



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO'S 1290, 1291, 1292 & 1293 OF 1985 (CONSOLIDATED)

1. SAMMY KAMOTI WAFULA

2. DAVID WATUA WANAMBWA

3. JOHN KAKAI MAMBO

4. PETER WAFULA SIMIYU ALIAS BOSCO WAGOYE.....APPELLANTS

AND

REPUBLIC.....RESPONDENTS

JUDGMENT

We have consolidated these four appeals.

All the appellants, who had been jointly charged, were convicted after trial by the learned Senior Resident Magistrate, Eldoret, of one count of robbery with violence contrary to section 296(2) of the Penal Code (cap 63), and one count of robbery contrary to section 296(1) of the Penal Code (cap 63). On the former they were awarded the mandatory death sentence. No mention is made of the sentence on the latter count. We assume that it was held in abeyance.

Very briefly, the prosecution case was that on October 27, 1983 at about 9.00 am in Eldoret town Mr Singh (PW 4) was robbed of his Peugeot 504 pick-up by a gang of 5 robbers at gun-point. 2 of them got into the front seat with him while 3 of them got into the rear. They took him to a wattle plantation, from which they emerged at about 11.00 pm and attacked a bus travelling from Eldoret direction towards Nairobi. The conductor was shot dead while the driver was wounded, and when the bus came to a forced halt, the passengers were robbed of their money, watches and other valuables. Singh was ordered into that bus and the robbers made off in his pick-up which was later found abandoned.

On October 28, 1983 at about 12.40 pm police officers entered into Muthoni's bar in Kitale, as a result of information received, and found 5 men eating and drinking at a table with a hand-bag containing a camera and a calculator, all of which had been robbed from the bus. Four of them, who are the present appellants, were apprehended while the 5th one, a very short young man, managed to get away.

The appellants were interrogated at the police station, and the 3rd accused in the lower court led the police to a place behind the Kitale show-ground where a gun and some ammunition wrapped in a sack and hidden in grass were recovered. It was the prosecution case that it was the same gun with which the conductor of the bus had been shot and killed. After their arrest the appellants were searched and each of them was found in possession of quite a bit of property like cash in Kenya currency, cash in Uganda currency, watches, etc. The 4th accused was found wearing a Seiko watch which was identified by Singh

as one of the items of which he had been robbed. Singh also identified in court at their trial the four appellants as members of the gang who had robbed him of his pick-up etc.

In their defence, all the appellants denied having participated in either of the two robberies or having been in possession of any of the stolen articles. The 3rd accused explained that he had been asked to carry a package by the 4th accused, who had offered him employment, and it was only later that he learnt that it contained a gun etc and, therefore, he decided to hand over the same to the police.

The learned trial magistrate rejected their defence and, accepting the prosecution case, convicted and sentenced them as offered.

Mr Harwood, the Senior State Counsel now representing the Republic, submitted that, owing to the length of time for which Singh was in the company of the robbers he had good opportunity of observing them, that it was not only the length of time which he spent with them but various activities which they carried out that he could observe them eg driving into the plantation etc, that the robbers must have been talking and moving around, that when the attack on the bus took place he was in effect forced to take part and he remained with them throughout until put onto the bus, that it was true that he had been ordered to keep looking up but submitted that Singh could not have been so doing for all of the 2 hours or more that he was with them. However Mr Harwood conceded that clear evidence on all these points should have been led and that this court cannot embark upon a course of conjectures, and he was puzzled as to why Singh was not asked to identify any of the appellants until he did the unsatisfactory dock identification almost 14 months later: he was certainly at the police station when he identified his Seiko watch on October 28, 1983 after the arrest of the appellants, when an identification parade could well and should have been conducted.

Identification at night time by a single witness is at best treated with great caution, and in the instant case there is absolutely no basis for concluding that the circumstances, including light, were conducive to positive identification, and Mr Harwood concedes that no worthwhile reliance can be placed on Singh's evidence of identification of the appellants.

Mr Harwood also pointed out that it was extraordinary that only one of the large number of people in the bus was asked to give evidence, that quite a number of them were deprived of money and other goods yet none of them (except the one regarding the camera and the calculator) was called to give evidence or to identify the comparatively large number of items which were found upon the appellants, that the bus inspector's evidence of purported identification of the appellants was unsatisfactory because when he saw the appellants he was told that those were the robbers who had already been arrested, and that we were entitled to ask the question why identification parades were not held and that certainly the police were not helping the prosecution or him by not following the elementary procedures of investigations.

Moving on to the most significant part of the evidence, that is the arrest of the appellants in the bar at 12.40 pm on October 28, 1983 and the recovery of various items, Mr Harwood pointed out that it was difficult for the possession of the camera and the calculator to be pin-pointed to any individual as the circumstances of their recovery were not fully spelt out, that it was not explained how and from whom the hand-bag containing these articles was recovered, that it appeared likely from the testimony of one of the police officers that the hand-bag was recovered at the police station, that it was difficult to understand why nobody was called from the bar to testify whether or not all the appellants had come in together and shared a table, had placed one order for food and drinks, had asked for a joint bill, had paid jointly etc. In the absence of any other evidence, Mr Harwood quite properly could not see how all the appellants had been in joint possession of these items.

Mr Harwood also pointed out the confusion in investigations about the used and unused cartridges etc, and whether or not the gun tested by the ballistic expert was the same gun which was recovered as a result of the 3rd accused's information and the failure to adduce proper medical evidence.

Mr Harwood also referred us to the judgment and the serious omission of the magistrate in not considering the evidence against each of the appellants individually. That we will do now. Insofar as the

1st accused is concerned there is really no other evidence against him apart from the flimsy evidence which we have outlined above. Insofar as the 2nd accused is concerned there is the additional evidence against him that his identity card was found in the same hand-bag as the camera and the calculator. However, as the 2nd accused has submitted, when the hand-bag was shown to the bus inspector (PW 1) he saw a camera and a photo-stat copy of a driving license in it but he made no mention of the 2nd accused's identity card, that again in the evidence of Corporal Ndungu (PW 7) who recovered the hand-bag, he found a camera and a calculator in it but he also made no mention of the identity card, and that he (the 2nd accused) gave evidence on oath, which was totally unchallenged, to the effect that he produced his identity card together with his receipts at the time of his arrest, the inference being that the police officers could not have found it in the same hand-bag as the camera and the calculator.

Moving on to the 3rd accused, the recovery of the gun is a strong incriminating factor against him, and we agree with Mr Harwood that his various explanations could not reasonably be true. However, there is again a lacuna in the evidence of the prosecution which is not for the 3rd accused to explain: according to PC Fredrick (PW 9) the gun recovered had no serial number but the Firearms Examiner (PW 14) testified that he was given 1AK47 Assault Rifle Serial Number 1386. It was incumbent upon the prosecution to establish that these two witnesses were speaking of the one and the same gun without the possibility of an error. That was surely not a difficult task.

Finally, insofar as the 4th accused is concerned, the additional specific evidence against him was that he was wearing the stolen Seiko watch of Singh and that he tried to escape when being apprehended. As to the latter, much weight cannot be attached to it. As to the former, clear and satisfactory evidence of identification of a common article like a watch was totally lacking: Singh did not state when he had purchased it or if it had any special identifying mark or indicate something by which he could have positively identified it.

Had this case been properly investigated by the police and presented by the prosecution, and considered by the trial magistrate, we might well have come to quite a different conclusion. However, as matters stand, we do not think that these grave charges were proved to the required standard against any of the appellants. Consequently we allow these consolidated appeals, quash the convictions of all the appellants and set aside the sentences passed upon them. They are to be released from prison forthwith unless lawfully held otherwise.

We would only wish to add that we deprecate the practice of bringing a charge of capital robbery where a murder has been committed in the course of a robbery. The accused persons are unjustifiably denied a trial by the High Court with assessors and deprived of the benefit of committal proceedings and legal aid.

Dated and Delivered in Nairobi this 12th day of June 1986.

S.K.SACHDEVA

JUDGE

A.R.SAMNAKAY

JUDGE