



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 121 OF 2015

VINCENT MOKOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisumu

(Hon. E.A. Obina SRM) dated the 31st July 2015 in Kisumu CMCRC No. 373 of 2013]

JUDGMENT

The appellant was sentenced to suffer death for robbery with violence and being aggrieved by the conviction and sentence he has appealed his grounds of appeal being:-

“1. That the learned trial magistrate erred in both law and facts by observing that the prosecution did establish their case on the strength of the identification evidence notwithstanding the fact that conditions coupled with circumstances prevailing at the time of the act were not conclusive to permit positive identification.

2. That the learned trial magistrate erred in both law and facts in placing reliance to convict me on the purported identification parade but failed to note that the parade was worthless as it contravened the parade rules and was unreliable to sustain a conviction on the same.

3. That the evidential value of the essential witnesses who failed to avail for testimony to clear the burden of proof placed on them was overlooked not with standing their reliance e.g. the A.P. and the regular police officers who arrested me.

4. That the prosecution set of evidence was tainted with contradictions, inconsistencies, doubts and fell far short below the degree of accuracy required to justify a conviction.

5. That the learned trial magistrate erred in both law and facts in failing to comply with the provisions of section 324 as read with section 329 of the C.P.C.

6. That the investigation done in this matter was shoddy to warrant a safe conviction on a capital offence.

7. That the learned trial magistrate erred in both law and facts by appreciating the evidence on record to implicate the evidence on record to implicate the appellant the appellant as one of the assailants yet there is no direct circumstantial evidence linking me to the offence.

8. That the learned trial magistrate failed to evaluate both the strength and weight of the appellants un-sworn defence statement which was not challenged by the prosecution, hence rejected it without conjent reason.

Briefly the facts of the case were that on 24th July 2013 Sera Shani Opiyo (PW1), the Complainant, was working in her father's M-Pesa shop when three people approacher her. Two were in police uniform while the other was in plainclothes. Pretending that she had irregularly transferred money to a customer on 21st July 2013 they told her to accompany them to Kombewa Police Station to record a statement. She obliged taking with her the Nokia phone she was using in her business, her personal phone, the transaction book and 300/=. They took her to a salon car where a fourth man was at the wheel. She sensed that her captors were not police officers when she entered the vehicle but it had been driven off. Somewhere along the way the vehicle stopped and those who were in police uniform came out only to return in plainclothes. It was then that they demanded money and since she did not have it she called her father who sent her 1000/=. They asked for more before they forced her to put on a mask so that she could not see where they were going. They had ordered her to tell her father they were headed to the police station. They then forced her to transfer the money in the two phones to their phone. They stopped somewhere to withdraw it from an M-Pesa joint but did not succeed as they did not have an identify card. Thereafter they stopped at a place called Khumusalaba whereupon three left the car and she was left with the driver. He removed her mask and asked her for her telephone number so that he could send 10,000/= for allegedly saving her from being killed by the others he was also to call her later. Unbeknown to them some boda boda operators in her area had informed their area Assistant Chief Apondi Obuon (PW2) of her arrest. However when he called Kombewa Police Station she was informed that no police officers had been sent to arrest her. The boda boda operators had noted the registration number of the car that had taken her away as KBM 526K a Toyota Corolla white in colour. With this information the Assistant Chief (PW2) and the Kombewa police and Kisumu C.I.D. mounted a search. Using a private car and technology they tracked the car to Khumusalaba. The registration number of the car had been changed to KAX 858J Corolla. On seeing the police the gangsters came out of the car to escape and one who the Assistant Chief (PW2) identified as Nyakwaka shot at the police. An exchange ensued resulting in the killing of two. Nyakwaka and the driver however managed to escape. On 1st August 2013 the appellant was arrested in Bungoma upon being identified by his brother in-law Chrissostim Namwetako Juma (PW3) who had lent him his car Registration Number KAX 858J on the material day. On 4th August 2013 an identification parade was conducted at Kombewa police station and the appellant was identified by the Complainant and the Assistant Chief. He was subsequently charged with this offence.

In summary, the accused's defence which was in the form of an unsworn statement was that he was a taxi driver and that on the material day at 8.30AM he was hired by two people who he picked at Mukoma and who said they were going to Ekoru. However after driving for about one kilometer the man who was seated in front told him to stop so he could answer a call of nature. When he stopped both men came out and ordered him not to move before robbing him of his phone and 2700/=. They then tied him up and bundled him in the boot of the car. They abandoned him at a place called Munyulia. After walking for about 30 minutes in the sugarcane he emerged at Munyulia stage where a good samaritan lent him a phone which he tried to call his brother in-law and sister to no avail. He therefore called his mother who sent him money which he used to go home in Bungoma. There he went to a hospital and was treated. The next morning he went to his sister's house and was told his brother in-law wanted his car back. He went to Bukemule where he was later arrested. He denied the offence saying he too was robbed.

As the first appellate Court I have reconsidered and evaluated all the above evidence while bearing in mind that I did not see the witnesses give evidence. I am satisfied, just as was the trial magistrate that the case against the appellant was proved beyond reasonable doubt. Not only was he positively identified by the Complainant when she entered the car before she was blindfolded, but also when they remained together in the car when it stopped at Khumusalaba and the three others went outside. Here he removed her blindfold and asked her for her telephone number. It was all happening in broad day light and the circumstances were conducive to a positive identification. She also picked him at an identification parade which in my view was properly conducted. The appellant was also positively

identified by the area Assistant chief (PW3) both at the scene and in the identity parade and also by Inspector Zabilon Nyongesa (PW4) who also took part in the sting operation. There is also evidence that his driving licence was found in the car together with the number plate KBM 526K. This coupled with the evidence from his brother in-law that he, the appellant had borrowed the car that morning and did not return it makes the prosecution's case water tight. His statement that he was car jacked does not add up. It is not instructive that when the three men went to pick the Complainant from the shop he was left in the car. He was also left alone in the car with the Complainant at Khumusalaba yet he did not attempt to flee. On both occasions they were at a market place and if it was indeed true that he had been car jacked he had opportunity to raise an alarm. He did not do this. Even when he alleges he went home later he never made a report to the police. His statement is not convincing at all. The investigations in this case were properly conducted and I do not agree with the submission that the identification parade did not meet the requirements. I do not believe that availing the OB in Court would have made any difference. The Assistant Chief and the police were at the scene and saw the appellant fleeing and the issue of his description at the first instance does not therefore arise. The Complainant stayed with the appellant for a considerable period of time and even had a conversation with him. It was not a few minutes as described by the Advocate for the Appellant. Her evidence is not that of a single witness as the appellant was also identified by the Assistant Chief (PW2) and Acting Inspector Zabilon Nyongesa (PW5). This Court is also satisfied that the accused's right to a fair trial were observed. He was fully aware of his right to representation by an Advocate as demonstrated by the proceedings of 19th February 2014. Indeed the Court told him he could appoint one. He was also supplied with the evidence the prosecution intended to rely upon in advance. There is nothing whatsoever to warrant this Court to find that the trial magistrate was biased against the appellant. Section 150 of the Criminal Procedure Code gives the Court power to call witnesses and when called the appellant was allowed to cross-examine them. All these witnesses were his kin and could not have lied against him. As for close of his case having stated that he would make an unsworn statement and would not call witnesses, once he made that statement then he closed his case. The record even showed that he did a summing up of his case. Nowhere did he complain that he was not allowed to close his case and this can only be an after thought. I find no merit in this appeal. The same is dismissed. The conviction and sentence imposed are upheld. It is so ordered.

Signed, dated and delivered at Kisumu this 9th day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Kimani for the state

Appellant in person

Court Assistant - Serah Sidera