



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 67 of 1997, 69 of 1997, 68 of 1997 & 70 of 1997

ALI MOHAMED MULOGA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.69 OF 1997

ALI MWARUKU MWANGUA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.68 OF 1997

JUMA IBRAHIM APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL CASE NO. 70 OF 1997

SULEIMAN HAMIS ALL..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(All from Original Convictions and Sentence in Criminal Case No.3988 of 1995 of the Snr. Resident Magistrate's Court at Mombasa - Ms. J.O. Siganga, SRM)

JUDGMENT

The four appellants ALI MOHAMED MULOGA, JUMA IBRAHIM, ALIMBARUKU MWANGUA and SULEIMAN HAMISI ALI were originally charged with Robbery with violence contrary to section 296(2) of the Penal Code, shop breaking and committing a felony contrary to S.306 (a) of the Penal Code and assault causing actual bodily harm contrary to S.251 of the Penal Code. It was alleged that on 16-10-95 at about 2 a.m. at Jiviweni Village Mtongwe within Mombasa District jointly with others not before court unlawfully assaulted Rombo Omar thereby occasioning him actual bodily harm. At the trial four witnesses gave evidence for the prosecution while all the (three) accused gave unsworn statements in their defence except Suleiman Hamisi Ali, the first accused in the Lower Court and the fourth appellant here gave a sworn statement. They were however convicted of these offences on 14-2-97 by J.O. Siganga SRM and sentenced to death on count 1, then on the second count of shop breaking and committing felony each was sentenced to serve three years jail term and to receive four strokes of the cane and on the third count of assault contrary to section 251 each was sentenced to serve 18 months jail, and all the jail terms ordered to run concurrently.

The evidence against them tendered by the four witnesses called by the prosecution was that at about 2 a.m on 16-10-95 PW.1 Abdalla Yahaya was sleeping in his house when he heard people talking outside the house. He looked through the window and saw many robbers outside and particularly saw four of them carrying a heavy load of stones in a sack using it to hit the door to force it open. Some of these robbers were armed with arrows and bows. The robbers flashed the window with a torch. The window had a wire mesh. PW.1 climbed on the ceiling but it was not finished so the robbers could see him, they ordered him to come down but he cried out "thief, thief" and they threw stones and arrows at him. Some neighbours heard his cry and blew a whistle at which the robbers fled but on their way they met PW.3 Omar Kombo and beat him up but on seeing PW.1 they left him and ran away.

On Identification it is common ground that the attack happened at night but PW.1 says he knew the people as he was chasing them where there were street lights. He said that from his window he could see them in the light on the street and he could also see them clearly when inside the house as the lights lit up inside the house. He recognized them. He said he used to work with Suleiman Hamisi Ali, the first accused then but here the fourth appellant for 1 year and even saw him when he left the job. He also identified Ali Mohamed Muroga the fourth appellant but accused No.2 from the ceiling.

He identified Ali Mobarak Mwamna accused No.3 as one of the robbers who then was wearing shorts and had a cap on and furthermore PW.1 said that he used to see him in the Estate. So was accused No.4 Juma Ibrahim whom PW.1 says he used to see for 4 years previously. It was Juma Ibrahim appellant No.2 who flashed a torch on PW.1 and ordered him to shut up enquiring as to where he was. PW.1 also had seen and identified Juma Ibrahim the second appellant and 4th accused. PW.2 Ibrahim Salim brother to PW.1 whose shop was broken into heard his brother's screams at about 2 a.m. and came to his rescue. He saw about 20 people armed with rongs and stones. He said he recognized Suleiman Hamisi accused 1, Appellant No.4. He was his neighbour and he knew his wife to have come from the same village. As his house is near the road where street lights were, he could well see the robbers. The fourth appellant Suleiman Hamisi told him "to-day Mzee we shall fight". He recognised accused No.2 Ali Mohamed Muroga whom he saw running out of the shop. About accused No.3 Ali Mbaruku Mwanqua. PW.2 said he recognised him well as he was inside and was carrying a pint of water. Besides he was a neighbour, he also hit his arm, and of accused No.4 Juma Ibrahim, PW.2 said he saw him because of the bright security light outside. PW.3 Kombo Omar Kombe said that on hearing the cry of "thief" "thief" he ran out and saw many people whom he knew and he recognised, even from 40 metres away. He identified Suleiman Hamisi Ali accused one/appellant No.4 carrying a knife. He also identified accused No.1 Ali Mohamed- Appellant No.1 carrying stones in what resembled a basket. He recognized Juma Ibrahim accused 4/appellant No.2 as the one who held stones in his hands and he also identified accused 3 Ali Mbaruku, appellant No.3 who also carried stones. There were others, They threw stones at the witness. He appealed to him to desist, but Accused 1 Suleiman Hamisi Ali, appellant No.4 ordered others to finish PW.3 as he had recognized him. He hit PW.3 with an axe and he became unconscious but regained it later at the Coast General Hospital. He said all the appellants here were all his neighbours and he used to see them. All the witnesses described the attackers to the police. The witnesses were all hurt in the attack and belongings were stolen from the shop. PW.4 P.C. Dickson Waheso together with some APs arrested the accused persons around 16-10-95 and charged them with the offences.

In their defence 1st Appellant Suleiman Hamisi Ali swearsaying after coming from hospital to see his wife who was admitted and after talking to her parents he went home. He knew nothing about the robbery. Ali Mohamed Muloga 2nd accused but 1st appellant pleaded an alibi saying he was fishing during the whole night of 16th/17th October, 1995. Accused 3 Ali Mbaruku Mwandira, appellant No.3, says in unsworn statement that he was on duty at the material time.

He works at Likoni Ferry as an Escort to the Ferry driver. Juma Ibrahim Juma accused 4 and appellant No. 2 said in unsworn statement that on 16-10-95 he was asleep in his home and knew nothing of the robbery.

The learned Senior Resident Magistrate after hearing this evidence found that the four with the others not before court had acted with common intention with accused 1 and convicted them on all the three charges of robbery with violence, shopbreaking and assault as was stated herein above on 14-2-97 and sentenced them each to death, 3 years jail and 4 strokes of the cane and 18 months imprisonment jail terms to run concurrently.

They have appealed separately but the 3rd and 4th appellants were represented by counsel and it may be convenient to consider first, their appeal. Miss Shariff Advocate argued the appeal for fourth accused Juma Ibrahim 2nd appellant and first accused Suleiman Hamisi Ali the fourth appellant. She attacked identification of the appellants saying the prosecution witnesses did not establish the situation and position of the lights and how that distance could have had any effect on the cogency of identification. She wondered how the three prosecution witnesses could have been able to pin point only the first and fourth appellants. She said that P3 forms relating to the complainants' injuries were not produced by the doctor(s) who wrote them. So that it failed to be evidence in the case. Miss Shariff argued that PW.1 who is said to have chased the thieves in the night left the chase and returned to his house without concluding the

chase and that he broke the chain of connection when he never reported immediately but went to work the next day instead without reporting.

The positioning of the alleged lights in relation to the identifying witnesses were not stated. No identification parade was held.

Of Appellant No. 4 (accused 1) nothing was found in his possession and no finding as to recent possession and there was no consideration to the defence. Miss Shariff extended these arguments and applied them to the arguments relating to appeal of the appellant No.3. She said the appellants could not be found guilty of assault just because 4th appellant was said to have committed it so without a finding first of common intention.

Earlier on the two unrepresented appellants argued their grounds of appeal.

Ali Mohamed Muloga challenged the evidence of identification. He said that there were no street lights nor did the PW.1 describe the nature and type of the light. He challenged the admission into evidence of P3 form (Ex.1) belonging to PW.3 Omar. Second appellant Ali Mwangi also argued his 5 grounds together and he also challenged the evidence of identification saying it was difficult for proper identification to be achieved through a wire mesh on the window. He said the report recorded in the OB did not say that appellant No.2 Ali Mwangi was a neighbour and if robbers were wearing black clothes and caps he wondered how he managed to recognise him, PW.3 was 40 metres away he wondered how he recognised anyone.

The State does not oppose these appeals and has not supported the conviction, but we are not obliged to follow the stand taken by the prosecution. We still would have to be satisfied on the evidence that the lower court for the reasons complained of was not entitled to come to the conclusion she arrived at in convicting the appellants.

We have looked at the evidence and it all hangs on the evidence of PW.1 who says he saw about 40 people from inside his house in the lights outside. The appellants had complained against this picking on every conceivable point that would shake reliance on it. There are two things that stand out, first it was at night, the light outside could have been bright enough to shed adequate illumination for proper identification, but this is a point which the appellants seemed to have mastered and pressed strongly in their arguments before us, but even if that were so, the prosecution should, to discharge the burden of proof on prosecution, have gone further in their presentation to show the court how that intensity of illumination could have aided the identification evidence they were relying on. One way of showing this is to show actual distances so that it is not relegated to the realm of

conjecture and opinion. Another way of affecting these proofs based on lighting is to describe to the Court the nature of lighting available at the time and then the length of time and opportunity available for such viewing. We do not ascribe to the view pressed on us in these appeals that because robbers flashed light then they could not be identified because the victims were blinded nor do we accept that there is a rule of law which says that light on the street cannot shed adequate light to the adjoining rooms. It all depends on the circumstances of each case, and this is why it is necessary for each prosecution to delve into circumstances of each case and prove it as a fact.

PW.1's evidence was assailed vehemently by the appellants on grounds that he would have been too scared to identify anyone because of the raid. As far as we are aware we have not been shown any principle of law that qualifies the smash and grab raid of marauding thieves as being able to paralyse human senses of seeing and recognition in those who witness the event. It was argued as though we need to take a judicial notice of it but as we state it is not before us as an notorious fact of medical knowledge or of human condition to take judicial Notice of. All this as we say depends on the facts of each case.

In this case we accept that there was light illuminating the area, but we are not certain how each of the identifying witnesses was impacted by this light. That was not shown. Secondly PW.3 says he was able to identify his victims from 40 metres away. That unless properly explained gives a sense of exaggeration. Then there is use of the word "neighbour" which all these identifying witnesses used to describe the appellants. Yet there was no reference to how close were their places of abode. "Neighbour" according to the Chambers Dictionary means "a person who lives near or next door to another-" It is also necessary, although not a must for the prosecution to tie up identification by holding identification parades but this was not done here.

The prosecution have not supported these convictions on the issue of light. We say that this is a case really on the border-line in that the identification was almost that of recognition but the basis of that recognition was based on their being neighbours yet the fact that neighbourhood or neighbourliness was not confirmed and established.

The learned Senior Resident Magistrate failed to critically look at these items.

It might be pointed out that because this is a capital offence the trial court ought to have been more circumspect.

We agree with the State Counsel that it is one of these cases where the Court should visit the Locus in Quo.

We think that in the totality of evidence there was doubt occasioned herein that must be resolved in favour of the appellants and because of this we allow these appeals, quash the conviction and set aside the sentences of death imposed on them and other sentences. We must also reiterate that for personal violence offences the production of P3 form ought to be produced in evidence in accordance with the law.

Dated at Mombasa this 6th Day of November, 1998.

A. I. NAUANGA

JUDGE

P. N. WAKI

JUDGE



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