CRIMINAL
Sentence where one count is a capital offence
Doctrine of common intention
Should prosecution call all witnesses in a case

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 106 OF 2007

DANIEL NDERITU MACHARIA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of J. Nyaga P.M. in Tigania Criminal Case No. 65 of 2005 delivered on 16th May 2007)

JUDGMENT

The appellant faced a total of 4 counts before Principal Magistrate Maua. After trial, he was convicted on count 1, 3 and 4. In the first count, he was charged with robbery with violence contrary to section 296 (2) of the Penal Code. On count 3 he was charged with the offence of being in possession of Firearm without a firearm certificate contrary to section 4 (1) as read with section 4 (3) of the Firearm Act. On the 4th count, he was charged with being in possession of ammunition without a firearm certificate contrary to section 4 (1) as read with (4) (3) of the Firearm Act. The learned magistrate on convicting the appellant sentenced him to suffer death on count 1 and sentenced him to 5 years imprisonment on each count, that is count 3 and 4. The appellant has now appealed against his conviction and his sentence. As the first appellant court, we are under duty to reconsider the evidence of the lower court, re-evaluate it and draw our own conclusion. This duty was well set out in the case Okeno V. R [1972] EA 32 at p. 36 where the predecessor of this court said:-

"An appellant n a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya V. Republic) [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala V. R. [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported."

We wish to begin by observing that the learned trial magistrate sentenced the appellant to death in respect of the first count and to five years on each count, that is, count 3 and 4. The sentence of 5 years on those two counts was in error. We say this with the backing of a previously decided case of the Court of Appeal, that is, Abdul Debano Boye & Another Vs. Republic Criminal Appeal No. 19 of 2001 (unreported) where the Court of Appeal stated:-

"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate death sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."

It therefore follows that the sentence of 5 years imprisonment will be left in abeyance in this judgment. The evidence adduced by the prosecution was to the effect that PW1 a police corporal in the company of PW2, 3 and 4 were on patrol on Kangeta/Maua road. They were

in the motor vehicle registration number KTR 247. They were patrolling that road because the police had received information that there were people on that road terrorizing the road users. It was PW1 who was driving the motor vehicle. They were driving from Kangeta to Maua when they noted two people stopping them. They did not stop. Further ahead, while they were driving uphill very slowly, they were stopped by three people. This was at Nturuba area. PW1 stopped. One of those people who stopped them was pointing a gun at them. PW1 and 2 were ordered at gun point to go to the back of the vehicle where the other officers were lying on the ground of the vehicle. When the attention of one of those assailants was not on the police officers, PW1 took the opportunity and grabbed that person whom they begun to struggle with. One of the police officers shot that person dead. That person had in his possession a riffle. When this person was shot the person driving made an attempt to run away. PW3 shot at that person but he managed to escape. The following morning, they were informed by members of the public that a man had been found with gunshot wounds at Nturuba. When they went there, they found the appellant who had a gun shot wound on the left eye. All the police officers confirmed that they did not identify any of the persons who had stopped them but they concluded that the appellant was the one shot by PW3. PW6 was a clinical officer who treated the appellant and filled the P3. When he treated him, the injury was one month old. He confirmed that the appellant had suffered gunshot wound. He confirmed that from the treatment notes from Meru General Hospital. At this point, we wish to dispel the argument of the appellant where he submitted that he was not allowed to cross examine PW6. We have examined the typed lower court proceedings and it is obvious on page 16 "B" that the appellant did cross examine PW6. PW8 produced a report of the examination of the Firearm and ammunition recovered at the scene. The firearm expert stated that in his opinion, the firearm and ammunition were firearm and ammunition within the terms of the Firearm Act. The appellant in his defence gave unsworn testimony. He stated that he was a miraa business man at Meru town. He was also a resident of Meru town. He said that he used to purchase miraa at night. On the material night, he boarded a bus called Meru classic. He was traveling from Meru town to Maua town. The vehicle broke down at Kangeta market. The passengers were refunded their fare. He together with other passengers decided to go to Maua town on foot. Without being specific as to where he was he then said that a vehicle came and he tried to stop it but it did not stop there. It stopped ahead. He then heard a sound like that of a tyre bust. On hearing that sound the second time, he felt that he had been hit by something. He fell down but he managed to pull himself off the road and he became unconscious. Next he found himself at Maua police cells. He was thereafter charged with the offence he faced in the lower court. The defence offered by the appellant was that of alibi. He had no duty to prove his alibi. It was so stated in the case Kiarie V. Republic [1984] KLR. The court held:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible tot ell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."

The allegation by the appellant that he was traveling in a bus that broke down was not brought up in the proceedings until he gave his defence. The appellant in all the cross examination he carried out of the police officers who were present at the scene did not touch on the possibility that there was a bus that broke down forcing passengers to walk. It is also material that the appellant in narrating what happened after the bus broke down continually referred to himself and others. He stated:-

"I and other people opted to go to Maua on foot…….. We stopped it (PW1's vehicle) …… We heard a sound like that of a tyre bust."

The *alibi* defence does however create a doubt in our mind although the appellant ought to have raised it while cross examining the prosecution witnesses. We find that we can differ with the finding of the learned trial magistrate when he stated:-

"I agree with his findings (clinical officer) that what the accused (appellant) sustained was a gun shot. The accused must be the person APC Chacha (PW3) had fired at Nturuba shopping center…….. He (appellant) was one of the two people who had hijacked the police officers."

The learned state counsel in submitting relied on the quotation from the case Taylor, Weaver and Donovon [1928] 21 Cr. App. R. 20 which we find is very apt to this case and which stated:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics."

The appellant's argument that the prosecution's case was weakened by the failure to call the persons, members of public who spotted him the following morning is neither here nor there. Although the prosecution has an obligation to call witnesses even those who would give adverse evidence to his case, the issue to consider in regard to which witnesses should be called is the quality and not the quantity. This was well stated in the case Charles Kariuki Mure Vs. Republic High Court Nyeri Criminal Appeal No. 172 of 2007 (unreported) thus:-

"With regard to witnesses who were not called, as a matter of law, there is no requirement that any number of witnesses be called to prove a particular fact. See for instance section 143 of the Evidence Act. We are not aware of any requirement that a case cannot be proved on the evidence of a single witness. Indeed it is not the quantity but quality of the evidence that counts. In the circumstances of this case we do not see what would have been gained by the prosecution calling members of the public who responded to the distress call and or PW1's mother who was in the vehicle. With regard to the members of public, we should agree with the learned magistrate that, by the time they came to the scene, the offences had been committed, the appellant chased and arrested. Their evidence could not therefore have bolstered the prosecution case any further. As for PW1's mother's evidence, the evidence of PW1, PW21 and PW3 sufficed."

The appellant's submissions relating to section 214 of Criminal Procedure Code was not well understood by us. We however state that the amendment that was effected by the trial court in respect of count number 3 and 4 where an addition was made did not prejudice the appellant. He was indeed given an opportunity to request the recalling of any witnesses but he declined. The trial court gave an opportunity to the appellant to indicate if he wished to recall any witnesses within the provisions of section 214. Finally, the prosecution produced in evidence the firearm and ammunition and the submissions of the appellant to the contrary has no basis. We however have considered the defence offered by the appellant. We find it was plausible that he was innocently walking when the gun fire took place. It is for that reason we allow the appellant's appeal. The appellant's conviction is quashed and his sentence is set aside. We order the appellant to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 29th day of October 2010.

LESIIT, J.
JUDGE

KASANGO, M.
JUDGE
Read, signed and delivered at Meru this 29th day of October, 2010.

In The Presence Of:

Kirimi/Mwonjaru .....……. Court Clerks
Appellant …….... Present
Mr. Kimathi …….....…… For the State

LESIIT, J.
JUDGE

KASANGO, M.
JUDGE