REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 193 of 2011

LONGIDAI LONGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 86 of 2008 of the Senior Resident Magistrate's Court at Maralal, Hon. A. K. Ithuku, SRM)

JUDGMENT

1. The Appellant Longidai Longure was along with William Lepurshirit *(the 2nd Accused)*, charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code *(Cap. 63, Laws of Kenya)*. The second accused was acquitted for lack of evidence. The Appellant was on the evidence found guilty of the offence of robbery with violence, and was sentenced to death as by law provided. Aggrieved both with his conviction and sentence, he appealed to this court first on three grounds, which were amended and substituted pursuant to Section 359(v)(c) of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* with the following grounds -

(1) That the learned trial magistrate erred both in law and fact and misdirected himself by basing the Appellant's conviction on a defective charge that the prosecution had proved a charge contrary to Section 296(2) of the Penal Code whereas the evidence adduced does not accord with the charge;

(2) That the learned trial magistrate erred in both law and fact by basing the Appellant's conviction on the evidence that this was a case of recognition, and failing to consider adequately that a case of this nature, first report given to the Police was so crucial so as to establish the truth of the matter, whereas no names of the attackers were given to the Police by PW3 and PW9 upon reporting the alleged incident on 8/03/2008, and though the application for the O.B. for the said date was applied for, the prosecution failed avail the same;

(3) that the learned trial magistrate erred in both law and fact by relying on the evidence of identification by PW3 and PW9 without first of all excluding the possibility of the existence of an error or mistake on the part of their identification more so in view of prevailing circumstances at the scene of the crime at the time of the attack. Noting that PW9's evidence contradicts PW3's evidence yet they were under the same circumstances and environment – that the person purported to have been the Appellant had disguised his face with a mask;

(4) that the learned trial magistrate erred in law and in fact and misdirected himself by failing to note and acknowledge that though PW7 claimed his gun was taken away on 21.02.2008 clearly informed the court that the same was returned to him after 3 days i.e. to mean 24.07.2008 a fort-night prior to the date of the incident on 8.03.2008;

(5) that the circumstances surrounding the Appellant's arrest were neither satisfactory nor do they prove the Appellant's participation in the commission of the offence charged and the entire case for the prosecution was not proved beyond reasonable doubt. Noting that the incident took place on 8.03.2008 and the Appellant was arrested on 25.03.2008, WHY?

2. For those reasons the Appellant prayed that his appeal be allowed, his conviction be quashed and sentence set aside, and he be set free.

3. In addition to his Grounds of Appeal, the Appellant also made written submissions on each of the grounds.

4. The Appeal was however opposed by learned State Counsel who submitted that the Appellant was recognized from his voice, his eyes, and clothes in particular by PW9 who knew the Appellant from his childhood, that the offence occurred during the day, and that the Appellant was well known, the weapon used in the commission of the offence was identified and the missing round of ammunition out of the five, was not accounted for. Counsel submitted that the conviction was safe, and should be upheld.

5. The arguments for and against the conviction and sentence will appear in the course of this judgment. The Appeal raises basically one issue, whether or not the Appellant was identified during the course of the commission of the robbery.

6. To be able to answer that issue satisfactorily, it is the statutory duty of this court, as the first appellate court review and re-evaluate the evidence adduced before the lower court, and make its own findings and draw its own conclusions. See for instance the case of **NGUI VS. REPUBLIC [1989] KLR 729 -**

"... The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions."

7. In this regard we have perused the record of proceedings and evidence before the lower court in relation to the Appellant's grounds of appeal, the most important of which is whether or not the Appellant was identified by recognition as well as by voice.

8. In the case of **ANJONONI & OTHERS VS. REPUBLIC [1976-80] KLR 1566**, Madan JA, observed at p. 1568 -

….The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case … where no stolen property is found in possession of the accused …. This was a case of identification by recognition of the assailants, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or another ..."

9. The Appellant contended in grounds 2 and 3 of the grounds of appeal that PW8 was never at the scene of the crime. It is correct PW8 was not at the scene of the crime. Her evidence was however in relation to the Nokia 1100 sold to her by the 2nd Accused. The Appellant contended in paragraph 3 of the Grounds of Appeal he could not have been recognized as he had disguised himself.

10. The evidence was set by PW2. He was the driver of motor vehicle KAT 940C, Mitsubishi Lorry. He was employed as a driver by the owners of the firm known as Wananchi Hardware. The

time was about 5.00 p.m. He along with sand loaders, Francis Abong *(the deceased)*, PW3 *(Christopher Alele Lomwa also known as Suguta)* and Amin, had gone to harvest sand from a nearby forest. He parked the lorry and moved a short distance away. He saw two people emerge from the forest, one of them who was wearing a shuka *(loose wrap across the shoulders)* had a rifle. The other had a panga and a rungu. He ran away and did not see the two people well. He heard gunshots as he run away. He stayed in the forest till 7.00 p.m. when he was called by the Police. He did not identify and had not seen the attackers before.

11. PW3 was Christopher Alele Lomwa referred to as Suguta by PW2. He corroborated the evidence of PW2 as to the time and place where they had gone to collect sand. His evidence was that they had loaded sand on to the lorry for about 10 minutes when he heard someone tell them to lie down in the Kiswahili language which he obeyed. As he lay down, the 1st Accused, (*the Appellant herein)* stepped on his head and proceeded to remove Ksh 50/= from his pocket and the pocket of Francis *(nothing was taken from Amin Abong (the deceased).* The 2nd Accused a person he had known from his childhood was standing with another person about 10 metres away. The robbery took about 10 minutes. It is only after the robbers had left that he realised, Abong had been shot and was dead.

12. PW3 testified that while he knew the 2nd Accused, the 1st Accused, ***"the Appellant was a stranger to me. I looked at him. I saw the two red rings on the rifle*** *(witness shows the red rings).*

13. PW3 testified that he knew the attackers and especially the 2nd Accused, he carried out his own investigations and found where the Appellant, the 2nd Accused, and other persons were drinking and he called Cpl. Chepkok, who responded in the company of another officer called Kirwa. The officers arrested the girl in the company of the Appellant and his companions, and recovered a Nokia Phone 1100.

14. PW3 suspected the gun cited with the 1st Accused belonged to his brother (PW7) who worked as a watchman at Loikas Primary School. Indeed PW3 and the officer found PW7 with the rifle of the same description used to attack them. PW7 was arrested and taken to Maralal Police Station where he recorded a Statement as to the loss of the gun.

When cross-examined by the Appellant, PW3 stated categorically that he had seen the Appellant clearly on that material day, that the Appellant was released, but was re-arrested after the owner of the gun was found.

When cross-examined by the 2nd Accused PW3 testified that he did not know him, but had seen him squatting behind a tree, saw his face, and the Nokia phone was found with his niece, and that the three people were arrested in his house and that he had *(the 2nd Accused)* given the Nokia Phone to his niece.

PW5 a brother of PW6 the father of the deceased identified the body of Francis Abong.

15. PW7 testified as to loss of his gun. The Appellant his brother had asked him for the gun one day, and when he refused, the Appellant broke into his house and stole the gun. He was seen by PW7's children Lokini – a little girl. He heard later that the gun had been used in a robbery and that someone had been shot dead.

16. PW8 testified that the Appellant's co-accused had sold her a Nokia Phone for shs 2,000/= for which she paid shs 1,000/= later on to realise it was stolen as it was blocked, and found that all the numbers showed belonged to *"Kikuyus"*, and becoming scared, she took it to a cell-phone shop where she was informed that the cell-phone had been acquired in the course of a robbery. For her efforts to buy a cheap cell-phone she ended up in Police custody.

17. PW9 corroborated the evidence of PW3. He put the time at about 3.00 p.m. PW2 came to the Lorry stage and wanted sand loaders. It is he who called the deceased and PW3. While loading sand, a

man emerged from the forest wearing a cap. He ordered them to lie down. As they were going down a gunshot rung out. They were robbed of money, and after about 30 minutes when they got up, they found the deceased had been shot dead. They loaded the body on to the lorry, and the turn boy drove out of the forest to Maralal Police Station where he was put in a police vehicle and returned to the scene of the crime.

He testified that the person who attacked them had a mask, he could identify him because the person was his neighbour, he knew his clothes, and his general body physique, as well as his voice. He had talked to them, and that person was the Appellant.

PW9 led the Police to the Appellant's home, where they found PW7, a KPR and the gun was recovered and he also identified the rifle with the red rings. He testified that the 2nd accused was arrested because his sister PW8, had a stolen cell-phone.

When cross-examined by the Appellant, PW9 testified that -

"Although you had covered your face, I could see your eyes and the rest of your body. It was during the day ..."

When cross-examined by the 2nd accused, PW9 testified that he had not seen him at the scene, but that PW8 was his niece, and that cell-phone she had belonged to one *"John Kimani"*.

18. The prosecution evidence was summed up by PW10. He testified that on 27.02.2008 at around 20.35 hours a driver of motor vehicle KAU Mitsubishi had reported that they, while loading sand at Loikas, had been robbed, by a group of 4 men one armed with MARK4 rifle, and the driver George Kimani had lost a Nokia cell-phone, and a jacket containing sh 24,000/= and that no arrests had been made of that incident.

PW10 also testified and corroborated the evidence of PW9 that on 8.03.2008 the driver of motor vehicle KAT 945C Mitsubishi Lorry were loading sand when 3 men one of whom was armed with a MAKK 4 rifle and 2 men armed with rungus attacked and ordered them to lie down, the driver PW7 managed to escape. Francis Abong was shot dead, and turn- boy managed to drive the lorry to the Police Station. The Appellant was arrested upon receipt of information on 4.04.2008, when the 2nd Accused was arrested and led officers to the home of PW7, a KPR member from whom the firearm was recovered.

19. PW1 and PW4, both Doctors testified as to the cause of death of the deceased Francis Abong. The learned trial magistrate correctly ignored the evidence of PW4. It was repetition of the evidence of PW1.

ANALYSIS OF EVIDENCE

20. It is clear from the evidence of PW3 that armed robbery took place on 8.03.2008. In the course of that robbery, one life was lost Francis Abong a sand loader was shot dead. He and PW3 lost shs 50/= each at the hands of the Appellant. The robbery took place at 5.00 p.m., during daylight. The Appellant though masked was recognized by PW3. PW3 also recognized the gun. It had 2 red rings on it. He identified the gun with the rings in court. The Appellant's co-accused was not at the scene of the robbery and was properly acquitted.

21. The Appellant was convicted and sentenced to death. He claimed he was not recognized in the circumstances of the crime.

22. In the case of **ANJONONI VS. REPUBLIC** *(supra)* while observing that identification of robbers is always an important issue, in a case of capital robbery, the court stated that recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailant in one form or another.

There was also the evidence of PW7, a brother of the Appellant, and Kenya Police Reservist. He was the person issued with the Mark 4 Rifle. He had denied the Appellant access to it. While his brother was away, the Appellant broke into his brother's house and walked away with the rifle. Though there was no evidence of the robbery of 27.02.2008, it is clearly implicit from the evidence of PW8, and PW10, that it is at that robbery that George Kimani lost his NOKIA 110, *(which was found with PW8)* and also his jacket containing Ksh 24,000/= about which there was no information or evidence. The inference can thus be drawn that the robbery of 27.02.2008, and 8/03.2008 was committed with the use of the same Mark 4 Rifle, and most probably by the same people, including the Appellant.

23. There is however no doubt that he was the prime mover of the robbery of 8.03.2008, for apart from recognizing him by his general physique, PW3 also knew the Appellant's voice as he talked to PW9 as he lay down with his colleagues.

24. In the case of **MBELE VS. REPUBLIC [1984] KLR 626**, the Court of Appeal said -

"In dealing with evidence of identification by voice, the court should ensure that -

(a) the voice was that of the accused and recognized it,

(b) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it,

25. In this case, PW9 was clear in his testimony that he knew the Appellant, and there existed other evidence that of PW3, and circumstantially of the Appellants brother, PW7 that it was the Appellant who stole the Mark 4 rifle used in the armed robbery.

26. The ingredients for the offence of robbery with violence are set out in Section 296(2) of the Penal Code,

(1) the offender is armed with any dangerous or offensive weapon or instrument,

(2) is in the company of one person or more other persons,

(3) at or immediately before or immediately after the time of the robbery he -

- ***(i) beats,***
- ***(ii) wounds,***
- ***(iii) strikes, or***
- ***(iv) uses any other personal violence.***

If those ingredients are established by evidence, the punishment is death.

27. In this case the prosecution opted to charge the Appellant with the offence of robbery with violence. They could as well have charged him with the offence of murder. Perhaps they did not do so, because the punishment for robbery with violence, is like, murder, death.

SENTENCE

28. In this case, there was overwhelming evidence that the Appellant committed the offence of robbery with violence. It is cruel that he caused the loss of a life for the sums of Ksh 100/= between PW3 and one of his colleagues. It was a senseless killing, and if the death punishment was being carried out today, we would confirm it without hesitation. However, since death penalties have not been carried out for the last quarter century, and since the sentences of those convicts on death row have been reduced by Presidential clemency to life imprisonment, we set aside the sentence of death imposed upon the Appellant and substitute the sentence of life imprisonment.

Save as aforesaid, we confirm the conviction, and dismiss the Appellants' appeal as devoid of any merit in law or fact.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 1st day of November, 2012

R. V. P. WENDOH

JUDGE

M. J. ANYARA EMUKULE

JUDGE