REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 99 OF 2001
(From Original Conviction and Sentence in Criminal Case No. 8196
of 2000 of the Senior Principal Magistrate's Court at Kibera)

ERICK ONYANGO OUKO …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

JUDGMENT

ERICK ONYANGO OUKO , hereinafter called the appellant, was charged and tried on one count of robbery with violence contrary to Section 296(2) of the Penal Code. A charge under that section carries a mandatory death sentence. The appellant was convicted and sentenced accordingly.

Being aggrieved by the conviction and sentence, the Appellant prefered an appeal to this court against both the conviction and sentence and set forth six (6) grounds of appeal which may be summarized into three:-

(1) THAT the charge preferred against the appellant was defective.

(2) THAT the evidence regarding the identification of the appellant was unsatisfactory, inconclusive and unreliable.

(3) THAT the trial Magistrate erred in law and fact in relying on the evidence pertaining to the appellant's arrest.

When the appeal came up for hearing the appellant who was unrepresented made oral submissions in support of the Appeal. He had also prepared written submissions which with our permission he was allowed to tender. In his oral submissions he stated that the Lower Court erred in convicting him on the evidence of PW1, the complainant, when in her testimony she did not state that the robbers were more than one. That the charge as drawn was defective as the alleged pistol which the complainant stated that the gangster was armed with was not mentioned in the charge sheet. He also wondered why if indeed he was arrested whilst in possession of the pistol, he was not charged with offences under the Firearms Act. The appellant further submitted that after his arrest, he was taken to the scene of crime and not the police station. The act of taking him to the scene of crime and some potential witnesses being asked to confirm whether he was the robber was prejudicial to him. In his written submissions, the appellant raised the issue of identification and submitted that the circumstances obtaining during the alleged robbery were such that positive identification was impossible. He also submitted that the evidence relating to his arrest was suspect and unreliable.

On its part the state through Miss Otieno, Learned State Counsel opposed the Appeal. She submitted that during the trial the prosecution proved that indeed a robbery took place at Kihara Supermarket on 11th October 2000 at about 7.30 p.m. when PW1 was robbed of money as stated in the charge sheet. That the appellant was arrested one kilometre from the scene of crime by PW4 and PW5 police officers who were on patrol. That the Appellant was positively identified by PW1, PW2 & PW3 who stated that electricity lights were on in the supermarket during the robbery. On arrest the Appellant was found with a home made gun and a black paper bag which the complainant identified as hers and which had coins totaling 464/20 which was part of the stolen cash. On the charge being defective, the learned state counsel submitted that it was not.

Before we consider the rival arguments advanced in this appeal it is pertinent that we set out briefly the facts of this case. On 11th October 2000 at about 7.30 p.m. the Complainant – PW1 was in her supermarket when the Appellant allegedly entered the supermarket and headed straight for cash register. The Appellant stood still at the register, produced a pistol, brandished it to all the people, telling them to lie on the floor. The Appellant then ordered the Complainant to open the cash till machine. He then placed the pistol on the counter as the money was handed over to him by the Complainant. He staffed the money in his pockets. He thereafter ordered the Complainant to put all the coins in a paper bag which he took and left. The Complainant followed the Appellant and on reaching the door way of the supermarket, she met some customers whom she informed of the robbery. The said customers then ran after the robber but never managed to arrest him. The Appellant was however arrested a kilometre away from the scene by two Police officers who were on patrol, on the basis of information passed to them by the customers aforesaid, brought to the scene and was positively identified by the Complainant as the robber. She was shown the pistol recovered from the appellant and some coins. The Appellant was then taken to Karen police station and was subsequently charged with the offence.

As a first Appellate Court, it is our duty to reconsider the evidence which was tendered before the trial Court, evaluate it and draw our own conclusions while bearing in mind that we never saw or heard the witnesses testify and give due allowance for that *(SEE OKENO VS REPUBLIC (1972) E.A 32, NGUI VS REPUBLIC (1984) KLR 729 AND NJOROGE VS REPUBLIC (987) KLR, 19.)*

The charge preferred against the appellant was drafted in the following terms:-

> *ERICK ONYANGO OUKO: on the 11 th day of October 2000 at Ngando village Dagoretti within the Nairobi area, jointly with others not before Court robbed LIDYA MWITHAKA cash Kshs.58,648/= and at or immediately after the time of the said robbery threatened to use personal violence".*

The charge was of course brought under Section 296(2) of the Penal Code. This section creates the offence of robbery with violence which carries the death penalty. For an offender who has stolen to be convicted under this section, he/she must have:-

> (i). Been armed with a dangerous or offensive weapon, or
>
> (ii). Been in the company of one or more other person or persons, or
>
> (iii). At or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

It would appear that particulars of a charge under Section 296(2) must contain any one of these three sub-heads in order for such a charge to be legally valid. If the prosecution is minded to bring a charge under this section, they must choose under which in the very least one of the three provisions set hereinabove they wish to proceed on. *(SEE JOHANA NDUNGU VS*

REPUBLIC – CRIMINAL APPEAL NO. 116 OF 1995 (MOMBASA) (UNREPORTED). The particulars of the charge sheet reproduced above clearly shows that the Appellant was not armed with a dangerous or offensive weapon. Secondly although the charge sheet states that the Appellant *"jointly with others not before court robbed……",* the evidence on record shows that the robber actually acted alone. He was not in the company of one or more or other person or persons. Finally, it is stated in the charge sheet that "……. *and at or immediately before or immediately after the time of the said robbery threatened to use personal violence".* As already stated above, the other ingredient of robbery with violence involves a situation where the offender immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person". It does not involve *"threat to use personal violence"* as stated in the instant charge sheet. The offender in this case being the Appellant did not in the process of robbery wound, beat, strike or use any other personal violence to any person.

For the foregoing reasons we are satisfied that the appellant's complaint that he was found guilty on a defective charge is not without merit. The particulars of the charge as drafted would have fitted a charge preferred under Section 296(1) of the Penal Code; that is to say; a charge of simple robbery. The offence of robbery is first defined under section 295 of the Penal Code as

> *"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any p erson or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".*

Considering the way the charge was framed and the evidence tendered, the trial Magistrate obviously erred in convicting the appellant on the capital charge of robbery with violence.

Regarding identification, the evidence on record reveals that the complainant was in her supermarket working when a person alleged to be the Appellant entered the supermarket, headed straight for the cash register, produced a pistol and ordered everybody to lie down on the floor. The person then ordered the Complainant to open the cash register. She did so whilst the pistol was pointed at her. That the person then placed the pistol on the counter as the Complainant handed over the cash to him. Soon after receiving the cash, including the coins, the person left. She then followed the person to the door where she met customers whom she informed of what had transpired. The said customers then gave chase but were unable to catch up with the robber. They came across two Police officers on patrol to whom they relayed the information regarding the robbery. The Police Officers somehow managed to arrest the Appellant whom they brought back to the supermarket and was identified by PW1, PW2 and PW3. The Appellant submits that bearing in mind that the robber was a stranger, the robbery was unexpected, and being armed, this must have terrified the witnesses as to be totally unable to identify the robber. They were not in a position to look or gaze at the person sufficiently to recognize him. That the said witnesses were instilled with so much fear such that they were impaired in their ability to identify the person positively. The evidence on record reveals that the supermarket was well lit.

However, where exactly were the lights – above the robber, in front of the robber, or from the sides of the robber? In *REGINA VS TURNBULL & OTHERS (1976) 3 W.L.R 455,* it was held that it is important that the Court examines closely the circumstances under which identification is made. In particular regard should be had to *"how long the witness had the accused under observation?, At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before…..".* In the instant case other than the bold statement that the supermarket was well lit, there is no evidence that any of the identifying witnesses had ample time to observe the robber. When the robber walked in, he ordered everybody in the supermarket to lie down. The order was duly complied with.

Even the complainant complied until she was ordered to stand up and open the till and give out the money. Nowhere in her evidence did she testify as to having had sufficient time to keep the robber under observation. Indeed the Complainant stated that the incident only took 5 minutes. PW2 in his testimony stated that he was at the doorway when *"he saw a person rushing into the supermarket and he was holding a pistol ….. accused ordered everybody in the supermarket to lie down. I did as ordered. I did not see anything as I lay on the floor but I heard accused order my employer, a lady – (PW1,) to give all the money in the cash till. We lay on the floor for five minutes….. Then I heard accused leave the supermarket. We all got up and we closed the doors and left the supermarket".* It is clear from the foregoing that this particular witness did not at any given time have opportunity to keep the Appellant under observation to have been able to identify him. Indeed during cross examination by the appellant he stated thus *"…….. as I lay on the floor, I he ard the robber talk out I could not see him as I lay face down"*.

PW3 is another witness who claimed to have identified the Appellant. However, this is not borne out by his testimony. He testified as follows *"…… He produced a pistol which he pointe d at everybody in the supermarket, ordering us all to lie down. The owner was at the cash till. I lay on the floor after he pointed the pistol at me…… I lay on my stomach. He left and I got up…."*

It would appear from the foregoing that the principles enunciated in the celebrated case of *REGINA VS TURNBULL* (Supra) were not observed in the instant case. Consequently the alleged identification of the Appellant at the scene of crime cannot be said to have been free from error. This conclusion is fortified by the fact that the alleged customers who chased and led to the arrest of the Appellant were never called to testify. As stated in the case of *KAVETA & ANOR vs REPUBLIC CR. APP. NO. 65 of 1986 (unreported)*

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

We are far from being convinced on the material before us that the circumstances in which the identification of the Appellant was made were favourable contrary to the submissions by the Learned State Counsel.

As regards the arrest of the Appellant, it is the Appellant's submission that the evidence of his arrest was suspect and unreliable. The state took the position that on his arrest, the Appellant was found in possession of a home made gun and a paper bag belonging to the Complainant and which contained coins stolen from the supermarket. The evidence of Appellant's arrest was given by PW4 and PW5. They stated that whilst on patrol along Lenana/Racecourse road, they met two people chasing a thief. PW4 stated *"They said an armed robber had robbed somebody at Kibera supermarket and they were chasing that robber. They showed us the direction taken by the robber…."*. It is noteworthy that the said two people who talked to the police officers did not testify. Consequently the trial Magistrate ought to have rejected that portion of evidence as hearsay. It would also appear that when giving the information the alleged robber was nowhere in sight. This is confirmed by PW4 when he testifies *"……. We started looking for the fleeing robber…."* It has been held over the years that when relying on the evidence of a chase and arrest, there should be no break in the chain of events. Those chasing the suspect should not loose sight of him. In the instant case we are not told that the two people who were chasing the suspect had him constantly in sight. Had these witnesses testified they would have provided the answer. However, from what they told PW4 and PW5, it would appear that they had lost sight of the suspect. This being the case how then did PW4 and PW5 know that the person *"spotted from a far…. On foot path leading to Lenana Forest….."* was the robber being looked for. We wish to repeat here once again that in the instant case there was no witness who testified to the effect that he/she kept the suspect in sight throughout, i.e. fromthe supermarket upto the place of his arrest. This is critical if the evidence of the Appellant's arrest is to be relied on as indeed was by the trial Magistrate. More so when none of the witnesses from the supermarket was present at the time of the alleged

arrest of the Appellant by PW4 and PW5. The Appellant was arrested a kilometre away from the scene. He was then taken to the scene and some of the witnesses were asked to confirm whether the Appellant was the one who committed the crime. This in our view was wrong and prejudicial to the Appellant. One could have hardly expected the witnesses to tell the police that they had arrested the wrong person. In our view the evidence pertaining to the Appellants arrest ought to have been approached with extreme caution and circumspection bearing in mind that there was a break in the chain of events from the scene of crime to where the Appellant was arrested *(SEE ALI RAMADHANI VS REPUBLIC, CR APP NO. 76 OF 1985 (UNREPORTED).*

PW4 and PW5 testified that upon arrest of the Appellant they searched him and found coins totaling Kshs.464/20 and home made gun. PW1 claimed in his testimony that he lost Kshs.51,000/= to the robber who stuffed the said amount in his pockets. When arrested the Appellant was only found in possession of coins. What happened to the rest of the money that the Appellant is alleged to have stuffed in his pocket? Is it possible that he disposed off the notes and not the coins? We do not think so. It is highly improbable that the Appellant would have thrown away the notes and retained the coins that were heavier and more difficult to carry. PW1 testified that some cash was picked by her husband and police officers at the scene. She could not tell how much it was. Similarly the two police officers (PW4 and PW5) were silent on this issue? Is it possible that the coins were planted on the Appellant? One would have expected that the Complainant's husband would have testified regarding this issue. For reasons best known to the prosecution, he did not. He would have cleared the doubt and specified which cash was picked from the scene.

Having held that the charge as lied did not meet the essential ingredients of the offence under Section 296(2) of the Penal Code, that the Appellant's identification was unsafe and unsatisfactory and that his arrest was incredible we in the circumstances consider the conviction recorded against him to be unsafe. Accordingly we allow the Appeal, quash the conviction and set aside the sentence.

The Appellant must be released from prison forthwith unless otherwise held for some other lawful cause.

Dated at Nairobi this …….. day of ……. 2004.

J. W. LESIIT

JUDGE

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M. S. A. MAKHANDIA

Ag. JUDGE