REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KITALE.
APPELLATE SIDE.
CRIMINAL APPEAL NO. 105 OF 2003.

(Being an appeal against the Judgement of the SPM'S court in Criminal Case No. 408/2001 by H.I. Ong'udi (Mrs) – SPM delivered on 3rd October, 2003 in Kitale)

EBONGON MATET ::APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

J U D G M E N T.

Ebongon Matet was originally charged with the offence of robbery with violence, contrary to section 296(2) of the Penal Code. He was also charged with the offence of being in possession of a firearm without a firearm certificate and also of being in possession of ammunitions without a certificate each of which offence is contrary to section 4 (2)(a) of the Firearms Act. After a lengthy trial which took just over 2 years and nine months, he was convicted of all the three counts and sentenced to suffer death on the 1st count, 5 years imprisonment for the 2nd count and 3 years imprisonment for the 3rd count. It was ordered that the last two sentences run concurrently.

Being dissatisfied with the convictions and the sentences, he has now preferred the appeal which is based on five grounds, which are mainly that identification parade at which he was identified was not conducted properly, that the prosecution was not able to prove its case beyond reasonable doubt, and that the learned trial magistrate erred in rejecting his defence, which action amounted to miscarriage of justice.

Briefly, on 25/12/2000 as Thomas Lapur Emuyen (PW1), then a bartender at Lodwar, went about his business in the bar, a customer walked into the bar and was served with 2 bottles of herbal drink. When asked to pay, as PW1 intended to close the bar, he asked for time and then started giving stories about how men had engaged into sexual acts which led to their being placed in the police cells. He then told his audience of two (PW1 & 2) to be quiet and to await his further action, after which he removed a pistol from his inner pocket. He then removed the strap of a bag from his pocket and asked PW2, (PW1's colleague) to tie PW1's with it, which PW2 did by, tying PW1's hands at the back. He took a knife from the bag and while armed with both the gun and the knife, he threatened PW1 and 2, and ordered them to give him money. PW2 got the key from PW1's pocket, with which he opened the drawers and gave the robber the sum of Ksh. 200/=. PW2 was ordered to remain behind as PW1 was taken behind the bar to their employer (PW3), where they found a girl (PW7) who was lying on the veranda. The assailant slapped and then kicked her and ordered her to take him to PW3's home where he demanded to be given their account number and money. She then managed to run away. He then fired twice at the door and then left with PW1 for the forest, and later brought him back to town and warned him about going back in the bar.

The fact that PW7 was injured on her cheek during the robbery was confirmed by the clinical officer at Lodwar.

Upon evaluation of the evidence that is before us, we find that PW1 went to the police immediately after his release and reported the matter. It was his evidence that he had served the appellant with drinks about 6 weeks before the incident, and further that he had informed the police that he had recognized his assailant by his voice and appearance.

According to PW1 the whole incident took more than four hours. Both the bar area and the house were well lit with lantern lamps, and that the appellant had engaged both PW1 & 2 in the aforementioned conversation. He was their only customer at that particular moment as the bar was supposed to be closed for the night, just after he had finished his first drink but he had stayed on.

In our humble opinion, we find that the time that PW1 and 2 spent with their assailant which was in a well lit area, was sufficient for them to recognize their assailant, and on that account are convinced that the circumstances were conducive to positive identification, more so because PW1 had served his assailant with drinks a few weeks before the incident.

We are convinced that a robbery did infact occur at Lodwar on 25/11/2000 and that PW1 & 2 were robbed of Ksh. 200/= while PW7 was harmed on the cheek by the robber.

The issue that arises is whether it was the appellant who committed the offence and whether he was liable for all the three offences for which he was convicted and sentenced.

Both PW1 and 2 were able to identify him at an identification parade which was conducted on 19/1/2001.

However by his own admission, PW2 was shown the appellant while at the police station before he identified him at the identification parade. Indeed, Police officer who conducted the identification parade (PW9) conceded to the fact upon being cross-examined on the issue by the accused, clearly stated “We make arrangements to ensure that the suspect is not seen by the witnesses. This should not have happened”. Further and interestingly, the owner of the bar in which the robbery took place, (PW3) confirmed having visited the appellant at the cells, on the day of the parade but before it was conducted and had even delivered a message to him and received his reply, for onward transmittion, presumably to a third party. It is highly suspicious that PW3 had pointed out the appellant to PW1 & 2 who identified him later that day.

But of graver concern is that in his evidence PW5, who recorded the first report and later arrested the appellant after investigating the crime, testified that the report had been made at 11.55p.m. That was in direct contradiction with PW1 who had claimed that the whole incident which started at 10.00pm took more than four hours.

The above rains serious doubts in our minds whether this appellant should have been convicted for that particular crime of robbery with violence.

Further, it was the evidence of PW8, who was one of the arresting officers, that at the time of the arrest, the pistol was recovered from the appellant’s small shorts and that he had tied a lesso around his body, yet his colleague (PW6) had testified that the gun had been recovered from the pockets of a long pair of trousers, after a body search was conducted on the appellant.

The Ballistics report though marked for identification was never produced in court and we feel that convictions in the 2nd and 3rd counts wasn’t proper in the circumstances, as it was never proved that indeed the appellant was armed with a ‘firearm’ in the real meaning of the word or even that what was found on him was ‘ammunition’ for purposes of the Firearms Act.

We are surprised to note that though PW6 and PW8 claimed in their testimony that they were the ones

who recovered the pistol and the ammunition, the same were actually found by No. 65325 PC Joseph Musau on 13/1/2001 at Lokichoggio and taken possession of by No. 32336 CPL Josphat Njemu. These two officers who were material witnesses were never called to testify. It is trite law that where the prosecution fails to call material witnesses, it can only be assumed that their evidence would have prejudiced the prosecution case. The above information which was contained in MD1 7(a) should not have escaped the attention of the learned Trial Magistrate. We believe that had she taken it into consideration it would have created serious doubts in her mind on the veracity of the prosecution case.

We find that there were major flaws in the prosecution case and in the circumstances, the prosecution failed the test, by not proving the case beyond reasonable doubt.

We therefore allow the appeal, quash all the convictions and set aside the sentences.

The appellant should be released forthwith unless otherwise held in lawful custody.

Dated and delivered at Kitale this 25th day of March 2004.

JEANNE GACHECHE

JUDGE.

GEORGE DULU.

JUDGE.

Delivered in the presence of: