



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL

629 & 630 OF 1990

**(From Original Conviction and Sentence in Criminal Case No. 645 of 1986 of the Chief Magistrate's Court at Nakuru: I.C.C. Wambilyangah Esq.)**

**NALENYA SOINE..... APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Coram: Owuor, J.**

**Oguk, J.**

**1st and 2nd Appellants present in person (un-represented)**

**Mr. Ondari (state counsel) for the State**

**JUDGMENT**

Criminal Appeal No. 729/90 and Criminal Appeal No. 730/90 are hereby consolidated.

The 1st Appellant, Flospher Kadalinda (original A1) and the 2nd Appellant, Nalenya Soine (original A2), were jointly convicted by the Learned Chief Magistrate, Nakuru of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and were each sentenced to death. Their appeals to this Court are against conviction and sentence.

The incident giving rise to the charge against the Appellants took place on the night of 19th and 20th of February, 1986 at Olposinoru Trading Centre in Narok District. This trading centre is at the boarder of Kenya - Tanzania on the Kenyan side. The deceased, Ismael Jama was running a shop business at this centre, and according to his shop attendant, Ahmed Mohammed Yunis (PW1), he was stocking only goods which were popular with the local residents in the area, the Maasai, who were living on both sides of the boarder. Yunis and his employer, Ismael (now deceased) used to live like brothers. He was like a companion to his employer. They used to work in the shop, eat, pray and chatted together. In the evenings after the days work, they would retire to the back room at the rear of the shop which they were using as their residence. They shared one room but had separate beds.

On the night of 19th February, 1986 after close of the business, they retired to their room at the back of the shop having securely locked the main door to the shop. At about 10 p.m they retired to their respective beds to sleep, but before they could put off the hurricane lamp that was on inside their room, they heard a

gun shot at the front of the shop and they got startled. This was soon followed by intense banging on the shop door. At this stage, Yunis stated that he and Ismael moved to the shop and the said gangsters then started banging the window of the shop as the door failed to give in. They managed to break open the window and the said gangsters started to enter the shop through the said window. He testified that he saw the 2nd Appellant and another (original A2 who escaped from custody during the trial in the court below) entering the shop. At that stage, Ismael suggested to him that they should escape by running out, but before they could make any move, the 1st Appellant opened fire and shot Ismael (deceased) at a point blank range of 5 paces away killing him instantly. He managed himself to escape and hide in some nearby bushes. Before the said gangsters left, they fired more bullets at the neighbouring shops to scare away the owners from coming out.

The attackers then carried away most of the goods that the deceased had stocked in the shop estimated to be valued at shs.86, 000/-. After they were gone, Yunis came out of hiding and woke up their neighbour, Noor Mohammed (PW8) to accompany him back to the scene. They found the goods scattered inside the shop and the body of the deceased lying outside his house at the back of the shop. They then sent one of the Youths to go and report the incident at Narok Police Station.

On the following day, the neighbours of the deceased including Yunis tracked down some foot prints believed to be those of the attackers which crossed the boarder into Tanzania. They believed that the said gangsters must therefore have come from Tanzania. Along the way, they even picked some of the items from the shop of the deceased which had dropped down together with one live bullet head. The tracking party then went and reported the incident at Loliondo Police Station in Tanzania some 28 miles from the Kenyan boarder. Their report was received by Asst. Inspector of Police, Thompson Makala Daudi (PW14) of Tanzania Police Force, and Ngorongoro District in Arusha Region. He was shown the recovered live ammunition and some spent cartridges. Upon receipt of the said report, he accompanied the reporters back to the scene in Kenya. He was shown where the deceased had fallen and as he observed the scene; he noticed the bullet holes on the door and window of the shop of the deceased. He also confirmed that the foot steps of the suspects had led into Tanzania and they even recovered some packets of biscuits which had dropped down. He then commenced investigations inside Tanzania.

In the cause of his investigations, Asst. I.P Makala, (PW14) arrested the original A2 who later escaped. He had found him with certain goods suspected to have been stolen from the shop of the deceased. This was on the 14th of March, 1986. He also arrested the original A3 who was acquitted of the offence by the Learned Chief Magistrate. He had found this man, Eliud Soine (original A3) selling goods in the shop of the 2nd Appellant who was the main suspect he was looking for but he found when the 2nd Appellant was then away. He then proceeded to arrest the 1st Appellant, Flospher from whose house several goods (ex. 11, 12, 13, 14, 16, 18, 19 21, 23, 50, 51 and 52) were recovered. Among those exhibits were a ground sheet (ex.50), a jungle pair of trousers (ex.51), and a jungle hat (ex.52) which are normally used by the Tanzanian Army but they were seized by the police officers because the vocation of the 1st Appellant as a farmer, did not require him to be in possession of such items. The rest of the recovered goods were believed to have been stolen from the shop of the deceased in Kenya. They were identified by one of the neighbours of the deceased (PW3). He continued to look for the 2nd Appellant till the 22nd of July, 1986 when he was found moving from Kajiado (Kenya) to Tanzania and he was arrested by PW14 who had then disguised himself as a Maasai elder. At that time, he was wearing a sheet (ex.20) and had a torch which one of the neighbours of the deceased (PW15) believed to be among the items that had been stolen from him.

After the arrest of the Appellants, extradition proceedings were conducted by a Tanzanian Court which was allowed and they were handed over to C.I Cheruiyot (PW18). He then took a statement under inquiry from the 1st Appellant which were admitted in evidence (ex. 56). It amounts to a confession of his participation in the said crime and goes on to implicate his co-Accused persons (original A2 and A3).

When put on his defence by the Learned Chief Magistrate, the 1st Appellant elected to exercise his right to silence and said nothing.

The 2nd Appellant raised an alibi defence and stated that on the night when the alleged crime occurred, he

was just at his home in Tanzania. He never ventured out until the 20th of February, 1986. He told the court that he runs a shop business in Tanzania and he continued to run the same normally till he was arrested on the 22nd of July 1986 by police officers. They duly searched his shop but nothing was recovered except for a basket and an old bed sheet, a torch made of leather which the police officers took and yet they belonged to him. As regards the goods which he used to sell in his shop, he stated that he was buying them from R.T.C Company which is a trading company operating within the area. He denied having committed any offence or having been found in possession of any stolen goods.

The 1st Appellant in his Petition of Appeal alleges that he was not given a fair trial by the learned trial Magistrate as he had refused his request to seek assistance from the Tanzanian High Commissioner to arrange for them some legal representation in view of the serious nature of the charge that was facing them.

The 2nd Appellant, on the other hand, alleged that:

1. That the Learned Trial Magistrate erred in law and in fact by holding that he was satisfactorily identified by Yunis (PW1) who was the sole identifying witness in the case.
2. That the Learned Trial Magistrate erred in law by concluding that the shop goods which were taken from his shop were those of the deceased and yet they were items commonly being sold in the area in several shops.
3. That his alibi defence was not given careful corroboration by the Learned Trial Magistrate.

It is true, as stated by the 1st Appellant, that he had insisted on being given legal representation free of charge. Indeed he was facing a capital charge but unfortunately there is no provision under the Kenyan Law for those facing charges of robbery with violence contrary to section 296(2) of the Penal Code to be provided with free legal representation other than those on a murder charge. The 1st Appellant therefore asked the Learned Trial Magistrate to stay the proceedings so that the Tanzanian High Commissioner in Kenya could arrange for them legal representation. His request was accepted by the Court and the case was adjourned for several months. When it became clear to the court that he was unlikely to obtain legal aid from the Tanzanian High Commission to Kenya, the Court decided to proceed with the case. His request to the Learned Magistrate to disqualify himself and transfer the case to another court simply because could not wait any longer for such legal aid, in our view, was rightly dismissed by the court. We may add, that even before us, the 1st Appellant decided to delay the hearing of the appeal by endless requests for adjournment to seek legal representation from the Tanzanian High Commissioner in Kenya. After realising that no counsel representation was forth coming, the Appellant agreed to proceed with his appeal in person and made very lengthy written submissions.

We have considered the written submissions by each of the Appellants as well as the oral submissions by the Learned State Counsel, Mr. Ondari.

It is not in dispute that there was only one eye witness to the incident, Yunis (PW1) who was in company of the deceased during the said robbery. There is overwhelming evidence to prove that indeed a violent robbery had occurred at the business premises of the deceased, Ismael Jama at which he was shot dead and several goods stolen from his shop. Yunis who was with him managed to escape narrowly and hid in some nearby bushes till the robbers ransacked the shop of the deceased and carried away the goods. It was his contention that during the incident he had spotted and seen the 1st and 2nd Appellants amongst the said gangsters.

The incident was preceded with a great deal of terror. Gun shots, were not only fired at the door of the complainant's shop, but also at the neighbouring shops to scare away the owners from coming out. Some huge stones were hauled at the door of the shop of the complainant and at the window which were found by the police officers when they visited the scene. Both Yunis and the deceased must have been in a state of fright and shock at these happenings and even the deceased had suggested to Yunis that they should escape but before he could do so, he was gunned down in cold blood. The shooting took place after both

Yunis and the deceased had moved from their bedroom where there was light from a hurricane lamp to the shop which was in darkness. We are in great difficulties in accepting the evidence of Yunis that he could see or recognise any of the said intruders. Assuming that he had known any of them before, the circumstances were such that in total darkness and chaos that prevailed, he could not positively identify any of them. Indeed he never gave the police any names of the suspects if at all he knew them or even any description of their appearance or how they were dressed that could assist the police officers in their investigations. Even after the 1st and 2nd Appellants had been arrested in their country, Tanzania, and extradited to Kenya, no identification parades were conducted at which the ability of Yunis to identify any of them could have been tested. His dock identification of the 1st and 2nd Appellants was, in the circumstances, almost worthless and we place no reliance on the same.

In our respectful view, the evidence of Yunis (PW1), was of little assistance or no assistance to the court in establishing the identity of the attackers of the deceased who carried out the robbery in his shop on the material night.

The rest of the evidence relied upon by the prosecution was largely based on the testimony of Asst. I.P Thompson Makala (PW14) of Tanzanian police force. He carried out investigations having established that the foot prints of the said gangsters had been tracked up to the boarder into Tanzania. He targeted traders and especially shop owners along the Tanzanian/Kenyan boarder. Thus, he visited the shops of the 1st and 2nd Appellants where he found certain goods on display which according to the neighbours of the deceased, were of the same type as those which had been stolen from the shop of the deceased. Whereas the 1st Appellant was found inside his shop and arrested, the 2nd Appellant was not found in his shop except for the original Accused 3 who was acquitted in the court below. His defence was that he had been merely requested by his brother, the 2nd Appellant to sweep for him the shop and he had no idea at all regarding the goods therein. Indeed the 2nd Appellant testified that he was himself the one who was running that shop. From both shops (PW14) took some goods which were later exhibited in court as those which had been stolen from the shop of the deceased. It is significant that Yunis (PW1), who used to work with the deceased in his shop, was not asked to show any special marks on them showing that they were from the shop of the deceased. Evidence adduced in the court below showed that Elposinoru Trading Centre where the deceased was robbed of his shop goods and killed, was a boarder Trading Centre on the Kenyan side. The shops of the 1st and 2nd Appellants were similarly on the Tanzanian side of the boarder approximately 28 miles away from the Kenyan boarder. On either side of the boarder was inhabited largely by the Maasai tribesmen and therefore the goods that were on sale in these centres on either side of the boarder, were goods which could readily appeal to the Maasai, in other words, these shops were stocked by goods that were readily marketable to the local residents. They were common goods. The goods stolen from the shop of the deceased did not have any distinctive marks peculiar to himself. Even the goods that were taken from the shops of the 1st and 2nd Appellants and produced during the trial as exhibits had no marks on them. The mere fact that they were the type of goods which the deceased used to stock in his shop proved nothing and was of no evidential value which could be relied upon by the court to convict.

The mere fact that the 2nd Appellant at the time of his arrest was found wearing a Shuka and had a torch, was also of little consequence because this was an old Suka (sheet), and there was nothing to distinguish it from any other Shuka commonly worn by the Maasai in the area or which could connect it to the deceased. The torch had no marks on it and the 2nd Appellant claimed that it belonged to him.

By and large, we consider that the 1st and 2nd Appellants were merely arrested, charged and prosecuted on the basis of mere suspicion. We have repeatedly stated in this court that mere suspicion, however strong, can never be a basis of conviction on a criminal charge. The mere fact that there was an inquiry statement taken from the 1st Appellant which amounted to a confession of his involvement in the said robbery, cannot be relied upon in the absence of any corroboration, to convict him, moreso, as the 1st Appellant maintained in the court below, that he required legal assistance as he could not follow the proceedings in the court below.

Upon our consideration and evaluation of the recorded evidence, we are not satisfied as the law requires us to be, that the charge against both Appellants was proved beyond all reasonable doubts. We are

prepared to give each of them the benefit of the doubt. It is regretted that both Appellants have been in custody since October, 1986 which is now a period of nearly 11 1/2 years.

For reasons given, we allow these appeals. We quash the conviction of the 1st and 2nd Appellants and set aside the sentence of death that was imposed upon each of them. We order that each of them shall be set at liberty and be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 2nd day of April, 1998,

OWUOR (MRS) JUDGE

I certify this is a true copy of the original.

Deputy Registrar high Court of Kenya.