



No. 2802

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL APPEAL NO. 65 OF 2010**

**DOUGLAS NYAKUNDI**  
**NYAKUNDI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the original conviction and sentence of the Senior Resident Magistrate's court at Homabay Hon. C.A.S Mutai, ..**

**in Criminal Case No. 1049 of 2009, delivered on 12<sup>th</sup> March, 2010)**

The appellant jointly with one, **Eugene Nyangau Mokua** were jointly charged before the Senior Resident Magistrate's Court, Homabay with two counts of robbery with violence contrary to section 296 (2) of the **Penal Code**. Particulars of the 1<sup>st</sup> count were that on 5<sup>th</sup> July, 2009 along Rodi Homabay road in Homabay district of the Nyanza province jointly while being armed with dangerous weapons namely pistols robbed **Joseph Nyabwengi Osoro** motor vehicle registration number KAW 832Y, Mitsubishi Lorry with assorted shop goods all valued at kshs. 5 million and at or immediately before or immediately after the time of such robbery killed the said **Joseph Nyabwengi Osoro**.

In respect of the 2<sup>nd</sup> count, the particulars were that on the 5<sup>th</sup> July, 2009 along Rodi Homabay road in Homa Bay district of the Nyanza Province jointly while being armed with dangerous weapons namely pistols robbed **Jared Ombogo Ombati** kshs. 1,100/=, ID card, voters card and keys all valued at kshs. 1,400/= and at or immediately before or immediately after the time of such robbery used personal

violence to the said **Jared Ombogo Ombati**.

The appellant's co-accused aforesaid was also charged with being in possession of firearm and ammunition without firearm certificate contrary to section 4(2) (a) as read with section 3(b) of the **Firearms Act**. It was alleged that on the same day and place, he was found in possession of a firearm and ammunition without firearm certificate.

The appellant and co-accused returned a plea of not guilty and they were subsequently tried. The prosecution case was that on the 5<sup>th</sup> July, 2009 at about 6.45a.m. PW3 **Jared Ombogo Mbat** boarded motor vehicle registration number KAW 832Y at Suneka which was driven by **Joseph Osoro Nyabwengi** (deceased). They were destined for Sindo to deliver goods belonging to their employer. The appellant's co-accused was a passenger therein. As they drove on, the co-accused kept receiving telephone calls. He was telling some people at the other end that they were about to arrive. When they had passed Rodi Kopany, the co-accused suddenly grabbed the steering from **Joseph Osoro Nyabwengi** – deceased and as they struggled a gunshot rang. The bullet went through the hand of PW3. After a while, another suspect came over and they all beat up PW3. They took a wallet from him which contained kshs. 1,100/= and mobile phone. He was an employee of the owner of the lorry as a turnboy, whereas the deceased was the driver. They threw him behind and covered him. After a while the lorry got stuck and a bullet was fired which apparently killed the deceased. The suspects then fled. PW3 was taken to the Homabay District Hospital and he later found the appellant at Rangwe Police Post. He was able to identify the appellant and the co-accused thereat. He was also able to identify them a second time at the Homabay Police station.

PW5 **James Ombidi**, the assistant chief, Koyolo sublocation rushed to the scene when he heard two gun shots. He found thereat a lorry belonging to Ouru Power with the body of the deceased therein. He then mobilized members of the public to arrest two suspicious looking people in the area. The appellant and the co-accused were arrested and handed over to the police shortly after the incident. When the lorry was hijacked, the police were notified and an ambush was laid by **CPL Joseph Munguti**, PW1 and **CPL Gitonga**. The lorry was however later found stuck in mud. The appellant and co-accused came out. The co-accused went to the rear of the vehicle and pretended to be urinating. As the appellant moved from the driver's seat the gun he had dropped on the ground. He then ran away as he was shot at. But he managed to escape. **CPL Gitonga** collected the weapon from the ground. The gun had a life ammunition. On inspecting the inside of the lorry he came across the body of the deceased. PW3 was also inside but he had been injured on the right hand. There were also two spent cartridges inside the lorry.

PW5 **Gladys Onchari** who is the transport manager of Ouru Company confirmed that she had known the appellant before as he had a business which was situated next to her place of business. According to the P3 form produced by PW7 **Imelda Adhiambo Odie** the information given to the police by PW3 was that he was attacked by unknown person. **Dr. Ayoma Ojwang** produced the post mortem report conducted on the body of the deceased **Joseph Nyabwengi Osoro** which confirmed that the cause of death was bullet wounds.

Put on his defence, the appellant elected to give unsworn statement of defence and called no witnesses. It was the evidence of the appellant that he knew both the deceased and PW3 because they were his customers. He had been selling cigarettes to them. On the 5<sup>th</sup> July, 2009 at about 3.00a.m. he had arrived from Nairobi with 13 cartons of cigarettes. He produced bus tickets confirming that he had travelled on that day as well as receipts for goods which he had purchased from Nairobi. As he was travelling to Oyugis and Asumbi where he was to deliver the 10 cartons of cigarettes and the 4 cartons of pens on a motor cycle between Namba and Asumbi, there was a road block. There were two administration policemen with one other, in civilian clothes manning it. One of them was PW4 who demanded for receipts for the carton of cigarettes. He however did not have the receipts at that particular time. PW4 suspected that the goods were stolen. The appellant was then arrested and taken to Rangwe

Police Post. While on the way to Rangwe Police Post they came across a lorry with the Ouru Power Logo. People had gathered around it. Several items belonging to him including an ATM card, his hawkker's licence and several other items were confiscated. At the police station the appellant met PW3 and noted that his clothes were blood stained and he was heavily bandaged. He told him that he had been shot. They were then taken to Homa bay police station. They later took him to Kisii where they searched his house. Several of his items were collected. He was later tortured at the Kisii Police Station and was then charged with the offences.

Having reviewed the evidence tendered by the prosecution, the defence and respective submissions, the learned magistrate concluded that the appellant was guilty as charged in respect of count II. However with regard to count I, he was persuaded that the evidence led supported the charge of attempted robbery with violence contrary to section 297(2) of the **Penal Code**. Accordingly he reduced the initial charge of robbery with violence to attempted robbery with violence and convicted the appellant on the same as well. On the other hand, he acquitted the appellant's co-accused on all the counts. Having convicted the appellant on the two counts, he sentenced him thus **"... Accused is sentenced to death on both counts. Punishment shall run concurrently. This punishment is mandatory under section 296 (2) and 297 of the Penal Code..."**. Of course this sentence is irregular and inappropriate for the simple reason that a man cannot be hanged twice over or concurrently. Ideally what the learned magistrate should have done was to impose the death sentence on the first count and leave in abeyance the sentence in respect of count II. Alternatively and since he had imposed death sentences on the two counts, the learned magistrate should have ordered that sentence in respect of count II be stayed pending the execution of the sentence in count I.

Be that as it may, the appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal through **Messrs Duke Onyari & Company Advocates**. He faulted his conviction and sentence on the following grounds:-

- "1. That the learned trial magistrate erred in law and fact when he made a finding that the prosecution evidence manifest (sic) with numerous contradictions.***
- 2. That the learned trial magistrate erred in law and fact in failing to evaluate and consider the evidence of the appellant in his defence especially in regard to circumstances leading to his arrest.***
- 3. That the trial magistrate erred in law and fact by omitting to explain again to the appellant the substance of the charge on closure of prosecution case, as required by section 211 of Criminal Procedure Code.***
- 4. That the trial magistrate erred in law and fact by handing down, in the circumstances of this case, a manifestly harsh and excessive sentence.***
- 5. That the trial magistrate erred in law and fact by not taking into the mitigating factors apparent...". (sic)***

When the appeal came before us for hearing on 28<sup>th</sup> March, 2011 the appellant's counsel failed to turn up for the hearing. The appellant could not however countenance an adjournment on that basis. He elected instead to prosecute the appeal in person.

**Mr. Mutai**, learned Senior State counsel appeared for the state and conceded to the appeal on the grounds that the circumstances of the appellant's arrest were not clear, the identification and or recognition of the appellant was not safe and that the appellant's defence was not carefully considered. Had that been done, it would have raised doubts whose benefit should have been resolved in favour of the appellant.

On his part, the appellant elected to rely on his written submissions filed in court on the eve of the hearing. We have carefully read and considered them.

Of course it is the duty of a first appellate court to reconsider the evidence tendered before the trial court, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. This duty was set out in the case of **Okeno –vs- Republic (1972) E.A 32**. This duty is not made any lesser or forfeited by the fact that the appeal has been conceded to by the state.

The conviction of the appellant turned on the evidence of his alleged recognition by PW3, a single witness. This witness claimed to have known the appellant over a period of time. Infact he was a customer as he used to operate a kiosk, selling sodas near where the witness was employed. The correctness or otherwise of identification and or recognition of a suspect which he disputes, entails the examination of evidence. The guidelines on the matters to be considered when dealing with such situation were succinctly set out in the well known case of **Republic –vs- Turnbull (1976) ALL ER 549**, an English decision in which it was stated as follows:

*“...First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of accused which the defence alleges to be mistaken the judge should warn the jury of special need for caution before convicting in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of records.*

*Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have this accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused. How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the prescription (sic) of the accused given to the police and the witness when first seen by them and his actual appearance...”*

The Court of Appeal has in several decisions adopted the above principles. In the case of **Paul Etole and Another –vs- Republic, Criminal Appeal No. 24 of 2000**, the Court of Appeal after referring to the above principles of identification by recognition stated:

*“...Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made ...”*

In this case there is absolutely no evidence indicating any positive recognition of the appellant by PW3 at

the scene of crime. The flow of his evidence was that: On 5<sup>th</sup> July, 2009 at about 6.15a.m he boarded the ill fated lorry at Suneka. In the lorry there was the deceased and another person who turned out to be the appellant's co-accused according to PW3. Along the way, the co-accused was constantly receiving and making calls on his cell phone alerting those people that they were about to arrive. When they passed Rodi Kopany, he suddenly heard noise. The co-accused had grabbed the steering wheel. He was then shot and a bullet went through his right hand. After a while another suspect came over. He was wearing a hat which covered his head. They slapped him on the face and was ordered to keep quite. They then covered him and threw him behind. That was all the evidence of recognition of the appellant by PW3 if we were to assume that the other suspect who came over was the appellant. The trial court believed so. However, to our mind, that evidence falls far too short of recognition of the appellant. Our conclusion aforesaid is buttressed further by the evidence of PW3 under cross-examination by the appellant. He categorically stated that he saw the appellant for the first time after his arrest. It was his evidence that **"... I later found the 2<sup>nd</sup> accused at the station..."**. PW5 too knew the appellant and also came to the scene of crime. At no point does she connect the appellant to the crime. More important is her evidence that she saw the appellant with a motor bike on that material day with cartons of cigarettes at the police post thereby confirming the appellant's defence of *alibi*. It is common ground that the appellant had a motor cycle which he used to ply his trade in cigarette and pens. PW5 testified thus **"... I know the 2<sup>nd</sup> accused had a motor bike which he used to sell cigarettes at Rangwe..."**. If PW5 saw the appellant with a motor bike on the material day, it was unlikely that he could have been at the scene of crime. He could not have been driving the lorry and riding a motor cycle loaded with cartons of cigarettes at the same time.

It is also instructive that much as PW3 claimed to have known the appellant and whom he associated with the crime, he did not as much as tell the police officers who came to the scene immediately that he had recognized the appellant among the robbers. Nor did he tell PW5 his boss at his place of work of the same. This then begs the question whether this witness really recognized the appellant at the scene of crime. **Corporal Munguti** testified that he found co-accused trying to urinate on the other side of the road. The appellant was trying to remove the lorry from the culvert. He talked to the appellant and sought to assist him. The appellant is alleged to have refused the offer. This means that they were at a very close range. One wonders then why the appellant could not have been arrested there and then.

The appellant and co-accused were allegedly arrested by members of public, yet none of the alleged members of the public testified to back up the story by the police regarding the arrest of the appellant. It was the evidence of PW4, the local assistant chief that, when he heard gun shots he rushed to the scene and immediately issued instructions that any stranger seen in the neighbourhood be arrested and handed over to the police. There were no descriptive features given by the chief regarding the appellant to the members of public. In those circumstances can it be ruled out completely that the appellant could have been a victim of mistaken identity? In any event, the evidence of PW4 with regard to the arrest of the appellant was hearsay. In the absence of the evidence of those who purportedly arrested the appellant, the appellant's statement of defence as regards his arrest remained unchallenged and or unrebutted. No doubt therefore, there were loose ends in the prosecution case which could have been tied up probably with the evidence of the investigating officer. Sadly again no such evidence was tendered.

The prosecution case was littered with inconsistencies and contradictions making the conviction of the appellant unsafe. The learned magistrate seems to have appreciated the inconsistencies and contradictions aforesaid in his judgment. He stated thus **"... I have also noted that there could have been some contradictions but were minor and could not touch on the root (sic) of the substance of the evidence tendered..."**. With tremendous respect to the learned magistrate, the contradictions were not minor. They were major and went to the root of the prosecution case. Considering the defence of *alibi* advanced by the appellant, the contradictions alluded to can only help buttress that defence. It cannot be a minor contradiction if the police claim that the appellant was arrested at Namba where he together with co-accused had gone for medical assistance. However PW4 testified that there was no such medical facility in the vicinity and the appellant was neither limping nor nursing any injuries. Other witnesses testified that the appellant was arrested with the co-accused as they ran away. PW1 testified that the firearm recovered at the scene was a Berretta pistol. During cross-examination he changed his story and said that

it was infact a Tokalif pistol. **Ag. Sgt Thigwa** (PW2) testified that he was given a Tokalif pistol and not berretta pistol for examination. The pistol if at all, was recovered by police officers who ordinarily must be familiar with firearms. That being the case, why should they be unable to agree on the type of the firearm recovered at the scene.

Finally, we agree with the appellant's submissions that the learned trial magistrate misdirected himself by failing to weigh both the strength and weight of his defence hence rejected it without cogent reasons. That defence was plausible and could have secured the appellant an acquittal.

For all the foregoing reasons we are satisfied that the state rightly conceded to the appeal. We therefore allow the appeal, quash the conviction and set aside the sentences of death imposed on the appellant. Unless otherwise lawfully held, the appellant should be released forthwith.

**Judgment dated, signed and delivered** at Kisii this 20<sup>th</sup> day of May, 2011.

**ASIKE-MAKHANDIA**

**RUTH NEKOYE SITATI**

**JUDGE**

**JUDGE**