



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gachuhi, Kwach & Cockar JJ A)

CRIMINAL APPEAL NO 87 OF 1992

WILFRED INDIASI LIANDA.....APPELLANT

SIMON GAITOIAPPELLANT

MAURICE WAWIRE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Mr Justice Osiemo) dated 15th January 1992,

in

HCCRA Nos 465-467 of 1989)

JUDGMENT

All the three appellants were convicted by the District Magistrate I at Kakamega of the offence of robbery contrary to section 296 (1) of the Penal Code. Each was sentenced to a term of 2 years imprisonment with 2 strokes. The Superior Court (Osiemo, J) dismissed each appellant's appeal against conviction and sentence. This, therefore, is their second appeal. The only point of law argued by Mr Mukavale on behalf of all the three appellants was as to the identification of the appellants by the prosecution witnesses.

Mr Karanja, state counsel, appearing on behalf the Republic, conceded the appeal, and very properly so in our view, in respect of the 2nd appellant who had been identified by only one witness, the complainant (PWI). With regard to the identification of the appellants by the complainant, the trial magistrate had found that it was possible that he might not have identified anybody as he believed the intruders were policemen. Having so discredited the evidence of the complainant relating to identification by him the trial magistrate had then proceeded to find the 2nd appellant guilty on account of the following facts:

1. That the 1st and 3rd appellants had been positively identified by other witnesses.
2. That the robbery was committed by the three persons.
3. That the 2nd appellant had been with the 1st and 3rd appellants for the whole of that day and,

therefore, all the three of them must have been together in the robbery.

The reasoning adopted by the trial magistrate to cover up the glaring cracks in the prosecution evidence was plainly conjectural. A mere association for a certain period with identified criminals without any independent evidence to provide a positive link with the commission of the crime can never be a basis for a conviction. The 1st Appellate Court unfortunately, overlooked completely the basis on which the trial magistrate had proceeded to convict the 2nd appellant. The appeal of the 2nd appellant must succeed.

As regards the appeals of the 1st and 3rd appellants, Mr Mukavale submitted that the legal requirements to make identification at night acceptable had not been satisfied. He detailed them as follows:

1. There was no evidence at all as to what light, if any, was available at the scene of the robbery.
2. There was no evidence to show from what distance the witnesses concerned had seen the appellants.
3. There was no evidence relating to the time for which each of the witnesses had been able to observe the robbers.

Mr Mukavale was clearly mistaken in his submission that the prosecution had not produced any evidence to show what light, if any, was available at the scene. The complainant (PWI) was at the time, that is at 10:00 pm at night, repairing his tractor outside his house. He said that on the table where he did his work there was light. This light must have been strong enough to enable the complainant do his work of repairing a machine. That was the light available to PW3, Beatrice, the 16 years old daughter of PW1 when, after quarrelling with her mother, she had come and stood outside the house watching her father working when the three robbers sprang on him. She said she saw them well. She was able to identify only one of the robbers- the 1st appellant. In the light that was available she was also able to see the gun he was carrying and that he was wearing a brownish coat.

Elimina (PW2) the 4th wife of the complainant who was in the bedroom explained that there was a chimney lantern lamp on the table in the sitting room and the light from it illuminated the bed-room also. She was taken outside by the robbers. It was in the sitting room where the lamp was that she saw the 1st appellant. And as she was being pushed out she saw the 3rd appellant enter the house. Clearly ample light was available to enable PW3 to recognize the two appellants whom she had known before as neighbours.

A neighbour, Christopher Namunyu (PW4), heard the alarm raised by the women in the complainant's house. He took a torch and went to the wire fence of the complainant's house. He flashed his torch and kept flashing it at the person whom he saw about 4 meters away climb over the wire and start running. PW4 recognized this man as the 1st appellant, a neighbour. Having seen him from close quarters in the light of the torch PW4 was also able to see that he was carrying a gun and was wearing a white shirt and a dark brown sweater.

On our own evaluation of the evidence relating to the light we are satisfied that there was adequate light available to each of the above three witnesses to be able to see the robbers. Identification was also made easier because the appellants were neighbours of the witnesses and were known to them.

So it was infact a question of recognition.

On the question of distance from which these three witnesses had separately seen the appellants there is clear evidence that PW4 had the opportunity of seeing the 1st appellant from also close quarters. The wife, PW2, had the opportunity of seeing the 1st and the 3rd appellants from much closer quarters. There is ample evidence on this issue. The daughter, Beatrice, was standing outside the house and was watching her father working when the robbers came. She must have been near enough to see that the 1st appellant was carrying a gun and was wearing a brownish coat. There is no merit in these grounds, relating to adequacy of light, and the distance from which each of the identifying witnesses saw the intruders.

As regards the time and opportunity that each of these witnesses had to observe the appellants we note that each one of them was emphatic that the 1st appellant was carrying a gun. Both the daughter, PW3, and the neighbour, PW4, had observed the brownish coat (as PW3 termed it) or the brownish sweater (as PW4 described it) that the 1st appellant was wearing. The discrepancy in the description as to whether it was a sweater or a coat is the type that would reasonably be expected in such circumstances and would add rather than detract from credibility. But both had the time and opportunity to observe the colour of the apparel. Elimina, the wife, (PW3), did not describe the clothes that the 1st appellant was wearing. It is clear from her evidence that she was never asked that. But she was able to observe that the 3rd appellant was wearing a red coat and had a torch, and that it was the 3rd appellant who got hold of the box which contained her and the family's clothes and carried it outside and then fled away with it. In our view all the three witnesses had sufficient time and opportunity to observe the appellants.

Having dealt with the complaints raised by Mr Mukavale relating to the prevailing conditions affecting identification we are satisfied that none of them has any merit. Conditions relating to light and the opportunities available to the identifying witnesses favoured a positive identification. The convictions of 1st and 3rd appellants are well-founded. Appeals of both against conviction are dismissed. The appeal of the 2nd appellant, Simon Gaitoi Lelmenioch, is allowed, his conviction is quashed and his sentence is set aside. He is ordered to be released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Kisumu this 4th day of December, 1992

J.M GACHUHI

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR