



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 94 OF 2012

FERDINAND MADEGWA SHIVANDA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. E. K. Mwaita, PM in Lodwar

Principal Magistrate's Court in Criminal Case No. 842 of 2010)

J U D G M E N T

The Appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

Particulars are that on night of 8th and 9th day of December 2010 at Todonyang Catholic Mission Manyatta in Turkana North District within Turkana County, while armed with a dangerous weapon namely a G3 Rifle robbed Brian Aridi of a bag containing Kshs. 273,000.00 one Thuraya phone, one Nokia 5230 phone, 3 phone chargers, one head phone, one novel titled "The Client", personal documents and a pair of red sports shorts all valued at Kshs. 342,000.00 and at the time of such robbery fatally wounded one Martin Opiyo.

The Appellant was convicted and sentenced to death. The Appellant appealed to this Court and raised the following grounds:-

1. *That the Learned Trial Magistrate erred in law and in fact in holding that the Appellant had been connected or linked with the crime and that his gun and ammunitions are the ones used to shoot the deceased which finding was not supported by watertight evidence.*
2. *The Learned Trial Magistrate erred in law and in fact in remarking that the Appellant had a scanner or planner who could identify and inform him of the deceased and his team without any iota of evidence in support thereof and the decision of the Magistrate is based on mere presupposition.*
3. *That in finding no witness saw the Appellant shooting the deceased and or robbing the victims, the Learned Trial Magistrate erred in relying on circumstantial evidence which does not outrightly point to the guilt or involvement of the Appellant.*
4. *The Learned Trial Magistrate erred in law and in fact in convicting the Appellant without the benefit of a confessionary statement which was not produced in Court.*
5. *The Learned Trial Magistrate erred in law and in fact in holding that investigations were meticulously done yet the evidence on record shows that investigations were shoddily done.*
6. *The Learned Trial Magistrate erred in law in failing to consider the material contradictions in the evidence of Prosecution witnesses regarding the slippers, blood stained clothes and recovery of*

- spent cartridges.*
7. *The Learned Trial Magistrate erred in failing to find that the non production of blood stained clothes which were allegedly recovered from the house of the Appellant was fatal to the Prosecution's case and production thereof would have been adverse to the Prosecution case.*
 8. *The Learned Trial Magistrate erred in failing to consider material contradictions in the evidence of Pw 6 and Pw 7 who were material Prosecution witnesses and ought to have exercised that contradiction in favour of the Appellant.*
 9. *The Learned Trial Magistrate erred in holding that the offence of robbery was committed yet the evidence of the witnesses at the scene could not establish how the money and the missing items were taken away.*
 10. *The Learned Trial Magistrate erred in disregarding the evidence and submissions of the Appellant in his defence which raises doubt as to whether he was involved in the said incident.*
 11. *The finding of the Learned Trial Magistrate is against the weight of available evidence.*

The facts leading to the arrest of the Appellant can be traced from the evidence of Pw 4 Brian Otieno Aridi Omondi, the complainant in the lower Court. The complainant was a student at the University of Nairobi. The mother of the complainant used to deal in the business of buying and selling fish. The complainant used to assist his mother in the business of buying fish. On 5th December 2010, the complainant left Nairobi aboard motor vehicle Reg. No. KBG 099R, a refrigerated Isuzu Lorry. He was with the driver Pw 5 Joshua Kanange Wakaba, Robert Owuor and Martin Opiyo the one who was killed during the robbery hereafter referred to as "the deceased". The complainant was carrying Kshs. 300,000 in cash for purchase of fish from Todonyang Catholic Mission Manyatta where they slept. The complainant had kept the money in a red waist pouch which he kept in a black bag which contained his personal documents. When they retired to sleep at around 9.00 pm, he used the bag which contained the money and his other personal documents as a pillow. The complainant shared a mosquito net with Pw 5 the driver of the lorry. Robert Owuor and the deceased shared another net. The deceased and Robert Owuor slept about two metres away from where the complainant was sleeping. At around 3.30 am, he heard a commotion and heard the deceased screaming saying that someone was trying to kill him. Thereafter he heard gunshots. He woke up and entered a nearby sheep pen. After the gunshot sound died out, he came out of the sheep pen and found the deceased who lay on his stomach in a pool of blood. His bag which contained money and his other personal documents was missing. He went and reported the incident at a nearby G. S. U. Camp at around 8.00 am on the 09/12/2010. He later went to Lodwar Police Station where he identified the properties which he lost. He was also shown the Appellant who was in custody.

The Appellant was an Administration Police Constable attached to Todonyang AP Post. The In-charge of Todonyang AP Post is Pw 2 Sergeant Stephen Kirwa. This witness testified that on 08/12/2010, he had issued the Appellant with a G3 rifle which had 20 rounds of ammunition. At around 3.00 am on 09/12/2010 he was asleep in the AP Post when he heard gunshots from Todonyang Catholic Mission Manyatta. He woke up and was joined by APC Gilbert Kipkemoi and APC Ferdinand Makokha. He mobilized all officers at the camp and realized that one Officer, the Appellant herein was missing. After a short while, the Appellant walked into the AP Post barefooted. He was raising the G3 rifle he had been issued with the previous day. He appeared shocked and kept saying, "*ni mimi! Ni mimi!*" Pw 2 asked the Appellant where he was coming from and the Appellant told him that he was coming from Todonyang Manyatta and that he had fired 4 rounds of ammunition. When he enquired from the Appellant whether anyone had been injured, the Appellant replied in the negative. He remained at the AP Post until 6.00 am when enquired from members of the public what had transpired at Todonyang Manyatta. The members of the Public told him that a business man had been shot dead at the Manyatta and money had been stolen. He proceeded to the scene where he found the body of the deceased. He went back to the AP Post where he disarmed the Appellant and placed him under arrest as he called Officers from the nearby G. S. U. Camp and Todonyang Police Post. The Appellant was taken to Todonyang Police Post where he was placed in custody.

Before the Appellant was taken to Todonyang Police Post, Pw 6 IP Richard Okodoi from Lokitaung Police station went to Todonyang AP Post and searched the Appellant's house. He recovered a blood stained T-shirt from a box belonging to the Appellant. He then took the Appellant and Pw 1 Amina

Epetet Ekipor who had been detained at Todonyang Police Post alongside the Appellant. While at Lokitaung Police station, Pw 6 interrogated the Appellant who informed him that he had kept the stolen money on the lower part of the Catholic dam at Todonyang. He also interrogated Pw 1. On 10/12/2010 he went and briefed the deputy OCPD on what the Appellant and Pw 1 had told him. On 11/12/2010, the OCPD Turkana North District called Pw 6 to his office. Pw 6 briefed him about what the Appellant had told him. The OCPD called Pw 3 David Rotich and gave him the information which Pw 6 had told him. Pw 3 then went to the dam where the Appellant had mentioned and recovered a bag buried on the ground. He followed footmarks which led him to where the bag was recovered. Inside the bag was Kshs. 255,690 as well as the personal items which were stolen during the robbery.

After completion of investigations, the Appellant was charged with the offence for which he was convicted. In his defence, the Appellant stated that on the morning of 09/12/2010, he had gone out of his house for a call of nature. He heard gunshots from Todonyang Manyatta. As the area was volatile and prone to attacks, he fired 4 rounds of ammunitions as a warning before heading back to his base at Todonyang AP Post.

The State Counsel Mr. Chelashaw opposed the Appellant's appeal arguing that the conviction by the Trial Magistrate was correct. As a first appellate Court, we are expected to analyze and evaluate the entire evidence that was adduced before the lower Court and reach our own conclusion. Our role as a first appellate Court was stated in the case of **Okeno Vs Republic [1972] EA 32** as follows:-

“An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions [Shantilal M. Ruwala Vs Republic [1975] 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 advantage of hearing and seeing the witnesses, (see Peters Vs Sunday Post,[1958] EA 424).”

We have evaluated the evidence of all the witnesses who were called by the Prosecution. There is no evidence that the accused was seen at the scene of the robbery. There is no doubt that a robbery occurred on the night of 8th and 9th December, 2010. During the course of the robbery, the deceased was killed. From the evidence recorded by the lower Court, we have to determine whether the Appellant herein was involved in the robbery. Pw 1 Amina Epelet Ekipor testified that she is a girlfriend of the Appellant. On 08/12/2010, she visited the Appellant's house at Todonyang AP Post. She left the Appellant's house for her house at Todonyang Mission. The Appellant visited her at her house and stayed with her until 11.00pm when he left. She testified that the Appellant had a gun and a torch and was wearing a pair of jungle shorts and was in slippers. She slept after the Appellant had left. At around 3.00 am, she heard gunshots. When the sound of gunshots died out, she went to her neighbour to inquire what had happened. The neighbour asked her to go back and sleep. After a short while, Kenya Police Reservists announced loudly that no one should leave the Manyatta as there had been an incident and a person had been killed. The reason for this is that the Reservists did not want people to interfere with the scene. At 7.00 am, she went to the scene and saw a body lying down. At the scene, there was a torch and a pair of slippers. She recognized the slippers as the ones the Appellant was wearing the previous night. She also identified the torch which the Appellant had. She had known the Appellant for about 5 months and she knew the torch as she had used it. The pair of slippers and torch were beside where the deceased lay.

The warning given to the Manyatta residents not to move out of the Manyatta is confirmed by evidence of Pw 9 Ekolonyo Locholin and Pw 11 Osman Etor Eleman who announced to the residents not to move out of their Manyatta. At daybreak, Pw 9 and 11 who are both Police Reservists tracked the bare foot footprints which led them to the AP Post. Pw 2 Stephen Kirwa saw the Appellant come to the AP Camp bare foot. The Appellant told Pw 2 that he was indeed from Todonyang Mission Manyatta and that he had fired 4 shots. This was confirmed by Pw 2 who testified that on the previous day at 6.00 pm, he had

issued the Appellant with a G3 rifle with 20 rounds of ammunitions. When the Appellant was disarmed, he had 16 rounds of ammunition.

The G3 rifle and spent cartridges which were collected from the scene were sent to a ballistic expert Pw 10 Hassan Maningo who examined the cartridges and the G3 rifle. He formed the opinion that the cartridges collected from the scene were those fired from the G3 rifle. The G3 rifle was in good mechanical condition.

It is the information which the Appellant gave to Pw 6 IP Richard Okodoi which led to the recovery of the bag which contained the money and other personal documents which were lost during the robbery. Pw 6 was not in the search group which recovered the bag buried on the ground. He gave the information which he received to the OCPD Turkana North who in turn called Pw 3 and gave him the lead to where the Appellant had hidden the bag.

The recovery of the bag through information received from the Appellant including the evidence by Pw 1 who was with the Appellant the previous night, including recovery of the pair of slippers and torch at the scene squarely puts the Appellant at the scene. The Appellant's claim in his defence that he fired to scare a target upon hearing gunshots is not true. The Trial Magistrate considered the Appellant's defence and found it not to be true. There were at least three bullet holes on the body of the deceased. Though there were slight contradictions on the number of cartridges which were collected from the scene, this did not lessen the circumstantial evidence which was overwhelming. The Magistrate did not make any mistake in his judgment when he observed that the Appellant may have had extra ammunitions because six spent cartridges were found at the scene and the Appellant had fired 4 as he had been given 20 rounds of ammunition and on arrest he had only 16 rounds of ammunition.

The Appellant has complained that the Trial Magistrate erred in remarking that the Appellant may have had a scanner or planner without any evidence to support the same. We agree with the Appellant's contention that this was a presupposition by the Trial Magistrate but this did not in any way lessen the evidence adduced by the witnesses. What was in contention is as to who robbed the complainant and killed the deceased. It was not a question of who may have led the Appellant to his victims.

The Appellant has also taken issue with the fact that the Trial Magistrate convicted him without the alleged confession being produced in Court. There was no evidence that a confession was recorded and none was expected to be produced. The Trial Magistrate in his judgment rightly observed that there was no confession produced and it was not necessary in any case. The Appellant was not convicted on a confession.

The Prosecution was supposed to prove that a robbery occurred which they did. There was money lost and other items which were later recovered. A person died during the robbery. The Prosecution was not expected to show how the money and missing items left the scene. The items were recovered away from the scene and therefore the stealing was established. The attacker was armed with a gun which was used to kill the deceased.

Though a blood stained T-shirt was recovered from the house of the Appellant and blood samples taken from the Appellant for comparison with blood removed from the scene, the results did not come out in time to be tendered in evidence. The non-production of the results did not however affect the other evidence adduced and it cannot be said that its production would have been adverse to the prosecution case.

In the case of **Mwangi Vs Republic** it was held that in a case depending exclusively on circumstantial evidence, the Court must before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The fact that the Appellant's torch and slippers were found at the scene and that it is information obtained from the Appellant which led to the recovery of the stolen properties was incompatible with his innocence and inconsistent with any other rational conclusion. He admitted in his defence that he fired four shots but his claim that this was in response to other shots cannot weaken the inference of his guilt. We find that the Trial Magistrate was correct in convicting the Appellant. We find no merit in his appeal which we hereby dismiss.

Dated and delivered at Kitale on this 6th day of November, 2013.

E. OBAGA

JUDGE

L. NDOLO

JUDGE

In the presence of:

Appellant:

Respondent: