REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

Criminal Appeal 123 & 124 of 2004

(From Original Conviction and Sentence in Criminal Case No.6363 of 2003 of the Chief Magistrate's Court at Kibera - Ms. Siganga – S. R. M)

BONIFACE SILOMO KAKWERA …….....……..... ……..APPELLANT

VERSUS

REPUBLIC…….....…….. ….RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 124 of 2004

HUSSEIN AHMED HASHI ……..……..... APPELLANT

VERSUS

REPUBLIC …….....……..... RESPONDENT

JUDGMENT

BONIFACE SILOMO KAKWERA, 1st Appellant and ***HUSSEIN AHMED HASHI,*** the 2nd Appellant were the 2nd and 1st accused persons respectively in their trial in the Lower Court in which both Appellants were jointly charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The first Appellant also faced a single count of being unlawfully present in Kenya contrary to Section 13 (2) of the Immigration Act. After a full trial the Appellants were convicted and sentenced to death as prescribed in the law. On the 3rd count the 1st Appellant was sentenced to a fine of Kshs.6,000/= in default to serve 6 months imprisonment after which to be repatriated to Tanzania. The Learned Magistrate correctly ordered that the execution of the sentence in count 3 be put on hold pending execution of the sentence in counts 1 and 2. However we hasten to add that in sentencing the Appellants to death in respect of each of the two counts of robbery with violence, the learne3d magistrate was in error as the Appellants cannot logically suffer death twice. Accordingly, the Learned Magistrate should also have directed that the sentence of death in respect of the 2nd count be

suspended and or kept in abeyance altogether.

Be that as it may, it is out of the aforesaid conviction and sentence that both Appellants have moved to this Court by way of Appeal. Both Appellants challenge their conviction on the grounds that their identification was not positive both at the *locus in quo* at and subsequent identification parades, that the charges were not proved to their required standard and finally that their defences were not given due consideration.

From the recorded evidence, the brief facts of the case would appear to be that on 8th April, 2003 at about 7.44 p. m., PW1, Henry Ngotho, drove into the compound of PW2, Justus Ogutu Arodi. Whilst at the parking, the doors of his motor vehicle were yanked opened and when he turned to look he saw three men all armed with pistols. They ordered him to keep quite and surrender his mobile phone and wallet. They then removed him from the motor vehicle and proceeded with him to PW2's house where he was ordered to ask PW2 to open the door. PW1 complied and upon PW2 hearing PW1's voice he opened the door to his house. They all entered the house. Once inside, one of the robbers pointed a pistol at PW2 and demanded for money and his cell phone. They then ordered all the people in the house to lie on the floor as they ransacked the house. After about an hour, the robbers left with the items particularized in the charge sheet. They used PW1"s motor vehicle registration number KAB 068Z to ferry the items. The said motor vehicle was later found the following day abandoned in Matasia Area, near Memusi School.

After the robbers fled PW1 and PW2 called the Police and later drove to Ongata Rongai Police Station and made a report. On 15th August, 2003, PW1 was called by Ongata Rongai Police Station and invited to attend an identification parade. PW1 was able to identify both Appellants in the identification parade. Similarly on 18th August, 2003 PW2 attended an identification parade at Ongata Rongai Police Station and was able to identify both Appellants. According to these witnesses they were able to identify the Appellants because during the commission of the offence, there was electricity light in the house and that the offence was committed over an hour thereby giving them opportunity to observe and identify the Appellants.

The 2nd Appellant was first arrested on burglary charges. However in the course of interrogation, he conceded to have participated in other robberies. He also led the Police to his accomplice the 1st Appellant, who was arrested in Eastleigh Section 3. Following further investigations, the Appellants were then charged with the instant offences.

Put on their defence, the 1st Appellant elected to give a sworn statement in which he stated that he was a Tanzanian. That he had been sent to Kenya by his father to get his sister. He arrived in the country on 2nd July, 2003. He had immigration papers that allowed him to be present in Kenya. On 12th August, 2003, he went to Garissa Lodge Eastleigh to buy some goods to take home. When he got there, he found many people had been arrested by the Police. The Police officers demanded of him to produce the a permit. However as he had left the same at home, he was handcuffed. He was later driven to Muthangari Police Station and was charged for offences he knew nothing about.

As for the 2nd Appellant, he gave unsworn statement of defence. He alleged that on 6th August, 2003 at about 7.30 p. m., he was heading home when he heard screams. As he walked on, people suddenly held him claiming that he was a thief. Police were then called who arrested him and took him to the Police Station and subsequently had him charged with the instant offences.

When the Appeals came up for hearing before us, we ordered that they be consolidated as they arose from the same proceedings in the subordinate Court.

In support of their Appeals, the Appellants tendered written submissions that we have carefully

read and considered.

The state through Mrs. Kagiri, Learned State Counsel opposed the Appeals. Counsel submitted that the evidence on record showed that the incident happened in the evening and lasted one hour. That the house was well lit. That PW1 and PW2 had 10 minutes to look at their attackers before they were ordered to lie on their stomachs. According to the Learned State Counsel this was sufficient time for PW1 and PW2 to identify their attackers who turned out to be the Appellants.

The Learned State Counsel further submitted that both PW1 and PW2 saw the Appellants clearly and noted the roles each one of them played in the robbery. They also noted that the 1st Appellant had a gap in the front Lower teeth and that the 2nd Appellant had Somali features, was tall and slim. The Learned State Counsel further pointed out that the Appellants were subsequently positively identified by the two witnesses in properly conducted identification parades.

With regard to the count three facing the 1st appellant, Counsel maintained that the Prosecution proved that at the time of the commission of the offence, the Appellant was unlawfully present in Kenya. That the document the Appellant availed in Court was a permit allowing him to be in Kenya. However the offence was committed before he had obtained the same.

We have carefully considered this Appeal and have evaluated and analysed the evidence tendered during the trial in the subordinate Court afresh whilst keeping in mind our role as a first Appellate Court as enunciated in the celebrated case of ***OKENO VS REPUBLIC (1972) EA 32.***

The conviction of the Appellants is predicated upon the alleged visual identification of the Appellants by PW1 and PW2 both at the scene of crime and at the subsequent identification parades. It is the state case that conditions obtaining at the scene of crime were conducive for positive identification. On the other hand the Appellants take the position that the circumstances in which PW1 and PW2 found themselves during the robbery could not have accorded them any clear opportunity to observe the robbers and subsequent thereto be able to identify them. They were in a state of shock, confusion and terrified.

According to PW1 and PW2, the offences were committed at 7.40 p. m. It must have been dark and that is why electric lights were on in the house. Both witnesses claim that they were able to identify the Appellants courtesy of the electricity light. On the question of identification of the 1st Appellant, the Learned Magistrate had this to say:-

"…… ***Both PW1 and PW2 positively identified accused 2 to be one of the robbers. This is positive identification. Accused were unmasked and were clearly seen due to the electric lights in the house by PW1 and PW2…..”***

As for the 2nd Appellant, the Learned Magistrate commented:-

"……***I am satisfied that PW1 and PW2 positively identified accused 1 among the robbers. The condition existing at the time of incident enabled them to clearly see accused 1. They also had ample time to see accused 1…..”***

In matters of identification at night and in difficult circumstances certain inquiries are mandatory for the trial Court. Such inquiries include the source of the light, its intensity, its source relative to the suspect etc. In the case of ***CHARLES O. 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 sought of***

light, its size, and its position relative to the suspect, are all matters helping to test the evidence with the greatest care. It is not careful test if none of these matters are known 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 greatest burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves…. …"

The Court proceeded to hold that failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction. Need we say more

In the instant case, no such inquiries were undertaken by the trial Magistrate. It matters not that the offence lasted over one hour. Those inquires were absolutely necessary to eliminate possibility of mistaken identity. Considering that the Appellants were arrested four months after the incident the inquires were all the more necessary. In order to buttress their evidence on identification, PW1 and PW2 each gave a description of the Appellants. They claimed in so far as the 1st Appellant was concerned that he had a gap in the lower teeth and a stammerer. As for the 2nd Appellant, he was described as a tall, slim light in colour with Somali features. However during the trial, the Appellants called for the Occurrence Book which was availed. PW4 who testified on the issue stated:-

"……***There is no description of the robbers in the OB…."***

If the two witnesses were unable to give the description of the Appellants to the Police soon after the incident, how possible was it that they could do so during the trial? In any event having a gap in the lower jaw is not a unique feature that can only be attributed to the 1st Appellant. Several communities in this country have such features. How about being a stammerer? Yes this is not a common occurrence. If it had been proved perhaps it would have placed the 1st Appellant at the scene of crime. However, from the evidence, at no point was the 1st Appellant tested as to whether he was a stammerer or not. The Appellant gave a long sworn statement and was cross-examined on the same at length. However there is no indication that the Appellant stammered in the process. In our view it was necessary to lead such evidence.

As from the 2nd Appellant, we do not think that this description as a tall, slim, light in colour with Somali features is of any assistance.

In the case of ***MAITANYI (SUPRA),*** the Court commenting on the importance of giving a description of the assailants in the first report by the victims had this to say:-

"……***There is a second line of inquiry which ought to be made and that is whether the Complainant was able to give some description or identification of his or her assailants to those who came to the Complainant's aid, or to the Police. In this case no inquiry of any sought was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the Magistrate to inquire into these matters….."***

Once again the Learned Magistrate never made any inquires into this aspect of the case. In our view the purported description of the Appellants as aforesaid was an afterthought and not credible at all.

Considering the manner in which the offence was committed, we doubt whether the two witnesses had an opportunity to observe any of the Appellants. The robbery was brazenly executed. PW1 was violently forced out of his car with pistols pointed at him. He was led into

the house of PW2. Immediately, PW2 opened the house, one of the robbers rushed in and placed a pistol on his temple. Both PW1 and PW2 then were forced to sleep on their stomachs with their faces facing the floor. According to the two witnesses however, they were forced on their stomachs after about 10 minutes. That within those 10 minutes they were able to identify the Appellants. Our reading of the evidence seem to suggest that there was mayhem in the house. Further there were more than 5 other robbers in the house who were all moving up and down the house. It is never suggested that the Appellants merely stood still all the time in the room as to enable the two witnesses to focus their attention on them and be able to identify them. In any case no evidence was led to show for how long the two witnesses if at all kept the Appellants under observation as to register their appearance and thus be able to subsequently identify them.

In the case of ***BONIFACE OKEYO VS REPUBLIC, CR. APPEAL NO. 52 OF 2000*** the Appellate Judges held:-

"….***If circumstances of identification are poor and unfavourable and a witness can't accurately and positively identify a suspect a conviction can't arise from such identification. There should be no possibility of error…."***

And in the case of ***KAVETA & OTHERS VS REPUBLIC, CRIMINAL APPEAL NO. 65 OF 86,*** the same Court stated:-

"…….***..Where evidence is based on identification the Court should closely examine the circumstances in which the identification by each witness came to be made….."***

In our view and considering the brazen manner in which the robbery was executed, we doubt whether there were perfect conditions that would have enabled PW1 and PW2 to identify any of the robbers.

We shall now comment very briefly on the identification parade. In respect of the 1st Appellant, it would appear that the parade was not fairly and properly conducted. According to the evidence the parade in respect of this Appellant was conducted by PW3. In his testimony PW1 he stated:-

"….***..At the identification parade I told all parade members to open their mouths and accused was the only with a gap in the lower jaw. This enabled me to identify him. I also identified accused two from his facial appearance. He seems to be a Maasai….."***

The Appellant was thus identified merely because of the gap in his teeth. It would appear that he was also the only person in the parade with a gap in his teeth. This act violated the provisions of the Forces Standing Orders. PW3 should have endeavoured to have other parade members with gaps in the lower teeth. This omission in our view had the effect further the evidential value of the identification parade. More so considering further that the identifying witnesses had not given a description of the Appellant in their first reports.

With regard to the 2nd Appellant he was described as being a tall person in height, this with Somali features. We have looked at the parade forms in respect of this Appellant and it would appear that apart from the Appellant there was only one other Somali on the parade going by the names on the parade forms. This parade too was in our opinion not fairly conducted.

The upshot of all the foregoing is that we are not satisfied that the Appellants were positively identified as the perpetrators of the crime. We think that this issue is sufficient to dispose of this Appeal. However we are constrained to comment on the 1st Appellant's conviction and sentence in respect of the third account. The Appellant gave sworn statement of defence and stated that he came to Kenya sometimes on 2nd July, 2003. He had a permit to be present in

Kenya. The offence was committed on 8th April, 2003. Essentially then the Appellant raised an alibi defence. He was saying that he was present in Kenya at the time the offences were committed in dismissing the defence, the Learned Magistrate had this to say:-

"….***As for count 3, accused 2 produced what he called a permit allowing him to be in Kenya between 2. 7. 2003 and 15. 8. 2003. The robberies occurred in April, 2003, being before the permit was issued. I also find that the production by accused 2 of this document, only during the defence case to be an afterthought. Not once during the entire Prosecution case did accused 2 show the Prosecution witnesses this document. Even upon his arrest, he did not show it to the Police. Neither did he cross–examine any Prosecution witness about the existence of such a permit. The author of the document (exhibit D1) did not testify in Court. The said document is alleged to have been issued by authority in Tanzania but its authenticity has not been proved. There is a doubt in my mind that this document is a genuine document….. I convict accused of the charge he faces in count 3 accordingly…."***

Whenever an alibi defence is raised, the person raising it does not assume any duty of proving it. It was so held in the case of ***STEPHEN MUNGAI MACHARIA VS REPUBLIC, CR. APPEAL NO. 1/94:-***

"…….***. We would state here that, when the Appellant puts forth an alibi as his defence it was upon the Prosecution to disapprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused remains on the Prosecution throughout the trial….."***

The way the Magistrate approached the issue seem to suggest that the Appellant ought to have proved his alibi. This was wrong. It matters not at what stage, the defence is raised. In the instant case, the Appellant raised it in his defence. In support thereof, the Appellant produced a permit allowing him to be in Kenya. The Prosecution did not object to its production and indeed the Court admitted the same as defence exhibit. In the premises it was not open to the Court in the course of writing the Judgment to question its authenticity or need to have the author of the same summoned to testify. These issues were revisited by the trial magistrate rather too late in the day. Further, what could have been easier than to send an investigating officer to check with the Immigration Department from Tanzania and Kenya Customs Department at Namanga to establish the genuineness or otherwise of the permit. We do not think therefore that the Appellant's conviction on the 3rd count of being unlawfully present in Kenya can be sustained. Going by the permit he was not in Kenya then.

In the result we allow the Appeals, quash the convictions and set aside the sentences imposed. The Appellants shall be set at liberty forthwith unless otherwise lawfully held. However since the 1st Appellant by his own admission is a Tanzanian we recommend his repatriation to Tanzania as the permit allowing him to remain in Kenya has long since expired.

Dated at Nairobi this 26th day of October, 2006.

……**…….. ……..**

LESIIT MAKHANDIA

JUDGE JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant: Present

Miss Abenge: For state

Erick/Tabitha: Court clerks

…… ……

LESIIT **MAKHANDIA**

JUDGE **JUDGE**