



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 166 of 2004

VITALIS OBONYO ONYANGOAPPELLATE

VERSUS

REPUBLICRESPONDENT

**(FROM ORIGINAL CONVICTION AND SENTENCE IN KISUMU CHIEF MAGISTRATE'S
COURT IN CRIMINAL CASE NO.756 OF 2004**

Coram:

Mwera, Karanja JJ

Mutai for State

Appellant in person

C/c Raymond/Laban interpreters Swahili/English/Luo

J U D G E M E N T

The present appellant was accused 1 in the lower court at Kisumu, where he was charged with another under section 296(2) Penal Code in that on 5th November 2002 at Bandani along Kisumu-Busia Road, with others not before court, while armed with dangerous weapons namely pistols and knives they jointly robbed Geoffrey Ng'ang'a Mbutia of a motor vehicle registration No.KAP 853X TOYOTA HIACE, cash shs.1,700 plus other valuables all worth shs.1,201,700/=, and during the jobbery they threatened to use violence on the said Mbutia.

After trial the lower court acquitted the appellant's co-accused but went on to convict and sentence him to suffer death as laid down by the law-hence this appeal.

The grounds of appeal are that the appellant's identification was not positive and yet no identification parade was conducted. Further, that the circumstances of his arrest could not be linked to the alleged robbery.

At the hearing of this appeal, the appellant filed what he called "written submissions". He highlighted their contents to the effect that the lower court judgment did not accord with the evidence. We were told that while Mbuthia (PW1) said that he was attacked from his driver's side of the subject motor vehicle, he had in fact looked in the direction of the passenger's side. Then his attacker forced him to face down, as a result of which he, PW1, could not identify the attacker. Then the robbers fled in the motor vehicle. Coming to the conductor of that motor vehicle, one Wainaina (PW2), the appellant told us that PW2 only heard the words "push over" from the driver's (PW1) side and if anything he could only see the appellant from the rear. Thus he, too, could not identify the appellant either. The appellant went on to tell us that Tom Onyango (PW3), a passenger, who was seated behind the driver (PW1) could not well identify the appellant; That all he was capable of was to identify the appellant's co-accused on an identification parade, and in any event that co-accused was acquitted. Further that none of these 3 witnesses gave a physical description of the appellant to the police.

As for his arrest, we were told that the appellant was found some distance from where the subject motor vehicle had rolled and was abandoned. He had been at a building site working in the hot sun without his shirt on. When he went to buy chang'aa that is when he was arrested on suspicion of having been one of the robbers. He had nothing to do with the alleged robbery. The red shirt found near the motor vehicle was not his and the police tracking dogs did not catch him. The appellant added that the recovered red shirt had bloodstains but they were not examined and matched with his blood group at all.

The Senior Provincial State Counsel, Mr. Musau had a different view. He submitted that PW1 was robbed of his motor vehicle in broad daylight and he with his conductor (PW2), identified the appellant as one of the robbers. The arrest of the appellant followed soon thereafter; he was brought to the police station where the witnesses were recording their statements and they identified him. That the appellant was arrested, bare-chested, a few meters from where the stolen motor vehicle had rolled. The T-shirt at the scene had bloodstains and a police dog picked that scent which led to the arrest of the appellant. Thus there was no need for an identification parade. Further, that the lower court went over the defence and in its appellate capacity, this court will do likewise. Mr. Musau's position was that this appeal be dismissed. With all the foregoing, we now turn to the evidence before the lower court.

Geoffrey Ng'ang'a Mbuthia (PW1) was driving the matatu stated above along Kisumu-Bondo road. On the material day at about 11 a.m., he got to a place called Riat and a prospective passenger flagged him down. PW1 stopped and looked in the direction of the passengers' entry as his conductor opened the door. Then somebody got to his (PW1's) side of the matatu, with a gun in hand and ordered him to move over to the passenger's side. The passenger next to PW1 jumped out of the motor vehicle. The prospective passenger ordered the conductor to open the doors. Passengers in the vehicle ran out screaming. The two robbers sat on each side of PW1. The "passenger" with the gun could not drive the motor vehicle. His mate changed over to do so. As that took place, PW1 jumped out of the motor vehicle. The two robbers drove off. Another motorist drove along. PW1 and his conductor explained their plight. The motorist took the conductor, seemingly to go and report the incident. PW1 was left at the scene. When PW1 went to report the matter at a roadblock near Maseno, the police officers there had already been notified. He went to report at Kisumu Police Station. PW1 said that on the same day in the evening the appellant had been arrested and brought to the Police station. PW1 identified him there as the robber with a gun whom he had directly and clearly seen and talked to during the robbery.

In cross-examination PW1 maintained that the robbery took place at about 11 a.m. As the robber (appellant) confronted him, PW1 had not initially seen the gun. He was not alarmed until he saw it. He had not at that time looked in the direction of the door where his conductor was being confronted by the "prospective" passenger. PW1 called this passenger, the appellant's accomplice. The witness was not

present when the appellant was arrested. But on his arrest he was brought to the police station where PW1 was and he identified him. He had been robbed of his money as he put his head under the seat, but after he had already seen the appellant.

The conductor with PW1 was Patrick Wainaina (PW2). When they were stopped near Riat, he instructed their would-be-passenger to sit where PW1 was with one other passenger. Then another person appeared on the driver's (PW1) side and loudly ordered him "Songa" (move over). The passenger who had been sitting with PW1 then jumped out of the motor vehicle, screaming. PW2 opened the passenger door. They too ran out of the motor vehicle screaming. PW2 went behind the matatu but he had noticed the two robbers had sandwiched his driver (PW1). One thug got out, went round to the driver's side and they drove off. A KEMRI motor vehicle came along, took PW2 in and they gave chase. The robbers took a side road and disappeared. Police officers then came to inform PW2 that they had recovered the matatu but the robbers had fled. A police dog was brought and tracking started. Later the police came with a suspect at the police station. PW2 had seen the appellant. The motor vehicle was towed to the police station.

In cross-examination, PW2 told the learned trial magistrate that he had seen the appellant running to PW2's side, ordering him loudly to move over. It was at 11. a.m. and PW2, had seen him well. When the appellant first got behind the driving wheel, PW2 was still in the motor vehicle and he saw it all. He only jumped out after the accomplice got into the place where the passenger who had been sitting with the driver, jumped out. The appellant was unable to drive off the motor vehicle and so his accomplice came round and took over.

Tom Otieno Onyango (PW3) was among the passengers who were travelling in PW1's matatu on the material day. At Riat it stopped to take on more passengers. At that time two people came to the vehicle – one on one side, and the other armed with a gun ran to the driver's side ordering him to move over. Passengers started screaming. PW2 jumped out of the window and opened the door. All the passengers including PW3 who sat on the right of the matatu, jumped out and stood a distance away and shouted for help. The robbers drove the matatu off. A motorist drove along. He took PW2 in and they drove after the matatu. PW3 took a matatu to a place called Kisian. There at a roadblock, he with another passenger, reported the incident to the officers. They referred him to Kisumu Police Station. He wrote his statement there. On 25th November 2002, some 20 days after the incident, PW3 took part in an identification parade. He identified the appellant as the man who had the gun. He had seen him from the second seat he had occupied behind PW1. However, the other evidence below shows that this witness in fact identified the appellant's co-accused who was acquitted.

Robert Gitau (PW4) was the owner of the matatu that was hijacked. He produced its logbook.

P.C. Wanjala Wanyonyi (PW5), while on patrol duties on 5/11/02 got a report at about 11 a.m. that a matatu had been hijacked near Riat. With his crew, PW5 went to the scene of the robbery and were given the direction the motor vehicle had gone. Near a nearby hill, the matatu had rolled but its engine was still running. There were no occupants. Police dogs were brought but they could not do much, some 20 meters away.

Then a blood-stained red T-shirt was recovered by PW5. The motor vehicle was towed to the police station. There they found a suspect who had been arrested. He had been found without a shirt. It was the appellant; he was charged. A few days later the other suspect was arrested and the two were charged together. The other suspect attended an identification parade. PW5 told the learned trial magistrate that the T-shirt had bloodstains which had "since died." The witness produced the exhibits involved.

According to PW5 identification parades were conducted on 25h November 2002 and some witnesses picked out the appellant. Those witnesses had seen the appellant when he was brought to the police station where they were recording statements on the same date of the robbery. The witness added that he found the appellant at the police station without a shirt. He added:

"The witnesses said (that) they had seen you in the T-shirt; you also had injuries that confirmed

the bloodstains on the shirt were yours.”

P.C. George Adagala PW6 (not 5 as per the record) took the photographs of the subject matatu which he produced.

P.C. Otieno Obonyo PW7 (recorded as PW6) was the dog handler who reported at the scene at 11.30 a.m. following the robbery of 5th November 2002. They headed to Nyahera Hills and found an abandoned motor vehicle. The tracking started. They recovered a red T-shirt with bloodstains. They took it and went a few meters to the main road. The dog got the scent (or track) and it led PW7 and his team to a man with bare-chest. The man on seeing the police ran into a group of people. But the police got to him and had him arrested. He was the appellant who was then escorted to Kisumu Police Station.

In cross-examination, PW7 told the appellant that the stolen motor vehicle had no occupant when they got to it. The red bloodstained T-shirt lay some 100 meters from the motor vehicle. And that the appellant answered that he was from a nearby village. The motor vehicle lay some 600 meters from the main road.

I/P Samuel Aboside PW7 (read PW8) conducted an identification parade on 5th November 2002 with Tom Otieno Onyango (PW3) as the witness. He picked out Joseph Owino Nyam Olo accused 2 who was acquitted. He produced the parade form.

When the appellant was called upon to put up his defence, he gave an unsworn statement, that on the material day, his in-law (?) died and they were building a hut for her. He was sent to buy changaa from a nearby home and that is when police appeared in a land rover and called him to where they were. They found in his bag chang'aa, ordered him into the motor vehicle and later charged him with the present offence he knew nothing about. Before the learned trial magistrate, the appellant wore the same clothes he was arrested in, save that he lost one slipper at the police station.

After all the above, the learned trial magistrate wrote and delivered a judgment subject of this appeal.

On identification of the appellant the learned trial magistrate relied on, without specifying, the evidence of two witnesses who saw the appellant with injuries but without the blood stained T-shirt. The stolen motor vehicle was recovered without any occupants.

In our view the appellant was identified at the scene by PW1 and 2 – the matatu driver and his conductor respectively. The lower court did not rely on PW3 to convict, and we think rightly so. PW3 had identified the co-accused on the identification parade I.P. Aboside conducted. The incident took place during broad daylight and PW1 said that it was the appellant who appeared by his window, pointing a gun at him and ordering him to move over. It was a close encounter and PW1 was firm that he saw the appellant well before he noticed the gun and was forced to put his head under the seat. On his part PW2 who sat some 2 seats near PW1, opened the matatu door for the appellant's accomplice who got in the cabin. At that point, the appellant pointing a gun at PW1, shouted that he move over. PW2 looked in that direction and saw the appellant. The passenger who was sitting with PW1 sensed danger and jumped out of the matatu, screaming. Other passengers screamed and pW2 opened the door to let them out. The appellant was unable to drive the motor vehicle and so his mate ran round to do so. PW1 had that chance to jump off. The matatu was driven off by the 2 thugs. It was driven into the hills where it over-turned.

Although PW1 and 2 do not say whether the appellant was brought to the police station later on the material day wearing anything or not, or whether he had injuries, they nonetheless maintained that they identified him at the police station. According to PW2, the appellant was apprehended when a police dog followed his scent. None of PW1 and 2 spoke of the recovered red T-shirt with bloodstains. They were not at the point it was recovered and it was apparently not shown to them.

P. C. Abonyo (PW7) was the police dog handler who travelled to the scene where the stolen matatu had rolled and lay abandoned some 600 meters from the main road. The team recovered the blood stained red T-shirt, 100 meters from the motor vehicle. The witness took the dog with the stained shirt a few

meters from the road and the dog “got the track” and led the police to the bare-breasted man there. The man tried to run into the group thereabout, but he was ordered to stop. It was the appellant who was the man. He was arrested and taken to Kisumu Police Station. Being asked at the scene where he was from, the appellant answered that he was from a nearby village. Again PW7 does not allude to any injuries on the appellant. He was the dog handler and that was his evidence.

P. C. Wanyonyi’s (PW5) story appears to be that P. C. Abonyo brought the police dog to the scene where the motor vehicle had rolled. It could not do much some 20 meters away. The red T-shirt was recovered from the scene. When PW5 got back to the police station, a suspect without a shirt had already been arrested. Although the witness does not say whether he was present when PW7’s dog got the scent from the blood-stained T-shirt, thereby leading the team to the appellant, that direct information comes from PW7, the dog handler himself. But PW5 said, as PW1 and 2 did, that the last two identified the appellant at the police station later on the material day. It appears that the arrest was not made in the presence of PW5:

“I found you at the police station without a shirt.”

But it is only this witness who said that the appellant had injuries. To him they were the source of blood on the T-shirt. Although the appellant’s blood group was not examined to see if it matched the stains on the T-shirt and even if the lower court did not get that far in its judgment, we are of the view that by the scent the dog picked from the stained T-shirt, it led the police team to a nearby main road where the appellant, shirtless, was tracked down even as he made to disappear in the group there. This happened on the same day and as nearly as possible to the time the robbery took place and was reported.

The appellant in cross-examining PW7, the police dog handler, was recorded to have said that he came from a nearby village.

As we have noted above it appears to us that even as PW5 (P.C. Wanyonyi) first got to the scene before PW7 (P.C. Abonyo) arrived with a police dog to commence tracking, PW5 seems not to have been present at the time of the actual arrest which PW7’s dog facilitated. Having said so we turn to his defence. The appellant told the lower court, and repeated before us that he was found bare-chested because he had been carrying out some building work nearby. He was then sent to buy chan’gaa and that is when police arrived to arrest him – with the chang’aa, an illicit brew. We thought this was an after-thought because the appellant did not raise this chang’aa thing in any part of cross-examination especially when PW7 handled the dog that tracked him down and he was arrested. It could have been worthwhile to challenge PW7 that he was arrested for possessing chang’aa if indeed that was true. We think that was not so and the appellant was arrested with the help of the police dog not too long after he with others, robbed PW1 of the matatu on the material day. His arrest was not far from where the robbers had abandoned the matatu after it rolled.

Perhaps it could sound as if the appellant would be being asked to prove his innocence, which should never be the position in any criminal trial, but could it have been too much for the appellant at the time of his arrest or later in his trial to get one of the people he was building a hut with, if indeed he was so engaged on that day, to bring his shirt to the police or the court and produce it? He was facing a very serious charge. Well. It was incumbent on the prosecution to prove its case before the lower court and from the evidence we have reviewed, we think it did just that.

In the end result we dismiss this appeal.

Judgment accordingly

Delivered on 22nd April 2008.

J. W. MWERA

J U D G E

J. R. KARANJA

J U D G E

JWM/mk.