



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(Coram: Kneller, JA, Chesoni & Nyarangi, Ag JJA)

CRIMINAL APPEAL NO 51 OF 1984

BETWEEN

DANIEL NYAOSO KIAGA..... APPELLANT

AND REPUBLIC RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nakuru (Masime, J) dated March 9, 1984 In High Court Criminal Appeal No 384 of 1982) _____

JUDGMENT OF THE COURT

Daniel Nyaoso Kiaga (hereinafter referred to as “the appellant”) was convicted of robbery contrary to Section 296(1) of the Penal Code and sentenced to seven years’ imprisonment with twenty four strokes. The trial court also ordered the appellant to be repatriated to Uganda on completion of his prison term. On his first appeal, Mr Justice Masime dismissed the appeal against conviction and sentence except for the number of strokes which he reduced to six because of the appellant’s age. This second appeal is on the grounds that the identification parade was rigged; the trial magistrate misdirected himself on point of law and fact; the judgment was against the weight of evidence, the appellant was framed; the sentence is harsh and excessive and the appellant is aged fifty two years.

The case put against the appellant was that, Margaret Wangui Kago owned a matatu Peugeot 404 registration No KLE 123, which she operated during day time and her driver, Josphat Hinga, operated it at night. On the night of December 10, 1981, he was in the Matatu parking area in Nakuru Municipality when the appellant and another man were said to have hired the matatu to take them to Moi Children’s Home at a fare of Shs 20, was alleged, was paid by the appellant before the two men entered the vehicle. The appellant sat on the front passenger seat next to Hinga and the appellant’s companion occupied the back seat. When they reached Moi Children’s Home, the appellant asked Hinga to stop. Hinga said that the stopped the vehicle and switched off the lights, but before he switched off the engine, the man on the rear seat put his arms around the driver’s neck and the appellant lifted his legs and threw him to the back seat. The driver screamed once and the man on the back seat threatened to shoot him if he screamed again, though he never said whether or not the appellant’s companion was armed. The driver released himself from the grip and got out of the vehicle. The complainant said he had properly observed the appellant and noted his appearance with the aid of the light from the street lamps when the two were bargaining the fare. The appellant drove off the vehicle. Hinga reported the robbery to Nakuru Police Station and to Wangui, his employer.

Hinga, said that when he identified the appellant at an identification parade at Nakuru Police Station on December 23, the appellant said nothing, and, indeed he (appellant) does not dispute that he was not identified by the complainant, but he attacked the manner in which the identification parade was conducted. Hinga said that he identified the appellant by his face and clothes, but denied seeing the appellant thrice when the latter was in the police custody before the parade was held. Inspector Julius Mureithi, who conducted the identification parade confirmed that when Hinga identified the appellant, the latter said nothing. The appellant told Inspector Mureithi that he was not satisfied with the parade but he did not give the reasons for his dissatisfaction. The appellant gave evidence on oath and said that the police displayed him thrice to the complainant before the identification parade was held. He wanted to protest but feared to do so. In cross-examination, the appellant said that he was identified because he was the only one without shoes. It was not suggested to the appellant through cross-examination that it was untrue that Hinga saw him thrice before the former identified him on the parade. Hinga's evidence was that, apart from the face, he identified the appellant from the clothes he wore on the night of the robbery, which he described as a blue shirt and brown trouser. George Njoroge Kamau, another prosecution witness who said he saw the appellant at the Nakuru Matatu stand on the night of the robbery and identified him on December 23, told the Court that on the night of December 10, the appellant was wearing a red jacket, not spoken of by Hinga. Kamau said he observed the appellant well because the latter entered Kamau's matatu and paid Shs 20 but did not use Kamau's matatu because it failed to start. When the appellant's left Kamau's vehicle, he did not demand a refund of the Shs 20 yet when he went to Hinga, he bargained for the fare to be lowered to Shs 15. Hinga in his own evidence said that he talked in the appellant's companion for a couple of minutes fixing the fare before the companion went to call the appellant, yet Hinga told the Court that he observed the appellant under street lighting when they were bargaining the far. In cross-examination at the trial, the appellant put it to Hinga that he saw the appellant thrice in police custody before the parade was held. Yet another prosecution witness, Julius Gichohi, a taxi driver, told the Court that he agreed to take the appellant and his companion to Moi Children's Home at Shs 15, but the two went to Miringa Bar and when they came out they went to Kamau's vehicle, Gichohi who identified the appellant on December 23, said that the appellant was wearing a shortsleeved T-Shirt.

Since the identification of the appellant by Hinga was based partly on his appearance and partly on his clothes, the discrepancy in the evidence of Hinga, Kamau and Gichohi all who said they saw the appellant at Nakuru on the night of robbery, raises a doubt to the identification of the appellant on the material night. None of the identifying witnesses had any special reason to recall the appellant's face and/or his attire. The appellant indicated his objection to Inspector Mureithi immediately, so it was not an afterthought.

The evidence of Boniface Kamau and Robert Kimani Solomon which was that these witnesses saw the appellant in possession of the vehicle KLE 123 at Eldoret on December 12, 1981 when he was trying to sell it, was accomplice evidence and so evidence of the weakest kind which could only lend assurance to an otherwise strong case against the appellant.

These two witnesses were arrested and jointly charged with the appellant with the robbery of the vehicle. Martin Omolo, who was the fourth accused said that on December 11, Boniface Kamau who had been the 3rd accused, took the vehicle to Omolo and he was with the appellant. Kimani who was the second accused was with them. Again that was accomplice evidence, and the appellant was not given the opportunity of cross-examining Omolo.

The appellant denied, in his sworn evidence, being in possession of the spot light . Corporal Mburu said he arrested the appellant when he had it in his possession. The appellant put forward a defence of an alibi. He said that on December 10, 1981 he was at Eldoret and remained there till his arrest. He was returning from seeing a friend's daughter at an Eldoret hospital at 7.30 on December 12, 1981 when the police arrested him for having no identification card. He was charged with failing to register and fined Shs 60. He then left a wrist watch at the Eldoret Police Station as he did not then have its receipt and when he took the receipt on the following day, he was arrested and charged with robbery. In cross-examination, he said that the two Ugandans who took the stolen vehicle to Boniface Kamau and Robert Kimani disappeared and the police said that the appellant had the vehicle because they had seen him with those

Ugandans. He first knew the Ugandans had the vehicle after he was arrested. It will be remembered that Corporal Mburu was patrolling the area between Ngala Street and Eldoret Nursing Home when he arrested the appellant, which may indicate that it was near the Nursing Home. Corporal Mburu was with another police officer who was not called to testify. The appellant's cross examination was not directed at dislodging his alibi and in view of the contradictory evidence as to the appellant's identity at Nakuru on December 10, 1981, it could not be said that the alibi was disproved, despite the trial magistrate's general rejection of the appellant's sworn evidence as lies. The first appellate court did not consider the material discrepancies in the appellant's identification by those who claimed to have seen him at Nakuru on December 10, and specially as to what clothes he was wearing that night nor did it consider the fact that the evidence of Boniface Kamau (PW 5) and Robert Kimani (PW 6) was accomplice evidence. The cross-examination of Kimani was all part of his evidence which could not corroborate itself as it was not independent evidence.

The appellant's co-accused, Omolo, gave evidence on oath, but the appellant was not allowed to cross-examine the co-accused when, as we have shown, the co-accused had implicated him. The appellant was therefore denied a fundamental right which in our view, is fatal to his conviction as was so held in *Edward s/o Msenga v R/1956/23 EACA 553*. The Principal State Counsel urged us to order a retrial since the omission to accord the appellant the right to cross-examine was not by the prosecution, but by the Court. It does not matter who denied the appellant his fundamental rights, the error is fatal and a retrial is not in the circumstances of this case justified. The conviction was neither illegal nor defective.

For the reasons given, the appellant's conviction cannot be supported. We allow the appeal, quash the conviction, set aside the sentence including the order of repatriation and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held. Those shall be the orders of this court.

Dated at Nakuru this 24th day of September, 1984.

A A KNELLER

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

J O NYARANGI

AG JUDGE OF APPEAL

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

DEPUTY REGISTRAR