REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 18 of 2012

RASHI ALI IDRIS.....…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*From original conviction and sentence in criminal case Number 301 of 2011 in the Senior Resident Magistrate's Court at Garissa).*

JUDGEMENT

The appellant was convicted by Wajir Ag. Resident Magistrate of four counts. Counts I and II were offences of robbery with violence contrary to section 296 (2) of the Penal Code for which the appellant was sentenced to death on each count. Counts III and IV were offences of being in possession of a firearm and ammunition respectively without a certificate contrary to section 4 (1) and as 4 (2) read with section 3 of the Firearms Act for which he was sentenced to serve ten (10) years imprisonment on each count.

Mr. Arthur Ingutia represented the appellant presented and argued the grounds of appeal. Firstly, the counsel submitted that the laid down procedure was not followed in regard to the manner in which the trial was conducted and thus violating Article 50 of the Constitution. Specifically, the bond of the appellant was cancelled without reasonable cause, he was denied the opportunity to call witnesses and that the record of previous convictions, if any, was not called for to aid the appellant to mitigate in regard to the sentence. The judgment of the magistrate was challenged in that it failed to consider that the prosecution's evidence was contradictory and fell short of meeting the standards of proof in a criminal case. The appellant contended that his defence was not considered and that the two charges under the Firearms Act ought to have been consolidated into one.

Precisely, the facts leading to this appeal are that PW1 an Administration Police Officer received a report from the complainants PW2 and PW5 to the effect that they had been robbed by two men at Arbajahan in Wajir County. The complainants were transporting their cattle to Nairobi from Wajir.

They decided to put up at Arbajahan for the night camping in the bush. Around 3.00 a.m. they were attacked by the appellant who was armed with a gun and his co-accused armed with a panga. The complainants were robbed of their mobile phones and clothes. The two assailants were arrested the following day by PW1 and his colleagues leading to recovery of the rifle used during the robbery. The stolen clothings were also recovered in the same operation.

This appeal raises the issue of whether the appellant was accorded a fair trial by the trial court. The appellant was released on bond about three months after being arraigned in court. About one month he absconded. His wife appeared in court on 16/11/11 and told the trial magistrate that the accused was sick

and was unable to attend court. The court issued a warrant of arrest. On 23/11/11 the appellant did not attend court and in addition to the warrant of arrest, the court issued summons requiring attendance of the surety. The case was mentioned again on 13/12/11. The appellant was not arrested until 20/12/11. The prosecution told the court that the appellant was arrested by Army Officers patrolling the border at Khamu while escaping to Ethiopia. The accused's explanation was that he was arrested while looking for his camels. The court cancelled the bond and the appellant was remanded in custody for the rest of the trial period.

It should be noted that the appellant who was said to be sick did not produce any medical evidence to support the claim. Even though he was taken to court under a warrant of arrest, he ought to have asked for time to avail the medical records, if any. The appellant had missed to attend court four times without bothering to give the court any explanations for his action. In normal circumstances, the accused would have tendered an apology to the court after arrest and make an attempt to explain what difficulties he faced preventing him to attend court on the four (4) occasions. The right to bond/bail is dependent of the beneficiary fulfilling his part of the bargain by attending court dutifully. We come to the conclusion that the appellant's right was not violated by cancellation of the bond. The magistrate exercised his discretion correctly.

The appellant elected to give a sworn statement in his defence and to call witnesses. The number of witnesses to be called was not given. On the hearing date, the appellant called one witness DW2. The case was adjourned to another day to allow the appellant to call other witnesses. On his request, summons were issued to the area Chief Noor Yusuf to come and to testify. When the case came for hearing, it was brought to the attention of the court that the witness had already testified as a prosecution witness. The appellant said his other witnesses were attending a funeral on that day. The court gave the appellant another hearing date. The accused was present in court during the hearing that followed but the court was not sitting. The next hearing was fixed on 16/11/11 when the appellant failed to attend court. The matter was mentioned for four consecutive times until the accused was arrested. When the appellant was arrested and taken to court, he still had the opportunity to apply to be allowed time to call the remaining witnesses. However, the accused did not bring up the issue. His failure to do so may have been correctly interpreted to mean that the appellant had abandoned his original plan to call the other witnesses. We come to the conclusion that there is no tangible evidence to show that the appellant was denied the opportunity to call defence witnesses.

The evidence of PW2 and PW5 is that they were attacked and robbed in the material night at around 3.00 a.m. Both said that there was moonlight but did not say whether the moonlight aided them as opposed to any other source of light to identify their assailants. The fact that each of them said that accused 2 had a torch which he put between his neck and shoulder as he opened the porch of PW2 suggests that it is from the light of that torch that they saw the faces of their assailants. If there was moonlight, there was no need of Accused 2 using a torch. Neither would the complainants need the torch light to see their assailants. The intensity of the moonlight and the torch light was not described by either PW2 or PW5.

The witnesses testified that their assailants had tied head cloths but left their faces open. PW2 said the beards of the appellant were short and that when he saw him in court, the beard had grown longer. He gave no other facial features which helped him identify the appellant. The complainants claimed to have seen the faces of their assailants clearly yet each of the witness admits that they were ordered not wake up or change position which order they obeyed. It is highly doubtful that the complainants could clearly see the faces of their assailants as they lay on the ground without turning their heads.

PW5 said in his evidence in chief that the appellant had a gun while accused 2 had a knife. He further said that accused 2 had a panga. A panga is a different weapon from a knife. There was no evidence that accused 2 was armed with two weapons. PW2 said that the appellant had a gun and accused 2 a panga thus contradicting PW5.

In regard to where the gun was recovered, one witness said the gun was found under the bed and the other under the mattress. The effect of it all is that the gun was found in the house of the appellant. This is a negligible discrepancy which has no effect on the prosecution's case.

We agree with the defence that the magistrate seemed doubtful on the issue of positive identification when he said in his judgment:

"They (meaning complainants) **might not be expected to make good judgment".** We note that he also stated that **"PW1 and PW5 must have panicked when someone pointed a gun at them".** We believe that when the magistrate said PW1 , he meant PW2 who was the first complainant in this case. PW1 was an Administration Police Officer. The magistrate also pointed out that if police conducted an identification parade it would have cleared all the doubts. In our considered opinion, an identification parade would not have served any useful purpose because the complainants saw the appellant beforehand.

It is our findings that the conditions were not conducive for positive identification and that the trial court failed to evaluate the evidence in this regard thereby reaching a wrong finding that the complainants identified the appellant. Similar evidence on identification was adduced in respect of the 2nd accused. However, he was acquitted without good reasons being given to support the magistrate's findings. It is a legal requirement that the decision of the court to either acquit or convict must be supported by reasons. It was therefore a misdirection on the part of the magistrate to fail to provide sound reasoning in acquitting the 2nd accused. However, having found that identification in this case was not positive in respect of both the appellant and the 2nd accused, we hereby find that there was no evidence of identification in respect of the appellant and his co – accused.

The magistrate based the conviction on both identification and recent possession. The application of the doctrine of recent possession was based on the fact that the gun and the complainant's property were recovered the following day less than twelve hours after the theft. The issue for determination is whether the doctrine was correctly applied as set out in the case of **Arum vs Republic All ER Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005** it was held in that case that the court must satisfy itself that:-

(a) that the property was found with the suspect;

(b) that the property was positively identified by the complainants;

(c) that the property was stolen from the complainant ;

(d) that the property was recently stolen from the complainant.

The evidence of search of the property was from the administration police officer PW1, who with his colleagues followed foots steps from the scene (in the bush) to the house of the appellant. The first complainant accompanied the officers. PW2 identified his clothes being a trouser and a kikoi. The appellant was found wearing the kikoi at the time of recovery. PW2 told the court that although the kikoi had no mark he was able to identify it. The clothes of PW5 were found in the paper bag of PW2 during recovery which he also identified.

PW5 lost two trousers, one shirt and one kikoi. The two trousers were recovered which PW5 identified by their colour and sizes. It is not a requirement of the law that stolen items belonging to a witness should have marks. It is not unusual for one to identify his clothes by size and colour. Apart from the clothes, PW2 also identified his paper bag which contained the clothes. These items were recovered in presence of PW1 and his colleagues only less than ten (10) hours after the theft.

During cross – examination of the complainants, the appellant did not raise the issue of identification of the clothes. Neither did he claim ownership of the recovered property, not even in his defence. The burden of proof shifted to the appellant to explain how he came into possession of the items which burden he failed to discharge. The evidence of the key witnesses PW1 and PW2 on recovery is strengthened by the fact that there were clear and visible footsteps from the scene leading to the house of the appellant. PW1 searched the house and recovered the gun which the complainants said resembled the one used in the robbery. The property of the complainants were recovered in the same house belonging to the appellant. This evidence on recovery was overwhelming and dislodges the appellants claim that the gun

and clothes were planted on him. The complainants were strangers in the area as they were on transit and had no reason to frame the case against the appellant whom they had never known or seen before the incident. Even assuming that the area Assistant Chief had a grudge against the appellant as he claimed, it was not possible that he could use strangers in a plot against the appellant to have them framed in a criminal case. The appellant did not raise the issue of any existing grudge with the chief during cross-examination. It came much later in his defence. The trial magistrate in his judgment said the appellant admitted possessing the gun without a certificate. The defence said that there was no such defence. We note that in cross – examination by the prosecutor the appellant said. "I do not have a permit to possess a gun". The appellant did not admit being in possession of the gun. He simply said he had no permit. The rest was an assumption by the trial magistrate.

The magistrate evaluated the defence of the appellant and found it "**shaky and not strong enough to challenge the prosecution's evidence".** It is therefore not correct to say that the defence of the appellant was not considered as claimed by the defence. It is our finding that all the ingredients of the offences of robbery with violence contrary to section 296 (2) of the Penal Code were proved.

The principles in regard to recent possession as laid down in the case of **Arum vs Republic** were correctly applied by the trial court and that the conviction based on recent possession was safe.

Count III is the charge of being in possession of a firearm without a certificate. We find that it was proved beyond any reasonable doubt. The convictions on counts I, II, and III are safe and are hereby upheld.

In regard to failure by the court to call for the previous records of the appellant, we have a few observations to make. After conviction, the prosecutor told the court that he had no records of previous convictions of the appellant. In the absence, of previous records, the court is supposed to treat the accused as a first offender while passing sentence. Although the court did not put it on record, there is no doubt that the trial magistrate took that position. The failure to produce previous records did not cause any prejudice to the appellant. Neither did the omission cause any miscarriage of justice.

The appellant argued that counts III and IV ought to have been drawn as one offence and relying on the case of **Mwangi vs Republic Cr. Appeal No. 3 of 1973 Court of Appeal** (sitting at Nyeri). In that case, the appellant was convicted on a single charge of being in possession of a firearm and ammunition. In his appeal, the appellant argued that the charge was duplex in that the firearm and ammunition should have been contained in two separate counts. The court held that the firearm and ammunition may be charged in one count. We agree with this finding of the Court of Appeal for the reason that a firearm certificate is always issued to cover both the firearm and the ammunition to be used in the firearm. In the case before us, the gun was recovered with the ammunition inside its magazine. The appellant ought to have been charged with only one count and not two in respect of the firearm and ammunition. Count IV is therefore defective and misplaced. The trial magistrate erred both in law and infact when he convicted the appellant of the charge. The conviction and the sentence in count IV are hereby set aside.

It was a misdirection on the part of the trial court to sentence the appellant to death twice in counts I and II. A person cannot be made to suffer death twice. We uphold the sentence of death in count I and order that the sentence of death in count II be held in abeyance.

In Count III the sentence provided by the law under section 4 (3)(b) is imprisonment for a term of not less than five (5) years and not more than ten (10) years. The sentence of ten (10) years is the maximum. Being a first offender, the appellant ought to have been given a more lenient sentence. We hereby reduce the sentence to seven (7) years imprisonment.

The appeal is therefore only partially successful as stated above with all the other grounds having been found lacking in merit.

…. **….**

JUDGE F. N. MUCHEMI **S. N. MUTUKU**

JUDGE **JUDGE**

Judgment dated and delivered in open court on the ….....28..... day of ….....January.....2013 in the presence of the appellant, the state counsel and Mr. Mr. Ingutia for the appellant.

S. N. MUTUKU
JUDGE