



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 4, 5, 8 AND 9 OF 2019

(From Original Conviction and Sentence in Criminal Case No. 2349 of 2017 of Chief Magistrate's Court at Kakamega)

ISAYA OTIENO OSIYO.....1ST APPELLANT

PATRICK OKWIRI.....2ND APPELLANT

ABDULAHI DOKA FARAJI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellants were convicted by Hon. H Wandere, Senior Principal Magistrate, Kakamega, of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and were sentenced to fifteen years imprisonment. The particulars of the charge against them were that on 27th July 2017, at Kasarani area near Fresh Beth Junior Academy Day School within Kakamega County, jointly with others not before the court being armed with a dangerous weapon, namely a pistol, they robbed Bernard Omondi of a motorcycle valued at KShs. 98, 000.00, and immediately before or after the time of the robbery used actual violence on him.

2. They pleaded not guilty to the charge before the trial court, as a consequence of which the primary court conducted a full trial. PW1 testified that on the material day he was robbed of the motorcycle by three men. One pointed a pistol at him and the rest wrestled him to the ground. It was about 8.00 PM. There were security lights around. He identified the 3rd appellant as the person who had approached him first and caused him to take him to where the other two appellants were. He met them for the first time. He made a report of the theft of the motorcycle and was locked up in the cells as a first suspect, a parade was done and he identified them. PW2 was the owner of the motorcycle in question. He testified about how he got the report of the robbery. PW3 was the investigating officer. He narrated the steps they took to apprehend the appellants and to recover the stolen motorcycle. They also recovered a pistol from one from one of the appellants. He stated that it was one of the appellants who took them to the home where they recovered the motorcycle. PW4 was the officer who conducted the identification parade. The appellants were put on their defence. They gave sworn statements, where they denied the offence.

3. The appellants, being dissatisfied with the conviction and sentence, appealed to this court and raised several grounds of appeal, particulars of which are set out in the petitions of appeal on record. They ranged from the evidence being worthless and contradictory, the conviction being against the weight of the evidence, failure by the trial court to analyse the evidence, dismissal of their *alibi* defences, the evidence being inconsistent with the first report of the offence, violation of constitutional rights to a fair trial, the charge being defective, the identification parade not being properly conducted, to the investigations not being conducted properly.

4. The appeal came up for hearing on 9th October 2019 and 31st October 2019. The appellants placed before me written submissions, and urged me to rely on the same. The State, through Ms. Omondi, Prosecution Counsel, indicated that they relied on the trial court record.

5. This being the first appeal court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited in criminal appeals on this issue. In its pertinent part, the decision is to the effect that:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

6. Let me start with the alleged constitutional violations. There are two aspects to it. The first is that the appellants were not taken to court within twenty-four hours of their arrest. They were allegedly arrested on 27th July 2017 and were presented in court on 31st July 2017. 27th July 2017 was a Thursday, and 31st July 2017 was Monday. There was, therefore, a weekend in between. That often presents a challenge with complying with the twenty-four hour rule, and it is something that the Constitution itself countenances. In any event, the appellants ought to have raised the issue with the trial court so as to get explanations from the prosecution. The violation of this rule has nothing to do with fair trial as such and, therefore, it is of no consequence to the trial process. A conviction cannot be quashed on the basis of the such a violation. The remedy for it should be civil action for false imprisonment and wrongful detention.

7. The other aspect relates to Article 50, the failure to disclose evidence in advance of the trial. The appellants contended that that evidence was not availed. I have gone through the record. The trial court ordered on 14th September 2017, when it allocated the matter a date for hearing, that the appellants be availed with witness statements. When the matter came up for hearing on 18th September 2017, the appellants indicated that they were not ready to proceed on account of lack of witness statements and the court directed that they be furnished with the same. When the matter came up for mention on 12th October 2017 to fix a date for hearing, the court again directed that the appellants be availed with copies of witness statements, charge sheet and investigation diary. At the mention on 19th October 2017, the prosecution availed the appellants with witness statements of two witnesses, copies of the charge sheet and of the identification parade form. The court then directed that the appellants be supplied with the investigation diary on 23rd October 2017. Come that 23rd October 2017, the state confirmed that it had supplied them with the investigation diary. When the matter came up for hearing on 29th November 2017 all three appellants told the court that they had copies of all the witness statements, and were ready for the hearing. That was the day when the first witness, PW1 took the witness stand. There cannot, therefore, be any merit in the allegation that the evidence the prosecution intended to rely on was not disclosed to the defence in advance of the hearing.

8. They raised the issue of report of a ballistic expert, saying that they were not given copies. The evidence tendered showed that the appellants had a pistol. However, it was not alleged that the same was fixed at any time. No bullets or spent cartridges were alleged to have been recovered. The only time a ballistics expert report is necessary is where it is alleged that a firearm was fired, and evidence is required to match the spent cartridges collected to the firearm from which it was alleged they had been discharged. That was not the case here. There was, therefore, no need for such a report.

9. I will consider next the ground that the evidence was worthless or contradictory or inconsistent. The appellants submitted on the discrepancy between the first report by PW1 and the evidence that was tendered by PW3, the investigation officer. I have noted that there was indeed some inconsistency between what PW1 reported and what PW3 told the court happened. PW1 was consistent in his story, about what happened, which was corroborated by PW2. The first report is usually made shortly after the incident. It will be noted that the maker of that report would usually be shaken and distressed by the incident, and the same may not always provide an accurate account of what may have had transpired. It is my view that the inconsistencies were minor, and did not take away from the overall picture that was presented by the prosecution witnesses. It is to be expected that in every trial there will always be some inconsistencies and contradictions for it is not humanly possible for all the witnesses to tell exactly the same version of the events. Minor inconsistencies and contradictions can be overlooked, major ones may be of concern. I am persuaded in this case that the same were minor.

10. There is the ground that the trial court failed to analyse the evidence. I have carefully gone through the fifteen pages of the judgement. The trial court narrated the testimonies of all the prosecution witnesses as well of the defence. Thereafter, it examined the ingredients of the offence of robbery with violence. That was followed by the testing the evidence as against the said ingredients. There cannot, therefore, be any basis for the submission that the court did not analyse the evidence.

11. There is a ground in the petitions of appeal that the charge was defective. This was not elaborated on in the submissions. It was not pointed out in which respects the charge was said to be defective. I have carefully gone through the charge, and I have not picked out any defects in it.

12. There was an issue with identification. PW1 said that he had been with one of the appellants for quite a while. He carried him on the motorcycle from one destination to another before the robbery happened. That no doubt afforded him time and opportunity to identify the said appellant. He testified that the robbery happened within a town setting, at early evening and there were security lights all round. There was not much violence, and that PW1 was shown a pistol. The circumstances were not so stressful as to make it impossible for PW1 to identify the appellants. Related to that is the issue of the identification parade. It was alleged that the same did not meet the standards. I have looked at the submissions on record; none of them point out the aspects of the parade that did not satisfy the requirements.

13. There is also the claim that the investigations were shoddy. Again, the appellants have not pointed out the aspects of it that were shoddy or poor. It should be pointed out that the role of the trial court is to look out for evidence that supports the charge that the accused persons face. It should not concern itself with whether the investigations were carried out properly or not. Investigations are about evidence gathering. That is not the concern of the court unless it is alleged that the said evidence was obtained unlawfully.

14. Overall, I am of the persuasion that the trial court properly handled the trial, properly analyzed the evidence and properly applied the law, and came to the correct conclusions. Consequently, I do not find any merit in the appeal before me. The same is hereby dismissed, with the consequence that the conviction is upheld. The verdict came after the recent developments relating to mandatory sentences. After taking everything into account, the trial court refrained from imposing the death penalty, instead it awarded them a fifteen year prison sentence. Taking the circumstances into account, I am persuaded that the said sentence is adequate, and I shall confirm it.

15. The appellants, should they be aggrieved, have fourteen days to lodge appeal at the Court of Appeal. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE