



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 159 & 160 of 2002

(From original conviction and sentence in Criminal Case No. 298 of 1999 of the Senior Resident Magistrate’s Court at NAROK – T. O. AUMA, ESQ.)

SAKARA OLE KISUSUA1ST APPELLANT

KAMAMORU OLE SUEL.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants faced eight counts of robbery with violence contrary to Section 296(2) of the Penal Code. They were also charged with several counts of being in possession of a firearm and ammunition without a Firearm Certificate contrary to Section 4(1) and 4(3) of the Firearms Act Cap 114 Laws of Kenya. They were convicted in some of the counts of robbery with violence and sentenced to death. The trial magistrate also convicted them on the other minor offences and sentenced each of them to three years imprisonment but that subsequent sentence was improper in view of the death sentence which he had already pronounced against each one of them. They were aggrieved by the said conviction and sentence and appealed against the same. This being the first appellate court, it is mandated to reconsider the evidence that was tendered before the trial court, evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, see **OKENO VS R [1972] E.A. 32**. The prosecution case briefly stated was as follows:-

PW1 was a driver/tour guide with Pollman’s Tours and Safaris. He testified that on 17/6/99 they were travelling from Naivasha to Maasai Mara in motor vehicle registration number KAH 522Z with six American passengers. They were in a convoy of four motor vehicles and the motor vehicle which PW1 was driving was leading the convoy. On reaching Loita Plains he saw a man dressed in the traditional masai way pointing a gun at the vehicle and there were other men in front of the vehicle. PW1 stopped the vehicle and the man ordered him to switch off the engine, hand over the keys and get out. It was about 4.30 p.m. and PW1 said that the man who was ordering him to do so was the first appellant. The man then ordered PW1 to hand over all the money that he had and also ordered him to tell the tourists to do likewise. He took PW1’s wallet which had Kshs.8000/- and a wrist watch. The other vehicles in the convoy were also stopped and the occupants were robbed of their money and watches. The first appellant was said to have ordered a driver called Amos Kibata to go to his motor vehicle and ask the male passengers to get out, leaving only three women in the vehicle. The appellants allegedly entered the said motor vehicle and the first appellant ordered the second appellant to disconnect the vehicles’ microphones so that the drivers could not communicate and the second appellant did so but one microphone fell down as the appellants were leaving with the female tourists and Amos in one of the vehicles. Meanwhile,

PW1 and his colleagues repaired the microphone that had fallen down and they communicated with the touring company in Nairobi and after a little while police officers and Kenya wild life personnel arrived. The group left and headed for Masai Mara and on the way they met Amos in his motor vehicle together with the three female tourists. Later on, PW1 was called to Narok Police Station and asked if he could identify their assailants out of a group of ten people. He identified the first appellant and later he was called and shown another group of people and he picked out the second appellant. PW1 found his watch at the police station but did not recover the money.

PW2, Amos Kibata Warui corroborated the evidence of PW1 in all material respects. He said that the first appellant was holding a gun as he ordered him and all the other drivers to get out of their vehicles while the second appellant was the one who was collecting money from the drivers and the tourists. PW2 was robbed of Kshs.12,000/-. The appellants commandeered the vehicle that was being driven by PW2 and somewhere within the park he was ordered to stop. The appellants alighted. The second appellant took a camera and binoculars belonging to one of the tourists and went away with it. The first appellant then ordered PW2 to drive away. He reported the incident to the police. On 19/6/1999, PW2 identified the first appellant in an identification parade. He said it was easy to identify him as he had seen him clearly for a long time during the robbery which took a long time. He said the first appellant had big eyes and had gaps in his teeth. PW2 also identified the second appellant. He had earlier described both appellants to the police in some considerable details.

PW3 and **PW4**, corroborated the evidence of PW1 and PW2 regarding the robbery and their identification of the appellants.

When PW3, PW4, PW5 and PW6 were testifying, the prosecution was conducted by Sergeant Elima. That was contrary to the provisions of Section 85 of the Criminal Procedure Code as was held in **ROY RICHARD ELIREMA & ANOTHER VS REPUBLIC** Criminal Appeal No. 67 of 2000.

PW5, Stephen Ngoidila Ole Minishi testified that PW2 explained to them what had happened to them and where they dropped their assailants. PW5 and others followed footmarks which led them to a masai manyatta. They found some men drinking a local beer and upon questioning them, they realised that the two appellants had just arrived from some unknown place. They interrogated the two and the first appellant led them to the place where he had hidden a gun, a camera, a pair of binoculars and four wrist watches were also recovered from the two appellants. Kshs.1,322/- was also recovered from the first appellant.

PW6, Inspector Joe Lekuta was one of the people who accompanied PW5 in arresting the appellants and his evidence corroborated that of PW5 in all material details.

PW8, Inspector Joshua Murena testified as to how the identification parade was conducted and the two appellants picked out.

The two appellants denied having committed the robberies as charged with and said that they were arrested as they were drinking with their friends and that they knew nothing about the robberies.

The trial court held that the appellants had been properly identified by PW1, PW2, PW3 and PW4. The court also believed the evidence of PW5 and PW6 that it was the first appellant who led them to the place where the gun had been hidden.

The appellants grounds of appeal can be summarised as follows:-

1. That part of the prosecution case was conducted by an unqualified police prosecutor and therefore the trial was a nullity.
2. That there was insufficient identification evidence.
3. That their defences were rejected without any reasons being advanced for the rejection.

Having carefully examined the evidence that was tendered by the prosecution witnesses before the trial court, we are satisfied that the appellants were properly identified by PW1, PW2, PW3 and PW4. PW2 drove his vehicle with both appellants riding therein and spent nearly one and a half hours with them in broad day light and that was sufficient time to enable him see them clearly. The identification parade was conducted just two days after the robbery when the memories of the identifying witnesses were still very fresh. The recovery of the gun that was used during the robbery as well as recovery of part of the stolen items in possession of the appellants, one day after the robbery is also conclusive evidence that the appellants were the ones who had carried out the robbery.

However, as earlier observed, a substantial part of the trial was conducted by an unqualified prosecutor and that rendered the trial a nullity. The appellants have been in custody since 1999. We believe that most of the exhibits that were recovered were either returned to their owners who included tourists and must therefore have gone back to their countries of origin. It may therefore be impossible to conduct a successful retrial, even if we ordered the same to be done. Considering all the circumstances of the case, we allow the appeal, quash the convictions and set aside the sentences that had been passed against the appellants. They should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 18th day of July, 2006.

MUGA APONDI

JUDGE

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of the first and second appellants and N/A for the state.

MUGA APONDI

JUDGE

D. MUSINGA

JUDGE