REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 290 of 2006

(from original conviction in Cr. Case 160 2 of 2004 of Chief Magistrate's Court Makadara *(S. Karani (SRM)*

VINCENT ONZOFU OTUYA……1st APPELLANT

SAID WALIKYA YUSUF……2nd APPELLANT

V E R S U S

REPUBLIC …….. RESPONDENT

J U D G M E N T

This is an appeal filed by Vincent Onzofu Otuya ***(1st Applicant)*** and Saidi Walikya Yusuf ***(2nd Applicant***) arising from Judgment in Criminal Case No.16402 of 2004 where the two appellants were convicted by SRM Makadara Law Courts on a charge of preparing to commit a felony contrary to Section 308 (1) of the Penal Code. A third person who was charged along with them died in custody and the charge against him was withdrawn under Section 87 of the Criminal Procedure Code. The charge was on 18th day of July, 2004 at Eastleigh Estate in Nairobi within the Nairobi area, not being in their places of abode had with them some articles of use in the course of or in connection with robbery, namely two home made Gun pistols and a panga. The appellants denied the charge. It was the evidence of P.W.1 Corporal Elijah Korir who was attached to Pumwani Do's office that on 18/7/04, while at his place of work, at around 4 pm, a fire broke out in Eastleigh Section 3. He was called by CIP Kuja & sent to the scene accompanied by Sergeant Kiraru, APC Charles Etabwa and seven (7) other officers. A house had caught fire and people were trying to put it off. It was at that fire scene that the police officers were told that there were guards grouping somewhere, intending to steal. That Boss ***(whoever that is)*** directed them to go to Kinyago to the alleged house. On reaching that house, P.W.1 says they found three guards who upon seeing them shot at them ***(police***) and the officers returned fire. However the people ran away through a sewer, all the police officers went into the house and found others there - they shot and injured all although one died. Upon searching they recovered a home made pistol, toy pistol and a panga and those inside the house attempted to run away. The recovered items were produced as Ex 1-3. He identified 1st and 2nd accused (***now a appellants***) as the people.

On cross-examination PW1's reply to 2nd accused was that he did not know whose house that was but the accuseds came out of it and each one had one of the exhibits.

On further cross-examination P.W.1 denied a suggestion by the third accused that the

exhibits were recovered from a store and that there was no need for dusting as they had not ran away.

P.W.2 Police Constable Charles Etabwa confirms that they had gone to help put off a fire when they got informed about a group which had gone into a house to plan to steal. They approached the house, the people inside shot at them, they returned fire and killed one and injured others. They made arrests and recovered pistols and panga. He identified 2nd and 3rd accused, but said he didn't see the other accused although they were three. On cross-examination P.W.2 declined to disclose this information saying that would endanger his life and is specific that 3rd accused is the one who had the toy pistol tucked in his front trouser pocket whilst the panga was on the ground. P.W.3 Police Constable Alfred Ruto of Criminal Investigation Department Buruburu was assigned to investigate the matter and says he found the three individuals in the cells, they were injured with bullet wounds. He confirms that the two accuseds whom he identifies in court are the people he charged and he also produced the two pistols and panga.

In his unsworn defence 2nd accused ***(who is now 2nd appellant)*** says he lives in Eastleigh Section 3 and sells samosa, potatoes and ndengu. He found a neighbour's house on fire and assisted in putting out the fire. Shortly a gentleman in a hat and a jacket appeared, 2nd appellant did not know him. They differed in the process of putting out the fire and the man boxed him and 2nd accused (***appellant)*** boxed him twice and the man fell down. The man then got up, removed a gun and civilians started throwing stones at him. The man fired in the air and people ran away and the man shot at 2nd appellant who then lost consciousness and when he woke up, he was at Kenyatta National Hospital, he was charged for an offence he didn't know about nor even committed.

3rd accused (***who is now 1st appellant)*** in his unsworn defence says he lives in Kariobangi and sells shoes. On 18/7/04 he went to his place of work and left at 3.00 pm. He decided to check on two of his customers who lived in Eastleigh Section 3 and owed his boss some money and enroute, he met many people on a lorry who told him houses were being burnt. He met two boys who were running and who told him to go to see for himself. Shortly he heard gun shots behind him and he continued walking fast. Then he heard gun shots ahead and he became confused and took the road going upwards while shouting. He felt a gun shot and fell down he was then placed inside a motor vehicle which had two corpses. He was taken to Kenyatta National Hospital and latter on he was charged with an offence he didn't know and people he did not know.

The learned trial magistrate upon hearing the matter indicated in her judgment that the facts of the case were consistently testified to by P.W 1, PW2 and PW3. According to her assessment, PW3's evidence corroborated that of P.W.1 and PW2.

The learned trial magistrate then stated this in arriving at a conviction:-

"***Having evaluated the prosecution and defence evidence on record….. I must state I found the prosecution witnesses to be extremely confident, consistent and in my very reasoned opinion, truthful witnesses. I do appreciate there were slight inconsistencies in the prosecution case, however to my mind, I do not consider them fatal – for instance the exact recovery part of the exhibits whether on the floor or order of arrangement of the exhibits.***

Given the offence was committed over one year ago, the human memory is susceptible to lapse on small details hence my not considering the fact that PW1 may have said the weapons were recovered on the body of 1st accused, while P.W.2 said it was on the floor, to be fatal contradictions."

The learned trial magistrate took note of the appellants defence that the weapons were planted on them, saying the same was not plausible as the accuseds were not known to the prosecution witnesses, therefore the issue of sending a scare or vendetta by planting the weapons on them did not arise, observing that P.W.2 on cross-examination had stated that their initial mission was to put out the fire not to look for thieves therefore there was no possibility of them having any of the exhibits on themselves with which to fabricate or plant on the accused persons. The learned trial magistrate also observed that 2nd accused in his defence never stated what made him to differ with the stranger as they put out the fire and that the lack of these "details/particulars of issues….is because his defence is mere fabrication which has no specifics to it and I find 2nd accused simply not believable.

The learned trial magistrate in her judgment described the 3rd accused's defence ***(1st appellant***) as wanting in that, he alleged to have been shot at for no apparent reason and that if indeed he was a victim of stray bullets, one would expect him to have sustained one gun shot wound and not three – so that what he was saying was inconsistent with stray bullets and she was inclined to believe the prosecution evidence that the accused persons were shot in self defence by P.W.2 as they tried to grab his gun from him.

The learned trial magistrate took note of the fact that the prosecution witnesses did not verify whether the house where the accuseds were arrested was their residential house to qualify the offence but said that this oversight was corrected by the action of the suspects who fled from the scene of crime while shooting at the prosecution witnesses and the fact that a home made pistol, a plastic toy pistol were found with the accuseds and says that the possession of the said weapons were met with good intent or for self defence. She also takes note that P.W.1 and P.W.2 were told by civilians that a group of youths were preparing to go to steal – which qualified the offence charged.

The 1st appellant in his petition of appeal states that-

(1) ***The learned trial magistrate relied upon the evidence of P.W. 2 which had a lot of contradiction and discrepancies hence was unsafe to sustain a conviction.***

(2) ***That the learned trial magistrate erred in law and fact in basing her verdict in inadequate evidence and poor investigation on the key witness (****7th owner of the house****) was not availed in court to testify on the alleged recovered exhibits.***

(3) ***That the case in question was not proved beyond any reasonable doubt and even his mitigation was not considered. That the sentence of 6 years imprisonment imposed was too harsh and excessive.***

The 2nd appellant had further grounds of appeal state that-

(1) The learned trial magistrate erred in law by admitting the evidence of prosecution witness which were inconsistent and irrelevant in that the presence of an unexplained toy pistol would not be the standard of proof of guilt.

(2) That the evidence of P.W. 1 and P.W.2 was pressing inconsistent and uncorroborated to be relied upon for the inference of the commission of the offence. That his prosecution was orchestrated by the police officer (P.W.1 and P.W.2) who were compelled by personal vendetta to make him suffer irreparably to the detriment of his family.

The appellants in their oral address to the court had some written form of submissions wherein 1st appellant granted out that the evidence adduced in court by both P.W. 1, P.W.2 and P.W. 3 2 was contradicting in that P.W. 1 told the trial magistrate that on 18/7/04 he was at Eastleigh

Section 3 and that is the date he encountered the appellants, and later on P.W.2 in his evidence in chief gives the date as 18/8/2004 and then P.W.3 told the trial court that it was on 17/7/04 when the incident took place. So the appellant submits that the three prosecution witnesses gave different dates and he wonders who among them might be telling the truth. To this the learned trial magistrate said the inconsistency were minor and that the human memory is susceptible to lapse on small details – yet the learned State Counsel concedes that there are several considerations especially with regard to the date of the offence but that these are minor and do not dent the prosecution case. But then doesn't this go to the credibility of the prosecution witness? Just who between P.W.1 and P.W.2 was at the scene and when did the incident take place bearing in mind that the contradiction is not just on the date but even the months. None of the prosecution witnesses suggested in their evidence either in chief or in cross-examination that they had a problem with remembering the dates so why did the learned trial magistrate take it upon herself to decide that the contradictions were due to memory lapse. Certainly the contradictions in the dates was not adequately resolved by the learned trial magistrate. 1st Appellant further pointed out that no recovery form was produced at the trial – P.W.1 and P.W.2 both stated in cross-examination that they had no duty to require the appellants to sign any record to confirm recovery and there is in fact nothing led in evidence to suggest that such omission would be fatal – that ground has no leg on which to stand. 2nd appellant pointed out in his further supplementary grounds of appeal that there is contradiction also in evidence of P.W.1 and P.W.2 in that whereas P.W. 1 says they were shot at by three guards who ran away whilst P.W.2 says that as they reached the house they heard a bullet shot at them – I don't think that contradiction affects the material particulars of the charge the appellants are facing – which is preparation to commit a felony contrary to section 308 (1) of the Penal Code and that section provides as follows:-

"***Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony, is guilty of a felony, and is liable to imprisonment…."*** I think the two main ingredients are being armed with an offensive or dangerous weapon and the circumstances thereto must indicate the intention.

The 2nd appellant takes issue with this saying P.W.1 said he found a home-made pistol and a panga as they attempted to ran away whilst P.W.2 said "***we told them to lie flat, we searched and recovered two long pistols and a panga."*** It is this contradiction which the learned trial magistrate attributed human memory lapse without solicitation from any source. The learned State Counsel Miss Gateru did not address her submissions on this ground so as to reconcile the contradictions – she simply made reference to one version of recovery.

As to the failure to establish the owner of the house or call the owner as a witness, the learned State Counsel submitted the recovery by itself proved the charges. Was it fatal not to call or establish who the owner of the house was. The learned trial magistrate had expressed views on that omission but found answer in that the conduct of the appellant running away and the recovery of the weapons supported the commission of the offence. I take note that in their cross-examination and even in their defences, the two appellants never raised the question of who the owner of the house was and so that omission did not have any fatal bearing to the outcome of the case. There is also the allegation by both appellants that the recovered weapons were actually planted on them by the two police officers who were out to fix them on personal vendetta. The learned trial magistrate had correctly observed that the two police officers had gone to answer a distress call and help put out a fire and were not "***out on a limp"*** as it were to have armed with weapons to plant on the appellant. I can't fault that reasoning. ***But*** quite apart from that, there is nothing offered by the two appellants in evidence to lay a basis for personal vendetta or indeed suggest that the police officers held a grudge against the appellants – that limb of the appeal has no ground upon which to stand. So that this appeal really hinges on two features-

(a) The contradictions on the dates when the offence occurred.

(b) The actual recovery of the weapons.

Were these contradictions so significant as to be fatal or were they minor and therefore no consequential effect. It has become impossible to reconcile these major contradictions or even to justify them and thus be able to know who between the three police officers is telling the truth. More so because the attempted justification by the learned trial magistrate was not based on any suggestion by the prosecution witnesses but purely on her own invocation of memory lapse. Consequently as a result of these irreconcilable contradictions I must allow the appeals by the two appellants and quash the convictions and set aside the sentences meted out by the trial court. Each of the appellants shall forthwith be set at liberty, unless otherwise lawfully held.

Dated and delivered at Nairobi this 3rd day of March, 2008.

H.A. OMONDI

JUDGE.