REPUBLIC OF KENYA

Court of Appeal at Kisumu

Criminal Appeal 46 & 47 of 2009

MARIKUS ODUOR OTIENO.....1ST APPELLANT

NASHON SEWE OKETCH.....2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 17th February 2009

In

HC.CR.A NO. 131 OF 2006)
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JUDGMENT OF THE COURT

Marikus Oduor Otieno and ***Nashon Sewe Oketch*** (herein after referred to as the first and second appellants respectively), were jointly charged before the Senior Resident Magistrate at Kisumu with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code*** the particulars being that:-

"On 19th November 2005 along the Kisumu/Nairobi Road within Kisumu City, jointly with others not before the court while armed with a pistol, robbed James Awuoth Ago of Kshs 453,500/=, two bank books and two cheques all valued at Kshs 454,000 and at immediately before or immediately after the time of such robbery, shot and injured the said James Awuoth Ago."

The first appellant was separately charged with two additional counts of being in possession of a firearm and being in possession of two rounds of ammunition without a firearm licence contrary to ***Section 4(1)(a)*** as read with ***Section 4(2)(a)*** of the ***Firearms Act***,

The compacted particulars of these charges were that, on 29th November 2005, at Manyatta Estate in Kisumu City, he was found in possession of a firearm – an American Colt Pistol serial No. 481976 and two rounds of ammunition without a firearms certificate.

They both pleaded not guilty to their respective charges and the matter proceeded to full hearing with the prosecution calling a total of fifteen (15) witnesses. In their defence, both appellants had tendered sworn evidence but called no witnesses.

The brief facts of the case were that, James Awuoth (PW2) was working at Sarit Mobile Petrol Station in Kisumu city. On the date in question about 10.30 am he was sent to the bank with Kshs

450,000/= which he was supposed to bank. The money was packed inside a polythene bag. As he was about to leave the petrol station, he was confronted by a man who demanded to be given the money. As he tried to resist, another person alighted from a nearby Peugeot motor vehicle which he said was speeding and shot him on his hand. The two other people then grabbed the money and they boarded the motor vehicle in question and drove off after the same was push-started. The witness was rushed to Aga Khan Hospital where he was admitted for two days and then discharged. While recuperating at his home, some Police Officer visited him and recorded his statement. He told the trial court that he gave the description of one of the robbers who had grabbed the money from him to the police. He was later called to the Police Station to attend an identification parade. He picked out the 2nd appellant. He said he did not see any of the appellants before that date.

On cross examination by the 2nd appellant however, the witness stated that he had seen the 2nd appellant (Nashon Sewe Oketch) around the petrol station before trying to pretend he was mentally unstable. He said that he (2nd appellant) was elderly, bearded and had unkempt hair.

Edwin Sinwa (PW3) was the owner of the getaway motor vehicle. He had employed ***Kenedy Otieno Ouma (PW7)*** as driver.

According to PW7 who was in charge of the said motor vehicle on the date in question, he had given the motor vehicle temporarily to one James to take some clients to Kibos. The said James later reported that he had been robbed of the motor vehicle. He reported the matter to the Police Station. The motor vehicle was later found abandoned at a place called Ondieki Estate. It was photographed and later released to PW3.

Some days later, PW7 – saw the 2nd appellant herein. He was assisted by members of public to arrest him and they took him to the police station. He is said to have agreed to take them to his other accomplice's house. He knocked at the door and Marikus (1st appellant) is said to have opened the door. He came out of the house while armed with a pistol. They arrested him and took him to the police station where he was handed over to ***P.C Urbanus Nzioki (PW13)*** who also took possession of the firearm and the two rounds of ammunition. The pistol and ammunition were later examined by the Firearms Examiner ***Lawrence Nthiwa (PW 10)*** who confirmed that the pistol and the two rounds of ammunition were a firearm and ammunition as defined under the Firearms Act (Cap 114 of the Laws of Kenya).

In his evidence in court, PW10 identified the pistol in court as serial No. 781926 which serial number differed from the serial number of the pistol described in the charge sheet of which number was indicated as 481976.

At an identification parade conducted by ***Ag IP Bett (PW9),*** PW2 picked out the 2nd appellant. They were both subsequently charged with the offences stated earlier on in this judgment.

In his defence, the 1st appellant denied the charge and stated that he was in his house on 28th November, 2005 at 8.00 pm when members of public went to his neigbhour's house and started knocking at the door but the neighbor was not in the house. He said that on hearing the noise outside he went to check on what was happening. He said that one of the members of public requested him to be a witness to what they were doing. He reluctantly agreed and so they entered into the neighbour's house and that was where the pistol was recovered from. The police were called and they came to the scene. According to the appellant, he was told that he would be taken to the police station so that he could record a statement on what he had witnessed. At the police station, he was told that he could not be released until the neighbor was apprehended. That was not to be and instead, the 1st appellant was charged with the offences in question which he said he knew nothing about.

On his part, the 2nd appellant said that he was accosted by a group of people who identified themselves as police officers. They took away his bicycle, cell phone and wallet. They then forced him to board a police motor vehicle and took him to the police station. He said that an identification parade was conducted at the police station and he was not picked out by any of the witnesses. He, like the

1st appellant denied the charges leveled against him.

The trial court considered the evidence and found both appellants guilty as charged and convicted them accordingly. They were both sentenced to death on the first count and the first appellant was sentenced to five years imprisonment on counts two and three, with the learned trial magistrate directing that the sentences were to run consecutively. These sentences were nonetheless suspended and rightly so by the High Court which ordered that the same be held in abeyance.

Aggrieved by the decision of the trial court, both appellants filed separate appeals which were consolidated and heard together by Mwera & Karanja, JJ.

The appeal before the High Court was principally based on the grounds of contradictions in the evidence and on the issue of lack of proper identification.

The High Court re-analysed and re-evaluated the evidence tendered before the trial court and concluded that the prosecution case was watertight. It dismissed the appeal save for suspending the sentence in counts two and three. The learned Judge affirmed the conviction and death sentence on count one. That dismissal is what provoked this appeal. The 1st appellant filed his memorandum of appeal through *Otieno, Yogo, Ojuro & Company Advocates* on 12th June 2012 while the 2nd appellant filed his on 27th May 2009. They were nonetheless both represented by learned counsel *Mr. Otieno* who argued the grounds on both memoranda of appeal together. Learned counsel submitted that the inconsistencies and contradictions in the evidence should have been resolved in favour of the appellants. He particularly pointed out the contradiction or discrepancy in the serial numbers of the firearm and strongly submitted that the discrepancy was not as a result of a typographical error and that the same was material and that the two serial numbers could not be reconciled.

He also argued that the Judges of the High Court had failed to consider the defences raised by the appellants and thus failed to properly and fully re-evaluate the evidence placed before them.

The rest of the grounds hinged on identification of the 1st appellant who, counsel submitted, was not properly identified. He further submitted that the second appellant was not identified either at the scene or at the Police Station and that only PW1 linked him to the offence. He submitted that PW1 was an unreliable witness and that he was an accomplice having been the one who was in charge of the motor vehicle used in the robbery and which he freely gave to another person who later claimed to have been carjacked and robbed off the same. He urged us to allow the appeal in its entirely.

Mr. Meroka learned State Counsel opposed the appeal. He submitted that the discrepancy in the serial numbers of the pistol could be cured under ***Section 382*** of the ***Criminal Procedure Code***. He submitted that there was an unbroken link from the time the pistol was recovered by members of public; taken to the firearms examiner; and produced in court as exhibit. The court should thus accept that as a typographical error.

On the identification of the second appellant, he submitted that the robbery took place in broad daylight and so PW2 was able to clearly see and identify him. He also said that PW2 knew the second appellant before, and further submitted that the first appellant was known to PW7 before and he thus identified him positively.

Learned counsel for the appellant had also filed written submissions in which he referred to several decisions on the issues of identification and alibi defence.

We have carefully reviewed the record and considered the submissions of both counsel and the authorities in question.

This being a second appeal, only issues of law fall for our consideration. Most of the issues raised herein are indeed pertinent issues of law. On the issue of identification, we note that as far as the second appellant was concerned, only PW2 said he identified him at the scene of the robbery. Learned State

Counsel maintained that since the incident happened in broad daylight, and also that as PW2 knew the second appellant before, that identification was foolproof. We are apt to note that the identification was by a single witness. We have therefore to treat that evidence with the necessary circumspection. In the *locus classica* case of ***Republic Vs. Turnbull and Others*** ***[1976] 3 ALL ER 549***, the court held that a witness may be honest but mistaken. This court differently constituted in the case of ***Joseph Ngumbao Nzaro Vs. Republic*** ***[1982] 2 KAR 212*** pronounced itself in the following words:-

"It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification……"

We are also in agreement with the observations of this court – (differently constituted) in **Cleopas *O. Wamunga Vs. Republic*, *Criminal Appeal No. 20 of 1989*** to the effect that:-

"…… evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he (accused) alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification…."

We have therefore to consider the evidence of PW2 with great caution. He told the court that:-

"I can identify one person. He was bearded and had uncombed hair and was elderly. I had not seen this person before. (Emphasis ours)."

On cross examination however, he stated:-

"I said the man was old man and slim and was in a red shirt. I had seen him around the Petrol Station before trying to pretend he was mentally unstable…"

These two statements are quite contradictory. Had PW2 seen the 2nd appellant before or not? Can a court of law rely on this evidence which is uncorroborated to dismiss this appeal? In our view, this contradiction goes to the root of the case. It displays uncertainty on the part of the witness and renders his identification doubtful. In any event, if indeed the witness used to see the second appellant before, then what was the need for an identification parade? We are not satisfied that the identification of the second appellant was foolproof or watertight. Having said so, it will not be necessary for us to delve into the proprietary or otherwise of the identification parade conducted by PW9. This doubt must benefit the second appellant.

In respect of the 1st appellant we find that he was not identified at the scene. He was only mentioned by PW7. He said that he saw the 1st appellant seated in the co-driver's seat when the motor vehicle passed him shortly after he had left it with one James. Even assuming that indeed the 1st appellant was seen inside the said motor vehicle away from the scene, that would not necessarily prove that he went to the scene of the robbery and participated in the robbery. We find the evidence against the 1st appellant unsatisfactory and insufficient to support the conviction against him.

We must therefore, respectively disagree with the two courts below on the soundness of the conviction on the robbery charge.

On the issue of the firearm, we find that the discrepancy in the serial numbers was not addressed by the two courts below and the same resolved. We note that this issue was raised before the High Court (at page 89 line 3 – 4 of the record). Had the learned Judges addressed it, then they could have resolved it one way or another. It is clear to us therefore that they did not re-analyse and re-evaluate the entire evidence before the trial court as they were supposed to do. We are therefore minded to give the benefit of doubt to the first appellant also on counts two and three.

In sum, we are satisfied that this appeal has merit. We allow the same, quash the conviction and set aside the sentence and order that both appellants be and are hereby set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 11th day of October, 2012.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

K. H. RAWAL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR