REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 166 OF 2005
(From Original Conviction(s) and Sentence(s) in Criminal case No. 494 of 2001 of the Senior Principal Magistrate's court at Garissa (R.N. Nyakundi – S.P.M.)

DEKOW MOHAMED YUSSUF..……..……..APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

J U D G M E N T

The Appellant **DEKOW MOHAMED YUSSUF** raises four grounds of Appeal against conviction and sentence in **GARISSA Criminal Case No. 494 of 2002.** That the learned trial magistrate erred in law and fact; one, in holding that the Appellant had been identified; two, in convicting the Appellant on uncorroborated evidence, three in convicting the Appellant against the weight of evidence, and four, in passing an excessive sentence in the circumstances of the case.

The appellant had been charged with two counts of **CAPITAL ROBBERY** contrary to **Section 296(2)** of the **Penal Code**. In the first count the Appellant was alleged to have robbed the Complainant, PW1 of Kshs.20,000/- while in the second count he is alleged to have robbed the Complainant, PW3 of Kshs.800/- and 25 Kilograms of Miraa. The facts of the prosecution case was that PW1 and PW3, together with others were traveling in a Land Rover from Liboi to Dobley in Somalia. It was 3.00 p.m. Before their vehicle reached the border point, seven men all armed with AK 47 rifles stopped the vehicle. They ordered all occupants out of the vehicle where they searched and robbed them. PW1 said that the Appellant whose face was uncovered pointed a gun at him while two of his accomplices searched and robbed him. They also took a paper bag in which was a shirt among other items. That on 14th August 2001, about three weeks after the robbery, PW1 saw the Appellant at Gagahaley making purchases. He recognized him as one of the robbers. PW1 said that the Appellant was also wearing his shirt which he identified in court as exhibit 1. PW1 did not say how the Appellant was arrested. PW3 on other hand said that the only person he could identify in the robbery was not in Court. The other evidence was of PW2, **CIP NGARE** who on 27th August 2001 conducted an identification parade in which PW1 identified the Appellant. PW4 was the arresting officer, who said that PW1 identified the Appellant to him, and that he escorted him to Liboi Police Station. PW6 told the Court that he was the Investigating Officer of the case, a role PW5 also claimed. PW5 did not complete his evidence and was never re-called to do so. PW6 said that he received the Appellant at Garissa Police Station on 14th August 2001. He had been brought from Liboi Police Station. He also took over a shirt as an exhibit in the case.

The Appellant gave an unsworn statement in his defence in which he alleged that in April 2001, PW1 and himself had a quarrel over a lady both of them wanted to marry. He said that they even fought over her. That after being warned severally not to marry her, he was eventually arrested and charged with this

offence. The Appellant denied the offence.

MR. OTIENO learned counsel of the Appellant, in support of ground one of the appeal submitted that the Appellant was arrested on the basis of a shirt - exhibit 1, which was not sufficiently identified by the Compliant, PW1. He also said that the arresting officer, PW4 contradicted the said Complainant's evidence on two issues, the first one being the date of arrest. PW4 said it was 9th August while PW1 said it was 14th August. The second issue was on recovery of exhibit. PW1 talked of his shirt being worn by the Appellant, while PW4 said he recovered nothing.

MRS. GAKOBO learned counsel for the state submitted that the evidence of identification was sound since the circumstances of identification were favourable. She also submitted that the said identification was fortified by the Complainants ability to identify the Appellant at an identification parade conducted by PW2.

Having re-evaluated the evidence adduced before the trial court, we observed that the Court seemed to have been in great haste during the proceedings. This is confirmed by the content of the evidence adduced. There was lack of detail and description so that what was recorded seemed to be a summary rather than an account of the events testified to. Taking the evidence of PW1 as an example, he did not disclose fully how and in what capacity he rode in the Land Rover from Liboi to Dobley. Was he a driver, a passenger, or a fare paying passenger? The trial magistrate recorded him to have said that he 'borrowed' a vehicle heading to Dobley. It was the duty of the Court to record what can be understood. We are unable to comprehend what the Complainant meant when he used the term 'borrowed'. There is also a lack of detail. There is no information as to the number of people travelling in that vehicle. On the account of the actual robbery, the Complainant did not describe the sequence of the events of the robbery. The evidence lacked detail including the roles played by the robbers. Also missing is the basis of identification of the Appellant as among those who robbed the Complainant. How did the Appellant identify him? What was the basis of the identification? There is no description given by the Appellant whether of the Appellant's physical appearance or the manner in which he was clothed or any other description. It is also evident that the learned trial magistrate muddled up the evidence of the day of robbery with that of his arrest. He recorded the following;

> ***"On 14.8.2001, I was at Gagahaley for prayers. I found the accused purchasing some clothes. The accused notified me. He informed another lady to pick the clothes and balance. I was able to recognize him at the scene of the robbery. He was also wearing my shirt. I can identify it."***

At the end of the evidence of PW1, the Complainant in count 1, one is left with so many questions begging for detail and chronology. That reflects negatively on the trial Court and gives the impression that the learned trial magistrate did not apply his mind to the evidence as it unfolded before him. Had he done so, he would have sought for more detail from the Complainant, PW1.

Unfortunately the same problem runs through the rest of the witnesses. PW2 talks of having conducted a parade in which PW1 identified the Appellant. He makes no reference to the other identification witness PW3, whose name also appears in the parade forms. We must mention that the learned trial magistrate made no mention of the parade forms being produced as part of evidence, yet they are part of the Court record. Further PW1 and PW3 in their evidence made no mention of participating in any identification parade. Going further, PW3's evidence is the most scanty. His entire evidence was as follows: -

"PW3 MOHAMED HUSSEIN SWORN AND STATE AS FOLLOWS; -

> ***I am a resident of Liboi. I am a Miraa dealer. I recall on 27.7.2001. I was at Liboi. While there left Liboi boarded Land Rover heading to Dobley. Shortly before the barrier we were stopped by seven bandits. The time of the attack and robbery was about 3.00 p.m. in the afternoon. We were driven towards the bush while they robed me of Kshs.800/-, and twenty five kilogrames of Miraa. The bandits were armed with rifles mainly AK47, they hit me. They later released me and continued with journey having first reported the incident. I and***

another who is (PW1) were Kenyans, reported to the police. The investigations were commenced. I was able to identify one person but is not in court."

Having re-evaluated this evidence of PW3, one gains nothing of evidential value. We need not say more. Yet PW3's evidence was more complete that that of PW5. PW5's evidence was only 3 open ended sentences as follows: -

"PW5: NO. 69538 PC FARAH HUSSEIN SWORN AND STATE AS FOLLOWS; -

I am attached to D.C.I.O. Garissa. I am the Investigating Officer which I took over from the other officer. I took over the exhibits in this case."

We need not comment any further on the evidence of PW5. On the evidence of PW6, again he produced exhibit 1 in the case without saying where he got it from or who gave it to him. He also does not disclose who handed over the Appellant to him.

We have gone into some detail to demonstrate the nature of the evidence recorded by the learned magistrate, with a purpose. A trial magistrate is expected to make inquiry in regard to pertinent issues in a case during trial. We are not suggesting that the trial magistrate takes up the role of a prosecutor. Not at all. The inquiry will assist the Court to take comprehensive evidence for example, as relates to identification so that at the time it evaluates the evidence before Court, it will have a clear and complete picture of the impressions created in the minds of the witnesses, of the events under inquiry. In CHARLES MAITANYI vs. REPUBLIC {1985} 2 KAR 25 at page 77, NYARANGI, PLATT and GACHUHI JJA, held;

"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 a senior magistrate trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the 'greatest care' the evidence of a single witness.

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 sort 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 the accused, the recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."

We find that there was no inquiry made into the circumstances of identification both of the Appellant and of the shirt produced as an exhibit. The Complainant, PW1, gave no description of the Appellant to the Court. He did not claim that he gave any description to the Police at the time he made his report at Liboi Police Station. His recognition of the Appellant at Dagahaley was therefore suspect.

Related to that same issue no basis was laid for the conducting of an identification parade in the case. The Appellant was arrested by PW4 after PW1 identified him. Having led to his arrest, the holding of an identification parade, in which PW1 was the identifying witness, was not necessary in the circumstances. In any event having not described him to the Police prior to the identification parade, the value of identification parade was significantly depreciated by that fact. MR. OTIENO in his submission in support of the rest of the grounds of Appeal challenged the conviction of the Appellant on the basis of the evidence of PW1 in support of Count 1 and PW3 in support of count 2 without corroboration.

MR. OTIENO was of the erroneous view that by saying the Appellant was armed with a rifle and that he pointed it at PW1 without himself stealing it, then the offence of **ROBBERY WITH VIOLENCE** had not been committed. MRS. GAKOBO did not agree with him and rightly so. It is trite law that the offence of ROBBERY WITH VIOLENCE, contrary to **Section 296(2)** of the **Penal Code,** is committed in any of

the following circumstances.

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

(See OLOUCH vs. REPUBLIC 1985 KLR 549)

The Appellant was therefore rightly charged with the offence, since evidence adduced supports the first two circumstances enumerated above. MR. OTIENO was clearly misinformed on that point.

Turning now to the other issue raised, it was **MRS. GAKOBO'S** submission that the evidence adduced by the Complainants in the case was corroborative and also corroborated. She submitted that PW1's evidence of identification was corroborated by his ability to identify the Appellant in the identification parade. She also submitted that the evidence of PW5 that a shirt was recovered as an exhibit in the case corroborated the evidence of PW1 that the Appellant was wearing his shirt during the arrest.

We have already dealt with the issue of the identification parade and its value in this case. We have also dealt with the issue of the shirt; especially the fact that from the evidence adduced, it is unknown how it found itself in the hands of PW6. PW1 had also not described it at all and therefore the evidence before the Court was inconclusive as to its identity and therefore ownership. We must also mention that the shirt is not one of the things stolen from PW1 in the charge and therefore cannot be a basis to support the charge.

We now wish to deal with the manner in which the evidence of PW1 and PW3 was handled by the learned trial magistrate. At J4 of the judgment the learned trial magistrate observed;

"What this gives rise to is that given the evidence that none of the armed robbers covered themselves as they went about their business of robbery. The chances of one stealing a movement of observation and recording the physical features of one are high. I have considered and synthesized the testimony of (PW1) as regards his pointing to the accused person as being part of the gang which robbed them on 27.7.2001. In considering the same, I have borne in mind also the evidence of (PW3) who also testified as having identified one other suspect besides the one in Court …(sic)"

At J5 the learned trial magistrate conceded thus: -

"As far as the testimony of (PW1) is concerned on seeing the accused at the scene and identified him, I am satisfied that his testimony is accurate person positively as being part of the armed men on 27.2.2001 with AK 47s. While considering the testimony, I have borne in mind the danger of relying wholly on the correctness of Identification by (PW1). However, I have also taken the circumstances of the offence on 27.7.2001 …(sic)."

It is clear from the above account and indeed from the entire judgment that the learned trial magistrate did not warn himself of the dangers of convicting on the evidence of a single identifying witness. In fact from the judgment that aspect does not seem to have been appreciated. The position of the case is that the Appellant was identified only by PW1. PW3 did not identify him at all, whether in Court or during the identification parade. In fact from his evidence, PW3 is very clear that the person he could identify was not in Court. That kind of evidence could not have lent any credence to the evidence of identification by PW1, the way the learned trial magistrate thought. Such evidence could not have amounted to corroboration of PW1's evidence of identification. It could only corroborate the fact that a robbery took place on the day alleged, but that was all. The evidence of the two Complainants was not treated well as required. PW1 was the sole identifying witness and his testimony needed to be treated with extreme

caution and analysed with circumspection.

Having re-evaluated the evidence, we find that the evidence of PW1 was scanty and did not establish the basis of identification. It was insufficient to support the charge. We find that the conviction entered here both in respect to count 1 and count 2 were unsafe. We find merit in this appeal and allow it.

Accordingly we quash the conviction on both counts and set aside the sentence.

Dated at Nairobi this 5th day of May 2005.

LESIIT, J **F.A. OCHIENG**

JUDGE. **JUDGE**

Read, signed and delivered in presence of;

LESIIT, **J.F.A. OCHIENG**

JUDGE **JUDGE**