



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO.680 OF 2007

WALLEN NYANDO MAKOMERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.23578 of 2004 of the Chief Magistrate's Court

at Makadara by Miss Karani – Senior Resident Magistrate

JUDGEMENT

The appellant was charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code and two counts of being in possession of a firearm without a firearm certificate and being in possession of ammunition without a firearm certification contrary to section 4(1) as read with section 4(3) of the Firearm Act Cap 114 laws of Kenya. After full trial, he was convicted on count 2 and sentenced to death.

The particulars of count 2 are that on 14th day of November 2004 at Eastleigh 7th Street in Nairobi jointly with others not before court while armed with dangerous weapons namely pistols robbed Biri Ahmed Abdi of cash Kshs.3,070/=, a wrist watch make Casio, and a mobile phone make Motorola T190 all valued at Kshs.10570/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Biri Ahmed Abdi.

The appellant challenges his conviction on the following grounds;

(1) The learned trial magistrate erred both in law and facts by basing conviction on the alleged mode of identification which was not conducive to warrant positive identification.

(2) The learned trial magistrate erred in both law and facts by basing conviction on the alleged mode of arrest and failed to appreciate that;

(a) No positive chase would have resulted in such a crowded area.

(b) No positive chase would have resulted in a place full of buildings.

(c) No confirmation in court that PW2 was following a specific mark.

(d) PW2 did not witness the actual robbery.

(3) That the trial court erred in law by convicting the appellant while relying on the doctrine of recent possession.

(4) The learned trial magistrate erred in law and facts by failing to find that there was a grudge that existed between the appellant and the late PC Langat who allegedly trumped up the charges against the appellant.

(5) The trial magistrate erred in law and fact when she failed to consider that essential witnesses were not availed in court to testify against the appellant.

The appeal was opposed by the State on the grounds that the six prosecution witnesses who testified clearly and correctly placed evidence that the appellant was one of the robbers who committed a series of robberies on the material day.

On the other hand, the appellant gave sworn testimony and stated that on the material day he quarreled with the late PC Langat on payments concerning alcohol which was his business. He alleged that late PC Langat threatened him that he would be arrested and charged with a serious offence. Appellant contended that as he was in his normal business, he was instructed to lie down by police officers who alleged that he was involved in a series of robberies. He was then taken to Pangani Police Station and charged with an offence which he never committed.

This is a first appeal and it is our duty to re-evaluate the evidence in order to determine whether the appellant was convicted properly and on sufficient grounds. The trial court found the complainant who gave evidence as PW1 to be a truthful and a forthright witness and who appeared to narrate in details his experience in the hands of the robbers. The evidence of the complainant was that on 14th day of December 2004 at Eastleigh he was robbed the items stated in count 2 of the charge sheet. The incident occurred between 6 and 6.45 a.m. and at that time there were not many people on the road. It is the contention of the complainant that visibility and the issue of mistaken identity was not an issue since there were not many people on the street at the time of the robbery. PW1 stated immediately after the robbery, he met police officers whom he showed the persons who had robbed him and who were also robbing other innocent people. He pointed the robbers to the police officers who ordered them to stop but they ran in different directions.

It is the evidence of PW2 PC Nelson Mureithi that he chased the appellant and subsequently arrested him a few metres away from the scene. It is the contention of PW2 that he did not lose sight of the appellant till he arrested him a few metres away from the scene. On arresting the appellant, a search was conducted and items stolen from the complainant was recovered from him. The items were identified by the complainant as the ones earlier robbed from him.

In convicting the appellant, the trial court was of the view that there was no mistaken identity since the

appellant was arrested by police officers who followed him after the appellant tried to run away from the scene. The appellant was found with items stolen from the complainant.

The evidence of PW2 is that on the material day while on patrol duties within Eastleigh area, they were informed that a gang of young boys were robbing people within 7th Street. The gangsters were pointed out to them and upon ordering them to stop they defied orders and started running in different directions. It is alleged some of the robbers started shooting at the police officers. Pw2 and other police officers pursued the robbers and shot four of the gangsters. The appellant was arrested by PW2 and other police officers who immediately conducted a search and recovered a Casio watch, mobile Motorola T190 and cash Kshs.2,000/=. The said items were properly identified by PW1 as having been stolen from him a few minutes ago. The evidence of PW2 was reinforced by PW3, PW4 and PW5 as to the circumstances leading to the arrest and recovery of the stolen items.

The question for our determination is whether the trial court committed any misdirection in convicting the appellant. We are alive to the fact that it is the responsibility of the prosecution to prove the charge beyond reasonable doubt. In this case, the trial court analyzed in detail the evidence of the prosecution and the defence by the appellant. The defendant in his defence claims that there was a long standing grudge between him and the late PC Langat over illicit brew business which he was involved. The trial court considered that defence and found it wanting on the grounds that the appellant wanted to transfer his guilt because the late Langat could not defend himself against the allegations by the appellant.

As rightly pointed out by the trial court, there is no evidence to show that the late PC Langat stage managed the robbery in order to fix the appellant. There is no evidence to show that the late PC Langat together with PW2, PW3, PW4 and PW5 conspired and staged the alleged robbery. The appellant confirmed that he was arrested by PW2, PW3 and PW4 within the area where the subject robbery took place. He also confirmed that he found dead bodies in the Land Rover that took him to Pangani police station. However, he avoided mentioning that the said bodies were in any way connected to the said robbery and the shooting that took place after they were ordered to stop.

It is also clear that the appellant laid claim to the items that were recovered from him but the trial court correctly found that the said defence was false. We too agree. In short we are in total agreement with the trial court, that the appellant was arrested a few metres away from the scene and after his friends were shot. We are in agreement with the trial court that the prosecution proved its case beyond reasonable doubt and that the appellant was convicted on sound and satisfactory evidence. There is no basis to disturb and/or interfere with the lawful decision of the trial court. Consequently, the appeal against conviction and sentence has no merit. We uphold the conviction and affirm the sentence.

Dated, signed and delivered at Nairobi this 16th day of May 2011.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE