



IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CRIMINAL APPEAL 84 OF 2000

1. BORA KARISA TSUMA

2. BONDO TSUMA KAHILA

3. ERIC NYIRO DOUGLAS..... APPELLANTS

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Hayanga & Commissioner Khaminwa) dated 3rd May, 2000

in

H.C.CR.A. NOS. 319, 320 & 321 OF 2000

JUDGMENT OF THE COURT

The three appellants Bora Karisa Tsuma, Bondo Tsuma Kahila and Eric Nyiro Douglas were charged and convicted of two counts of robbery with violence contrary to section 296(2) of the Penal Code. They were all sentenced to suffer death by Siganga (Senior Resident Magistrate) on 21st day of June, 1995. Their first appeals were dismissed by the superior court (Hayanga, J. and Joyce Khaminwa, Commissioner of Assize) on 3rd May, 2000. They have appealed to this Court and their appeals being a second appeal they can only be on a point of law in terms of section 361(1)(a) of the Criminal Procedure Code.

Mr. Ngombo who represented all the three appellants condensed their numerous grounds of appeal into one main ground in that all the three appellants were not at the scene of the robbery nor did they participate in the robbery.

Hence, the two lower courts erred in basing the conviction of the three appellants on their alleged identification by the two eye witnesses at the scene and thereafter on the identification parade at the Police Station in view of the conditions during the robbery being not conducive to their proper identification.

The material facts which are necessary in order to enable the points of law raised to be examined and determined are these:

On the night of 2nd June, 1994 at about 12:30 a.m. one Muren Mohamed Ali (PW1), his wife Alwir or Azuya Mohamed (PW2) and their male child, were asleep in their house at Majengo, Mariakani in Kilifi District of the Coast Province. They were attacked by a gang of about four people and robbed of their radio cassette. The gang was armed with pangas and stones. Muren and Alwir were both injured during the robbery.

Alwir in particular, very seriously. One of the gang was stabbed with a somali sword by Muren. The couple was taken to hospital for treatment while their son went to make a report at Mariakani Police Station to P.C. Nyongesa (PW4) who was in charge of crime at the time. P.C. Nyongesa went to the scene of robbery, a swahili-type of house. He found the front door smashed. He was also given a panga (Exh.1) which had been abandoned at the scene by the robbers. The sitting-room was in disarray and an International Radio Cassette was missing.

P.C. Nyongesa then went to the hospital to check on the couple, he saw the severe injuries that Alwir had sustained.

Both of them informed him that they would be able to identify the robbers, they had seen them clearly during the robbery and also knew the robbers previously. Following information given to him, P.C. Nyongesa arrested the 1st and 2nd appellants, Bora and Bondo on 10th June, 1994. Later on he also arrested the 3rd appellant Eric. At separate identification parades conducted at the Police Station by I.P. Gregory Muganda (PW3) all the appellants were identified by Muren and Alwir as the three of the four people that had robbed them on the night of 2nd June, 1994.

The three appellants jointly faced two counts of robbery with violence contrary to section 296(2) of the Penal Code.

In view of the fact that Mr. Ngombo has raised the issue of whether or not the charges were properly laid, we see it necessary to refer to them in full. The particulars in respect of count 1 were as follows:

"Bora Karisa Tsuma, (2) Bondo Tsuma Kahila (3), Eric Nyiro Douglas. On the 2nd day of June, 1994 at about 12:30 a.m. at Majengo Mariakani within Kilifi District of the Coast Province jointly being armed with pangas robbed Muren Mohamed Ali his International Radio Cassette valued at Kshs.7,000/= and immediately before or after such robbery wounded Muren Mohamed."

In count 2 similarly, a charge of robbery with violence contrary to section 296(2), the complainant was Alwir and she had been robbed of the same International Radio Cassette that was the subject matter of count 1. According to Mr. Ngombo the charge was fatally defective in that, it was prejudicial to the appellants. They were left guessing which of the two victims they had robbed the alleged radio from. Moreso being a capital offence and if convicted they were faced with a death sentence. Hence the allegation of prejudice. If it is true that both the counts were based on theft of one item, the radio. Alwir clearly referred to the radio as hers so did Muren. These were a married couple living together in the same matrimonial house. In the particular circumstances of this case, we are satisfied that as to who the radio belonged to and who was robbed of it was not such a particular as to render the charge against the appellants materially defective. We are of the view that although it would have been preferable to charge the appellants with one count of robbery with violence contrary to section 296(2), in that they had robbed Muren of his radio and another count of assaulting Alwir, we are of the view that the irregularity was minor and the appellants were not prejudiced in any manner nor was any injustice occasioned. It mattered not whether they robbed Muren or Alwir of the radio. The radio belonged to both of them and it was robbed of them during the same robbery.

The whole question in this case turns on whether the appellants were positively identified at the scene of the robbery. The main attack by Mr. Ngombo was directed, as it had to be, towards showing that the lower courts misdirected themselves by omitting to consider if there was sufficient light for a clear and

positive identification, taking into consideration the fact that the robbery took place in a large 'Swahili type' house with many rooms and in the middle of the night.

The evidence which was accepted by the two lower courts was that the robbery took place in the middle of the night, Muren and Alwir were deeply asleep when they were woken up by a bang and breaking of the door. Muren said he woke up, opened the door of their bedroom and found one person standing inside the house. He clearly saw that person, the person was holding a panga.

"... there were two lights each in and out of the house."

Muren went back inside his bedroom, armed himself with a Somali sword, got out of his bedroom and entered the corridor.

The person with the panga advanced towards him. That person raised his panga to cut him, Muren stabbed him with the somali sword. That person dropped his panga. He was injured and ran out screaming. Muren knew the person, his name was Tsuma.

Immediately after that another person emerged from the sitting room armed also with a panga. He identified that person as the 1st appellant. 1st appellant also ran out to get reinforcement and returned with 2nd and 3rd appellants.

The third appellant was armed with a stone. Muren retreated into the bedroom and armed himself with a walking stick. He confronted the three robbers, the walking stick was grabbed from him and he fell on the floor. As 1st appellant raised a panga to cut him, Alwir had by now armed herself with a chair and hit the 1st appellant on the head. 1st appellant turned onto Alwir and slashed her with the panga seriously wounding her. In the meantime the 3rd appellant was hitting Muren with a stone he was carrying.

The couple raised an alarm which was answered by the neighbours. The three appellants ran away as the neighbours came to their rescue.

Muren was clear in his testimony, in that his house was brightly lit with electric lights, 2 bulbs in the inside and two bulbs in the verandah on the outside. He testified that he saw the robbers and told the police that he could identify them although he did not know two of them by their names.

However, he knew the 2nd appellant who had worked for his family for a period of 12 years, five years previous to the robbery.

It was on the basis of his seeing the appellants at the scene that he was able to identify each one of them, at separate identification parades mounted at the police station.

We are satisfied, as the lower courts were, that although the parades were properly conducted in accordance with the rules, they were of little evidential value. As clearly stated by the learned Senior Resident Magistrate, the identification of the appellants at the parades did not advance the prosecution case because the two eye-witnesses, especially Alwir, knew all the appellants prior to the incident and hers was a case of recognition and not identification.

This is what Alwir said about the lighting at the scene and what transpired:

"corridor/verandah where the electricity lights were on.

Also the security lights inside the house were on... The robbers were all men and I saw their faces and they were people I used to see prior to the incident. They were people who used to pass around my compound infact one of the robbers is an exemployee of mine... Accused 2 is my ex-employee and I know his name is Bondo. I do not know the names of accused 1 and 2"

As to what each one of them was doing during the robbery she said:

"I saw accused 3 during the robbery. I recognized accused 2 as the one who took the radio cassette and left the house with it. Accused 1 is the one who grabbed my husband and who I hit with a chair."

Those are the people that, Alwir, identified at the Police Station. She knew all these people before. She had seen them passing around her house, while the 2nd appellant had actually worked for her. She had cause to recognize them by the bright glare of the electrical light inside her house.

The state of lighting in that house was also testified to by P.C. Nyongesa who visited the scene on that very night and a few minutes after the robbery. He testified:

"At the scene the house was in shambles. There were security lights, 4 of them. On the walls of the house the security lights were bright and visibility is clear and bright. A person is visible at a great distance from the house. Inside the house all the lights were working."

In answer to 1st appellant's question Nyongesa further stated that:

"The home is big a swahili house, has more than ten rooms. The electricity lights were in all the rooms."

We have gone into this issue of lighting at the scene of the robbery at some great length because of the crucial issue of identification. The trial and the first appellate courts considered the evidence of identification and were alive to the matter of the quality of light by which the appellants were seen identified and recognized.

The concurrent findings of facts and conclusion that they reached fit well with the following passage in the case of Wang'ombe v. Republic, [1980] 1 K.A.R 149 at 150 L.9.

"In this case guilt turned upon visual identification by one or more witnesses ... a reference to circumstances usually requires the judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, the position from the accused and the quality of the light."

Respectfully adopting these words, we are satisfied that the appellants were properly identified as the people who robbed Muren and his wife, contrary to what they said, that they were not at the scene and did not take part in the robbery. We see no ground upon which to depart from, or interfere with the findings of the two lower courts. The appellants were properly convicted, their first appeals were properly dismissed and there is no merit in these second appeals against both convictions and sentence.

We order that they be dismissed.

Dated and delivered at Mombasa this 28th day of July, 2000.

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 REGISTRY