



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 195 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 739 of 2007 of the Senior Resident Magistrate's Court at Voi – J. Gandani, SRM)

1. GABO ABDI SONGOLO.....1ST APPELLANT
2. ADAN GALO BORU.....2ND APPELLANT
3. MOHAMED SOMANI GODANA.....3RD APPELLANT

- Versus -

REPUBLICRESPONDENT

J U D G M E N T

The three appellants were charged and convicted of the offence of Robbery with Violence contrary to Section 296(2) of The Penal Code. The Senior Resident Magistrate's Court sitting at Voi sentenced each of the three persons to death. The particulars of the offence as outlined in the charge sheet are-

“On the 3rd day of July 2007 at Kisemenyi area in Taita Taveta District within the Coast Province, jointly with others not before court while armed with dangerous or offensive weapons namely a panga and rungun, robbed GABRIEL MBULUNZE MAKOVE of nine (9) heads of cattle valued at Kshs. 200,000/- and or immediately before or immediately after the time of such robbery wounded the said GABRIEL MBULUNZE MAKOVE.”

The trio appealed against the conviction and sentence. Although they had filed separate appeals namely **Mbsa Criminal Appeals No. 195 of 2009, 196 of 2009 and 198 of 2009**, on the consent of all the appellants and the state, the three appeals were on 12th April, 2011 consolidated into **Appeal No 195 of 2009**.

The prosecution called nine (9) witnesses and each appellant gave unsworn evidence in their defence. The complainant (PW1) is a farmer. On 3rd July, 2007 he took out nine cows to graze at Maungu Ranch, of these, two belonged to his friend Mboka. At about 9.00am three people (the appellants), one of whom he knew and recognized as Mohamed Songolo (the 1st appellant) came to where he was herding the cattle. After a brief conversation, the 3rd appellant ordered him to sit down. At this time the 2nd Appellant stood on his side and the 1st Appellant behind him.

The 3rd Appellant took PW1's panga while the 1st Appellant shoved him down. The three then attacked him, hitting him on the head with sticks and cutting him on the neck with the panga. They also hit him on the back and waist. He passed off. Later he found himself bleeding profusely and at that point realized that the nine animals had disappeared. He painfully dragged himself to his home. He found his wife, son (PW3) and in-law (PW2). He told them that three people, one of whom was Mohamed Songolo (the 1st Appellant had attacked him). After assisting PW1 to hospital, PW2 and PW3 embarked on a search for the stolen animals. Their effort took them to a slaughter house in Voi. PW2 who was familiar with his in-law's animals was able to identify three of them on motor vehicle KTX 296 which he later learnt belonged to PW5. He also identified the skin's of three other animals which had been slaughtered with the marks "LMK" and "JM". These belonged to PW1 and his friend Mboka respectively. With the help of the police, and on enquiry, he was told that the cows had been brought to the slaughter house by PW4 and another person.

PW4 told the police that one Adam Haji had introduced him to the three Appellants who sold him nine (9) animals at an agreed price of Kshs. 114,000/-. Although six of them were delivered, the three appellants informed him that they had lost three (3) animals as they drove them towards Voi. In the meantime PW4 hired motor vehicle KTX 296 from PW5 who helped him transport three of the other six animals to the slaughter house.

The three lost animals wandered close to the boma of PW9. He learnt from the police that the animals were amongst animals that had been stolen. He helped trace the animals.

In their defence each of the Appellants, in their unsworn evidence, denied their offences. They each said that they do not know why they had been arrested.

In this appeal, the three Appellants raise three issues. That none of the prosecution witnesses positively or otherwise identified them. That no identification parade was conducted and the Magistrate erred in not considering this as a material omission on the part of the prosecution. Further that critical persons and in particular one Adam Haji and the investigating officer did not testify and this must be construed against the prosecution.

We sit on a first appeal court in this matter. A first appeal is in the nature of a retrial. We are enjoined to consider the evidence tendered before the trial court, re-evaluate it and reach our own conclusion. We must nevertheless bear in mind that, unlike the trial court, we do not have the advantage of hearing and seeing the witnesses.

The violence that befell PW1 happened in broad daylight at about 9.00am. The three persons who attacked him and stole his animals engaged him in a conversation before attacking him. He knew one of them (the 1st Appellant) and recognized him. He had known him for a period of 2 years by the names of Mohammed Songolo. The animals that were taken from him were later sold to PW4. Amongst the people who sold the animals to PW4 was the 1st Appellant.

At the first opportunity he had to tell anyone about his anguish, PW1 told PW2 and PW3 that he had been attacked and assaulted by three people, one of whom was Mohamed Songolo (the 1st appellant). In respect to the 1st Appellant there is evidence of recognition and an identification parade was unnecessary. This evidence is strong. Evidence of recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other (**Anjonomi & Others –Vs- Republic [1980] KLR 59**). And although mistakes in recognition can be made, other evidence against the 1st Appellant bears out PW1's recognition of the 1st Appellant. The evidence of PW4 confirms that the 1st Appellant was indeed involved in the sale of the stolen animals. The animals that PW4 had bought from the appellants were identified by PW2 as belonging to his in-law PW1.

What is the evidence in respect to the 2nd and 3rd Appellant? At the time of the robbery the 2nd and 3rd Appellants were not known to PW1. The 1st, 2nd and 3rd Appellants engaged PW1 in a short conversation

of about three minutes before they attacked him. Infact the 3rd Appellant stood in front of him and the 2nd Appellant beside him. This was all in broad daylight. The circumstances were such that PW1 had sufficient opportunity to see the faces of all the three and make an impression of them. It is conceded that no identification parade was carried out. The learned Magistrate thought that although it was necessary it was understandable that it was not done when she said as follows-

“After the arrest of the 2nd and 3rd accused, the police should have conducted an identification parade. Could it be that none was conducted as the complainant was still in hospital nursing serious injuries as he testified that he was admitted in hospital for two weeks.”

On, our part, we do not think that there was good reason for the police not conducting the parade. Although PW1 was admitted in hospital for a about two weeks, it would seem that the accused persons were still in the custody of the police when he was discharged. Listen to what PW1 says in cross-examination by the 1st Appellant;

“When I was discharged I came to Voi Police Station and you were called out from the cells. I was asked by the police if you are the one who robbed me. I told them you were.”

During the trial PW1 identified his assailants as the persons in the dock. He said;

“I recognized one of them who is the 1st accused here ... The other 2 people were strangers to me. They are the 2nd and 3rd accused here.”

He (PW1) also said in response to questions by the 2nd appellant;

“I told the police that if I see the other 2 robbers I would identify them. I did not identify you in an identification parade. I was not there when you were arrested.”

And responding to the 3rd Appellant;

“When I came to the police station I did not see you. This is the first line I am seeing you after the robbery.”

We have to agree with the 2nd and 3rd Appellants that dock identification alone is worth little. The Court of Appeal said as much in **Fredrick Ajode –Vs- Republic Criminal Appeal No. 87 of 2004** when it held that;

“It is trite law that dock identification is generally worthless and the Court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.”

On analysis the evidence against the 2nd and 3rd Appellants is as follows:-

- (a) PW1 was attacked by three people one of whom he recognized (1st Appellant) and who stole nine cows from him.***
- (b) PW4 bought nine cows from the 1st, 2nd and 3rd Appellants.***
- (c) Six of the nine cows were identified by PW3 as belonging to PW1.***

There is evidence that the 2nd and 3rd Appellants were involved in selling cows to PW4 but there is little evidence that the duo participated in the robbery. A properly and lawfully conducted identification parade may have connected the 2nd and 3rd Appellants to the robbery. It was, in our view, a fatal failure on the part of the police not to have conducted an identification parade. On the evidence tendered it was unsafe for the learned Magistrate to find that the 2nd and 3rd Appellants participated in the robbery.

The Appellants also questioned why the prosecution failed to call one Adam and the investigating officer. The prosecutor has discretion as to who to call as a witness. A court will only interfere with that discretion if it is shown that the failure of the prosecutor to call a particular witness has been “***influenced by some oblique motive***” (***Oloro & Others –Vs- Republic (1956) 2 EACA 493***). The proceedings show that the prosecutor sought adjournment on five occasions (16.9.2008, 4.11.2008, 24.3.2009, 10.6.2009 and 24.6.2009) so as to avail these two witnesses but to no success. Adam Mohamed alias Adam was mentioned by PW4 as the person who introduced him to the three Appellants. According to PW4, he seemed to know the appellants well. PW5 told court that it was Adam who hired his motor vehicle KTX 296 for purposes of transporting some cattle to Voi. PW6 who works with the slaughter house said that five of the cows suspected to have been stolen belonged to Adam. Without doubt, Adam’s evidence would have corroborated the evidence of at least three of the prosecution witnesses. In particular his evidence was critical in shedding light on the role of the 2nd and 3rd Appellants. The prosecution case against the appellants and in particular the 2nd and 3rd Appellants was weakened because Adam did not participate in the trial. As to the 1st Appellant, he was recognized by PW1 and had sufficient interaction with PW4 as he was the one who led the negotiations for the sale of the animals and received the money that was made in payment of the animals. It seems therefore that the evidence against him was strong enough even without the evidence of Adam.

We now turn our attention to the effect of failure to call the investigating officer. This type of complaint is not uncommon and the Court of Appeal has had occasion to deal with it. In the decision of ***Jeremiah Gathiku Kirungi –Vs- Republic (Criminal Appeal No. 73 of 2008)*** said as follows:-

“... the effect of failure to call police officers involved in a Criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate.”

The evidence against the 1st appellant is, in our view, overwhelming and not even the failure to call the investigating officer can weaken the testimony of PW1 and PW4 as corroborated by the evidence of the other prosecution witnesses. We do not find that the failure to call the investigating officer was slanted or motivated by bad faith on the part of the prosecution. The record shows attempts by the prosecution to secure adjournments so as to avail the investigating officer.

We have said enough to show that evidence against the 2nd and 3rd Appellants is not sufficiently strong as to found a safe conviction. In respect to the 1st Appellant, the evidence is overwhelming and the trial Magistrate was entitled to convict him.

Upon conviction each accused person was sentenced to death. The trial was conducted by J. M. Gandani, SRM who also wrote the judgment. The judgment was read by P. N. Ndwiga, SRM who then took the appellants mitigation and imposed sentence. Although the succeeding Magistrate never said so, the court must have been proceeding under the provisions of Section 200(1) (a) of the Criminal Procedure Code which provides as follows:-

“Subject to Subsection (3), where a Magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and exercises that jurisdiction, the succeeding Magistrate may deliver a judgement that has been written and signed but not delivered by his predecessor.”

The succeeding Magistrate invited the accused persons to mitigate and then imposed a death sentence upon saying this;

“I have taken into account the nature and circumstances of the offence herein. Each accused is hereby sentenced to death.”

The process of sentencing is part of the trial. So as to reach an appropriate sentence, the court will take into account the evidence, the nature of the offence and the circumstances of the case. The succeeding

Magistrate, albeit in a terse statement, said that he had taken into account the nature of the offence and the circumstances of the case. We think that he directed himself correctly on the question of sentence. The assailants/robbers inflicted severe injury on the complainant and a death penalty is merited.

In the end, we quash the conviction of the 2nd and 3rd appellants and set aside their sentences. They are hereby released forthwith unless otherwise lawfully held. As to the 1st Appellant the appeal fails in its entirety. We uphold both the sentence and conviction against him.

Dated and delivered at Mombasa this 29th day of November, 2011.

MARY KASANGO
JUDGE

F. TUIYOTT
JUDGE