



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 111 & 112 OF 2012

BETWEEN

JACKSON OSIAKO NDIANGUGU.....1ST APPELLANT

GEORGE MWEMBERE CHESEREMI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

**Being an appeal from the Judgment of Hon. S.M. SHITUBI CM delivered on 17.05.2012 in
Kakamega Cm's Criminal Case No. 1529 of 2010)**

J U D G M E N T

Introduction

1. The appellants herein Jackson Osiako Ndiangugu alias Pastor and George Mwembere Cheseremi were convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on the 15th day of March, 2010 at Kakamega town in Kakamega District within Western Province jointly while armed with dangerous weapons namely pistol robbed Sudhir Khetia of Cash Kshs.7,000/=, 120 US Dollars, a wallet, two alien identity cards Nos. 184547 and 234809, a copy of Kenyan Identity Card No. 2446680 a standard chartered visa card, six passport photographs and assorted business cards all valued at kshs.20,000/= and at/or immediately before or immediately after such robbery threatened to use personal violence against the said Sudhir Khetia. In the Court below, George Mwembere Cheserem alias Abu was the first accused while Jackson Osiako Ndiangungu alias Pastor was the second accused person. The third accused, Joseph Ayoo Omar alias Mtotoo is not part of this appeal.

The Appeal

2. Being aggrieved and dissatisfied by the judgment delivered on 17.5.2012 the appellants filed their amended appeal on the following 11 grounds;-

1. The learned Chief Magistrate erred in law in failing to evaluate the evidence used to convict the appellants.
2. The learned Chief Magistrate failed to evaluate the contradictory evidence of rifles and pistols

involved in the alleged robbery and that the alleged pistol, although recovered, was not produced as an exhibit in the case.

3. The learned Chief Magistrate erred in law and fact by failing to make a finding that the pistol serial No. 124467 allegedly used in the robbery had been produced in another Criminal case No. 1527/2010.

4. The learned Chief Magistrate erred in law and fact in failing to make a finding that the appellants were not the registered owners of the SIM Cards that allegedly received money through one HALIMA WERE.

5. The learned Chief Magistrate erred in law and infact and failed to make a finding that the complainant and/or PW1 took a long time to report to the police about the purported robbery.

6. The learned Chief Magistrate erred in law and fact in failing to make a finding that the prosecution failed to produce the alleged tape recordings in their possession of the alleged conversations between PW1 and the 2nd appellant.

7. The learned Chief Magistrate erred in law and fact by failing to consider the 2nd appellants alibi

8. The learned Chief Magistrate erred in law and fact in failing to make a finding that the police made no tangible recoveries from the appellants.

9. The learned Chief Magistrate erred in law in failing to warn herself of the dangers of convicting the appellant on evidence of a single identifying witnesses.

10. The learned Chief Magistrate erred in law in failing to make a finding that the complainant and/or PW1 had not made any initial descriptions of the appellant to the police prior to conducting the identification parades as required in law.

11. The learned chief Magistrate erred in law by relying on the evidence of faulty and/or defective identification parade to convict the appellants.

3. The appellants pray that the appeal be allowed, conviction quashed and sentence set aside and that they be set free.

Submissions.

4. The appeal was canvassed by way of written submissions made by the appellants through Mr. Peter Kirenga, Advocate. The appellant's submissions are dated 17.05.2016. Counsel for the appellants Mr. Kirenga highlighted the said submissions and put emphasis on the identification parade which he maintained was faulty, pre-arranged, and therefore of no evidential value.

5. He stated that during the two parades conducted at Kakamega Police Station the appellants were placed at strategic positions and that the parade members were the same which is against the judges' rules on identification. Mr. Kirenga cited a number of authorities to support his claim. The court has carefully read through the said authorities.

6. On recoveries counsel submitted that since the police took the appellants to their homes where items were recovered, such evidence amounts to confession which is not allowed in law. He relied on **Kisumu CA Cr. Case No. 44 of 2013** where the court stated "that courts can no longer rely on items recovered as this would amount to confession by an accused person."

7. Regarding the recovery of the pistol counsel contended that PW6 told the trial court that the particular fire arm was used as an exhibit in a different court case and as such the same cannot be said to have been with the appellants. Counsel asked this court to find that the appeal herein has merit and to allow the

same.

8. Mr. Jamsumba Prosecution counsel opposed the appeal and relied wholly on the evidence on record.

Duty of the 1st Appellate Court.

9. This being a first appeal this court is reminded of its role which is to reconsider and re-evaluate the evidence on record before making its own findings, the only caution being bearing that it did not see or hear the witnesses. See **Okeno –vrs – R [1972] E.A 32 and David Njuguna Mairumu – vrs – Republic [2010]** e KLR where the Court held that “The duty of the 1st appellate court is to analyze and re-evaluate the evidence which was for the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the 1st appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

The Prosecution Case

10. The prosecution called six (6) witnesses. In his testimony the complainant Sudhir khetia (PW1) testified of how he was attacked and robbed on the 15.3.2010 at about 9.00am. He stated that, he was driving motor vehicle Toyota pickup Registration Number KAN 171V taking his 4 year old child to school. At the junction of Golf Hotel three people emerged and since the vehicles’ windows were down they pointed a gun at him and entered the vehicle. He was pushed to the middle of the front seat as one attacker entered through the driver’s door and the other through the passenger door. The third person entered and sat at the back of the pick-up.

11. The vehicle was then driven towards Shinyalu and as they drove he pleaded with the assailants to spare his life. The attackers took his wallet which had an equivalent of US Dollars 120 Ksh.7,000/= 3 ID cards passport pictures, 6 passport cards, trading cards and other business cards. They also took his mobile phone Nokia 2330. The attackers searched him and the car looking for money. They demanded Kshs.3 million or else they would kill him. Eventually, however, the figure went down to Kshs.500,000/=.

12. He then called his manager Peter Wawire (PW4) and asked him to send him kshs.50,000/= as an emergency.

13. PW1 told the trial court that the 2nd appellant is the one who drove the vehicle while the 1st appellant sat on his left side and his child stood at the dashboard while the third assailant sat at the back of the pickup.

14. He explained how the money was sent through M-pesa to 0728940966 and thereafter how they continued to call him demanding for more money. He was released after the ordeal and he drove back to his home. In the first instance he gave Kshs.50,000/= and another Kshs.50,000/= after he was released by the at tackers who kept on calling him and threatening his life. He reported the incident and the threats he received from his assailants to the police, namely Deputy PCIO Yego who advised to lodge a complaint with details of the robbery. He also testified that he participated in a parade to identify the suspects where he positively identified the 2nd appellant in the 1st parade and the 1st appellant in the second parade. He was also able to identify the items recovered by the police: 6 pass ports photographs “PEX2”, 2 alien cards PEX3 (a)(b) photocopy of Id PEX4 Visa Card PEX5 bundle of business cards PEX6 Cheque leaves “PEX7 India Papers PEX8. He maintained that the 1st and 2nd appellants participated in robbing him and that he saw them very clearly.

15. On cross examination by the 1st appellant he reiterated his earlier testimony and maintained that he was able to identify the 1st appellant as he saw him in the morning of the attack. He claimed to have

described the 1st appellant to the police who took his statement. He also explained that he had 100 US dollars which figure he approximated to be Kshs.115,000/- . When he was cross –examined by 2nd appellant PW1 maintained that he identified the 2nd appellant who demanded for money from him. He reiterated his earlier testimony and explained that the recoveries were made from the appellants’ houses.

16. PW1 also explained that it was his manager (PW4) who sent the monies through PW3. The case herein was investigated by Chief Inspector Godfrey Nyongesa No. 231518. He was informed of the robbery that occurred on 15.3.2010 on the 1st of April 2010 by Deputy PCIO Western. He testified that money had been sent by M-Pesa to the robbers during the course of the robbery. He confirmed the M-Pesa transactions from Halima Were (PW3) to two mobile numbers: 0719727167 and 0728940966 which were used to receive money. PW3’s phone number received money from 0719-727-167 and then sent these monies to 0728940960.

17. PW2 No.231518- Chief Inspector Godfrey Nyongesa was also able to identify the telephone numbers which the suspects were using. He searched the person in possession of the number 0726516163 with assistance of Safaricom and on 11.8.2010 he was able to meet the 1st appellant at Kakamega General Hospital where on conducting a search on him he recovered the sim card for number 0719727167 “PEX9(a)” He also recovered the Sim Card No. 0726516163 “PEX9(b)” the number which assisted him to arrest the appellant.

18. After that PW2 interrogated the 1st appellant who gave him the names of the other associates and helped in their arrest. He also searched the 2nd appellant and recovered a sim card for 0728940966 which had received money from PW3 during the robbery PEX9(c). He added that the 2nd appellant and a third accused confessed that the firearm they were using was in the custody of the 1st appellant who he interrogated and he gave the details of the fire arm’s whereabouts. He further testified of how he was able to recover the said firearm from the 1st appellant’s home on 11.08.2010 at 8pm. He produced the fire arm as “PEX10” 2 while rounds of ammunition were produced as PEX10 (b). He also stated that during his investigations he confirmed that the mobile phone numbers used for the M-Pesa transactions were not registered though they were used to call the complainant as voice calls and short messages between 27.3.2010 and 11.4.2010.

19. The Investigating officer produced the complainant’s number/sim 0724966600 as PEX12. HALIMA WERE(PW3) an M-pesa Agent whose M-pesa is known as Haliam M-pesa gave an account of what happened on 23.10.2010 at 9,00am when PW4 requested her to send from him kshs.50,000/= using her number 0718531073. She sent the money in batches to an unregistered beneficiary. She also gave an account of the money she sent on the 20.3.2010 after being instructed by PW1 Director Yako Super Market. On this day she dispatched kshs.50,000/= also in batches which were sent to mobile No. 0719727167 and 0728940966. She later learnt that the beneficiaries of the said monies were robbers who had car jacked the complainant.

20. Peter Wawire(PW4) a manager with Yako Super Market confirmed having received a call from PW1 on the 15.3.2010 who instructed him that to send kshs.50,000/= to a specified telephone number. This was strange to PW4 but he went ahead and made arrangements and sent the money to 0719727-167 through an M-pesa Agent (PW3). PW1 called him again and requested him to send another sum of money. According to PW4, PW1 seemed to be under pressure when he called the second time. PW1 later told them of the ordeal he had undergone at the hands of robbers.

21. PW5 No. 230552 SP Johnstone Musyoki Munyera a firearm examiner based at CID Headquarters examined one pistol serial No. 124467 marked “A” and two ammunitions marked “B” which he received from PW6. He observed that the firearm was capable of firing after testing it. He produced the spent cartridge as “PEX13” and the ballistic report as “PEX14” .

22. PW6 CIP Christopher Mzee No. 230474 conducted the identification at the request of PW7 Sgt Kabogo. He explained to PW1 (the complainant) the purpose of the parade after which PW1 went through the parade and identified Jackson Osiako. He (PW6) produced the I.D parade record PEX 15(a).

He conducted a second parade and produced I.D parade record PEX15(b) where George Mwembere the 2nd appellant was also identified. He testified that he complied with the law in terms of height, age and appearance.

23. PW7 No. 42295 Sgt Peter Kabogo also investigated the case herein after receiving PExhibits 16 – 17. He interrogated the appellant's phone and did a search in the 1st and 2nd appellant's houses where he recovered assorted items which were later identified by the complainant. He testified that an identification parade was conducted on 17.8.2010 and a report prepared. He sent the pistol to the ballistic expert for examination and a report prepared. In his testimony he explained to the trial court the events of the robbery on 15.3.2010 as explained to him by the complainant and how the robbers continued to extort money from him (PW1). He also produced all the exhibits duly identified by the complainant being PEX 1- 8 Exhibits 13 and 16 – 40 respectively. That was the close of the prosecution's case.

Defence Case

24. The appellants were put on their defence and they both opted to give sworn statements. The 1st appellant testified of his arrest on the 11.08.2015 and how he was taken to his house where a search was conducted. He denied the recoveries alleged by the prosecution and added that the complainant did not identify him. The 2nd appellant on the other hand claimed to be a pastor and a herbalist. He told the trial court that the complainant was one of his clients and that on the 8.2.2010 they met and the complainant told him that he wanted to kill one Vaghela and he needed his help. He (DW2) agreed to assist the complainant at a fee of Ksh.500,000/= which was to be paid in a manner that would not be suspicious to PW1's wife or brother. They were to meet again on 15.3.2010 at the Golf Junction near the police station. They met and PW1 gave him a number to transact the Kshs.50,000/=. He received the money from 0728940966 and by 11th August, 2010 he had received Kshs.100,000/=.

25. He also testified of his arrest on the 11.08.2010 and how he was placed in the cells for some time. He also gave evidence regarding the ID Parade and added that he was also charged in another Criminal Case No. 1527 of 2010.

Trial Courts Findings

26. In her judgment the trial court was satisfied that both the appellants participated in the robbery. The trial court confirmed that indeed the complainant was robbed on the 15th March, 2010 as given by the testimony of PW1 and M-pesa transactions. The trial court found there were more than two thugs who were armed with a gun and who took the complainants wallet after hijacking him. The complainant's items were also recovered in the appellant's house and the 1st appellant also led the officers to where they recovered the pistol and ammunitions. The trial court was convinced that the prosecution had proved their case to the required standard and sentenced the appellants to suffer death as by law provided.

Determination.

27. To prove the offence of robbery with violence the prosecution must prove one of the following ingredients:-

(i) That the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) That the offender is in the company of one or more other persons; or

(iii) That at or immediately before or after the time of the robbery the offender wounds, beat, strikes or uses other personal violence to any person. See **Oluoch vs. Republic. (1985) KLR 549.**

28. In the case of **DIMA DENGE & OTHERS VS. REPUBLIC CRA 300/2007**, it was held that one only needs to prove one of the above ingredients for the offence of robbery under Section 296(2) to be proved. The Court of Appeal in the above case stated thus:-

“The elements of the offence under section 296 (2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

29. In instant case the complainant was attacked by three people on the 15th March, 2010 at 9.00 a.m. while he was taking his son to school. It was day time and he spent a substantial time with his attackers who entered his vehicle and drove it from the junction of the Golf hotel towards Shinyalu. They were talking as he pleaded with them not to harm him and his child. He sat in front of the motor vehicle while the same was being driven by the assailants and he said he was able to see them and identify them at a parade conducted by PW6.

30. The two appellants were allegedly traced by PW2 because of the M-pesa transactions they did. He tracked the numbers and was able to arrest the 1st appellant who told him of the other members of his group. The M-pesa transactions were done by PW3 an M-pesa Agent who allowed PW4 to send money through her to a number given to PW4 by PW1. This M-pesa link was what led to the appellant's arrest. Further to that PW2 and PW7 who investigated the case did some recoveries of some items which were allegedly found in the appellants' houses after a search was done. The pistol was also recovered.

31. There was therefore a link between the robbery that occurred on the 15th March, 2010 and the items recovered from the appellants. They (appellants) were unable to account for the said goods and the monies they received from PW4 through the agent PW3. I therefore find that the evidence by the prosecution's witnesses corroborated the incidents of 15th March, 2010. Especially the evidence by PW3 and PW4 which showed that the M-pesa transaction was done on the same day and which evidence was investigated by PW2 and PW7 who traced the transaction using the Sim cards produced in evidence.

32. I therefore find that the trial court was duly guided by evidence adduced and that she correctly evaluated the same to come up with the conclusion to convict the appellants.

33. On the issue of the evidence of rifle and pistol involved, it is clear from the judgment that the trial magistrate addressed this issue, and more particularly at page 108 line 18 of the judgment. The said pistol was taken to a ballistic expert (PW5) and the ballistic expert produced his report PExh. 14 (a) and P.Exh. 14 (b) which confirmed them as firearm and ammunition respectively.

34. From the evidence the pistol which was serial No. 124467 was used in the robbery. It does not matter that the pistol was produced in another case. It does not mean that the same pistol cannot be used in various criminal activities.

35. It is true that the Sim cards were not registered in the names of the appellants but that notwithstanding the appellants were searched and the Sim cards found on them. The same sim card is the one that was used severally to call the complainant and even used to withdraw money at Chavakali. If it was found and/or recovered from the 2nd appellant and not any other person it means that it was his even though it had not been registered in his name or any other person's name.

36. Regarding the appellants' complaint that the complainant took a long time before reporting the incident. It is trite that in law there is no time limit within which to report a criminal offence. PW1 told the court that he was traumatized after the incident which prompted him to first take his family to India because the threats had become too much. Though he did not report to the police immediately, the complainant told the people close to him of what had transpired. Later after he returned from India, he made a report of the incident and the case was then investigated. It was not long after reporting the case that the items he lost were recovered and he was told to go to the police to identify them.

37. This matter was investigated by PW2 who exercised due diligence which led to the arrest of the appellants. He is the one who initiated a search where the items of the complainant were recovered. He, together with other officers went to the appellants houses and searched and recovered items that were later identified by PW1.

38. As a court, I am aware of the need to treat the evidence of a single identifying witness with caution, especially if the conditions for identification are difficult. **See R- Vs – Turnbull [1976] 3 All ER 549 and Wamunga vs Republic [1989] KLR 424.** The courts have thus held that such evidence must be put under close scrutiny lest there be a miscarriage of justice because of mistaken identity. It is also critical that a court pays close attention to the evidence of the complainant to confirm if the complainant gave a description of his attackers with the first report, in order to rule out consultation with other people before the evidence is given.

39. In this instant case, the conditions for identification were not difficult since the robbery took place at 9.00oclock in the morning. The complainant and the appellants sat together in one seat in the car, as they talked and as the appellants demanded cash. I have no doubt therefore that the identification of each of the appellants by the complainant was without error.

40. As for the identification parade, I find that the same was properly conducted as per law required. A report was made and produced as P. Exh. 15 (a) and 15(b). The complainant had a second chance of seeing his assailants and he properly identified them. Even if the evidence of the parade and the recovered items were to be excluded, there is still other evidence to connect the appellants to the robbery. The complainant clearly identified his assailants during the half hour ordeal. He gave a description of them to the police and the money he went was withdrawn using the same sim card to which the money had been sent.

41. From the above analysis, I make a finding that the appeal herein lacks merit and the same is dismissed in its entirety. Right of appeal within 14 days from today.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 23rd day of May .2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Kirenga.....for Appellant/Applicant

Mr. Juma Ochieng.....for Respondent

polycap.....Court Assistant