REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 58 OF 2013

WILFRED LOSIKITE LONGAR …..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(*Appeal arising from the decision of Hon. R. M. Washika, Ag. PM in Kapenguria Senior Principal Magistrate's Court in Criminal Case No. 398 of 2012)*

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 the 30th day of March 2012, at Makutano Township within Pokot county, jointly with another before Court while armed with an offensive weapon namely a pistol, robbed Daniel Shikanda of his motor vehicle Reg. No. KBA 407 E Toyota DX grey in colour valued at Kshs. 420,000 and at or immediately before or immediately after the time of such robbery threatened to shoot the said Daniel Shikanda.

The Appellant also faced a second count of being unlawfully present in Kenya Contrary to Section 13 (3) (c) of the Immigration Act Cap 172 Laws of Kenya. Particulars are that on the 30th day of March 2012, at Kapenguria Police station within Pokot county being a Tanzanian Citizen was found being unlawfully present in Kenya without a written authority from the Kenyan Government.

The Appellant was convicted on both counts. He was sentenced to death in respect of the charge of robbery with violence but was discharged on the second count under 35 (1) of the Penal code. Being dissatisfied with the conviction and sentence, he preferred an appeal to this Court in which he raised the following grounds.:-

1. *That the Trial Magistrate erred in law and fact by convicting him on evidence which was fraught with in consistencies.*
2. *That the Trial Magistrate erred in law and fact by holding that the Prosecution had proved its case against him beyond reasonable doubt..*
3. *That the Trial Magistrate erred in law and fact by convicting him in absence of key witnesses particularly the Arresting Officer.*
4. *That the Learned Trial Magistrate erred in law and facts by convicting him on the face of a defective charge sheet.*
5. *That the Trial Magistrate erred in law and in fact by convicting the Appellant without considering his evidence.*
6. *The Trial Magistrate erred in law and fact in convicting him in absence of an explanation by the*

Prosecution as to why he was detained in custody for more than 24 hours.

7. *That the Trial Magistrate erred in law and fact in shifting the burden of proof to him.*
8. *That the Trial Court erred in law by convicting him when the judgment had not complied with provisions of Section 169 (1) of CPC Cap 75.*
9. *That the Trial Magistrate erred in law and fact in failing to notice that the first report made at Police station was at variance with the evidence adduced by witnesses.*

The complainant Daniel Shikanda a taxi driver at Makutano testified that on 30/03/2012 he was at Kapenguria stage when two people came and requested him to take them to Kolongolo. He had carried the two people on two previous occasions. While on the way to Kolongolo, the two asked him to stop so that they could check on maize. Someone flashed his mobile. The one who was seated at the back seat removed a sisal rope and tied him on the neck and tied him to the seat. The one who was on the front seat beat him before he carried him and threw him to the back seat while he was tied to the seat. The one at the back then tied his legs and hands. The one who was seated in the front took control of the car and started driving off. He was ordered to sit down so that he could not see where he was being taken. He was later carried and placed in a culvert. He managed to untie the rope and chased after the one who was seated at the back seat who had now been left behind by his colleague who drove off. Some good samaritans who came from Kapkoi on a motor cycle assisted him chase the one who had been left behind. They managed to find him and arrested him. There were people planting maize on their farms who came and called Kenya Police Reservists who tried to interrogate the arrested suspect as to the whereabouts of the stolen motor vehicle. The one who was arrested is the Appellant in this case.

The Appellant's appeal was opposed by Mr. Chelashaw State Counsel on the ground that there was positive identification of the Appellant by the complainant. That the robbery took place in broad daylight and that the Appellant was arrested on the same day of the robbery.

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 a as 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 the complainant as well as the other witnesses. We wish to point out that the complainant had given his testimony before a Magistrate who was later transferred. When the succeeding Magistrate informed the Appellant about his rights under Section 200 (3) of the Criminal Procedure Code, the Appellant opted for the case to start *de novo*. The complainant then testified afresh. His testimony before the first Trial Magistrate was materially different from what he testified before the Magistrate who finally concluded the case. We think that for purposes of testing the credibility of the complainant's evidence, the Trial Magistrate ought to have looked at what the complainant had said before.

During the first hearing, the complainant testified that on 24/03/2012 he was called by some customers who wanted to be picked from KCB Makutano. He went and picked two customers and dropped them at Kapenguria Hospital. The two called him the second day asking him to drop them but he asked his boss Kamakili to drop them as he was going towards where the two customers were going. On the third day, the same people asked him to take them to Kolongolo. When they reached the junction of Kanyarkwat, they asked him to stop. They took a rope and strangled him. He was tied on his hands before being

drugged. He was then carried and put in a culvert. He was left with the Appellant. Members of the public chased the Appellant and arrested him. The rest disappeared.

The person the complainant referred as his boss is Pw 2 John Khavakali who was the owner of the taxi which was stolen. When this witness testified, he did not say that he had driven the Appellant who was with another person at the request of the complainant who was his employee. The complainant was not being honest to the Court as to how many times he had seen the Appellant. At one time, the complainant said that he was drugged and strangled. At another time he says he was tied with a rope and put in a culvert. The testimony of the complainant does not make sense. How can a drugged person who is tied become sober, untie himself and then start chasing his alleged assailant? Even if we were to take his subsequent testimony that he was tied and placed in a culvert still there will be questions as to the possibility of one of his assailants taking time at the scene until the victim untied himself for him to chase him and arrest him. The complainant stated that he was tied using a rope, yet in the same testimony, he said that he was tied with his shirt which was torn by his assailants.

The complainant testified that he chased after the Appellant with assistance of some samaritans who had come from Kapkoi. It is not clear whether the good Samaritans were called from Kapkoi to come and assist in the search for one of his assailants or they were just passing by. These samariatans were never called to testify. The Kenya Police Reservists who arrested the Appellant were never called to testify. It is said that the Appellant was taken to a G. S. U. Camp. Pw 4 the Investigating Officer testified that the G. S. U. Officer who received the Appellant had died. What about the good samaritans and the Kenya Police Reservists as well as the farmers who assisted to arrest the Appellant. Was it not possible to get even a single person to come and testify on how the Appellant was arrested?

The evidence of the Arresting Officer is that the attackers of the complainant were armed with a pistol which they used to threaten the complainant. The complainant who was attacked did not say whether he saw a pistol or if any was used to threaten him. The Trial Magistrate in her judgment stated that the assailant was armed with a pistol during the robbery. This was a misdirection as no such evidence came from the complainant. As we stated in this judgment, the complainant testified twice before different Magistrates and at no single time did he say that any of the robbers were armed with a pistol. The Trial Magistrate in her judgment stated that the complainant was thrown out of the car and that the complainant screamed which screams attracted a crowd which she described as mob justice which pursued and arrested the Appellant. No such evidence was adduced by either the complainant or any of the witnesses. We wonder where the Trial Magistrate got that evidence from as no such evidence was recorded. This is the evidence which the Trial Magistrate relied on reaching a conviction. The evidence leading to the arrest of the Appellant can be nothing but an imagination of the Trial Magistrate in support of her judgment. If such evidence was adduced as described in the judgment of the Learned Trial Magistrate, then the same was not recorded by her and as we are a Court of record, we cannot but dismiss it as her imagination as it is not supported by the evidence recorded in the proceedings.

The Appellant's grounds include one in which he contends that the charge sheet was defective. We have looked at count one in the charge sheet and find nothing which renders the charge defective. As regards count two, we find that the charge was defective in that it cited a repealed statute. However, this defect did not affect or prejudice the Appellant's case. He understood the particulars of the charge and he fully addressed himself on the charge in his defence. The charge was based on the Immigration Act which had been repealed in 2011 by the Kenya Citizenship and Immigration Act of 2011 which came into force on 30/08/2011. The offence herein was committed on 30/03/2012 long after the Immigration Act had been repealed.

The Appellant complained that the judgment was not in accordance with the provisions of Section 169 (1) of the Civil Procedure Code Cap 75. We have looked at the judgment of the Trial Magistrate. She summarized the evidence of the Prosecution and the defence. She set out points for determination and then went on to analyze the evidence and reach a decision and gave the reasons for the decision. The only fault in her judgment is that she considered the defence and Prosecution case separately which should not be the case. She should have considered the Appellant's defence in relation to the evidence recorded in the proceedings. Otherwise, we find that the judgment was in accordance with the requirements of the

provisions of Section 169 of the Criminal Procedure Code.

The Appellant also raised an issue that he was not taken to Court within 24 hours as provided by the Constitution of Kenya 2010 and that there was no explanation given for that. We notice from the record that the Appellant was arrested on 30th March, 2012 which was on a Friday. He was brought before Court on 02/04/2012 which was on a Monday. There is no way he would have been brought to Court earlier than 02/04/2012. His constitutional rights were never violated and there was no need of explaining what was obvious.

We notice from the record that the Appellant give his defence on 07/05/2013, he submitted immediately after his defence and the Prosecution replied after this. The Trial Magistrate then set the time for judgment at noon on the same day. The judgment was indeed delivered on the same day. We commend the Magistrate for acting with speed. We however point out that it is due to this haste which made the Magistrate not fully analyze the evidence on record and reach a proper conclusion based on the evidence and law. The Appellant was facing a serious charge which required a careful consideration of the evidence.

The Appellant in one of his grounds contended that the burden of proof was shifted to him. We do not find anything on record to show that the burden of proof was shifted to him in respect of count one which faced him. The Trial Magistrate did not require the Appellant to proof that he did not commit the robbery. The burden of proof lay on the Prosecution and remained there. It was never shifted to the Appellant.

As regards count II, the Appellant was charged for being unlawfully present in Kenya. As the Appellant denied that he was a Tanzanian citizen, under the Kenya citizenship and Immigration Act, the burden of proof shifted to him to proof that he was indeed lawfully present in Kenya by producing the necessary documents to proof his assertion. Offences under the Kenya Citizenship and Immigration Act are some of the instances when burden of proof shifts to an accused person. The Appellant failed to proof that he was not a Tanzanian but a Kenyan.

We find that the Trial Magistrate was correct in convicting the Appellant in count II. The Magistrate was however wrong in discharging the Appellant. The proper procedure was for the Trial Magistrate to leave the sentence in respect of count II in abeyance having convicted and sentenced the Appellant to death sentence in count I. Having found that the conviction of the Appellant on the count of robbery with violence was not safe, we quash the conviction resulting therefrom and set aside the death sentence.

As for count II, we set aside the order discharging the Appellant under Section 35 (1) of the Penal Code and in place thereof order that the Appellant shall pay a fine of Kshs. 100,000 or serve one year imprisonment in default. We further order that he should be repatriated back to Tanzania upon payment of fine or completion of sentence whichever comes first.

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

E. OBAGA

JUDGE

L. NDOLO

JUDGE

In the presence of:

Appellant: ….....

Respondent: ….....