant, that the testimony of Mutisya, Swaleh and Emily on the issue was not believable. In his counsel's view, Mutisya and Emily should have been disbelieved by both the courts below. The issue as to whether or not Mutisya and his wife could be believed is a question of fact. In view of the concurrent findings of fact on the issue by the two courts below that issue does not fall for determination before us.

Concerning the evidence of Swaleh, Mr Hamza Omar, for the appellant submitted that Swaleh was an accomplice and his evidence could not therefore be relied upon without other independent, believable and clear evidence. On the facts on record it is quite clear to us that Swaleh cannot be classified as an accomplice. Nor can he be regarded as an accessory after the fact as was suggested by Mr Ogoti for the respondent. An accessory by dint of the provisions of Section 20 as read with Section 396 (1) of the Penal Code , is a principal offender. We suppose Mr Ogoti meant that Swaleh was merely an innocent receiver. The appellant was introduced to him by a neighbour. He bought the bicycle from the appellant, without any indication or evidence to suggest that the bicycle was stolen property. Our view of the matter is that Swaleh was an innocent receiver.

The last point Mr Hamza Omar raised on behalf of the appellant is that all ingredients of the offence of robbery with violence were not proved. He submitted that it was incumbent upon the prosecution to adduce medical evidence to establish that violence was involved in the said robbery. With due respect to counsel, there is clear medical evidence on record to prove that Mutisya was injured in the course of the robbery. Besides, there is evidence which both courts below accepted and relied upon to show that the

appellant was not alone at the time of the robbery. Section 296 (2) of the Penal Code has several alternative limbs. If one or more of them are established by evidence a charge of robbery with violence within the ambit of the provisions of the sub-section would be established. For the foregoing reasons, the appellant's appeal lacks merit. Accordingly, it is dismissed in its entirety.

Dated and delivered at Mombasa this 26th day of July, 2001.

R. O. KWACH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

M. OLE KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR