



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 112 & 107 of 2007

JAMES KIOKO KIIO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the original conviction and sentence in Criminal Case No. 1081 of 2006 of the
Chief Magistrate's Court at Machakos by S.A. OKATO - Senior Resident Magistrate)*

J U D G M E N T

The appellant has asserted that the evidence adduced by the prosecution was inconsistent and also full of gaps.

To illustrate that point, the appellant pointed out that the complainant stated that he was robbed at about 6.00p.m, yet the complainant had arrived in Machakos town, where he was allegedly robbed, at 8.00p.m.

Secondly, the complainant is faulted for having failed to specify the nature of the lighting, its intensity or the source thereof. The lighting that was in issue was that which the complainant had said was at or near the place at which he was robbed.

The other issue which the appellant raised was that there ought to have been an Identification Parade, as the complainant had not known the appellant prior to the incident.

The appellant also pointed out that whereas the complainant had testified that the robbers had hand-cuffed him, the charge sheet did not cite the hand-cuffs, as being one of the weapons which the robbers used.

Furthermore, the appellant emphasized that the pistol and knives which the complainant talked about were never produced as evidence, at the trial. In any event, he says that he was not in possession of any knife or pistol, at the time he was arrested.

The appellant lays the blame for his arrest squarely on **PW 3, PC GEOFFREY KAILUTHA**. He explained that there had been a grudge between him and **PW 3**, and that that was the reason why **PW 3** arrested him. In the appellant's view, **PW 3** had a pre-meditated mind, hence the decision to lead the

complainant to the place where the appellant was.

As far as the appellant was concerned, **PW 3** did not tell the trial court why he suspected that the appellant was one of the persons who had robbed the complainant.

In order to show that **PW 3** had had a grudge against him, the appellant drew the court's attention to the fact that **PW 3** conceded having arrested him once before, and having preferred robbery charges against him in another case which was ongoing at the time of the trial from which this appeal emanates.

This court was also reminded that **PW 2** had disowned the statement which he had recorded with the police. The said statement was adduced in evidence as part of the appellant's defence, after **PW 2** denied that it was the one he had recorded. Following the retraction of the statement, the appellant says that he ought not to have been convicted. Alternatively, the appellant contends that the trial court should have taken into account the contents of **PW 2's** statement, and to have used it to acquit him.

It was also submitted by the appellant that the trial court erred by shifting the burden of proof to him. That submission was founded upon the comment made by the trial court, about the failure of the appellant to call his wife as a witness, to prove that the money which she gave out was not intended to compensate the complainant for the money he had been robbed of.

In answer to the appeal, the state submitted that the conviction was based on overwhelming evidence.

Being the first appellate court, we shall re-evaluate all the evidence on record and draw therefrom our own conclusions.

PW 1, CHARLES NZOMO KITONYI, was the complainant. He said that he was in Machakos town at 6.00p.m. It is then that the appellant approached him and introduced himself as a police officer called Kivui.

PW 1 stated that "there was enough light from the electricity from the buildings."

Although **PW 1** produced his I.D. the appellant arrested him. When **PW 1** protested, the appellant handcuffed him. The appellant then led him to a dark corner, near the Co-operative Bank, where he robbed **PW 1** of his mobile phone and KShs.3,500/- cash.

After the appellant ran away, the complainant reported the incident at that Machakos Police Station. It was the evidence of **PW 1** that he described the appearance of the robbers to the police.

PW 3, PC GEOFFREY KAILUTHA was one of the two police officers to whom **PW 1** described the robbers.

When **PW 3** testified, he confirmed that **PW 1** did describe the two robbers, namely the appellant and a Mr. Njoroge.

As **PW 3** had previously arrested the appellant in respect to an offence of robbery, the description which **PW 1** gave to him caused him to form the opinion that the person who had robbed **PW 1** was the appellant.

PW 3 had previously been to the appellant's house, where he had conducted a search in relation to the other offence; he therefore knew the appellant's evidence.

Having formed the opinion that the description given by **PW 1** matched that of the appellant, **PW 3** led the complainant to Mjini Estate, where the appellant lived.

According to **PW 1**, when they found the appellant, he was in his house, eating.

The appellant then sent his wife to bring to **PW 1**, the mobile phone which the robbers had taken. **PW 1** also testified that the appellant sent his wife to bring KShs.1,500/- cash.

The particulars of the phone which the appellant's wife brought matched the particulars on the receipt which **PW 1** was given when he bought the phone.

Apart from the phone and the KShs.1,500/- which the appellant's wife gave to **PW 1**, the appellant added KShs.2,000/-, with a view to having the matter resolved amicably.

Curiously, when **PW 1** was cross-examined by the appellant, he said that he arrived in Machakos town at about 8.00p.m. He also said that he did see when the phone was being recovered.

In contrast, **PW 3** testified that he traced the appellant in a changaa drinking den. At the time when the appellant was traced **PW 3** was with **PW 1**.

As **PW 1** expressly denied the appellant's contention that he (the appellant) was drinking at the time of arrest; and as **PW 1** insisted that the appellant was at his house, eating, we find that there is some inconsistency regarding the place and circumstances of the appellant's arrest.

Secondly, whilst **PW 1** said that the phone was brought by the appellant's wife; **PW 3** testified as follows;

"I did not recover the mobile phone from you but from the person you had sold it to."

PW 3 had testified that the appellant had sold the phone to Ramadhan Swaleh (**PW 2**). Therefore, that implied that **PW 3** recovered the phone from **PW 2**.

On his part, **PW 2** said that the appellant had offered to sell to him, a mobile phone, Nokia 1110. However, as the appellant was still explaining to **PW 2** that he (the appellant) would provide **PW 2** with a receipt for the phone, on the next day, policemen arrived at the scene in the company of the complainant. **PW 2** testified that the police recovered the phone from the appellant.

PW 2 also testified that as at the moment when the police arrested the appellant, **PW 2** had not given any money to the appellant, as payment for the phone.

PW 2 also testified that the appellant was arrested outside **PW 2's** house.

In contrast, **PW 2's** statement which he had recorded earlier, indicates that **PW 2** had lent KShs.2,000/- to Abdul Samat, for the purchase of the mobile phone. In other words, it was Abdul Samat who had purchased the phone.

In the statement, **PW 2** went further to state that the phone was recovered from Abdul Samat.

It is instructive to note that during the trial, **PW 2** was placed in custody, at the instance of the learned trial magistrate, on the ground that **PW 2** was a difficult witness. It is also noteworthy that **PW 2** had been arrested together with the appellant, and that he was only set free after he had recorded his statement.

PW 3 explained that **PW 2** was set free because he was co-operative.

We find that the circumstances in this case are not at all clear-cut. We say so because although it does appear that **PW 1** had positively identified the appellant, the only other evidence which may have corroborated the said identification, is not wholly consistent with that given by **PW 1**. We say so because **PW 1** says that **PW 3** led him to the appellant's house, where they found the appellant eating. But **PW 3** says that he led **PW 1** to a change drinking den. Thereafter, it is not even clear who exactly surrendered the phone to the police. **PW 1** said that it was the wife of the appellant, whilst **PW 3** said that it was **PW**

2. On the other hand, **PW 2** said that the phone was recovered from one Abdul Samat.

To our minds, the evidence of **PW 2** may have been informed by the need, of the said witness, to cooperate with the police, so as to earn his freedom. He first said that it is the appellant who handed over the phone to the police. But in his statement to the police, he had said that it is he (**PW 2**) who took the phone from Abdul Samat, and handed it over to the police.

After weighing the evidence of the prosecution as against the defence, we have formed the considered opinion that there are doubts about the prosecution case.

However, if we had come to a different conclusion, we would have made it clear that if the appellant had been arrested in the presence of the complainant, there would have been no need for an Identification Parade, as suggested by the appellant. Such a parade would have had no evidential value, because the complainant would have already seen the suspect after his arrest.

Furthermore, we do not share the appellant's contention that handcuffs can be described as dangerous or offensive weapons or instruments.

But even if it were to be assumed that the handcuffs were dangerous or offensive weapons, the failure to enlist them as such, in the charge sheet would not have rendered the charge fatally defective, provided that the prosecution was otherwise able to prove all the ingredients of the offence or robbery with violence. In this case, one of the said other ingredients was that the appellant was in company of one other robber, a Mr. Njoroge.

The other ingredient was that the two robbers were armed with a pistol and knives.

Strangely, **PW 1** did not mention either the pistol or knives, when he testified. It is only **PW 3** who told the trial court that **PW 1** had mentioned a pistol and a knife, in his recorded statement.

Surely, if **PW 1** saw that the appellant was armed with a pistol and a knife, he would have told the trial court so. As he did not tell the court about the alleged weapons or instruments, we are doubtful about the same, having been in the hands of the appellant.

Meanwhile, if **PW 1** described the features of the suspect so clearly that **PW 3** was able to make out the fact that it was the appellant who had been described, that would have been a sufficient foundation for **PW 3** leading the complainant to the place where the appellant was known to frequent. In other words, it would not have been correct to fault **PW 3** for having a baseless premeditated view that the appellant was one of the persons who had robbed the complainant.

Just because a law enforcement officer had previously arrested a suspect in one case, is not reason enough to bar him from arresting the suspect for an offence committed thereafter. Therefore, when the suspect was arrested for a second or third time, by the same officer, the suspect cannot argue that that was, by itself, proof that the officer had a grudge against him.

As regards the burden of proof, the learned trial magistrate said;

“Although the accused had no burden to discharge, this being a criminal case, one would have expected him to call his wife as a witness. He did not call her because the KShs.1,700/- was not given to PC Kailutha in order for the accused to secure his freedom because of the changaa business, but was meant to induce the complainant into abandoning his complaint he had lodged with the police.”

In our understanding, the learned trial magistrate had the correct appreciation of the law. She expressly said that the accused person did not have the obligation, in law, to discharge any burden of proof.

But because the prosecution witnesses had stated that the appellant had given KShs.1,700/- to the

police, so that the complainant could withdraw his complaint, the trial court came to the conclusion that that evidence was factually correct because the appellant did not adduce any evidence to the contrary. It was another way of saying that because the appellant had put forward an assertion which was inconsistent with the evidence adduced, he needed to support his said position by producing evidence. In this case, as the money was produced by the appellant's wife, it is only fair that the said wife should have told the court the reasons why she had done so.

In any event, we believe that the reasons why the money was produced would, ultimately, not have been the determining factor, on the guilt or otherwise of the appellant.

In conclusion, although this appeal has caused us a lot of anxiety, we have decided that it would be unsafe to uphold the conviction herein. We therefore allow the appeal; quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Machakos, this 24th day of September, 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE