REPUBLIC OF KENYA

Court of Appeal, at Kisumu

Criminal Appeal No 74 of 1985

Kariuki

versus

Republic

(Appeal from a judgement of the High Court at Kisumu, Schofield, J)

December 6, 1985, Kneller JA, Platt & Gachuhi Ag JJA delivered the following

Judgment.

This Appellant Joseph Kanyua Kariuki was the first accused at his trial. Thee were three others. He ended up with a conviction on each of four counts of robbery contrary to Section 296(1) of the Penal Code, and in all ten years imprisonment together with twenty strokes of corporal punishment. First appeals on each count against both conviction and sentence were dismissed.

In his appeal to this Court, the Appellant has emphasised various aspects of his identification; such as by identification parade, and by recognition in court by such witnesses as Sgt Mwita (PW 6); and the lack of identification by finger print evidence.

He complains that he was terribly tortured and in this state shown to the witnesses. His injured state also robbed his statements under caution of any value as evidence. Another link between the caution statements and the identification parades is that the latter were conducted by the same officer or officers and all the statements taken by one officer. It follows therefore that the Appellant's identification or lack of it, weighs most heavily on the Appellant's mind, followed by the circumstances in which he gave his statements. It is indeed the Appellant's identification in general that has been at the heart of this appeal, but we must notice one other matter of law in the Appellant's favour, and that is whether the charge on count four was made out. The charge on count four, like all the other charges, sets out an offence of robbery, in that on September 6, 1982 in a specified part of Kisumu, the four accused person jointly being armed with a Russian Assault rifle robbed Mrs Shantaben Raicha of a car (Reg No KDZ 920, a Datsun), and cash Kshs 27,850.00 and at or immediately before or immediately after the time of such robbery used actual violence to Mrs Raicha.

On this particular day, September 6, 1982, Mrs Raicha was taking Kshs 27,000.00 to pay in to the Bank. It was between 10.00 am and 10.20 am Mrs Raicha was accompanied by her daughter-in-law. She drove out of the main gateway, but before negotiating the main road, she stopped her car to see if the road was clear for her to turn left into it. But she saw four persons running fast towards her. One person who reached her side told her forcefully to get out of the car and leave the key behind. Other people attended her daughter-in-law in this fierce fashion. The women got out. It is alleged that the Appellant got in, tried to start the car but it stalled. By this time the alarm had been raised; Sgt Marwa Mwita (P W 6) and office

messenger, Duncan Wandera (P W 8) were throwing stones at the robbers, and without taking the money or moving the car, the four robbers fled. They were chased and although it is anticipating events slightly, it may as well be said that this Appellant was arrested by Police Constable Lawrence Muraguri (P W 7) during the chase after the robbers.

On these facts there was no theft. It will be recalled that the definition of robbery in Sec 295 of the Penal Code, commences with the words – "any person who steal anything/" The definition of theft in Sec 268 of the Penal Code provides for the taking of the thing.

In Sec 268 (5) it is laid down that "a person shall not be deemed to take a thing unless he moves the thing or causes it to move." The things alleged to have been stolen were the car and the money. Neither were moved or cause to be moved as far as the evidence goes.

There was no "taking" of these articles. The intention to steal however was clear; and the steps leading up to the theft stopped short of taking, by the accident that the Datsun did not respond to the robbers's efforts to start its engine. Consequently the Appellant should have been convicted, on this basis, of the lesser offence of attempted robbery c/s 297 of the Penal Code, an offence punishable with seven years' imprisonment. The sentence passed lay outside these limits. It is only fair to say that this conclusion was aniticpated by the lower courts, but abandoned. The first reaction of the trial court was right. The conviction must be altered to the lesser offence by virtue of Sec 179 of the Criminal Procedure Code.

The other very obvious legal flaw in the proceedings arises in the evidence of Inspector Langat (P W 15). He held identification parades on September 8, 1982 at 3.30 pm, 4.05 pm and 4.30 pm. Unfortunatly, the four accused, including this Appellant, were put on the parade together, and with twelve others. That is to say, these four accused lined up with twelve innocent person. That is an infringement of the Police Force Orders which requires a safety margin of one accused to eight other persons. To reduce the margin to one accused to three others invites identification by chance or by guess work. This is explained in Mboche vs R (1973) E A 95 at p 97 pers Simpson and Muli, JJ. That renders the parade an unreliable source of indentification.

That has the effect of upsetting:-

1) the identification of Appellant and two others by Mr Dahyabhai Patel on count 2;

2) the identification of the Appellant and one other by Mr Jayantilal Shah on count 3;

3) the identification of the Appellant and one other by Mrs Raicha on count 4.

But the parades conducted by Chief Inspector Kamunya were not as bad. He had one to seven persons; i.e. two accused and twelve others. It is a minor infringement and while we recommend to Police Officers the careful compliance with their own Froce Orders, it seems to us that this represents the limit of non-compliance that can be safely allowed. So long as other questions can be satisfactorily resolved, the following is the resulting identification:-

1) Mr Rashmi Shah's identification of this Appellant at 11.00 am on September 8, 1982 on count 3;

2) Mr Rashmi Shah's identification of another accused person;

3) Mr Praful Bachulal's identification of this Appellant on count 1 on September 9, 1982.

It will be convenient now to relate these facts to the charges.

On count 1 it is alleged that on October 6, 1981 the Appellant and others robbed Mr Praful Baculal of a Mercedes Benz car and Kshs 225,000.00. Identification took place on September 9, 1984, about a year later.

On count 2 on July 26, 1982 the alleged robbery took place in Mr Dahyabhai Patel's shop of a car and cash, coat and wrist watch.

On count 3, on August 18, 1982 the alleged robbery took place of a car and cash. One of the Shahs took part in a reasonable parade, and it is as well to note that the better parade took place in the morning of September 8, 1982 and the poor parade in the afternoon of that day. Otherwise the chance of Mr Jayantilal shah discussing what he had seen with Mr Rashmi Shah would have been unfortunate.

It follows that Mr Dahyabhai's identification of the Appellant being unrealible and there being no other evidence, except the caution statements of two co-accused, the conviction on count 2 is not sound.

The next error of procedure is that the trial court held multiple trials within trials, in the Appellant's case. There should be one such trial for each statement. It ought of course to live up to the name and be a "trial." If injuries are alleged, there should be some medical evidence, if possible, and it would be wise for Senior Offices taking statements to have accused persons medically examined to safeguard themselves. But it happens in this case that the Appellant denied involvement in the robberies in two statements admitted his offence in the case of Mr Raicha. The Court is able however to leave aside all this evidence, as the lower courts noticed that the denial took the prosecution no further, and on Mrs Raicha's case there was other evidence.

It will now be convenient to deal with Mrs Raicha's case. The Appellant was seen by Sgt Marwa Mwita at the scene. There was a chase and the Appellant was captured by Lawrence Muraguri. Sgt Marwa Mwita saw the Appellant again at the Police Station and recognised him there. To answer a point raised by the Appellant, that is why the Sgt could not and did not attend an identification parade. But the chase and the Appellant's capture assure the Court of his identification, apart from his irregular identification at the parades, and his statement irregularly admitted in evidence, after attempting to rob Mrs Raicha of her car and money.

In the case of the two Shahs, one has identified the Appellant. In the case of Mr Praful Bachulal he identified the Appellant. The later complains about the circumstances of his identificaition, especially because he was easily recognised since he had ben greately tortured. But this aspect did not disturb him at the trial. His problem then was that he had been seen by each of those identifying witnesses in the police station just before the parade. The appellant's lack of consistency robs both complaints of validity. The change of emphasis is no doubt due to the fact that there was no possibility of the witnesses seeing how the parade was formed. This was proved by a visit to the station by the trial magistrate. But the trial court also accepted the word each witness that he had not seen the Appellant before the parade. It was not put to the witness that identification was due to injuries. The nearest the Appellant got was his being tied to the Second Accused; but this Mr Praful Bachulal denied. As the visibility of the effects of torture was not put o the witnesses, there is no evidence on the point now made by the Appellant.

The Appellant raises the question of finger print evidence. There is no evidence on the point. It was not raised at the trial. It must be supposed that there were not sufficient trances of finger prints for the police to detect them.

Another point raised in the rectitude or otherwise of Chief Inspector Kamunya carrying out the parades. There is nothing to suggest impropriety.

What the Appellant may be attempting to say is that there was in each case one identifying witness and Mr Praful Bachulal's case a long period before identification.There was no proper direction on this point; warning of the danger of identifying by a single witness (see Roria V R (1967) e a 583). But it seems to the court that the trial magistrate did find that the circumstances in each case in daylight were favourable for identification since the witnesses had been forced out of their cars; that the witnesses identified the Appellant without hesitation, and that the Appellant drove the cars in each case, except that he could not start Mrs Raich's car. In Mr Praful Bachulal's case he recognised the face and voice of the Appellant. Not too much weight was put upon the similarity of the method of these robberies by the High Court, and that approach is right; allowing some added support. Had there been a proper warning these are the factors

that would have been taken into account in dealing with it.

Having reviewed the questions of law raised in this appeal, we are satisfied that there was admissible evidence upon which the trial court could convict the Appellant on counts 1 and 3. Consequently the appeals against conviction on those counts are dismissed. But the conviction on count 2 is quashed, and sentences upon it set aside. On count 4 the conviction is reduced to attempted robbery contrary to section 297 of the Penal Code, but the imprisonment imposed will be reduced to seven years while the corporal punishment imposed will stand as lawful for that offence. The result is that the appellant will continue to serve ten years' concurrent imprisonment, but will now have imposed upon him fifteen strokes of corporal punishment.

Delivered on the December 6, 1985

Kneller JA, Platt & Gachuhi Ag JJA