REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 263 of 2008

JOHN NAKOROTO EREGAI …….……..….APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 42 of 2008 in the Principal Magistrate's Court at Limuru – Mrs. M. A. Murage (SPM) on 23/7/2008)

JUDGMENT

1. **John Nakoroto Eregai,** the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** on two counts.

2. The chief facts were that on the 4th January 2008, at Kamirithu village in Kiambu West District within Central Province, jointly with another not before court, being armed with a dangerous or offensive weapon namely a pistol, robbed Simon Njogu Maina of his motor vehicle registration No. KRM 594 Datsun Saloon valued at Kshs.180,000/= in **count I**; and that on the same date and place, and in the same circumstances, they also robbed John Ndung'u Mungai of cash Kshs.35,000/=, a mobile phone and a wrist watch both valued at Kshs.17,000/= in **count II**.

3. Upon conviction the appellant was sentenced to suffer death as by law prescribed, on both counts. Being dissatisfied with the convictions and sentence, the appellant filed an appeal based on the following grounds: the prosecution did not prove its case to the required standard, the charge sheet was defective; and the visual identification was not free from error and mistake.

4. The appeal was opposed by the state through learned State Counsel Ms Wang'ele, who urged that the prosecution had proved its case beyond reasonable doubt. Miss Wang'ele submitted that both **PW1** and **PW2** had identified the appellant both by appearance and by voice, and that **PW1** spotted the appellant 8 days later and arrested him with the help of members of the public.

5. The learned State Counsel invited us to invoke the powers conferred upon us under **Section 382 Criminal Procedure Code,** and to correct the error on the face of the record which resulted in the charge sheet referring to the subject matter of this case, as motor vehicle registration number **KRM 594**, while the evidence referred to motor vehicle registration number **KRN 594**. She urged that the error had not occasioned any injustice to the appellant, and was never raised during cross-examination.

6. We have scrutinized and re-evaluated the evidence on record afresh and in doing so we have warned ourselves that we did not have the benefit of observing the witnesses as they testified. This is in line with the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR,** in which the Court of Appeal held that:

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

7. On identification **PW1** testified that he had parked his motor vehicle outside a butchery when the two robbers approached him, and asked to be taken to Ngarariga. That there was light at the butchery by which he was able to see and identify them, and that they negotiated a fare of Kshs.150/= to go to Ngarariga. **PW1** also testified that the appellant accidently turned on the light in the car when he hit the **PW1** with his gun, and that at this point **PW1** saw him well.

8. He had given the appellants description to the members of the public who came to the scene where the motor vehicle rolled a short distance from the scene of robbery. **PW1** had also told the police when he made his report that he would be able to identify his assailants if he saw them again.

9. **PW2** corroborated the evidence of **PW1** in all material particulars and added that when **PW1** jumped out of the moving car, the appellant jumped into the driver's seat and took control of the steering wheel. The appellant's cohort ordered **PW2** to lie down and took from him the property listed in the charge sheet. Some 5 km away the motor vehicle overturned and the robbers fled into the nearby forest. The motor vehicle was subsequently recovered where it came to rest.

10. **PW1** testified that he traced the appellant at his home, and arrested him with the help of the members of the public. That evidence was corroborated by **PW2** who testified that he was present at the arrest of the appellant. **PW2** stated that the appellant was arrested three days later, in his village, with the help of the police. He too had identified his voice as he spoke to **PW1**.

11. In considering the evidence of identification we reminded ourselves of the Court of Appeal decision in the case of:

JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212 in which the court stated that:

"***A careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential."***

12. We also considered the case of **WAMUNGA V REP CR. APP. NO. 20 OF 1989 [1989]KLR PG.424,** wherein the Court of Appeal held *inter alia* that:

"***Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

13. In the case before us evidence was led that there was lighting outside the butchery where the two complainants first met the nefarious passengers. The record does indicate that the appellant negotiated the fare with **PW1**, and at that time there was no interference or hindrance in the observation of each other.

14. While in the taxi enroute to Ngarariga the witnesses were able to observe the appellant again because he inadvertently turned on the light in the motor vehicle when he moved to hit **PW1**.

15. The evidence of **PW3,** CIP Nthiwa, was that the implement used as a weapon to rob the two witnesses turned out to be an imitation firearm, upon examination. It was an assemblage of a grey rod to provide grip, a wooden piece to act as a magazine and black celotape wrapped around the magazine to make it look real. The implement had the general shape of a pistol but with no provision for loading, cocking or firing it.

16. **Section 34(2)** of the **Firearm Act, Cap 114** Laws of Kenya provides that:

"A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code."

It therefore matters not that the appellant wielded an imitation firearm, and that it was not capable of discharging a missile. For the purposes of Penal Code under which the appellant was charged, it is deemed to be a dangerous weapon.

17. **PW6,** P.C. Kilonzo confirmed that he received a report of the robberies from **PW1** and **PW2** at about 8.00 p.m. on the material date. He returned with **PW1** towards the direction in which the car had been driven and came upon it in the forest. It had overturned.

18. We considered the defence tendered alongside this evidence and found that it did not debunk the otherwise strong prosecution evidence. This being a criminal trial the appellant was under no obligation to explain his innocence at all. He however did offer a statement in his defence in which he merely explained what occurred on the date of his arrest.

19. We were, therefore, of the same mind with the learned trial magistrate that his evidence did not challenge the prosecution evidence at all and that the appellant was properly convicted.

20. On sentencing, the record reads as follows:

"In each of the two counts accused sentenced to death as provided by the Law."

We respectfully find that the learned trial magistrate was in error to sentence the appellant in such a manner. Where an accused person is convicted on two or more counts under **Section 296(2)** of the **Penal Code** in one file, the proper thing to do is for the trial court to sentence the accused person to suffer death on one count, and to order that the sentence on the rest of the counts remain in abeyance.

21. In **OSBON ONDITI OUKO AND ANOR. VS REPUBLI CR. APPEAL NO. 173 OF 2006** (Unreported) two appellants were convicted on three counts and were sentenced to serve 5 years imprisonment for the charge of possession of firearm, and at the same time, to suffer death by hanging in respect of the two robbery charges. The honourable Judges of Appeal sitting at Kisumu had this to say:

"In passing, we must state that those sentences were improper as the appellants could not be hanged twice over and still serve a five year sentence. Only one sentence of death ought to have been imposed while the others would remain in abeyance."

22. All in all we find that the appeals on conviction in respect of each of the two counts are wanting in merit. We dismiss the appeals and uphold the convictions in respect of each count.

The appellant is hereby sentenced to suffer death in **count I** and the sentence in **count II** is ordered to remain in abeyance.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **4th** ***day*** of ***December*** **2012.**

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE