



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 376 OF 2009

ABDIKADIR MOHAMED OMAR.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence by Hon S. Muketi S.P.M. dated 3rd September, 2009 at Nairobi SPMCCR Case No. 1898 of 2008

JUDGEMENT

The appellant, **AbdiKadir Mohamed Omar**, was arraigned before the Senior Principal Magistrate's Court, Nairobi on eight counts.

The particulars of Count 1 was that on the 10th day of November, 2008 at around 2400 hours at Elwak Guest House in Elwak Township in Mandera Central District within North Eastern Province jointly with others not before court while armed with dangerous weapons, AK 47 rifles robbed **Idris Mayow Bulle** of his national identity card and cash amounting to Ksh.2,450/= and immediately before, or immediately after the time of such robbery used actual violence on the said **Idris Mayow Bulle**.

The particulars of Count 2 was that on the 10th day of November, 2008 at around 2400 hours at Elwak Guest House in Elwak Township in Mandera Central District within North Eastern Province jointly with others not before court while armed with dangerous weapons, AK 47 rifles robbed **Adan Shukri Sheikh** of cash Ksh.100,000/= and immediately before, or immediately after the time of such robbery used actual violence on the said **Adan Shukri Sheikh**.

The particulars of Count 3 was that on the 10th day of November, 2008 at around 2400 hours at Elwak Guest House in Elwak Township in Mandera Central District within North Eastern Province jointly with others not before court while armed with dangerous weapons, AK 47 rifles robbed **Yusuf Mohamed Osman** a motor vehicle registration number KAZ 908U valued at Ksh.900,000/=, his mobile phone, Nokia valued at Ksh.2,500/=. All valued at Ksh.902,500/=. and the motor vehicle was the property of Government of Kenya and immediately before, or immediately after the time of such robbery used actual violence on the said **Yusuf Mohamed Osman**.

Count 4 was that on the 10th day of November, 2008 at around 2400hours at Elwak Guest House in Elwak Township in Mandera Central District within north Eastern Province jointly with others not before court while armed with dangerous weapons, AK 47 rifles robbed **Hassan Ibrahim Mohamud** a motor vehicle registration number GK A 147L, Nissan Hard Body pick up valued at Ksh.3.5 million, the property of Government of Kenya, his torch valued at Ksh.200/= and a bag valued at Ksh.450/= all valued at Ksh.3,500,650/= and immediately before, or immediately after the time of such robbery used actual violence on the said **Hassan Ibrahim Mohamud**.

Count 5 was that on the 10th day of November, 2008 at around 2400 hours at Elwak Guest House in Elwak Township in Mandera Central District within North Eastern Province jointly with others not before court while armed with dangerous weapons, AK 47 rifles robbed **Abdirahman Lukman Maalim** a motor vehicle registration number GK A 556l make Land Rover 110 the property of Government of Kenya valued at Ksh.2.5 million, his mobile phone, Nokia 3310, valued at Ksh.3,000/= and cash Ksh.5,000/= all valued at Ksh.2,508,000/= and immediately before, or immediately after the time of such robbery used actual violence on the said **Abdirahman Lukman Maalim**.

Count 6 was that on the 10th day of November, 2008 at around 2400 hours at Elwak Guest House in Elwak Township in Mandera Central District within north Eastern Province jointly with others not before court while armed with dangerous weapons, AK 47 assault rifles, kidnapped and abducted **Geraudo Katarina aged 67 years** and **Olivaro Maria Teresa** aged 68 years both Italian nationals residents in Kenya and drove them to Somalia.

Count 7 was that on the 10th day of November, 2008 at Elwak Guest House in Elwak Township in Mandera Central District within North Eastern Province being a Somali national was found unlawfully present in Kenya in contravention of the Immigration Act, in that he had no valid permit or pass authorizing his stay in Kenya.

Count 8 was that on the 10th day of November, 2008 at Elwak Guest House in Elwak Township in Mandera Central District within North Eastern Province being a Somali national was found to have failed to report to the nearest immigration officer in contravention of the Immigration Act.

The appellant pleaded guilty to Counts 7 and 8 and was convicted on his plea of guilty. He denied Count 1 to 6.

The prosecution called 17 witnesses while the appellant gave an unsworn statement and did not call any witnesses in his defence. At the close of the trial, the court convicted him on Counts 1 to 5 and acquitted him on the 6th count for lack of sufficient evidence. He was sentenced to suffer death as per law prescribed.

The appellant now comes to this court on appeal. His petition of appeal cites the following grounds;

1. **That**, the learned trial magistrate erred in both law and facts when he convicted me in this case without him considering that I was arrested as a suspect and also being a fugitive from Somalia.
2. **That**, the learned trial magistrate erred in both law and facts when he convicted me in this case without him considering that I was never in any possession of the said A-K 47 rifle and vehicles.
3. **That**, the learned trial magistrate erred in both law and facts when he convicted me in this case while relying on contradicted evidence from the prosecution side.
4. **That**, the learned magistrate erred in both law and facts when he rejected my defence without giving proper reasons for rejecting thus violating the law as per section 169(1) of c.p.c.
5. *That, since I cannot recall the whole evidence that was adduced during the hearing of this case at the trial court now beg leave to this honourable court of justice to furnish me with court proceedings in order to assist me to add more grounds during the hearing of this appeal and same, that I pray to be present during the hearing date.*

As a first appellate court, we are under duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. This duty has been stated and restated in many decisions both by the high court and Court of Appeal See **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32**. See also **Mwangi –vs- Republic [2004] 2 KLR 28** where the court held that “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 have the appellate court’s own decision on the evidence.”

At the trial, PW1, Adan Shukri Sheikh testified that his father operates a lodging named Elwak Guest House. On 10th November, 2008 while he was at the hotel/lodging which has 13 rooms, and having been assigned the duty of collecting money and at 12.30 a.m. a lot of people came to the lodge and there was a lot of noise. Room No. 6 was booked by the appellant. Initially he had booked the room alone but had said he would come with two others. The room had 3 beds. These people spent the night in this room having come on 7th November, 2008. They had spent 3 nights in the room. Initially they had paid Ksh.100 but later paid Ksh.800.00. The Kshs.800.00 was paid at 4.00 p.m. on the night of the attack.

On 10th November, 2008 at midnight he was asleep in his room. The room was not numbered. He heard lots of noise from the direction of town. He woke up and went to the door. There was a lot of knocking at the main door from outside. The door was broken and these people gained access to the lodge. He does not know the number of people but estimates this to have been not less than 20. They each started hitting the room doors using crude weapons. They did this to every room and entered. This was all the way up to room No. 6. They unlocked a latch to my room door through a hole on the door.

The room was not lit and the three assailants each had a rifle. I was alone in the room and do not know the type of rifle. They pointed the rifle at me and asked me for everything that I had. I gave them Ksh.100,000.00 the proceeds of the sales of our shop at the lodging. They demanded for more. They then heard something from outside and left. They hit me with a stick. I heard gunshots from outside and they left. I did not immediately leave the room due to fear but later walked out. I also heard other people coming from their rooms.

When the police came, the accused was in the toilet. He had money in his pocket and the watchman said it was similar to the amount he had lost in the fracas. He had lost the money together with an Identity Card and wallet but these items were thrown in the toilet. The money was removed from the accused and counted at Ksh.2,450.00. He could remember the denominations. When the watchman demanded his Identity Card and the appellant denied having it and said that the money was his. Some teachers within the lodge called a police officer and started beating the appellant who said he would produce the identity card. The police searched the toilet and only recovered a floating sim card.

PW1 further testified that he did not know the appellant prior to 7th November, 2008, the date he booked in. At the time of the robbery, the lights went off and he could not identify the person who robbed him. The amount of Ksh.100,000.00 stolen was not recovered.

PW2, Idris MayowBulle testified that he was a watchman at the guest house lodge Elwak Central. He testified that he was at the entrance of the lodge from inside. The main door was locked using two padlocks. There was knocking at the door and he went to the door and enquired who they were. He did not know the number but they said they wanted a lodge. He told them that the lodge was full. They went away and came back after thirty minutes. A vehicle was used to hit and open the gate and thirty people entered the lodge. They were armed with rifles. He, the watchman went hiding.

The occupants of room No. 6 showed them around, ransacked and manhandled people in the hotel. There were two vehicles parked in the hotel whose keys they took from the drivers and fled with them.

After the fracas, he would not find his identity card and Ksh.2,400/= . Life resumed at the lodge and they started looking for the occupants of room No. 6, only to find the appellant locked up in the bathroom. He was arrested by the police and found in possession of Ksh.2,450/= . The sim card was also recovered from the toilet that the appellant had entered.

At the close of the prosecution case, the appellant was put on his defence and gave an unsworn statement in such defence. He testified that he stays in Mogadishu and did not have a specific job. He had decided to come to Kenya and seek refugee status to avoid war in Somalia. Before he got the refugee camp, he had entered Kenya through Elwak. He booked into the hotel when it got at night. As he slept, he was woken up by gunshots and there was a knock at his door. He was instructed to go outside. When the assailants left, there was discussion and enquiry amongst the patrons. He further testified that the watchman approached him and enquired as to whether he knew the assailants which he denied. He went

back to his room only for the watchman to ransack his trouser and claim that the Ksh.2,400/= in his trouser pocket was his. He was arrested and taken to Mandera Police Station where he spent three nights. He was later charged in Mandera Law Courts which charges he denied. The Ksh.2,400/= belonged to him.

The appeal came for hearing on 22nd October, 2013 where the claimant appeared in person whereas Mr. Kadebe appeared for the state.

The appellant testified/submitted that when he was arrested, he was at a hotel. He was arrested on suspicion and resided at the hotel before the incident. He would not remember the name of the hotel but it is in Elwak. He was arrested as an alien but not on the incidence that took place. He shared his room with two others but they fled after the incident. That he is a Somali refugee and that the exhibit was a cartilage and no gun was produced. The other exhibit was Ksh.270.00. He submitted that there was no other exhibit. He denied the allegation of stealing.

The appellant further submitted that he is a Somali and Somali is at war. That he pleaded guilty to the charge of being an alien and has completed the sentence. He denied the other offences.

Mr. Kadebe for the state opposed the appeal. He submitted that the conviction and sentence are proper. 17 witnesses testified on a robbery where crude and conventional weapons were used. S.296(2) enjoins guilt to those who accompany culprits like in the present case. Page 17, paragraphs 2, 3 and 4 are express on the issue of guilt. S. 20, Penal Code: the appellant was party to the offence and incident.

Counsel also relied on circumstantial evidence. Appellant would not explain why he was holed up in a toilet after the incident and security alert by the police. His testimony of going to the toilet to take a bath is not convincing. He was found with Ksh.2,400.00, monies stolen from the complainant watchman. The doctrine of recent possession is applicable in the circumstances of the appellant. Further, the appellant was properly identified, having been familiar to PW1 and PW2 and having been a lodger at the hotel for three days. This supported the conviction and sentence which counsel submitted was faultless. He prayed for upholding of conviction and sentence and a dismissal of the appeal.

Having considered the record and the respective submissions of the parties, and bearing in mind our duty as a first appellate court, we consider that this appeal must turn on the question of whether or not there was sufficient evidence to connect the appellant to the robberies. The issues raised on this appeal are:-

- That he was convicted without consideration that the appellant was arrested as a suspect and fugitive from Somalia
- That his conviction did not take into account that he was never in possession of the AK 47 rifles or vehicles.
- That he was convicted on contradictory evidence.
- Misapplication of the doctrine of recent possession when this was not proved to the required standards.
- That his defence was rejected and not considered without reasons being offered for the same.

1. Conviction without consideration that the appellant was a suspect and fugitive from Somalia

The appellant complains and raises as a ground of appeal the fact that he was convicted without the trial court considering that he was a suspect and fugitive from Somalia. The record of court exhibits a situation where the appellant was arrested and charged with 8 counts. Two of those counts related to being in Kenya unlawfully and failing to report to an Immigration Officer.

The appellant pleaded guilty and was convicted on these counts. His conviction on the other charges of robbery with violence was based on evidence tendered by the prosecution at the trial. It was not whimsical, or at all. We find that the trial court cannot be rightly faulted and this ground fails *in toto*.

2. That the appellant was never in possession of the AK 47 rifles or vehicles.

It is true that the appellant was not found in possession of the AK 47 rifles or even motor vehicles stolen during the attack at Elwak Guest House. However, there was substantial evidence from the prosecution linking the appellant to the incidence of attack and robbery thereby leaving no doubt that he was part of the group that committed the robbery. The conviction therefore did not require any direct handling of the instruments of violence or possession of the stolen vehicles.

The prosecution case was that the appellant and his two room-mates were forerunners for the planned invasion and attack.

3. That the appellant was convicted on contradictory evidence.

The prosecution clearly adduced the evidence linking the appellant to the robbery. In his written submissions the appellant cited a case of contradictory evidence by PW1 in that the witness hid in a room outside the lodge premises. He was not therefore in a position to identify him as the person who led the attackers in ransacking the rooms and robbing the occupants. This is not true.

PW2's evidence was that when the attackers struck, he was not able to return to room No. 1. He hid in a small room nearby and was able to witness all the events of the attack. We find that the allegation by the appellant of contradiction does not hold water.

PW2 also testified about the appellant being found with Ksh.2,400.00 that had been stolen from him during the attack. The slight contradiction in the denominations of the currency are admitted but we find this minor contradiction not fatal to the prosecution case. It is minor and would not affect the evidential proof of the charges and case.

4. Misapplication of the doctrine of recent possession when this was not proved to the required standards.

PW2 testified that at the time of arrest, the appellant was found with Kshs.2,450.00 of which Kshs.2,400.00 had been stolen from his shirt placed on the bed in room No. 1. PW2's identity card and sim card were found on the floor of the toilet where the appellant had entered.

This is adequate evidence of recent possession by the appellant and was not rebutted in his evidence. The trial court cannot therefore be rightly accused of misapplication of doctrine of recent possession in the circumstances.

5. That his defence was rejected and not considered without reasons being offered for the same.

At the trial, the appellant gave an unsworn statement in defence. He did not call any witnesses. He gave an elaborate testimony of his travails from Somalia to Kenya in search of refugee status. He also gave his own account of the events of the fateful night and all denying that he was involved in the robbery. He was arrested and charged.

He further testified that the Ksh.2,400.00 exhibited in court was his money and was removed from his pocket. PW2 had denied that the money belonged to him. This is not true. PW2 only denied that the denominations of currency notes brought as exhibits was not what was stolen from him. He did not deny that the money belonged to him.

The trial court elaborately analysed his defence vis-à-vis the prosecution evidence and rejected the same. It is not therefore safe to submit that the defence evidence was ignored in convicting the appellant. It was considered and found incredible and not feasible.

The appellant raises his arrest status as a ground of appeal. He submits that he was arrested as a fugitive and not for any other offence and therefore false recognition. He also faults the conviction on grounds that he was not found in possession of the A-K 47 rifles and the motor vehicles stolen during the

incidence. This is flimsy. It is well documented in evidence that the appellant was a forerunner for the robbers. His two room-mates disappeared into Somalia with the robbers and cannot be traced. It is only lucky that the appellant was apprehended, arrested and charged with this offence. His grounds of appeal therefore fail *in toto*.

The appellant also raises the issue of being convicted without regard to his evidence or even reasons for such disregard of his evidence. The unsworn statement of the appellant was not probative and amounted to a mere denial. It was not valuable in exonerating the appellant from the offences charged. Moreover, there was ample evidence and even the circumstantial evidence linking the appellant to the offences charged. The appeal is therefore untenable and should be dismissed in its entirety.

The totality of the evidence as analysed above leads us to a finding that a robbery did take place and that the appellant was in the company and party of the other robbers. They were not only armed but exerted violence on the lodgers and management, robbing them of substantial amounts of money and government vehicles besides other items.

In the result we find that the prosecution's case in the trial court was proved. We dismiss the appeal and uphold both the conviction and sentence.

Delivered, dated and signed the 27th day of June, 2014.

R. LAGAT-KORIR

D.K.NJAGI MARETE

JUDGE

JUDGE

In the presence of:

.....: Court clerk

.....: Appellant

.....: For the Appellant

.....: For the State/respondent