REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS) Criminal Appeal 467 of 2006

PETERSON CHARLES OGWOK.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3436 of 2005 of the Chief Magistrate's Court at Makadara by G.L.Nzioka – Principal Magistrate)

JUDGMENT

The appellant, CHARLES PETERSON OGWOK, was convicted on one count of robbery with violence contrary to section 296 (2) of the Penal Code; and one count of attempted rape contrary to section 141 of the Penal Code. He was then sentenced to life imprisonment for the offence of attempted rape; whilst for the offence of robbery with violence, he was sentenced to death.

In the appeal which he lodged before this court, the appellant raised

several substantive issues. However, in this judgment we will confine ourselves to one issue, which determines the appeal.

The only reason why we do not deem it necessary to delve into the other issues is that the said exercise would be no more than an academic one. But we must emphasize that Dr. Khaminwa, the learned advocate for the appellant raised pertinent issues. However, we are not delving into the said other pertinent issues because the appeal can and shall be determined on the one issue.

The issue upon which the determination will be based is the alibi which was advanced by the appellant, as his defence.

In her judgment, the learned trial magistrate states as follows;

> "First and foremost, the accused only produced a passport during his defence case to prove that he had travelled. He never introduced it during the prosecution case. Secondly, although he allegedly told the police officer he had travelled, during the cross-examination of the arresting officer, the witness i.e. the watchman, the driver, they were not questioned on the alleged absence of the accused from the scene."

The trial court went on to make a finding as follows;

> "At no particular time did the defence even put the issue of absence of the accused from the country to the witnesses. I only heard it during the defence case. I treat the accused's

defence as an afterthought."

Factually, the learned trial magistrate was not correct, to have held that it was not until he was defending himself that the appellant first asserted that he had been outside the country at the time when he was alleged to have committed the offence herein.

A perusal of the record reveals that when PW 1 was being cross-examined by Mr. Kanyangi, the learned advocate who was then representing the accused, the witness said;

> "I am sure the accused came to that house that day. It is not true that he was on safari to Uganda."

The cross-examination of PW 1 was conducted on 16th November 2005, whilst the defence case was conducted on 27th July 2006.

In effect, the appellant first raised the alibi more than seven months before he put forward his defence. It was therefore incorrect for the trial court to have held that the alibi was simply an afterthought.

The learned trial magistrate also went on to hold as follows;

> "The passport produced in court was last used to Tanzania alone in the year 2003. The only other entry is on 25th April, 2005, to Uganda and a return on 1st May 2005. It does not assist to tell where the accused was on the relevant dates on 28th, 29th and 30th, when the witnesses saw him. The

> accused could even have travelled to Kenya and back. The court takes judicial notice of the fact that Uganda is a 12 hours journey to Kampala from Nairobi, and one can travel with any other document other than a passport; a temporary permit would suffice. I doubt the authenticity of the passport and the stamps therein. I say so because the accused never produced the passport to the arresting police officers upon arrest."

The arresting police officer was PW 6, PC John Kanyungu. He gave his evidence before the trial court on 10th March 2006, which was about four (4) months after the appellant had first asserted that at the time material to the offence herein, he was on safari in Uganda. Clearly therefore, if the prosecution wished to dislodge the alibi, they already had about 4 months to prove that the accused was in Nairobi, and not in Kampala at the material time.

Secondly, we have found no evidence on record, which was led by the prosecution, to form the basis upon which the trial court founded the conclusion that the authenticity of the passport was doubtful. It was therefore a serious misdirection on the part of the trial court to have arrived at a finding that was without factual or legal foundation. Even if the learned trial magistrate was schooled in the procedures of verifying the authenticity of passports and stamps affixed thereon, the court should only have made

findings after obtaining answers to questions which the accused would have given, when he was questioned about such issues.

In this instance, the accused produced a passport in support of his defence. The prosecution did not challenge the authenticity of the passport. Therefore, the trial court had no lawful grounds for concluding that the authenticity was doubtful.

In any event, the accused had no obligation to prove the alibi. If he had been required to prove his said defence, that would be tantamount to asking him to prove his innocence.

In the case of KARANJA & ANOTHER Vs REPUBLIC [2004] 2 KLR 140, the Court of Appeal quoted with approval, the following words from SEKITOLEKO Vs UGANDA [1967] E.A. 531;

> " (i) as a general rule of law the burden on the prosecution of proving the guilt of the prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else,
>
> (ii) the burden of proving an alibi does not lie on the prisoner,....."

In this case, the defence of the accused was well founded, as it was backed with the passport belonging to the accused. On the face of that document, it appeared that the accused had travelled from Nairobi to

Kampala on 25th April 2005. He had then returned to Nairobi on 1st May 2005. That would imply that as at 29th April 2005, when the offence was committed, the accused was not in Nairobi.

The only way the prosecution could persuade the trial court that the alibi ought to be disregarded was by adducing evidence to displace the alibi. And in this case, the prosecution did not lead any such evidence.

The learned trial magistrate did take judicial notice of the length of time it takes to travel from Nairobi to Kampala. The court also took judicial notice of the fact that a person need not use a passport when travelling from Nairobi to Kampala and back. It was the finding of the trial court that one need only have a temporary permit to travel between those two cities in Kenya and Uganda, respectively.

With all due respect to the learned trial magistrate, those do not, to our minds, appear to be matters of such common notoriety that the court could take judicial notice thereof.

It does appear to us that the trial magistrate drew from her own personal experience and knowledge, to make the findings, which she then purported to take judicial notice of.

But even if it were factually accurate that a journey from Nairobi to Kampala takes about 12 hours; and even if a person only needed a temporary

permit to travel from Kenya to Uganda, that would still not have been sufficient to dislodge the alibi. We say so because it would be wrong to presume that simply because it might be possible to use temporary permits to travel from Nairobi to Kampala, the prosecution had proved that that is what the accused had done.

Mere suppositions and conjecture cannot dislodge an alibi. The prosecution needs to produce evidence in order to dislodge an alibi. And in this case, no evidence was led to dislodge the alibi.

We therefore hold that the defence created sufficient doubt on the prosecution case, to lead us to conclude, as we hereby do, that the conviction herein was unsafe.

Accordingly, the said conviction cannot be sustained. We therefore quash it, and also set aside the sentences that the trial court had handed down.

In conclusion, we do commend the learned state counsel for conceding the appeal; he did the right thing by so doing.

The appellant should now be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 9th day of March, 2010.

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FRED A. OCHIENG	**M.A. WARSAME**
JUDGE	**JUDGE**