REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 300 of 1997

SAID ABED SAID ..... APPELLANT

- Versus -

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1020 of1997 of the Chief Magistrate's Court at Mombasa - J. Siganga -Senior Resident Magistrate)

JUDGEMENT

The Appellant herein laid out four grounds of Appeal in his Petition which he also argued in person before us. In his Amended grounds of Appeal he states:

"1. That the learned trial Magistrateerred in holding that the evidenceof P.W.2 pertaining to my arrest andrecovery of the exhibited items wascorroborated by the evidence ofP.W.3 without proper finding thatP.W.3 was not among the PoliceOfficers who were together withP.W.2 during the arrest as per theevidence of P.W.2.

2. That the learned trial Magistrateerred or misdirected herself infinding that the complainantsinjuries were caused by the appellant during the struggle without properseeing that there was no evidence onrecord that the injuries wereactually caused by the appellant.

3. That the learned trial Magistrate erred in law and facts in findingthat the prosecution had provedtheir case beyond reasonable doubt.4. That the learned trial Magistratedid not give proper consideration tomy defence but favoured theprosecution side thereby rejectingmy defence unreasonably".

The particulars of the offence. which the learned trial Magistrate found were established, were that the Appellant did on 29.3.97 at 12 midnight in Kitaruni village, Mombasa jointly with others not before the court, being armed with dangerous weapons namely knives, rob one Daniel Okello Omer of his cash money Shs. 2,000/=, a wrist watch make quartz valued at Shs. 800/= and used violence on the complainant immediately before, during or after

the robbery.

The complainant was a Senior Private in the Kenya Army stationed at Nyali Barracks. He was coming from his brother's house at "Third World", Mtongwe, in Likoni area at about midnight.

He was walking alone, Then he saw ahead of him on the road a group of people crossing. As he reached that point they emerged from the side of the road and started asking whether he was not one of the

Policemen who had chased them earlier. He denied that and continued walking. After walking 400 meters he heard footsteps behind him and turned round to see four people following him. He sensed danger when they split' into two and walked on each side of him. Suddenly they grabbed him and removed all his money Shs. 2,000/=, wrist watch and wallet containing his work documents. All four started beating him with hands and fists. One removed a knife but the complainant grabbed him. The others produced knives also and he screamed for help as he struggled with one of them, Asaloon car appeared at that moment and four Police Officers emergedthere from. Three of the assailants fled while the complainant heldthe fourth firmly. The Police came and rescued him. As theyapproached, the man held by the complainant threw down the knife heheld. The man was the Appellant. The Police recovered the knife,the wallet and watch from the scene. They took the complainant andthe Appellant to Likoni Police Station where the complainantnoticed he had suffered injuries on the cheek and hand. He wastaken for treatment at the Navy Hospital Mtogwe.

Before the Police came, the struggle had taken about 2 - 3minutes. A P3 Form was filled in at Coast General Hospital and wasproduced in evidence by the Investigating Officer P.W.2 PC GabrielMuoki.

The Police Officers who emerged from a foreign registeredsaloon car were P.W.2 PC Gabriel Muoki. CPL Lucas Kania (P.W.3), PCKatana and the driver PC Gabriel Galgokhi. Two of them testifiedon the events of that night. The learned Senior ResidentMagistrate found their evidence consistent and - corroborative ofeach other and both corroborative of the complainant's evidence.

The first ground of attack was that there was an error in thefinding that P.W.3 Cpl Kanja was present at the scene with otherofficers and therefore corroborated the evidence of both P.W.2 andthe complainant. The basis for such assertion was that the namesof the Police Officers mentioned by P.W.2 PC Muoki, included one"Cpl Keya" and not Cpl Kanja who testified as P.W.3.

On this assertion[1] we have made reference to the original handwritten record on the evidence of P.W.2 and he clearlymentioned Cpl Kanja and not "Cpl Keya" as one of the officerspresent at the scene with him. It is obvious that there was atyping error in the name of Cpl Kanja. He gave a detailed accountof what he saw on oath and said he was with P.W.2 Cpl Muoki. Thefinding that they were together was not therefore erroneous, and wewould dismiss that assertion by the Appellant.

The second and third complaints relate to the injuriessuffered by the complainant. The submission made in this regard isthat there was no proof of such injuries since the P3 completed bya Doctor was instead produced by P.W.2, a Police Officer. Therewas no explanation for the absence of the Doctor before the P3 formwas produced by

P.W.2. In the process the Appellant was deprivedof the opportunity of cross examining the Doctor.

Even if such inquiries were established, at any rate, hesubmitted, there was no evidence that they were caused by theAppellant since the complainant only realized he had been injuredwhen they reached Likoni Police Station.

On the first limb of this complaint we suspect that theAppellant, who does not say so in so many words, was alluding tothe decision of the Court of Appeal in Rajab Abdalla -vs- RepublicMsa CrA 86/97 (UR) where it was held that a P3 form produced by aPolice Officer was irregularly and improperly produced contrary toSection 33((b) of the Evidence Act. That decision has howeversince been rationalised in BONIFACE_KARERE_NDERI_-V-_REPUBLIC_NyeriCrA 39/98 in which the Court of Appeal stated:*"The ABDALLAH case was decided on the presumption that the P3 form was produced inthe trial court under Section 33(b). In whichcase before the evidence on the P3 form couldbe admitted through the hand of a person otherthan the maker it was necessary to firstestablish that the maker of the said P3 formwas dead, or could not be found, or had becomeincapable of giving evidence or his attendancecould not be procured without an amount ofunreasonable delay or expense. In this casewe do not know under which provision i.e.whether Section 33(b) or Section 77(1) of theEvidence Act PC Kiprono produced the post-mortem report and the report of the GovernmentAnalyst. Those documents could have beenproduced under either Section. The differenceis that under Section 33 the reason for theunavailability of the maker must first beestablished[1] before accepting the evidence inthe document, whereas under Section 77(1) anycompetent witness in criminal proceedings mayproduce the relevant document. Consequentlyit would not be appropriate for us at thislate stage to decide the provision of theEvidence Act under which the two documentswere produced in evidence. This case isdistinguishable from ABDALLA 'S case on thegrounds we have outlined above"*

Underlining ours

In view of the holding in that case that document may be produced in evidence under either Section 33 or 77 of the Evidence

Act, we see no compelling reason for holding that the P3 form in this case was irregularly or improperly produced in evidence. But that is not the end of the matter. The injuries on the Appellant were noticed by the two Policemen who gave evidence. Even withoutthe P3 form, we are not prepared to find that there was no violencemeted out on the complainant as we believe, as the trial Magistratedid, that there was a violent struggle as the Appellant was heldfirmly by the complainant until that fortuitous moment three or sominutes later when the Police arrived. There was evidence acceptedby the trial Magistrate and we also accept it, that there wereother persons in the company of the Appellant all of whom set uponthe complainant. On that premise the offence of Robbery withviolence under Section 296(2) Penal Code is constituted evenwithout considering whether there was an offensive weapon held ornot. That is the wording of the Section itself and was amplifiedby the Court of Appeal in NDUNGU -Vs- REPUBLIC CR.A 116/95 (UR).

We have said enough to show that we see no merit in those twogrounds of appeal.

The final ground of ; Appeal is that the defence was notconsidered. We think it was. The defence essentially

claimed thatthe appellant was framed as he was merely going home after watchinga video at 8 p.m. on the material day when he met some people whoasked him to identify himself which he did. They said he was arobber and whisked him away to Likoni Police Station and chargedhim with the offence. That evidence did not shake the trialMagistrate's belief that it was the Appellant who was found in thetight grip of the complainant at midnight and was arrested whilehis compatriots fled. She saw the witnesses in the witness box andwas able to assess their credibility. We come to the same conclusion as we think there are no reasonable doubts raised in theprosecution case.

It is only left for us to say that the State through SeniorPrincipal State Counsel, Mr. Gacivih supported the conviction andthe sentence and, we think, rightly so.

The Appeal is dismissed in its} entirety.

Dated at Mombasa this 23rd day of july 1999.

A Hayanga

JUDGE

P.N. Waki

JUDGE