



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, KIAGE & MURGOR J.J.A.)

CRIMINAL APPEAL NO. 217 OF 2007(R)

BETWEEN

JAIRUS MUKOLWE OCHIENG .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from a sentence of the High Court of Kenya at Nairobi (Lesiit & Makhandia JJ.) dated 26<sup>th</sup> September, 2006*

*in*

*H.C. CR. A NO. 82 OF 2004)*

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JUDGMENT OF THE COURT

That appellant was charged, tried, convicted and sentenced to suffer death by the Senior Resident Magistrate at Kibera on account of a charge of **robbery with violence** contrary to **Section 296(2)** of the Penal Code. The particulars of the charge were as follows;

***“JAIRUS MUKOLWE OCHIENG; On the 4<sup>th</sup> day of September 2003 at Kibera Kianda within Nairobi Area Province, jointly with others not before court, while armed with dangerous weapons namely pangas robbed Charles Ayoti Ouma [of] a mobile phone Siemens A36 and cash Kshs. 1,100 all valued at Ksh. 7,100 and at or immediately before or immediately after such robbery used actual violence to the said Charles Ayoti Ouma.”***

Following that conviction and sentence, the appellant preferred an appeal to the High Court at Nairobi. That first appeal was heard by Lesiit, J. and Makhandia J, (as he then was) who, by the judgment dated and rendered on 26<sup>th</sup> September 2006, dismissed it.

The appellant now appeals to this Court. He prepared and filed some homegrown Grounds of Appeal. A Supplementary Memorandum of Appeal was subsequently filed on his behalf by Ms. EDNA SUDI KHAEMBA, his learned counsel, which raised the following grounds;

***“1. THAT the 1<sup>st</sup> appellant court erred in law by failing to evaluate the evidence presented to court which did not conform with the ingredients of robbery with violence contrary to section 296(2) of the penal code.***

***2. THAT the 1<sup>st</sup> appellant court erred in law in affirming the conviction of the appellant while relying on recognition/identification whereas the circumstances favoring a positive identification were difficult and stressful and not free from possibility of error.***

***3. THAT the appellate court erred in law uphold if the appellant conviction on the ground of language of the court used.***

***4. THAT the 1<sup>st</sup> appellant court erred in law in affirming the conviction of the appellant whereas the appellant defence was not considered.***

***5. THAT the 1<sup>st</sup> appellant court erred in law in affirming the conviction of the appellant whereas the appellant’s alibi was neither considered nor displaced.***

***6. THAT the 1<sup>st</sup> appellant court erred in law in failing to analyze and evaluate the evidence adduced at the trial and thus came to a wrong conclusion.***

***7. THAT the 1<sup>st</sup> appellate court erred in law in upholding the appellant’s conviction and sentence whereas the appellant constitutional right to a fair trial was contravened contrary to Section 77(1) (2)b, f, g, of the former constitution.”***

We do not find much merit in the first ground of appeal the gravamen of which is that, in the view of the appellant’s advocate, the ingredients of robbery with violence did not exist in the case. Submitting before us on this point, Miss Sudi made heavy weather of the fact that the complainant in his evidence had testified that one of his assailants had only slapped him on the shoulder with a panga. To counsel, there was no evidence of any injuries having been suffered. She expounded on this further when arguing her ground six by stating that no violence was in fact occasioned upon the complainant. The absence of violence, in counsel’s view, removed the alleged offence from the ambit of ***robbery with violence*** under **Section 296 (2)** of the Penal Code.

It cannot be so. That offence, which may be faulted from a conceptual stand point, is nonetheless defined with clarity and is devoid of ambiguity. It is enough for us to reiterate what we stated recently in **DIMA DENGÉ DIMA & OTHERS Vs. REPUBLIC** Cr. Appeal No. 300 of 2007, which is that;

***“The elements of the offence under Section 29 (2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is enough to found a conviction.”***

We also refer, as we did in that case, to the decision of this Court in **JOHANA NDUNGU Vs. REPUBLIC** Criminal Appeal No. 116 of 1995 (unreported) which in our view puts the question beyond dispute;

***“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section;***

1. *If the offender is armed with any dangerous or offensive weapon or instrument, or*
2. *If he is in company with one or more other person or persons, or*
3. *If at, or immediately before, or immediately after the time of the robbery, he wounds beats, strikes or uses any other violence to any person.*

***Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.***

***In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.***

***With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”***

From the record herein it is clear that the complainant (**PW1**) and his cousin (**PW2**), were on the material day the victims of a robbery. They were walking from Kenyatta to their home at Kibera Kianda and as they took a shortcut through a forest, **PW2** excused himself to answer a call of nature in the bush, while **PW1** sat on a stone awaiting his return. Some two men then emerged and after asking **PW1** for some Ksh. 5 to buy a cigarette, they suddenly set upon him. One unleashed a panga with which he slapped **PW1** and ordered him to lie down and make no noise. They proceeded to relieve **PW1** of his cell phone and some Kshs. 5,990 which he had on him. One of the men used a knife to rip **PW1**'s rear trouser pocket and take a wallet from which he fished some Ksh. 700 before leaving.

The robbing duo next accosted **PW2** after he finished his business in the bush and they quickly frisked his pockets, found some Ksh. 500 which they appropriated and left.

These events were witnessed by an unnamed young man who was collecting firewood nearby and he stated that he knew the robbers as they, too, used to collect firewood from the same forest. He even knew the name of one of them as “Karis”.

The just determination of this appeal turns principally on whether the appellant was properly identified as one of the two robbers. This is a question of mixed law and fact flowing from Grounds 2 and 6 in the Supplementary Grounds of Appeal. Both courts below took the view that the appellant was properly and satisfactorily identified, recognized even, as one of the robbers. The High Court Judges had this to say;

***“In our view, and based on the recorded evidence, we are satisfied, as indeed was the trial court, that the circumstances obtaining at the scene of crime were favourable for positive identification. It should be noted that the appellant was arrested on the same night at about 11.00pm, 6 hours after the robbery. According to the witnesses, he was still in the same jacket as he was wearing during the robbery. One may argue that the***

*mere fact that the appellant was wearing a similar jacket as that worn by one of the robbers during the incident cannot by itself place him at the scene of the crime. That perhaps he could be a victim of mistaken identity as there was nothing unique about the jacket that could irresistibly be associated with the appellant or with one of the robbers at the scene of crime. This may be so. However, there is other evidence linking the appellant to the crime. There is evidence of recognition. According to the complainant he;*

*‘...used to see accused in that area in Kianda, so I knew him during the robbery by his appearance I saw his face during the incident ....’*

Against the learned Judges’ analysis and conclusion aforesaid, there are, from our reading of the record, other factors a proper consideration of which would have added to the doubts that the Judges clearly entertained, but in the end dispelled. Had the learned Judges properly evaluated these other factors in a fresh and exhaustive way as was their duty as a first appellate court, (see **PANDYA Vs. R [1957] EA 336; OKENO Vs. R [1972] EA 32**, they would in all probability have arrived at a different conclusion.

Even though the incident occurred in daylight towards evening, we note that it occurred within a forest and we do not have any evidence as to how well lit the forest was or for that matter, how dense the forest cover was. A dense forest cover can lead to a sort of darkness even at noon. Further, the attack on the appellant was definitely sudden and lasted but a short while during which the robbers ordered him to lie down on the ground and he obeyed. It is only after they had left that he stood up. Moreover, during most of that fleeting incident, one of the robbers, the appellant allegedly, was in fact behind him. Even when they left to steal from his cousin **PW2**, the complainant only had a rear view of them.

Those circumstances, properly considered, would not leave intact the confidence and assurance that the appellant’s conviction was safe. The account of the incident given by the appellant, viewed in totality, does not at all give the impression that the robbers are people he knew or was familiar with so as to bring the matter within the realm of recognition.

That the question of identification is often fraught with danger and entails the risk of misjustice if not carefully and meticulously addressed was well captured in the oft-quoted English case of **R Vs. TURNBULL [1976] 3All ER 549**. We bear in mind the cautionary words of Lord Widgery C.J;

**“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of relatives and friends are sometimes made.”**

There is nothing in the case before us that affords any comfort or confidence that the purported identification (we really cannot call it recognition) of the appellant by the complainant, who was to him a stranger to all intents and purposes, was free from the possibility of error.

The same circumspection with regard to the complaint’s alleged identification/recognition of the appellant applies with yet greater force to the evidence of **PW2**. This witness readily admitted that he **“did not know the accused (appellant) before the case.”** All he could say is that the appellant wore a black jacket and held a knife and that when the appellant was arrested, in that witness’ absence, **“he wore the same jacket and the knife was recovered from him.”** We cannot quite shake off the impression that **PW2’s** assertion that the appellant was the robber was based, not so much on recollection, but on the fortuitous fact of the recovery of a knife on a man in a black jacket and little else.

It is instructive that neither the phone alleged to have been stolen from the complainant nor the money was recovered from the appellant at the time he was arrested. Indeed, the evidence of the arresting officer is that the arrest of the appellant had nothing to do with the robbery. **PW3** testified that he and a colleague, Police Constable Ali, were on patrol duties on the material night. When they got to Slams Bar, they found that the appellant had been ejected from the bar for creating a disturbance. This is why they arrested him and took him to the LDP (Labour Democratic Party) office at Kianda after conducting a

search on his person and finding a knife hidden in his right sock. On what next transpired PW3's testimony was simple;

**“On reaching the LDP office, we found two men complaining that accused had robbed them of a cell phone and had run away thereafter so we escorted accused to Jamhuri (sic) police post and we charged him with this offence.”**

There was not even a pretension of an investigation before the police decided to charge the appellant. It would seem that on the strength only of some two men pointing at him, a person under arrest for a totally unrelated reason, the appellant found himself facing a capital robbery charge. There is no indication that before the charge was laid any kind of description of the appellant had been given to lend credence to the claim that he was one of the robbers. Moreover, it is on record that the one robber, who had been mentioned by name as 'Karis', somehow managed to make his escape and remained at large.

The question of identification of the appellant clearly was at large and hung on the balance during the trial, the evidence on it being merely adequate. The same could have been bolstered and the doubts dispelled had the independent eye witness, the unnamed boy or young man who was collecting wood in that forest, been called as a witness. There is absolutely no explanation given why that eye-witness was not called to come and testify in court. It may well be that there was a plausible explanation for his not being called; he may have travelled, been indisposed, dead or otherwise unavailable but such explanation was not forthcoming and no attempt was made to refer to the matter or to elicit information about it by the prosecution. This is yet another weakness that flows directly from the fact that no investigation was conducted. Little wonder no person testified in the capacity of an investigating officer.

The law on a situation such as the present, where a potential witness whose testimony would definitely have shed light on an otherwise ambivalent case, is well settled and the learned Judges were presently aware of the same. They did in fact refer to it in the following terms;

***“In BUKENYA & ANOTHER Vs. UGANDA (1972) E.A. 549, the Court of Appeal for East Africa held that the prosecution is duty bound to make available all necessary witnesses to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of witnesses not called to testify would have tended to be adverse to the prosecution.”***

Having properly stated the law, the trial Judges' then proceeded to apply it in a distinguishing manner as follows;

***“An adverse inference can only be raised if the evidence in support of the charge is barely sufficient. In the instant case, the evidence against the appellant is overwhelming. The evidence of PW1 and 2 was largely unrebutted as they were not subjected to any cross-examination. There were no unbridgeable gaps in the prosecution case that would have warranted the testimony of the investigating officer. Similarly, we do not think that evidence of the boy who witnessed the robbery would have added anything new to the prosecution case other than just perhaps buttressing prosecution case.”***

With all due respect, the learned Judge's categorization of the prosecution case as 'overwhelming' is not borne out by the record. The evidence was no more than borderline and the non-calling of the boy witness definitely called for an adverse inference against the prosecution. We are unable to fathom the basis upon which the learned Judges speculated that the evidence of the boy would have added nothing new other than just perhaps buttressing the prosecuting case. It is to be noted that this was not a case where there was already a multiplicity of witnesses on the same point which would have rendered the boy's evidence mere cumulative surplusage. In fact, only he would have been an independent eye witness and neither strategy, economy nor efficiency would have persuaded the prosecution, properly understanding its case, to exclude that evidence.

The whole essence of the negative or adverse inference is that the boy's evidence may well have been the very opposite of what the learned Judges said it might have been. Far from buttressing the prosecution case, and there is no telling, it may well have entirely exploded it. The boy could well have come to say no robbery occurred or that if it occurred the appellant was not the assailant. The unexplained failure of the prosecution to call the boy properly invites the latter scenario by the inference and the two courts below erred in not drawing it.

The final issue that merits our attention is the peculiar fact that the entire prosecution case was not subjected to any form of cross-examination. The learned Judges of the High Court also noted this rather anomalous situation and addressed it thus;

**“From our perusal of the record we note that the appellant did not subject any of the witnesses to cross-examination, in which event the word of the witnesses went unchallenged. Although an accused person in a trial has a right not to cross-examine a witness, it is always desirable for the trial court to try and establish perhaps why the accused is not keen on cross-examining the witness. It could be that perhaps he does not understand the proceedings, or that he does not know that he has a right to cross-examine witness or may be he has a medical problem. In a serious case such as the instant one which upon conviction carries a death sentence, such an inquiry is all the more desirable. At this stage we are unable to determine one way or another as to why the appellant found it unnecessary to cross-examine any the witnesses. In any event it is not one of the grounds in the petition of appeal.**

We are not persuaded that the learned Judges did sufficient justice to the matter by merely wondering why the appellant did not cross-examine the prosecution witnesses. Whereas it may be that any one or more of the scenarios the Judges mentioned may have been in operation, we think that the proper conclusion should have been that the non-cross examination of all of the prosecution witnesses, far from leading the conclusion that their testimony was unchallenged, should instead have led to a more circumspect engagement with the evidence. Cross examination is a vital and indispensable tool for the discovery of truth by testing the perceptions, passions and predelictions of witnesses. When evidence is tendered without being tried, tested, challenged and turned inside out by cross-examination, its strength and cogency could well be spurious.

It is not accidental that the legislative in its wisdom imposed a duty upon the court to play a didactic and facilitative role on the question of cross examination where an accused person is without the benefit of legal representation. **Section 208(3)** of the Criminal Procedure Act is couched in the following mandatory terms;

***“If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.”***

(Our Emphasis)

From the record before us, we see that at the end of the examination in chief of each prosecution witness the trial magistrate recorded the following; “Cross-Examination by Accused; - Nil.”

We are not satisfied from the record that at the end of each witness' testimony the Court did ask the appellant whether he had any questions to put to the witness. We are also not satisfied that the answer given upon such invitation, if any was made, was recorded. This is not a mere procedural slip. Rather, it implicates the fair trial right of an unrepresented accused person who is facing a capital charge upon conviction for which the ultimate sentence may be imposed. The trial court cannot in such situations play a merely passive role unconcerned whether the accused understands the essence and importance of cross-examination. In this case it was an omission so egregious on a charge so serious that we consider it to have caused the appellant some in justice.

For the reasons we have given, we are unpersuaded by the submissions by Mrs. Murungi, the learned Senior Assistant Director of Public Prosecutions, that the appellant's conviction was safe and proper. We find the evidence of his identification wanting, and the failure of the prosecution to call a vital independent witness suspect.

The appellant's appeal is allowed. We quash the conviction and set aside the sentence imposed on him. He shall be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of October, 2013.***

**J.W. MWERA**

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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**

