



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 470 of 2010

JAMAL ABDULAHI OSMAN ..... APPELLANT

MOHAMED ABDIKADIR HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Meru*

*(Lesiit & Kasango, JJ.) dated 29<sup>th</sup> October, 2010*

*in*

*H. C. Cr. A. 223 of 2009)*

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**JUDGMENT OF THE COURT**

*Jamal Abdulahi Osman* and *Mohamed Abdikadir Hassan*, the two appellants herein, were charged together with a third accused in the Senior Resident Magistrate's Court at Wajir with one count of robbery with violence contrary to **section 296 (2)** of the Penal Code. The two appellants herein were also charged with another count of assault in resisting arrest contrary to **section 253 (a)** of the Penal Code while the first appellant faced a third count of handling stolen property contrary to **section 322 (2)** of the Penal Code.

The facts of the offence in count one were that on 1<sup>st</sup> February, 2009 at around 4:00 p.m at Wajir District within the North Eastern Province, jointly robbed Abdiwelli Ahmed of cash money Kshs.100,000/= and USD 1,500/= and immediately before and after the time of such robbery wounded the said Abdiwelli Ahmed. The facts of the offence in count two were that on 1<sup>st</sup> February, 2009 at around 4:00 pm at Wajir town in Wajir District within the North Eastern Province, jointly assaulted Abdirahman Abdullahi with intent to resist or to prevent the lawful apprehension or detained himself for the offence of robbery with violence. Count three concerned handling stolen goods where on 4<sup>th</sup> February, 2009 at around 4:30 p.m at Jogbaru area in Wajir East District within North Eastern Province, otherwise and in the course of stealing dishonestly received cash money Kshs.11,000/= in one thousand denomination knowing or having reason to believe them to be stolen goods.

The prosecution called seven witnesses while the third accused Siyad Ali Gurre called two witnesses and after hearing their evidence as well as the sworn evidence of the appellants, the learned Senior Resident Magistrate (Mr. A. Inguta) found the first appellant guilty of the main count of robbery with violence and

sentenced him to death. The second appellant was convicted in the main count of robbery with violence and in a minor charge of assault. He was sentenced to death in the first count and to six month's imprisonment in the second count. Their co-accused, Siyad Ali Gurre was acquitted. Their first appeal to the High Court (Lesiit & Kasango, JJ.) was dismissed on 29<sup>th</sup> October, 2010, hence this second and possibly final appeal. Being dissatisfied with the dismissal of his appeal by the High Court, the appellants now come to this Court by way of second appeal. The appeal came up for hearing before us on 30<sup>th</sup> October, 2010 when Mr. S. K. Njuguna appeared for the appellants while Mr. Kaigai (Assistant Director of Public Prosecution) appeared for the State.

The evidence adduced by the prosecution is that on 1<sup>st</sup> February, 2009 at about 8:00 a.m, the first accused walked into Dahabshir bureau near Zafanana booking office where he met Abdiwelli Ahmed Sheikh (PW 1) (Abdiwelli) the owner of the bureau. The appellant asked Abdiwelli if his name was on the list of money recipients and his answer was in the negative. Abdiwelli testified that he knew the appellant very well having gone to the same primary school in Mandera. The appellant left and returned at about 4:00 p.m in company of the second appellant and upon making similar inquiries as to whether his name was on the list of recipients he again received a response in the negative. At that moment the second appellant drew a knife and stabbed Abdiwelli between the small finger and the ring finger. The first appellant also drew a knife and tried to stab Abdiwelli and in holding his hand in defence his right hand got cut. The first and second appellants robbed him off US \$1,500/= and Kshs.100,000/=. Upon raising alarm, members of the public responded, including Abdirahman Abdullahi (Abdirahman) (PW 2) who met the second appellant exiting. In an attempt to make his way out, the second appellant attacked Abdirahman, injuring him, but was nabbed at the scene of crime. The first accused escaped. Abdiwelli and Abdirahman were taken to Wajir Police Station where they lodged their reports and were later treated at Wajir District Hospital where Abdiwelli saw the second accused who apparently was there to seek treatment for the injuries suffered. Abdirahman (PW 2) testified that on the material day he saw three people known to him entering Dahabshir money transfer office. The first and second appellant got inside the bureau while the third accused remained outside. When he heard commotion from the shop he dashed to see only to find the door locked. He looked through the window and saw the first and second appellants wielding knives. When he went to the door, the second accused confronted him and cut him on the hand and later escaped. Abdullahi Adan Shale (PW 3) also present at the scene testified that he heard Abdiwelli screaming and on rushing to the scene he saw first and second accused leaving Abdiwelli's shop wielding knives. He also saw Abdiwelli and Abdirahman bleeding profusely. Mohamed Adow Ali (PW 4) (Mohamed) a taxi driver was called by one Rukia and was requested by the third accused to transport the second appellant to hospital.

Dr. Sankhai Marwa (PW 5) attached to Wajir District Hospital produced P3 Forms for Abdiwelli and Abdirahman which showed that Abdiwelli had suffered cuts on both hands while Abdirahman had suffered cuts on the left hand. Inspector of Police Mr. Kibe (PW 6) attached to Wajir Police Station testified that he conducted the identification parade where all the witnesses positively identified the accused. Lastly, PC Nehemiah Wesonga (PW 7) attached to Wajir Police Station was the investigating officer who summoned the witness statements and produced Kshs.11,0000/= recovered from the first accused suspected to have been stolen.

When put on their defence, the first appellant made a sworn statement that he was not in Wajir at the material time and was arrested when he went to visit the third accused who was being held at Wajir Police Station. The second appellant's defence was that he arrived from Basir on the day of the incident at about 3:30 p.m and had come to visit his uncle. As he was going to the mosque he was mistaken for a robber.

The first appellant filed supplementary grounds of appeal dated 1<sup>st</sup> October, 2012 while the second appellant filed home-made grounds of appeal and supplementary grounds of appeal both filed on 1<sup>st</sup> October, 2012. Additionally, Mr. S. K. Njuguna, learned counsel acting for both first and second appellants, filed a supplementary memorandum of appeal on 26<sup>th</sup> October, 2012. The supplementary memorandum of appeal filed by the advocate for the appellants mainly complained that the court relied on the evidence of PW 1 and PW 2 even after being declared hostile witnesses and that their evidence required corroboration. They also alleged that the appellant was not given an opportunity to cross

examine PW 1 and PW 2 after they were recalled by prosecution and that the name of the interpreter during trial was not recorded. They submitted that the learned judges failed to re-evaluate the testimony of the appellant adding that the identification of the appellants was flawed. The second appellant submitted that judges erred in law in failing to appreciate that the case against him was that of mistaken identity.

Being a second appeal, only points of law fall for the consideration of this Court – see **section 361 (1)** of the Criminal Procedure Code. ***Njoroge -vs- Republic (1982) KLR 388***, this at page 389 held:

***“...On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence...” See *M’Riungu -vs- Republic (1983) KLR 455*.***

Mr. S. K. Njuguna, learned counsel for the appellants, submitted that after the Magistrate's court declared Abdiwelli and Abdirahman hostile witnesses their testimony was useless and unreliable making reference to the case of ***Abel Monari Nyanamba & 4 Others vs. Republic (CA) C A Cri. Appeal No. 86 of 1994, Nairobi (Unreported)*** and the case of ***Malema vs. Republic [2007] KLR pg. 15***. Counsel submitted that there was no corroboration of the evidence of PW 1 and PW 2 and therefore no real evidence was adduced. He added that there was contradiction in evidence for instance in terms of the money alleged to have been stolen which were in US \$ and Kshs. He submitted that the complainant testified that he saw the first appellant in hospital when it was actually the second appellant. On the issue of identification, the advocate submitted that PW 1 said he knew the first appellant, while at the Identification Parade he failed to identify him. He further added that the case of the second appellant was that of mistaken identity. He prayed that the appeal be allowed.

Mr. Kaigai, Assistant Director of Public Prosecution, did not support the conviction arguing that the case does not meet the legal threshold. He added that PW 1 and PW 2 were declared hostile and therefore the quality of their evidence was in doubt and that the appellants were not allowed to cross examine the hostile witnesses. He argued that identification parade did not follow the proper procedure. He urged the court to order a re-trial arguing that as the case was not old, witnesses would be available.

Our reading of the evidence on record, and with great respect to both the courts below, we are of the view that the identification of the appellants as robbers was questionable for the following reasons. Both appellants had an *alibi* - that they were elsewhere at the time of the incident. From the testimony of the first appellant, he stated that he had travelled to Griftu to sell camel and stayed there up to 3<sup>rd</sup> February, 2009. He was arrested after he went to visit his cousin Siyad Ali Gurreh and was on his way to the mosque when he was confronted by three police officers and arrested. While the second appellant testified that his was a case of mistaken identity as he was accosted when he was going to the mosque. It is our considered opinion, the lower courts did not take proper consideration of the appellants *alibi* and the same was not displaced by the prosecution. This raises reasonable doubt as to the involvement of the appellants in the crimes charged. In the case of ***Sekitoleko vs Uganda [1967] EA 531*** a case which has been applied before by this Court, the Chief Justice Sir Udo Udoma had this to say in relation to *alibi* evidence:

***“(i) as a general rule of law the burden on the prosecution of proving guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R. V. Johnson [1961] 3 All E.A. 969 applied; Leonard Aniseth V. Republic [1963] E.A. 206 followed);***

***(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself.”***

In our view therefore the *alibi* pleaded by the appellants who had no burden to discharge it was not displaced by the prosecution and it raises reasonable doubts as to their involvement in the crime charged.

On the issue of identification, it emerged from the evidence that the first appellant escaped from the scene of crime only to be arrested a few days later and taken to the police station. We do not see a direct link

between the first appellant and the robbery incident and there was no evidence to show that the Kshs.11,000/= recovered from his sister's house belonged to Abdiwelli. There could also have been a probability of mistaken identity in respect of the second appellant. Abdirahman during cross-examination said that there was confrontation at the scene and there were also many people disembarking from the bus. This was corroborated by Abdullahi Adan who also said that after Abdiwelli raised alarm many people gathered. In the commotion described it is possible the second appellant could have fallen victim of mistaken identity.

On the issue of identification parade the first appellant told the court that he was walked through the corridor and a police officer rushed with some witnesses pointing fingers at him. He added that the officer who was conducting the parade put him next to a window and that is how he was identified. In cross-examination he said:

***“Yes I was removed from where I was and forced into another position in parade line”.***

This clearly casts doubt on the whole identification parade process and the benefit should be given to the appellants. The judgment of the High Court appears to us inconclusive on the essential aspects of identification. We agree with Mr. Kaigai that this case did not meet the legal threshold of proof and issues raised were not given proper determination. We have re-evaluated the evidence ourselves and agree with both Mr. Kaigai and Mr. S. K. Njuguna learned counsel for the appellants, that this is a fit case for us to interfere with the decision of the two courts below. We allow the appeal, quash the appellants' respective convictions, set aside the sentences imposed thereon, and order that both appellants be released forthwith unless otherwise lawfully held.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of February, 2013.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**