



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, KIAGE & MURGOR JJ.A)

CRIMINAL APPEAL NO. 316 OF 2011

BETWEEN

1. ATHANAS MUTUKA AMUNGA MATENDECHERE)
2. JOHNSTONE MWORE MUTOKA)..... APPELLANTS
3. JOHN LUNGAJI MALONGO)

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Onyancha & Lenaola JJ.)
dated 30th November, 2010

in

H.C.CR.A. NO.100 OF 2006)

JUDGMENT OF THE COURT

This is a second appeal. The first, second, and third appellants namely **Athanas Mutuka Amunga Matendeche**, **Johnstone Mwore Mutoka** and **John Lungaji Malongo** respectively are each currently incarcerated under death sentences (if their sentences have not been commuted to life imprisonment by the President) for the offence of Robbery with Violence contrary to **Section 296(2)** of the Penal Code in that they together with one **Cecillia Atila Luganji** who died during the hearing of the case before Senior Resident Magistrate, and others not before the court, on the 20th day of November, 2004, at **Busama village, Bungundi sub location, Lugaga Location in Vihiga District** within the Western Province jointly while being armed with offensive weapons namely panga, iron bars, and rungas, robbed **Benjamin Chasala Adevi** of his cash Ksh.10,000/=, a bicycle make Hero Jet F/No. 798626, a Radio Cassette make Sanyo S/No. 041101, a weighing machine scale S/NO 1872, four sufurias, a Radio cassette make Panasonic S/No. RX 65730, a pair of black shoes and assorted shop goods all valued at Ksh 30,000 and at

or immediately before or immediately after the time of such robbery wounded the said Benjamin Chasala Adevi. Two Senior Resident Magistrates heard the case with the first one (R.A Oganyo) hearing the entire prosecution's case and the second one (Macharia) hearing the defence after properly complying with the provisions of **Section 200** of the Criminal Procedure Code and thereafter proceeding to prepare and announce the verdict.

Their appeal to the High Court was dismissed and hence this appeal originally brought vide three homemade Memoranda of Appeal filed by each appellant.

On the Judiciary assigning an advocate for the appellants, the firm for the same advocate filed one Supplementary Memorandum of Appeal which Mr. Oguso, the learned counsel for all the appellants relied on in his address to us. These grounds are that:-

"1. The evidence on identification of the Appellants was insufficient to be a basis for a sound conviction

2. Both the trial court and the Appellate court erred both in law and fact in basing their findings on inadmissible evidence which was un-procedurally wrongly and unlawfully admitted.

3. The Appellate court erred both in law and fact in failing in its duties and obligations of independently analysing the evidence on record and arriving at its own decision in light of such evidence.

4. The two courts below failed in law and fact that in failing to analyse and or consider the prosecution case as against the defence as required by the law and instead dealt with the two aspects of the case separately and distinctive of either.

5. The decisions of the two courts below are against the weight of the evidence.

6. The sentence imposed on the Appellants is unconstitutional."

Mr. Oguso addressed us on all the above grounds. For reasons that will be clear later in this judgment, we will consider only two of the above grounds which we think will suffice in disposing of the appeal. We will also consider in the same context two other matters that though not in the grounds set out but which we think needed to be considered by the trial court but were not so considered. Those omissions were unfortunately not picked up for consideration by the first appellate court and the effect of those failures.

First, the brief facts. Benjamin Chasala Adevi (PW1) (Benjamin), was as on 20th November, 2004, running a shop within Busama village, Bungundi Sub- location, Lugaga Location of Vihiga District (now Vihiga County). On 20th November, 2004, he closed his business at about 8.00 pm and went to sleep at 10.30 pm. His wife **Margaret Amima (PW3)** was in the same shop where they were doing business and sleeping in the back rooms. At about 11.00 pm thugs attacked them, broke the door to their shop and entered the shop flashing many torches. They told Benjamin to give them money as they also pulled Margaret away ordering her to give them money while at the same time beating Benjamin seriously. Margaret escaped to a neighbour's house as she feared the thugs would rape her, but Benjamin remained in their hands. Benjamin gave them Ksh.10,000/= and they took many shop goods as well as a bicycle, kitchen utensils, a radio, weighing machine, clothes, shoes and a blanket. They left with all these items stolen. Benjamin was unable to identify even a single one of them, but said in evidence that they were many. Margaret also could not identify them. On their leaving the shop, Benjamin rushed to his neighbour who was Assistant Chief of the area. That was **Nickson Mbokhu Afande (PW6)**. Nickson the Assistant Chief mobilised members of the public to track down the thieves. It had rained that day and one of the items stolen according to the report was as we have said, a bicycle. It was thus easy to trace them by following the tyre marks on the wet ground. In the meantime, on the same night of 20th November, 2004, another robbery had been perpetrated upon one **Habel Isije** in that general area bordering Eburnangwe Sub-location and a report of that other incident had been made to the Assistant

Chief of the area **Catherine Asila (PW5)** who had in turn reported that incident to **IP Kennedy Onsando (PW2)** who in response to the report went to the scene of that other incident, after picking up five police officers from Magadi Police station. They found that other victim unconscious and took him to Vihiga District hospital, at Mbale. IP Kennedy thereafter got a report of the robbery the subject of this appeal via VHF communication from Magadi Police station, and as Ebunangwe Sub-location borders the sub-location where this incident took place, IP Kennedy went to the scene through a short cut together with four of his officers. He found Benjamin who had been beaten by the robbers but was able to talk. Benjamin told IP Kennedy and his team of the items he was robbed of. IP Kennedy called for a police dog after enquiring as to which route the attackers had taken. The police dog was brought and with the help of the police dog IP Kennedy and his police officers, together with Assistant Chief Catherine and Assistant Chief Nickson who had met IP Kennedy and his police officers at Madanya bridge, they traced the thieves. The dog led the police and the entire security team and two Assistant Chiefs to a house in which there were some people who for a long time refused to open the door. The police fired in the air to scare those inside to open, but they did not open until after two hours, when one person was intercepted at the back of the house. Be that as it may, on the house being opened, several items that were identified by Benjamin early the next morning, were found inside the house. These included the bicycle which in our minds was identified by Benjamin as his bicycle. Those people, who are the three appellants and one Cecilia Atila Lunganji who was wife to the first appellant and who died before the trial was finalised, were arrested by police and taken to the police station. After Benjamin had identified the items found in that house as his property they were charged with the offence as stated above.

At the close of the prosecution's case, as we have stated, the first trial Magistrate Ms. R.A. Oganyo found a *prima facie* case established by the prosecution against each appellant and put each on his defence. She then ceased conducting the case, but no reason is rendered and we can only imagine that she had gone on transfer. That ruling pursuant to the provisions of **Section 210** of the Criminal Procedure Code was read by Mr. Macharia, another Senior Resident Magistrate who, as we have said took over the hearing of the case. On the court's compliance with the provisions of **Section 211** of the Criminal Procedure Code, and on the appellants being asked to make their statements on the way they could give their defence, and whether they would call witnesses, Mr. Lugadiru, then acting for them is reported as having said:-

"His clients will give sworn evidence. They will call 3 witnesses."

Thereafter, before Mr. Macharia started hearing the case the record reads in part:-

"Rights of accused under Section 200 of CPC explained and Mr. Lugadiru states that he will only recall PW4 to seek a clarification. PW4 is the clerical officer."

Court: Case to proceed from where the previous trial (sic) court had reached. PW4 to be recalled witness summons to issue for 9.11.05. When defence case will commence."

On 9th November, 2005, the defence hearing did not proceed as third appellant was taken to hospital for special treatment. The hearing was thereafter adjourned from time to time till 22nd February, 2006, when Mr. Lugadiru applied to and was allowed to withdraw from acting for the appellants. Thereafter, the learned Magistrate discharged Mr. Lugadiru but proceeded with the defence case even before the date set for hearing. The matter was to be heard on 24th April, 2006, and mention on 7th March, 2005, but that was on 22nd February, 2006, vacated and no reason was given for the same. The appellants were again asked under **Section 211** to make choices on the same.

The learned Magistrate stated:-

"Rights of accused under Section 211 of CPC explained to them in Kiswahili and they refused."

It is not easy to understand what that meant, but the appellants were reported to have each decided to give sworn testimony. The way their defences were recorded leaves a lot to be desired, and will be

the main thrust of this judgment, but the gist of it all is that each appellant denied the offence with the first appellant being reported as having stated that the house in which the alleged stolen properties were found was his house. On 19th he had visitors who had gathered for funeral arrangements as his brother's child had died. At night police arrested him together with his visitors, and later took away his properties which included some properties belonging to his sister. He then produced receipts for the properties and these were admitted as defence exhibits. In cross-examination, the evidence was recorded in such a way that it became difficult for us and even for the learned Assistant Director of Public Prosecutions to understand the record. The other two appellants maintained that they were mere visitors to that house having gone there for the funeral of a relative. Again, the learned Magistrate in his recording of the defences of these two appellants followed the same procedure in recording their evidence which as we have stated left a lot to be desired.

In his judgment, the learned Magistrate, after setting out the prosecution's case, set out the defence case in such a manner that he narrated each appellant's case but interposed it with his comments on the same, the which comments demonstrated that the learned Magistrate, was clearly biased against each appellant. For example, in his summary of the third appellant's defence the learned Magistrate stated in part:-

"He had said that the weighing machine was owned by his sister. He was not able to explain why Exhibit D2 and D3 were from the same source and appeared to have been written using the same hand. It is then that A1 revealed that all the documentary exhibits that he had tendered in court were in the custody of his sister and he had not seen them before. They were availed to him during trial. My take of the testimony of A1 is that it is not truthful. The documentary exhibits produced by him were manufactured for purposes of trial. I will treat his line of defence as a sham."

As to the second appellant, the learned Magistrate applied the same line of approach and dismissed his defence as a mere denial well before he considered the prosecution's case. The same went for the third appellant. Thus the defence of the appellants were analysed, considered and dismissed well before the prosecution's case was considered. Thereafter, the learned Magistrate considered the prosecution's case separately, and at the end of it all concluded:-

"In my mind, there is watertight evidence of recent possession by A1, A2 and A3 of items stolen from PW1 and in the absence of an explanation of how they gained possession, the law presumes that they either stole it or at the very least they were the handlers of stolen property. However, given the manner in which they were tracked from the scene of crime at the shop/house of PW1, up to where they had sought refuge in the house of A1, I am left with no doubt in my mind that they were not mere handlers, they were robbers."

Mr. Oguso, the learned counsel for the appellants raised several issues which as we have stated, we will not go into considering as we have stated, save that in our view, he was plainly wrong in contending that the police should not have gone to the house of the third appellant and should not have recovered the alleged stolen property before a report was made to them. First, it is clear from the evidence of IP Kennedy that they went there after receiving a report which was relayed to him vide VHF communication from Magadi Police station. Nickson had informed the area Councilor who thereafter told him that the police were aware of the incident and indeed the police were aware and had informed their boss by VHF. By the time IP Kennedy went to the third appellant's house, the police had been informed and IP Kennedy was indeed responding to that information. In any case, this offence of robbery with violence as well as the offence of conveying suspected stolen property are both cognisable offences and that being the case anybody including the police could arrest without warrant and needed not have a formal report made before taking action. If thieves were to be spared arrest simply because formal reports had not been made to police, no one knows how many such offences would escape arrest and prosecution. In our view, it is not only the duty of any police officer, but also of any person to apprehend any offender in respect of any cognisable offence notwithstanding the failure or absence of formal report of the commission of such offence.

We must now go back to the matter before us. Mr. Abele, while supporting conviction and sentence, was

of the view that the way the learned Senior Resident Magistrate conducted and recorded the defence case clearly demonstrated his bias against the appellants. That is what we must now discuss. The prosecution's evidence recorded by Ms. Oganyo was in our view properly recorded in first person singular recording clause to verbatim what the witness said. However, when it came to recording of the appellants' evidence which was in each case the same, Mr. Macharia, decided to use third person singular thereby preferring to make a report of what he felt the appellant said in effect making a report of what the witness said. In doing so, he used such terms as he perceived to connote the intention of the appellant in each case. He used the phrases *"he alleges, He claimed,* etc generally in recording the appellants evidence. We think a reproduction of part of that evidence as recorded by the learned Senior Resident Magistrate will suffice:-

"He is not able to explain why he retained the radio his sister retained the cash sale receipt. He is referred to Ex D1. He alleges the weighing machine belonged to his sister yet the receipt is in the name of Barnabas Mamange. He alleges that the said Barnabas Mamange is his brother based in Nairobi. He changes his version of story and alleges that it is his brother who had brought the weighing machine to him for safe keeping. He is not able to explain why the receipts are from the same source. He now says that he had not seen these receipts prior to his arrest."

This type of recording the appellants evidence continued throughout their case. It was to say the least biased and we agree with Mr. Abele on that aspect.

What was the effect of this bias? This was a case that, as is conceded by both Mr. Oguso and Mr. Abele, depended on the application of the doctrine of recent possession. The law is clear, and the learned Magistrate appreciated it, that the appellants, once found in possession of recently stolen items, had the legal onus, which though is not as onerous as that the prosecution have, of explaining the circumstances under which he came to be in possession of the same. In our view that required proper, fair and impartial recording of the appellants' defence such that his explanation may not in any way be camouflaged by the Magistrate's own views of his evidence as happened here, otherwise it becomes impossible to appreciate the accused's defence.

In any case, what is the purpose of a trial in a criminal case if evidence of an accused person is set out together with trial court's commentaries as he proceeds to record it? How would one know how much of that evidence was not recorded at all? In our mind, the prosecution's case can only be said to be strong and can only be relied upon for a conviction once it is set out against defence set out by the accused. If there is bias in recording that defence then one cannot rightly assess the proper weight of the prosecution's case. Like in this case where as we have said the prosecution's case had to be assessed against explanation offered by the defence. If that defence is partially set out then the prosecution's case cannot be said to be strong. We abhor what happened in this case and as we have stated, it would not be proper to consider the case that was advanced against the appellants because the appellants defence was in our view, through open bias by the trial court, whittled down to nothing even before it could be considered.

Secondly the learned trial Magistrate considered defence case in isolation first, dismissed it and thereafter proceeded to find out if the prosecution's case standing as it was with defence case having been dismissed could be relied on to support a conviction. This was also wrong in law. It has been said over and over again that a Court of law must consider the entire case as one and then make an independent decision and not consider defence case first, reject it and thereafter proceed to consider the prosecution's case.

Before we allow this appeal as we must do on the grounds above, we observe that before the close of the prosecution's case, Mr. Lugadiru then for the appellants, applied for recall of the Clinical officer and that application was granted. However, after Mr. Lugadiru withdrew from acting for the appellants, the court again complied with provisions of **Section 211** before the clinical officer who was for the prosecution was recalled to give evidence. There is no record as to what happened and why that witness was never recalled. Again Mr. Lugadiru had said that the appellants would call three witnesses but when the matter proceeded after the second compliance with **Section 211** of the Criminal Procedure

Code, nothing is recorded as to why the court did not have the witnesses called. We note that on 22nd February, 2006, the matter came up although there was no order for hearing or mention on that date as the order of 7th February, 2006, had set the hearing date for 24th April 2006 and mention on 20 the February, 2006. Whatever happened, when the matter came up for hearing Mr. Lugadiru applied to and was allowed to withdraw from acting for the appellants, the court proceeded to find out from the appellants whether they had any objection and each appellant apparently had no objection. Mr. Lugadiru was discharged and then the court stated that the appellants rights had been explained to them in Kiswahili "*and they refused*". It is not clear what this meant, but certainly it could not mean that they refused to recall the witness who was to be recalled, neither could it mean that they refused to call the three witnesses. In any case one would have expected the court to ask them to call these witnesses after their defences were received. There is nothing to show that the court was mindful of the appellants' request through their then former advocate to call these witnesses. These two omissions were serious omissions as it was clear the defence was not accorded facilities to ventilate their cases properly. We note that their advocate had withdrawn from acting for them and that was when they needed the courts assistance even more particularly on procedural matters like calling their three witnesses.

We think we have said enough to indicate that this appeal must succeed. It is allowed. Convictions quashed. Sentences set aside and the appellants are set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 28th day of March, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

P.O.KIAGE

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JUDGE OF APPEAL

A.K.MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR

