



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU**

Criminal Appeal 163 & 165 of 2008

BETWEEN

STEPHEN KALENG MAKALALE 1ST APPELLANT
SABIANO MBONDO OKANGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru JJ.) dated 15th July 2008

in

H.C.CR.A. NO.310-311 OF 2001

JUDGMENT OF THE COURT

In this second appeal, the appellants, **Stephen Kaleng Makalale** (*1st appellant*) and **Sabiano Mbondo** (*2nd appellant*) both of them former Administrative Police Officers, were convicted, after a trial, by the senior Resident Magistrate, Narok, of the count of robbery with violence contrary to **section 296 (2)** of the Penal Code, and were thereafter sentenced to the mandatory death sentence. Their respective first appeals were dismissed by the superior court (Koome and Kimaru JJ.), and hence this joint appeal.

Mr. Bichanga, advocate, who appeared for both appellants in the appeal raised 7 grounds of appeal in a supplementary memorandum of appeal, but at the hearing he argued only the following four:

- (1) Some essential witnesses, among them the arresting officer, were not called with the result that the omission prejudiced the appellants' respective cases.
- (2) The superior court failed to analyze and re-evaluate the evidence as it was required to do.
- (3) The appellants were not identified as having committed the robbery complained of.
- (4) There was an unexplained delay of 2 ½ years before judgment could be pronounced and such delay caused anxiety to the appellants.

The appellants were, on 9th July 2000 detailed to provide security to a van owned by Wells Fargo, a security guard company, which was to transport some money belonging to National Bank of Kenya Ltd, from its branch, at Narok

to its headquarters in Nairobi. The money was in a portable security box. It was kept in a compartment in the vehicle which was lockable. Apart from the two appellants, and the driver, there were two escorts and a car commander from the security company. The appellants were each armed with a G.3 rifle.

Richard Vincent Orwa, (Orwa) testified that he was the branch accountant of National Bank of Kenya Ltd, Narok, branch at the material time. He testified that he stuffed in the security box a total of Kshs.8 million in various denominations before he sealed the box. The money was in 16 bundles. He fixed seals on the box and the said box could only be regularly opened in Nairobi. He handed over the box to the crew of the aforesaid motor vehicle. The driver of the motor vehicle registration No. KAD 918N, was Muthoka Kimeu (Kimeu). Near Ntulele, along Narok – Nairobi, road, the driver testified, that the 1st appellant asked him to stop saying that he felt nauseated and wanted to vomit. As soon as the driver stopped the 1st appellant came out, cocked his gun, which he pointed at the driver and ordered him to come out of the vehicle. The driver complied. With the assistance of the 2nd appellant, he ordered the escorts to come out as well, but after taking out the security box. The escorts were **Gidiel Githinji Kiaira** (*Gidiel*), who was the car commander, **Maurice Simiyu Siocha** (*Simiyu*), and **Sammy Kibiegion Koech**, (*Koech*). The appellants ordered these three to carry the box into a nearby forest. The driver was also ordered to accompany them, leaving the vehicle by the road side. Later, however, the driver requested to be allowed to go back to the vehicle to collect a jacket. One of the appellants accompanied him, as the appellants feared if he went alone he was likely to escape. He was given the vehicle keys. He went and moved the vehicle out of the road and after driving it for a short distance into the bush he was ordered to leave it there which he did. The two thereafter joined the others.

It is in evidence that the escorts were ordered to cut the hinges of the security box using a hacksaw which the appellants had. It took sometime but eventually the box was opened. Inside the box there were bundles of money. The appellants, according to Kimeu, Gidiel, Simiyu, and Koech, produced two yellow polythene bags into which they stuffed all the money after which they ordered the escorts to carry it deeper into the forest. At some stage, however, Kimeu said he dodged the appellants and escaped. He returned to where he had left his vehicle and drove back to Narok where he reported to the police what he believed was a robbery. The report was made at Narok Police Station.

It was the prosecution case that both appellants were later the same day arrested at a police road block mounted to catch them if they passed there. Cpl Nyangaresi Bibao (Bibao) testified that he found both appellants under arrest at the road block and that he was one of the police officers who escorted the appellants to Ntulele Police Station where some money the appellants were rested with was counted. He testified that he witnessed a quarrel between some police officers over some of the money which could not be accounted for. Lucy Wairimu Gacharera (Lucy), testified that she witnessed the arrest of the appellants who she had given a lift in a vehicle she had hired to transport some green maize from Kisii. She was heading to Nairobi in company of three other persons.

The appellants' story was however different. In a nutshell their case was that the police at Narok conspired with the Wells Fargo crew to steal the money. A government land rover, white in colour, was used. Six police officers

were involved. The plot to steal the money was hatched in Narok town. The police followed the Wells Fargo motor vehicle and about three or four kilometers from Narok town it went ahead and waved Kimeu to stop, which he did. The six policemen came out of their vehicle. The crew of the Wells Fargo and both appellants came out too. Simiyu, allegedly asked the appellants to stretch a bit by walking in the Nairobi direction. They readily agreed. Shortly later the appellants saw both vehicles being driven fast towards Nairobi. The two appellants did not know what to do. They decided to report the incident at Ntulele Police Station which according to them was the nearest Police Station. On arrival there they found Kimeu there with several policemen. He pointed them out as the officers who had been with them. They were arrested and later were charged with the offence for which they stand convicted. They both denied having stolen the money complained of or having commandeered the Well Fargo vehicle into the bush.

The officer who arrested the appellants and seized the money allegedly recovered from them did not testify. Some of the police officers, who effected the arrest, we were told, were prosecuted, presumably for stealing part of the stolen money. We were not told the result of the prosecution. Mr. Bichanga for the appellants submitted before us that the absence of evidence of arrest leaves a gap in the prosecution case, as in his view in absence of that evidence it cannot be said that the appellants were arrested with any money or that they were in any way connected with the robbery.

The trial Magistrate in his judgment believed the testimony of the car crew from Wells Fargo, that both appellants robbed them of the money; that they frog-marched them into the forest where they forced the security box open and took the money; and that the two appellants used polythene bags which were yellow in colour to asport the money away; and that the appellants were arrested at a police road block with the money. He believed Lucy that she witnessed the arrest of the appellants, and the failure to call the arresting officer did not in anyway weaken the prosecution case. He also believed Cpl. Juma, that he took possession of the money recovered from the appellants soon after their arrest. He rejected the appellants' version of the matter and concluded that the story they both gave was concocted. He therefore found them guilty as charged, convicted them and meted out the mandatory death sentence.

The superior court on first appeal affirmed the decision reviewed the evidence, reminded itself that unlike the trial court it neither heard no saw the witness testify and in that regard it cited this Court's decision in **Njoroge v. Republic** [1987]KLR 19. The court then analyzed the evidence thus. The appellants did not waylay the car crew. They had traveled with them from Nairobi to Narok. The evidence adduced by the prosecution placed the appellants at the **locus in quo**, and their identity was not in doubt. The car crew and Lucy were witnesses of truth and their respective testimony without doubt, connected the appellants to the commission of the offence. Any contradiction in the testimony of those witnesses were of a minor nature. The theft of part of the recovered money by what the superior court called rogue policemen, did not weaken the prosecution case, and moreover that theft occurred after the robbery complained of was complete. The court rejected the appellants' respective defences and consequently dismissed their respective appeals and thus provoked this appeal.

We earlier set the appellants' complaints against the decisions of both courts below. We will deal with them seriatim.

The case of **Bukenya v. Uganda** [1972] EA 549 lays down the test, to apply in considering whether a failure to call certain witness was or was not prejudicial to an appellant's case. The Court of Appeal for East Africa authoritatively rendered itself thus, at p.550:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call but this needs to be qualified in three ways. First there is a duty on the Director to call or make available all witnesses, necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case... Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

Mr. Bichanga submitted that the police officers who arrested the appellant having not been called, the trial and first appellate courts should have taken a perverse view of the matter and held that the case against the appellant was concocted.

The appellants were ordinarily based in Nairobi. They were assigned escort duties. They were provided with weapons. Their work was to provide security to the money and car crew of Well Fargo who were detailed to collect money from Narok and take it to National Bank of Kenya, headquarters in Nairobi. The car crew testified against them. The robbery took place in broad daylight. The crew members had been with the appellants from Nairobi to Narok and from Narok to where the robbery took place. The crew members were ordered by the appellants to break the security box and to carry the money which was inside the box. That is the story of the car crew members. That story has to be juxtaposed with the story of the appellants, who stated that the car crew members conspired with the police at Narok to steal the money. They stated that they were hoodwinked and asked to have a walk while the crew members and the police had a chat by the roadside. They readily agreed. Why would they do so knowing very well that their duty was to guard both the money and the Wells Fargo personnel who had custody of it? The story is incredible. The prosecution called Lucy as a witness – She testified that she gave a lift to two armed police officers who were carrying something in two yellow polythene bags. The trial and first appellate courts believed her. The totality of the evidence given by the Wells Fargo crew and Lucy leaves no doubt that a robbery took place and the appellants were connected with it. They admitted they were given a lift. Clearly the two courts below were entitled to come to the conclusion that the chain of events left no doubt that the appellants committed the robbery complained of. The evidence of arrest would have served to make the case against the appellant more plain. It cannot be said that the evidence against them is barely adequate.

Besides, the arresting officers, like the appellants, turned rogue and themselves stole the money that had been recovered. Their evidence if called would have been of the weakest kind.

The next complaint the appellants raised is that the superior court did not analyze and re-evaluate the evidence before dismissing their joint appeal. Earlier we stated that the superior court reminded itself of its duty of analyzing and re-evaluating the evidence. It then set out the evidence and discussed it in detail. However, the court failed to note that the

evidence of No. 21 5960 Cpl. Oruko, the investigating officer of the case, is incomplete. He gave evidence in part on 4th May 2001, and he was stood down because time was over. At the resumed hearing of the case on 5th June 2001 the court called another witness, No. 51981 P.C. Fredrick Walela. Thereafter the prosecution closed its case. Mr. Bichanga, cited this as evidence that the superior court failed to analyze the evidence. The other aspect, Mr. Bichanga pointed out is the fact that the Wells Fargo officers from whom the money was allegedly robbed were initially treated as suspects. They were detained by the police for a few days. Some of them were found with part of the stolen money. In his view their evidence was inadmissible.

The position in law with regard to accomplices is this. An accomplice is a competent witness against an accused person (see S.141 of the Evidence Act, Cap 80 Laws of Kenya). However such evidence needs corroboration. In the case of Uganda v. Shah [1966] EA 30, the Court of Appeal For East Africa, in dealing with the question of accomplice evidence, rendered itself, as follows:

“The second and third grounds of appeal were that the learned judge had erred in holding that there was no independent evidence incriminating either the first or third respondent, corroborating the accomplice evidence against them. The facts relied on by the prosecution were the finding of the 113 ½ bags of Arabica coffee on the Busikikiri Estate where only Robusta was grown, and the expert evidence that the coffee so found was similar in quality to the stolen coffee. The learned magistrate held that these facts were capable of amounting to corroboration.

...

Evidence to be corroborative must be independent and it must implicate, or tend to implicate, the individual accused in the offence. This is a matter of fact in each case. It seems to us that when one is dealing with a small private company, a family company, evidence that stolen property was found on its premises must tend to implicate the directors in the alleged offence of receiving or retaining. It could not, of course, in itself be enough to sustain a conviction but we think it is enough to corroborate accomplice evidence which has been found credible.” (Emphasis Supplied).

It is clear from that authority that accomplice evidence is admissible but also that if believed, it might be relied upon to found a conviction if corroborated by independent and admissible evidence. Both courts below believed the testimony of the Wells Fargo officers, and made reference to the evidence of Lucy as being supportive of their evidence. The two courts did not specifically hold that the Wells Fargo officers were accomplices. However, in the course of their discussion of the evidence the two courts implied that the witnesses were not accomplices. Even assuming they were, the witnesses were believed, and there was ample corroborative evidence supplied by Lucy. Their evidence tended to implicate the appellants, and we are satisfied that the superior court did reasonably evaluate the evidence, analyzed it, and we, therefore, find no basis for faulting it on this aspect. The incomplete evidence of the investigating officer did not cause any appreciable prejudice to the appellant. Its exclusion does not in anyway weaken what is clearly a very strong case against the appellants. The submission that there is no response from the appellant about the alleged recovery of money from them is neither here nor there. The appellants case was that no money was recovered from them, a story both courts below rejected.

Then there is the complaint, that the appellants were not identified as the people who were arrested at the road block. This complaint is a red herring. Lucy testified that they were. She was supported on that aspect. Her evidence in

that regard was as follows:

“From Narok town we encountered some police officers who checked us and released us. We then proceeded. On the way we found two police officers in full uniform. They were carrying two yellow polythene paper bags. These are the bags they had (Exh 4 & 5 identified). They stopped us and asked what we were carrying. We told them maize. They then asked if we had cess. We showed them the cess. They then asked us to give them a lift to somewhere ahead. They first said ahead. We agreed... I can't tell between these two who was in front.”

Later after being stopped at a road block, the witness said:

“We were ordered to come out empty handed. We got out and we were ordered to lie with out heads down. We did so. I heard one police asking where is the gun.? ... I heard an askari say “Hata pesa ndiyo hii iko hapa... We were brought to station. I didn't know how much money was recovered.”

It is instructive that the appellants were not accompanied by the Wells Fargo staff at the time they asked for a lift. Lucy saw the two yellow paper bags. The Wells Fargo staff gave evidence concerning those bags. There was no evidence that before her arrest Lucy had come into contact with the Wells Fargo staff. We have no doubt whatsoever that the appellants were properly identified by Lucy as the two uniformed police officers carrying firearms and polythene paper bags. Although Lucy did not specifically identify them, the sequence of events leave no doubt in any one's mind that the appellants are the people who were given a lift by her.

We have said enough to show that the appellants' appeal; has no merit. But before we pen off, there is the issue the appellants raised regarding delay by the superior court to give its judgment. The appellants state that the judgment took 2 ½ years before it was delivered. Submissions on the appellants' first appeal were concluded on 16th February 2006. The judgment of the court was given on 15th July 2008, about 2 ½ later. The delay is not explained. Whatever reason which led to the delay cannot be justified in the circumstances of this case. In an appropriate case such delay can deprive a judgment of its integrity. We deprecate the delay.

What is the effect of the delay on the appellants' case? The delay affected a judgment concerning a first appeal. The appellants were then and now condemned prisoners. Considering the decision we have come to, the prejudice, if any they suffered, is anxiety as to the outcome of their appeal. This is not the sort of prejudice which will constrain an appellate court as this one, to interfere with a decision appealed against. An appellate court interferes with a decision on established principles. Firstly, when the decision failed to take into account relevant matter. Secondly, where a decision takes into account an irrelevant matter. Thirdly, where a decision is based on no evidence. Fourthly, where a decision, when looked at objectively, shows that no reasonable tribunal, directing its mind on the evidence and the law would have come to such a decision. Fifthly, that if the delay complained of has affected the outcome of a decision, because the court giving the judgment has as a result, not fully appreciated the evidence, and submissions on the appeal.

We dismiss the appellants' appeal. It is so ordered.

Dated and delivered at Nakuru this 28th day of May 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR