REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1326 of 2001
(From Criminal Conviction and Sentence in Criminal Case No. 18 of 1999 of the Senior

Resident Magistrate's Court at Kiambu – G.M Njuguna)

JAMES NJOGU NGATA …….....……. APPELLANT

VERSUS

REPUBLIC …….....……RESPONDENT

JUDGMENT

JAMES NJOGU, hereinafter referred to as the appellant was charged with the offence of ***robbery with violence*** contrary to ***section 296(2) of the Penal Code.*** He was further charged with ***being in possession of Government shoes contrary to Section 184(1) of the Penal Code.*** He was subsequently convicted on both counts and sentenced to death on the first count and one month imprisonment in respect of the second count. Being dissatisfied with the conviction and sentence he lodged the instant appeal.

The brief facts of the prosecution case were that PW1, Simon Kungu Kiongo, an employee of Malde Transporters was on 20th March, 1999 at about 10.30 a.m. driving motor vehicle registration number KAC 702 C from Nakuru towards Nairobi. On reaching Mai Mahiu and going up the hill he saw five people one of who was dressed in police jungle uniform and who was armed with a pistol. The motor vehicle was moving about 8kph as the hill was very steep. He was stopped by this people, blind folded and robbed of Kshs.4,900/= and the lorry with the tea leaves. He was taken deep into the forest where he was tied to a tree with a rope. 20 minutes after the robbers had left with the lorry, PW1 managed to untie himself and rushed to the lorry. Through the assistance of other motorists he was taken to Mutarakwa police road block where he found the police and reported the robbery. As he was being driven to the police road block he had seen his stolen lorry with rear lights on packed by the roadside. He came back with the police and found the lorry which apparently had developed a mechanical problem. Inside the lorry the jungle uniform was recovered. They also recovered a Somali sword and two knives. Together with the police, they commenced combing the area. After awhile, the complainant then saw the appellant near a curio shop. He recognized him as having been one of those who robbed him of the lorry. Infact he was the one who wore the jungle uniform and had a pistol during the robbery. The appellant was arrested and after further investigations he was charged with the instant offences.

Put on his defence, the appellant elected to give a sworn statement of defence. He claimed that he lives in Limuru but has a stall at Mai Mahiu. On the material day he opened his stall at 10 a.m. His colleague who had sent him to buy him some items then came for his item. The appellant explained to him that he had used his money on an emergency. His colleague however insisted on his money being paid otherwise the appellant would suffer the consequences. Later he came back with a white car and a police officer. He was arrested and taken to Tigoni Police Station. He was tortured and forced to confess

to the crime. He was thereafter charged with the instant offence which he knew nothing about.

In his petition of appeal, the appellant faults his conviction by trial magistrate on the following grounds:-

(i). **THAT** the whole trial was a nullity as the rank of Prosecutor who conducted the trial was not disclosed.

(ii). **THAT** the charge sheet was defective

(iii) **THAT** there was no corroboration.

(iv) **THAT** essential witnesses were not called

(v) **THAT** the identification evidence was not water tight.

(vi) **THAT** there was no robbery committed.

(vii) **THAT** the repudiated confession should not have been relied upon.

(viii) **THAT** the trial magistrate shifted the burden of proof to the appellant.

In support of the aforesaid grounds of appeal the appellant tendered written submissions which we have carefully considered.

The appeal was opposed. Mr., Makura, learned State Counsel submitted that whereas in the typed proceedings, the rank of the Prosecutor is not disclosed, however in the original record the rank of the Prosecutor is disclosed as Inspector Mwangi. On the 2nd ground, Counsel submitted that although it is true that the name of the complaint in the charge sheet is given as Simon Kungu Kiongo but in evidence PW1, the complainant was Simon Ngugi Thiongo, the variance in the names did not render the charge sheet incurably defective. That Section 382 of the Criminal Procedure Code is available to cure the defective. On ground three, Counsel submitted that although the appellant was convicted on the evidence of a single identifying witness, the learned trial magistrate was alive to that fact and duly warned himself of the danger. On the 4th around in which the appellant challenges his conviction on the ground that the statement under caution was wrongly admitted, counsel submitted that the statement was admitted after a trial within a trial was conducted and the court came to the conclusion that it was voluntarily obtained and in compliance with the judges rules. Regarding the 6th ground in which the appellant states that his arrest was merely based on suspicion, counsel submitted that the appellant was arrested by PW4 after positive identification by PW1. According to PW1 when the offense was committed, there was electric light in the house and he identified the appellant very well. As to whether the appellant's defence was considered, Counsel submitted that the appellant gave an unsworn statement of defence which was duly considered by the trial magistrate and rejected.

We have as expected re-analysed and re-evaluated the evidence adduced before the trial court while bearing in mind that we neither saw nor heard the witnesses and giving due allowance in line with the Court of Appeal decision in ***OKENO V REPUBLIC (1972)EA 32.***

As the starting point, the appellant points out that from the record the rank of the prosecutor who prosecuted the case was not indicated throughout and that which omission rendered the whole proceeding a nullity as was held in the case of ***BENARD LOLIMO EKIMAT V REPUBLIC, C.A. NO.151 OF 2004 AT ELDORET.*** In this case, Omolo, O'Kubasu and Onyango Otieno JJA stated

"*….On our own views where the rank of a police officer prosecuting a case is not indicated, it is difficult for the court to determine whether or not the said prosecutor was qualified to conduct the prosecution of the case in terms of Section 85(2) as read with Section 88 of the Criminal Procedure Code and that renders the proceedings a nullity. This is a matter which cannot be assumed……"*

We have painstakingly looked at the original record as well as the typed proceedings and noted that whereas in the typed proceedings, the prosecutor is throughout indicated as "**Mwangi**", in the original record he however appears as "**I.P. Mwangi.**" Clearly then the rank of the prosecutor is indicated. He is an inspector of police and is thus qualified to undertake prosecution of cases in accordance with the provision of Section 85(2) as read together with Section 88 of the Criminal Procedure Code. We are of the view that failure to indicate the rank of the prosecution in the typed record was a typographical error. In any event between the two records, we would rather go by the original record. Consequently this ground of appeal lacks merit and is accordingly dismissed.

With regard to the second ground of appeal, the charge sheet clearly indicates that one Simon Kungu Kiongo was robbed of his motor vehicle KAC 702C loaded with tea leaves and Kshs.4,900/=. However PW1 who posed during the trial as the complaint while under oath gave his name as Simon Ngugi Thiongo. We are not certain whether the aforesaid names refer to one and the same person. The prosecution did not lead any evidence to suggest that the names referred to the same person. The prosecution did not seek further to amend the charge sheet so as to take care of the variance of the names between those in the charge sheet and those of PW1 in evidence. It would also seem that this aspect of the matter escaped the attention of the trial magistrate and yet it was critical to the same person, and we cannot make that inference in the absence of any evidence, it is possible that the real complainant did not testify. And if he did not testify then the offence of robbery with violence was not proved. It is also possible that the real complainant could as well have testified. But we have no way of knowing or confirming it. We do not agree with the learned state counsel, that the variation in the names of the complainant does not render the charge sheet incurably defective. In our view, it does and is not curable by the provisions of Section 382 of the Criminal Procedure Code. As a doubt has been raised regarding the real names of complainant in the proceedings, that doubt, as in every criminal proceedings, must be resolved in favour of the appellant. We therefore find merit in this ground of appeal.

We shall consider grounds three, four and five of the petition of appeal together as they revolve around the issue of identification. It is on record that only PW1 testified as to the identification of the appellant at the scene of crime. However his evidence was basically his word against that of the appellant. His evidence therefore required corroboration. Such corroboration should have been provided by PW1's turn boy who was at the scene of crime but who for unexplained reasons was not called to testify. We are aware that the learned trial Magistrate was alive to the dangers of convicting the appellant on the evidence of a single identifying witness and duly warned himself. Nonetheless he proceeded to act on the same. In our view the evidence of identification left a lot to be desired. From the evidence recorded it would appear that the circumstances obtaining during the alleged identification of the appellant by PW1 were not conducive. PW1 was obviously under tremendous stress on seen the gun pointed at him. He testified

"……***At the function to Kijabe, 8 armed people emerged from the bush. One had a pistol and jungle uniform by police ……"***

Further when the robbers gained entry into the motor vehicle, they immediately blind folded him and dumped him at the back of the driver's seat. Nowhere in evidence is it suggested that PW1 had time or any sufficient time to observe any of his attackers as to be in a position on the appellant as having been one of the robbers. Yes the robbery occurred during the day and in those circumstances identification should not be a problem. However there must be evidence to show that the identifying witness had opportunity to look at and or observe the culprit he identifies sufficiently. There was no such evidence. In his submission with regard to this ground, learned state counsel submitted that when the offence was committed there was electric light in the house. This submission is not borne out by the evidence on record. The offence was committed along a road and not in the house. It was during the day and not at night. We do not know how the learned state counsel came by the said version of events. We would want to imagine that perhaps it was an oversight and or an error on his part in appreciating the recorded evidence. To bolster further our view that the circumstances of identification were not conducive we note PW1 was not even able in his evidence to pinpoint the role played by any of the robbers once they got inside the motor vehicle. After being blindfolded, PW1 was thereafter taken deep into the forest and tied to a tree and was only able to relieve himself of the agony 20 or 50 minutes after the robbers had left. It is not suggested in evidence that from the time he was removed from the vehicle upto the time he was tied

on a tree deep in the forest that PW1 had the blindfold removed so that he could be able to see the robbers. What the evidence suggests is that PW1 was all along blindfolded and therefore unable to see the robbers at all.

Regarding the confessionary statement, we would observe that the appellant did raise the issue that the same was not voluntarily obtained. That he was tortured to the extent that his penis was injured. The appellant went out of his way to show to the court the part of his penis that was injured. The court after observing the same remarked

"…….***A dark area seen above the penis is the left side which appears to be a birth mark and not inflicted by any object…..".***

With tremendous respect to the learned trial magistrate, we do not think that it was open to him to reach such conclusion. This was a wrong approach as the learned trial magistrate was not an expert in the field. Whether it was a birth mark or a scar following an injury could only have been testified to by someone qualified in the medical field. We have also had occasion to peruse the alleged charge and caution statement. What is stated therein is so scanty as to raise doubts as to whether it was voluntarily obtained. We also note that the appellant was arrested on 20th March 1999 and the alleged statement was obtained on 20th March, 1999. It would appear that the statement was obtained after a prolonged stay in custody by the appellant, indeed a period of 9 days. We need not restate what was stated by the Court of Appeal in ***GITHINJI AND ANOR V R (1954) 21 EACA 410***

*"……**That a confession made by an accused person when he has stayed for a long time in police custody is inadmissible….."***

Considering what we have raised above regarding the charge and caution statement and had the trial magistrate been alive to those aspects during the trial within the trial, he should have come to the conclusion as we have done that the same was not voluntarily obtained.

It is in evidence that PW1's motor vehicle was photographed before it was released to him. The said photographs were marked MFI3 during the hearing. However when PW4 attempted to produce that as exhibits, the appellant objected stating that he

"……. ***wanted the person who took them to come to court to testify…."***

That objection was sustained. However the prosecution case was eventually closed without the witness who took the photographs testifying and producing them. In the absence of the said exhibits and the court having not viewed the lorry that was allegedly robbed from PW1 during the trial, can it be said that the prosecution proved its case of robbery with violence beyond reasonable doubt. At the centre of the offence of robbery is theft. It must be shown that something was stolen and at or immediately before or immediately after the time of stealing he uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. Once the above scenario obtains but the robber(s) are armed with dangerous or offensive weapons or instrument, are in company with one or more other person or persons; or visits violence to any person in the course of the robbery, then the provision of Section 296(2) come into play. In the absence of the lorry being tendered into evidence either by way of photographs or itself being viewed by the court and a note thereof made in the record, it becomes very difficult to hold as the trial magistrate did that PW1 was actually off his lorry. In our judgment the learned trial magistrate erroneously entered a conviction based upon a mere assumption of the existence of the alleged motor vehicle in question.

Finally we turn on the issue of the appellant's defence. The appellant in his sworn defence raised an Alibi defence. However in his submissions on this issue, learned state counsel stated that the appellant gave unsworn statement of defence. Once again this was erroneous on the part of the state counsel and will say no more. The learned trial magistrate rejected the defence. In doing so he stated that the appellant should have availed defence witnesses to corroborate his defence. This holding was unfortunate as it tends to show that the court may have shifted the burden of proof to the appellant. It is trite law that

"……*.. when an accused raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in unsworn statement at his trial, the prosecution (or police) ought to test the alibi whenever possible but different considerations may then arise as regards checking and testing it, and it is sufficient for the trial court to weigh the Alibi against the evidence of the prosecution……."*

See ***WANGOMBE VS REPUBLIC (1980) KLR 149.*** In instant case prosecution could easily have summoned some witnesses from Mai Mahiu to disapprove the appellant's claim that he owned a stall thereat and that he was arrested whilst in his stall.

In view of the foregoing, we would allow the appeal, quash the conviction and set aside the sentences imposed on the appellants on the two counts. The appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated and Delivered this 6th day of June, 2006.

…….

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE