REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 17 of 2006

JACKSON OSIAKO NDIANGUNGU .....APPELLANT

=VERSUS=

REPUBLIC..... RESPONDENT

JUDGMENT

These are consolidated appeals against Conviction and Sentence from the Judgment of the Senior Resident Magistrate, Hon. P.W. Macharia, in the Chief Magistrate's Criminal Case No. 3849 of 2002 which was delivered on 23rd Februar,2007.

In the said case, Five (5) accused persons were initially charged on 29th April, 2002 as follows:-

1. **Count No.1** - Robbery with Violence Contrary to

Section 296 (2) of the Penal Code.

ACCUSED :

1. Jackson Osiango Ndiangugu

(First Appellant herein)

2. John Kilo Wafula

(Second Appellant herein)

3. Ibrahim Maulidi Ndovolosio

(Third Appellant herein)

4. Caleb Isundu Indeche

2. **Count No. 2** Being in possession of a prohibited weapon

Contrary to Section 4 (3) of the Firearms Act, Cap. 114, Laws of Kenya.

ACCUSED: Jackson Osiango Ndiangungu.

3. **Count No. 3** Being in possession of a prohibited weapon

Contrary to section 4 (3) (a) of the Firearm

Act, Cap 114 of Laws of Kenya.

ACCUSED: Jackson Osiango Ndiangungu

4. **Count No. 4** Being in possession of a prohibited weapon

Contrary to Section 4 (3) (a) of the Firearm

Act, Cap 114 of the Laws of Kenya.

ACCUSED: John Kilo Wafula.

5. **Count No. 5** Being in possession of prohibited weapon

Contrary to Section 4(3) (a) of the Firearm

Act, Cap 114 of the Laws of Kenya.

ACCUSED John Kilo Wafula

6. **Count No. 6** Being in possession of prohibited weapon

Contrary to Section 4(3) (a) of the Firearm

Act, Cap 114 of the Laws of Kenya.

ACCUSED 1. Ibrahim Muhindi

2. Ndovolosio and

3. Jane Mweni.

7. **Count No. 7** Being in possession of prohibited weapon

Contrary to Section 4(3) (a) of the Firearm

Act, Cap 114 of the Laws of Kenya.

ACCUSED 1. Ibrahim Maulidi

2. Ndovolosio and

3. Jane Mweni.

All the 5 accused pleaded not guilty. Upon hearing the case the Honourable Chief Magistrate found the First Accused (now the First Appellant) guilty of the robbery with Violence contrary to section 296 (2) of the Penal Code. The Court found the Second Accused (now Second Appellant) guilty of robbery with violence contrary to Section 296(2) of the Penal Code. The trial Court also found the Third Accused (now the 3rd Appellant) guilty of robbery with violence contrary to Section 292 (2) of the Penal Code. The Court proceeded to convict each of them and sentenced them to death as provided by the Law. The Court acquitted the Fourth and Fifth Accused persons of all counts in the charge sheet.

Being aggrieved each of the first three accused persons filed an appeal respectively. They have subsequently been consolidated and heard by two judges.

In the Judgment, we notice that the learned magistrate recorded that there were two counts of robbery with violence against the accused i.e Count 1 and 2. She proceeded to convict and Sentence the three accused on the purported 2 counts of robbery with violence. However, there is an error in the face of the record that there is no second count of robbery with violence. As shown earlier, the Second Count was against the First Accused and related to section 4(3) of the Firearms Act, Chapter 114. As a result and as a matter of fact, law and principle, we hereby set aside and quash the Conviction and Sentence of the three accused / appellants on the purported count 2. There has been no prejudice to the Accused as this issue did not arise during the trial and came up on record in the Judgment. Such a count did not exist and no evidence tendered. This also does not affect Count No. 1 and the evidence tendered in connection therewith. We have considered the Memorandum of Appeal, the proceedings and the Judgment.

As required of this Court as the first appellate Court guided by the Court of Appeal Case of **OKENO =VRS= REPUBLIC (1972) E.A. 32,** we have reconsidered the evidence, evaluated them ourselves and drawn our own conclusions in deciding this appeal.

The First Appellant has raised the question of identification. He says that on the material night, it was dark and there was no evidence that there was moonlight. Counsel for the First Appellant argued that P.W.1 and P.W. 9 demonstrated that they saw with the assistance of the head lights of the vehicle in which they were. They saw someone stop in front of the vehicle and came towards the vehicle. That the person stopped and ordered them to go to the back of the vehicle. They were told to lie on their bellies. That P.W.1 confirms that the person who staggered in front of the vehicle stayed there for only 30 seconds. That the entire hijack took place for 30 minutes, hence there was no time for identification.

In the proceedings, P.W.1 testified that his driver P.W.9 was driving motor vehicle Reg. No. KAM 813 Nissan Pick- up Hard Body green. P.W.1 was seated with a friend in the front cabin. P.W.2 and P.W.3 were in the rear. At a place called Msalaba, a man emerged from the left side of the vehicle and staggered in front of the vehicle as though he was drunk. He pulled out a rifle which resembled an AK 47 assault rifle. The vehicle was moving slowly. It was about 11 p.m. and doing Eldoret – Kitale road. The man stayed in front of the vehicle for 30 seconds before he moved to the driver and ordered him to step out. Other men / accomplices emerged from the left side of the vehicle. According to P.W.1, one of the men took control of the vehicle at the steering wheel and the vehicle driven for 30 minutes. At Likuyani area, they were ordered out and told to surrender at gun point. They were abandoned in a remote place. The robbers took their belongings and the vehicle. He claims they stole from him a citizen wrist watch serial no. 701498 valued at 12,000, a Casio calculator valued shs 1,500/=, a Motorola mobile phone valued at shs 30,000/=a dark blue jacket valued at shs 500/=, Kshs 30,000/= in cash and the motor vehicle. Also stolen was a Smith and Wesson revolver serial No. AHF 2047 issued to him by the Police together with six rounds of ammunition. He was a police reservist.

He was told to alight from the vehicle and was forced to climb the rear of the pick up and to face down and not to utter a word.

After 30 seconds, somebody called out and asked for the driver of the pick – up. They were unable to start the vehicle. He alighted from the back and saw a heavily built man at the steering wheel. P.W. 1 switched on the ignition light. He switched on the ignition switch and was ordered to return to the back of the vehicle.

P.W.1 identified first Appellant (Accused 1) as the person who drove the pick up during the robbery and also as the person he assisted to start the vehicle. He said that he saw Accused No. 1 with the aid of the cabin light which was on. Accused did not have any spectacle then.

P.W.1 said that the person at the wheel asked for the driver. P.W.1 volunteered to go and assist in starting the vehicle. The person did not disembark and he bent over to allow P.W.1 get into the cabin and switch the vehicle. P.W.1 switched on the cabin light. He saw the face of Accused No.1 who is the First

Appellant.

He recognized the First Accused when he went to the Court. He directed the First Accused to where the ignition switch was and he looked at his face. He spoke to him.

It is our view that P.W.1 had came to close contact with the First Appellant. He looked unto his face as he was showing him the ignition switch. He put on the cabin light and could see the face of the First Accused. He described his large eyes.

To our mind, the conditions were quite favourable to proper identification. There was sufficient light in the cabin. P.W.1 even spoke to the First Appellant when he offered him money to spare their lives. However, P.W.1 did not identify the First Appellant in any identification parade. The next time he saw him was in Court when the case came for trial. The record shows that this was on 20/06/2002 while the Accused took their plea on 29/4/2002. The robbery took place on 30th March 2002. This is therefore about 6 weeks later.

In **KIARIE =VRS= REPUBLIC (1984) KLR 744** the Court of Appeal stated " ***where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a Conviction"***

The Court of Appeal added that an identification of an appellant in Court by the Complainant " ***is almost worthless without an earlier identification parade."***

The Honourable Chief Magistrate was alive to this principle, and the standard of proof required and the case to be taken when dealing with identification. She said at P.8 of the Judgment :-

" ……. **It is not clear at which police station P.W.1 identified Accused 1 in an identification parade and for this reason; I will not give much emphasis on this element of identification of Accused 1 by P.W.1. "**

Having said so, what other evidence did the trial Court consider and take into account in finding the First Accused to be guilty of the charge? We do find that the other evidence and basis for the conviction of the First Appellant was the evidence of P.W.13 and P.W.9.

On a tip – of P.W.13, a police corporal linked Accused 1 to the robbery in question. He was informed by a police informer that some robbers were hiding in a house in Baringo Estate in Eldoret town. He proceeded to the house where he met a lady who introduced herself as the wife of the First Appellant. She confirmed that house was owned by the First Appellant. Several items were recovered from the house including a Seiko 5 wrist watch. P.W.9 identified the watch as that belonging to him. The other evidence was that P.W.9 identified the First Appellant in an identification parade held at Langas Police Station.

P.W.9 who was in the cabin with P.W.1 testified that the person who stopped the vehicle was the First Appellant. He was also the person who drove the vehicle while he was in the back of the pick-up. He said that he saw with aid of the cabin lights. Lastly, he said that he identified the First Appellant in the identification parade.

We have considered the foregoing. We find that in the charge sheet, there is no charge or count relating to any theft of any property or item belonging to P.W.9. The Seiko watch is not one of the items listed as stolen. All the items and property listed belonging to P.W.1 and not P.W.9. The Seiko watch is not listed there. There is no evidence that P.W.9 made a report to the police of the alleged stolen Seiko watch. In the circumstances, it is our view that the trial magistrate misdirected herself when she relied on the purported evidence of recent possession of stolen property. The Seiko watch was not one of the property / items allegedly stolen. The watch which belonged to P.W. 1 and stolen was a Citizen watch and not a Seiko watch. P.W.9 was not a complainant as found by the trial Court. The Complainant was P.W.1 . Another issue is that the First Accused was not found in the house at the time of the search and there was no evidence to prove that it was his house where the watch was found. In any case, the said

watch found is not subject of this case.

This leaves us with the question of the identification parade in which P.W. 9 participated in. This would be the only evidence given by P.W.9 that is of some credibility. We are not satisfied that P.W.9 identified the First Appellant at the scene of the crime. He did not describe the Accused with any certainty. He did not explain how he could see inside the cabin when he was in the back of the car lying and facing down.

We are satisfied that P.W.9 identified the First Accused at the parade held at Langas Police Station. However, it is unsafe to find the First Appellant as guilty of the offence of robbery with violence, when it is doubtful that the witness could have probably seen and identified the accused on the material night.

As a result of the foregoing, we find and hold that the trial Court misdirected itself on the law. We are bound to apply the principles in the KIARIE case that in respect of P.W.1, there was no identification parade from which he identified the First Appellant. For P.W.9, while there was an identification parade, he could not have seen the First Appellant that night properly to enable him identify him.

The prosecution did not prove the charges against the First Appellant beyond any reasonable doubt. We therefore do hereby quash the conviction and set aside the sentence. The First Appellant shall be released from custody forthwith unless otherwise lawfully held.

With regard to the second Appellant who was the Second Accused, the learned trial magistrate found that all the eye witnesses talked of having identified him at the scene of the crime. She said that P.W. 1 said that he saw the Second Accused stand in front of the vehicle for about 30 seconds. That he was holding an A K 47 assault rifle and he is the one who commanded the driver to stop. P.W.1 says that he went to the Police Station later where an identification parade was carried out. There were 4 persons in the parade. P.W.1 was able to identify the Second Accused as the person who appeared before the pick–up holding an A.K. 47 rifle. He said he was able to single out the Second Accused because the headlights of the motor vehicle were on. He said that it is the Second Accused who ordered them not to make a move. He saw him in the headlight for 30 seconds. P.W.2 stated that two weeks after the incident, he was taken to Langas Police Station. He found 8 people in a room. He identified the Second Accused person. He said that he was the one who had a rifle. In cross-examination, P.W.2 said that he did not remember the number of people in the parade. He said that the parade was held at Soy Police Station. This is in contradiction to his earlier statement that the parade was held at Langas Police station.

P.W.9 did not testify that he had identified the Second Accused. However, in cross-examination by the Second accused initially; stated that he was able to identify the 2nd Accused for the first time when he saw him in Court. He said that the Second Accused wore a long Coat and he was thin. That he recognized his facial features. He suddenly shifted his position and stated that he had participated in a parade at Langas Police Station where he had identified and picked the Second Accused.

He said that the parade took place at Langas Police Station, yet the trial Magistrate in the Judgment found that the parade took place at Iten Police Station. She stated that the second Accused was identified by P.W.1, P.W. 2, P.W.9 and one Edward Kiprotich Langat, a victim of the robbery but who did not testify.

It is certain that the trial Court misdirected itself in relying on a statement of the said victim who was not called as a witness. This was hearing evidence after all.

P.W.8, a Police Officer testified that he was the one who found the A-K 47 rifle in the Second Accused's house. He says that the First accused was brought to his office as a suspect in respect of offences of robberies in Eldoret and North Rift generally. That the Second Accused offered to take them to a house in Kamukunji Estate. When they stormed the house, they found the Second Accused in the kitchen eating. They took the Second Accused to the main house when he volunteered and gave them the A-K 47 rifle.

From the evidence, there was no testimony that the A-K 47 recovered was the one which was used in the robbery. While possession is not in doubt, it was the duty of the prosecution for purpose of Court to prove that the said rifle was the one carried by the Second Accused during the robbery.

From all the foregoing, I do find that the trial Magistrate erred in law and fact in convicting the Second Accused of the offence of robbery with violence. The Prosecution case was full of inconsistencies. The Curt reached wrong conclusions and findings on several aspects of the facts. The Prosecution did not prove their case beyond any reasonable doubt.

We therefore do hereby quash the Conviction and set aside the Sentence. The Second Appellant shall be released from custody forthwith unless otherwise lawfully held.

With regard to the Third Appellant, the Honourable trial Magistrate found that the evidence linking him to the charges was mainly circumstantial. That not a single witness spoke of him having participated in a parade where the Third Appellant was a suspect. However, P.W. 1 testified that the Third Appellant was at the scene of the crime. That he was the man who he handed over Kshs 30,000/= in cash.

P.W.1 and P.W.2 identified the Third Appellant in Court for the first time. The trial Court ought to have warned itself of the charge of relying on such evidence unless other evidence was placed before the Court connecting the accused with the offence.

It is our opinion that the Honourable Chief Magistrate convicted the Third Appellant on the basis of his confessions at the Police Station. The Chief Magistrate stated:-

" …….. **According to P.W.13, nothing material to the present case was recovered from the house of Accused 3 at Baringo Estate. Unfortunately for Accused 3, Confessions of an accused at a police station were admissible in evidence when he was arrested on 15th April,2002 so long as the same was not obtained under duress or promise of a reward. The legal position later charged vide Legal Amendment No.5 of 2003 which outlawed such confessions. Accused 3 did not hint to having been tortured nor was he compromised into co-operating with the police. In effect Accused 3 authored his own mistake by revealing involvement in the robbery to the investigators. "**

From the evidence, the Third Accused was arrested in a changaa den. At the station he was interrogated. The police suspected that he could have been involved in robberies in Eldoret and North Rift generally. The Third Appellant confessed that he had a firearm, an A-K 47 rifle. He led them to where it was. It was in the possession of the Second Appellant. He also took the police to his girlfriend's house, where the police recovered a Taurui pistol. It was loaded.

However, after scrutinizing the evidence of P.W.8, P.W.10, P.W.11, P.W.12 and P.W.13, we do not find anywhere where the Third Appellant Confessed to the robbery on the night of 30th March 2002 along Eldoret – Kitale Road. The Third Appellant has been convicted of robbery with violence not on possession of firearm.

What is in Contention is the appeal before us is Count one upon which the Third Appellant was convicted. It is our view that the learned trial Magistrate could possibly have convicted the Third Accused with possession of the firearm as set out in Counts 6 and 7 using his Confessions. However, it was unsafe and irregular for the trial Court to use the evidence of the recovery for the firearms and the association of the Third Accused with the Second Accused to convict him for robbery with violence under Count One. Considering that the Third Accused was arrested for drinking in the first place and not as a suspect for robbery and the police suspected that he could be involved in the spate of robberies in the area generally, the Court ought to have been strict and vigilant to ensure that the alleged Confession was not obtained under coercions, or duress.

Considering the nature of the offence and the sentence, the Court ought to have ensured that the Accused's fundamental rights had not been violated. The trial Court in our view should have referred and recorded the words which the Third Accused used when he made his Confession. No where on record do we find a statement by the said Accused that he was involved in the robbery in question.

The Court should have taken into account that P.W.13 knew the Third Appellant or the police had previously arrested the accused and charged him with another robbery. P.W.13 said that he was

convicted and placed on probation. Due to this, the Court ought to have placed the Confession to strict scrutiny.

It is our view that the Prosecution did not prove that the Third Appellant was involved in commission of the offence of robbery with violence beyond any reasonable doubt. It was unsafe to convict the third Appellant on circumstantial evidence without corroboration that he was involved in the robbery. The Confession was not clearly expressed, certain and irrefutable. No specific words are referred to constituting the Confessions.

As a result, we hereby quash the Conviction and set aside Sentence. The Third Appellant shall be released from custody forthwith unless otherwise lawfully held.

DATED AND DELIVERED ON THIS 21ST DAY OF FEBRUARY, 2008 AT ELDORET.

JUSTICE M.K. IBRAHIM,

JUDGE.

JUSTICE KABURU BAUNI

JUDGE.

21/2/2008

CORAM – M.K. IBRAHIM, J

C/C - CHELANG'A

MR. MIYIENDA for the 1st and 2nd Appellant.

MR. MIIENDA for the Third Appellant

Mr. Chirchir for the State.

ORDER:

Judgment read and signed in their presence.

M.K. IBRAHIM,

JUDGE.
