



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & MWERA, J.J.A)

CRIMINAL APPEAL NO. 3 OF 2009

BETWEEN

ATHUMANI JUMA APPELLANT

AND

REPUBLICRESPONDENT

*(Being an appeal from conviction and sentence of the High Court of Kenya at Nairobi (**Apondi & Warsame, JJ.**) dated 21st January, 2009*

in

H.C. Cr. A. NO. 471 OF 2009)

JUDGMENT OF THE COURT

The appellant was charged before Senior Resident Magistrate, Kibera with three counts of robbery with violence contrary to **section 296(2)** of the Penal Code. In the first count, he was alleged to have robbed Harrison Machika of a wallet, national identity card and employment card on 29th April 2003. In the 2nd count, he was alleged to have robbed Oscar M'Meywa of a wallet containing shs. 200/-, national identity card and house keys on the same day. In the 3rd count, he was alleged to have robbed Solomon Amogola of shs. 800 and car keys on the same day.

He was taken to court for plea on 16th June 2003. When the substance and elements of the charges were explained to him he denied the three charges. He was thereafter tried before **M/s Siganga** but the trial magistrate ceased to exercise jurisdiction before judgment was prepared and delivered. The case was allocated to another magistrate, **Ms. Muchira** who complied with section 200 of the Criminal Code whereupon the appellant elected to have the case heard afresh.

After the re-trial the appellant was convicted of the offences in the first and second counts and sentenced to death. The complainant in count III did not testify and the appellant was acquitted of the charge. His appeal to the High Court against conviction and sentence was dismissed.

The evidence to support the charges was briefly as follows:

On 29th April 2003, at about midnight **Harrison Machika** (1st complainant), **Oscar M'Meywa** (2nd complainant) and three others, all employees of Last Maria Restaurant at Valley Arcade boarded a taxi after close of business to take them to their respective houses at Kawangware. The taxi was driven by Solomon Amogola, the complainant in count III. After three of them were dropped at their respective houses, the taxi stopped near Democracy Supermarket to drop the 1st complainant. The 1st complainant was seated at co-driver's seat while the 2nd complainant was seated at the back. When the car stopped eight people surrounded the car. One was armed with a pistol while the others were armed with rungs and pangas. The occupants were ordered to alight and surrender their properties. The 1st complainant surrendered his wallet containing shs. 200, ID card, job card and house keys. As the robbers were robbing the 2nd complainant, the 1st complainant ran away screaming. Meanwhile the robber who had the pistol removed the 2nd complainant's wallet which contained shs. 200/-, identity card, and house keys. The 2nd complainant held his hand and they started struggling. Meanwhile the other robbers escaped after hearing screams. When the 1st complainant saw the other robbers run away, he went back to help the 2nd complainant who was struggling with one man. He was joined by members of public who viciously attacked the robber identified as the appellant with pangas, chopping off his left leg and left him for dead.

PC Griefus Nambiro and other police officers from Muthangari Police station went to the scene after receiving the report. They found the appellant lying down having been doused with petrol and rescued him from being set on fire. They collected the pistol which was lying near him and his chopped leg and took him to Kenyatta National Hospital. The pistol was found to be a homemade gun.

The appellant testified that he was a resident of Kawangware and that he was in his house when he heard screams outside; that he met a group of people who interrogated him and thereafter attacked him and chopped off his right leg.

The trial magistrate made a finding that the 1st and 2nd complainant properly identified the appellant and disbelieved the evidence of the appellant. The High Court affirmed the finding of the trial magistrate on the identification of the appellant.

The appellant relies on three main grounds of appeal namely; that the learned Judges erred in law by failing to note that **section 207 (1)** of Criminal Procedure Code (CPC) was not complied with; that the learned Judges erred in law in failing to properly re-evaluate and re-analyse the entire evidence; and lastly, that, the learned Judges erred in law in concluding that prosecution case was proved beyond all reasonable doubt.

Mr. Amutallah, learned counsel for the appellant submitted that plea was not taken before the trial *de novo* started, which was a fatal omission that prejudiced the appellant. On the other hand, **Mrs. Murungi** the learned Senior Assistant Director of Public Prosecutions (SADPP) submitted that the plea was properly taken at the initial trial; that the charge was never amended and that the case went to full trial and the appellant was not prejudiced as he cross-examined the witnesses and gave evidence in his defence.

Section 207(1) of CPC provides that the substance of a charge should be stated to an accused person and that he should be asked, among other things, whether he pleads not guilty or guilty to the charge. Section 207(3) further provides that if the accused does not admit the charge, the court shall proceed to hear the case.

It is a prerequisite to a fair trial that an accused person should be informed in a language that he understands the substance of the charge or charges he faces and be given a full opportunity to cross-examine the witness, defend himself and be afforded an opportunity to call witnesses in defence.

In this case, the substance of the charge was explained to the appellant when he appeared for plea on 16th June 2003 and he pleaded not guilty to the charges. Thereafter, the witnesses gave evidence in his

presence and he fully cross-examined each of them and gave his evidence in defence denying committing the offences. The trial however aborted and the appellant elected to have the trial re-started. This was done and the appellant cross-examined all the witnesses and gave his evidence in defence denying the charges. It is evident that the appellant had been informed of the charges he faced and that he denied the charges. By **section 382** of the CPC, an appellate court cannot reverse a finding on account of, among other things, an irregularity in the proceedings unless the irregularity has occasioned a failure of justice. The retrial was on the same charges that had been read to the appellant earlier and which he had denied. In the circumstances, the failure to read the charges again before the re-trial started was not an irregularity, and if it was, it did not occasion any failure of justice. (See **Peter Gachigwa Migwi v Republic [2013] eKLR; JAO v Republic [2011] eKLR.**)

On the complaint of failure to re-evaluate and re-analyse the entire evidence, the trial magistrate made a finding that the appellant was identified by the 1st and 2nd complainants that he did not leave the scene and that he was caught red-handed. The trial magistrate also considered and rejected the evidence of the appellant in defence.

There was evidence that the car lights were on and also that there was light from the security lights of nearby Democracy supermarket. Although the High Court did not exhaustively re-evaluate and re-analyse the evidence of the two complainants as well as the evidence of the appellant, it believed the evidence of identification of the appellant by the two complainants. Such failure to re-analyse and re-evaluate the evidence is not fatal if it did not in fact occasion a failure of justice - (**Okeno v Republic [1972] EA, 32**). The prosecution case depended more on the evidence that the 2nd complainant held the appellant at the scene during the process of robbery than on visual identification. Thus the conviction depended on the credibility of two complainants and the appellant on the circumstances in which the appellant was arrested.

The two courts below believed the evidence of the two complainants and rejected the evidence of the appellant. We cannot interfere with the findings of the two courts which were dependent on credibility of witnesses, unless no reasonable tribunal could have made such findings. (**Republic v Oyeir [1985] KLR 353**). We are satisfied that there was overwhelming and credible evidence which proved the charges beyond all reasonable doubt.

For those reasons, the appeal is dismissed, save that the sentence of death in the second count shall be held in abeyance since the appellant has already been sentenced to death in the first count.

Dated and delivered at Nairobi this 21st day of March, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR