REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 28 OF 2010

JOHN ONYANGO NYAKWAKA .... APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Criminal Case number 662 of 2009 of the Principal Magistrate's Court at Maseno)

Coram

Nambuye, J

Aroni, J

Mr. Gumo for state

Court clerk Laban / Ochollah

Appellant in person

JUDGMENT

The appellant herein faced three counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. In count one (1) he is alleged to have jointly with others not before court robbed **Meshack Maube**

of a mobile phone make Motorola 157C and cash 3,000/=.
In count two (2) robbed **Arif Kbnar Musa** of a Motor vehicle registration number 898S valued at Kshs. 3 million, Nokia mobile make 6230 valued at Kshs. 7,000.00.

In count three (3) robbed **Lalji Velji Halai** a chain valued at Kshs. 2,000, cash Kshs. 246,010.00.

The appellant was tried, found guilty, convicted and sentenced to hang in the manner provided by law with regard to count one (1). We note that although the appellant had been convicted on all the three (3) counts, the sentence for the other two (2) counts was put in abeyance pending the execution of the sentence in respect of count one (1) for obvious logistical reasons because once executed in respect to count one (1), there is no way the appellant would be available for execution respecting to count two (2) and three (3).

The appellant became aggrieved and filed a petition of appeal on 11th March 2010, comprising nine (9) grounds of appeal and the complaints raised are that the learned trial magistrate erred in law and facts by:-

(i) Placing reliance on the evidence of the arresting officer when convicting him.

(ii) Failing to appreciate the evidence of the key witnesses who were at the scene.

(iii) Failing to appreciate and or to address as to why there were contradictions of the attires and the position of the arrest.

(iv) By failing to dust the motor vehicle alleged to have been stolen.

(v) By convicting notwithstanding that there was no direct or circumstantial evidence linking the appellant to the offence.

(vi) Failing to observe the fact that the investigation done in this matter was shoddy to sustain the conviction on the capital offence.

(vii) Failing to evaluate the strength and weight of the appellants sworn defence statement that was strong enough to secure an acquittal if carefully put in light hence rejected it.

On the date of the hearing of the appeal, the appellant put in supplementary grounds of appeal with the consent of the state namely:-

(i) That the learned trial Magistrate erred in law and facts and convicted the appellant not considering that the ingredients required to be established and or under Section 296 (2) of the Penal Code had not been established in order to make that conviction safe.

(ii) Erred in law and facts by convicting the appellant on the evidence of PW5, PW6 and PW7

without noting that there were co-existing circumstances which weakened the inculpatory facts thereby leaving tainted facts.

(iii) Displaced the defence without observing it intrinsically together with the prosecution.

At the hearing of the appeal, the appellant relied on written submissions which is a reiteration of the grounds of appeal, but in our opinion the following have been stressed:-

(1) None of the three complainants identified him as having been among the robbers who wielded guns against them.

(2) None of the items that were robbed off from the complainants were found on him upon his arrest.

(3) The ingredients required to be established in Section 296 (2) of the Penal Code were not established.

(4) PW5, PW6 and PW7 did not give consistent evidence.

(5) No reasons were given for displacing his defence.

(6) There was unreconciled contradiction as regards the distance he was from the canter at the time of arrest and the type of the clothes he was wearing when he was arrested.

(7) The police also failed to bring material evidence by failing to dust the vehicle for finger prints.

The State responded to those submissions by stressing the following:-

(i) He supports the conviction because one of the robbers who drove the canter jumped out of the vehicle and fled when he noticed that police were pursuing them and police did not loose sight of him until he was arrested. PW1 identified him to have been one of the robbers. Also if he was not one of the robbers why was he running away. It is the state's stand that the evidence of PW5, PW6 and PW7 corroborates each other.

In response the appellant stated that "**it is not true as concluded by the state that the evidence is corroborated and pointed out the discrepancy on failure to identify him as one of the robbers, discrepancy in the clothing worn, and the fact that there were bushes, the possibility of arresting a wrong person could be ruled out".**

- **He was not arrested near the scene of the robbery but near robbers.**

- **He gave his identity card to show that he comes from the same area but investigations did not prove otherwise.**

We have given consideration for the rival arguments put forward by both the appellant and the State. We have considered the same in the light of the following:-

(1) All the three complainants did not identify the appellant to have been one of the robbers.

(2) None of the stolen items were recovered from the appellant.

(3) Indeed one of the robbers commandeered the canter and drove it to the direction where it was recovered.

(4) It is on record that the area surrounding the place where the canter was abandoned had thickets on both sides.

(5) PW5, PW6 and PW7 allege that they pursued the robber who jumped out of the vehicle and that they did not loose sight of him till he was arrested.

(6) It is correct that PW5 and PW6 contradicted each other as regards the manner of clothing the robber arrest ed had. PW5 said that he had on a jacket white in colour, but he could not recall well and a blue jeans trouser. Whereas PW6 said that he had brown jeans.

(7) It is evidently clear that the state relied on circumstantial evidence.

The principles on circumstantial evidence have now crystallized to our knowledge. We wish to sample a few case law on the subject. There is the case of **OKENO =vs= REPUBLIC** where the law lords of the Court of Appeal for Eastern Africa [1972] EA 32 held inter alia that "**It is the duty of the first appellate court to reconsider the evidence, evaluate it itself, and draw its own conclusions on deciding whether the judgment of the trial court should be upheld or not".**

The case of **MWANGI =vs= REPUBLIC [1985] KLR 522** "**in a case depending exclusively on circumstantial evidence, the court must before deciding upon conviction find that the inculpatory facts are incapable with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that the co-existence circumstances which would weaken or destroy the inference.**

The case of <u>**James Mwangi versus Republic [1983] KLR 327**</u> also a Court of Appeal decision, where the law lords of the Court of Appeal held inter alia that "**in a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis from that of guilt. In order to draw the inference of the accuseds' guilt from circumstantial evidence there must be no other co-existence circumstances which would weaken or destroy the inference".**

The case of **Kihingu versus Republic [1984] KLR 648** where Okubasu J as he then was now J. A. held inter alia that **"circumstantial evidence is very often the best evidence and it cannot be impugned merely on the grounds that it is circumstantial".**

The case of **Kariuki Karanja versus Republic [1986[KLR 190** where the court of appeal held inter alia that:-
(a)On first appeal from a conviction by a Judge or Magistrate the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such material as it may have decided to admit.
(b)In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of the guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis from that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution".

The trend set by the afore set out case law continue to the present as demonstrated by case law from the Court of Appeal. There is the case of **NZIVO versus REPUBLIC [2005] KLR 699** where the Court of Appeal held inter alia that

(1) 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 the appellate court's own decision on the evidence".

(2) **The first appellate court, must itself weigh conflicting evidence and then draw its own conclusions. It must make its own findings and draw its conclusions. Only then can it decide whether the magistrate's findings should be suppressed. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.**

(3) **In a case dependant on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accuseds' guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would rather or destroy the inference.**

In the case of **Mohamed and 3 others versus Republic [2005] KLR 722** decided by Osiemo J as he then was, held inter aliathat **"circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proven".**

The case of **Republic versus Nyamu & 2 others [2005] KLR 806** where Rawal J held inter alia that **"in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of an explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused".**

From the afore set out assessment of the applicable principles on when not to convict on the basis of

circumstantial evidence both the superior court and the Court of Appeal are in agreement on the crystallization of the said principles which we are obligated to apply to the findings of the learned trial magistrate which led to this Appeal.

We have revisited the said findings and we find that the learned trial magistrate's findings on the facts before us were as follows:-

(i) Noted that the question was whether the complainants had been robbed within the meaning of robbery with violence contrary to Section 296 (2) of the Penal Code. In the learned trial magistrate's opinion since defence had not specifically disputed the occurrence of the robberies, the learned trial magistrate found as a fact that robbery with violence contrary to Section 296 (2) of the Penal Code had been committed.

(ii) That the 2nd and final question to be decided was whether the accused person was one of the robbers and in response to this question, the learned trial magistrate noted that:-

(a) The complainants themselves were unable to identify the robbers.

(b) That the prosecution were relying on the evidence of PW5, PW6 and PW7 to prove the (accused) appellant complicity in the commission of the offence.

(c) That the sum total of the prosecutions evidence is that the robbed vehicle was pursued and its driver arrested following a chase shortly after he had jumped out of the same vehicle.

(d) That the accused had said that the police had arrested a wrong person as he was on his way to his business.

(e) That the learned trial magistrate had considered the evidence of PW5, PW6 and PW7 and found that they had given consistent and truthful evidence on the events leading to the arrest of the accused person in that, the learned trial magistrate believed the witnesses when they said that they had chased the accused till they arrested him when still within their sight.

(f) That by reason of what has been stated in number (e) above as the one who was driving the robbed vehicle after the robbery he was convicted as one of the robbers.

(g) That the contradiction between the arresting officers regarding the distance at which the appellant was arrested as well as the type of clothes he was wearing when he was arrested was found immaterial and cannot be used to discredit the otherwise consistent and credible evidence of the arresting officers.

(h) That the accused person's apparent alibi defence which was not supported by his evidence was found insufficient to displace the prosecutions evidence in the circumstances

(i) That for the reasons given above in number (g) – (h) the learned trial magistrate was

satisfied with the guilt of the appellant and convicted him accordingly and sentenced him.

We have duly considered the facts set out, findings made by the learned trial magistrate, against the complaints raised by the appellant against those findings as already noted earlier on the record, and also in line with the standard of proof required as per the principles of case law afore set out above, and in our opinion, the following is the correct appraisal of the evidence adduced before the lower court in relation to the appellant's guilt and, we proceed to make the following findings on the same:-

(1) We are satisfied that indeed a robbery took place.

(2) That the complainants were unable to identify the robbers.

(3) That the prosecution as well as the lower court ,relied heavily on circumstantial evidence tendered by PW5, PW6 and PW7. It is evident that the officers differed on their description of the distance between the robbed vehicle and the sport the appellant was arrested and ornthe nature and colour of clothing. It is on record that one witness stated the person who jumped out of the vehicle had an overall and a blue jeans trouser. While the second witness said that the person who jumped out of the vehicle was wearing a jacket and a brown jeans trouser. Whereas the third witness did not give any specification.

It is on record that the learned trial magistrate noted the existence of these discrepancies, but ruled that they were not material and could not oust the consistence and credit worthiness of the evidence of the prosecution witnesses. We have give due consideration of the said findings and we are of the opinion that the discrepancies are material and go to the root of the case because, if indeed the police officers kept chase, never lost sight of the person they were pursuing till they arrested him, there is no way they could have given different information of the distance he was from the vehicle when he was arrested and the nature of clothing he was wearing when he was seen fleeing and when arrested. We feel it was not right for the learned trial magistrate to treat the evidence lightly in the manner he did.

(4) Issue also arose about the alibi raised by the appellant to the effect that he was a local resident in the area and was leaving for his place of business. We note the learned trial magistrate took note of this evidence but discounted it because it had no other supporting evidence with at most due respect to the learned trial magistrate, he was dealing with a criminal trial. We all know that in a criminal trial, the burden of proof is always on the prosecution. It is never shifted on the accused person. Herein the moment the appellant mentioned he was a local resident and was headed for his place of business, it should have been incumbent upon the prosecution who had sufficient personnel then, to move to the location of the business and area provincial administration personnel to confirm whether indeed the appellant was a local resident or not , on the first hand, and on the other hand to confirm whether he had any business concerns there or not. It is our stand that the failure of the prosecution to take that precaution is fatal to the prosecution's case.

(5**) We have also noted from the record that the prosecution's witnesses relied upon mentioned the presence of bushes on either side of the road. They did not however explain how they were able not to loose sight of the person they were pursuing despite the presence of the bushes on either side of the road. We note that the learned trial magistrate did take note of this. We are of the view that indeed there were bushes on either side of the road, that the human ingenuity of any fleeing person would undoubtedly instruct that person to dash into bushes and disappear. This kind of situation can only give rise to issues of a mistaken identity which we have no doubt., the appellant was raising and which we feel was not adequately addressed by the learned trial magistrate.**

The end result of the afore set out assessment is that we feel by reason of our assessment in number 3, 4 and 5 above, the conviction is unsafe. We are inclined to allow the appeal, quash the lower court's decision and set free the appellant and ordered to be released in relation to the conviction which led to this appeal unless otherwise lawfully held.

We further add that for purpose of jurisprudential growth, we direct that a copy of this judgment be circulated to all magistrates whose geographical criminal jurisdiction falls under this High Court.

Dated, signed and delivered at Kisumu this 22nd day of February 2011.

R. N. NAMBUYE

JUDGE

ALI-ARONI

JUDGE

RNN/aao