IN THE COURT OF APPEAL
AT KISUMU
(CORAM: WAKI, AGANYANYA & NYAMU, JJ.A.)
CRIMINAL APPEAL NO. 196 of 2009

BETWEEN

SEBASTIAN OKWERU MUREFU ……….......…………………APPELLANT

AND

REPUBLIC ………………………………...…………………..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Muchemi & Chitembwe, JJ.) dated 4th June, 2009
in
H.C.Cr. A. No. 22 of 2006)
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JUDGMENT OF THE COURT

The appellant and another who was acquitted by the trial court, were charged in the Chief Magistrate's Court at Kakamega with three counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. In count I, it was alleged that on 7th day of December, 2003 at Lubao market along Webuye-Kakamega road in Kakamega District within Western Province, jointly with others not before the court and while armed with a dangerous weapon, namely a gun, they robbed ***Jacob Lunani Mukalama*** and ***David Khadonye Oriki*** of cash Kshs.202,500/=, motor vehicle registration number KTV 549 Isuzu lorry valued at Kshs.800,000/= and one mobile phone make Sagem 920 valued at Kshs.6,000/= all to the total value of Kshs.1,085,500/= and at or immediately before or immediately after the time of such robbery threatened to shoot the said Jacob Lunani Mukalama and David Khadonye. The goods were the property of Kahuho Trading Company Limited.

In count II it was alleged that the appellant with his co-accused on the same day and place with others not before the court while armed with a dangerous weapon, an AK47 rifle they robbed David Khadonye Oriki of cash Kshs.202,500/= and a mobile phone make Sagem 920 valued at Kshs.6,000/= all valued at Kshs.208,500/= the property of the said David Khadonye Oriki and at or immediately before or immediately after the time of such robbery threatened to use violence against him.

In count III the appellant and his co-accused were further charged with others not before the court that on the same day and place while armed with a dangerous weapon, namely a gun they robbed David Luchibi of motor vehicle KAP 198H Toyota Hiace matatu valued at Kshs.800,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Luchibi by firing in the air.

After a full trial the 2nd accused ***Peter Kanyingi Njau*** was acquitted of all the charges while the appellant was found guilty of the three counts, convicted and sentenced to death but it was ordered that he would serve the sentence on count I while the sentence on the other counts lay in abeyance. He was

aggrieved by this decision but his first appeal to the High Court *(Apondi & Kimaru, JJ.)* was dismissed was dismissed, hence the second and possibly the last this appeal before this Court. ***Mr. Menezes,*** learned counsel for the appellant relied on 7 grounds set out in the supplementary memorandum of appeal as hereunder:

"1. The first appellate court erred in law in not considering carefully and then finding in law that the charges facing the appellant were duplex and hence, nullities in law.

2. (a) The first appellate court abdicated its duty of evaluating the evidence before it, assessing the relevant questions of fact and of law, weighing conflicting evidence and thereafter drawing its own inference and conclusions – after making due allowance to the fact that it had neither seen or heard the witnesses, and was thus guilty of massive misdirections in law.

(b) The first appellate court would have found the following irregularities and lacunae in the prosecution case if it had assessed the evidence with anxious care that was called for, viz:

(i) That the ownership of the lorry and the matatu had not been properly established.

(ii) That the exhibits put forward by the prosecution had not been produced according to law;

(iii) The trial magistrate did not take into any consideration the issue of *"unto suggestion"* ***and dock identification when considering the issue whether there was proper identification of the appellant.***

(iv) That the learned trial magistrate misdirected himself in not pausing and reflecting on the circumstances of the hold up of the lorry in count I, "the space of time, the inevitable fear unto death, of a situation which had completely gone out of the material witnesses control.

(v) That the learned trial magistrate should have considered in totality the investigation *(sic)* ***carried out by the police were so pathetic as to render the case not proved beyond reasonable doubt, in fact the evidence raised more questions than answers.***

(vi) The learned trial magistrate erred in not considering that the prosecution did not cross-examine the appellant on material issues thereby believing and accepting the defence of the plaintiff *(sic)* ***thereby warranting an acquittal.***

(vii) That the learned trial magistrate erred in law in simply summarizing the evidence without assessing it with the anxious care it deserved. It was a case of *"rush to judgment"* ***rather than an analytical approach. In fact the learned trial magistrate did not even summarize the evidence in its totality.***

(viii) That the learned trial magistrate had not considered the defence evidence at all other than simply summarizing it. That the defence was cogent and plausible and the law demanded that it be considered anxiously.

(ix) That the learned trial magistrate erred in fact and in law in being selective in his acquittal or accused 2 and conviction of the appellant in almost similar circumstances.

(x) That the trial court had misdirected itself in law in not finding and holding that the learned trial magistrate had drawn conclusions leading to the conviction even before evaluating the prosecution case and had thereby precluded itself from considering or properly considering the appellants defence; putting the "cart before the horse."

3. The first appellate court erred in law in pooh-poohing the fact that no identification parade was done in respect of the appellant when the circumstances warranted the holding of such parade.

4. The first appellate court misdirected itself grossly is not paying any attention whatsoever to the appellant's defence other than simply setting it down on record.

5. The first appellate court erred in showing latent and patent bias against the appellant which is manifested in the offhand manner in which his defence was considered.

6. The first appellate court has said *"after analyzing the evidence on record"* ***did the court consider at all? There is nothing on the record to this effect other than giving the defence a few lines, all evidence favourable to the appellant was totally ignored.***

7. The first appellate court had a duty to enquire into the alleged infringements of his constitutional right when the trial court had not inquired into it when its attention as drawn to it at the time of the plea."

The appeal was heard by this Court on 13th September, 2011 when ***Mr. Menezes***, learned counsel for the appellant consolidated all the grounds into 3 but submitted specifically on the failure by the first appellate court to re-evaluate the evidence with a view of coming to its own conclusion, the unclear circumstances in which the appellant was arrested, the failure by the two courts below to consider the defence offered by the appellant and also their failure to deal with the issue of infringement of the appellant's constitutional rights. In his view if these issues had been considered anxiously, the appellant could have been acquitted.

Mr. Kiprop, learned State Counsel for the Republic opposed the appeal and submitted that contrary to the views held by counsel for the appellant, the two courts below analysed the evidence adduced point by point and the basis for the appellant's conviction was spelt out. According to him there was no discriminatory conviction for the appellant.

The facts of the case before the trial court were that Kahuho Trading Company owned motor vehicle registration KTV 549 Isuzu lorry which was used for transporting and/or supplying goods. On 7th December, 2003 it was being driven by ***Jacob Lunani*** (PW1) accompanied by a salesman David Khadonye (PW3) and one Erick. It transported and supplied liquor to customers in Webuye, Malava and Kakamega. While on its way back to Kakamega, at Bukhaywa near Lubao market some strangers who were staggering across the road signalled the lorry to stop. When PW1 stopped, one of the people removed a gun from a sack and pointed it at PW1's chest ordering him to get out of the driver's seat. He, together with the salesman and the loader were forced out of the lorry leaving the key in the ignition. They escaped to the sugar plantation where they hid. The robbers drove away the lorry with the remaining beer and empty crates. When PW1 came out of the sugar plantation, a good Samaritan offered him a lift to Lubao where he reported the incident to the Administration Police (AP) Camp. During the incident, apart from the lorry which was driven away, a sum of Kshs.202,500/= and a mobile phone belonging to David (PW3) were stolen.

While at Lubao PW1 saw a Nissan matatu being driven from the direction of Webuye to Kakamega. It belonged to ***David Luchibi*** (PW10). PW1 heard gunshots but he did not know what was going on. However, it was another robbery being committed against the driver of the matatu vehicle in which PW10 was the driver. The matatu vehicle was from Kitale to Kakamega. PW10 saw a canter lorry which according to him hit another lorry which was ahead of his matatu vehicle. It had its full lights on. According to PW10, four people who resembled police officers alighted from the lorry and surrounded the matatu. They then ordered all passengers and PW10 to alight from the matatu vehicle. The *"policemen"* then entered the matatu vehicle and drove it away towards Webuye direction. Police from Kakamega were informed and they came to the scene. PW10 accompanied them in their motor vehicle towards Webuye. Along the road members of the public informed the police that the matatu vehicle had been driven towards Lukume. Police went up to Lukume and to near Ingotse where the matatu motor vehicle was recovered. According to PW10 police went into the market and after sometime they came back with a suspect and the Isuzu lorry keys. This is how the appellant and the other who was acquitted were arrested and charged with the offence, the subject of this appeal.

PW10 was supported in his evidence by ***Michael Kakai*** (PW9) who was a passenger in the matatu vehicle registration number KAP 198H. He was, along with other passengers, ordered out of the matatu vehicle by people who looked like policemen.

The appellant denied the offence in a sworn testimony and said he was arrested when he was coming from Shikoti Secondary School where he intended to sell his beans. And that in the course of his arrest he was assaulted and injured.

As this is a second appeal only issues of law fall for our consideration – see ***section 361*** of the Criminal Procedure Code. Although Mr. Menezes listed 7 grounds of appeal in his memorandum of appeal, he only submitted on the grounds stated earlier. From the record of appeal and the submissions made, the main issue that turns for the court's determination was that of identification. Mr. Meneze's submissions were to the effect that if the superior court had not simply run through and reproduced the evidence adduced before the trial court, it could not have arrived at the decision it did to dismiss the appeal. According to his submissions, the first appellate court should have, for example, found that since it was not the police but members of the public who arrested the appellant and that no such members of the public testified, that evidence did not sufficiently incriminate the appellant with the commission of the offence framed against him, or that he was not the suspect to be arrested.

The evidence touching on the arrest of the appellant was that of ***APc. James Serem*** (PW7) who was attached to Ileho A.P.'s Camp. He was at the camp on 7th December, 2003 at 1.00 a.m. when he saw a canter motor vehicle brought to the camp by officers from Lubao A.P.'s Camp. He was asked if a Nissan matatu had been seen pass by and when told one had passed by he was informed it had been stolen and that it was carrying robbers. PW7 with two of his colleagues boarded the lorry to chase the matatu. The Nissan matatu was recovered 50 metres from Bushiri Centre at a roadside without any passenger in it. It was registration number KAP 198H. PW7 left some officers to check in the sugarcane plantation around and he headed towards Ingotse.

PW7 and the driver of the canter saw someone on a bicycle taxi and the canter driver (PW1) identified him as one of the robbers. When told to stop he got out of the taxi and ran away into a sugarcane plantation. He was pursued by members of the public and apprehended in the sugarcane plantation. The appellant was then handed over to police from Kakamega Police Station.

On this aspect PW1 testified that he saw and identified the appellant as the person who ordered him out of the lorry. According to him when police officers went after the stolen matatu and left him at Lubao, they came back with the lorry key but by that time the lorry had been pushed in order to start and had been driven to Kakamega to offload the beer crates at Kahuho Enterprises.

David Khadonye Oriki (PW3) was with PW1 in the lorry registration number KTV 549 Isuzu on 7th December, 2003 when this robbery took place. He was amongst those who went to report the incident to Lubao Administration Police Camp. He mentioned and identified the appellant as one of the robbers whom police arrested and brought to the Chief's Camp on that same day.

Mr. David Luchibi (PW10) was the driver of the Nissan matatu vehicle registration number KAP 198H. He was robbed of this motor vehicle around Bukhaywa by people who posed as police officers, but who turned out to be robbers. He boarded a police vehicle to assist in tracking down the motor vehicle and the robbers. The appellant was arrested near Ingotse and PW10 identified him as the one who was ordering people to alight from the matatu.

The High Court set out the evidence adduced before the trial court and in our view re-evaluated it itself and came to its own independent conclusion. That it did not arrive at a different decision from that of the trial court did not mean the evidence was not re-assessed. The issue at hand was that of the identification of the appellant and his involvement in the commission of the robbery which occurred on 7th December, 2003. On this issue the two courts below concurred that the appellant was one of the robbers who robbed PW1 and PW3 of the Isuzu lorry KTV 549 and money which were the proceeds of the sale of beer, and also the Nissan matatu vehicle registration KAP 198H from PW10 and applied

personal violence on them by throwing victims out of the said motor vehicles and shooting in the air to scare them off.

We agree that the evidence of PW1 and PW7 did not tally as to how the appellant was arrested but we find the two courts below relied mainly on visual identification of the appellant by PW1 and PW3 as the basis for his conviction. We also agree that the appellant's defence was not considered by either the trial and the first appellate court in detail. But it is our view that the appellant denied the offence and said on the day the offence was committed he was not at the scene but at Shikoti Girl's School. The trial court considered this denial but rejected it because of the evidence of visual identification by PW1, PW3, PW9 and PW10 and the appellant's arrest by PW7. In our view the evidence of the prosecution witnesses outlined above displaced the appellant's defence.

The appellant in fact betrayed himself when he was found riding on a *boda boda* bicycle taxi and on being stopped he attempted to flee. This is how he was beaten up by the mob who flashed him out of the sugarcane plantation where he was hiding.

After perusing the records of both the trial and the first appellate courts and after hearing submissions of counsel on both sides, we are of the view that the appellant's appeal was properly dismissed by the High Court and we cannot interfere. In the circumstances we dismiss this appeal in its entirety. It is so ordered.

Dated and delivered at Kisumu this 30th day of November, 2011

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR