REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 1014 OF 1983

(From original conviction and sentence in criminal case No 500 of 1983 of the Senior Resident magistrate's

Court at Nairobi: H H Buch Esq.)

JOHN NJAGI SAMSON…….APPELLANT

(Original Accused No 1)

AND

REPUBLIC…….RESPONDENT

CORAM: ABDULLAH, J.

ALUOCH (MRS) B Mbai (State Counsel) for Respondent Appellant absent, unrepresented and not wishing to be present.

JUDGMENT

The Appelant was convicted by the learned Senior Resident Magistrate at Nairobi of 11 counts of robbery contrary to section 296(l) of the Penal Code and was sentenced to 12 (twelve) years imprisonment and (one) stroke of corporal punishment on each of the said 11 counts. The sentences of imprisonment were ordered to run concurrently. He was also ordered to be under police supervision for 5 years In the late afternoon of 1st March 1983, several visitors to this country Amongst whom were the complainants on the 11 counts of robbery, were set upon by a gang of persons armed with pistol, panga and axe at a vie point somewhere on the road to Naivasha and were robbed of various articles, money and vehicle of the 1st complainant, as listed in the particulars of each count. During the course of robbery, one of the victims was shot at, but fortunately the bullet only grazed his head whilst some of the other victims were beaten or manhandled.

Amongst the victims were complainant on the 1st count, Mr Robert Bruce Scott (P W 1), complainant on the 7th count, Mrs Illese prevkord (P W 2), complainant on the 12th count, Mrs Edith Bandhult (P W 8) and the complainant on the 6th count, Mr Jamin Amutavi (P W 14) who was the driver of the Pollman's Tours carrying some of the tourist. These witnesses say that they saw the Appellant amongst the gang who set upon them. According to Mr Scott the Appellant fired a shot at him, so he thinks. According to Mr Amutavi whose vehicle with tourists arrived at the scene, when Mr Scott and his party were in the process of being robbed, it was the Appellant who fired a shot. According to Mrs,. Prevford and Mrs Bandhult, it was the appellant who grabbed a necklace from Mrs Prevford. Out of these witnesses, the

only one who picked up the Appellant at an identification parade the following day was Mr Amutavi. However, the Appellant claimed that this witness had seen him in a motor- vehicle whilst he was being taken from Nairobi to Naivasha, .for the identification parade. Mrs Scott was not called to the parade and Mrs Prevford and Mr Bandhult were unable to pick up the Appellant It may be mentioned that Mr Scott, Mrs Prevford and Mrs Bandhult as well as other tourists gave evidence before the Senior Resident Magistrate on 3rd March, 1983, less than 48 hours after the incident.

Less than 2 to 3 hours after these robberies took place near Naivasha the Appellant was found driving5 others in & Peageot Saloon motor vehicle KQW 895, on a roadside near Jamhuri Grounds in Nairobi, by Senior Sgt Onyango (P W 13) of the Western Mobile Unit, and his party of 5 constables. The occupants of the car who were ordered to cone out ran and all mad their escape good, except the Appellant and another who were caught after a chase of few yards. The Appellant made several unsuccessful attempts to obscord. In the motor vehicle, several stolen articles of the various complainants were found on the rear and front seat, A knife under the driver's seat, two simis under rear set and an axe in the boot were also found. When questioned the Appellant said that he was a CPD Officer from Kiambu but when asked for his identity he said that he was a son of Njenga Karume. The Senior Sgt. who was not aware of the robberies, detained the Appellant and another after they failed to account for various items found in the vehicle, Besides the items found in the motor vehicle, the police also recovered some items such as handbags of various complainants in a bush about 50 feet from the motor vehicle.

This motor vehicle KQN 895 belongs to uncle of the Appellant and according to the evidence of Appellant's aunt Mrs Nginga (P W 17) and the house maid Jane Muriuki (P W 18) , the Appellant removed the motor vehicle from the usual parking place in Kianhu without authority or knowledge of the aunt.

The defence of the Appellant was that he is a taxi driver, whose taxi was Hired around 5 p.m. to take some customers to Ngong who had luggages containing cartoons. Near Jamhuri Park he stopped his vehicle, to allow one of the passengers to go for a short call when a police patrol car stopped and questioned him. He opened the boot at the request of the police, whilst his passengers ran but. one of then was apprehended and brought back. The police found several exhibits in the cartoon whose ownership was claimed by the person who was brought back to the car and who was the one who had hired the Appellant's taxi.

The learned Senior Resident Magistrate considered the defence of the Appellant that he was merely a taxi driver carrying the goods of his customers and in the light of all the evidence before him came to conclusion that Appellant-was amongst the gang which robbed the various complainants of various articles as listed in the respective counts, convicted him accordingly and sentenced him.

In his petition of appeal against conviction, the Appellant is aggrieved because the-learned Senior Resident Magiatrate did not consider his defence “which was the most important factor in this case"(because the person who was arrested with him accepted that the that he recovered property was his that he (the Appellant) was merely a taxi driver, but he (the Appellant) was not identified and the driver (P W 14) had opportunity to look at the Appellant before the parade.

As regards the Appellant's objection to the driver Mr Amutavi (P W l4) having opportunity to look at the Appellant before the identification parade was held, the learned Senior Resident Magistrate considered the Appellant’s objection on record in the identification parade form and properly came to conclusion that he "should not give much weight the parade in view of the objection but upon consideration of all the circumstances, he came to the conclusion that both P W 1 and P W 4 had seen and recognised accused No 1 (the Appellant) at the scene though such recognition by P,W 2 and P W,8 was not certain beyond all doubts.” We on our part, have analysed and evaluated the evidence of identification of the appellant by P W 1 and 14. These witnesses who gave evidence before the trial court, two days after the event, of the circumstances of robbery which took place in daylight when robbers took their time of removing various belongings of the Complainant, appears to have satisfied the learned magistrate that both Mr Scott and Mr^Amutavi, local men "had seen and and recognised accused Nol (the Appellant).” We are of the opinion that the learned magistrate's finding was proper and justified.

Assuming that the evidence of identification of the Appellant may likely cause any apprehension as to its veracity or accuracy, (We have no such apprehension) there is independent evidence of the circumstances under which the Appellant with others was found in possession of the stolen articles of various complainants within hours of the robberies that in the absence of any reasonable explanations of such possession, the only reasonable inference which could be drawn is that the Appellant took part in the commission of the robbery. On such evidence, the learned Senior Resident Magistrate could have 'cased the conviction of the Appellant and we would have had no hesitation in sustaining such conviction,

However, the Appellant contends that the learned Senior Resident Magistrate did not consider his defence which was the most important factor in this case. "What was the defence of the Appellant? It was that he was merely a taxi driver who had been hired by his customers to carry then and their luggage to Ngong and that he had no idea whatever of the contents of the luggage of his customers. The learned Magistrate considered the circumstances of the Appellant's arrest and rejected the Appellant's defence by commenting “Thus the accused's conduct at the Jamhuri grounds speaks for itself," and “Accused's statement goes against himself and I simply do not believe his defence as true and reject the same.” We agree with the contention of the Appellant that his defence “was the most important factor in this case" as is defence of every accused, person in a criminal trial and which requires every trial court to consider, in the light of both the evidence for the prosecution and the defence. In the instant case, the learned Senior Resident Magistrate properly considered the defence of the Appellant in the light of all the evidence which was before the said Court and in our opinion, came to correct conclusion that the defence of the appellant could not be accepted because he was driving the motor vehicle obtained by him under circumstances and that the stolen items of the Complainants were kept openly on the seats and in the "boot of his vehicle."

The Appellant complaint that the (learned) Senior Resident Magistrate did not take into consideration the fact that the first accused, accepted the alleged stolen property to be his property in the. first stage of the case as he had agreed the property was his on the scene of arrest by the police officers.” From the record of the evidence it would seem that the person who was arrested together with the Appellant was dealt with in another file, upon the plea of guilty of such person. However, the fact that a person has pleaded guilty to an offence alleged to have been committed by more than one person does not absolve another person if there is acceptable evidence to prove the guilt of such other person beyond reasonable doubt.

In the instant case, there was overwhelming acceptable evidence to establish the guilt of the Appellant with regard to several robberies perpetrated as alleged in the particulars of each of the 11 counts. We find that the Appellant was properly convicted by the learned Senior Resident Magistrate on each of these counts and we dismiss his appeal against such conviction.

As regards sentence, the learned magistrate reduced the original charge of capital robbery to simple robbery and commented that the Appellant and others who were armed with dangerous weapons perpetrated the robberies on the tourists under such circumstances that they (the tourists) will carry sad memories of Kenya and proceeded to impose sentence of 12 years imprisonment and 12 strokes which he subsequently amended to 12 years imprisonment (concurrent) with one stroke on each count. We are of the opinion that although the sentence appears to be harsh, it was not manifestly excessive. The learned State Counsel has expressed a doubt whether the learned Senior Resident Magistrate was empowered to amend his own sentence about 8 months after the passing of the same.

After reading his judgment, the learned Senior Resident Magistrate adjourned the hearing for a short duration to enable the defence counsel to make submissions in mitigation. When the hearing resumed, the magistrate, after hearing both the prosecution and defence, proceeded to pass sentence of twelve years imprisonment with twelve strokes and subject to police supervision for 5 years on release. It would seem that at this time of passing sentence it escaped the notice of the magistrate that the Appellant was convicted on 11 counts. Subsequently, when he realized or his attention was drawn to the error of failing to pass sentence, on each of 11 counts, he amended the sentence as above, Although the learned Senior Resident Magistrate became functus officio after passing the original sentence, the irregularity in amending the sentence as he did, which in effect, will reduce the Appellant's sentence to a total of 12 years imprisonment and 11 strokes, has not occasioned a failure of justice. If it is an irregularity which

needs to be cured, we do so in exercise of our- powers of revision under S^.364 of Criminal Procedure Code. Appeal is dismissed in its entirety,

Delivered and signed this 25th day of July,1984.

F E ABDULLAH

JUDGE

J ALUOCH (MRS)

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 1007 OF 1983 (From original conviction(s) and sentence(s) in criminal case No 145 o 1983 of the Resident Magistrate's court at Kitui: A D O Andati, Esq.)

PETER MUEMA……..APPELLANT

AND

REPUBLIC…….RESPONDENT

CCORAM: TODD, J

Appellant absent, unrepresented and not wishing to be present, C W Gatonye (Senior State Counsel) for Respondent.

JUDGMENT

The appellant peter Muema was charged with 2 others with the offence of Robbery contrary to section 296(1) of the penal Code in the alternative he was charged with one of his co-accused Fredrick Mutunga with handling stolen property contrary to section 322(2) of the Penal Code, in that they on the 3rd July, 1983 at Ngiini village in Kitui district otherwise then in the course of stealing jointly and dishonestly handled 10 women's inner wears, 5 petticoats, 4 children's clothes, 1 dress and 4 children's inner wears, all valued at shs 900/= the property of Peter Jackson Nzioki knowing or having reason to believe them to have been stolen or unlawfully obtained. It was stated in the particulars to the substantive charge or robbery that the robbery of the several items including those mentioned in the alternative charge of handling stolen property occurred on the 1st July, 1983 at Kalundu bus stop in the Kitui District.

The appellant when charged on the first count pleaded not guilty, but when charged on the alternative count he said: "It is true that I unlawfully handled the 10 women's inner wear, 5 petticoats,

4 children clothes, 1 dress, 4 children's inner wear and I knew they were stolen property and were the property of Peter Jackson Nzioki." Then the prosecutor related the following facts:-

"On 1.7.85 the complainant was waiting for a vehicle at Kalundu bus stage. He was approached by 3 people who asked him where he was heading to. Before he could answer they grabbed him at the neck and they grabbed his property. They took from him the items listed in charge sheet. The men ran. away.

On 3rd July,1985 he identified one of the accused 1st accused (appellant) as one of the people who had robbed him when people went to home of 1st accused and they got the items listed in the alternative charge of handling stolen property is when 1st accused was arrested. He the pointed out the 2 other accused persons to have been with him. The 1st accused said he had kept the property knowing it was stolen property. He was arrested with the goods in his house. He knew the property to be stolen."

To which the appellant said:- "I knew it was stolen property. I admit the facts." Then the trial magistrate recorded:- "1st accused is guilty on his own plea and convicted on the alternative charge of handling stolen property." Then the prosecutor said:-

"We have not received his previous record but the offence is serious. He has another case pending. It is case No 326 of 1982. It involves robbery of a motor vehicle. The offence (is very common in the area.") (I do not think the prosecutor should have informed the trial magistrate that there was another case pending against the appellant since the result was then not known. To where the appellant replied:- "I help my parents at home. I have another case pending. I ask for mercy." (And I do not think the appellant would have mentioned other case pending.) www.kenyalawreports.or.ke The alternative charge as drawn is defective because it is not stated in the particulars of the charge as it should be so stated how the accused or the appellant dishonestly handled the stolen goods whether by receiving them or retaining them, as added by Act 4 of 1975, or dishonestly undertook, or assisted in, their retention,, removal, disposal or realization by or for the benefit of another person, or if he arranged to do so as set out in the section.- In this regard I refer the learned trial Magistrate to the case of Antony Olala Wasiembo_ v Re public Kenya Court of Appeal Criminal Appeal No 48 of 1979 unreported in which it is recorded:-

"The particulars were stated as follows:- Antony Olala Wasiembo: On the 18th day of June, 1978, at Randa Estate Nakuru in Nakuru District of the Rift Valley Province handled stolen property in that otherwise than in the cause (sic) of stealing, dishonestly handled one Sanyo record player and one record all valued at Kshs 660/= knowing or having reason to believe them to have been stolen or unlawfully obtained. This charge was defective in that it did not specify the manner of the alleged handling, as required by section 322(1) of the Penal Code, in other words whether the allegation was that the appellant dishonestly received or retained the goods, or dishonestly undertook or assisted in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranged so to do." I also refer the learned trial Magistrate to what was said by Sir William Doffus P in the case of Ratilal & another v Republic (1971) E A 575 at pages 577,578,579,580,581 and 582. However such a defect may not in fact occasion a failure o-f justice to an accused person if it is quite clear what he has to meet but it is safer to have the charge properly drawn. In the appeal now before me the appellant admits that he unlawfully handled the goods, but because it does not mention how he cane to handle them in the charge he makes no mention of this fact in his plea. He then admits what the prosecutor told the court which includes that he robbed. He cannot rob or steal and receive or retain at the same time.

I, think and find in the circumstance that the proceedings before the trial magistrate ought and should be declared a nullity and I so declare the a nullity trial and the appellant to be released from custody unless otherwise lawfully held. The prosecution is free to proceed again against the appellant upon property framed charges and if the trial magistrate is disposed to find the appellant guilty of one or either of the two charges then I refer bin to which was said by Law acting P in the case of Kipsaina v Republic (1975) E A 253 at page 254 at letters D E & F which I quote:- page 254 at letters S,E, & F which I quote:-

"The evidence in this case does not point to the blanket having been dishonestly received rather than stolen, and the appellant 's conviction on the alternative charge of handling was prejudicial to him, as sentence quite disproportionate to the offence of breaking and stealing which he is just as likely to have committed. In our view, the magistrate in the circumstances erred in law in convicting of the alternative charge of handling. We quash that conviction, and substitute a conviction for the substantive offence of braking entering, and stealing, the articles specified in the charge. We set aside the sentence of nine years imprisonment with hard labour and substitute a sentence of three years imprisonment on the first limb of the charge, with a concurrent sentence of one year's imprisonment on the second limb, together with three strokes of the cane…"

Dated and delivered at Nairobi by Todd, J this 27th day of January, 1984.

J H S TODD

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 1711 OF 1983

(From original conviction and sentence in criminal case No 3383 of 1983 of the First

Class District Magistrate's court at Nairobi: (J M Mbithi, Esq.)

ALFRED OGINGA…….APPELLANT

(Original Accused No 1)

AND

REPUBLIC……..RESPONDENT

CONSOLIDATED WITH ORIGINAL APPEAL NO 1712 OF 1983

(From original conviction and sentence in Criminal case No 3383 of 1983 of the First Class District Magistrate's Court at Nairobi. (J M Mbiti Esq.)

RICHARD OTIENO……..APPELLANT (Original Accused No 2) AND

REPUBLIC…….RESPONDENT

CORAM: F E ABDULLAH J

J ALUOCH (MRS) J

Appellants absent, not wishing to be present and untepresented. L G Mbarire (Miss) State Counsel) for Respondent.

JUDGMENT

The two appellants Alfred Oginga Ofula and Richard Otieno were convicted by the learned 1st Class District Magistrate, Nairobi of offence of robbery, contrary to section 296(1) of the Penal Code (Cap 63). The appeals were consolidated. Each appellant was sentence to 3 years imprisonment, and ordered to receive 4 strokes of the can, plus 5 years mandatory police reporting order after release. Both appellants have appealed against both conviction and sentence. We have gone through the petitions of appeal filed by both appellants, and have found that both have claimed that the 2 of them together with the complainant were involved in a fight and not a robbery, and that the court did not we decided to examine carefully the defence put forth by both appellants in light of the prosecution evidence on record. According to the 1st appellant in defence he was playing draft with one Patrick Owino who was the original 3rd appellant and whose appeal was finalized before us on 23rd July, 1984. They were joined 2nd appellant who again left to go and buy cigarettes. Shortly afterwards, there was a lot of noise out side.

The 2 came out and found Richard 2nd appellant on the ground, he was injured. The Police cane and arrested all of then as they were in the bus taking him to hospital. The 2nd appellant on the ether hand stated in his statement in defence that whilst on his way to buy cigarettes he net the 1st appellant and another playing drafts. He left then, walked along, crossed the road and got to the shops. On his way back ho found some people standing. He did not know then. One held him. He was hit on the face. He realized it was a fight. He was beaten and he fell unconscious. He found then beating another man. These people ran away as 1st appellant and another arrived. They took him to Kenyatta national Hospital. It was there that Police went to see him. The complainant was with then and the appellant identified him as being one of those who assaulted him.

The prosecution case on the other hand was that the complainant had alighted from a bus on l8th September 1983 about 7 p.n. That he was with P,W 2 as he net the two appellants. That the 2 appellants together with others attacked him and robbed him of a pair of shoes, watch, coat and some cash money. The complainant was injured on the head and mouth during the robbery. The appellants and others ran and disappeared, but on 3rd October 1983 the complainant pointed out the 1st appellant to the police, and he was arrested. The 2nd witness, P W 2 on the other hand testified that, the same evening, he found the complainant being beaten, after the latter had alighted from a bus. According to him he found the 2 appellants and others having knocked down the complainant. P W 2 passed then to go and call people. When he returned all of then were gone. He later identified the 1st and 2nd appellant, when they www.kenyalawreports.or.ke were arrested. In the learned Magistrate's judgment at page 18, beginning at line three ho said,

"I do not believe the defence case that it was the contrary that it was accused No 2 who was assaulted and robbed of his cigarettes. Their clever way of putting questions to P W 1, P W 2 and even P W 3 shows that they are people who could have acted in such a manner….."

We on our own pace have assessed and evaluated the entire evidence in this case and, whilst we are prepared to accept that the complainant was robbed of his property at the save time, it is our considered opinion, that the defence case considered alongside the prosecution case, causes some doubt is to whether what happened in this case was a robbery as described by prosecution, or a fight, as described by the appellants. We find that the learned magistrate did not fully consider the implication of defence case, apart from just saying that he did not believe it. We are also unable to find reasons to support the learned Magistrate's observation of the appellants when he said, "Their clever way of putting questions to P W 1, P W 2 and even P W 3 shows that they are people who could have acted in such a manner". What the learned Magistrate describes as "Clever way of putting questions ….", could have just been the appellants' way of putting what according to them was the truth of the matter.

The sum total of our consideration of this case is that the prosecution evidence on record fell short of proving the charge against the appellants, because the defence put up by the 2 appellants caused doubts in our minds. We have therefore decided to resolve this doubt in favour of the appellants. We allow the appeal, quash the conviction and set aside the sentence imposed on both. We order further that each appellant be released forthwith unless otherwise lawfully held.

Dated at Nairobi this 30th July 1984.

F E ABDULLAH

JUDGE

J ALLUOCH (MRS)

JUDGE