



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CORAM: KWACH, MULI & AKIWUMI, J.J.A.

CRIMINAL APPEAL NO. 45 OF 1993

BETWEEN

SAMSON NYATAYA

OCHWAYU KINDU

ZAKARIA KOMEN

DOMINIC JABUTIAPPELLANTS

AND

THE REPUBLICRESPONDENT

**Appeal from a judgment of the High Court of Kenya at
Kisumu (Mango, J) dated 19th March, 1993**

in

H.C.CR.A. NOS. 384-387 OF 1992)

JUDGMENT OF THE COURT

The four appellants who were Administration Policemen at the time, were convicted by the Chief Magistrate, Kisumu, of robbing the complainant, Mohamed Wabwire Omar (P.W. 1) on the night of 18th May, 1992, of 2.06 million Uganda shillings and 35,000 Kenya shillings. They were each sentenced to three and a half years imprisonment.

The evidence led in support of the charge was that at about 3 p.m. on 18th May, 1992, the complainant was given by his father at Nambo Beach, and within sight of the 3rd and 4th appellants who are friends of his father, the sum of KShs.36,000/= being part of the proceeds of fish which he had sold that day. The complainant had earlier that afternoon, being given 2.06 million Uganda shillings by his father in the latter's house at Sio port. He took the Uganda shillings and the Kenya shillings to where he lived at Nambo Beach which is a different village from that of his father. At about 1 o'clock that night, the complainant was woken up by people who said they were policemen and that he should open his door. Upon looking out of the window, he saw all the appellants standing outside in the moon light. They were in uniform and were no strangers to him as he knew them well. Indeed, earlier in the afternoon, he had seen the 3rd and 4th appellants in the company of his father at Nambo Beach. He lit a candle and opened

his door. These two appellants then came in. The 3rd appellant handcuffed him and upon searching the room, found a card board box in which the complainant had kept the Uganda and Kenya shillings his father had given him.

The other appellants came in and the complainant was asked what he had the money for. To cut a long story short, the appellants led the complainant out saying that they were taking him to the police station. The box with the money was carried by the 1st appellant and the complainant was in handcuffs. The scenario was that the complainant had committed an offence for which, he was being taken to the police station.

During his cross-examination, he said that the appellants had told him that it was an offence to be in possession of undeclared Uganda currency. After the appellants had escorted the complainant away in the night for a long distance, he was asked by the 1st appellant if he had some money to give them so that they would not pursue the matter any further and let him go. The complainant had KShs.6,000/= with him which he gave to the 3rd appellant and continuing the charade, the 3rd appellant returned KShs.1,000/= to the complainant saying that this was because they did not want to be too hard on him as he had children to look after. The complainant was then told that he could go back home. It was 3 o'clock in the morning by the time the complainant finally got back home and went to bed. Next morning, he recounted his ordeal to those who lived in the nearby rooms in the same house with him. One of them, Stephen Juma Chaka (PW2) whose room was next door to the complainant, confirmed what the complainant said namely, that on the night in question, he heard knocking on the complainant's door and on going out, he saw four persons in uniform standing outside in the moonlight. He recognized three of them namely the 1st, 3rd and 4th appellants whom he knew. He went to the toilet and on his return, saw the complainant being led away by the four officers, the 1st appellant carrying with him the card board box. The complainant having told his neighbours what had happened to him in the night, went to see his uncle Isha Wawire, PW6, at Musuma Beach and asked him if he could send a message to his father that four Administration Policemen had in the night stolen the money his father had given him. The complainant arrived at his uncle's place which is six miles from Nambo Beach where the complainant lived, at 9.30 a.m. in the morning. The complainant left Isha Wawire at 11.00 a.m. in a boat. Isha Wawire himself, arrived at Sio Port where the complainant's father lived, at 3 in the afternoon, it being ten miles from where Isha Wawire lived.

It seemed that Isha Wawire and the complainant had long distances to travel and it was not till 5 in the afternoon that the complainant eventually reached the Usenge Police Post where he reported the robbery to the police. By 6.20 p.m. the report had been relayed to the Police Inspector Commanding the Bondo Police Station (PW5) who is also in charge of the Usenge Police Post. He acted quickly, proceeding first to the police post and then to where the complainant lived. Thence, he and the complainant and others went to the Usenge Chief's Camp where the appellants were stationed. There, the complainant identified the appellants as those who had robbed him the night before. The Police Inspector also carried out a search but did not find any of the stolen money. He charged the appellants with the offence of robbery and the appellants as was their right, gave no statements. When they appeared in court and the charge was read to them, they pleaded not guilty.

The material witnesses namely, the complainant and Juma Chaka were cross-examined at some length, but it was not put to them as it was to be preferred later by the appellants in their defence, that they were not the ones who robbed the complainant during the night of 18th May, 1992, because they were somewhere else, namely in their camp.

This was in essence the evidence that was led against the appellants and in respect of which they were called upon to make their defence. The 1st, 2nd and 4th appellants made very brief unsworn statements and the 3rd appellant gave evidence on oath, to the effect that they were somewhere else, that is to say, at their camp, at the material time and presumably in each other's company. No evidence was called other than what the appellants themselves said, in support of their defence of alibi.

It has been necessary to refer in some detail to the evidence that was before the trial magistrate because of the criticism that has been levelled against his judgment and that of the learned judge who

heard the appeal from the judgment of the trial magistrate. The trial magistrate considered the evidence of the prosecution and without difficulty, came to the conclusion that the appellants were the ones that robbed the complainant because the complainant and Juma Chaka had ample opportunity to recognize the appellants whom they also happened to know and what is more, that the complainant had been in their company for a long time as they took him away ostensibly to the police station. He concluded in these words:-

"After evaluating the evidence on record I find that it is the accused

persons who did rob the complainant. I find the charge against them proved beyond a reasonable doubt. With respect I have not believed their defence. I find them guilty and convict them accordingly."

The trial magistrate was criticised that he had not given due consideration to the defence of alibi put forward by the appellants and that he should not have believed the evidence of the prosecution. On appeal to the High Court, the learned judge, it must be admitted, gave more consideration to the defence of alibi but reached the same conclusion on the facts as the trial magistrate and gave reasons for doing so. He then dismissed the appeal.

Being dissatisfied with the judgment of the learned judge, the appellants have now appealed to this court on the following grounds in respect of the 1st, 2nd and 4th appellants:

"1.The learned judge erred in law in adopting a

simplistic view of the entire case before him.

2.The learned judge misdirected himself in law in simply

echoing what the trial magistrate had stated in his judgment without reviewing the evidence afresh with anxious care and anxiety as was his duty.

3.The learned judge erred in law in not finding that the trial

magistrate had misdirected himself in weighing the prosecution case in isolation and drawn conclusion from it, thereby precluding himself from weighing the defence impartially or at all.

4.The learned judge erred in law in not assessing the growing sense

that the prosecution case did not ring true.

5.The learned judge misdirected himself in law in not finding

that the trial magistrate had not given any or any adequate consideration to the defence case apart from briefly summarising it."

And on the following grounds in respect of the 3rd appellant:

"1.The learned judge misdirected himself in law in failing to find the trial magistrate

had failed to appreciate and to give any weight to the fact that the evidence of the second appellant (KINDU OCHWAYU) showed that there had been ill feelings between the appellants and O.C.S. PW 5, INSPECTOR JOHN MORIASI, the arresting officer.

2.The learned judge erred in law and in fact in not

finding that the trial magistrate failed to direct his mind to the defence of alibi raised by the

appellants and had also failed to consider whether the defence of alibi had been properly rebutted by the prosecution."

Put more succinctly, these grounds amounted to this that the defence put forward by the appellants namely that of an alibi was not considered and if it was, was not carefully weighed. But the matter really at issue at the trial was whether the appellants were the ones who robbed the complainant or not. In our view, there was overwhelming evidence which both the trial magistrate and the learned judge believed and which satisfied them that it was the appellants who robbed the complainant. True it is that the trial magistrate did not dwell at length on the defence of the appellants, but he did set out the essential facts of their defence of alibi and having evaluated them together with the evidence of the prosecution, came to the conclusion that he did, namely, that having regard to the principle that the burden of proving the guilt of the appellants beyond all reasonable doubt, rested on the prosecution and he being convinced of the truth of the material evidence led by the prosecution, rejected the evidence of the appellants which he did not believe. It is our view, having regard to the nature of the rival versions of the facts, that the trial magistrate gave the appellants defence adequate consideration. As already observed, the learned judge's consideration of the defence was even lengthier than that of the trial magistrate.

After properly reviewing all the evidence before him he also came to the same conclusion as the trial magistrate. There are therefore two concurrent findings of facts from which we can only depart if there are compelling reasons for doing so. We find none. If anything, our view of the facts coincide with those of the learned judge and trial magistrate.

It was suggested by learned counsel for the appellants that the fact that the complainant went to bed after his return from his ordeal without first recounting his story to his neighbours and only reported the matter to the police at 5.00 p.m. on 19th May, 1992, makes his evidence unworthy of belief. But there is evidence that the complainant told his neighbours about his ordeal first thing in the morning. There is also evidence that distances are far apart in the area and it is not therefore unreasonable that the complainant did not reach the police post till 5.00 p.m.

Learned counsel has also urged that an existing bad blood between the administration police and the regular police in the area could have led to a trumped up charge being made against the appellants. But if such bad blood existed which we are not satisfied that it did, it does not apply to the complainant. We do not think that the learned judge misdirected himself in the way in which he considered the evidence before him.

We think that this appeal must be dismissed and it is hereby dismissed.

Dated and delivered at Kisumu this 26th day of November, 1993.

R. O. KWACH

JUDGE OF APPEAL

M. G. MULI

JUDGE OF APPEAL

A. M. AKIWUMI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR