



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 26 OF 1994

GABRIEL KAMAU NJOROGHE.....APPELLANT

GABRIEL KAMAU KABUTHUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Criminal appeal no. 26 of 1994 and criminal appeal no. 27 of 1994 have been consolidated for the purpose of the hearing of this appeal.

These appeals are lodged by the Appellants Gabriel Kamau Ngoroge Alias Kana Alias Kana Alias Toto and Gabriel Kamau Kabuthu alias Badda from conviction c/s 296(2) of the Penal Code of a charge of Robbery with violence and against sentence of death imposed upon them by the learned Kiambu Chief Magistrate Wamwanyi on 3rd Jan. 1994 upon conviction on count 2.

A number of grounds of appeal were submitted but we note that the main ground of appeal reads:

“The learned trial magistrate made an error in both law and facts and misdirected himself by basing the conviction on the evidence of a sole identifying witness, which was not sufficiently trustworthy and to have established that the applicant was the robber”.

We have perused and noted all the grounds of the appeal as submitted for the counts consideration, we note that the main challenge poised to the judgement is the question of ‘identity’ of the appellants. “Were they properly and effectively identified or does there remain any doubt? As to this vital question the question of identity assumes even greater significance and importance when the appellants are likely to lose their lives which hinges on the question of weight to be attached to the crucial aspect of the evidence of the identifying witness or witnesses.

Having this in mind we have perused and considered the trial court’s record in its entirety so as to arrive at our own conclusions afresh, taking into account the grounds of the appeal.

We note that there were six persons who faced the trial who faced the trial before the learned chief magistrate. At the conclusion of the trial the learned trial magistrate acquitted Accused No.s 3,4,5 and 6 giving them what he termed as “the benefit of the doubt and convicted Accused Nos. A & 2 who are now the appellants.

The charges against the accused were:-

1st count “Jointly with others not before court and being armed with dangerous weapon - two with pistols. Accused No.s 1 - 6 robbed Maina Gatonga of a motor vehicle Reg. KZD 563 make Peugeot 504 Pick/up and various properties all valued at Kshs. 407,705 and application of personal violence to Maina Gatonga and 2nd account:

related to robbery with violence against Kenneth Muga Otweyo. On 18th August, 1992 along Nairobi/Thika Highway armed with dangerous weapons pistols and an axe robbed the above named Kenneth Muga Otweyo of cash Shs. 407,705/- the property of Bank of Baroda. All the accused were acquitted on count 1 of the charge sheet. On count two appelleant Nos. 1 and 2 were only the ones convicted. The rest of the accused were acquitted.

These two appellants are the ones whose appeal is now before us. We as the Appellate Court of the first instance when considering this appeal has the principles enunciated in the court of appeal decision made in Okel -v- R (1972) E.A 32. We have subjected the entire evidence and record of the court to a fresh and exhaustive examination.

The first appellate court must also itself weight a conflicting evidence and draw its own conclusion - Shantilla M. Rwala -v- R.

We are conscious of the fact that every ingredient of an offence charged is in issue in a criminal case and expediency is not the only basis for a Judicial decision.

We note that the connection of the Appellants in the appeal is based on the testimony of one witness only i.e. P.W. 1 Muga Otweyo. We have minutely considered this evidence of this witness in its entirety afresh so as to determine what weight to apply to this evidence.

On this evidence hinges the lives of both the appellants. In the decision made in Rosia -v- Republic the court of appeal evidently stated the conditions in which such evidence even if uncorroborated would do.

But we caution ourselves not to be swayed by a sense of the enormity of the crime and to lower the standard of proof beyond a reasonable doubt which remains upon the public to discharge through out as a pre-requisite for a conviction to succeed.

In Abdullah bin Wendo -v-R the Court of Appeal reversed the finding of the trial judge on the question of identification and said-

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification specially when it is known that the conditions favouring a correct identification were difficult.

In the present case the Learned trial magistrate in basing his conviction relied solely on the evidence of one prosecution witness i.e. P.W. 1 Otweyo. This witness attended several identification parades and ultimately picked up accused Nos. 1, 2, 3, 4 and 6 who he identified as persons who took part in the robbery.

We note that the learned trial magistrate dis-regarded the testimony of this witness in respect to the accused Nos. 3, 4 and 6 whom he acquitted of the charges laid against them. However he accepted this evidence against the accused Nos. 1 and 2 on count two and convicted them and accordingly imposed the mandatory death sentence.

The learned trial magistrate assessed the evidence and justified the conviction on the following language-

“On the evidence before me, I am satisfied that Otweyo had the time, opportunity, presence of mind and brucinty to observed accused number 1 and 2 clearly at the scene and properly picked them at the identification parade and the possibility of error is remote.”

There are two features of this finding to which we cannot remain oblivious. There are:-

1. The mere fact that the learned trial magistrate rejects the evidence of this material witness in respect of accused Nos. 3, 4 and 6 , this surely must also show this evidence in respect of the other two accused Nos. 1 and 2 lacked a certain amount of veracity and credibility. Surely a deficiency in respect of one part of a testimony must also make the rest of such a testimony somewhat suspect. The learned magistrate cannot just pick and choose to suit his purpose and
2. Secondly from his finding (supra) the learned trial magistrate uses the terminology “I am satisfied in respect of witness’s opportunity”-this in our view would not do more so when part of the evidence of the witness is not relied upon. This finding surely must be based upon the proof beyond a reasonable doubt.

We note the doubt persisted through the judgment of the Court.

3. The learned trial magistrate concedes that ‘the possibility of error is remote’ this statement in the findings make it by itself defeating, it concedes the possibility of an error even though remote.

The learned trial magistrate having acted upon questionable evidence is in our view a serious misdirection.

Having considered the evidence in its entirety afresh, we are of the view that the learned trial magistrate did not comply fully with the section 169 of the Criminal Code. Having assessed the evidence correctly the learned trial magistrate applied wrong principles and arrived at a mistaken conclusion.

There lingers a nagging doubt in our minds as to the identity of the accused in this episode. We agree with the learned state counsel Horace Okumu. We find the conviction is unsafe, we quash it. It is ordered that both the Appellants No.1 and 2 be released from custody forthwith unless they be held for any other lawful excuse.

Dated and delivered at Nairobi this 28th day of July 1995

V.V. PATEL

S.M AMIN

JUDGE

JUDGE