



**IN THE COURT OF APPEAL
AT NAKURU**

CORAM: BOSIRE, AGANYANYA & NYAMU, JJ.A.

CRIMINAL APPEAL NO. 311 OF 2006

BETWEEN

IBRAHIM KIPROTICH KOGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Apondi & Kimaru, JJ) 12th October, 2006

in

H.C.CR.A. NO. 131 OF 2002)

JUDGMENT OF THE COURT

In the Chief Magistrate’s Court at Nakuru, the appellant was jointly charged with others not before court with six counts of robbery with violence contrary to **Section 296(2)** of the Penal Code, and was also charged with two alternative counts of handling stolen goods contrary to **Section 322(2)** of the Penal Code. The trial court found the appellant guilty in counts 1,3,4 and 6 and sentenced him to death. His other two co-accused were acquitted on the basis that the evidence of identification was unsafe but the trial court found that the appellant had not only been identified but was also recognized by some of the complainants who were the victims of a series of robberies which were perpetrated by the gang on the night of 25th December, 2000 at Kitale township in Transzoia District within the Rift Valley Province.

The particulars of the charge stated that while armed with dangerous weapons namely AK 47 rifles the appellant and others robbed the six complainants of various items which included two motor vehicles and in the process killed two people.

After the verdict by the trial court the appellant was dissatisfied with it and as a result he filed a petition of appeal to the High Court. This first appeal was dismissed by the High Court on 12th October, 2006. The dismissal of the appeal gave rise to this second appeal in which the appellant has through his advocate *Mr. Maragia Ogaro* filed a supplementary memorandum of appeal raising the following grounds:-

“1. That the learned appellate Judges erred in law by holding conviction and sentence reached by the trial court upon reliance of identification by recognition which issue of law failed to meet the

standards required to be relied upon and this honourable court is urged to find that the evidence of identification by recognition in the trial court was not watertight.

2. That the learned appellate Judges erred in law by upholding conviction and sentence reached by the trial court when it relied upon the evidence of identification by recognition irrespective of the said court failing to warn itself of the dangers of relying on the said evidence before reaching and/or making a finding and this honourable court is beseeched to find that the subsequent conviction by the superior court that too failed to warn itself was fatal and unsafe.

3. That the learned appellate Judges erred in law by upholding conviction and sentence reached by the trial court that stood unproved on the account of absence of essential witnesses and/or required elements ingredients and/or evidence.

4. That the learned appellate judges erred in law by upholding conviction and sentence reached by the trial court upon reliance on extraneous issues and breach of Section 382(11) of the Criminal Procedure Code Cap 75 Laws of Kenya and this honourable court is implored to find that in light of the extraneous issues relied on by the trial and superior court the conviction of the appellant was unsafe.

5. That the learned appellate judges erred in law by upholding conviction and sentence reached by the trial court which had summarily rejected the defense evidence without giving reasons and hence breaching the provisions of section 169(1) of the Criminal Procedure Code Cap 75 Laws of Kenya.

6. That the learned appellate Judges erred in law by upholding conviction and sentence reached by the trial court irrespective of the fact the proceedings of the trial court were incomplete on account that PW9 and PW11 never completed testifying and were not subjected to cross-examination.

7. That the learned appellate judges erred in law in upholding sentences reached by the trial court irrespective of the same being illegal.”

In this appeal the State was represented by *Mr. V.O. Nyakundi*, learned State Counsel II.

Although the learned counsel for the appellant endeavoured to argue the grounds seriatim as set out above, we think that the critical ground upon which all the other grounds revolved, is whether or not the evidence of identification was sufficient in the circumstances. The appellant’s challenge was that although the appellant was allegedly known to PW1 as a former employee for eight months, in the complainant’s report to the police who visited the scene of crime the following day, the witness did not name the appellant; that in addition the appellant was not arrested until after nearly 30 days and therefore the so called recognition was an afterthought; that the trial court acquitted the appellant’s co-accused because it found as a fact that they were identified under circumstances which made it difficult to identify them, yet the trial court proceeded to apply a different standard of identification to the appellant; that the alleged recognition was impaired by the failure by the complainant to name the appellant and it was further impaired by the failure by the prosecution to call essential witnesses including PW10 who was said to have been in the company of the alleged gang as they perpetrated the robberies on the material night and that some of the counts were defective; that in its judgment the High Court did allude to some reliance on extraneous evidence that the appellant was involved in all the robberies set out in the six counts on the erroneous and mistaken belief that the robbers remained together throughout the series of robberies that night although the trial court had found as a fact that the robbers were not together as per the evidence of PW10; that the defence of the appellant was not considered by the courts below as required under the law in that it stated that nothing was recovered from the appellant, and that there was no record of the robbery in the occurrence book and that the complainant did not give the name of the appellant to the police before his arrest; PW9 and PW11 did not complete their testimonies because after a trial within a trial the witnesses did not continue with their evidence and this prejudiced the appellant and finally that the sentences imposed were illegal since only death sentence ought to have been imposed and all others held in abeyance.

In his submissions *Mr. Nyakundi* conceded the appeal on the ground that prosecution witness 1,2,3 and 8 who had claimed to have known the appellants never mentioned his name to the police who visited the *locus in quo* the following day; that the recognition by voice was unsafe and the prosecution did not explain why it took them two months to arrest the appellant yet he was allegedly immediately recognized by PW1. In the result the State ***counsel stated***, the subsequent recognition by the witnesses was an afterthought.

As alluded to above the critical ground is that of identification because in our view all the other grounds turned on issues of credibility and other findings of fact, both of which fall outside our mandate. With respect, on the central ground of identification we do not agree with both the appellant's counsel and the State Counsel for the reason that according to the record, the appellant was identified by ***Mr. John Naninani, (PW1)*** and ***James Kiptanui Bett, (PW8)*** who said that the appellant worked for their respective families for eight (8) months and two years respectively, and in addition PW10 who was with the gang as they perpetrated the series of robberies that night also testified that he was guarded by the appellant and at some point the appellant exchanged the role of the driver with him and for this reason he had ample time to identify him.

Taking the above evidence in view it cannot reasonably be argued that the appellant was not safely identified by three witnesses and at least two of the witnesses also recognized him as a former employee.

In our view nothing turns on all the other grounds in that the appellant's counsel did not give details of the alleged vital witnesses who were not called and that they were needed in order to sustain a weak case for the prosecution. We find ourselves unable to make an adverse inference because in the circumstances, the prosecution case was not a weak one, taking into account that identification was by recognition. Again concerning the alleged introduction of extraneous matter in the judgment by the High Court, we note that the extraneous matter was the finding that the gang stuck together that night as they perpetrated the robberies. We think this aspect came from the evidence of PW10 who was throughout the night in the company of the robbers hence the High Court observed that the appellant was involved in all of them. We think that since the appellant was sufficiently identified by recognition by at least two separate complainants and in addition PW10 did testify that he did not observe any break in the chain of events, the reference complained of was not entirely extraneous. Turning to the challenge that the appellant's defence was never considered, we think that although the two courts below could have done a more detailed analysis, all the same, in our view they captured and observed the wider principle that in the circumstances the contentions in the defence were not plausible and in any event they could not supplant the overwhelming evidence of identification by at least three witnesses two of whom were complainants in the spate of robberies perpetrated on the material night. In this connection, we reiterate the holding in the case of ***M'RIUNGU V. REPUBLIC [1983] KLR 455:-***

“The question whether the victim of robbery had recognized the appellant was one of fact.”

Consequently, as the two courts below did make a concurrent finding on this it is our view we cannot undo it.”

This being a second appeal our mandate is to adjudicate on matters of law and we cannot therefore adjudicate on matters of fact except where they fall within the limitations set out in the decided cases from this Court as follows:-

“Although the Court of Appeal on second appeal may upset a finding of fact by the trial or first appellate court, it will not lightly disturb concurrent findings of fact by the trial court and the first appellate court unless it is shown that the findings were based on no evidence, misdirection or error of law which is the same thing as saying that no reasonable tribunal could, on the evidence adduced, have made such findings, KARINGO V. REPUBLIC [1982] KLR 213, KIARIE V. REPUBLIC [1984] KLR 739; MWITA V. REPUBLIC [2004] 2 KLR 60; BURU V. REPUBLIC [2005] 2 KLR 533”

Finally as regards the evidence of PW9 and PW11 we think the courts below did not give much weight to the evidence and consequently no prejudice was in the circumstances occasioned to the appellant to

warrant our intervention.

All on all the appeal lacks merit and the same is hereby dismissed.

It is so ordered.

DATED and DELIVERED at NAKURU this 11th day of November, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR