



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1255 of 1992

MOURICE CHIEDO WOGA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, Mourice Chiedo Woga was convicted by Acting Chief Magistrate CO. Ongudi (as he then was), of the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code, and sentenced to death on the 19th day of August, 1992.

He has now appealed to this Court and argued his appeal by himself on mainly three grounds. In that the Learned Trial Magistrate erred in law and in fact by convicting him when there was no evidence to positively identify him. Considering the circumstances under which the alleged robbery took place, none of the witnesses could have possibly identified any of the assailants.

Secondly, that the Learned Trial Magistrate erred in admitting the alleged charge and cautionary statement into evidence when he did not type the statement. According to him, the Court ignored the fact that the statement had been written and made up by the investigating officer, Inspector Wafula.

Thirdly the Learned Trial Magistrate erred in convicting him when the prosecution had completely failed to adduce any evidence as to his arrest. Finally, that the Learned Trial Magistrate erred by not considering his defence in particular, his alibi that he was in custody at the time that the offence was committed.

The case against the appellant was that in broad-daylight, on the 27th day of April, 1991, one Chrispin Opondo PW 1, a purchasing officer with Victoria Nile company and Paul Kiprotich, a driver PW 2 with the same company, were travelling to Lake Victoria to buy fish. PW 1 was carrying the sum of 90,000/= for that purpose. In their company was also a supervisor of the company. While driving along Rwamba Port Victoria Road at a place called Nambengale Trading Centre, a vehicle, Pick-up Registration Nos.KAA 966Q approached them from the opposite direction. The vehicle's lights were flashed at them to stop which the driver did. All-over sudden, four people came out of the vehicle. One of the people had a gun, two had pangas while one had a rungu. The people began beating them and demanding money. They were beaten seriously and PW 1 surrendered the money to the assailants. During the robbery, PW 1 told the Court that he clearly saw the appellant. He was armed with a panga. He was the one that was beating them and saying that he was going to kill them. He was very close to them. He had known the appellant for a period of five years. After giving the money, PW 1 escaped into the bush and went to report to Yala Police Station.

According to PW II, when the man with the fire arm jumped out of the other vehicle, he fired three times. The assailants demanded money as they beat them. He had his own 300/=, which he was forced to give.

He similarly was able to identify the appellant as one of the robbers. He was the one that was beating them as he demanded money. He also spoke to PW 2 and ordered him to lie down with the panga he was armed with and told him not to look at him. The assailants then drove off in their lorry and left them at the scene.

Both PW 1 and PW 2 later on the 25th of May 1991 identified the appellant at identification parades conducted by Inspector Stephen Madoka. The appellant did not dispute or complain the manner in which the parades were conducted save that they served no purpose since PW 1 had said that he had known him for a period of 5 years previously.

The appellant was arrested on 18th of May 1991. According to P.C Francis Achinga, PW 3, on that day, he accompanied the Officer-In-Charge of Yala Police Station to a certain village for the purpose of arresting certain people. One of the persons he arrested was the appellant. They took him to Yala Police Station but later he was taken to Siaya.

On 28th of May 1991, the appellant was taken to Inspector Wafula, PW 4, who recorded a charged and voluntary statement from him. The statement which in details stated how the robbery was committed and by who all the other people were and how much each of the robbers got was admitted into evidence. The Learned Trial Magistrate was satisfied after a trial within a trial that the appellant's denial notwithstanding, he had indeed made the statement to Inspector Wafula. The statement was a complete confession while it implicated other people including pW 2 the driver of the vehicle.

The defence which the appellant alleges that the Learned Trial Magistrate did not take into consideration was a sworn statement to the effect that; he, the appellant, was asleep in his home on the 17th of April 1991. He was woken up by the Police. He was asked about the robbery which he denied. He was told to dress up which he did. His home was searched but nothing was found. He was then taken to the Police Station and charged with this offence. To deal with the issue of the alibi and when exactly the appellant was arrested. The appellant's contention was that he possibly could not have robbed the complainants on the 27th of April 1991 because he was in custody. Having been arrested on 17th of April 1991. It is on this basis that he argues that the Learned Trial Magistrate did not firstly consider his defence and secondly he should have found that the prosecution had not disapproved his alibi evidence.

This was the appellant's very clear assertion both in his sworn evidence in Chief and the cross examination where he stated:-

"I was arrested on 17th April 1991. It was not on 18th May 1991. I was never released after my arrest. I have not lied at all".

The appellant has argued that it was upon the prosecution to prove that he was not in custody as he claimed) by producing the O.B from Yala Police Station.

In his Judgment, the Learned Trial Magistrate after being satisfied that the appellant was amongst the people that had robbed the complainants in that he had been properly identified by the two witnesses and that he had confessed to committing the robbery came to the conclusion that the appellant had lied in his defence and therefore did not believe his story.

We have very carefully analyzed and considered the evidence in this case as we are indeed under duty to do.

The overwhelming evidence before the Learned Magistrate was that the robbery took place on the 27th April 1991, at 1.30 p.m. The appellant's allegation is that he was in his house on the night of the 17th of April when he was arrested and detained. PW 3 testified that he went with his Commanding Officer for a raid in a village where the appellant was arrested on the night of the 18th of May 1991. In his own statement, the appellant stated that the offence he was arrested for was this robbery. This is the robbery that he was beaten to admit immediately upon his arrest and it is the robbery that he was charged of. The ll defeats common sense to expect the Court to have found that he was arrested and held in custody for an

offence that had not been committed. At no time was there a doubt that the appellant was being charged for the offence committed on the 27th of April 1991. After having believed the testimonies of the two witnesses in that they had seen the appellant and that he had been one of the robbers, his defence of alibi could not have been available to him as decided by the Court of Appeal in **Peter Muthiga Mwara -vs- Republic KAR (1982-88) IKAR Page 11299** revolves

The whole of this appeal according to us dwell on two main issues; first on the identification of the appellant and secondly his alleged confession.

First to consider the issue of identification. The appellant's contents that the Learned Trial Magistrate erred in basing the conviction on his identification by the two main witnesses PW 1 and PW 2 because of two main reasons.

In that the circumstances in which the robbery was allegedly carried out were that none of the witnesses could have made a proper identification. According to the appellant:-

- (i) "That the witnesses were not aware of the date.
- (ii) That the attackers were strangers to PW 2 though PW 1 claimed in Court that he knew me for 5 years.
- (iii) That the witnesses were Ordered at gun-point coupled with beating to lie down and complied.
- (iv) That both were under attack and were put under restricted position of mobility and observation throughout the ordeal.
- (v) That the length of observation was just a flash of seconds as per the evidence of PW1.
- (vi) As a result of sightation of a gun and a gun short coupled with beating, a state of shock, fear, confusion and panicking was developed".

According to the appellant in the scenario he has defined above, positive identification was not possible, nor would the identification at an identification parade held over one month after the robbery add any weight to the mistaken identity.

Secondly as to the issue of him being recognized by PW 1 who claimed to have known him for over 5 years. His contention is that Opondo did not give his name to the officers at the first contact with the police. In that regard, Opondo was not being truthful.

Especially since none of the Police officers came to testify as to what report was given by PW 1, in particular whether PW 1 gave the appellant's name and how he was arrested.

We have in great details analyzed the evidence of PW 1 and PW 2. In as far as it relates to the appellants, identification both at the scene and at the identification parades. Both PW 1 and PW 2 testified as to what they saw the appellant do during the robbery. In that he was the one armed with a panga and was the one beating them and demanding the money.

The Learned Trial Magistrate was alive to the issues raised by the appellant. In our view, he considered the evidence before him very carefully. He had the following to say:-

"According to the evidence, the incident occurred at 1.30 p.m in the afternoon. Opondo, PW 1 and Kibet, PW 2 testified that they saw and identified the accused. For Opondo, PW1, it was a case of recognition for he had known the accused for 5 years. Kibet did not know the accused before but testified that the accused spoke to him as he beat him with a panga ordering him to lie down... He later picked up the accused from the identification parade".

Further that:-

"The two prosecution witnesses had time and opportunity to see the accused properly. He was close to them as he demanded money and beat them. Opondo also knew him before".

From this evidence, the Learned Trial Magistrate was satisfied that the two witnesses did see the appellant and identified him at the identification parade.

The appellant's complaint about Opondo's claim that he had recognized him because he had known him for 5 years is that he, Opondo did not give the police his name. There were no further record produced to verify this.

The record indicates that Opondo did in fact tell the police right from the beginning that he could identify one of the people. He testified to that effect.

"I saw and identified one of them. I can see him in the dock. He is called Mourice. I have known him for 5 years".

In cross-examination, he further stated:-

"I later saw you at Siaya Police Station during identification parade... I gave your name to the Police when I wrote my statement and said that you were living at Siaya. I knew you before for more than five years... When I reported, I stated I knew one of the suspects. The parade was held to prove it. I could identify you".

The Learned Trial Magistrate was satisfied that the circumstances were such that Opondo was able to recognize the appellant. It was in broad-daylight. The appellant was very close to him as he beat them. After having known the appellant for five years, there could be no question of mistaken identity. Opondo not only told the police that he knew Mourice but further that he lived in Siaya.

As held by the Court of Appeal in the case of M'Ringu -vs-Republic IKAR at Page 362. Recognition under possible circumstances is a matter of fact. We are satisfied that the Learned Trial Magistrate came to the right finding that Opondo properly recognized the appellant at the scene of robbery and further identified him at the identification parades.

As for PW 2, he did not know the appellant but as stated further, he was very close to the appellant, heard him commanding them to lie down and not look, saw him armed with a panga and was beaten.

There was no claim by the appellant that PW 2 had for instance seen him before he identified him at the parade or that the parade was improperly conducted.

We having assessed the evidence on our own see no reason why we would not come to the same conclusion or find otherwise. We find as the Learned Trial Magistrate did, the appellant was properly identified.

Finally, the issue of the Learned Trial Magistrate having erred in admitting the charge and voluntary statement into evidence and depending upon it to convict the appellant. The allegation that the statement was read before the Trial within a Trial was held is not true. The record indicates to the contrary. The Learned Trial

Magistrate dealt with the issue of the reported confession. He had the following to say:-

"Accused made lengthy confession which admitted into evidence after trial within a trial. In the statement, he gave graphic description how the robbery was planned and executed and how the money was shared between them. I am satisfied that it was given voluntary and that the police officer did not write it by himself as the accused claimed".

The statement in issue was very lengthy. It gave all the details as to where the vehicle that was used for

the robbery was stolen from. It gave also the details of where even the money that bought the petrol came from. Furthermore where the gang was sleeping and exactly what happened during the robbery and after the robbery. The confession according to the Learned Trial Magistrate although retracted it gave a true account of what exactly happened.

It also was corroborated in material facts by the testimonies of PW 1 and PW 2. On that basis, the Learned Trial Magistrate in our view, was correct coming to the finding that he did and relying on the confession to convict the appellant.

In conclusion, we agree with the Learned Trial Magistrate in finding that the appellant's guilty had been proved beyond any reasonable doubt. This appeal is hereby dismissed on both the Conviction and Sentence.

Orders accordingly.

Delivered and signed at Nairobi thisday of 1998

OWUOR

JUDGE

OGUK

JUDGE