



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 98 and 78 OF 2014.

JAMES AMBANI ISHALABO.....1ST APPELLANT

ALICE HALIMA SHIBISHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT.

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court in Kibera,
Cr. Case 1004 of 2013 delivered by Hon. Juma, SPM on 11th June 2014.)*

JUDGMENT

Background.

James Ambani Ishalabo and Alice Halima Shibishi, herein the 1st and 2nd Appellants respectively, were charged jointly in Count I with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**. The particulars of the charge were that on 13th January, 2013 at Lavington area along Jacaranda Avenue in Dagoretti District within Nairobi County, jointly with others not before the court, while armed with dangerous weapons, namely pistols, robbed Manvinder Singh Sehmi of a motor vehicle registration number KXV 024, a laptop computer and Kshs. 25,000/- in cash, all items valued at Kshs. 530,000/- and that immediately after the time of such robbery killed Balraj Singh Sehmi.

In count II, the 1st Appellant James Abani Ishilabo was charged with being in possession of imitation of a firearm contrary to **Section 21(1)** as read with **Section 34(1) of the Firearm Act** in that on 21st March, 2013 at around 6.30 a.m. at Katina Kawangware in Dagoretti District, within Nairobi County was found in possession of an imitation of a firearm namely a toy pistol.

Both appellants were convicted in count I and sentenced to death. They were dissatisfied with both the conviction and sentence and thus preferred appeals separately. The 1st appellant filed appeal No. 98 of 2014 whereas the 2nd appellant filed Appeal No. 78 of 2014. Both appeals were consolidated for purposes of this judgment. In his Amended Grounds of Appeal, the appellant appealed on grounds that the charge sheet was defective, that the trial court relied on uncorroborated evidence, that the trial court did not consider his defence and that the case was not proved beyond a reasonable doubt. The 2nd Appellant on the other hand in a Memorandum of Appeal dated 23rd June, 2014, was majorly dissatisfied that the court heavily relied on the evidence of PW3 which was circumstantial and not sufficient to found a conviction.

She was also dissatisfied that her mitigation was not considered in sentencing.

Submissions

The 1st appellant relied on written submissions whereas the 2nd appellant made oral submissions. The 1st Appellant submitted that the charge sheet was defective as it was drafted under both **Sections 295** and **Section 296 (2)** of the Penal Code thereby making it duplex which prejudiced his case. He then cited contradictions between the evidence of PW1 and 2 both of whom were employees of PW3. His contention was that at some point, they testified that they were employed by Jolly Joginder Sehmi and at some point by one Manvinder Singh (PW3). According to the 1st Appellant, the contradiction implied that the charge was not supported by the evidence on record. This, according to him, was a material contradiction which casts doubt on reliability on the evidence. He cited the cases of **Ranhrishan Pandya[1967] EA 339** and **Alexander Nyachim Marube v. Republic (Criminal Appeal 159 of 1984)** to buttress the submission.

It was also the submission of the 1st appellant that his identification was not full proof. This was because PW5 the only witness who testified that she identified him said that she was in shock and traumatized at the time of the robbery. Indeed, even as at the time of her testimony, she informed the court that she was still traumatized. Therefore, his identification was allegedly made in difficult circumstances and could therefore not be relied on as was held in the case of **Maitanyi vs Republic [1989] KLR**. In addition, PW5 declined to participate in an identification parade. During her testimony, she purported to identify the appellant which according to the latter, amounted to dock identification which was not only unreliable but worthless. It was also the submission of the appellant that crucial witnesses such as the farmhand and the complainant's daughter were not called to testify. He submitted that the absence of their evidence weakened the prosecution's case. Finally, it was the submission of the 1st appellant that his defence was not considered.

The 2nd Appellant very briefly submitted that the prosecution did not establish their case to the required standard, more so because the trial court did not give regard to her defence that he had been abducted by robbers and was arrested as she went to make the report of the abduction at the police station.

The appeal was opposed. Learned State Counsel, Miss Sigei submitted that both appellants were properly identified. As for the 1st appellant, he was involved in not only robbing PW3 and 5 who were a husband and wife but also beat up PW5 for about 5 minutes and tied her up. Further, it was already daylight at 7.00 a.m. and therefore the conditions for identification were conducive. In addition the 1st appellant was implicated by the 2nd appellant and the prosecution established that the two were acquaintances.

With regard to the 2nd appellant, counsel submitted that she was convicted based on circumstantial evidence but which was strong enough and linked her to the offence. According to the counsel, the prosecution established that there was no breaking into the house and that the robbers got entry using keys that were in custody of the 2nd appellant. As at the time the robbers struck, the 2nd appellant was also in custody of the gate keys which were handed over to her by PW2, the night watchman as he checked off duty. In addition, the 2nd appellant who lived in the servant quarters drove off in the company of the robbers in PW3's motor vehicle. She also did not leave any of her personal belongings in her house which suggested that she knew she would not come back to her employment. It was also the counsels submission that both appellants were implicated in the offence by virtue of a confession made by the 1st Appellant.

Evidence

The case for the prosecution was set off by the evidence of both **PW3, Manvinder Singh Semi** and **PW5, Shahir Achfar Semi** both a husband and wife respectively and parents to **Balraj Singh Semi** who was killed in the cause of the robbery. On the 13th January, 2013 at about 7.00 a.m. PW3 and 5 were woken up by a disturbance in their bedroom. PW5 felt some light shine on her face. It was a torch being

directed at eyes. She woke up and saw a man holding a gun towards her husband. Another man started dragging her off the bed. They were roughed up by the men who were demanding for money and other valuables. They also demanded for keys to the safe which safe they did not have. They were tied up to the floor. After ransacking the drawers and the house, they demanded for the car keys. The family owned a Mercedes Benz Reg. KXV 024 whose keys were in the kitchen. PW5 was briefly untied and frog matched to the kitchen to hand over the car keys. It was while walking to the kitchen that she saw another robber emerge from her son's bedroom while holding a pistol. After handing over the car keys, she was again frog matched back to the bedroom where she was tied up and both were left on the floor. The evidence of PW5 was that immediately the robbers struck in their bedroom and they were roughing them up, she heard a gunshot coming from the direction of her son's bedroom.

After the robbers had left, PW5 who was not tightly tied up on the legs freed herself. She peeped through the bedroom door and saw the robbers drive away with their Mercedes motor vehicle. Before the vehicle drove off, she noticed one robber on the driver's seat while the 2nd appellant sat at the back seat. In a very short while, a second robber got into the vehicle and the car drove off. She testified that the armed robber was the 1st appellant who also roughed her up for about 5 to 7 minutes. After the car drove off, she rushed into their son's bedroom only to find that he had been shot on the chest and was bleeding profusely. They called in a neighbor who helped them rush him to Nairobi Hospital where he was pronounced dead on arrival. Apart from the motor vehicle, other items that were stolen from the house included a HP laptop, an Ipad, his wife's, son's and daughter's mobile phones, his wife's jewelry and his son's globe map.

PW3 then raised **PW1 Linet Vuhya Muzalwa** who was a day domestic worker and lived in Kawangware. He informed her about the incident and that their son had been killed. PW1 rushed to the scene and confirmed the incident. She confirmed that the 2nd appellant was also a domestic worker in the resident. She knew where the 2nd appellant lived. She was escorted by the police who had already arrived at the scene to the 2nd appellant's residence in Kawangware but she was nowhere to be traced. Together with the police, PW3 and 5 confirmed that the 2nd appellant had escaped with all her personal belongings including her clothes.

PW2, Vincent Ooro Anindo was the night watchman in the residence. He checked off duty on the morning of 13th January, 2013 at 6.00 am. He left the keys with the 2nd appellant who lived in the servant quarters. He learnt about the incident at about 10.00 a.m. after he was called by PW3. It was the testimony of PW2 that it was the 2nd appellant who used to open the gate during the day.

PW4, CPL Juma Ali of Flying Squad Nairobi and **PW6, CPL Moses Nyota** a CID officer arrested the 1st appellant on 21st March, 2013 after being led to his residence by the 2nd Appellant. Both testified that they recovered from the 1st Appellant's house a toy pistol serial number PAT402235, a black bag, 8 sim cards, 2 mobile phones, a crystal globe map and an Islamic beret. It was also their testimony that the 1st appellant informed them that his other accomplice was a Mr. Musa who lived in Kibera. They escorted him to his house but they did not find him. They made an inventory of the recovered items.

PW7, Dr. Peter Muriuki Ndegwa conducted a post mortem on the body of the deceased Balraj Singh Semi on 13th January, 2013 at the Lee Funeral Home. He concluded that the deceased died due to severe hemorrhage due to severe chest injury caused by light gunshot. He adduced the post mortem report as evidence.

PW8, PC Abed Wanga Ruto of CID Kabete investigated the case. He summed up the evidence of prosecution witnesses. His further testimony was that the 2nd appellant was arrested after tracking her mobile phone at Yaya Centre. Further that the 2nd appellant made a confession recorded by **SSP Joseph Oudoh and SSP Michael Ndungu** in which she implicated herself and the 1st appellant. Based on the confession, she preferred the charges against the appellants.

After the close of the prosecution case, the court ruled that both appellants had a case to answer and were

accordingly put on their defence. They both gave sworn statements of defence. According to the 1st appellant, on the morning of 21st March, 2013 at about 5.45 am, police officers while in the company of the 2nd Appellant went to his house and arrested him. They asked him if he knew the 2nd appellant to which he answered affirmatively. He was quick to add that he took in the 2nd appellant to live with her after the death of her husband but after she found a job, she left his house. He stated that the toy pistol which was recovered from his house belonged to his son and was not capable of firing. The same case applied to the globe map recovered from his house. He stated that other items recovered from his house belonged to him. His further defence was that on 22nd March, 2013, he was escorted to Pangani Police Station under the custody of CIP Chemgut who tortured him demanding him to disclose if he knew one Moses. He confirmed he knew him whereupon the police escorted him to his house but he was not found. He maintained his innocence.

As for the 2nd appellant, her defence was that on 13th January, 2013 she was washing clothes outside her employer's residence when thugs struck and threatened to kill her if she raised an alarm. She was left guarded by one robber while the rest went into her employer's house. Shortly afterwards, she had a scream. The robbers fled with her insisting that they could not leave her behind. They took her to an unknown house. It was her defence that two weeks later, a lady went to her confinement and asked her to go away. It was as she fled that she stumbled on a woman who after she explained her predicament took her in for a week. Thereafter, the lady helped her get a job at Yaya area. It was her new employer who escorted her to Kilimani Police Station where she reported her experience. She was escorted to Kabete Police Station where she was tortured. Police also escorted her to her residence after acknowledging that at some point she lived with the 1st Appellant. They then escorted her to the 1st Appellant's home and he too was arrested and taken to Kabete Police Station. They were thereafter charged accordingly. While maintaining her innocence, she stated that it was the main gate watchman who was in custody of the gate keys and he used to leave them at the gate when checking out from duty.

Determination

This is the first appellate court whose duty is to reevaluate the evidence on record and come up with an independent conclusion. In so doing, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See the case of **Pandya vs Republic (1957) E.A. 336.**

On consideration of the evidence on record and the respective submissions, I have deduced the issues for determination to be whether the charge sheet was defective, whether the case was proved beyond a reasonable doubt and whether the appellants' respective defenses were considered.

On the issue of defective charge sheet, the 1st appellant submitted that the charge was duplex because it was drawn under both Sections 296 and 296 of the Criminal Procedure Code. The Court of Appeal has often held that drafting a charge sheet under both provisions renders a charge duplex because each provision provides for a distinct offence. See **Simon Materu Munialu v Republic (2007) eKLR (CR. App. No. 302 of 2005) and Joseph Njuguna Mwaura v Republic CR. App. No. 5 of 2008 (3013) eKLR.** Nevertheless, test is whether the same prejudices the accused. In the instant case, the statement of the offence and its particulars relate to the offence of robbery with violence to which they pleaded. The evidence tendered engendered to establish the offence of robbery with violence. The particulars of the offence as drafted disclosed one and only offence of robbery with violence. It is the same offence against which the appellants defended themselves. Therefore, from the outset, both appellants were aware of the specific offence they were facing and would defend themselves against. No prejudice was accordingly occasioned to them by the fact of drafting the charge sheet under both provisions of the law. Furthermore, the error being technical in nature is curable under Section 382 of the Criminal Procedure Code.

On prove of the case, I will first address the evidence touching on the 1st Appellant. His arrest was hinged on his implication by the 2nd appellant and also the purported identification by PW5. According to PW4, 6 and 8, after the arrest of the 2nd Appellant, she confessed to have been an accomplice with the 1st

Appellant. She offered to lead the police to his house where he was arrested and some items recovered. At this point, I would wish to point out that according to PW8, the 1st appellant was implicated by a confession made by the 2nd Appellant and was recorded by two Senior Superintendents of Police Oudoh and Ndungu. Unfortunately, the confession statement was not produced in court. Although PW 8 identified the alleged confession statement, he could not purport to rely on a confession which he himself was not authorized by law to record. I say so because under **Rule 2 of the The Evidence (Out of Court Confessions) Rules, 2009** an investigating officer cannot record a confession statement. Therefore the evidence of PW8 in so far as he purported to rely on the confession was just but hearsay evidence and therefore inadmissible. It was evidence that could not found a basis for a conviction.

The above leaves the court then to re-examine whether the 1st Appellant was properly identified so as to link him to the offence. The only witness who testified to have identified him was PW5. Her evidence was that he roughed her up for between 5 and 7 minutes. She recalled to have been in great shock not only during the robbery but also as at the date she testified. It is worth to note that when the robbers struck in their bed room, she was still in bed and the first thing she noticed was a torch light directed on her eyes. At that point she did not state whether she was able to see the person who shone the torch on her. She was thereafter frog matched to hand over the car keys. This was just after being untied to temporality relief her for that purpose. During this period, she did not candidly state how she was able to identify the person roughing her up. In the circumstances that she was in great shock, and further bearing in mind that the bedroom may have been covered by some darkness as the robber had a torch, the only thing that would have erased doubt that she truly identified the 1st appellant was through an identification parade. Indeed, one was organized by the police but PW5 completely declined to participate in it citing that she was still traumatized. It is then safe to conclude that she only identified the 1st appellant in the dock. Bearing in mind that she had not given a description of the robbers in the first report to the police, the dock identification was entirely unreliable. She could have identified him in court merely because he was an accused, anyway. See **Muiruri & 2 others v. Republic[2002] 1 KLR 277**, that:

“It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.”

That drives me to once again re-evaluate whether by virtue of recoveries from 1st appellant's house, he was culpable. Doubts abound about the recoveries. It is a trite procedure but once stolen goods are recovered, an inventory should be made. There is no clear evidence that although an inventory was identified it was signed by the persons who were present during the recovery. In fact the arresting officers gave conflicting testimonies on this issue. That again casts doubt in the mind of the court whether those items were recovered from the appellant's house. After all, the prosecution failed to disprove that the item belonged to the 1st Appellant as he claimed in his defence. For the above reasons, the court is doubtful if the 1st appellant was culpable. I will give him that benefit of doubt.

With regard to the 2nd appellant as I said, she was convicted purely on circumstantial evidence. Courts of concurrent jurisdiction and the Court of Appeal have severally delivered themselves on circumstances under which an accused can be convicted based on circumstantial evidence. See **Martin v. Osborne[1936] HCA 23,[1936] 55 CLR 367**, that:

“If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning

include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of the conduct pursued.”

Also **Sawe vs Republic [2003] KLR 364** in which the Court of Appeal sitting at Nairobi held that:

“(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

(2) Circumstantial evidence can be a basis of conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

(3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

In the instant case, there is no doubt that the 2nd appellant lived in the servant’s quarter. When PW2, 3, 5 and police officers who visited the scene went to her house, they found that she had left with all her belongings including all her clothes. PW5 saw her leaving together with the robbers in their family vehicle. Her defence was that she was abducted and put in confinement for two weeks but this is a concocted story given that after she was released she did not bother to report to the police about her ordeal. Instead, she just took up a new job to occupy herself. She must have left with her clothes because she did not intend to return.

Her further defence was that she was arrested as she went to report the matter to the police. But this version of story is unbelievable because the police indicated that she was arrested at Yaya area on tracking her mobile phone. Clearly, she had no intention of reporting the incident to the police. If her story were anything to go by, the good Samaritan woman into whose hands she ran after her release from confinement should have accompanied her to the police to report the issue. It is illogical, in my view, that instead of rushing to the police she decided to take up a job. Her behavior was of a person who did not care what had happened in her employer’s home. She was aware that the robbers were violent as she heard the occupants of the residence screaming, yet her approach to the incident was of person who did not care. That behavior and attitude could not be justified by any other explanation than of a person who was an accomplice to the crime. It is also not logical to buy her explanation that she could not report to the police because she was not familiar with the location of the police station. She was a resident of Kawangware which is a heavily populated area. Even if she did not know the exact location of Kilimani Police which serves the Kawangware area, she would have enquired from other people. Furthermore, she was only able to explain about her whereabouts of three weeks only out of the nine weeks that she was missing. Her defence in my view lacked any evidentiary value and did not dislodge the strong circumstantial evidence that linked her to the offence.

In addition, as PW1, 2, 3 and 5 testified, the 2nd Appellant was in custody of both the gate and house keys at the time of robbery. She must have opened for the robbers to gain access both to the compound and the house. I find her defence a total make up, a sham and totally lacking in merit.

Finally, I have had the opportunity to read the judgment of the learned trial magistrate and it is clear that she considered defenses of both Appellants but dismissed them as lacking in merit.

I have noted that the learned trial magistrate made no mention on conviction or otherwise in her judgment of the 2nd count. I have already held that the 1st appellant was not culpable in the robbery with violence. I also cast doubt in the manner the recovery of the stolen goods was conducted in his house. For that reason, I hold that he was also not guilty in Count II.

There is no doubt that PW3 and 5 were robbed by armed persons, that force was used against them, the robbers were more than one in number and several goods were stolen from them thereby establishing the offence of robbery with violence as provided under Section 296(2) of the Penal Code. But I have only

found the 2nd appellant culpable based on strong circumstantial evidence. I therefore dismiss her appeal and uphold the conviction and sentence passed by the trial court in her respect. I however find that the case was not proved beyond a reasonable doubt in respect of the 1st Appellant. I quash his conviction, set aside his sentence and order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 20th day of **July, 2017**.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. *1st Appellant present in person*
2. *2nd Appellant present in person*
3. *Miss Sigei for the Respondent.*