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

Criminal Appeal 1034 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 5215 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – SPM)

ALOISE ONYANGO ODHIAMBO...………....................................……..……..…..APPELLANT

VERSUS

REPUBLIC…………………....................................……………………………..…....RESPONDENT

J U D G M E N T

ALOISE ONYANGO ODHIAMBO was convicted on three counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. He was sentenced to death as by law prescribed. He has lodged this appeal challenging both his conviction and sentence.

The brief facts of the prosecution case were that the three Complainants in the case, PW1, PW3 and another one **VIOLET ASANDO** not called as a witness were traveling in a public service vehicle, registration number KAP 264X driven by PW2. They were traveling from Nairobi City Centre towards Riruta Satellite when half way through the journey some 3 persons who had posed as passengers suddenly attacked PW2 and took control of the motor vehicle. The Appellant was identified by both the Complainants PW1 and PW3 and PW2 the driver as one of the assailants. The Appellant had been sitting between PW3 and a lady passenger at one of the rear seats of the vehicle when he took a calipers (metal) from PW3 and used it to hit and inflict injuries on the Complainant PW1 who was seated in the front seat and also the driver PW2. He also hit other passengers as he and his accomplices robbed them. The vehicle having been taken over by one of the Appellants accomplices who was also armed with a gun was driven towards town, then towards Chiromo, before the carjacker hit a vehicle in front of it. The accident attracted a Traffic Police Officer on duty at the scene, PW5. The passengers started crying for assistance whereupon the assailant/carjacker who was driving the vehicle jumped out and escaped. One of the other accomplices also jumped out through the window and escaped. The Appellant was however not so lucky as he was held by the passengers and prevented from escaping. PW5 recovered the calipers exhibit 1 from the Appellant after PW3 identified it as his property.

In the Appellants unsworn defence in the trial court, he said that he was also a passenger in the vehicle in question. He said that a person who was drunk alleged that he, the Appellant was one of the attackers as a result of which he was beaten until he fell unconscious before being charged with this offence. Despite giving an unsworn statement, the court allowed the Appellant to be cross-examined by the prosecution. That was irregular, defective and unprocedural. However, we are satisfied that it was a curable defect under Section 382 of the Criminal Procedure Code and that the Appellant did not suffer any prejudice.

The Appellant argued only four grounds of appeal through his advocate Mr. Kajwang. These grounds were: -

1. There was no unity of purpose between the Appellant and the alleged robbers.

2. The evidence on identification was insufficient.

3. The evidence of recovery of the offensive weapon or of recently stolen exhibits was not supported by consistent corroboration.

4. The learned trial magistrate erred in law and fact in dismissing the defence.

The appeal was opposed.

We have re-analyzed and re-evaluated the evidence adduced before the trial court while bearing in mind that we neither saw nor heard the witness and giving due allowance in line with the Court of Appeal case of **OKENO vs. REPUBLIC 1972 EA 32**.

Mr. Kajwang for the Appellant submitted that the learned trial magistrate failed to analyze the evidence adduced before her and that consequently failed to tie up the evidence against the Appellant and show the nexus and unity of purpose between him and the escaped robbers.

MRS. KAGIRI, learned counsel for the State steered clear of the issue raised of the lack of analysis of the evidence by the learned trial magistrate in her judgment. Learned counsel however submitted that there was sufficient evidence on record to show that the Appellant, acting with the escaped accomplices committed the offences complained of.

On this twin-issues raised by the learned counsel for the Appellant, we wish to deal with each separately. **Section 169(1)** of the Criminal Procedure Code lays down in clear terms what the contents of a judgment should be. These can be summarized as: -

1. Points for determination

2. The decision thereon and,

3. The reasons for the decision.

We have perused the judgment of the learned trial magistrate and are satisfied that after summarizing the evidence adduced before her, the learned magistrate analyzed and evaluated this evidence and gave reasons for the decision she reached. It may not have been a perfect analysis and evaluation but it does meet the basic requirements of **Section 169(1)** of the **Criminal Procedure Code**. In any event, this court as a first appellate court has a duty to analyze and evaluate afresh the entire evidence adduced before the trial court and draw its own conclusion to ensure that the Appellant is not prejudiced.

On lack of showing a nexus between the Appellant and the two robberies who managed to escape, we do not find any merit in this criticism of the learned trial magistrate. At J2 at paragraph 3, of the judgment the learned trial magistrate did deal with the issue of common intention between the Appellant and the escaped robbers and was satisfied that the Appellant was part and parcel of the two accomplices and that his actions during the robbery was a clear demonstration that they were together in the robbery.

MR. KAJWANG submitted that the evidence of identification was dock identification and therefore insufficient to sustain a conviction. **MRS. KAGIRI** on her part submitted that PW1 had identified the Appellant as the one who hit him with a caliper while PW3 sat next to the Appellant with one person between them and therefore, witnessed the Appellant hitting passengers and robbing them. That PW3 also testified of how the Appellant also robbed him and passed some of the stolen items to his co-accomplices.

There can be no dock identification where an accused person was arrested at the scene of crime by persons who subsequently testify in court and also identify him. In the instant case, there is overwhelming evidence that the Appellant, who sat at the rear seat of the 'hijacked' public service vehicle at the time, was apprehended inside the vehicle and prevented from escaping. The vehicle had been driven by his co-accomplice from Dagoretti corner to Chiromo quite a long distance. During the diversion, the Appellant and another accomplice harassed passengers injuring some and robbing others of personal properties including cash money and mobile phones. Also robbed was PW3, the Complainant in Count 3, of personal property including a metal piece refereed to as a caliper. PW1, PW2 and PW3 identified the Appellant to PW5, the Traffic Police Officer who was at the scene of accident between the Public Service Vehicle in this case and the vehicle of PW4. Subsequently the three witnesses identified the Complainant in court as the person not only who had robbed them but also whom they had restrained inside the vehicle in order to prevent him from escaping. That identification cannot be referred to as dock identification by any stretch of definition. The Appellant was arrested at the scene of crime in the course of the robbery itself. He did not leave the scene at any one time so that there was no need for a subsequent identification in an identification parade. The evidence of identification was watertight and could not be faulted. We do not agree with **MR. KAJWANG's** submission that it was necessary to mount identification parades for the identification of the Appellant in this case.

The role played by the Appellant in this case was very ably testified to by PW3 who sat near him and saw him all along as they travelled over a long distance, how he harassed, hit and robbed passengers including himself. In fact the robbery was only interrupted due to a non-injury traffic accident between PW4's vehicle and the hijacked public service vehicle. PW3 lost a calipers to the Appellant but was recovered by PW5 from the Appellant after his arrest. The Calipers, exhibit 1, was blood soaked. That blood served as corroboration of PW1, PW2 and PW3's evidence that the Appellant had used it to hit and cause injury to them and other passengers in the course of the robbery. The Appellant's role in the robbery in the evidence of PW1, PW2 and PW3 was consistent and each witness corroborated the other's evidence on that. These witnesses sat at different seats inside the vehicle. They could not have been lying concerning the Appellant's participation in this robbery.

The learned counsel for the Appellant challenged the evidence of recovery of the calipers, exhibit 1, from the Appellant on grounds that PW5 in his evidence never said that he personally recovered it. Learned counsel for the state submitted otherwise and said that the Police Officer said explicitly in the evidence that he recovered the exhibit from the person of the Appellant.

From the proceedings at page 9, PW5 stated thus: -

"***A Matatu (vehicle in question) came from town heading to Westlands. We had reflective jackets and passengers screamed and the driver turned the vehicle and hit other (sic). When he heard the noise we ran to assist them. Some of the robbers ran off hit one was held by passengers who were assaulting him. We re-arrested him, searched him and found this weapon – canfas (sic) gauge…"***

It is clear that PW5 said that he conducted the search and recovered the exhibit No. 1 from the Appellant's pockets. We find that the evidence of recovery of the said exhibit, which PW3 identified as one which had been stolen from him in the same robbery, served as corroboration to the evidence of identification adduced by the 3 eye witnesses in this case. That recovery suffices as an added assurance to the eye-witness evidence of these witnesses that indeed the Appellant acted in concert with the escaped co-accomplices, and that they executed their intention of robbing the passengers in PW2's vehicle on the evening in question.

As to the Appellant's defence not having been accepted, we find that the evidence adduced against the Appellant strongly proved that he was a co-accomplice to the robbery and not a victim as he alleged in his defence. The learned trial magistrate correctly directed herself in dismissing the Appellant defence and that decision cannot be faulted.

Before we conclude this appeal we wish to comment on the pertinent point we noted in the learned trial magistrate's judgment.

The prosecution did not call the Complainant in the second count of **ROBBERY WITH VIOLENCE**, yet the learned trial magistrate found the Appellant "guilty as charge". Where an accused person faces more than one count, it is advisable for trial courts to carefully consider the evidence adduced in respect of each count before arriving at a decision. It is improper to make a general conclusion to the offences, in the manner the learned trial magistrate did in these cases. **Section 169** of the **Criminal Procedure Code** requires that the trial court indicates specifically the offences for which an accused person is found guilty and under which law these offences fall. In the instant case, we do not find the generalization entered herein as serious as to have caused the Appellant any prejudice since the 3 offences he faced were similar and had occurred in the same incident. The defect is in our view curable under **Section 382** of the Criminal Procedure Code. The evidence in support of counts I and 3 was overwhelming and the conviction entered in their respect correct. We shall quash the conviction and aside the sentences in respect of count 2. The conviction in respect of count 1 and 3 were safe and are upheld. On sentence, we confirm sentence of death in count 1 and suspend the sentence of death in count 3.

The upshot of this appeal is that it fails for lack of merit and is therefore consequently dismissed

Dated at Nairobi this 16th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE

Read, signed and delivered in the presence of;

Appellant(s)

Mrs. Kagiri for the State

Ann/Eric– CC

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE