



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

CRIMINAL APPEAL 479 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 8478 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Muchira – SRM))

SYRIACUS ONYANGO OPERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

480 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 8478 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Muchira – SRM))

SELETSE OTURI LINYONYIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(From original conviction(s) and Sentence(s) in Criminal Case No. 8478 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Muchira – SRM))

RAMADHAN JUMA ABDALLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appeals filed by **SYRIACUS ONYANGO OPERA**, hereinafter referred to as the 1st Appellant,

SELETSE OTURI LINYONYI, 2nd Appellant and **RAMADHAN JUMA ABDALLA**, 3rd Appellant are consolidated for purposes of this appeal since they arise out of the same trial. All three Appellants were convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** which they faced jointly and sentenced to death as by law prescribed. They now challenge their convictions and sentences in this court.

The Appellants raise several grounds of appeal which largely revolve around the evidence of identification, issues of corroboration, the defectiveness of the charge, common intention and finally the manner in which the Appellants' defences were handled.

The facts of the case were that the Complainant, PW1, had been employed by PW2 to drive his taxi registration No. KYY 116, Mitsubishi. On the 16th November 2003, at 10.00 p.m. at Kangemi, he was approached by the 3rd Appellant to drive him to Kangemi. Gichaga, the Complainant charged him Kshs.100/- for the hire. When the two approached Kangemi, Gichaga with 3rd Appellant seated at the back seat, the Complainant was ordered to stop. When he turned back, the 3rd Appellant hit him with a pistol. Due to shock, the Complainant released the vehicle and the engine went off. That is where three men emerged from the fence and started hitting the windscreen before entering the vehicle, two to the front seat and one behind. The 1st Appellant had a sword which he gave to the 2nd Appellant. The Complainant was pushed to the back seat between the 2nd and 3rd Appellant while 1st Appellant took over the driving of the vehicle and the 4th man sat as co-driver. After driving for some time, the Complainant and the Appellant met with a police vehicle. The 3rd Appellant ordered the 1st Appellant to block it but he refused saying it was a Government vehicle. The Government vehicle turned back and followed them before firing gun shots at it. That is when the 1st Appellant drove at a speed, lost control and hit a nearby kiosk. The Complainant and the Appellants were arrested while the fourth accomplice escaped. In the vehicle, police recovered the identity card in the names of the 1st Appellant and a voters card in the names of the 3rd Appellant. The Somali sword and a toy pistol were also recovered.

The 2nd Appellant in his defence stated that he was walking along the road at the time when a vehicle hit a kiosk. It was followed closely by a police vehicle who alighted and ordered all people to lie down. He was arrested and charged for the offence.

The 1st Appellant on his part stated that he was walking along the road when a vehicle overturned. That he ran to help the passengers of the motor vehicle but was arrested in that process.

The 3rd Appellant on his part said he was a passenger and a victim of the hijacking of the vehicle just as much as the driver Complainant was.

We have analysed and evaluated afresh the entire evidence adduced before the lower court while bearing in mind that we neither saw nor heard any of the witnesses and giving the due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**.

The 2nd Appellant in this case was represented by **Mr. Obuo** advocate while the 1st and 3rd Appellants acted in person. The State was represented by **Mrs. Kagiri**, learned State Counsel, who also opposed the three appeals.

On the first issue of identification, **Mr. Obuo** for 2nd Appellant submitted that since no evidence was led to show whether inside the vehicle there were lights and if so what their intensity was, the identification of the Appellant as one of the robbers was not safe.

The 1st Appellant in his written submission challenged the legality of the conviction on the basis of visual identification and the mode of arrest. It was his contention that the learned trial magistrate did not intricately examine the evidence adduced before arriving at a conviction. The 1st Appellant contented that nowhere did the Complainant mention any lights existing at the spot where it was alleged he boarded

the taxi and took over the driving of the vehicle neither did the Complainant talk of any lights.

The 1st Appellant urged court to find that the Complainant at no time had a chance to glance at the person who drove the vehicle and therefore reject his evidence of identification.

The 3rd Appellant on his part in his written submission stated that the issue of identity on his part did not exist and that the finding of guilty against him on that ground was an error.

Mrs. Kagiri submitted that the evidence of the Complainant, PW1 and one of the arresting officers who testified, PW3 was clear that all the three Appellants were arrested while still seated in the car. Learned Counsel submitted that in the circumstances the issue of identification did not arise.

In the learned trial magistrate's judgment at page J4 she observed: -

“From the time PW3's motor vehicle gave chase, PW3 and PW1 consistently without valiance tell the court that the former never lost sight of the carjacked motor vehicle KYY 116. the same lost control and knocked a roadside kiosk. Before the occupants had time to take off, PW3 and his reinforcement were onto them... in the motor vehicle. None of the 3 according to PW1 left the motor vehicle after they entered...”

The circumstances of this case makes the identification of the 1st and 2nd Appellant to be in issue. The 3rd Appellant did not deny that he was in the Complainant's vehicle at the time of his arrest. The 1st and 3rd Appellant deny having been inside the said vehicle and each claimed they were pedestrians going about their own business, when a vehicle crushed into a kiosk and police who were following it arrested every person in sight. There is no doubt that both the 1st and 2nd Appellant were at the locus in quo of the scene where the Complainant's hijacked vehicle crushed into a kiosk.

We agree with the Appellants that no evidence was adduced concerning the lighting conditions both within and without the motor vehicle. In the circumstances apart from the 3rd Appellant who hired the Complainant in the first place and later had a prolonged discussion with him both at the time they were alone and later after the hijackers entered the vehicle, the Complainant did not have a clear chance to see the hijackers sufficiently to identify them.

The evidence before the court was that the vehicle crushed into a kiosk and stopped. PW3, the only arresting officer to testify in this case said that he and his colleagues surrounded the motor vehicle. He stated thus: -

“We fired in the air. The motor vehicle lost control however, and it hit a kiosk by the road side. The car stopped. We surrounded the occupants. We arrested 4 and one escaped before we could arrest...”

The Complainant corroborated PW3's evidence when he said that except for one who had a long gun who escaped, the other occupants were arrested still seated inside the vehicle. It is therefore clear that no one was arrested outside the Complainant's motor vehicle and that the 1st and 2nd Appellant's defence to that effect was exaggerated.

There was other evidence which added credence to the evidence of the Complainant and PW3. The recovery of the identity card bearing the name of the 1st Appellant inside the Complainant's vehicle. As for the 2nd Appellant, it was the Complainant's evidence that he sat next to him throughout the period he was hijacked and that the 2nd Appellant was still seated next to him at the time of his arrest. PW3 also said he knew the 2nd Appellant before and that he was the person he personally arrested from the Complainant's vehicle.

We are satisfied from the evidence of the prosecution by the Complainant and PW3, that the

Appellants were seated inside the vehicle and that they had not had any chance to leave by the time they were arrested. Even though the Complainant may not have been able to identify the 1st and 2nd Appellants had they escaped, given the fact that they were arrested inside the Complainant's vehicle, then the issue of their identity did not arise as the evidence adduced against them was watertight.

The 2nd Appellant's advocate raised issue with the fact that only one arresting officer was called as a witness. **Mrs. Kagiri** did not think there was any need for other evidence being called to support that of PW3.

The evidence of arrest given before the lower court is that of PW3. It was substantially corroborated by the Complainant's evidence who was present all the time during the arrests of the Appellants. In the case of **BUKENYA vs. REPUBLIC 1972 EA 549, LUTTA, JA** as he then was, held that where the prosecution fails to call a witness and it transpires that the evidence in support of the charge against the accused concerned is barely adequate, the court trying the case is perfectly entitled to draw an adverse inference that had the witness testified, his evidence would have tended to be adverse to the prosecution case. We cannot possibly hold that the evidence regarding the Appellants' arrest was barely adequate. The Complainant sat with the 2nd and 3rd Appellants just before the arrests. PW3 arrested the 2nd Appellant personally while the identity card of the 1st Appellant was recovered inside the motor vehicle. The 3rd Appellant does not deny being inside the Complainant's vehicle during this incident. In the circumstances, the evidence adduced by the prosecution regarding the Appellants' arrest was quite adequate and this ground of appeal fails.

Mr. Obuo also raised issue with the prosecution evidence that if police officers surrounded the Complainant's vehicle how come one escaped. The evidence of the escape of one of the accomplices to this offence was mentioned rather casually and neither PW3 nor the Complainant were put to task to explain the circumstances of the escape. PW3 however did state that the man escaped before the police could arrest him. PW3 also described seeing attempts by occupants of the Complainant's vehicle to open the vehicle doors as the vehicle was in motion just before the police started firing at them. The vehicle was then surrounded and all occupants ordered to step out and lie down. It must be at that point that the fourth accomplice escaped. We do not think that in the ensuing melee any suspicions or doubts should be raised concerning the escape of one of the accomplices especially in light of the evidence that the rest of the Appellants were arrested as soon after stepping out of the vehicle.

There was issue with the manner in which the learned trial magistrate handled the defence case. Without going into much detail, we agree that the learned trial magistrate shifted the burden against the Appellants when she commenced that the defence did not rebut the prosecution case and that the Appellants did not call evidence to corroborate theirs. That was a misdirection on the trial magistrate's part. The learned trial magistrate did however consider each of the Appellant's defences before rejecting them. In our own evaluation of the evidence before the court we are satisfied that no prejudice was suffered by the Appellants due to the said misdirection as the evidence of the prosecution against them was watertight.

There were other issues raised concerning lack of qualification by the police officers who conducted the prosecution. That was however a non-issue since from the record the police officer who conducted the prosecution's case was qualified to do so being a Police Inspector.

The 3rd Appellant's defence was that he was a victim of the carjacking just like the Complainant in the case was. We have considered in detail the evidence adduced by the Complainant and have no doubt that the 3rd Appellant acted in concert with the 1st and 2nd Appellant and the escaped accomplice.

The Complainant's evidence was that it was the 3rd Appellant who managed the entire episode because he ordered him to stop right at the spot where his accomplices were waiting. At the time he ordered him to stop, the 3rd Appellant was armed with what the Complainant thought then was a pistol. It turned out to be a toy pistol and was also recovered by the police from the vehicle and produced in evidence. After his accomplices entered the Complainant's vehicle, the 3rd Appellant demanded to know

how much money the Complainant had. He then stole the Kshs.100/- the Complainant said he had. During the time that the 1st Appellant was driving the Complainant's vehicle, the Complainant said that the 3rd Appellant kept giving him orders and that just before the arrest the 3rd Appellant had commanded him to block the oncoming GK vehicle unaware it was carrying the police who eventually arrested them. The 3rd Appellant was actively involved in the car jacking incident and clearly from his role, he had one common intention with his accomplices, which was to rob the Complainant of his vehicle.

We find that the three Appellants in this case acted in concert and stole the Complainant's vehicle and cash Kshs.100/- from him on the material day. The charge was not defective as the 3rd Appellant stated in his submission. The robbery was complete the moment the 1st Appellant took over the driving of the vehicle. We find that the conviction entered by the learned trial magistrate in this case was safe. We find no merit in these appeals and we dismiss them accordingly. We uphold the convictions and confirm the sentences.

Dated at Nairobi this 8th day of March 2007.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants present

Mr. Obuo for the 2nd Appellant

Mrs. Kagiri for the Respondent

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE