



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & GATEMBU, JJ.A) CRIMINAL APPEAL NO. 360 OF 2012

BETWEEN

EVANS KALO CALLOS APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi, (Khaminwa & Warsame, JJ) dated 28th May, 2012

in

HC. CR.A. 795 OF 2007

JUDGMENT OF THE COURT

1. The appellant, Evans Kalo alias Callos, was on 10th December 2007 convicted by the Magistrate’s Court at Nairobi on three counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code and for possession of a firearm and ammunition without a firearm certificate contrary to section 4(2)(a) of the Firearms Act. He was sentenced to death for each count of the offence of robbery with violence and to imprisonment for seven years for possession of a firearm and a further seven years for possession of ammunition without a firearms certificate.

2. His appeal against the convictions was dismissed in its entirety by the High Court on 28th May 2012 (J. M. Khaminwa, M. Warsame, JJ). The death sentence on count I was upheld while the death sentences on counts II and IV and the sentences of imprisonment on counts IV and VI were held in abeyance.

3. Dissatisfied, the appellant has in this second appeal, which under section 361 of the Criminal Procedure Code we can entertain only on grounds of law, challenged his conviction and the decision of the High Court rejecting his appeal.

Background

4. On 7th November 2005 robbers armed with dangerous weapons, namely AK rifles and pistols, laid siege on the Westlands Branch of Bank of India in Nairobi. They took the bank personnel hostage and forced them to open the bank vault from where they stole cash denominated in Kenya Shillings and US dollars in the amount of Kshs. 4,286,758.10. The premises were under surveillance through closed circuit television (CCTV).
5. Cornelius Achieng Owour (PW1) was a cashier at the Branch. Together with the branch manager (one Eswadalaba who at the time of trial had moved back to India) were forced by the armed robbers who had disguised their appearance by covering themselves and were clad in bui bui and Nigerian dress to open the safe. From the photographs printed out of the CCTV recording, Cornelius was able to identify the branch manager and the clothing worn by the robbers.
6. Beatrice Odide (PW2) was a tea girl at the Branch. She reported to work at 9.00 am on 7th November 2005. One of the armed robbers threatened her with a gun and demanded keys to the strong room from her. She did not have the keys. She was hit on the head. The cashier, who had the key, (PW1) arrived later. Beatrice and other employees of the bank were locked up in the kitchen. She described the attire worn by the robbers and was able, when shown photographs printed from the CCTV recording, to identify the branch manager as well as the robbers, whose faces were covered, based on the clothes they wore.
7. John Karanja Ngugi (PW3) was a long serving employee of the bank at the Westlands Branch. On the morning of 7th November 2005, he was outside the Bank waiting for it to open. When the door was opened, he heard a bang and two men entered the bank. He was pulled into a corridor and a gun was brandished. He lay on the floor from where he heard the robbers direct the manager, who had one key to the strong room, to open it. As the manager had only one key, they waited for the second key holder, the cashier, to arrive after which the safe was opened. John and other staff were then herded into the toilet. John was able to identify the clothing worn by the robbers from the photographs extracted from the CCTV. He did not see the faces of the robbers as they were disguised. According to him, the branch manager and the corridors of the bank were visible from the photographs.
8. Senior Sargent Benjamin Waliko (PW7) a photographer based at the police headquarters received a recorded compact disc, of the CCTV recovered from the bank from the scene of crime police, the Flying Squad, Pangani with a request to produce the contents of the compact disc (the recorded image) from which he reproduced and printed 13 images and handed them over to the investigating officer.
9. Police Constable Peterson Amimo (PW4) the investigating officer got a recorded compact disc of the CCTV captured during the robbery on 7th November 2005 from the installers who fixed the CCTV at the Branch. He also got a coloured print out from the compact disc from which he recognized the face of the appellant with whom he had previously dealt in several robbery cases.
10. Subsequently on 24th December 2006, Constable Amimo travelled to the appellant's home in Vihiga accompanied by Police Constable Jackson Ngure (PW5) in a bid to trail the appellant. Upon their arrival they found the appellant's son in the house. Upon searching the appellant's house they recovered a pistol and ammunition.
11. Lawrence Thiwa (PW6) a fire arm examiner produced a report compiled by another firearms examiner one Mr. Lindsay Kipkemboi in respect of the firearm and ammunition recovered from the appellant's house in which he opined that the pistol was in good working order and was capable of being fired and that the rounds of ammunition recovered were successfully test fired.
12. The appellant in his defence stated that on the date of the alleged robbery he was not in Nairobi; that the investigating officer Police Constable Peterson Amimo had a grudge and had threatened to kill him; and that Police Constable Peterson Amimo was holding on to his documents that were

ordered released in a criminal case in which he was acquitted.

13. After reviewing the evidence, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant on all counts except count III and accordingly convicted him. The High Court, as already mentioned, after reviewing the evidence upheld the said convictions.

The appeal and submissions by counsel

14. The appellants lodged his appeal to this court firstly vide home-made petition of appeal lodged herein on the 8th June, 2012, and thereafter supplemented by supplementary grounds of appeal lodged herein on 23rd November, 2012 by the appellant himself followed by those supplemented by learned counsel A. O. Oyalo on the appellants behalf lodged on 7th May, 2014. The appellant's complaints are that photographic prints were improperly admitted and used in evidence contrary to section 78 of the Evidence Act; that the lower courts failed to have regard to the fact that PW 4, the only witness who told the court that the appellant was captured in CCTV which had been installed at the locus in quo, had a long standing quarrel with the appellant; that the appellant's son who allegedly witnessed the search at the appellant's house was not called as a witness and the handwriting and signatures of persons who wrote and signed the search inventory were not proved as required under section 70 of the Evidence Act; that essential witnesses namely Sargent Mathew Ndirangu, the person who installed the CCTV camera at the locus in quo and the Branch Manager of the bank were not called to testify; the High Court did not analyze and re-evaluate the evidence as the law requires; the burden of proof was shifted to the appellant; the prosecution evidence was replete with contradiction, discrepancies and inconsistencies despite which the appellant was convicted; none of the witnesses identified the appellant; the charge was invalid because unrelated offences were charged in the same charge sheet contrary to section 135(1) of the Criminal Procedure Code; the appellant's alibi defence was not considered; and that the appellant's home was wrongly searched without a search warrant authorizing the search.
15. At the hearing of the appeal before us, Mr. A. O. Oyalo learned counsel for the appellant submitted that the charge is invalid; the entire trial was a nullity; the offences under counts 1 to 4 were allegedly committed in Nairobi in November 2005 while the offences under counts 5 and 6 were allegedly committed in western Kenya in December 2006; there is no connection between the offences allegedly committed in November 2005 and those allegedly committed in December 2006 and the charge sheet is therefore invalid. In support counsel referred us to Section 135(1) of Criminal Procedure Code and the case of **R vs. Newland [1988] 2 All. E. R 891.**
16. Counsel further submitted that the trial magistrate erred in allowing inadmissible evidence comprising photographs to be used at the trial without a certificate; section 78 of the Evidence Act was therefore not complied with; PW7 produced the photographs in evidence after all other prosecution witnesses had already testified; PW7 testified that he did not use the photographs for purposes of identification and the pictures should have been used throughout the trial; the finding by the trial court that the appellant was one of the robbers is not supported by any evidence.
17. Citing the decision of this Court in the case of **Okale v R [1965] E A 555**, counsel submitted that as none of the witnesses identified the appellant, the trial magistrate could not base the conviction on his own theory or reasoning not canvassed during the evidence or in counsel's submissions; the judge based his decision on his own examination of the photographs yet none of the witnesses said they identified the appellant; PW 7 had no authority to produce the photographs; the photographs were not properly processed under section 78 of the Evidence Act and that the CCTV was not played in court.
18. According to Mr. Oyalo, by taking the position that the appellant had not challenged the prosecution evidence particularly the photographs produced by PW 7, the trial magistrate thereby wrongly shifted the burden of proof to the appellant. In that regard, counsel also relied on **Okale v R** (supra).

19. Relying on the decision of this Court in **Dickson Mwaniki M'obici v R Criminal Appeal No. 78 of 2006** counsel further submitted that the appellant put forward an alibi, which was not considered and that notwithstanding that alibi defence, the burden of proving the guilt of the appellant remained with the prosecution and never shifted to the appellant.
20. It was also the appellant's case that essential witnesses were not called to testify. According to Mr. Oyalo, the bank manager should have been called to tell the court if indeed a CCTV camera had been installed on the premises; the experts who removed the compact disc should also have been called, as should have Sargent Ndirangu who forwarded the exhibit memo to PW7; as their evidence was necessary in order "for a proper chain of evidence to be established" [**Gabriel Kamau Njoroge v R(1982-88)1 KAR 1134**]; that absent their evidence there was a break or gap in the chain of evidence.
21. The appellant further complained that the High Court did not discharge its duty of reviewing and re-evaluating the evidence; had the High Court done so, it would have noted that the trial court relied on an inventory of items recovered from the appellant's house without proof of the handwriting and signatures as required under section 70 of the Evidence Act; the allegation that PW4 had an interest should have been explored; the High Court in violation of Section 57 of the Evidence Act made reference to and relied on inadmissible evidence of previous criminal charges against the appellant.
22. Opposing the appeal, Mr. C. O. Orinda (ADPP) learned counsel for the respondent submitted that this being a second appeal, only matters of law should be considered and new issues should not be raised at this stage; out of the 7 witnesses who testified before the trial court three, namely PW1, 2 and 3 were all employees of the bank; it was difficult, due to the manner in which the robbers had dressed and disguised themselves, for the employees to have identified the robbers; PW 4, 5, 6 and 7 are police officers who were pursuing evidence captured in the CCTV; that there would be no identification without the CCTV; PW 4 was not dealing with a new suspect; he knew the appellant and that is how he led the team to where the appellant was.
23. According to Mr. C. O. Orinda, the items recovered from the search conducted in Vihiga, namely the driving licence and the application for duplicate licence, clearly linked the appellant to the firearm and ammunition that was recovered and to the house where they were recovered; the appellant was identified from the CCTV recording by PW4 who then pursued the appellant to his rural home.
24. As to the complaint that the charge sheet is defective, counsel submitted that guns are a common feature and that the charges form one series of a transaction; the facts link the appellant with CCTV and his arrest on a subsequent date; there is no indication that the appellant was in any way prejudiced as the plea was properly taken and the appellant knew what he was pleading to.
25. Regarding the photographs counsel submitted that what the witnesses saw was the clothing worn by the robbers as opposed to their faces; the witnesses were clear on the manner of clothing worn by the robbers; the purpose of the photographs was not for identification of the robbers but identification of the clothes; the photographs were marked for identification at the onset and later produced by PW 7; the list of exhibits clearly shows that photographs were part of the exhibits and the same were shown to PW 1,2 and 3 during the trial and were properly admitted into evidence; and that it is clear from the evidence of PW 4 that he knew the appellant.
26. Counsel further submitted that an alibi can be discounted by calling other evidence if the evidence of the prosecution does not adequately address it; in this case, the clear image of the appellant as captured on CCTV and the items recovered from the appellant's home in Vihiga connected the appellant to the crimes and the burden of proof was not shifted; the absence of the branch manager, having left the country, was explained and that calling additional witnesses would not have added any value to the prosecution's case and the appellant suffered no prejudice; the evidence tendered against the appellant was overwhelming and that the conviction of the appellant

is safe and the same should be upheld.

Determination

27. We have considered the appeal and the submissions by learned counsel. The issues that require determination are first; whether the appellant was positively identified and whether photographic evidence was improperly admitted. Secondly, whether the prosecution failed to call essential witnesses. Third, whether the charge sheet was defective on account of combining unrelated offences. Fourth, whether the signatures and handwriting of the persons who wrote and signed the inventory of the items recovered from the appellant's house were proved Fifth, whether the appellant's defence was considered, and sixth, whether the High Court as the first appellate court reviewed and re-evaluated the evidence placed before it?

28. We begin with the question whether the appellant was positively identified and whether photographic evidence was improperly admitted. In their testimony before the trial court, PW1, PW2 and PW3 who were employees of the bank who witnessed the robbery on 7th November 2005 described in detail the manner in which the robbers were dressed. On being shown the photographs produced from the CCTV footage, the witnesses were able to recognize the clothes worn by the persons captured in those images as the clothes that the robbers wore during the raid. The witnesses also confirmed that the photographs represented the scene of the crime. Apart from recognizing the bank manager in the photographs, they also recognized the bank corridors at the bank premises leaving no doubt that the images were taken at the scene of crime. PW 3, a long serving employee of the bank, was aware there was CCTV installed in the premises.

29. PW 4 who knew the appellant before trailed him to Vihiga District on the basis that he "had featured in a CCTV camera..." His testimony was that he got a print out from the compact disc showing the face of the appellant. That testimony was supported by the testimony of PW 1 who stated in her evidence when shown photographs in court that

"these photos show their faces."

30. After reviewing the evidence the learned trial magistrate found as a fact that:

"There was CCTV in the premises. PW 1, PW 4, PW3 were able to identify the photos when they were printed as of those who robbed them by the clothes they wore."

And later in the judgment the trial magistrate had this to say:

"The issue before the court is whether the prosecution has proved their case against the accused in respect of the four counts of robbery. PW1, PW2, PW3 all testified that the robbers who were disguised threatened them with guns as they led them to the place where the safe was. PW1 opened the safe with the manager and Kshs. 4,286,758.10 was stolen. PW1 identified the photos taken by CCTV as being of those who robbed them. He identified the clothes and the bank corridors."

PW2 and PW3 were each robbed of their mobiles. They identified the clothes the robbers wore from the photos. PW7 recovered the compact CD from the scene of crime and processed the photos 13 images were processed."

From the image produced in Court, it is clear that accused was one of the robbers."

31. There can be no doubt, as the learned editors of **Archbold, Criminal Pleading, Evidence and Practice 2012** observe at paragraph 14-28 that ***"the recognition of clothing can be a valuable aid to identification."*** PW 1, 2 and 3 all recognized the clothing of the robbers. PW 4, who knew the appellant before, in turn gave evidence that he recognized or identified the appellant from photographs printed from the CCTV recording. PW 4 testified under cross examination that:

“You were captured in the CCTV. I knew you very well. I had dealt with you in several robbery cases. We placed in the paper as a wanted person.”

32. The trial magistrate satisfied himself that the image in the photographs was that of the appellant. The identification of the appellant was by PW 4 and not by the trial court. As the learned editors of Archbold state:

“There is no effective distinction in principle between the evidence of a man who looks at a video tape, or a security officer who sees the incident on a security monitor, and that of a bystander who observes primary facts. Thus a witness may give evidence that he recognizes or identifies a person from his viewing of a video recording of the alleged offence. In such circumstances, the tribunal of fact has to apply the Turnbull directions having regard not only to the witness, but also to the position of the camera, its opportunity for viewing that which it depicts, and to the nature and clarity of the film or recording.”

33. Having found PW4 to have been a witness of truth and having found as a fact that PW4 identified the appellant by recognition from the photograph, the learned trial magistrate was in our view right to base his conviction on that finding.

34. There is also the complaint that the photographs that were relied upon were inadmissible under section 78 of the Evidence Act. The photographs in question were marked for identification from the onset of the prosecution case and were referred to by the prosecution witnesses throughout the trial. The court ordered that the appellant be provided with the photographs after the testimony of PW2. The photographs were formally produced as exhibits by PW 7 Benjamin Waliko a photographer based at the police Headquarters. He testified that he received a compact recording recovered from the CCTV at the scene of crime from which he produced the prints.

35. Section 78 of the Evidence Act provides:

“78. [Photographic evidence—admissibility of certificate]

- 1. In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.***
- 2. The court may presume that the signature to any such certificate is genuine.***
- 3. When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.”***

36. No objection was taken during or at any stage of the trial or subsequently to either the reference to the photographs by the witnesses or to the production of the photographs as evidence. There is nothing in section 78 of the Evidence Act that prevented the trial court from admitting the photographs into evidence. There is accordingly no merit in the appellant’s complaint that photographic evidence was improperly admitted into evidence.

37. The next matter for our consideration is whether the prosecution failed to call essential witnesses. According to the appellant, the bank manager where the robbery occurred, the installer of the CCTV camera at the bank premises and Sargent Mathew Ndirangu should have been called to testify. The case of **Bukenya and others v Uganda [1972] E. A. 549** cited to us by counsel for the appellant stands for the proposition that though the prosecution has a discretion to decide who are the material witnesses and whom to call, there is a duty on the prosecution to call or make available all witnesses necessary to establish the truth even though their evidence may be

inconsistent. The court itself has a duty to call any person whose evidence appears essential to the just decision of the case and if the prosecution calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution.

38. In our view, the evidence called by the prosecution in the present case was adequate to prove the charges. Having called three employees of the bank who witnessed the robbery, it was not necessary to call the manager or the installer of the CCTV camera whose unavailability was in any event explained. According to the testimony of PW7 Benjamin Waliko, he received the compact recording for purposes of printing from Flying Squad officer Sergeant Mathew Ndirangu who retrieved it from the scene of crime. The exhibit memo form under cover of which the recorded CD was forwarded to PW7 emanating from Sergeant Mathew Ndirangu was produced as an exhibit before the trial court without objection. It was therefore not necessary in our view to call Sergeant Ndirangu. Consequently, there is no merit in the appellant's complaint that essential witnesses were not called.
39. As regards the question whether the charge sheet was defective on account of combining unrelated offences, the contention by the appellant is that there is no nexus between the offences of robbery committed on the 7th November 2005 and the offences of possession of firearm and ammunitions committed on 24th December 2006.
40. Section 135 (1) of the Criminal Procedure Code provides that any offences may be charged together in the same charge sheet if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or similar character. Under section 135 (3) of the Criminal Procedure Code the trial court can either before trial or at any stage of the trial direct separate trials for any one or more offences charged if it is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or if for any other reason it is desirable to direct that the person be tried separately.
41. The English Court of Appeal decision in **R vs. Newland [1988] 2 All E R 891** cited to us by counsel for the appellant was concerned with the power to sever an indictment and to order separate trials. The court held that that power applies only to valid indictments and that in ordering separate trials where the indictment was defective because of misjoinder of disparate offences the judge had acted without jurisdiction. In that case the appellant was charged with possession and dealing in drugs on 28th November 1986 under the Misuse of Drugs Act 1971. He was also charged under the same charge sheet with the offence of assault of police officers on 18th December 1986 when police officers were called to a disturbance at an Indian Restaurant in which the appellant was not involved. The appellant wrongly interfered with the police and assaulted the police officers. As the court in that case observed, "*the drug offences and the assault offences were entirely unconnected.*"
42. The circumstances in the present case are different. The pursuit of the appellant in connection with the offence of robbery led to the establishment of the facts on the basis of which the charge for possession of firearm and ammunition was based. The offences involved use and possession of firearm thereby giving the offences a similar character for purposes of Section 135 (1) of the Criminal Procedure Code. Besides that, there was no suggestion at any stage of the trial that the appellant was embarrassed or prejudiced by reason of the offences having been charged under the same charge sheet. We are therefore not persuaded that the proceedings and findings of the lower courts were vitiated by a defective charge sheet.
43. As to the question whether the signatures and handwriting of the persons who wrote and signed the inventory of the items recovered from the appellant's house were proved, Section 70 of the Evidence Act provides that:

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in

that person's handwriting must be proved to be in his handwriting."

44. PW 4 Police Constable Peterson Amimo testified that he prepared the inventory in question. He produced it as an exhibit as the maker. His evidence in that regard was not challenged and was supported by PW5 Police constable Jackson Ngure who was present during the search. There was no objection to the production of the inventory or any suggestion that it was not under his handwriting. We are not persuaded that section 70 of the Evidence Act was violated.

45. Finally there was the complaint that the appellant's defence was not considered and that the High Court did not review and re-evaluate the evidence. It is the duty of the prosecution to prove the guilt of an accused person and if at the end of the whole case there is reasonable doubt created by the evidence given by either the prosecution or the defence as to the guilt of the accused, then the prosecution has not made out the case and the accused is entitled to an acquittal. See Woolmington v DPP [1935] All E R 1. Accordingly, the lower courts were under a duty, to consider the evidence tendered by the prosecution and by the appellant in his defence as a whole and to determine whether at the end, any reasonable doubt was raised as to the guilt of the appellant.

46. We have not found anything in the judgment of the trial court indicative of a shifting of the burden of proof to the appellant. We think the trial court discharged its burden of considering the evidence as a whole before convicting the appellant. On its part the High Court reviewed and re-evaluated the matter and arrived at its own conclusions. We are satisfied that it discharged its duty of independently and exhaustively analyzing and re-evaluating the evidence before arriving at its own independent conclusions. See Okeno v R [1972] EA 32.

47. The upshot of the foregoing is that there is no merit in the appeal. It is dismissed in its entirety.

Dated and delivered at Nairobi this 17th day of October, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

