



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 25 OF 2017

From original conviction and sentence in Maua CRC No 1030 of 2014 delivered on 4.12.2016

(CORAM: GIKONYO J)

HASSAN MWENDAAPPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellant Hassan Mwenda was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on 26th February 2014 at Maua township in Igembe South District within Meru County jointly with others not before court while armed with dangerous weapon namely rifle, robbed John Kobia of Kshs 273,000 and at or immediately before or after at the time of such robbery threatened to use actual violence to the said John Kobia. The Appellant was at the end tried and convicted and sentenced to death.

[2] The Appellant was dissatisfied with the said conviction and sentence and filed this appeal. in the Memorandum of Appeal filed in court on 22nd February 2017,he raised the following grounds of appeal

(a) *THAT the honourable Trial Magistrate erred in law and facts by convicting the Appellant for an offence which was not proved beyond reasonable doubt.*

(b) *The Learned Honourable Trial Court erred in law and fact by failing to find that the circumstances leading to the Appellant's identification were not free from error.*

(c) *THAT the honorable court erred in law and fact by failing to analyze the defence put forth by the Appellant and thus a miscarriage of justice.*

(d) *THAT the whole judgment is without basis on both the law and facts.*

Appellant: Alibi dismissed without basis

[3] During the hearing of the appeal on 20th November 2017, MsThibaru Learned Counsel for the Appellant contended that the Appellant's alibi was dismissed despite evidence having been produced. She urged that the evidence and the alibi ought to have been evaluated properly. Counsel also argued that identification of the Appellant was wanting as the offence was committed at night. She therefore asked the court to allow the appeal.

Prosecution: Evidence overwhelming

[4] Mr. Namiti, the learned State Counsel in opposing the Appeal argued that the evidence was overwhelming and placed the Appellant at the scene of crime. He also submitted that identification was proper since PW1 knew the accused person well and there was sufficient light to identify a person. He stated that PW2 corroborated Pw1's evidence. Consequently, he urged the court to dismiss the appeal.

Court's duty

[5] This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses. See **KILU &**

1. An Appellant on a first appeal 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.

2. 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; Only then can it decide whether the Magistrate's findings should 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.

In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, merely rehashing of the evidence as was recorded will not pass for a good style. Of great significance, therefore, is for the appellate court to employ a style imbued with judicious emphasis, an eye for symmetry or balance and an ear for subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the law applicable thereto. Such style also insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. And ultimately, the court should, in absolute clarity and directness, make its overall impression of the evidence adduced after placing it upon the scales of the law. I shall so proceed.

The evidence

[6] PW1, the complainant in this case gave a detailed account of the events of that day. It was his evidence that on 26th February 2014 at, around 10:30PM he left North Gate bar while headed home in the company of his wife and drove to Arimi Sacco where he was to park his vehicle and go to the house. He stopped the vehicle outside the gate. While waiting for his wife to open the gate, he heard people talking behind him. He immediately locked the vehicle and walked towards the gate. He then saw 2 men walking towards him and on looking ahead he saw a man standing in front of him and when he got to him, the man told him in Kiswahili "*lalachini*" and a rifle was placed on the side of his head. He complied. His testimony was that bank security lights were on and he could see clearly and he recognized the man who was standing ahead of him. He used to see the man in Maua Town. The man also used to visit his neighbours house with one Dorcas.

[7] He gave further testimony that he had Kshs 576,000 on him; Kshs 300,000 was inside his jacket and the rest of the money was in different pockets of his trouser. He told the trial court that one of the men dipped his hands into his pocket and removed Kshs 300,000. But, as they struggled to share the money some money dropped. He then screamed and the bank watchman came. It was his evidence that his wife was also screaming 20 meters away saying "*Carlos kumbeninyinyimnaibia bwana yangu*". He testified that other members of the public came and gave chase but retreated when the assailants attempted to shoot. He then asked his wife who Carlos was and his wife told him that he was referring to Mwenda (the Appellant). They then proceeded to Maua police station and reported the matter. They also informed the police that he had identified the Appellant. The following day they looked for the Appellant all over Maua and surrounding areas with no success. On 3rd March 2014, at around 5:20PM his wife called him on phone and told him that he had met Carlos at Basin area Maua whereupon they followed him and reported to the police.

[8] PW2 Winfred Kathure corroborated PW1's evidence by testifying that on 26th February 2014 at around 10:30 PM they were robbed of Kshs 273,000 with her husband (PW1). It was her evidence that that they had left North gate in Kasugund headed home whereupon she proceeded to open the gate and met Carlos (the Appellant) fiddling with her husband's phone. She then heard her husband screaming saying he had been robbed and proceeded to where he was. It was her testimony that besides Carlos (the appellant), there were 2 other men attacking her husband but she did not recognize them and that there was sufficient lighting from the bank. It was her testimony that they removed money from her husband and they took off and that some of the money dropped in the process. She further testified that they pursued the robbers but lost them. They then reported the matter at Maua police station and told policemen that one of the robbers was Carlos. On 3rd March 2014, she saw the Appellant and called her husband who came with policemen and the Appellant was arrested.

[9] PW3 Henry Ndubi, a security guard with Arimi Sacco testified that on 26th February 2014, he was on duty when he heard screams outside the bank. It was his evidence that it was a man screaming and 3 thieves had grabbed him. He recognized the man who was screaming while lying on the ground as he lived in the neighbourhood and he used to guard his car at night. He further testified that many people came at the scene and he told them that he had been robbed. He later left and continued guarding the bank. It was his further evidence that he had seen Carlos (the appellant) hanging around before the robbery occurred.

[10] PW4 PC KimiluWambua, the investigations officer in this case testified that on 3rd March 2014 he was at the DCIO's office when the complainant arrived and reported having been robbed near Arimi Sacco. He asked him whether he had recorded a statement to which he responded in the affirmative and informed him that his wife had identified the Appellant as one of the robbers whom they referred to as Carlos. The complainant and his wife later took him to Kariene within Maua town where he pointed out the Appellant and arrested him. He later recorded statements from the complainant, his wife and PW3 an eye witness and PW2 told him that she knew the Appellant and that she had identified him before the incident as she went to open the gate.

[11] The Appellant was put on his defence. This is his testimony. That on the material day he went to Maua and brought miraa and went to Isiolo and sold it there. And that he spent the night at Isiolo at Karimi lodge. He stated that he was popularly known as Carlos in Maua town. He also stated that there was no enough light for PW2 or PW3 to identify him.

Analysis

[12] The evidence of the prosecution witnesses was consistent throughout the trial. The evidence of PW1 is a vivid narration of how he was robbed by a gang of three armed men. He categorically stated that he recognized one of the men who he had been seeing in Maua town as he used to visit his neighbours house. His evidence remained unshaken even in cross examination and I find it profitable to cite what he stated, thus;

“I know you very well. I identified you at the scene.....at the OB I told the police I had been robbed by a person I identified. My wife particularly indicated she had identified you. We looked for you even at Kimongoro where you were alleged to stay currently.

[13] PW2 in her evidence in chief clearly stated that she knew the Appellant prior to the robbery and that she knew him by the name of Carlos. In cross examination she stated;

“I know you.....you used to visit your wife’s sister in our plot.....I recognized you as I knew you well”.

[14] PW3 however appeared to contradict himself in his evidence in chief that he did not recognize the men who were robbing PW1. In cross examination he stated that he knew the Appellant. PW4 corroborated PW1 and 2’s evidence and indeed confirmed that it was PW2 who pointed out the Appellant to him culminating in his arrest.

[15] The Learned Trial Magistrate in his judgment resolved the apparent contradiction and observed inter alia thus;

“PW2 evidence collaborates about the incident and the identity of the accused. She confirmed this to the police and she in fact identified the accused during the arrest as can be read from the cross examination of PW4. I note some contradictions but in view of PW2 evidence the said contradictions are not material. PW2 evidence is credible and believable.”

[16] No is better placed to observe the demeanor of witnesses than the Trial Magistrate. PW2 was categorical that she knew the Appellant by the name of Carlos. The Appellant in his defence admitted that he was popularly known as Carlos. All the prosecution witnesses testified that there was enough light from the bank at the time of the robbery and this evidence remained unchallenged throughout the trial. In any event this was a case of recognition as opposed to identification and therefore the contention by the Appellant that circumstances leading to the Appellant’s identification were not free from error is without basis. See the case of *Simiyu & Another – v- R*, [2005] 1 KLR 192 at 195, where the Court of Appeal faced with facts similar to the instant case expressed itself as follows:

“If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R – v- Kabogo s/o Waguny 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe.... Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification.... In the circumstances, we have no doubt that the appellants’ convictions are both unsafe and unsatisfactory”.

[17] See also what the Court of Appeal in *Anjononi and Others vs Republic*, (1976-1980) KLR 1566 stated, that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

[18] Applying that test, in this case, PW2 clearly stated that she recognized the Appellant at the scene who was known to her as “Carlos”. PW1 in his evidence stated that he heard his wife say; **“Carlos kumbeni nyinyi mnaibia bwana yangu”**. PW4 in his evidence stated that PW1 had indeed told him that he had been attacked by thugs and that his wife had identified the Appellant as one of the robbers and that they referred to him as Carlos. The Appellant in his own evidence stated that he was popularly known as Carlos within Maua town. Clearly from the circumstances of this case the recognition of the Appellant by PW2 was certainly free from error as he was even recognized by his name. Consequently, I do hold and find that the conviction against the Appellant was safe and sound as he was properly identified by recognition and I cannot fault the Learned Trial Magistrate on this finding.

Alibi

[19] With regard to the other issue that the Learned Trial Magistrate did not consider the Appellant’s defence of alibi, the Appellant in his testimony stated that on the material day he was at Isiolo and that he spent the night there. He however did not say the time he went to Isiolo and the time he left Isiolo. At the conclusion of his testimony he stated; **“there was not enough light for PW2 or 3 to identify me.”** One wonders how he came to the conclusion that there was no enough light for him to be identified without facts preceding the conclusion. The only logical inference from the facts of the case is that, he must have been at the scene.

[20] Learned Counsel for the Appellant further contended that the trial court did not consider the provisions of Section 309 of the Criminal Procedure Code CAP 75 of the Laws of Kenya. In *R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS* (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

[21] The Supreme Court of Uganda, in *FESTO ANDROA ASENUA V. UGANDA*, CR. APP NO 1 OF 1998 made a similar observation

when it stated:

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”

[22] *More recent case of Athuman Salim Athuman v Republic [2016] eKLR* the Court of Appeal sitting in Mombasa stated as follows;

“Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in *GANZI & 2 OTHERS V. REPUBLIC*[2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant’s defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstances of this appeal, we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the appellant’s alibi defence was completely displaced.”

[23] In this case the Appellant raised the defence of alibi at the defence hearing. From the evidence on record I am satisfied that the alibi was dislodged as the Appellant was placed squarely at the scene of crime. And I am in agreement with the Learned Trial Magistrate that the alibi was an afterthought.

[24] Section 309 of the Criminal Procedure Code CAP 75 of the Laws of Kenya, provides as follows:

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

In the case of *Michael Saa Wambua & another v Republic [2017] eKLR*, the Court of Appeal sitting at Nairobi Nambuye, Kiage, M’ Inoti JJ.A, had this to say regarding section 309 (supra);

“Our construction of section 309 of the Criminal Procedure Code and understanding of the principle in the *Njuki & 4 Others versus Republic case, (supra)* is that there are two ways in which an alibi defence put forth by an accused person may be rebutted. One of them is for the presentation to call evidence in rebuttal. The second is for the court to weigh it against the totality of the prosecution case. The two courts below weighed the appellants’ alibis against the totality of the prosecution evidence, and found the prosecution’s evidence especially that tendered through the two eye witnesses Robert and Raphael truthful, credible and therefore ousted the appellants alibi defences. We therefore find no error in the two courts below rejecting the appellants’ defences. We affirm that rejection.

[25] From the circumstances of this case and the evidence on record, I am satisfied from the totality of the evidence on record that there was overwhelming evidence that placed the Appellant at the scene of crime and this evidence dislodged the Appellant’s alibi. Consequently, non-compliance with section 309 of the Criminal Procedure Code does not arise. There is also nothing fatal arising from Section 309 of the Criminal Procedure Code given the evidence in support of the prosecution’s case. The Appellant was in no way prejudiced.

[26] In light of the foregoing and for the reasons stated, the Appellant’s Appeal is without merit and is accordingly dismissed. IT IS SO ORDERED.

Dated, signed and delivered in open court at Meru this 15th day of February, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Namiti for Respondent

Mr. Wamache advocate for M/s.Thibaru for Appellant

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F. GIKONYO

JUDGE