REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 208 OF 2002

(From Original Conviction and Sentence in Criminal Case No.2161 of 2000 of the Chief Magistrate's Court at Makadara).

NOAH OMONDI OMINDE…..…….................……………………….APPELLANT

VERSUS

REPUBLIC……………………..……...........…………………..….RESPONDENT

CONSOLIDATED WITH

JULIUS OTIENO ODHIAMBO...……….……………………………….APPELLANT

VERSUS

REPUBLIC……………………………………………………..….RESPONDENT

JUDGMENT

NOAH OMONDI OMINDE and **JULIUS OTIENO ODHIAMBO** (**hereinafter referred to as "the appellants"**) in these consolidated appeals respectively were charged with one **ISAAC ONYANGO AYOKI** before the Chief Magistrate's Court, Makadara with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars being that on 2nd November 2000 at Gathecha estate, the three accused persons while armed with offensive weapons among them a Somali sword, hammer and stones robbed Eva Wamaitha of her cash Kshs.2,200/= and at or immediately after the time of such robbery threatened to use actual violence on her.

The accused also faced a second count of attempted robbery with violence contrary to Section 297(2) of the Penal Code. The particulars being that under similar circumstances as in count one they assaulted Raphael Mwaniki Kioko with intent to steal from him. Following a full hearing in which the prosecution led six witnesses and having also heard their defences, the trial magistrate held, on the evidence before her that the appellants' coaccused aforesaid was not guilty of the charges preferred and accordingly acquitted him under Section 215 of the Criminal Procedure Code. However, in respect of the Appellants, he found them guilty as charged and convicted them accordingly on the two counts. As death is the only sentence prescribed upon conviction under the sections of the Penal Code that the appellants were charged, the learned trial Magistrate did sentence the appellants to death. Being aggrieved by the conviction and sentence, the appellants separately lodged appeals against the said conviction and sentence. The said appeals were however consolidated during the hearing. In their petitions of appeal, the appellants put forth more or less same grounds of appeals which revolve around their identification that the learned trial Magistrate shifted the burden of proof, contradictions in the prosecution case and finally that the sentence imposed on the appellants was illegal.

During the hearing of the appeal, the 1st appellant was unrepresented. We however allowed him to tender written submissions in support of his appeal. The 2nd appellant was however represented by Mr. Omuga, learned counsel who made oral submissions in support of the 2nd appellant's appeal. The state which opposed the appeal limited to conviction only was represented by MS Nyamosi, learned state counsel. We have carefully read and considered the 1st appellant's written submissions.

Mr. Omuga in urging the appeal on behalf of the 2nd appellant submitted that the appellant was not arrested in the act or at the scene. Rather he was arrested by PW3 and 4, 200 metres away from the scene of the alleged robbery. That the members of the public who allegedly chased the appellant following the incident were not present when the appellants were arrested. They only appeared after the appellants had been arrested. Counsel further submitted that following the arrest, the appellants were ferried to Ruaraka Police Station and it was while they were at the police station that the complainants purported to identify them. Counsel further submitted that under this circumstances it was necessary that an identification parade be conducted. The learned Magistrate therefore misdirected herself when she stated in her judgment that an identification parade was not necessary in the circumstances of the case. In support of this submission learned counsel referred the court to **MISC. CRIMINAL APPEAL NO. 191 OF 2003 AND MAURICE MAKANGE KOBIA VS. REPUBLIC (KAKAMEGA) (UNREPORTED)**. It was learned counsel's submission that the identification of the appellant was neither proper nor watertight as to find a conviction.

On the issue of the learned Magistrate shifting the burden of proof to the appellants', counsel submitted that the appellants were being condemned for not having heard the shouts of "**thieves", "thieves"** as other members of the public who responded to the shouts and went to assist the complainants. Counsel further submitted that none of the members who purportedly chased the appellants were called to testify. No weapons were recovered from the appellants nor the money allegedly stolen from the complainant in count one.

On contradictions in the prosecution case, counsel submitted that the complainants contradicted themselves on the roles played by each appellant in the alleged robbery. Whereas PW1 stated that the 1st appellant held her clothes and threatened her with a knife as 2nd appellant attacked PW2, PW2 testified that he was attacked by the co-accused in the case who was acquitted. Counsel submitted that these contradictions should have been resolved in favour of the appellants. In concluding his submissions, learned counsel stated that the complainants could have been attacked by other people who subsequently disappeared in the bush nearby. He therefore urged us to allow the appeal.

On her part, M/S Nyamosi submitted on sentence that when they were convicted, the appellants were aged 18 years. Death sentence should therefore not have been imposed as they committed the offence when they were under the age of 18 years. As regards conviction, learned state counsel submitted that the ingredients of robbery with violence and attempted robbery with violence were met. That identification parade was not necessary as PW1 and PW2 had seen the appellants before they were taken to the police station. Regarding the shifting of the burden of proof, counsel submitted that there was no such shifting. The magistrate was merely evaluating the evidence tendered and on record.

According to the learned state counsel, the offence was committed at about 2 pm and took about 30 minutes according to PW1. The circumstances were therefore favourable for positive identification of the appellants. That PW2 who was in the company of PW1 corroborated the evidence of PW1. Finally, counsel submitted that the evidence on record was overwhelming and there was no doubt at all that the appellants and nobody else committed the crime.

In brief reply, the 1st appellant submitted that the incident happened next to the road where there was heavy human traffic. That no independent witness was called to testify. That the members of public who chased the robbers were not called to testify. Finally he submitted that he was not arrested with anything incriminative.

The role of the 1st appellate court in an appeal of this nature was succinctly stated by the Court of Appeal in the case of **GABRIEL NJOROGE VS. REPUBLIC (1985-88) 1KAR 1134** in the

following terms:-

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusion though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect…………"***

We shall bear the above injunction as we consider this appeal. However, before we commence our task, we think it is pertinent to set out the brief facts of case as tendered before the trial Magistrate.

On 2nd November 2000 at about 3 p.m. PW1 and PW2 the complaints in counts one and two respectively, were walking along some footpath heading towards Gatheca estate. They came across three people who they identified as the accused persons in the court below. The three persons then suddenly attacked them using Somali sword, hammer and stones and robbed them of money, Identity card and a shoe. The identity card and shoe were however recovered hence the 2nd court of attempted robbery. During the incident, the Complainants cried out loud for help shouting "thieves" "thieves" attracting the attention of the members of the public who responded and chased the robbers. The alleged robbers were however arrested by two police officers who bumped into them as they were running in their direction and upon hearing shouts of "**thieves" "thieves"**. Upon arrest the appellants were taken to Ruaraka Police Station. PW1 and PW2 then went to the police station and identified the appellants as the persons who had robbed and injured them. Following further investigation the appellants and the co-accused were then charged with the offences in the charge sheet.

In their defences, the 1st appellant stated that he was walking with the 2nd appellant when some people attempted to stop them. The two appellants ran away in fear but the people chased and arrested them. These people claimed they were police officers so they were taken to the police station and were subsequently charged with offences they had nothing to do with. The 1st appellant further testified that the police officer who arrested him had on prior occasion arrested him for assaulting his son. He had as a result demanded compensation. The appellant had paid half of the compensation demanded. However, when he failed to pay the remaining half, the police officer threatened to teach him a lesson. The appellant believed that the complainants had ganged with the police officer to frame the appellant with the case. As for the 2nd appellant he testified in his defence that he must have been arrested because of the grudge between the 1st appellant and the police officer. He testified that the police officer pointed out the appellant to the complainants. Otherwise he had nothing to do with the crime .

On the issue of identification we note that the offence was committed at about 3 p.m. in broad daylight and took about 30 minutes. However, it is not clear from the record whether the complainants kept the robbers under close observation and if so for how long. PW1 testified:-

> ***"We saw three people ahead walking in the same direction. They were three accused persons in the dock. They then sat on stones. One passing them they arose and followed us. There were bushes on both sides of the road. One passed us and went ahead of us. He had a store. He is the 1st accused. He ordered us to stop. The two were then at the rear. The second accused came and held my dress at the back…… the other boy went to Kioko…………"***

As for PW2, he testified as follows on the same issue.

> ***"………On 2nd November 2000 at about 3 p.m. I was with Eva from Baba Dogo going to Gatheca. We found three boys on road. I was ahead of Eva. After passing the boys one ran ahead past me, he had two stones. He told me to give him the money. I was going to shop for my wife. Before I could answer another came and hit me on the head using a hammer. I bled ……… Whoever had stones started***

searching my pockets. The third boy was struggling with Eva…………"

From the aforesaid evidence it is quite clear that the complainants did not have opportunity to observe the robbers keenly as to be able to positively identify them. At any given time, the alleged robbers were either behind the complainants or ahead of them. There is no evidence on record that the complainants turned and looked back to observe the robbers when they were at the back. Nor is there evidence that when the alleged robbers sat on a stone as the complainants passed by, they stopped and observed them. Finally when one of the robbers ran passed them, in our view it would not have been possible for the complainants to put him under observation for they could only have seen the back of the said robbers.

Even if we were to grant the complainants the benefit of doubt and hold that they had an opportunity to observe the robbers as they committed the offence, in our view the complainant could only have had a flirting glance and or glimpse of robbers, that was not sufficient to enable them identify the robbers subsequently. Is it small wonder that none of the complainants ever gave any description of the Appellants, their mode of dress, their complexion etc. it was necessary for such description to be given so as to see if it matched or fitted the persons who were arrested my members of the public, the appellants. After all when arrested the Complainants were absent.

We now turn to consider the mode of arrest of the appellants. On the recorded evidence, soon after the commission of the alleged offence, the appellants ran off as members of the public chased after them shouting "thieves" "thieves". Apparently, the appellants as they were running came face to face with two police officers (PW3 and PW4) from the opposite direction who confronted them and arrested them. In his own words PW3 testified as follows:-

> ***"………. I then heard cries of "thieves" "thieves" from the valley. I checked down and saw three boys running towards us running away from the noise………. One of the three went back towards the valley where Nandasaba was. Two came towards me. Nandasaba ran towards my direction. Two boys neared me by about 10 metres away. The second accused in dock flashed something at me and I told him to surrender or I would shot him. Nandasaba arrested third accused in dock. I arrested accused 2 after a chase and brought him to where PC Nandasaba was. We took accused 2 and accused 3 to Ruaraka Police Station…….***

As for PW4, PC Nandasaba, he testified that:-

> ***"………. I heard people shout on my right about 200 metres away. I could hear people cry out "thieves" "thieves" I could not see. That estate is bushy and has about 4 paths. One route crosses the estate from the shopping centre. I stopped to observe. I saw someone run towards me. He had a black T. shirt and Muslim cap. He stood on seeing me and turned back and ran off………. Then I saw two other people run towards where I was going……I walked towards them then I saw a big crowd across. I went after them and managed to arrest 3rd accused in the dock……. The crowd had not reached the place………."***

In the case of **ALI RAMADHANI VS. REPUBLIC, CRIMINAL APPEAL NO.79 OF 1985**, the Court of Appeal held:

> ***"The identification of a person who took part in the alleged offence and was chased from the scene of crime to the place where he was arrested is of course strong evidence of identification and if all the links in the chain are sound, it may be safely relied upon…………***"

In the instant case, it is clear that neither the complainants nor members of the public who pursued the robbers managed to arrest them. They were arrested by PW3 and PW4 who were across the valley. PW3 and PW4 only arrested the appellants because they saw them running towards them and

heard people whom they had not seen shouting "thieves", **"thieves".** These people were still in the valley. They had not pointed out to the PW3 and PW4 that the thieves they were chasing the appellants. And even when arrested, PW1 and PW2 did not appear at the scene of crime to confirm that indeed they were the appellants who robbed them. The complainants were only able to allegedly identify the appellants at the police station as the culprits. We doubt whether the complainants could have said that the appellants were not the robbers after they had been pointed out to them at the police station.

People run for all sorts of reasons. Here is a situation where the alleged crime was committed in a bushy area. The robbers ran off and were chased. Those who chased the robbers at some point lost sight of the robbers. In our view at this point, there was a break in the chain of events leading to the arrest of the appellants. We cannot therefore comfortably say that the links in the chain, are sound. PW3 and PW4 confirmed in their testimony that by the time they were arresting the appellants they had not seen the members of the public who were chasing the robbers while shouting "thieves" "thieves". They were still in the valley.

In the case of **MAURICE MAKANGA KOTIA (SUPRA),** it was stated that, and which position we are in agreement with:-

> **"……. We are cognizant that where a robber is arrested after a robbery by a person or a group other than the one chasing him, it cannot be assumed that he is the person who had robbed unless there is evidence of identification………."**

The above exposition is on all fours with the circumstances obtaining in the instant case. We would therefore hold that everything considered, the identification of the appellants through mode of arrest was unsatisfactory contrary to the submissions by the learned state counsel. We cannot therefore say with certainty that there was proper evidence on the basis of which it can be said beyond reasonable doubt that the appellants were identified as the robbers.

We should also point out that although the complainants alleged that they were robbed of money, identity card and a shoe, and the process of so doing, the alleged robbers used a sword, stones and hammer, when arrested, none of the appellants was found in possession of any of this items. Had any of the said items been recovered from the appellants or any one of them it would have provided the necessary linkage or nexus. It would also have provided the necessary corroboration. If for sure the appellants had participated in the commission of the offence and were chased from the scene of crime to the point of arrest as claimed in the testimonies of PW1 and PW2, surely they could have been arrested with the knife and the money with regard to the 1st appellant or a hammer with respect to the 2nd appellant. Upon arrest the appellants were immediately searched and no recoveries were made. The prosecution did not explain where these items disappeared to since their case rested on the chase and arrest of the Appellant.

We are cognizant that PW3 testified as follows:

> ***"………. The 2nd accused in the dock flashed something at me and I told him to surrender or I would shot him………"***

The question that arises is did the 2nd accused surrender and if he did what happened to the item that he was flashing at PW3? From the evidence on record 2nd accused who is the 1st appellant herein actually surrendered. So what became of the item that flashed at PW3? Further PW3 testified:-

> "*As I chased accused he threw something in a bush. I did not know what he threw*".

If that above statement be true how come after the arrest of the 1st appellant, PW3 being a Police Officer did not take him back and searched for the item that was allegedly thrown in the bush.

We must also point out that this was a clear case where identification parade ought to have

been conducted. The appellants had been arrested in the absence of the complainants and taken to the police station by PW3 and PW4. It is at the police station that the appellants were pointed out to the complainants who then identified them as robbers. It was wrong on the part of the police to have brought in the complainants whilst the appellants were still in the police officers which act caused the complainants to identify the appellants. Had the appellants not been seen by the complainants, an identification parade conducted and they were identified by the complainants, this would have provided further corroboration of the evidence of PW1 and PW2. However, as it turned out, this was not to be.

Finally we wish to deal with the issue of shifting the burden of proof. It is trite law that in criminal proceedings, the burden of proof always lies with the prosecution. The accused person is not obliged to proof his innocence. In the instant case, the learned trial magistrate in the course of his judgment stated:

> ***"PW1 called for help and that is how people came to their rescue. If the accused persons were actually in that area during the robbery one could have expected that they also hear those cries of help but they appear not to have heard that. They could not have heard that because they were the ones the alarm was raised against."***

This statement is rather unfortunate as critical evaluation of the same would seem to suggest that the learned magistrate expected the appellants to prove their innocence. To that extent therefore the appellants were right in complaining that the learned magistrate shifted the burden of proof to them contrary to the submissions by the learned state counsel.

On sentence we note that the appellants were sentenced to death. At the time when the sentence was meted out on 22nd January 2002 they were aged 18 years. The offence was alleged to have been committed on 2nd November 2000. The appellants were then we believe aged about 16 years. Under Section 25(2) of the Penal Code, it is provided that a sentence of death shall not be pronounced or recorded against any person if it appears to the court that at the time when the offence was committed that person was under the age of eighteen years, but in lieu thereof, the court shall sentence such person to be detained during the President's pleasure. In our view, the learned trial magistrate was wrong in thinking that he was bound to impose the death sentence. Had we come to the conclusion that the appeal had no merit and proceeded to dismiss the same, we would obviously have interfered with the sentence imposed as it was clearly illegal. However this is not necessary in view of our findings in this appeal.

Still on the question of sentence, we note that the appellants were charged with two capital offences, convicted and sentenced on both. The court of appeal in **MUIRURI VS. REPUBLIC (1980) KLR 70** stated:

> ***"That where a person is charged with a number of capital offences it is preferable for the prosecution to proceed on one capital charge only and leave the other capital charge in abeyance, even though the charges appear to be interrelated………"***

The court went on to observe that if the prosecution fails to heed that advice then it is a good practice for the trial court to sentence the accused on one capital charge and leave the sentence in the other charges in abeyance. This is what ought to have happened in the instant case. Unfortunately the trial Magistrate did not heed the advice of the Court of Appeal but proceeded to sentence the Appellants to death on both counts. This ought not to be the case.

For the reasons set out above we accordingly hereby allow the appeal, quash the convictions and set aside the sentences of death imposed on the appellants and each one of them. We order that the appellants be released forthwith unless they are otherwise lawfully held.

Dated at Nairobi this 18th of October, 2005

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LESIIT J

JUDGE

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M. S. A. MAKHANDIA

JUDGE