



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 104 OF 2013

R.V.P. WENDOH AND J.A.MAKAU JJ

LOKORIO ALDO APPELLANT

- V E R S U S -

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case no. 407 of 2012 of the SPM's Magistrate's court at Isiolo – J.M. Irura – Ag. P.M.)

JUDGMENT

1. The Appellant LOKORIO ALDO was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were as follows:-

Count I

On the 4th day of September 2012 at water area in Isiolo county, together with others not before court, being armed with a dangerous weapon namely an AK-47 rifle robbed JAMES MATHENGE of Kshs. 20,000/- cash, a mobile phone make NOKIA CI-01 valued at Kshs. 6,000/- all valued at Kshs. 26,000/- and immediately before or immediately after the time of such robbery beat the said JAMES MATHENGE.”

Count II

On the 4th day of September 2012 at water area in Isiolo county together with others not before court, being armed with a dangerous weapon namely an AK-47 rifle robbed MBOGO GATHIRU of Kshs. 1,000/- cash, a mobile phone make NOKIA 1210 valued at Kshs. 4,000/- and a motorcycle ignition keys valued at Kshs. 200/- all valued at Kshs. 5,200 and immediately before or immediately after the time of such robbery beat the said MBOGO GATHIRU.’

2. That after the trial the learned trial magistrate convicted the appellant with the offence and sentenced him to suffer death.

3. The Appellant being aggrieved by the conviction and sentence imposed on him by the trial court preferred this appeal setting out mainly three grounds of appeal as set out in the amended petition of

appeal namely:-

1. **That the trial court erred in law and facts by failing to hold that he was not identified as one of the alleged robbers.**
2. **That the trial court erred in law and facts by failing to hold evidence on record is contradictory.**
3. **That the trial court erred in law and facts by failing to hold that no possession was proved.**

4. We are the first appellate court and we have followed the applicable principles as set out in the case of **Okeno -vs- Republic [1972] EA 32** where the court of appeal held:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peter v. Sunday Post, [1958] EA 424.)”

5. When the appeal came up for hearing the Appellant appeared in person. The state was represented by Mr.Mulochi, learned state counsel, the Appellant relied on written submissions which he filed with the court. The Appellant’s main ground of appeal is that the conditions at the scene at the time of the commission of the offence were not favourable for positive identification, that the court failed to give due consideration to the Appellant’s defence of alibi and that court relied on uncorroborated evidence.

6. Mr.Mulochi, learned state counsel opposed the appeal. The learned State Counsel urged that the Appellant was properly convicted and sentenced as evidence of PW1 and PW2 is consistent; that the two were able to identify the appellant with the aid of motorbike headlight though the offence took place at night urging that the two gave description of the appellant which was similar. He submitted that the two gave description of the appellant as a tall, well built person with a rasta. The two claimed to have been injured and their evidence was corroborated by PW6, the clinical officer on their injuries. He urged the prosecution evidence was not shaken by the appellant who gave a defence of alibi. He added the offence of robbery was proved as the appellant was armed and was in company of two others and used violence against the two complainants who were also injured. He added that PW5 testified there was light.

7. The facts of that prosecution case are that on 4th September, 2012 at about 8.30 p.m. PW1, was a pillion passenger in motorcycle driven by PW2 from Kulamawe to his house at Isiolo that about 30-10 meters to PW1’s gate they spotted someone standing about 5 meters from the gate; that the motorcycle had its headlights on and the person was standing as if he was urinating. The person was a male, was wearing trouser and was a tall man; that at the gate PW1 told PW2 he was scared because the person had not finished his business of the call of nature and that he asked PW2 not to switch off the motorcycle headlights; that as PW1 was attempting to open the gate, the person approached him and cocked a gun and said “washinzi laleni chini na mtoe kile mko nacho”; that both PW1 and PW2 knelt down and lifted their hands up. that at that time three (3) people appeared and started robbing PW1 and PW2 while the lights of the motorbike were still on. That PW1 and PW2 were unable to identify the three (3) persons who were armed with knives and were wearing marvins on their heads; that the first person who had the gun was ordering the others as they were beating and robbing PW1 and PW2. PW1 was robbed of his mobile phone, Nokia C1-01 worth Kshs. 4000/- and 20,000/- whereas PW2 was robbed of mobile phone and Kshs. 1000/-; that after the robbery the robbers switched off the motorcycle and took the key. They then left ordering PW1 and PW2 to lie down. PW1 and PW2 then screamed for help and PW1’s

neighbour came and took them to police station where they made their report. That on 7th September, 2012 at about 8.00 a.m. as PW1 was going to his place of work he spotted the person who was armed with the gun at the time of the robbery and as he had seen a police officer one Njiru (PW3) he went and informed him, and he accompanied him and pointed at the person who was then arrested by PW3.

8. The Appellant put forward a defence of alibi. The Appellant testified that on 14th August 2012 he had gone to Meru and returned to Isiolo on 6th September 2012 and found his friend with whom he stays; that the following day in the morning he was arrested and escorted to police station; that the police officers who arrested him called PW1 who came and said he was the one who had robbed him saying he knew the appellant well and he had made a report stating it was the appellant who had robbed him yet his name was missing in the first report and the P3 form. During cross-examination he testified that the person pointed at him due to the rasta he had, adding that he had nothing to show that he was in Meru from 14th August 2012 to 6th September, 2012.

9. The prosecution case rests on evidence of identification and not recognition. The basic principle to be considered when dealing with the issue of identification or recognition has been set down in several cases. In the case of **Robert Gitau –vs- Republic Criminal Appeal No. 63 of 1990 (Nakuru)** the Court of Appeal stated as follows:-

“It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R (Criminal Appeal No. 20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant’s face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell.”

10. The evidence of identification was that of PW1 and PW2 made at night. It is very important when considering such evidence for the court to bear in mind the unique circumstances surrounding the identification. The court must consider the duration of observation, whether the witness could have identified the face in the manner described; the nature of the light that enabled the witness to identify the robbers. The intensity or location of the source of light in relation to the point where it was alleged the attack took place and whether the eye witnesses gave a description of their attackers to the police at the earliest opportunity or at all.

11. PW1 in his evidence as regards identification of the attacker was and we quote:-

“when we were about 10 meters from the gate we spotted someone standing about 5 meters from the gate. The motorcycle had its headlights on. The person was standing as if he was going for a call of nature. The person was male and was wearing a trouser. He was a tall man. . . . I asked him not to switch off the motorbike headlight . . . As I was putting on the key the person appeared and cocked a gun. He said “washenzi laleni chini na mtoe kile mko nacho.” . . . at the time lights of the motorbike were still on . . . my neighbour took me to police station where I made a report . . .”

PW2 on his part stated partly as follows:-

“Before we got to his house I saw someone who was standing near the fence as if he was going for a call of nature. I spotted him while he was at a distance of about 30 meters . I came and stopped at the gate where Mathenge was to go in when I got there I turned and Mathenge alighted so that he could open the gate. The person was at a distance of where the two docks in court are. I put on the hazard so that Mathenge could open the gate, the said person turned to us and ordered us to lie down and we

obeyed. He was holding a gun pointing at us . . . among the three I was able to recognize the accused person. I was able to identify him as there was enough time as we were still there while the others were robbing us. . . . I gave description to the police you were well built . . . you were the tallest amongst them . . . I was able to identify your face.”

12. The learned trial magistrate in her judgment stated that;

“According to their evidence they noticed the person while at a distance of about 10-30 meters from the gate as they were approaching the gate . . .In my opinion they must have been able to see his face and stature clearly due to the lighting from the motorcycle. PW1 and PW2 were also categorical that on stopping they did not switch off the headlights of the motorcycle . . . there was adequate lighting at the area . . . I am of the considered opinion that the time they spent during the robbery was adequate enough for the complainants to note their assailant ... the description given by the complainant fits the person before the court . . . I further take note that all the prosecution witnesses described him that he had rastas and even at the time of his arrest he had the said rastas.”

13. We have quoted the relevant part of evidence of PW1 and PW2 on identification of their attacker and also from the learned magistrate’s judgment of what she considered regarding the evidence of identification by PW1 and PW2. We note that the learned trial magistrate did not give a careful and cautious consideration of evidence of identification of a stranger by PW1 and PW2. We note the trial magistrate simply noted PW1 and PW2 in her opinion must have been able to see the face and stature of the appellant clearly due to lighting from the motorcycle and because the motorcycle headlights was never switched off.

14. We have carefully considered the evidence of PW1 and PW2 and with due respect we find that the trial court misapprehended the evidence on lighting. PW1 testified that the motorcycle lights were on all the time. That PW1 and PW2 were forced by the appellant to kneel down. PW2’s evidence contradicts that of PW1 in that on arrival at the gate he turned and Mathenge alighted as he put on hazards. PW2 did not say the headlights were on at the time. He did not say the headlights even if they were on, were directed to the direction of the attackers. The learned trial magistrate did not consider the type of light at the time of robbery or its intensity or location of its source in relation to the point where it is alleged the attack took place. PW1 testified that the attacker called them ***“washenzi laleni chinii na mtoe kile mko nacho”*** and they knelt down where as PW2’s evidence is that the attacker told them to lie down and they complied. The learned trial magistrate was required to consider the surrounding circumstance and the duration of the attack amongst other factors. The court was required also to consider whether the witnesses gave description of the attackers to PW4 and police at the earliest opportunity.

16. We wish to observe that though the complainants PW1 and PW2 reported the robbery at about 9.00 p.m just about 30 minutes after the robbery to PW4 No. 67713 PC. John Lochokwe of Isiolo Police Station, they did not give a description of the suspect they claim to have identified to the police. PW4 said and we quote:-

“they came complaining that they had been robbed by a “gang of three people and one of them was armed with a gun . . . they said one of them had rastas on his head and noticed his face.”

The description given by the complainant was broad and general and could not pinpoint at any particular individual. The complainants did not account for failure to give specific description of their attackers. In this regard we are guided by the case of ***Simiyu & Another –vs- R (2005) 1 KLR 193*** where the court of appeal expressed itself on this point as follows:-

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or

persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant's to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity."

17. We note the complainants did not give a specific description of their attacker to police because the circumstances were not favourable for positive identification.

18. It is also interesting to note that though no specific description of the attackers were given PW1 on 7/9/2012 spotted a person who he pointed to PW5 to arrest as the man who had the gun at the time of the robbery., He claimed he was able to know him by his face and his dreadlocks on his head and because he was tall. We note PW1 did not in his report to police give description of the attackers face, his complexion, the style and size of his dreadlocks and his height or stature. PW2 similarly did not do so. He did not in his evidence in chief mention one of the attackers having rastars or seeing his face. He did not give any description of the attacker. The evidence of PW1 is contradicted by PW2 who was with him at the material time. The inconsistency of evidence of PW1 and PW2 who were at scene of the attack make us draw an inference that the circumstances prevailing at that time were not favourable for positive identification and that is why PW1 and PW2 contradicted one another to whether they were lying down or kneeling at the time of the attack or as to whether motorbike headlights were on or not or whether PW2 had put on hazards. We draw conclusion that the prevailing circumstances were not favourable for positive identification. In our view it means that the appellant was mistakenly identified by the PW1 the following day at the trading centre because the complainant believed the person who had rasta was the person who appellant believed he had a rasta and tall and that the appellant was the attacker. We cannot help to ask ourselves if PW1 identified the appellant and he was arrested by PW5 what was difficult in having an identification parade for PW2 to identify the attacker who he had claimed he was able to identify. Had this been done then it would have strengthened the prosecution's case and corroborated evidence of PW1.

19. We believe we have said enough to demonstrate that the circumstances obtaining during the robbery were not conducive to positive, reliable and correct identification of the appellant.

20. Turning to the Appellant's defence of alibi, the appellant testified that he was as from 14th August 2002 to 6th September 2012 been at Meru and as such at the alleged time of the commission of the robbery on the 4th September 2012 he was not at Isiolo. The learned trial magistrate in her judgment in dismissing the defence of alibi she stated if the defence was true the accused person would have called any of the people he said he came and went to them who must have added weight to his alibi that indeed he was not in Isiolo during the time of such robbery. On defence of alibi we are guided by the case of **Charles Anajare Mwamusi V. Republic C.A. Criminal Appeal No. 226 of 2002** where the court of appeal expressed itself as follows:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable."

Kiarie v. Republic [1984] KLR 739 at page 745 paragraph 25.

21. We are satisfied that the learned trial magistrate misdirected herself when she shifted the burden of proof and assumed that the appellant by his alibi had assumed burden of proving that the answer to the charge was true but failed to note the appellant was only required to introduce into the mind of the court a doubt that is not unreasonable that he was not at the scene of the robbery at the time of the robbery. We believe and rightly so that it is settled law that an accused person bears no burden of proving his defence is true or of proving his innocence. That once a defence of alibi is given the burden of proof shifts to the prosecution and it is sufficient if an alibi introduces into the mind of court a doubt that is not unreasonable.

22. In conclusion we find that the circumstances of identification were not good for positive, reliable and correct identification. We accordingly find merit in the appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty unless he is, otherwise lawfully held.

READ AND DELIVERED AT MERU THIS 8TH DAY OF JULY, 2013.

R.V.P. WENDOH

J.A. MAKAU

JUDGE

JUDGE

8.7.2015

8.7.2015