



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 62 OF 2015.

FREDRICK OTIENO DOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 4328 of 2012 delivered by Hon. E. Juma, SPM on 5th March 2015).

JUDGMENT.

Background.

Fredrick Otiemo Dola, herein the Appellant, was charged with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the first count were that on 24th August, 2012 at 8.30 p.m. at Kibera Lane saba in Nairobi within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols robbed Seif Bernard Mutie Muendo of one mobile phone make nokia X2 valued at Kshs. 12,000/-, cash Kshs. 8,000/- and assorted beers valued at Kshs. 13,700/- all valued at Kshs. 33,700/- and immediately before such robbery threatened to shoot Seif Bernard Mutie Muendi.

The particulars of the second count were that on 24th August, 2012, at 8.30 p.m. at Kibera Lane Saba in Nairobi within Nairobi County, jointly with others not before court while armed with dangerous weapons namely pistols robbed Richard Wambua Muasya one mobile phone make Nokia 110 valued at Kshs. 2,900/- and cash Kshs. 10,000/- all valued at Kshs. 12,900/- and immediately before such robbery threatened to shoot Richard Wambua Muasya.

The Appellant was found guilty on both counts. He was sentenced to death in count I with the sentence in count II held in abeyance. He has lodged the present appeal against both the conviction and sentence. In summary, his grounds of appeal were that the learned trial magistrate erred when he overlooked the first report made by the complainants which did not identify the Appellant nor give his description. Secondly, that the trial court erred when it failed to find that the prosecution did not prove the case to the required standard. Thirdly, that he was convicted on the basis of contradictory evidence. Fourthly, that the trial magistrate failed to summon essential witnesses. Sixthly, that the investigations were shoddy and lastly, that his defence was rejected without justification.

Submissions

The Appellant relied on written submissions which were filed contemporaneously with the grounds of appeal on 7th November, 2017. He took issue with the fact that he was not properly identified. He pointed to the fact that none of the complainants when they made their initial reports to the police stated that they would identify him. That although they testified that they had known him since their childhood and clearly saw him during the robbery, they did not give his description as one of the persons who robbed them in their first report with the police. They neither gave his name as one of the robbers. He also took issue with the conflicting evidence on how he was arrested. He submitted that the investigating officer testified that the complainants led to his arrest. To the contrary, the complainant testified that they were informed of his arrest after which they identified him. With the inconsistency in the evidence of the key witnesses, the Appellant submitted that the prosecution case lacked merit and urged the court to allow the appeal.

On behalf of the Respondent, learned State Counsel, Ms. Sigei opposed the appeal. She submitted that the identification of the Appellant was by recognition since the complainants knew him prior to the date of the robbery. Furthermore, according to the counsel, there was sufficient lighting at the scene of robbery which enabled the complainants to identify the Appellant. She denied that there was discrepancy in the evidence on how the Appellant was arrested. She also submitted that the Appellant's defence lacked merit, reasons wherefore the trial court dismissed it. Counsel submitted that the appeal lacked merit and urged the court to dismiss it.

Evidence.

PW1, Seif Benard Mutie, and PW2, Richard Wambua Muasya were both businessmen at Lane saba in Kibera. PW1 owned a bar whereas PW2 who neighbored PW1 owned an M-Pesa Shop. On 24th August, 2012 about 8.00 p.m, a gang of about six men led by the Appellant who had a gun struck PW1's bar and ordered everyone to lie down. The bar patrons were ransacked and robbed off personal belonging. PW1 however defied the order to lie down which enabled him to recognize the Appellant as one of the robbers. He described him as his neighbour whom he had known for about ten years. Nevertheless, PW1 lost Kshs. 16,000/=, a Nokia mobile phone and alcoholic drinks valued at about Kshs. 16,000/= in the robbery.

The robbers then moved to the next shop belonging to PW2 which offered Mpesa services. According to PW2, he first heard someone shouting in PW1's bar ordering people to lie down. He stepped out of the shop to find out what was happening and as he returned to his shop he was accosted by the gang some of whom were armed with pistols. He testified that the gang comprised about eight men. They targeted the Mpesa cash drawer from which he was robbed of Kshs. 10,000/=. Both PW1 and 2 reported the matter to Kilimani Police Station on the following day. PW1 had on the same night reported the incident at Golf Course AP post. The Appellant was arrested thereafter and they were called to the Chief's camp to identify him. PW2 gave the name of the Appellant to the police as Fredrick Otieno Wiso.

The case was investigated by **PW3, Corporal James Kimathi** who also recorded necessary witness statement. He testified that he visited the scene which he confirmed that it was well lit with electric lighting. He also testified that PW1 and PW2 led to the arrest of the Appellant. He further confirmed that the complainants reported that they were robbed by persons known to them.

The arrest of the Appellant was effected by **PW4, Sergeant Willian Mogesi** of Golf Course AP Camp. His testimony was that on 19th September, 2012 PW1 and 2 reported at the AP post that they had been robbed on 24th August, 2012 by a person whom they had seen and therefore requested that the police arrest him. The witness was accompanied by APC John Waswa and Simon Kinyanjui Mbau to where the Appellant was and effected the arrest. The Appellant was thereafter charged accordingly.

After the close of the prosecution case, the court ruled that a prima facie case had been established and the Appellant was called to offer a defence. He chose to remain silent.

Determination

It is now the duty of this court to evaluate and analyze the evidence afresh before arriving at its own independent findings. See: **Pandya v. Republic[1969] EA 339.**

I have deduced the issues for determination to be whether the Appellant was properly identified and whether the case was proved beyond reasonable doubt

On identification, it was the case for the prosecution that the same was by recognition as the complainants knew the Appellant prior to the date of the offence. Their evidence was that they knew the Appellant as he had grown up in the locality and they were therefore in a position to recognize him. Each testified that they informed the police that he was the one who led the gang that robbed them and even gave his name. The Appellant submits that the occurrence book entry regarding the offence did not include his name or a description fitting him. The court had the benefit of looking at the available occurrence book entries. The first is entry 13/19/9/2012 which relates to the Appellant's arrest. It indicates that he was arrested in relation to robberies that were reported vide occurrence book entries 12/24/08/2012 and 14/24/08/2012. Entry number 12/24/08/2012 indicates that the complainant, PW2, was robbed by seven men and that he knew one member of the gang. He gave his name as Kevo. In contrast, the witness testified that the Appellant was one Freddy and that this was the name he gave to the police when he reported the matter. The court did not have the opportunity to see the other occurrence book entry in which PW1 testified he had given the Appellant's name. However, the evidence of the investigating officer was persuasive with regard to the content of the entry in question. He testified that the complainants did not indicate the names of any of the attackers but simply informed the police that they knew their attackers.

The importance of an initial report was set out in **Terekali s/o Korongozi & others v. R[1952] 19 EACA 259**, viz:

"Their importance can scarcely be exaggerated for they often provide a good test by which the truth and accuracy of the later statements are to be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often come out in the first statement taken from a witness at a time when recollection is very fresh and there had been no opportunity to consult with others."

In this case, the complainants made their initial reports soon after the robbery but did not indicate the name of the Appellant who they testified they had recognised. Their statements offer no help as they were recorded after the Appellant was arrested. But if they knew the Appellant prior to the robbery, nothing was easier than stating he was one of the robbers. This would have been more assuring that they did not mistake him for someone else. After all, it is possible for a witness to honestly mistake a suspect even when they believe he is the one who committed the offence. See **Freemantle v. The Queen[1994] 1 WLR 1437** in which it was held that:

"...experience has shown that virtual identification(even by recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witness may be as to the correctness of their virtual identification and no matter how impressive and convincing that they might nevertheless be mistaken in their identifications."

Therefore, the only thing that would have erased doubt that the complainants clearly identified the Appellant, a person they knew, during the robbery was by giving his name and description to the police when they first reported the matter. The failure to do so, as they did, casts a doubt

that they identified him and by extension his participation on the robbery.

There was also a contradiction in the evidence of how the Appellant was arrested. The complainants testified that the police arrested the Appellant and then called them to inform them of the same which would lend credence to their testimony that the police were aware of who perpetrated the robbery. The arresting officer however testified that the complainant led him to make the arrest. He testified that they both arrived at the post and informed him that they had seen one of the robbers. This went against their testimony that they informed the police of the Appellant's identity.

The court also found the evidence of PW2 in re-examination that there were frequent complaints against the Appellant and that many people mentioned the Appellant's name as the culprit wanting. It is an obvious indicator that his arrest was likely informed on the basis of suspicion. Suspicion on the other hand, however strong, can never found a basis for a conviction. Any conviction must be premised on cogent evidence that must be proved beyond a reasonable doubt.

Consequently, for lack of a positive identification of the Appellant and any other evidence linking him to the offence, this appeal must succeed. I accordingly quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free. It is so ordered.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Miss Sigei for the Respondent.*