



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MALINDI**

**Criminal Appeal 329 of 2008**

**JIMMY KAI JONGOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgement of the High Court of Kenya at Malindi (Omondi & Njagi, JJ) dated 26<sup>th</sup> September, 2008*

**in**

**H. C. CR. A. NO. 26 OF 2005)**

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**JUDGMENT OF THE COURT**

The appellant and one **Benjamin Chuto Samuel** (co-accused) were convicted of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge stated that on 10<sup>th</sup> August, 2004 at Msambarauni, Mtwapa Kilifi the appellant and the co-accused while armed with pistols robbed **Bildad Kemboi** of Kshs.118,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said **Bildad Kemboi** by shooting him with a pistol on the right leg.

The appellant and the co-accused pleaded not guilty but after trial the appellant was convicted and sentenced to death while the co-accused was acquitted.

The complainant Bildad Kiptum Kemboi (PW 1) was employed by TSS Grain Millers as a salesman/driver. On 10<sup>th</sup> August, 2004, the appellant and two turn boys Alfred Chemai Ngetich (PW 2) (Alfred) and Juma Ali Kombo (PW 3) (Juma), left Mombasa in vehicle reg. No. KAL 879S a Canter lorry for Majengo and Kikambala to sell maize and wheat flour. They sold flour at Majengo and Kikambala. At about 2.00 - 2.30 pm, the complainant turned back. He was to collect sales money on the way back to Mombasa. On reaching Msambarauni he saw a white car – Toyota Corolla - coming from Mombasa direction. He had seen the car earlier trailing the lorry. It branched off and then turned back and followed the lorry. The turn boy shouted at the complainant. The complainant saw through the side mirror that the occupants were brandishing pistols. The car overtook the lorry and the occupants ordered the complainant to park by the roadside. They fired at the lorry and the complainant was hit on the leg. The robbers then parked their car, came out of the car, went to the lorry, forced the door of the lorry open and demanded money from complainant while aiming the pistol at him. They threatened to kill the complainant and the complainant gave them “a parcel of money”. The robbers also took the mobile phones of the complainant and the two turn boys after which they sped off after shooting one of the turn boys. The complainant was taken to Mtwapa Police Station by a good Samaritan where he reported the robbery. He later went to hospital for treatment. The description of the suspect given to police by the victims of the robbery fitted that of the appellant. The appellant was known as a matatu driver by police officers including Cpl Langat

of CID Mtwapa (PW 6). The police started looking for him. Thereafter the appellant rang Cpl Langat asking him why police were looking for him and he told the appellant to go to the CID office. The appellant did not go and on 1<sup>st</sup> September 2004 the appellant was arrested by PC Mwachida (PW 8); PC Mbindyo (PW 9) and PC Waweru of CID Kilifi who had been instructed to look for him. On 14<sup>th</sup> September, 2004, IP Wafula (PW 5) conducted an identification parade where the appellant was identified by Juma (PW 3).

The appellant in his sworn testimony, by way of defence said at the trial, among other things, that he is a *matatu* driver; that on the material day his *matatu*, motor vehicle reg. no. KAP 182T was detained by police at Kijipwa Police station in the morning; that he informed his employer Abas Abdul of the incident; that he did not have a driving licence; that he was given a police abstract regarding loss of his driving licence at Kijipwa Police station; that the vehicle was released at 3.30 pm; that he was never at Msambarauni at 2.30 pm on the material day; that Cpl Langat called him and told him to report at CID office Mtwapa; that he went on his own to police station on 1<sup>st</sup> September, 2004 but he was detained, and, that he was identified in identification parade 13 days later by a witness who had been shown the appellant before the parade. The trial magistrate convicted the appellant on the basis of the evidence of the complainant; the evidence of identification by Juma and Hussein Mwinyi Mwijibu (PW 4) (Hussein) and on the basis of the evidence of Cpl Langat.

On appeal the superior court after evaluating the evidence stated:

**“We have examined the conditions surrounding the identification. We find the prosecution witness (sic) were why (sic) consistent to detail as to how the incident was executed. PW 1, PW 3 and PW 4 evidence corroborate each other as regards the fact that appellant did walk to the canter pistol in hand. PW 1 saw him. PW 3 saw him as he lay on the seat facing up. – PW 5 who knew him not just by name and appearance but even confirmed that he was a matatu driver saw him as he stood 100 metres away watching the unfolding events. It was not a fleeting glance .... the process had steps - approach, branch off the road, turn, follow canter; order at off the road (sic); overtake, were shooting; went to the canter opened the door, demand for and take money, demand for phones ....”**

The superior court proceeded:-

**“All the prosecution witnesses (sic) were consistent that the incident occurred at about 2.30pm that was day time – was nothing to impede the vision of the witnesses. Our finding is that the opportunity and environment for identification was favourable there was no mistake it was positive identification”**

There are several grounds of appeal, the main grounds being four. They state in general that the superior court erred in law by failing to see that the identification by PW 1, PW 3 and PW 4 was of doubtful integrity; that the superior court erred in law in relying on the evidence of PW 4 when he recorded his statement 2 months after the incident: that the superior court erred in law in failing to see that the prosecution case was shoddily investigated and thus unreliable, and, lastly, that, the superior court erred in law in failing to consider the appellant’s defence which was firm and unshaken.

The superior court had a duty to reconsider evidence, re-evaluate it itself and arrive at its own independent conclusion (*see Okeno vs R. [1972] EA 32*). The prosecution case depended solely on the identification of the appellant at the scene by three witnesses, namely, Bildad Kipkumu Kemboi (complainant), Juma, a turn boy and Hussein – a passer-by. According to the complainant he saw through the driving mirror that the occupants of the Toyota car were armed and that they fired after they ordered the complainant to park the lorry by the road side. He claimed that there were five people in the car. He also claimed that he identified the appellant whom he did not know before. According to him, after shooting him the appellant went round the lorry and shot at the turn boy – a relative.

The complainant did not state at what stage he identified the appellant or how long the incident took or how much money was in the parcel that he handed over to the appellant. Indeed, there is no evidence at all that the complainant was robbed of the sum stated in the charge sheet – Kshs.118,000/=. After the appellant was arrested the police did not conduct an identification parade in respect of the complainant. It has been correctly submitted that the evidence of identification by the complainant was merely evidence of dock identification. Alfred (PW 2) said that he laid on the dash board after the robbers fired and that he did not have a chance to see the robbers. Juma claimed that after a shot was fired a stout and brown man went to the door of the lorry and took the money. He further

claimed that he saw him as he was lying on the seat looking up. He later identified the appellant at the identification parade held on 14<sup>th</sup> September, 2004 – over one month after the robbery. He did not know the appellant before the robbery. Neither of the two turn boys supported the evidence of the complainant that one of them was shot by the robbers.

Hussein was a crucial witness. He testified, among other things, that as he was riding his bicycle carrying pipes towards Msambarauni Mtepeni, he was forced off the road by a lorry at Msambarauni stage; that he disembarked from the bicycle; that he saw a white saloon car pass, then turn back and follow a canter lorry; that the appellant was seated in the left side with a pistol and the co-accused on the right side driving; that there were other three or so people in the vehicle; that the co-accused shouted to appellant to shoot those who were watching by the road; that the witness fled; that he reported to District Criminal Investigating Officer (DCIO) on the following day and that he knew the appellant as a matatu driver before. On cross-examination, Hussein testified that the robbery took place less than 100 metres from where he was standing and that he recorded his statement to the police on 2<sup>nd</sup> November, 2004 – that is, over 2½ months after the robbery. At the trial the witness requested to be allowed to testify in camera for security reasons. There was no objection and his evidence was received in camera. Although Hussein implicated the co-accused, the trial magistrate found that the evidence of Hussein was not sufficient stating in part:

***“The circumstances of this case, being the failure of Hussein to record a statement immediately and failing to attend a parade make it unsafe to rely on his sole evidence to convict the 2<sup>nd</sup> accused unlike the case of 1<sup>st</sup> accused where there is other evidence to support Hussein.”***

The same test should have applied to the appellant’s case.

The appellant’s defence was that of alibi. It is clear from the judgment of the trial magistrate that the appellant produced his police abstract at the trial dated 10<sup>th</sup> August, 2004 showing that he reported the loss of his driving licence and PSV badge as O.B. 22 but the trial magistrate observed that the police abstract did not show the time when it was issued. The appellant has consistently raised the defence of alibi throughout the trial. On 16<sup>th</sup> September, 2004 when he was taken to court for plea he told the court: ***“I am being victimized after I refused to co-operate with the DCIO. On the said day I was at Kijipwa where my vehicle had been detained ....”***

The complainant and Hussein were cross-examined on this defence. The appellant told I. P. Wafula at the identification parade that he was at Kijipwa Police Station at the material time. Moreover, it is apparent from the judgment of the trial magistrate that the appellant sought to have I. P. Noor of Kijipwa Police Station testify in support of his defence. In law, the appellant had no burden to prove the alibi and it is sufficient if the alibi introduces into the mind of the court a doubt that is reasonable (***See Kiarie vs Republic [1984] KLR 739***). There is evidence of Cpl Langat (PW 6) of CID Mtwapa that he saw the appellant on the material day at Mtwapa at 1.30 pm standing at Mtwapa Service Station. This evidence would displace the alibi that the appellant was at Kijipwa Police Station at that time but it is not decisive. It was correctly submitted, in our view, that since the appellant had consistently raised the defence of alibi and since the police knew of that defence they should have called a witness from Kijipwa Police Station to rebut the defence. The fact that appellant later rang Cpl Langat to inquire why police were looking for him raised doubts about his participation in the robbery.

There was a state of panic at the time of the robbery as the robbers were armed and in fact shot at the complainant. The complainant, Juma and Hussein, who claimed to have identified the appellant did not give a description of the clothes the appellant was wearing or give the registration number of the white Toyota car used in the robbery. The trial magistrate observed that the canter vehicle was not produced in court as evidence and that no P3 form (police medical form) was given to the complainant to confirm a gun injury. We have already observed that there was no evidence that Kshs.118,000/= was indeed stolen. Further there was no evidence that police went to the scene to search for spent cartridges or that they recovered any from the vehicle.

All these factors we have mentioned above show that the prosecution case was not properly investigated and that reasonable doubts exist about the credibility of the prosecution case regarding the identification of the appellant at the scene of the robbery. The defence of alibi which was not rebutted by cogent evidence raised reasonable doubts about the appellant’s participation in the robbery. The superior

court merely scrutinized the prosecution evidence but failed to exhaustively re-appraise the evidence. The appellant was entitled to the benefit of doubt.

The upshot is that we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of January, 2010.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**