



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

MARK MARIGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an Appeal arising from the Judgment of the Learned Trial Magistrate DOLPHINE ATIENO ALEGO (Senior Resident Magistrate) in Eldoret Chief Magistrate's Court Criminal Case No. 1195 of 2009 delivered on 26th April 2010)

JUDGMENT

This appeal arises from the Judgment and decision of the Senior Resident Magistrate at Eldoret in Eldoret Criminal Case No. 1195 of 2009 in which the appellant, **MARK MARIGA**, was charged with two others with the offence of robbery with violence contrary to S. 296 (2) of the Penal Code. It was alleged that on the night of the 16th February 2009 at Eldoret West Market, Uasin Gishu District, jointly with others not before Court, armed with a dangerous weapon namely AK 47 rifle, robbed **PATRICK WAFULA TUMBO** of his mobile phone make Nokia 1200, a spotlight and seventy bales of second hand clothes valued at Kshs. 1,402,700 and at the time of such robbery used personal violence to the said Patrick Wafula Tumbo. There were alternative counts of handling stolen goods contrary to S. 322 (2) of the Penal Code and an extra charge of store breaking and committing a felony contrary to S. 306 (a) of the Penal Code all affecting one of the appellant's co-accused i.e. Paul Otieno Dudi.

The appellant denied the charge facing him but was convicted and sentenced to death after the trial. Being dissatisfied with the conviction and sentence, the appellant preferred the following fourteen (14) grounds of appeal viz:-

- (1) *That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant to death without taking regard to the evidence adduced in Court.*
- (2) *That the learned trial Magistrate erred in law and fact in misdirecting herself on the essential ingredients of robbery with violence contrary to S. 296 (2) of the Penal Code.*
- (3) *That the learned trial Magistrate erred in law by failing to independently analyze and/or evaluate the evidence before drawing conclusion as by law required.*
- (4) *That the learned trial Magistrate erred in law and facts by convicting the appellant without taking*

regard to the weight of the defence evidence adduced.

- (5) That the learned trial Magistrate erred in law and fact by imposing a very harsh and improper sentence in the circumstances.
- (6) That the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant on flawed procedures.
- (7) That the learned trial Magistrate erred in law and fact by failing to find that the prosecution had not proved its case beyond reasonable doubt on the main charge of robbery with violence.
- (8) That the learned trial Magistrate erred in law and fact by convicting the appellant and acquitting the other co-accused (accomplice).
- (9) That the learned trial Magistrate erred in law and fact in holding that the offence committed was that of robbery with violence whereas the evidence adduced depicts the ingredients of the offence of breaking into a store and committing a felony contrary to S.306 of the Kenya Penal Code.
- (10) That the learned trial Magistrate erred in law in holding that the identification parade was free from any error or discrepancies.
- (11) That the learned trial Magistrate erred in law and fact at reaching at a finding that the appellant was positively identified on the fateful night of the commission of the alleged offence.
- (12) That the learned trial Magistrate erred in law and fact in holding that the appellant and other accomplices were armed with dangerous weapon namely AK 47 rifle.
- (13) That the learned trial Magistrate erred in law and fact by reaching at a finding that the investigation officer did not fully discharge his burden of proof against the appellant as required by law.
- (14) That the learned trial Magistrate erred in law and fact by not setting an inquiry on what happened to the key prosecution witnesses who were arrested and released on flimsy excuses whereas they were key witnesses.

At the hearing of the appeal, learned Counsel, **MR. OMBOTO**, appeared for the appellant and upon concession of the appeal by the respondent, he urged this Court to consider the grounds of appeal and quash the conviction.

The learned Senior Deputy Prosecuting Counsel, **MR. OLUOCH**, appeared for the respondent and conceded the appeal on the basis that the prosecution case was laden with numerous contradictions which ought to have been resolved in favour of the appellant. Pointing to the contradiction in the evidence of the complainants (PW 1 and PW 10), the learned prosecution counsel submitted that the offence of robbery with violence was not disclosed and that it was possible that other persons committed an offence which was more or less burglary and stealing.

The learned prosecution Counsel further submitted that nobody saw the appellant commit the alleged offence and that no recoveries were made. For these reasons, the respondent conceded the appeal.

Notwithstanding the concession, our duty as a first appellate court is to re-evaluate the evidence and draw our own conclusion. We however, bear in mind that the trial Court had the advantage of seeing and hearing the witnesses (See **OKENO VS. REPUBLIC (1972) EA 32 and ACHIRA VS. REPUBLIC (2003) KLR 707**).

Briefly, the prosecution case consisted of the following facts:-

On the material date at about 3.00 a.m., **PATRICK WAFULA TUMBO (PW 1)** and **JUSTON ONALO OMOLA (PW 10)** both employed as guards or watchmen were on duty at Trofan Guest House within Eldoret when a saloon vehicle appeared there with two occupants dressed in green jungle jackets. The occupants represented to the two watchmen that they had been sent by the Eldoret Officer Commanding Police Station (OCS) to obtain information on burglaries in that area. They enquired as to which shop harboured stolen goods. Immediately thereafter, they bundled the two guards into the vehicle and drove away. The two guards were held in captivity for about one and a half hours and upon their release they returned to their place of work and found that the premises they were guarding had been broken into and second hand clothes stolen from therein.

Tumbo (PW 1) said that those who abducted them were armed with an AK 47 rifle and that they took away his Nokia mobile phone and a torch. He said that he identified the first accused (appellant) as one of the two occupants of the vehicle armed with the firearm. He also said that the appellant talked to him for about fifteen minutes and that he saw him with the help of a spotlight although it was also a bright night. He also picked him out in an identification parade conducted later.

Omola (PW 10) said that he also recognized the two occupants of the vehicle as the moon was up. He said that he recognized the appellant and another at the identification parade. He also said that it was the appellant who bundled them into the boot of the vehicle and was the person in possession of the firearm. He further said that the two intruders wore police caps on the fateful night and had engaged him and his colleague for about fifteen minutes before they were bundled into the vehicle.

The premises broken into after the abduction of the two guards was a store containing seventy three (73) bales of second hand clothes (mitumba) belonging to **BASILICA CHEPCHIRCHIR (PW 3)** a trader in second hand clothes. She was informed of the breaking of the store and the theft of the bales of second hand clothes by her worker **RUTH (PW 7)** at around 9.00 a.m. on the 16th February 2009. She rushed to the scene and found that a wall had been demolished. She confirmed the theft of the bales of second hand clothes and reported to the police. Sixteen of the bales were later recovered in Kisumu.

PC KIPCHUMBA KUTO (PW 2) of Eldoret Police Station produced the recovered bales of second hand clothes in Court and was the investigating officer in the case. The sixteen bales were found at a store in Kisumu guarded by **DENIS WATANGA WAKHUNGU (PW 4)**. The bales were found there by the police after information was given to them by **BEATRICE CHEMELI BITOK (PW 5)** and **ANNA CHELIMO SAMOEI (PW 6)** both second hand clothes Vendors in Eldoret. **SGT. SIMIYU (PW 8)** of the C.I.D. Eldoret took photographs of the recovered bales.

NOAH TUMBA (PW 9) of Linex Pillars Old Mombasa, confirmed that the stolen bales of second hand clothes were sold by him to Basilica (PW 3) also known as Mama Cheri.

C. IP AHMED ALI (PW 11) of Eldoret Police Division conducted an identification parade in which the appellant was allegedly identified by Tumbo (PW 1).

The appellant was placed on his defence on the basis of the foregoing facts. He denied the offence and stated that he was a taxi-driver and on the 21st March 2009 he took a couple to Malaba. On his way back, at Lumakanda, he was stopped by some women who wanted to be taken to Maili Tisa. Immediately thereafter, a vehicle stopped behind them. Two people alighted from the vehicle and told the women to wait for a public service (matatu) vehicle. The two people asked him why he was standing on the road. They entered his vehicle and he drove to the Eldoret Police Station where he was arrested. He refused to part with a bribe asked for by the OCS. He was later placed in an identification parade and allegedly identified by the complainant (PW 1). He was charged with obstruction and taken to court. He pleaded guilty and was fined Kshs. 3,000/= but while still in Court he was charged with the present offence along with others.

There was no witness called on behalf of the appellant. His defence was considered by the learned trial Magistrate along with the evidence against him. The learned trial Magistrate arrived at the conclusion that the offence was established and that the appellant was among those responsible. The

learned trial Magistrate found that the prosecution had proved its case beyond any reasonable doubt.

On our part, we are satisfied that the offence of robbery with violence was proved in so far as it related to the complainant Patrick Wafula Tumbo (PW 1).

Such offence is established if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, of if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person (See **S. 296 (2) PENAL CODE** and **JOHANA NDUNGU VS. REPUBLIC CRIMINAL APPEAL NO. 116 OF 1995 (C/A)**). Herein, the particulars of the charge show that Tumbo (PW 1) was the complainant although was not the actual owner of some of the stolen goods and more so, the bales of second hand clothes.

Together with Omola (PW 10), Tumbo was guarding the premises in which the bales of second hand clothes were stored. The bales actually belonged to Basilica (PW 3). Both Tumbo and Omola stated that they were on duty guarding the said premises when two persons in a vehicle representing themselves to be police officers confronted and questioned them. Thereafter, they (guards) were forcefully bundled into the boot of the vehicle and driven away from the scene. They were released after some time and on returning to the premises under their guard, they found it broken into and the bales of second hand clothes stolen from therein. They further stated that the intruders were armed with a firearm i.e. AK 47 rifle.

Apart from the second hand clothes, Tumbo (PW 1) stated that his mobile phone and spotlight were also stolen from him. It is clear from the foregoing undisputed facts that the necessary ingredients of the offence of robbery with violence were established. To that extent, the charge was fully disclosed and proved by necessary evidence.

The main issue that fell for determination was whether the appellant was positively identified as one of the offenders. It was apparent that the kidnapping of the two guards (PW1 and PW10) from the premises they were guarding and the breaking of the premises immediately thereafter was part of the same transaction committed by the kidnappers and the burglars. The kidnappers and the burglars acted in concert and managed to steal from the material premises. It was undoubtedly, a well calculated operation. The two guards said that they identified the appellant as having been one of those who kidnapped them. That incident occurred in the hours of darkness but according to Tumbo (PW 1), he had a spotlight and the night was bright. He said that the appellant was armed with the AK 47 rifle and was the person who took away his mobile phone and questioned him for fifteen minutes. Omolo (PW 10) said that the moon was up. He was therefore able to identify the appellant. He did not however elaborate on what he meant by saying that the moon was up. However, since Tumbo (PW 1) alluded to a bright night, it was assumed that Omolo was saying that there was moonlight which helped him identify the appellant.

Both Tumbo (PW 1) and Omolo (PW 10) said that the intruders who confronted them were at the time wearing police caps or black berets. They also said that they identified the appellant during the identification parade conducted by C.IP Ali (PW 11)

C. IP Ali however said that the appellant was pointed out in the parade by the complainant (PW 1) and not Omolo (PW10).

The foregoing facts leaves us with doubt as to whether the identification of the appellant was proper and free from the possibility of error or mistaken identification. We do not think that the presence of the moonlight and a spotlight provided favourable conditions for the identification of the appellant at the scene of the offence and more so, considering that there was no mention of the actual intensity of the moonlight and the spot light by the identifying witnesses (PW 1 and PW 10). There was indication that the witness conversed with the intruders for about fifteen minutes. It is however, notable that the conversation was conducted while the parties were about five meters away from each other in the dark It is also notable that the intruders were wearing caps or berets thereby partly concealing their faces. In the circumstances, it cannot be said that the evidence of identification against the appellant was watertight and reliable for a sound conviction. If the identification of the appellant at the scene of the offence was

suspect, the identification parade which followed after his arrest was an exercise in futility if not pre-determined.

For all these reasons, we are unable to agree with the learned trial magistrate that the charge was proved against the appellant beyond any reasonable doubt.

In the end result, we think that it was appropriate for the state to concede the appeal which we now allow to the extent that the appellant's conviction by the learned trial magistrate is hereby quashed and the sentence set aside. The appellant be set at liberty forthwith unless otherwise lawfully held.

F. AZANGALALA
JUDGE

J. R. KARANJA
JUDGE

[Delivered and signed this 19th day of May 2011]