



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 74 of 2004

(From original conviction and sentence in criminal appeal case No. 6735 of 2003 of the

Chief Magistrate’s Court at Kibera (Ms. Siganga - SRM)

GEORGE OCHIENG ADUNDO
.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

GEORGE OCHIENG ADUNDO was charged with seven counts of offences. In counts 1 to 5 he was charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The five robberies were committed on different dates. In count 1 the robbery was alleged to have been committed on 19th October 2002 in Nairobi, in count 2 on 4th March 2003 at Ongata Rongai, in count 3 on 10th March 2003 at Ongata Rongai, in count 4 on 10th March 2003 at Ongata Rongai and in count 5 on 17th March 2003 at Ongata Rongai.

In counts 6 and 7 the Appellant was charged with **BEING IN POSSESSION OF A FIREARM a Taurus Pistol serial No.4127387 and one round of ammunition 38 special caliber without a firearm certificate**. After a full trial, the Appellant was found guilty and convicted in counts 1, 3, 4 and 5 and sentenced to death as prescribed in the law. In counts 6 and 7 he was also convicted and sentenced to 8 and 7 years respectively but the trial court correctly ordered the imprisonment terms to be held in abeyance in view of the death sentence in the other counts. It is from the conviction and sentences that the Appellant now appeals to this court.

The Appellant appeared in person while the Respondent was represented by **Mrs. Gakobo**, State Counsel who also opposed this appeal.

The Complainants who testified were four in number. P.W.8 I.P. **Alexander Wandati** was the Complainant in count one. He said that on 19th October 2002 at 1.00 a.m., as he walked to take a bus home along Slip Road off Moi Avenue and Tom Mboya Street, a lone robber hit him on the head and he fell down. His police phone fell off his hands while the revolver dropped off the holster. The robber who stood in front of him was first surprised by the items but collected them plus his mobile and cash then walked away **I.P. Wandati** identified the Appellant as the man who robbed him at an identification parade conducted in March 2003. He said that he knew the Appellant before. P.W.8 was examined by

Dr. Kamau on 22.11.2002 who confirmed the head injury. The P3 form was exhibit 11.

The Complainant in count 2 did not testify.

The Complainant in counts 3 and 4 were P.W.1 **Nicholas** and P.W.2 **Alex** respectively. Both were walking home on the 10th March 2003 at 11.p.m. in Ongata Rongai when 3 men who identified themselves as Police Officers ordered them to stop. They first robbed **Nicholas** of his mobile phone and cash before hitting him on the head after which he fell down unconscious. Then they turned on **Alex** who by then was protesting due to their violence. He too was robbed of cash, wallet and mobile phone before one of the three men hit him on his mouth with an iron bar causing him to lose 4 teeth. **Dr. Kamau** confirmed the injury suffered by PW2 though strangely he classified it as harm while it obviously ought to have been classified as grievous harm since the lost teeth which will never grow back! **Dr. Kamau**, P.W.10 produced the P3 form in respect of Alex P.W.2 which the court erroneously marked exhibit 10. The police abstract from central police station was what the court had earlier on marked as exhibit 10 before the P3 form on **Alex** was identified in court.

P.W.1, **Nicholas** identified the Appellant in an identification parade conducted by P.W.5 **CIP Atuku** on 25.3.2003.

The Complainant in count 5 was P.W.3 **John Wanyoike** a taxi operator. He said that on 17.3.2003 at 9.00 a.m. on Wanugu Road, Ongata Rongai a lone gun man robbed him of his mobile phone and cash. P.W.3 was dropping a client at the gate of his house when the robber struck. P.W.3 later identified the Appellant in an identification parade conducted by P.W.6, **I.P. Mukundi** on 28.3.2003.

In support of counts 6 and 7 was the evidence of two witnesses. The first being **P.C. Wambua** P.W.9. P.W.9 said that on 21.3.2003 at 10 p.m. while acting on information he received, he and several other police officers proceeded to a hotel in Kware slums in Ongata Rongai. They arrested the Appellant who was seated alone and recovered a revolver exhibit 2 from his loins. It had one round of ammunition. Later on, P.W.9 conducted investigations and discovered that the firearm, exhibit 2 belonged to a police officer attached to Nairobi Area Police Headquarters and that he had been robbed of it in October 2002. He collected the firearms movement register, exhibit 9, from police headquarters. He also obtained an abstract of the O.B. entry of 19th October, 2002 from Central Police Station exhibit 10, as proof that **I.P. Alexander Wandati** had reported the robbery at that station. The second witness was P.W.4 **Johnson Mwangela** a firearms expert. He received the firearm with one ammunition from P.W.7 on 13th May 2003. He confirmed that the firearm and ammunition were firearm and ammunition as per the Firearms Act.

The Appellant has raised five grounds of appeal. The Appellant challenged the conviction in the capital offences on basis of identification. The second ground raised was that of his mode of arrest and recovery of the firearm. The third ground challenged the conduct of identification parades and their admission in court as evidence. The fourth ground challenged the prosecution case for being riddled with contradictions and in the fifth ground the Appellant challenges the rejection of his defence.

The Appellant gave written submissions which we considered along with the submission by the learned State Counsel.

On the issue of identification, the Appellant contended that the complaint in count 1, P.W.8 was alone when he was suddenly attacked from behind. The Appellant contended that the Complainant P.W.8 did not see the assailant's face since he saw him running away according to his evidence. The Appellant also contended that the Complainant alleged that P.W.8 was robbed by more than one person yet P.W.8 said he was robbed by one person. The Appellant submitted that in the circumstances the ingredients of Robbery under **Section 296(2) of Penal Code** were not met. The Appellant also contended that the Complainant, P.W.8, could not have recognized or identified his assailants because he never mentioned it to the police when he reported the incident as evidenced in the O.B. abstract exhibit 10.

Mrs. Gakobo for the State did not agree with the Appellant's submissions. Learned Counsel

submitted that P.W.8 in his evidence clearly stated that he recognized his assailant because he knew him before. That P.W.8 was clear in his evidence that there were street lights at the place of attack which enabled him to see and recognize his assailant.

Before a Court can base a conviction on the evidence of identification at night such evidence should be watertight. See **REPUBLIC vs. ERIA SEBWATO (1960) E.A. 174** and **KIARIE –R- REPUBLIC (1984) KLR 739**. Visual identification must be treated with greatest care. See **AMOLO –V- REPUBLIC (1988-1993) KLR 290**. In **KARANI vs. REPUBLIC (1985) KLR 290** while adopting **RORIA vs. REPUBLIC (1961) E.A.583, NYARANGI JA, PLATT AND GACHUHI Ag. JJA** held:-

“A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is a need for other evidence.”

In the instant case the circumstances of identification were difficult because the incident took place at 1.00 a.m. P.W.8 was alone at a stage waiting for a vehicle to take him home. From the evidence of P.W.8 the attack was both unexpected and sudden. P.W.8 was attacked from behind, but he claimed that his attacker walked to the front to face him as he lay on the ground and he claims that on seeing him he recognized him. We are doubtful that the Complainant, P.W.8, identified his assailant. The fact that P.W.8 did not mention that fact to police officers at Central Police Station where he reported the robbery is one of the indicators. The second indicator is the fact that between October, 2002 when the robbery took place and March 2003 when the revolver was recovered no efforts were made by the Complainant, a police officer, to trace this assailant whom he wants us to believe he knew before. We believe that his evidence that he recognized his attacker was a story he made up in court otherwise efforts would have been made before then geared at not only recovering the gun but also apprehending the “known” robber. The fact that an identification parade was found necessary for P.W.8 to identify the Appellant even though the parade officer in that respect was not called as a witness, serves to further fortify the fact that at no stage in the course of the investigations of this case did P.W.8 say that he had recognised his assailant.

Having found so, the evidence of identification by P.W.8, as far as the trial went, was dock identification, or identification made under difficult circumstances. That kind of evidence needed other evidence to support it either direct or circumstantial which implicates the Appellant with the offence. See **KARANI vs. REPUBLIC** supra.

This brings us to the question whether the recovery of the firearm exhibit 2, from the Appellant provides the other supporting evidence. The recovery was made five months after the firearm was stolen from PW.8. There was an added angle to the issue of the firearm which the Appellant raised in his written submission. The fact that the serial number of the firearm stolen from P.W.8 is quoted in the charge sheet as U 12387. In the evidence of P.W.8 he said the firearm stolen from him was Q127387. The arms movement register, exhibit 8 shows that the serial number of the pistol issued to **I.P. Alex Wandati** in July 2002 was type Taurus body No.Q1-27387. The same firearm was recovered by P.W.9 on 21st March 2003 from the Appellant and examined by **Mr. Mwongele**, the ballistic expert on 5th June 2003 as per his report exhibit 4. Looking at the entire evidence before the court, the inconsistency in the serial number appears only in the charge sheet. Considering all witnesses gave the same serial number as the one on the recovered firearm itself, the one appearing in the arms movement register exhibit 10 and the one examined by the ballistic expert P.W.4, we find the error on the charge sheet typographical in nature and that it was of form and did not go to the substance of the charge. The error was curable under **Section 382 of Civil Procedure Code**. We are satisfied that the Appellant was clear of what charge he faced and was not prejudiced by the error. We are fortified in this finding by the Court of Appeal decision of **SILVANUS NJUKI vs. REPUBLIC KLR 2002** which held:

“Discrepancies in description of an exhibit cannot form the basis of setting aside a conviction where the accused person never objected thereto at the trial and where such discrepancies or errors have not caused any prejudice to the Appellant nor occasioned any injustice to him”.

The next issue to deal with was whether five months can be considered as recent possession of a firearm. We have not found any case law to guide us on this point. However, we have considered the nature of the item in question, a firearm, whose possession without a valid licence is not only illegal but severely punishable under the law to find that it is not an object that could freely change hands from one person to the other. In that regard, five months can be regarded as recent possession of a stolen firearm. We find that the recovery of the firearm, exhibit 2, from the Appellant, five months after it was stolen from P.W.8, provides the circumstantial evidence which directly links the Appellant with the robbery in count 1.

In the Court of Appeal case of ODHIAMBO vs. REPUBLIC eKLR 2001 it was held as follows:-

“It is settled law that evidence of recent possession is the circumstantial evidence which depending on the facts of the case may support any charge however penal”

We find the recovery of the gun from the Appellant was recent possession of the stolen firearm and that in the circumstances of this case, the possession is sufficient to support the charge of **Capital Robbery**.

The Appellant questioned whether the evidence adduced sufficiently supported the capital charge. The law is now settled as to what ingredients constitute a charge of robbery with violence. See MUIRU KARANJA & ANOTHER vs. REPUBLIC [2002]1 KLR 241, OLUOCH –V- REPUBLIC [1985] KLR 549

It is sufficient to prove the charge if the prosecution proves any one of the following modes:-

- (a) If offender is armed with any dangerous or offensive weapon or instrument or
- (b) If the offender is with one or more person(s) or
- (c) If at or immediately before or immediately after the time of the robbery, the offender wounds, strikes, beats or causes any other personal violence to any person.

The particulars of the charge alleged that the Appellant was with others, that he was armed with dangerous weapons namely iron bars, and that he used personal violence on the Complainant. The prosecutor proved that he was armed and also that he struck the Complainant until he was stitched on the head and admitted in hospital for 2 days. The P3 form was exhibit 11. We find that the charge was proved. We uphold the conviction and confirm the sentence.

The issue of identification was also raised in regard to counts 3, 4 and 5. The Complainant in counts 3 and 4 were robbed at the same time. The Appellant’s contention concerning the evidence of these two witnesses was that they could not be believed concerning the intensity of light prevailing at the scene of incident at the time of the attack. P.W.1 Complainant in count 3 said that there was bright moonlight which made the night as bright as day. Yet, he said that the robbers were using torches. The Appellant in his submissions contended that the time under which P.W.1 claimed he kept the Appellant under observation was too short for positive identification of a stranger. Concerning P.W.2, the Appellant contended that he did not identify anyone at the scene and that his identification of the Appellant in court during trial was dock identification

The Appellant also contended that the identification parade in which P.W.1 identified him was fake. He did not elaborate. **Mrs. Gakobo** for the state submitted that even though the attack was at night, there was bright moonlight which enabled P.W.1 and P.W.2 to identify the Appellant. Counsel submitted that the fact both Complainants were able to tell the mode of dressing of the Appellant at the time of the attack and fact that P.W.1 subsequently identified him in an identification parade was sufficient to render the convictions in both counts safe. Counsel submitted that P.W.2’s evidence corroborated that of P.W.1.

It is settled law that issues of identification must be tested with the greatest care. In MAITANYI

vs. REPUBLIC [1986] KLR 198 the Court of Appeal stated:-

“It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not careful test if one of these matters are unknown because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards it now becomes the great burden of senior magistrate trying cases of capital robbery to make these inquiries themselves.”

Both P.W.1 and P.W.2 said that as they walked home at 11 p.m. on the material night, three men flashed torch lights at them and ordered them to stop. P.W.1 further claimed in his evidence that there was bright moonlight causing brightness similar to daylight. The question which arises is why anyone would see the need to use a torch if there was such bright moonlight. That further puts to doubt P.W.1's description of the moonlight being as bright as day. P.W.1 claimed he stood face to face with the Appellant who also robbed him and hit him on the head. He said that all this happened in 2 to 3 minutes. From the point they stood facing each other, PW.1 described his clothing as being a spotted shirt, short sleeved sweater and jacket. Eighteen days later, according to **IP. Atuku** P.W.5, P.W.1 identified the Appellant in an identification parade.

Prior to that P.W.1 said that he had given a description of the Appellant to the police. During cross-examination by the Appellant, PW.1 said that the description was in the O.B. containing the report which included his mode of dressing and facial appearance. Looking at P.W.1's evidence critically, he said that what enabled him to identify the Appellant was his facial appearance and the Appellant's accent which he said he recognized at the time of the identification parade.

P.W.6 who conducted the parade said that the basis of identification by PW1 was facial appearance and upon being identified the Appellant spoke saying he was satisfied with the parade. The Appellant's voice did not feature as one of the basis of identification and it could be that P.W.1 was referring to the response given to P.W.6 by the Appellant after the identification.

We find that P.W.1 saw his attackers for a very short time of 2 to 3 minutes. Even if the moonlight was bright, due to the brevity of the attack and the short time he took to observe his attackers, we hold that it was insufficient for positive identification without the possibility of error or mistake. It is no consolation that P.W.1 was able to identify the Appellant in a parade conducted subsequently. What was needed was other evidence to support that of visual identification by P.W.1.

P.W.2 provided this other evidence. However, unlike P.W.1, P.W.2 did not have the opportunity to identify the Appellant in an identification parade. P.W.2's identification was purely that of dock identification. P.W.2 says that he stood face to face with the Appellant for five minutes. He said that the Appellant took his property while a second man stood behind the Appellant flashing a torch at him, P.W.2, all the while. Given that scenario that torchlight was flashed at the Appellant all along throughout the robbery incident, the effect would be to reduce P.W.2's ability to see clearly. Therefore in the circumstances, P.W.2's vision must have been affected by the torch light reducing his ability to see the one who was robbing him. The identification in Court by P.W.2 is doubtful and being dock identification, it cannot render any weight to the evidence of identification by P.W.1. Even without going into other issues raised by the Appellant in regard to these two witnesses we believe the Appeal against conviction in counts 3 and 4 can safely be determined at this stage. We find merit in the appeal against conviction in counts 3 and 4 quash the convictions and set aside the sentence.

In counts 5 there was one sole witness, P.W.3. His evidence was that he identified the Appellant by light from the head lamps of his vehicle when the Appellant walked in front of his vehicle from the passengers door to his, driver's door. P.W.3 was also able to identify the Appellant in an identification parade conducted by P.W.6 **I.P. Mukundi** on 28th March 2003. P.W.3 did not put a time frame but if a person walks from the left side of a vehicle to the right, we do not suppose it can take more than a minute or two. The brightness of the head lamps and whether they were full lights or dipped was also not

described. We find that the time the robber took to walk from the left side to the right side of P.W.3's vehicle, at night, was too short to enable a positive identification without the possibility of error or mistake. There is no improvement to the quality of the identification by P.W.3 by the fact that he was able to identify the Appellant in an identification parade. That identification was not positive and since it stood alone, it could not justify a conviction for the serious charge of capital robbery. Even without going into more detail, we find merit in the appeal against conviction in count 5, quash the conviction and set aside the sentence.

The two last counts were those of possession of the firearm and the ammunition without a firearm certificate.

Concerning these counts, the Appellant challenges the evidence of P.W.9 the arresting officer. The Appellant contended that P.W.9 should not be believed because he did obtain a search warrant and neither did he prepare an inventory of the recovered firearm before going to arrest the Appellant. The Appellant also maintained that failure to call the informer rendered the evidence of P.W.9 doubtful. The Appellant also challenged the rejection of his defence without any reasons being given. His defence was that he was arrested as he waited for a client.

Mrs. Gakobo for the State submitted that counts 6 and 7 were proved as required on the basis of the evidence of the ballistic expert.

We have already dealt with the issue of serial numbers of the firearm which also touches on the firearm recovered from the Appellant. We found the firearm exhibit 2 was the same one that had been stolen from P.W.8 five months before. There is no requirement that a police officer should obtain a search warrant before going to investigate a suspect. Such a requirement would make the work of the police impossible. P.W.9 received information that a person seated at a certain hotel looked suspicious. P.W.9 could not have been able to know what he may find, if anything from the suspect. The information was received at night and by then no courts were functioning. It would be to assist criminals to hold, as the Appellant suggested to us, that P.W.9 should have waited to obtain a search warrant before going to investigate. The fact he investigated the suspect without the warrant does not affect the credibility of P.W.9 or the weight of his evidence. In the same vain lack of inventory is neither here nor there especially considering only one item was recovered and by then the investigations were not specific to any case within the knowledge of P.W.9. Had it been that P.W.9 went out in search of a wanted suspect in a case under investigations known to him, then an inventory may have been necessary to be made. As for the informer, there is no legal requirement that he should be called as a witness. It could be different if the alleged informer was involved in the actual arrest of the Appellant say by pointing him out to the police officers in the Appellant's presence. In such a case, the informer would have been exposed to the Appellant and there would have been no need of hiding him or failing to call him as a witness. In the instant case, the informer was not so exposed and his role in the case was partial and failure to call him as a witness did not affect the prosecution case nor prejudice the Appellant.

As for the Appellant's defence that he was waiting for a client at a house when he was arrested, it is clear that the Appellant does not deny being arrested. We do not think that it matters whether he was arrested at a hotel or a house used as a hotel. What was recovered from him is what is material. There is no allegation that P.W.9 knew the Appellant before or that there was any motive in anyone to fabricate the charge against him. We agree with the Learned Trial Magistrate's findings and we quote at page. J5 of judgment thus:-

"That P.W.9 gave truthful and consistent evidence against the Appellant in regard to the charges in counts 6 and 7. P.W.9 did not know the accused prior to the 21.3.2003, when he and other police officers arrested the accused a hotel in the Kwale slums of Ongata Rongai Town. P.W.9, therefore, had no motive to frame the accused in this case or tell lies about him (accused) P.W.9 denied accused's contention that he was arrested in house. I believe that accused was found in possession of the revolver (Exh.2) with one round of ammo (exhibit 3)"

The Learned Trial Magistrate at Pg.J4 of judgment found thus concerning the Appellant's defence:-

“Accused defence is a mere denial which does not in my opinion address the issue at hand. He did not for example try to explain how come he was found hiding P.W.8’s revolver between his (accused’s) underpants and trouser.”

The learned trial magistrate gave reasons for rejecting the Appellants defence. Reason given is quite in order. The Appellant should have explained how he came to be in possession of the revolver which he did not. Having failed to give an explanation, the learned trial magistrate was quite right in finding as she did that possession of the firearm was proof he stole it from P.W.8. The possession of the revolver was the subject matter of counts 6 & 7 as explained earlier.

Having considered the grounds raised in regard to the conviction in counts 6 and 7 we find no merit in the Appellants appeal. We uphold the convictions in counts 6 and 7 and confirm the sentences imposed and the order suspending both sentences in view of the sentence in count 1.

The upshot of this appeal is that appeals against convictions in counts 3, 4 and 5 are allowed, convictions quashed and sentences set aside. The appeal against convictions in counts 1, 6 and 7 fails, convictions upheld and sentences confirmed.

Dated at Nairobi this 26th Day of September, 2006

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J. LESIIT

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Gakobo for State

Tabitha/Erick – CC

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LESIIT, J.

JUDGE

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MAKANDHIA

JUDGE