



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 540 OF 2007

(From original conviction and sentence in Makadara Chief Magistrate's Court Criminal Case No. 3811 of 2005, Karani (Miss) SRM on 12th September, 2007)

IDRIS ABDI GURHAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant, **Idris Abdi Gurhan**, was charged in the Chief Magistrate's Court at Makadara in Criminal Case No. 3811 of 2005 with the following counts:

COUNT I

ATTEMPTED ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

IDRIS ABDI GURHAN: On the 9th day of May 2005 at Eastleigh Nyota Clinic Nairobi within the Nairobi jointly with others not before court while armed with dangerous weapons namely a pistol attempted to rob ABDIRAHMAN MAWIYA of his case Kshs.2,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ABDIRAHMAN MAWIYA.

COUNT II

BEING IN POSSESSION OF A FIREARM CONTRARY TO SECTION 4(1) OF THE FIREARM ACT CAP 114 LAWS OF KENYA.

ACCUSED: IDRIS ABDI GURHAN: On the 9th day of May 2005 at Eastleigh Nairobi within the Nairobi Area was found in possession of a firearm namely a Barretta pistol serial number not visible without a firearm certificate.

COUNT III

BEING IN POSSESSION OF AN AMMUNITION CONTRARY TO SECTION 4(1) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA.

ACCUSED: IDRIS ABDI GURHAN: On the 9th day of May 2005 at Eastleigh Nairobi within the

Nairobi Area was found in possession of one round of ammunition of 9mm calibre without a firearm certificate.

The appellant was convicted on all the three counts and sentenced to death on count 1, 7 years on count 2 and 7 years on count 3 which later sentences were to run concurrently.

Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on the following grounds:

1. **THAT, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that the charge sheet was fatally defective.**
2. **THAT, the learned trial magistrate erred both in law and fact when he conducted an unfair trial denying the appellant his fundamental rights.**
3. **THAT, the learned trial magistrate erred both in law and fact when he convicted the appellant yet failed to find that the crown case wasn't proved beyond doubt due to lack of vital witnesses.**
4. **THAT, the learned trial magistrate erred both in law and fact when he relied on contradictory evidence to convict.**
5. **THAT, the pundit trial magistrate erred both in law and fact when he rejected my defence while relying on weak prosecution case to convict.**

The brief facts as can be gleaned from the record are as follows: **Abdirahman Mawiya** (PW1), an employee of a pharmaceutical company was working in a clinic known as Nyota Clinic in Eastleigh on 9th May 2005 at 8.00pm just before he closed two patients one of whom is the appellant entered the reception where he was while the other one remained at the reception. The appellant removed a gun, a sesca pistol and pointed it at him. **Joshua Irungu**, PW2, a guard heard the commotion and went to the window to inquire what the commotion was about. When the appellant moved nearer to show PW2 the gun, PW1 took advantage and grabbed his hand and a struggle ensued. The appellant's colleague then entered and started biting PW1's shoulder while the appellant started hitting PW1 with the butt of the gun. At that point when PW1 who was bleeding heavily was getting weak PW2 entered and the gun fell down. The appellant's colleague then ran. The appellant was however held by PW2 who held him down. PW1 was then taken for treatment and thereafter went to record his statement at Pangani Police Station. PW1 did not know he attackers before but believed they wanted money since he had patient's money in the drawer. Cross-examined by the appellant PW1 said that he saw the appellant's face and could identify him despite the fact that he hid his face by a cap since he was arrested right at the clinic. According to him PW2 had gone to call people whom he came with before the gun fell. PW2 supported PW1's testimony and said that he saw the two attackers enter the clinic but did not bother with them. However, he heard PW1 calling his name and when he entered he saw PW1 struggling with them and bleeding. He saw the appellant with a pistol. When he entered a struggle ensued between him and the appellant and the gun erupted. While the appellant was looking for the bullet the other attacker ran away and PW2 held him. When the police came they found the appellant lying down and was carried to the police car together with the gun and the bullet. He identified the appellant although he had not seen him before. According to him he did not go to look for people. However when people came the appellant was unconscious. He reiterated that the appellant was arrested with the gun.

PW3, **PC Thomas Otieno Okumu** was on 9th May 2005 was on patrol in Eastleigh when he got a call from his colleague that Nyota Clinic was attacked and a suspect had been caught. He rushed there and found the suspect who had been badly beaten. He called his OCS and the suspect was taken to the hospital, He recovered the gun which had 2 unused bullets. The gun was later taken to the ballistics expert to confirm if working and a report was received that the gun was indeed a real gun. According to him the appellant was the person they picked and was identified by PW1. PW4, **Lindsay Kipkemoi**, firearms examiner examined the firearms and the ammunitions and confirmed that they were firearms in terms of the Firearms Act and noted that the gun was capable of being fired.

In his defence, the appellant gave an unsworn testimony in which he said that he was a welder and that on 9th May 2005 he went to work at Eastleigh 2 roundabout and closed at 8.00pm when he left to go home.

On reaching Galole Street he found a crowd and as he was passing they started attacking him with rungas and pangas. His pleas fell on deaf ears and he lost energy. He was taken to Kenyatta National Hospital by the police who chased away the people who were beating him where he was admitted in confinement. He was later taken to Pangani Police Station and put in the cell and was later charged. He denied the offence.

In his judgement, the learned trial magistrate found the prosecution evidence to be consistent and well corroborated. She found that since the appellant was arrested at the scene there could be no room for mistaken identity as advanced by the appellant hence there was no need for identification parade. He further found that since at least one of the ingredients of the offence under section 296(2) of the Penal Code was established there was no need for medical evidence. She found that though the appellant had no chance to demand the money, she was satisfied that the appellant was after money. She therefore convicted the appellant on count 1. With respect to counts 2 and 3 she found that the gun that was examined was the one which was wrestled from the appellant and having been found to be a firearm the appellant was similarly guilty of counts 2 and 3 and convicted him accordingly. The appellant was consequently sentenced as stated at the beginning of this judgement.

This is a first appeal and we are duty bound to analyze and evaluate the evidence on record afresh and after doing so, to come to our own independent conclusion but always putting in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for the same. (See the case of **Okeno vs. Republic (1972) EA 32**).

It must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation**, thus:

“The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

‘I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).’”

In **Odongo and another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)**, Odoki, JSC (as he then was) said: **“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.”**

In his submissions the appellants stated that there was no evidence that the attackers intended to steal anything from the complainant hence the charge was not proved. It is true as found by the learned trial magistrate that the attackers had not stated that they were after anything before the struggle ensued. A similar incident was the subject of **John Gichunge Mitie vs. Republic [2006] eKLR** where the complainant was in her house at 8.30 p.m. together with her minor children when two people entered the house, attacked her. One of the two men had a simi and cut her on the forehead but she held onto it. Another hit her on the back with a gun butt and as she was screaming, her brother came to her rescue and the two men ran away. The attack took less than ten (10) minutes and nothing was stolen during the incident. It was her evidence that she did not recognize her attackers but later in evidence, she said that “the accused personcut” her on the forehead and that she was also cut on her fingers as she held on to the simi. She also said that she did not know the Appellant before but in cross-examination, she stated that the Appellant was arrested five(5) minutes after the incident, near P.W.1’s house. It was submitted by the appellant that the evidence against him was wholly unsatisfactory and could not sustain a conviction. The Court, however, proceeded to find as follows:

“We now have two matters that we must resolve; the contradictory evidence as articulated

above and the circumstantial evidence of the presence of the Appellant near the scene of the attempted robbery without explanation. Which evidence must prevail? There is no doubt that P.W.1 and P.W.3 were attacked by three (3) men whose motive in the absence of any other evidence may have been robbery. When P.W.1 raised an alarm, the robbers took to their heels and headed in the direction of P.W.2's land. Shortly thereafter the Appellant was arrested hiding in napier grass within that land. This was five (5) minutes or so after the attempted robbery. He had no weapon with him and the simi used to attack P.W.1 was actually found in P.W.1's house and it was produced in evidence. He goes on to admit the circumstances of his arrest but gives no reasonable explanation for it. In those circumstances what would any court confronted with that evidence decide other than that the Appellant with or without the evidence of identification was one of the robbers? In *Margaret Wamuyu Wairirioko vs R Cr Appeal No. 35/2005* (unreported), the Court of Appeal cited these words as made in *R. vs Taylor, Weaver and Donoran [1928]21 Cr.App. R. 20* to explain the worth of circumstantial evidence;

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

It is our considered view that taking all circumstances of this case into account and removing the contradiction highlighted, the Appellant was involved in the attempted robbery at the house of P.W.1 and that is the only conclusion that we can reasonably reach and even the benefit of contradictions being given to the Appellant, he cannot escape the consequences of his participation in it.”

We are similarly of the view and so hold that P.W.1 was attacked by two (2) men whose motive in the absence of any other evidence may have been robbery.

It was contended by the appellant that there were contradictions in the prosecution evidence and he particularly mentioned the fact that the charge sheet did not mention that actual violence was used, that the evidence of PW2 differed from that of PW1 on whether PW2 went to call people, where exactly the appellant was arrested whether in the clinic or in the drain and with respect to the pistol that was used. Whereas we appreciate that there were minor discrepancies in the evidence of the witnesses it is our respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See *Law of Evidence (10th Ed) Vol. 1 at 46*.

As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

“Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place and than that one or both suffered from a defective memory.”

This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR**, where the Court of Appeal held:

“As for the contradictions in the prosecution evidence it may be true that such

contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*.”

On the failure to call some witnesses or adduce some evidence such as the P3 form and the staff from AAR where PW1 went for medication, we can do no more than reiterate what the Court of Appeal stated in Benjamin Mbugua Gitau vs. Republic [2011] eKLR that:

“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”

It was further submitted that the testimonies of the prosecution witnesses was based on mistaken identities and conspiracy. It must however be noted that the appellant was arrested at the place of the attack. His evidence that he was just passing by was disbelieved by the trial magistrate and we on our part have no reason to arrive at a different finding. In Aloise Onyango Odhiambo vs. Republic [2006] eKLR, the Court expressed itself as follows:

“There can be no dock identification where an accused person was arrested at the scene of crime by persons who subsequently testify in court and also identify him. In the instant case, there is overwhelming evidence that the Appellant, who sat at the rear seat of the ‘hijacked’ public service vehicle at the time, was apprehended inside the vehicle and prevented from escaping. The vehicle had been driven by his co-accomplice from Dagoretti corner to Chiromo quite a long distance. During the diversion, the Appellant and another accomplice harassed passengers injuring some and robbing others of personal properties including cash money and mobile phones. Also robbed was PW3, the Complainant in Count 3, of personal property including a metal piece referred to as a caliper. PW1, PW2 and PW3 identified the Appellant to PW5, the Traffic Police Officer who was at the scene of accident between the Public Service Vehicle in this case and the vehicle of PW4. Subsequently the three witnesses identified the Complainant in court as the person not only who had robbed them but also whom they had restrained inside the vehicle in order to prevent him from escaping. That identification cannot be referred to as dock identification by any stretch of definition. The Appellant was arrested at the scene of crime in the course of the robbery itself. He did not leave the scene at any one time so that there was no need for a subsequent identification in an identification parade. The evidence of identification was watertight and could not be faulted. We do not agree....that it was necessary to mount identification parades for the identification of the Appellant in this case.”

As indicated elsewhere in this judgement, we are obliged to re-evaluate the evidence and arrive at our own findings taking into account we are not the trial court and had no benefit of seeing or hearing the witnesses testify. Therefore the contention that his defence was not considered is not necessarily fatal to the prosecution. On our part we have reconsidered the evidence on record and we hold that the case against the appellant was water tight. We have also considered his defence which we find wanting. The appellant’s defence was a mere denial. As was held by the Court of Appeal in Isaac Njogu Gichiri vs. Republic [2010] eKLR:

‘With regard to failure by the superior court to give due consideration to the appellant’s defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: “I find that the defence of the 5th accused is not true.” We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: “The trial Magistrate was also right in rejecting the defence of the

appellant in the circumstances.” We agree with this confirmation.

The trial court which saw the witnesses testify found PW1 truthful and we have no reason to disagree with that finding. In the premises we find that the appellant was properly convicted on all the three counts which conviction we find safe. Accordingly the appeal on conviction is dismissed.

As count 1 carries mandatory death sentence, we agree with **Ms Mwaniki**, learned State Counsel and uphold the sentence of death on count 1. We accordingly order pursuant to section 354(3)(b) of the ***Criminal Procedure Code*** uphold the sentence of death on count one and order that the other sentences be held in abeyance.

Subject to the foregoing this appeal fails and is dismissed.

Judgement accordingly

Judgement read, signed and delivered in open court this 16th day of December 2013.

F N MUCHEMI

JUDGE

G V ODUNGA

JUDGE

In the presence of:

The Appellant

Mr Okeyo for Ms Mwaniki for State