



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 22 OF 2005
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 21 OF 2005

Lesiit, Kasango J.J.

ABDUBA BORU GUYO
..... **1ST APPELLANT**
GUYO DIDA BORU.....
..... **2ND APPELLANT**

V E R S U S

REPUBLIC.....
..... **RESPONDENT**

[Being an appeal against the conviction and sentence of the SRM 's Court at MOYALE Hon Mr. J. N. NJUKI in Cr. Case No. 319 of 2004 dated and delivered on 24th February 2005]

JUDGEMENT

The appellants were the 1st and 2nd accused respectively in the trial before the court. They faced 4 counts of robbery with violence contrary to section 296(2) of the Penal Code. They were convicted in all four counts and sentenced to suffer death. The facts of the prosecution case are that on 17th September 2004 there was a bandit attack along Marsabit/Moyale Road in which the complainant travelling in various homes were attacked and robbed. The appellants were arrested on 6th October 2004 and charged.

Each appellant filed an appeal we have consolidated the appeals since they arise out of the same trial in the lower court. The appellants have challenged their conviction on grounds the trial magistrate was a Resident Magistrate and therefore lacked jurisdiction to hear the case, that there was inconsistency between the evidence adduced by the prosecution and the particulars of the charge; that exhibits brought before court were not properly identified.

We have analysed and evaluated afresh the evidence adduced before the lower court as is required of as a first appellant court. **IN OKENO V REPUBLIC 1972 EA 32**, the court held:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

We began by confirming whether the trial magistrate who heard the case had the jurisdiction to do so. The original record shows that the matter was mentioned before Hon. J. W. MUNGUTI a Resident Magistrate on 17th December 2004. He adjourned it to the next day 18th December 2004, when the appellants appeared before Hon. J. N. Njuki Senior Resident Magistrate who heard the case to completion. The typed copy made an error when it reflected that Mr. Munguti heard the case on 18th. That is not the correct position. We find that nothing turns on this point. We have also confirmed from the original record that all the prosecution witnesses were sworn before the then evidence was taken. The trial was not defective in that regard.

The incident in question took place at about 7 a.m. and therefore it was in broad daylight. It is however, clear that none of the witnesses knew the attackers before. The evidence against the appellants was that of visual identification by P.W. 3 and P.W. 4. These witnesses also identified the appellants in an identification parade conducted on 19th October 2004, 22nd October 2004 and 27th October 2004. There was also the evidence of recovery of a Police jungle trouser bearing the force No. 80205 and name EVANS WAGUTHA from the appellants. The trouser was identified by P.W.4 one of the robbery victims as a trouser he had exchanged with a colleague and which was in his luggage stolen by the highway robbers on the material day.

It is trite that the evidence of visual identification must be tested carefully in order for the court to satisfy itself that it was free from any possibility of error or mistake. In **REPUBLIC V. ERIASEBWATO 1969 EA 174** the court of appeal held that where the evidence alleged to implicate an accused is entirely that of identification that evidence must be absolutely watertight to justify a conviction. In **PAUL ETOLE AND ANOTHER V REPUBLIC CA NO. 24 OF 2000** the court of Appeal emphasized the need to caution oneself of special need for caution before convicting the accused. In this case there were identification parades carried out in which some of the witnesses identified the appellants.

In the court of appeal case of **FREDRICK AJODE V REPUBLIC CA NO. 87 OF 2004** it was held:-

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted and for it to be properly conducted a witness should be asked to give a description of the accused and the police should then arrange a fair identification parade”.

The learned trial magistrate convicted the appellants on the strength of the evidence of visual identification and the witnesses’ ability to identify the appellants in the identification parade. The learned trial magistrate did not warn himself of the special need for caution before convicting especially the 1st accused entirely on the evidence of identification.

We have analyzed the evidence adduced before the trial court and have found that the identification parades were not properly or fairly conducted. We say so for two reasons. The first one is the omission by the police to require the identifying witnesses to give a description of the persons they could identify before the parades were conducted. The second and more serious one was the fact that in all three parades, the parade officer used exactly the same members of the parade for the identification of each of the appellants. That is to say the identification parades conducted on the 19th October 2004 for the

identification of P.W. 4 and those of both appellants had exactly the same members of the parade, the only difference being the appellants who appeared only once for each parade. The same practice was repeated on 22nd October 2004 and 27th October 2004 when the appellants were identified. The identification parades were all conducted by IP Peter Mwangi P.W. 2. For those two reasons we are not satisfied that the identification parades conducted on both days for the identification of the appellants by eye witnesses of the incident were either fair or properly conducted.

We considered that the parades were conducted over 3 weeks after the incident in question. We also considered that the circumstances of the attack was such that many robbers cum bandits were involved in stopping several lorries which were travelling in a convoy on the material day. The robbers were heavily armed and orders were being given amid heavy firing of guns. We find that the circumstances of the whole incident were not conducive for a positive or correct identification of the attackers.

There was a need for other evidence other than that of visual identification to buttress the prosecution case.

The only other evidence was that of the recovery of the jungle trouser produced in court as an exhibit. This trouser was recovered by Police Officers under command of P.W. 5 Benson Murithi Sgt on 17th September 2004. P.W. 5 was himself not present at the scene of recovery. His evidence was also not specific as from which of the two appellants the jungle trousers was recovered from.

P.W. 1 was one of the Police Officers who recovered two trousers from the appellants including the police jungle trousers. The officer in his evidence in chief spoke generally of how they condoned off Addessa Village in Odda Area of Moyale, looking for suspected highway robbers. During the search in the various houses, P.W.1 and others arrested the two appellants and recovered two trousers Exhibit 1 and 2. It is only in cross examination that P.W. 1 stated that the police jungle trouser was recovered from the 2nd appellant. P.W. 1 mentioned the 2nd appellant as the one who had the trouser as a “by the way”.

The recovery was made on 6th October 2004. That was approximately three weeks after the robbery. The learned trial magistrate should have considered whether the recovery of the trouser three weeks after the robbery was recent that the doctrine of recent possession could apply. In his judgment, the learned trial magistrate observed:

I am also satisfied that A2 was arrested while wearing a trouser which was later identified as having been stolen during the attack. Though the arrested (sic) some 20 or 80 days after the attack, he has not explained how he came to be in possession of the same and a reasonable man would reasonably assume that he acquired it during the robbery.”

The learned trial magistrate was of the view that whether the trouser was recovered 20 or 80 days after the attack the mere fact no explanation of possession was given by the 2nd appellant it must be concluded he stole it at the time of the robbery.

The 2nd appellant denied possession of the jungle trouser at any one time and he alleged in his sworn defence that the police had it at the time he was arrested. The 1st appellant corroborated the 2nd appellants defence in his sworn defence that none of them had the trouser in question. That means the evidence that 2nd appellant had the police jungle trouser was the word of P.W. 1 against that of both appellants.

The burden was on the prosecution to prove their case against the appellants beyond any reasonable doubt. We are of the view that the issue of possession of the trouser was a contested one. We are also of the view that considering P.W.1 spoke generally about the recovery of the trouser until he was cross examined by the 2nd appellant, his evidence ought not to have been taken seriously.

In **ERNEST ABANGA V REPUBLIC CA 32 OF 1990** the court of appeal held that when a case rests entirely on circumstantial evidence, first and foremost the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. The prosecution failed in the first test

to cogently and firmly establish possession of the trouser.

There were several witnesses who were not called to testify. The included the drivers of the two lorries that were attacked by the bandits and several passengers. The only persons called to testify were P.W.3 a turn boy of one of the lorries and P.W.4 a passenger in one of the lorries. Those left out were material witnesses whose evidence was important and ought to have been called.

In **BUKENYA & OTHERS V. UGANDA 1972 EA** the court emphasized the need for the prosecution to call sufficient witnesses to prove its case and that where material witnesses are left out and the ones called can hardly prove the case, then an adverse inference against the prosecution should be made by the court.

In the instant case only two witnesses were called and their evidence could hardly prove the case. We therefore make an adverse inference that the witnesses left out by the prosecution, had they been called to testify could have adduced evidence which could have been adverse to the prosecution case.

We think that we have said enough in this case. Having carefully considered this appeal, we have come to the conclusion that the convictions entered against the appellants were not safe. We allow the appeal, quash the convictions and set aside the sentences. Since both appellants have admitted that they were Ethiopian Nationals with no permit to enter Kenya, we recommend that they be repatriated back to Ethiopia.

Those are our orders

Dated and delivered at Meru this 28th day of Jan 2011

LESIIT, J
JUDGE.

KASANGO, M
JUDGE.