



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, MWERA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 370 OF 2008

BETWEEN

YUSUF SAINGURANAPPELLANT

VERSUS

REPUBLICRESPONDENT

*(Appeal from judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ)
dated 23rd November 2004*

in

H.C.CR. A No. 1192 of 2001)

JUDGMENT OF THE COURT

1. This is an appeal by **Yusuf Sainguran** (hereinafter the appellant) from the judgment of the High Court upholding and affirming the conviction and sentence by the trial Chief Magistrate's Court in respect of a criminal charge of robbery with violence contrary to **section 296(2) of the Penal Code (Cap 63 Laws of Kenya)**.
2. The particulars of the charge are that on the **19thDecember 2000**, at about 12.00 p.m., at the premises of Indo Africa Steel Limited, in Eastleigh within Nairobi Area, jointly with others not before court, being armed with a pistol, the appellant attacked and robbed **PC Patrick Okisai** of one pocket phone serial number C 526126 and at or immediately before or immediately after the time of such robbery, used actual violence to the said **PC Patrick Okisai**.
3. In the immediate aftermath of the robbery, **PC Patrick Okisai** gave chase to the robbers, who had also robbed Indo Africa Steel Limited of cash. According to his evidence, the robbers on the run did not get out of his sight and when a confrontation ensued, he shot one of them, the appellant, whereas the other robber who was armed with a pistol escaped. The pocket phone was recovered from the spot where the appellant fell after being shot. He was then arrested, and subsequently arraigned before the Chief Magistrate's Court at Makadara on the **27thDecember 2000**, where he took his plea on a charge of the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The appellant pleaded not guilty. Following trial, the learned magistrate found him guilty of robbery with violence contrary to **Section 296(2) of the Penal Code** and convicted him accordingly. The appellant was consequently sentenced to death.

4. The appellant, aggrieved by the conviction and sentence, filed an appeal to the High Court against his conviction and sentence. At the High Court, he contended that the circumstances prevailing at the time of the incident were not favourable to his positive identification as the person who committed the offence. The Appellant also contended that the charge sheet was defective because it did not describe the pistol as a dangerous or offensive weapon.
5. In finding that the evidence linking the appellant to the said incident in question was sufficient, the learned Judges (**Lesiit & Ochieng, JJ.**) upheld the decision of the trial magistrates' court and dismissed the appeal in its entirety. The appellant now brings this second appeal to this Court.
6. In the appellant's grounds of appeal in the Memorandum of Appeal dated the **3rd December 2004**, he urges this Court to find *inter alia*:
 1. **THAT** the learned Judges erred in law in holding that the offence of robbery with violence was proven against the appellant beyond reasonable doubt
 2. **THAT** the learned Judges erred in law in holding that the identification evidence was free from any possibility of error
 3. **THAT** the learned Judges erred in law by failing to address the missing links in the chain of chase and arrest
 4. **THAT** the learned Judges erred in law in shifting the burden of proof from the prosecution to the appellant
7. It is now timely to give a summary of the record before this Court before we embark on the issues at hand. It was the prosecution's case that on the material date, two persons entered the premises of Indo Africa Steel Limited situated at Eastleigh in Nairobi Area at around 12.00 p.m. posing as customers. Suddenly, one of the two men, armed with a pistol attacked another person, **Prosecution Witness 5, PC Patrick Okisai** (PC Okisai) who had been browsing posters as he listened to his pocket phone. According to **PC Okisai**, the Appellant, who he identified as one of the two men, then took the pocket phone and ordered him to lie down at a corner in the shop as he kept him under watch while the other person robbed the shop.
8. According to the testimony of **Prosecution Witness 1, Miteshi Dallas Vaya**, (Vaya) the manager of the shop in which the incident occurred, a man entered the shop at around midday or thereabouts, looking around but before he could probe him, a scuffle ensued at the entrance, distracting his attention. A man, who was armed with a gun, forced his way into the shop, pushing in and subduing another man to the ground, whereupon he was joined by the man who had entered the shop earlier. He was later to learn that the subdued man was a police officer. The armed man demanded money, and he obliged by giving him the sum of Kshs. 94,724/- following which the robber and the man, was by now evidently an accomplice from the chain of events joined him in escapement. According to him, he had not seen both men before, but he noted that the man accompanying the armed robber had holes in his ear lobes.
9. The **Prosecution Witness 2, Joseph Nyanduga Kech** (Kech) and **Prosecution Witness 3, Amos Ochieng Onyango**, (Onyango) both salesmen at the shop, told the trial court that two men entered the shop at around midday or thereabouts in turns, the first of them, the Appellant herein posing as a customer, but behaving unusually. A scuffle then ensued at the entrance, distracting their attention. A man, who was armed with a pistol, forced his way into the shop, pushing in and subduing another man to the ground, whereupon he was joined by the man who had entered the shop earlier. As he proceeded to rob the shop's cash sales, the Appellant guarded the man who had been subdued. He took a pocket radio from the police officer. After the armed robber took the money, he left accompanied by the man who had just undertaken the robbery. Immediately following the incident, the police officer pursued the man and it is then that they heard gunshots a few metres from the shop. They found the appellant on the ground bleeding, around 35 metres from the shop, having been shot and subdued by the police officer. In their testimony, they identified the appellant as the person who had accompanied the robber. They had both observed the appellant as to identify him later; they told the trial court that he kept any countervailing force as his colleague conducted the robbery; the appellant had his hand under his shirt as if he concealed something; the appellant took an item from the police officer. Moreover, although the appellant was unknown to them before this incident, **Onyango** told the court that he noted the holes in his ear lobes at the place of his shooting, consistent with the testimony of **Vaya** relating to

- the physical features of one of the robbers.
10. The evidence by **Prosecution Witness 4, PC Patrick Wasike**, (PC Wasike) a police officer attached to Pangani Police Station in the Nairobi Area was that on the material day of the incident, he had separated from his colleague, **PC Okisai**, whereupon he heard gunshots, and upon rushing to the scene of the shooting, found his colleague **PC Okisai** having shot the appellant. He saw **PC Okisai** pick up his pocket radio from the ground near the place where the Appellant had fallen.
 11. The PC Okisai, a police officer attached to Pangani Police Station in the Nairobi Area, told the trial court that on the material day at around midday, he and **PC Wasike** were on patrol duties around 1st Avenue Eastleigh in the Nairobi Area when they two separated. While **PC Wasike** went for healthcare at St Teresa's Dispensary, he waited outside, listening in on his pocket phone. While standing outside between the health facility and Indo Africa Steel Hardware Shop, two men confronted him, one armed with a pistol. He ordered him to get into the hardware, and PC Okisai, whose testimony was that it appeared the two men did not initially know he was a police officer since there are other categories of persons who use radio phones, obliged after a brief scuffle. His colleague watched over him; he took **PC Okisai's** pocket phone as the armed man proceeded to rob the shop manager. When the shop manager handed over the money to the armed man, he came over and asked his colleague that it was time to leave. Thereafter **PC Okisai** ordered them to stop, and gunshots ensued. **PC Okisai** shot one of them with his pistol, which was hidden at his back all the while during the encounter. According his testimony, the robber who was shot was the appellant. His testimony was consistent with the evidence tendered by **Vaya, Kech** and **Onyango**, all of whom were at the shop and the scene of the shoot out immediately thereafter.
 12. In his defence, **Yusuf Sainguran**, the appellant said in his sworn statement that on the material date, he had gone to attend to his business as usual at Garissa Lodge, Eastleigh, within Nairobi Area. He told the subordinate court that his business entailed sale of clothes; that on the **19th December 2000**, he was at his business premises until 12.35 p.m. when he left for his house for prayer and lunch. According to his testimony, suddenly while on 1st Avenue Eastleigh, he was shot and fell on the ground. He was then searched, arrested and later taken to Pangani Police Station. He was hospitalized at Kenyatta National Hospital on the same day, and discharged therefrom on the third day. Following preliminary procedures during his detention, he was charged in court on the 27th December 2000.
 13. It is the totality of the prosecution's and the defence's evidence upon which the subordinate court found the appellant guilty of robbery with violence contrary to **Section 296(2) of the Penal Code**. The appellant appealed the judgment and sentence in the High Court. The High Court, having warned itself of its duty as the first appellate court to treat the evidence tendered by the prosecution and the defence to a fresh and exhaustive scrutiny, upheld the conviction and sentence as proper. An appeal now lies before us.
 14. This appeal came up for hearing before us on the 30th September 2013, and subsequently on the 11th February 2014. At the hearing, the appellant was represented by **Mr. Elvis Obok**, whereas the State was represented by **Ms. F. Njeru, Senior Public Prosecution Counsel**. At the hearing, learned counsel for the appellant confined himself mainly to the grounds 1, 2, 3 and 4 in the Memorandum of Appeal dated the **3rd December 2001**.
 15. Counsel for the appellant **Mr. Obok** submitted that the prosecution's case did not provide adequate evidence to support the identification of the appellant. He told this Court that by the prosecution's own evidence that the appellant's identification was impugned as **Vaya** had told the court that he was in shock as to be unable to identify the robbers. In support of this argument, **Mr. Obok** further submitted that the prosecution, through **Kech**, had further purported to identify the appellant in court. Learned counsel submitted that the physical feature with which the prosecution sought to identify the appellant was not adequate as it was only incidental; that **Kech** did not refer to the ear lobes; and moreover, that the physical feature of holes in the ear lobes was not distinctive as many people are similarly featured. On these bases, counsel submitted that a re-evaluation of the evidence by the High Court should have led to a setting aside of the conviction.
 16. Finally, counsel for the appellant argued that the testimony upon which the appellant had been convicted was in sum beset by serious contradictions. He said that **Onyango** referred to a robber veiled by a hat, whereas **Kech** did not; that **Onyango** recognized and referred to the feature of holes in the appellant's ear lobes, whereas **Kech** did not; and that the testimony of **Kech** suggested

that the appellant did not have the phone that he is said to have stolen or taken from the police officer.

17. Senior Public Prosecuting Counsel, **Ms. Njeru**, in opposing the appeal, submitted that the evidence in the lower court was very compelling. She told this Court that the issue of identification had been unsuccessfully raised in the High Court, and substantially considered during the first appeal; that the offence had taken place at midday in broad day light; that the evidence of **Kech** and **PC Okisai** was adequate for a positive identification of the appellant; that it is Prosecution Witness 1, **Vaya** who introduced, whereas **Onyango** had corroborated, the aspect of the distinctive physical feature of the ear lobes of the person who had accompanied the armed robber; that **Onyango** testified that the appellant was the said person at the scene of the robbery, having been the one who contained **PC Okisai**, and thus it could not be a case of mistaken identity. **Ms. Njeru** finally submitted that **PC Wasike** had told the lower court that he saw **PC Okisai** pick up a pocket phone from the ground on which the appellant had fallen. She told this Court that all the evidence was placed the appellant at the scene of the crime.
18. We have considered these submissions and carefully read the record of appeal. This being a second appeal, we will address in the main points of law as required by **section 361(1)** of the **Criminal Procedure Code** and our own decision in **Karingo v Republic [1982] KLR 213**, wherein we stated that:

“A second appeal must be confined to points of law and the Court of Appeal will not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence.”

19. It now remains to determine that the appellant’s argument turns on the issue of identification, upon which counsel for the appellant confined himself in his submissions. As he did before the High Court, he also raised the issue that he ought to have been charged with the offence of theft of a pocket radio rather than robbery with violence. He did not pursue that matter which he had argued before the High Court under the claim of a defective charge. We also note that it is that question of identification that the High Court had addressed itself to during the first appeal. Before re-evaluating the evidence before it, as required by law, the High Court had put the question thus:

“The question is this, was there a possibility of mistaken identity, in the circumstances prevailing? If there was any possibility of an error, the appellant would be entitled to an acquittal.”

20. The High Court, following a re-evaluation of the evidence came to a concurrent finding of fact as to identification of the appellant as one of the robbers in the incident at hand. The judgment of the High Court elaborately assessed the evidence of key witnesses including **Kech**, **Onyango**, and **PC Okisai**, all of whose testimony implicated the appellant. So did the High Court evaluate the appellant’s defence, as follows:

“First, there is no doubt that PW5 found himself in a tight corner, so to speak. He was in the hands of the robbers, one of whom was armed with a pistol. They pushed him into the shop without giving him the chance to reach for his gun. In other words, he was taken by surprise. That notwithstanding, PW5 does not appear to have been stricken with terror and confusion. To our minds, he definitely kept his wits about him. He produced his pocket radio, which he handed over to the robbers. PW5 testified that PW5 raised his jacket and showed it to the appellant, saying that he had nothing else. In our assessment, PW5 definitely kept a cool head, even though in a difficult situation.

PW2 testified that the appellant stood in front of PW5, as he was guarding the latter. In the circumstances, there would have been a good opportunity for the witness (PW5) to see the appellant.

Also, immediately after the robbery PW5 pursued the robbers. And in his evidence, he said that he did not lose sight of the Appellant. There is absolutely no reason to doubt that piece of evidence....

....

We say so because the evidence of PW2 and PW5 was sufficient, for purposes of founding a positive identification.

That identification, coupled with the recovery of PW5s pocket phone, near the spot where the appellant was felled by PW5's gun, puts the appellant squarely on the scene. And the appellant himself also admitted that he was in that general area, at the time of the robbery. His defence, however, is that he was an innocent bystander. Having held, as we have done here, that the appellant was positively identified as one of the robbers, his defence was rightly rejected by the trial court.

21. This Court has held in Wamunga vs. Republic (1989) KLR 424 that:

“...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

22. The record before us suggests that the trial court exercised due care in its evaluation of the evidence before it. It based its finding on the evidence of **Kech, Onyango** and **PC Okisai**. The credibility of these witnesses has not been impugned, as to doubt these findings.

23. The record of appeal further suggests that the superior court below exercised its legal obligation to re-evaluate the evidence. Its findings suggest that it exercised care as to the substance of the evidence on identification of the appellant on the one hand and the appellant's defence on the other hand.

24. In the result, and for the reasons we have endeavoured to give, the appellant's appeal lacks merit, and it is accordingly dismissed. It is so ordered.

DATED and delivered at Nairobi this 4th day of April, 2014.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR