



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 119 of 2006

ABDI RAHMAN ALLOW OMAR 1ST APPELLANT

ABDILATIF OSMAN alias BAGACHA 2ND APPELLANT

MOHAMED ABDI (alias) KAUNI 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from a judgment of A. Ingutya, SRM Wajir, dated 1st August 2006)

JUDGEMENT

The three appellants were tried jointly in a consolidated charge of robbery with violence contrary to section 296(2) of the Penal Code. According to the charge sheet laid before the trial court, the three appellants, while armed with dangerous and offensive weapon, namely a knife, robbed James Nderitu of Kshs. 1,400/= and or immediately before or immediately after the time of such robbery assaulted the said James Nderitu.

The 2nd appellant faced another count of refusing to have his finger prints taken contrary to section 21(3) of the Police Act. It was alleged that on 6th September, 2005 at Wajir Police Station in Wajir District being in a lawful custody, the 2nd appellant refused to have his finger prints taken by P.C. Mathew Keitany.

To prove these charges the prosecution called nine (9) witnesses. While the 1st appellant gave unsworn statement, the 2nd appellant gave sworn statement and the 3rd appellant elected to remain silent. They called no witnesses.

The trial court was persuaded, after hearing these witnesses and the defence, that the prosecution's case had been proved against the appellants beyond any reasonable doubt and proceeded to convict and sentence them to the mandatory death sentence. All the appellants were aggrieved and promptly preferred three separate appeals which were consolidated into this appeal, raising six identical grounds.

We further condense the grounds and summarize them as follows:-

- (i) that there was no evidence of identification

- (ii) that the prosecution evidence was contradictory
- (iii) that the learned trial magistrate relied on the evidence of a single identifying witness – PW1, when the prevailing conditions were not ideal counsel for the respondent supported both the conviction and sentence, submitting that the appellants were adequately identified and the charge facing the 2nd appellant in count 2 was also proved.
- (iv) that the identification parade was irregularly conducted, and
- (v) that the appellant's defence was not considered

Before considering these grounds and the appeal generally it is our duty as the first appellate court to reevaluate the evidence on record afresh in order to draw our own independent conclusions giving allowance to the fact that we have not seen or heard the witnesses.

It was the evidence of PW1, James Nderitu Thiraka (the complainant) that on the evening in question at around 7.30pm he was enjoying his drink of dry gin at a public called Soweto. The 1st appellant came into the pub, looked around and left. When the complainant left the pub for his home he met the 1st appellant once again along the corridor. The 1st appellant asked the complainant for a cigarette. When the latter offered to him half smoked cigarette the 1st appellant declined demanding for a full one. As the complainant stretched his hand to give him a full cigarette, the 1st appellant grabbed his hand and began to pull him. At this stage the 3rd appellant emerged from a miraa kiosk and joined in the furore. The 2nd appellant also joined in. The 1st appellant slammed the complainant's head on the wall, the 2nd appellant stabbed him with a knife in the stomach, while the 3rd appellant removed Kshs. 1400/= from his (the complainant's) pocket.

The complainant was able to reach the gate to PW4, Peter Kamau Kimindo's house. Peter found the complainant lying down outside the gate holding his stomach. The complainant was rushed to the hospital where he was examined and treated by PW8, Dr. Wahome Karanja (the doctor).

According to the doctor, the complainant suffered soft tissue injuries on the head, chest and a stab wound in the stomach, exposing the small intestines. The appellants were subsequently arrested. PW3 IP Charles Njiru conducted an identification parade in which the complainant was able to pick out the 1st appellant. PW8, PC Mathew Kaitany was in the process of taking the finger prints of the 2nd appellant when the latter resisted. The three appellants were then charged.

In his unsworn defence, the 1st appellant denied committing the offence. Similarly, the 2nd appellant denied any involvement in the commission of the offence. The 3rd appellant did not adduce any evidence in defence.

From the evidence on record, we have no doubt that the complainant was attacked by people who not only inflicted serious injuries on him but also stole from him Kshs. 1,400/=. It is also not in dispute that the attack and robbery took place at night, the estimated time being 7.30pm.

While the complainant maintained that the three appellants were well-known to him prior to the evening in question, the 1st appellant said nothing in this regard and the 2nd appellant was categorical that he did not know the place where the offence is alleged to have been committed, neither did he know his co-accused persons.

The first issue arising from this is that of identification. We note that the complainant was the only identifying witness. We further note that the robbery took place at or after 7.30pm. It is recognized that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In **Kiarie V. R. (1984) KLR 739**, the Court of Appeal said that where the evidence relied on to implicate an accused is entirely of identification, that evidence should be watertight to justify a

conviction. The need for extra care is not reduced even when the evidence is that of recognition for there may be cases when even people who know each other may very well still make mistakes.

In such circumstances, it is the duty of the court, before convicting, to find other evidence to lend assurance as to guilt of the suspect. In the well known case of Abdalla bin Wendo & another V. R. (1953) 20 EACA 166 the court stated this point as follows:-

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error.”

In R. Vs. Turnbull (1976) 3 ALL ER 519 at page 522 Lord Widgery C.J. stated that:-

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In the appeal before us, we have already observed that the robbery was at night. The complainant categorically stated that he was able to recognize the three appellants as they were all known to him prior to the date of the robbery.

Regarding the 1st appellant, the complainant testified that he knew him both by name and appearance. He knew him from their meeting in the estate, town and at the drinking joint. Immediately before the attack, the complainant had seen the 1st appellant enter the bar, surveyed it before leaving.

On his way out, the complainant once again encountered the 1st appellant in the corridor. The latter asked for a cigarette from the complainant, who gave him what he was smoking. The 1st appellant declined the offer and demanded a full cigarette. When the complainant stretched his hand to hand over a full cigarette to him, the 1st appellant grabbed his hand and banged his head on the wall. It is our considered view that these events coupled with the fact that the 1st appellant was known to the complainant, afforded the latter sufficient opportunity to identify the 1st appellant. Besides, he was picked out in an identification parade.

In respect of the 2nd appellant, the complainant testified that while the 1st appellant was engaged with him (the complainant) the 2nd appellant asked if he had given the money. Immediately after asking this question, the 2nd appellant stabbed the complainant with a knife in the stomach. It was further the evidence of the complainant that the 2nd appellant had been known to him for one year. They had met at the drinking place.

The evidence against 3rd appellant was that he emerged from a miraa kiosk as the 1st appellant was pulling the complainant. It is, according to the complainant, the 3rd appellant who removed Kshs. 1,400/= from his pocket. He was similarly known to the complainant.

The complainant maintained that there was moonlight on the night in question. From all the foregoing we come to the conclusion that the three appellants were clearly identified, indeed recognized as the circumstances that prevailed at the time of the attack as well as at the scene of the incident were favourable for positive recognition of the appellants.

Before we leave this point of identification, the 1st appellant argued that the identification parade in which the complainant picked him out was irregularly convened as there were 11 people instead of 9 in it. Apart

from the Police Force Standing Order and the Police Act, there have been a myriad of decisions by the courts regarding the purpose for and the manner of conducting an identification parade. Specifically see ***R. V Mwangi s/o Manaa*** (1936) EACA 29.

Standing Order 6(iv) (d) of the Police Force Standing Order provides as follows:-

“(d) The accused/suspected person will be placed among at least eight persons as far as possible similar in age, height, general appearance and class of life as himself.....” (emphasis ours)

Clearly from the foregoing a parade of eleven persons was not irregular as claimed by the 1st appellant. As a matter of fact, we have already found that he was positively identified. The parade was, in our view, simply to lend credence and support for the visual identification by the complainant. Having come to the conclusion that the appellants were properly identified, we also find that while armed with a knife, a dangerous weapon the three appellants shared a common intent and wounded the complainant. They also robbed him of Kshs. 1,400/=.

The appellants also argued that the evidence of the prosecution witnesses was contradictory in respect of how much money the complainant had at the time of robbery. We note that the complainant stated that he had Kshs. 1,500/=. That after buying a drink for Kshs. 100/= he remained with Kshs. 1,400/= which he alleged was stolen by the appellants. But according to PW2, Lydia Nyambura who sold the drink to the complainant, the latter gave her Kshs. 100/= out of which she gave him a balance of Kshs. 20/=. We find no contradiction in the testimony of the two versions. But it is a contradiction we hold that it is insignificant.

All the 3 appellants have also complained that the learned trial magistrate dismissed their evidence in defence without assigning any reason for doing so. The 3rd appellant did not give evidence in defence, yet he complains that his defence was not considered.

We have looked at the judgment of the court below and note that the defence of the 1st and 2nd appellants were considered albeit very briefly. On our part we find that the prosecution evidence displaced the defence of *alibi* advanced by the 1st and 2nd appellants.

The appellants have raised two other grounds not forming part of the grounds in the Memorandum of Appeal, namely that the language used during the trial is not indicated in the proceedings and further that they were not provided with an interpreter.

Secondly, 2nd appellant complained that he was unlawfully held by the police before being arraigned in court beyond the period allowed by the Constitution. Section 350(1) of the Criminal Procedure Code provides that the appellant can only rely on the grounds of appeal set out in the petition of appeal, unless of course with the leave of the court he can rely on supplementary grounds. However, given the serious nature of the two grounds raised we have decided, nonetheless, to consider them.

Regarding the language used during the trial it is clear to us from the record that the charge was read over to the appellants on 18th October 2005 in Somali language which they understood. The complainant testified in Kiswahili, PW5, PW6, PW7, PW8 and PW9 testified in English, while the language used by PW2, PW3 and PW4 is not indicated. We note, however, that the court clerk is shown throughout the trial as Aisha.

Having read and explained the charge to the appellants in Somali language, it was necessary for the learned trial magistrate to indicate that the testimony of the witnesses were translated to the appellants. The record is silent on this. The importance of proper record keeping in criminal trials was underscored by the Court of Appeal in the case of ***Fredrick Kizito V. R.*** Criminal Appeal No. 170 of 2007 (unreported) in the following words:-

“This and several other cases we have handled before, show the grave danger inherent in the failure

by the trial court to record the essential details in proceedings before it. For instance, the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk and the language or languages of the proceedings; the language used by each witness; that judgment was pronounced; the date thereof and in whose presence, et cetera. These are as important as the evidence and form part of the fair process of justice, the omission of which might affect otherwise sound conviction.”

In the landmark case of **Albanus Muasya Mutua V. R** Cr. Appeal No. 120 of 2004 it was held that since the record of the magistrate did not show the language used by the appellants, there was a violation of the latter’s constitutional rights. It must be remembered that the general principle of law is that as a general rule each case must be considered on the basis of its own peculiar facts and circumstances.

In **Francis Macharia Gichangi & 3 others V. R.** Criminal Appeal No. 11 of 2004 the court expressed the view that whether or not any of the provisions of the constitution have been violated is a question of fact and that the person aggrieved must tender evidence. It further observed that, in this regard, the accused person is under a duty to indicate to the trial court that he is not able to understand the language of the proceedings.

The court concluded that:-

“In an appropriate case where there is no complaint at the trial this court may well infer that there was interpretation where the proceedings show the accused understood the nature of the charge against him and the evidence presented in support thereof notwithstanding absence of a note regarding interpretation.”

In the appeal before us the appellants are not complaining that they did not understand the language used or that there was no interpretation but that the record does not show that there was interpretation. The appellants fully participated in the trial. They cross-examined prosecution witnesses and also gave a clear account in their defence.

By merely perusing the record of the court below, we are unable to say that the appellants did not understand what went on before the trial court for the period of one year when they were tried. The appellants have failed to persuade us that they did not understand the language used during their trial. This ground must fail

Turning to the second point raised by the 2nd appellant, he states that according to the testimony of PW6, he was arrested on 5th September, 2005 and arraigned in court on 18th October 2005. We have confirmed from the record that indeed PW6, I.P James Ochieng Oludhe told the court that he arrested the 2nd appellant on 5th September, 2005.

We have also looked at the original record and noted that the 2nd appellant was brought to court on 8th September 2005, three days later when his plea was deferred. Plea was finally taken on 27th September 2005 at 2pm and case slated for hearing on 18th October 2005. Once again we find no merit in this ground.

For the reasons stated, this appeal fails and is accordingly dismissed.

Dated and delivered at Meru this 7th day of February 2008.

I. LENAOLA

JUDGE

W. OUKO

JUDGE