



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 462 of 2005
KENNEDY OCHIENG ONYANGO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 770 of 2004 of the Chief Magistrate's Court at Nairobi by J.N. Wanjala (Principal Magistrate))

J U D G M E N T

The appellant, **KENNEDY OCHIENG ONYANGO**, was convicted on three counts of **robbery with violence contrary to section 296(2) of the Penal Code**. Thereafter, the learned trial magistrate sentenced him to death for each of the offences.

Being dissatisfied with the conviction and the sentences, the appellant lodged an appeal to this court. In his grounds of appeal, the appellant raised the following issues;

- (i) There was no positive identification;
- (ii) No Exhibits were linked to him;
- (iii) The charge sheet was fatally defective;
- (iv) The credibility of the eye-witness, PW 1, was wanting;
- (v) The informer, who led to his arrest, did not testify;
- (vi) The Exhibits were not identified in court;
- (vii) The Identification Parade was irregular; and
- (viii) The trial court did not consider the defence.

The first issue that we wish to address relates to the charge sheet.

According to the appellant, the charge sheet was fatally defective. His reason for so saying is that in relation to Count 2, he was named as the 3rd accused. And, as the trial court did acquit the 3rd accused, in relation to all the counts, the conviction on Count 2 cannot stand.

A perusal of the charge sheet shows that the appellant is cited as the 2nd accused, in both Count 1 and count 3. But on Count 2, he is cited as being the 3rd accused.

Does it therefore follow, that when the trial court acquitted the 3rd accused, on Count 2, it was the appellant who was acquitted?

We have gone over the record of the proceedings very carefully. And on 16th September 2002, Mr. Ocharo, the learned advocate for Anthony Mwangi Mwithuki, drew the attention of the court to the fact that;

“In Count No. 2, 3rd accused Anthony Mwangi Mwithuki, 2nd accused Kennedy Ochieng Onyango, are interchanged.”

As soon as the attention of the court was drawn to that fact, the prosecutor, Inspector Ngata, sought leave to amend the charge sheet.

The court then allowed the amendment, so that the appellant herein became the 2nd accused, even on Count No. 2.

Following that amendment, the acquittal of the 3rd accused, at the end of the trial, could not and did not result in the acquittal of the appellant herein.

The next issues that we will give consideration relate to identification, coupled with the credibility of **PW 1**. The said issue will also be considered alongside that of the exhibits.

In order to give due consideration to those issues, it will be necessary to re-evaluate all the evidence on record. We shall now proceed to discharge that obligation.

In order to re-evaluate the evidence, we must begin by spelling out the particulars of the three counts.

In Count 1, the appellant and four (4) others were said to have jointly with others not before the court, whilst armed with pistols, robbed Hon. Wafula Wamunyinyi of a motor vehicle KWW 771, a Mercedes Benz; a JVC television; KShs. 150,000/- cash; 3 mobile phones; Iron Box; two computer speakers; 6 earrings; a suit case; assorted clothing; and a small “Sony” radio.

In Count 2, the appellant and four (4) others are said to have jointly with others not before the court, robbed Philip Kithinji M’Mwirichia, of a motor vehicle KAL 052Q, Toyota Corolla; “Pioneer” music system; “Philips” video deck; KShs.6,000/- cash; “Crystal” wrist watch; a Co-operative Bank ATM card; five pieces of Kitenge materials and spectacles.

And in Count 3, the robbers, including the appellant, are said to have robbed Joan Awinja Milimu of a motor vehicle KZR 089 Toyota Corolla station wagon; “JVC” video deck; “Sony” Television; a chips fryer; a blender; a toaster; an “Osca” camera; iron box; a “Singer” sewing machine; and KShs.4,000/- cash.

PW 1, JOAN AWINJA MILIMU, is the complainant on Count No. 3. She was robbed within her compound, as soon as she had driven through the gate, at Buruburu Estate.

The robbers arrived in another car, and forced her to lead them into her house. After robbing her of KShs.4,000/- and other household goods, the robbers drove off in her husband’s vehicle.

Because the incident lasted about 30-45 minutes and although the five (5) persons who robbed her were not previously known to her, **PW 1** told the police that she could identify the man who had a gun throughout the incident. She explained that the said man talked to her, at close quarters, all through the robbery.

PW 1 described the said robber as follows;

“He is short and not too fat and he is a dark man.”

As **PW 1** talked to that particular robber at close quarters, and for a considerable length of time; and because the robber’s face was not covered nor disguised in any manner; and also because the electricity lights were not put off. **PW 1** should have been able to see the said robber very clearly. In other words, the prevailing circumstances were conducive for positive identification.

And when **PW 4, CHIEF INSPECTOR PETER MATU**, conducted an Identification Parade **PW 1** did pick out the appellant.

Yet, when **PW 1** was cross-examined she said to the appellant;

“You are tall and you are the one. You may not be brown. Perhaps I saw you as brown as I was terrified.”

PW 1 attributed the discrepancy in her evidence by saying that when she made the statement, in which she had described the appellant as a short dark man, she was very terrified.

But that still begs the question as to whether she did in fact identify the appellant positively.

PW 2, PHILIP GITHINJI M’MWIRICHIA, was the complainant in Count No. 2.

After he was robbed, **PW 2** informed the police that he could identify one of the robbers.

But during cross-examination by the appellant, **PW 2** said that he had never seen the appellant anywhere. He also confirmed that it is not he who had led the police to arrest the appellant.

Nonetheless, **PW 2** testified that he did identify his wrist watch which the police had recovered after the robbery.

His testimony was that the watch was of a make known as “Christian Daniel.”

First, the watch which was said to have been stolen by the robbers, as per the Charge Sheet was of a make called “Crystal”.

Secondly, when **PW 5** testified, he said that the watch which he recovered was of a make known as “Quartz”.

As both **PW 2** and **PW 5** identified the watch as Exhibit No. 7, one would imagine that they were talking about the same article or item. But that is not borne out by the different makes attributed to the said item. And, in any event, the prosecution did not lead any evidence to try and reconcile the apparent discrepancies in the make of the watch in issue.

And if **PW 5** recovered a “Quartz” watch from the appellant, why was the appellant charged with having robbed **PW 2** of a “Crystal” watch?

Furthermore, the Investigating Officer, **PW 13** testified that he did not know the person who identified the watch as belonging to him or her. In the circumstances, the court is not only left asking itself about the correct identification of the watch which **PW 2** was allegedly robbed of, but also about the owners of the watch or watches which were talked about by the prosecution witnesses, when they testified in court.

PW 3, MAREEUNA ALABO M’MWIRICHIA, is the wife to **PW 2**. She corroborated the evidence of her husband, concerning the robbery.

But even though the robbery lasted about 20 minutes, **PW 3** testified that she could not remember any of the robbers.

PW 4, CHIEF INSPECTOR PETER MATU, conducted an Identification Parade at which the appellant was picked out by **PW 1**, as well as by both Elizabeth Adoyo Echolla and Diana Lisemula. The latter two alleged identifying witnesses did not testify at the trial.

PW 5, PC ELIUD MISOI, was attached to the C.I.D. Central. He was on foot patrol along the junction of Moi Avenue and Ronald Ngala Street, at about 5.00a.m. on 19th March 2002.

At that point, an informer approached **PW 5** and told him about someone who had committed a robbery in the Buruburu area. The informer then led **PW 5**, with other officers to the area outside Florida 2000.

After **PW 5** had arrested the appellant together with four other suspects, **PW 5** recovered a Quartz watch from the appellant.

PW 6, CHIEF INSPECTOR NGENE, conducted an Identification Parade for the 1st accused.

PW 7, PC AHMED ADOW, was with **PW 5** and PC SHIKUKU, on foot patrol when an informer told them about suspects who had robbed someone in Buruburu. He confirmed that the appellant and his four accomplices were arrested outside the Florida 2000. But he could not recall what was recovered from the appellant.

PW 8, INSPECTOR KURIA WANGAI, conducted the Identification Parade for the 1st accused. His evidence has no bearing on this appeal.

PW 9 CPL JONATHAN CHEPKWONY was attached to the Pangani Flying Squad, at the material time. Whilst at his office, a Mr. Mwangi Gichure arrived and told the police officers that the appellant had left some electronics at the house of the said Mwangi Gichure.

The said Gichure provided that information to the police on 22nd March 2002. And he told the police that he suspected the things to have been stolen, as the person who had left them there had not returned to collect them.

PW 9 went to Mwangi Gichure’s house and retrieved the items.

During cross-examination, **PW 9** admitted that he did not know the appellant. All that **PW 9** knew was that

Mwangi Gichure had told the police that the items were left at his house by one Kennedy Ochieng.

PW 9 told the trial court that Mwangi Gichure would be a witness at the trial. But the prosecution did not have Mwangi Gichure testify.

In the result, whether or not the Kennedy Ochieng whom Mwangi Gichure had cited as the person who left some items in his house, was the same person as the appellant, we cannot be sure.

PW 10, ELIZABETH NJOKA WAFULA is the wife to **HON. ATANAS MUSIKO WAFULA WAMUNYINYI (PW 11)**

Those two witnesses gave evidence that corroborated each other. They were robbed of a Mercedes Benz KWW 771, together with KShs.150,000/- cash and other assorted items.

During the robbery, **PW 11** was physically assaulted, resulting in the loss of one tooth; breakage of three other teeth and injuries to the jaw.

According to **PW 10**, there was sufficient electric lighting inside the house, when the robbery took place. She also said that the lighting in the bedroom was also sufficient.

The said lighting, and the close proximity from which the robber with the gun talked to **PW 10**, enabled her to identify the robber as the 3rd accused.

Later, **PW 10** attended an Identification Parade, where she picked out the 1st accused.

But she expressly stated that she had never seen the appellant before the date when she gave evidence.

PW 11, HON. ATANAS MUSIKO WAFULA WAMUNYINYI, was the member of parliament for Kanduyi Constituency, at the material time.

He largely corroborated the evidence of his wife, (**PW 10**).

As far as he was concerned, it was the appellant who had a gun.

That piece of evidence is at variance with that given by **PW 10**, yet those two witnesses were said to have been robbed at the same place and time. We are therefore left wondering whether it was the appellant or the 3rd accused who was armed with a gun, during the robbery.

Bearing in mind the fact that **PW 11** described the experience as both bad and terrifying, it would have been helpful to the court had **PW 11** identified the one robber who was armed, at an Identification Parade. That could have helped the court ascertain whether or not **PW 11** had positively identified the said robber. But then, **PW 11** was out of the country when the police held Identification Parades. He therefore did not identify any of the robbers at any parade.

It is noteworthy that **PW 10** attended the Identification Parade which was mounted by **PW 4** on 23rd March 2002. That date is noteworthy because **PW 11** was admitted in hospital only until 20th March 2002. Unless **PW 11**

travelled to Malaysia immediately after being discharged from Nairobi Hospital, he ought to have been able to attend the Identification Parade.

PW 12, I.P. JOSEPH MWALUKUMBI, conducted the Identification Parade for the 3rd accused. As the appellant was the 2nd accused during the trial, the evidence of **PW 12** has no bearing on this appeal.

PW 13, SGT. BOSCO KISAA, was the Investigating Officer. He took over that role after PC Karue, who was the original Investigating Officer was shot dead by robbers.

When cross-examined by the appellant, **PW 13** said that he did not re-interview any of the witnesses. As a consequence, **PW 13** did not even know the person who lay claim to the ownership of the watch that had been allegedly recovered from the appellant.

After the prosecution closed its case, the appellant testified that he only arrived in Nairobi, from Siaya, at about 5.30a.m. on the morning when he was arrested. He did produce a receipt issued to him by the Kangasha Bus, in which he had travelled.

The prosecution objected to the production of that receipt because it did not bear the name of the bus company. However, the record does not indicate whether or not the receipt was admitted in evidence.

In her judgment, the learned trial magistrate commented that it was unfortunate that the police officer who had investigated the case, initially, died before testifying. We do share her view, that the said officer could have been useful to the court.

She also held that the appellant was “adequately identified” by the witnesses. Indeed, the trial court held that it was the appellant who was armed with a gun during the robberies.

We are afraid that that conclusion is not borne out from the evidence on record. We say so because **PW 10**, who was together with her husband, **PW 11**, at the time they were robbed, expressly said to the appellant;

“I have not seen you before. I have seen you in court. There is one parade I was a bit confused, but I chose somebody. It is possible to chose you (sic!) but I cannot recall now.”

That concession by **PW 10** was significant, because it implied that even though she might have picked out the appellant at the Identification Parade, she did so in a state of confusion. Surely, that would be a most unsound ground upon which to found conviction.

In the result, and for all the reasons we have already cited herein, we find that it would be unsafe to uphold conviction.

We therefore allow the appeal, quash the convictions and set aside the sentences. We now order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 8th Day of March, 2010.

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FRED A. OCHIENG
JUDGE

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M. A. WARSAME
JUDGE