REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KWACH, GITHINJI & WAKI, JJ.A.)

CRIMINAL APPEAL NO. 228 OF 2002

BETWEEN

HASSAN ODHIAMBO KALAMENI…… APPELLANT

AND

REPUBLIC…… RESPONDENT

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

Mombasa (Justice Hayanga & Khaminwa, Commissioner of

Assize) dated 2nd October, 2001

in

H.C.CR.A. NO. 115 OF 1998)

****

JUDGMENT OF THE COURT:

Hassan Odhiambo Kalameni (hereinafter "the appellant") was the second of four persons charged with the offence of robbery with violence contrary to ***Section 296(2)*** of the Penal Code before Mombasa Principal Magistrate's Court. Three of his co-accused however absconded shortly after commencement of the trial. One was re-arrested, tried but acquitted while the other two still remain at large. We shall revert to these strange circumstances shortly.

The appellant was convicted for the offence and was sentenced to death as by law provided. His appeal to the superior court was dismissed and he now appeals to this Court. This being a second appeal, only matters of law are of concern to us.

The Memorandum of Appeal which was drawn up and amended by the appellant in person laid out 14 grounds many of which challenged concurrent factual findings of the trial court and the superior court.

We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re-assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence.

At the hearing of the appeal, the appellant was represented by learned Counsel Mr. Kithi who sought to argue only two issues of law arising from the grounds of appeal laid out. Firstly, the identification of the appellant, and secondly, proof of any injury suffered by the complainant.

The robbery, the subject matter of the charge, took place in broad daylight (10.15 a.m.) on 10th August, 1996 at Mayungu area in Malindi. On that day the Italian consulate in Malindi, ***Giorgio Zonza*** (hereinafter 'the complainant') was driving his car from Mayungu area heading to Malindi town. With him was the Italian Vice Ambassador. The road was in a bad state and he was therefore driving slowly. Suddenly, an object thrown from outside the vehicle through the car window hit him on the head. It was later collected from the car and confirmed to be a stone. He felt pain but was able to stop the car. As he did so, a man wielding a machette (panga) confronted him and forcibly took his necklace, gold watch, wallet containing Kshs.15,000/= and other items. The solitary man ordered the two out of the vehicle and ordered them to walk away. As they walked away, the complainant saw three other people emerge from a nearby bush, heading where the car was and ransacked it. The complainant and his friend walked to Marafiki cottages at a distance where they called the Police at Malindi and reported the incident. The police took him to the hospital where he was examined and treated. One month later on 9th September, 1996 the complainant was called to Malindi Police Station where an identification parade was arranged and he picked out the appellant.

Mr. Kithi's contention before us was that the identification was not free from the possibility of error and was in any event tainted. Firstly, because the complainant was the sole identifying witness. He was hit with a stone and was stunned. He could not therefore purport to have clearly seen and identified the appellant at the scene of the crime. If he could, he should have made a first report to the Police and given a description of the assailant. Secondly, because the subsequent arrest of the appellant was not through the complainant but through the persons who were jointly charged with the appellant but escaped during the trial. There was no statement made to the Police to support the arrest of the appellant. Thirdly, because any criminal association with the 1st accused was vitiated when that accused was declared innocent and was acquitted. We have considered these submissions.

The evidence by the complainant on identification that was relied on and believed by the two lower courts is this:

> ***"At the scene of the crime I was only able to see and recognize the person who confronted me when I stopp ed the vehicle. He was wielding a panga and he was the second accused in the dock (identified). He pulled off my neck -lace and took my wrist-watch. I saw him very well. He also took my money. I had time to see him. I did not recognize the three peopl e who appeared later"***

. Cross-examined by the appellant, the complainant stated:

> ***"I saw you at a close range. I had already recovered from the shock of being hit with a***

stone. After being hit, I could not drive on. I was injured. I was hit while I was driving slowly.

You confronted me while I was inside the vehicle. You pulled the necklace from my neck and took away my watch, wallet and other items".

In dealing with that issue the superior court stated:

"speaking for ourselves in this case we are sa tisfied that the robbery was committed at day time and that there was ample time for the witness to notice the accused/appellant. The encounter was very close and physically personal when at close proximity both the victim and the robber had to face one another from the act of taking the wrist watch from the other and the necklace and the wallet. Although he was hit by a stone he said he was not stunned and he managed to stop the vehicle and notice the appellant. He was again able to identify him at the parade which was not in itself faulted.

Then there is evidence that appellant led P.W.6 to the place where the weapons were hidden.

The defence evidence did not approach the allegations in any way as to cast any doubt.

The law of practice enunciated fir mly now by the Court of Appeal is the one in ABDALLA BIN WENDO V. R (20 EACA 166), and SIMON WAIGANJO MWANGI V. R. Cr. Appeal No. 90 of 1997. It is that the court has to test with greatest care the evidence of a single witness respecting the identificatio n especially where it is known that the conditions favouring a correct identification are difficult and in such a case to require other corroborating evidence".

We think both the courts below properly directed themselves on the evidence and the law on identification and there is therefore no justification for us to interfere with their findings. At all events there was a further concurrent finding that the appellant led the police to the recovery of some of the weapons used in the robbery. That would provide sufficient corroboration if any was needed for identification of the appellant by a single witness. The appeal on that ground is dismissed.

Mr. Kithi's second ground of attack was the admissibility of the ***'Medical Examination Report'*** or P3 Form produced to prove that violence was meted out on the complainant. The Form was produced by a Police Inspector (P.W.5) without objections being raised or insistence that the Doctor completing the Form be called for cross-examination. Under the provisions of Section 77 of the Evidence Act, that evidence was admissible.

Mr. Kithi submits however, and we think correctly so, that the form was completed long after it was

issued and was signed by an unidentified officer of a limited liability company, although it was addressed by the Police to the Medical Officer of Health, Malindi Hospital. It was not clear whether, as required under ***Section 77*** of the Evidence Act, the document was "under the hand of a *Medical Practitioner*". Ignoring that evidence however, casts no doubt on the fact as stated by the complainant and believed by both courts below, that he was hit on the head with a stone, that the appellant was wielding a machette and was in company with others. Violence or the threat of it as an element of the offence charged was proved beyond doubt. That ground of appeal also fails.

On the whole we are in agreement with Mr. Ogoti, learned State Counsel who supports the conviction of the appellant. The appeal on conviction is dismissed and the sentence is confirmed.

It now remains for us to comment on the disappearance of the appellant's co-accused. All four accused persons were present on 17th October, 1996 when the prosecution's four witnesses testified and the case was adjourned to another date. On the resumed hearing date, 17th December, 1996, only the appellant was brought to court. They were all in Police custody as the offence is not bailable. The trial Magistrate sought no explanation for the non-production of the three accused but issued warrants of arrest which were extended severally until 6th May, 1997 when the first accused was produced in Court together with the appellant. No inquiry was made or explanation given on the circumstances leading to the absence of the first accused who then participated in the trial until the end. The prosecution applied to withdraw the case against the 3rd and 4th accused under Section 87(a) of the Criminal Procedure Code on the ground that they had absconded, and the application was granted. They were discharged.

We think the mystery surrounding the disappearance of the two accused persons ***FRANCIS KARANJA PASCAL WAWERU*** and ***JOHN KARIUKI NDICHU*** should have been investigated and an explanation given. We direct in the circumstances that this file be placed before the Honourable the Attorney General for necessary action.

Dated and delivered at Mombasa this 8th day of August, 2003.

R. O. KWACH

……..……..

JUDGE OF APPEAL

E. M. GITHINJI

……

JUDGE OF APPEAL

P. N. WAKI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR