IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 299 OF 2009

MOHAMMED WEKESA MUSUMBA ……...……..APPELLANT

AND

REPUBLIC ……..…..RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma (Muchemi & Chitembwe, JJ.) dated 18th June, 2009
in

H.C.CR.A. NO. 96 OF 2007)
****

JUDGMENT OF THE COURT

The appellant ***Mohammed Wekesa Musumba*** was charged jointly with two others who were acquitted by the trial court on a charge of robbery with violence contrary to ***section 296 (2***) of the Penal Code by the Resident Magistrate, Bungoma. The particulars of the 1st count against the three were that on the 11th February, 2005 in Bungoma district within the Western Province, jointly with others not before court while armed with dangerous weapons to wit rifles and pangas robbed ***Drews Simiyu Wabwoba*** Kenya Shillings 5,000/= and immediately before immediately after the time of such robbery wounded the said ***Drews Simiyu Wabuoba***.

The particulars of the second count were that the three persons on 11th day of February, 2005 at the same place jointly and unlawfully had carnal knowledge of ***P.N.W***. Upon conviction the appellant was sentenced to suffer death in the manner authorized by the law on first count of robbery with violence. He appealed to the High Court Bungoma but in its judgment dated 18th June, 2009 the High Court (F.N. Muchemi and Chitembwe, JJ) dismissed his appeal. The appellant now comes to this Court by way of a second appeal. That being the case only issues of law can be entertained by this Court - see **section 361** of the Criminal Procedure Code.

In this appeal the appellant was represented by N. Marube advocate while the State was represented by Omutelema, Senior Principal State Counsel.

Although Mr. Marube did draw the Court's attention to the home-made memorandum of appeal dated 29th June, 2009 filed by the appellant, he indicated to the court that he had on 28th January, 2010 filed a supplementary memorandum of appeal and as a result, the learned counsel restricted his submissions to the supplementary memorandum of appeal which raised two substantive grounds as follows:

"1. That the learned judges erred in law in not evaluating the whole evidence before the lower court, as is incumbent upon them as the 1st appellate court, weigh all the evidence and draw its own inference and conclusions and had they done so, they would have arrived at a different conclusion. A miscarriage of justice was thereby occasioned.

2. That the learned judge erred in law in not finding that the circumstances of identification/recognition of the appellants were not conducive and or did not meet the required legal standards".

The learned counsel's submissions were that the evidence of identification given by the prosecution witnesses ***Drews Simiyu Nabwoba*** (PW1), ***Fred Situma Murunga*** (PW3), and ***P.N*** (PW4) was not properly evaluated. In particular Mr. Marube pointed out to the court, that the trial court had disallowed the evidence of PW1 and PW4 but only allowed the identification evidence of PW3. Touching on the evidence of PW3 he contended that the evidence was not free from error as no prior description of the appellant had been given to the arresting officer and that no identification parade was held at all. He further submitted that in the judgment of the trial court, the court had clearly indicated that the evidence of prosecution witness PW4 as regards identification, was tainted and the court therefore declined to rely on it as against the second and third accused who were acquitted, and that the evidence of identification against the second accused was not distinguishable with that of the first accused (the appellant) except for the additional evidence that there was independent evidence following the appellant's arrest on 12th February, 2005 with an AK 47, and that there was also independent evidence that the appellant had a conspicuous mark on the forehead which was captured on the material day by ***Cornelious Wekesa Khisa*** (PW5).

The learned counsel challenged this evidence by stating that as regards the evidence of identification by PW3, as the incident happened at night there was no evidence of the strength of the light used in identifying the appellant. The positions taken by the identifying witnesses *vis a vis* the intensity of the light from the lantern or the moonlight were not gone into by the trial court or the first appellant court.

He went on to state that as the identification evidence of PW1, PW3 and PW4 was not free from error and the trial court had said so, the

strength of the additional evidence of the possession of the firearm allegedly by the appellant was never tested as well in that one version of the evidence was that the firearm was found in a toilet in a hotel where the appellant was staying in the company of two others and the second version of the evidence tendered was that the firearm was found in a sack which was in possession of the two ladies. In addition he submitted that there was no proof that the firearm used during the robbery was the same as the one exhibited in court as the two distinct descriptions of it were given. PW2's evidence was that the firearm description was **S/No. 19958BP211** make AK 47 whereas PW8 described the same gun as **AK 47 S/No. SBB21111**. In this connection, he submitted that had the first appellate court looked afresh at the evidence, the above discrepancy concerning the gun would have been detected and the benefit of doubt given to the appellant, for the reason that one weak piece of evidence concerning the gun cannot be used to corroborate another weak piece of evidence of identification of the appellant by PW3.

As regards the firearm, counsel submitted that there was nothing to connect the appellant with it, firstly, because it was recovered in a house after several occupants had been asked to move out by the police and the appellant was not the owner of the house where the firearm was recovered and secondly, there was no proof that the appellant had exclusive control of the premises where the firearm was recovered. The learned counsel stated that there was a parallel case where the appellant and several other persons had been charged with illegal possession of the firearm in question and the case is still pending. There was also evidence that the spent cartridge could have been fired from any other firearm of the same caliber and the consequence of the above was that the so called incriminating evidence of the firearm as against the appellant was weak and therefore it could not reasonably have been of value even in terms of strengthening the evidence of identification so as to place the appellant at the scene. It was also Mr. Marube's submission that the first appellate court failed in its duty to re-evaluate the evidence. Instead the first appellate court repeated what the trial court had concluded. Had the first appellate court done so it would have highlighted the apparent contradictions as set out in his submissions which contradictions should have been resolved in favour of the appellant. He pointed out that in the entire judgment the court did not show that it was alive to its duty and accordingly failed to discharge it. He concluded by urging the court to note that the judgment of the first appellate court consists of a regurgitation of the facts as found by the trial court.

Mr. Marube's submissions touching the second ground were that the circumstances of identifications/recognition of the appellant were not conclusive and did not meet the required standards. He illustrated the point by citing this Court's decision in the case of **SAID BAKARI ALI and 20 OTHERS vs. R Criminal Appeal 900** of **2003** where the Court said:

"We think the approach adopted by the prosecution with regard to the issue of lighting was casual in the circumstances - where exactly were the lights? - above the witnesses, in front of the entrance or exactly where."

The learned Senior Principal State Counsel Mr. Omutelema submitted that the appellant was found in possession of the firearm only one day after the robbery and the ballistic expert had shown after conducting the necessary tests that the spent cartridge recovered at the scene had been fired from that firearm. PW2 testified that the firearm was recovered from the room where the appellant was arrested and he could not explain the possession of the firearm, and that the appellant had confessed that the firearm was his. Counsel contended that although there was a misdescription of serial numbers relating to the firearm when two of the prosecution witnesses testified concerning the firearm, these were minor discrepancies. He added that the appellant was arrested in the bathroom where the firearm was found and he was in the company of two ladies and that fact alone placed the appellant at the scene of crime. As regards the evidence of PW3, counsel urged the Court to note that PW3 was a police officer and therefore was familiar with firearms and that the trial court could not give the same weight to his evidence as that of civilians and this explains why the court believed him.

At the outset, we consider it important to remind ourselves of the duty of the second appellate court. The Court's duty was very aptly stated in the case of **ADAN OMAN & ANOR. V. R Criminal Appeal NO. 11 of 2002 Nyeri** where the Court stated:

"The second appellate court for its part is only concerned with issues of law. Its duty is to consider and decide whether or not in discharging its functions the first appellate court applied those principles. In other words what the second appellate court is obliged to do is to decide whether a judgment can be supported on the facts as found by the trial court and first appellate court. It is not the function of the second appellate court to place itself in the shoes of the first appellate court by reconsidering and re-evaluating the evidence adduced in the trial court and draw its own conclusion."

But what are the principles which the first appellate court must uphold? The clearest elucidation of the Court's duty was expressed in the case of **PANDYA v R 1957 EA** by the predecessor of this Court in these words:

"On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to clear the case and reconsider the witnesses before the judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and reconsidering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witnesses but there may be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the court differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

In 1972 the same court reiterated the same principles in the case of **OKENO v R (1972) EA**, as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination Pandya v. R [1972] E.A 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A 424."

On our part we would like to look at the matter before us in the light of the above principles so as to ascertain if the first appellate court discharged its duty.

On the issue of identification the superior court in its judgment stated:

"PW1 and PW4 were in the house when they were attacked. PW4 said that the thugs took about thirty (30) minutes outside the house as they struggled to gain entry. All this time she was seeing them from outside her house. They were flashing torches around which enabled her to see from inside the house, as the torches were flashed by the assailant. From this light, PW1 and PW4 identified

the appellant who was holding a firearm. The source of light was not very reliable since PW1 and PW4 did not have their own torches…….”

Again the first appellate court observed”

“PW3, a close neighbour of PW1 saw the assailants through his own door outside the house of PW1. He looked at them as they flashed their torches around trying to break into PW1’s house. PW3 had his own torch. He saw the appellant who was wearing a cap and had not covered his face. The appellant had a rifle which PW3 who is a police officer identified as an AK 47. We are convinced that PW3 identified the appellant and the source of light from his own torch and those of the assailants were reliable. He was inside his house as he observed what was happening outside. The conditions for identification were conducive in regard to this witness…….”

We pause here and ask if, as observed by the superior court PW3 was inside his house, how far was his house from that of the complainant and how did he identify the appellant while inside his house? What was the capacity or strength of his torch itself? For how long did he focus on the appellant?

Again as regards the firearm the superior court stated:

“It was only a day after the attack that an AK 47 rifle was recovered by PW5 in a toilet and the appellant was arrested. The rifle was produced in court. In our view that is further corroborative evidence against the appellant.”

The record indicates that the firearm was recovered in a room in a hotel where the appellant and two ladies were arrested and second, that it was recovered from a toilet. It was not indicated who owned the toilet and whether the only person who had access to it was the appellant. Again, what was the court’s view concerning the evidence that the firearm was found in a sack which was in the ladies possession? In other words, how was the appellant connected with the firearm which was not recovered in his exclusive possession? What evidence is on record concerning the description of the firearm and does that evidence conclusively lead to the conclusion that the firearm produced in court was the one used in the robbery even in the light of the two conflicting descriptions? All these questions reveal serious discrepancies and unanswered questions which had proper re-evaluation been done could have led the court to a different conclusion.

Going by the record and with all due respect to the superior court, in its five page judgment, it failed to discharge its duty as the first appellate court. It is clear to us, the short judgment consists of a regurgitation of the facts as found by the trial court and not an independent evaluation of the evidence by the first appellate court. The Court concluded that the prosecution had proved its case against the appellant. It is our view the judgment fell far short of the standard enunciated in the ***Pandya*** and ***Okeno*** cases (supra). To illustrate the point, the judgment does not even on its face, reveal any analysis of the evidence by the court or a re-evaluation of it and the court’s independent conclusion thereon as regards both the important question of identification and the evidence concerning the firearm.

We would not want to guess what the first appellate court’s findings would have been had it discharged its duty as set out above. However we are of the considered view that as a result of the first appellate court’s failure to discharge its duty the appellant was denied an important matter of law which in turn resulted in the appellant suffering prejudice because of the court’s failure to adhere to the standards clearly laid down in a line of authorities going back to the 1950’s, and which standards were meant to safeguard the rights of the accused and to accord him due process of law. In our view the omission or lapse on the part of the first appellate court has resulted in a miscarriage of justice.

Failure to re-evaluate and to reconsider the evidence denied the appellant the right of protection of law. It further denied the appellant an independent evaluation which is in turn an important safeguard in the appeal system as enshrined in our laws and which constitutes a fundamental principle in the criminal justice system of this country. Failure by the first appellate court to discharge its duty is a matter of law which is well within the mandate of this Court hence our intervention. In our opinion the appeal system was designed to distil and safeguard the rights of accused persons at each stage of the process and therefore failure by the appellate court to fully discharge its duty compromised the appellant’s right of hearing.

For those reasons we allow the appellant’s appeal, quash the conviction and set aside the sentence. We further order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

It is so ordered.

Dated and delivered at Eldoret this 16th day of April, 2010.

P.K. TUNOI

……...……
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….
JUDGE OF APPEAL

J.G. NYAMU

…….……..……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR