

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 286 & 287 of 2006

(Arising from the original conviction and sentence in Criminal Case No. 3918 of 2003

of the Chief Magistrate's Court at Mombasa)

1. JULIUS KARISA KYALO

2. BENARD SIMON MUNYITHYAAPPELLANTS

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Bernard Simon Munyithya alias Rasta and Julius Karisa Kyalo alias Munyuki Kamundi, the appellants herein with one Benson Kashena were tried for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. In the end Benson Kashena was acquitted while Bernard Simon Munyithya and Julius Karisa Kyalo were convicted and subsequently sentenced to suffer death. Being dissatisfied they each preferred an appeal. The appeals were consolidated by an order of this court. Bernard Simon Munyithya was represented by Mr. Magolo, learned advocate – while Julius Karisa Kyalo appeared in person.

On appeal two main grounds were argued. First, is that it is stated that the charge is fatally defective and secondly, that the prosecution had failed to prove its case to the required standard of beyond reasonable doubt.

Before delving into the arguments on appeal we wish to set out the case that was before the trial court. A total of six (6) witnesses testified in support of the prosecution's case. Bernard Simon Munyithya gave an unsworn statement in his defence while Julius Karisa Kyalo gave sworn testimony. The prosecution's case is to the effect that on the 22nd day of November 2004 at about 10.30 a.m. Ramadhan Nyawa (P.W.1), a Salesman with Mombasa Tobacco Distributors boarded motor vehicle registration no. KAK 856Y to sell a consignment of cigarettes at Bombolulu. The motor vehicle was driven by Juma Mwaega (P.W. 3). The duo stopped at Upendo Shop to take orders. P.W.1 went to the shop and came back to collect the cigarettes. P.W. 1 said when he was opening the motor vehicle he heard some people ordering him to enter into the aforesaid motor vehicle. When he turned to check he saw somebody pointing a pistol at his neck. He complied with the order by entering into the rear cabin of the motor vehicle. The driver (P.W.3) who was standing besides the motor was ordered too to surrender the car keys and join P.W.1 at the rear cabin. Some of the strangers entered the rear cabin as the other drove the vehicle. P.W.1 said he was robbed of money Nokia 2100, a wallet and his identity card. Along the way P.W.1 was ordered to alight as the motor vehicle proceeded to an unknown destination. P.W.1 managed to get a lift from a good Samaritan. He then called his Manager Hemed Mohamed (P.W.2) whereupon he informed him about the incident. P.W.2 proceeded to pick P.W.1 after which they booked a report at Nyali Police station. P.W.1 was issued with a P3 form which he took to Jocham Hospital where he was treated for the bruises he sustained in the scuffle. P.W.1 and P.W.3 were categorical that they were unable to identify the robbers as they were terrified. P.W. 3 said that the robbers drove the motor vehicle and on the way they emptied it after which they abandoned it with him inside. He said members of the public came to open the door for him. Chief Inspector of police Gabriel Mburu (P.W. 4), the O.C.S. Nyali Police Station said he received a report of the robbery from his controller at 8.00 a.m. He said he rushed to the scene where he found members of the public beating Bernard Munyithya and

Julius Karisa Kyalo. The abandoned motor vehicle was found about 50 – 80 meters away from where the duo were being beaten. Two cartons of cigarettes were found 40 metres from where Bernard and Julius being beaten. The duo were rescued by P.W. 4 and his officers and taken plus the motor vehicle to Nyali Police Station. P.W.4 said that the members of public told the police that the robbers dropped the cigarettes as they fled. A search of the motor vehicle was carried out. Inside the motor vehicle the police found a driving license and a waiting identity card of Bernard Munyithya. At the police station P.W.4 said he found P.W.1 and P.W.3 waiting. P.C. Migandi (P.W.5) corroborated the evidence of P.W.4. Later in the day P.W.5 said that Julius Karisa was arrested by Flying Squad officers. The P 3 form given to P.W.1 was produced by Dr. Lawrence Ngome (P.W.6) on behalf of Dr. Njoroge.

When placed on his defence, Bernard Munyithya gave an unsworn statement. He claimed that on 22.11.2004 he had gone to collect his hawking merchandize from the store of one Peter Kioko. He said he fought with Peter Kioko when he declined to open the store and in the process members of the public came to the support of Kioko and that is why he ended up being beaten up. He said he was arrested by the police who took his driving licence and a waiting Identity Card.

On his part, Julius Karisa claimed in his sworn testimony that he had gone to take photographs to a lady by the name Mwikali. He said he ended up being beaten by people he did not know when they saw the photographs of Mwikali in company of other men. He said he was forced to enter into another house where he was stripped naked beaten and his camera confiscated. He was later taken by the beating mob to Nyali police station.

We wish to now consider the grounds of appeal which were argued before us. It has been argued by both appellants that the charge is fatally defective in that it does not conform with the requirements of Section 137(c) of the Criminal Procedure Code. It is said that the charge specified the amount but the evidence tendered did not indicate the amount robbed yet the charge was not amended. Mr. Monda learned State Counsel admitted the existence of the defect but was of the view that the same is curable under section 382 of the criminal procedure code. We have considered the two competing arguments over this ground and we, with respect, agree with the submissions of Mr. Monda that the defect pointed out is curable under Section 382 of the Criminal Procedure Code hence that ground is rejected.

The second ground of appeal is to the effect that the prosecution's case was not proved to the standard of beyond reasonable doubt. It is the submission of Mr. Monda the learned State Counsel that the evidence proved the offence as against the appellants hence the appeal should be dismissed. We have re-evaluated the evidence on record. What comes out clearly is that the prosecution's case heavily relies on circumstantial evidence. Both P.W.1 and P.W.3 did not recognize the robbers. What connected the appellants with the offence is the fact that they were found not far from the scene of crime being beaten by the members of public. Secondly, the driving license and the waiting card of Bernard Munyithya were found in motor vehicle registration No. KAK 856Y. We agree that the police saved the appellants from the wrath of a mob who apprehended them. Unfortunately, none of the members of the public was called to testify to explain the circumstances under which the appellants were cornered. The position is worsened by the fact that the chain of causation was broken. Having come to the above conclusion, what remains as the only nexus is the evidence of the documents of Bernard Munyithya which were found in Motor Vehicle registered No. KAK 856Y. It is the evidence of Bernard Munyithya that the documents were taken from him and deposited in the aforesaid motor vehicle to incriminate him. The law is well settled that where the prosecution's case depends on circumstantial evidence, that first, the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should unerringly point to the guilt of the accused. And thirdly, when the said circumstances and taken cumulatively they should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. We have no doubt that Bernard Munyithya's documents were found in the motor vehicle which was commandeered by the robbers. The question is whether there is any other explanation? In our view it is possible for the mob to collect the documents and deposit in the motor vehicle. It is also possible that the police could have planted the same in the aforesaid motor vehicle. We are of the view that some doubt has been created in our minds. We shall give that benefit of doubt to the appellant concerned.

In the end we allow the appeal by quashing the conviction and setting aside the sentence. The appellants are hereby set free forthwith unless lawfully held.

Dated and delivered at Mombasa this 28th day of May 2008.

J. K. SERGON

J U D G E

F. AZANGALALA

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