



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NOS. 244, 248 & 298 OF 2007

BETWEEN

SYRIACUS ONYANGO OPERA & 2 OTHERS APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 8th March, 2007

in

H.C.C.R.A. NOS. 479-481 OF 2004)

JUDGMENT OF THE COURT

The three appellants, **SYRIACUS ONYANGO OPERA** (1st appellant) **SELETSE OTURI LINYONYI** (2nd appellant) and **RAMADHAN JUMA ABDALLA** (3rd appellant) were convicted by the Senior Resident Magistrate at Kibera (Ms. Muchira) of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. Their appeal to the superior court was dismissed hence this second appeal.

The facts as accepted by the two courts below appear fairly simple and straightforward. The complainant, **Steven Mathenge Githogonde** (PW1) had been employed by **David Muriithi Karuga** (PW2) to drive Karuga's taxi registration No. KYY 116, Mitsubishi. On 16th November, 2003 at about 10:00 p.m. at Kangemi, the complainant was approached by the 3rd appellant to drive him to Kangemi Gichaga whereupon the complainant charged him (3rd appellant) K.Shs. 100/= for the trip. When the two (the complainant and 3rd appellant) approached Kangemi Gichaga with the 3rd appellant seated at the back seat the complainant was ordered to stop. The complainant complied with the order and when he

looked back the 3rd appellant hit him with a pistol. Due to this sudden change of events, the complainant panicked and in the process released the clutch and the engine stopped. That is when three men emerged from the fence and started hitting the vehicle windscreen and then entered the vehicle – two in the front seat and one in the back seat. The 1st appellant who was one of the three people who emerged from the fence had a sword which he gave to the 2nd appellant. The complainant was pushed to the back seat where he sat between the 2nd and 3rd appellants while the 1st appellant took over the driving of the vehicle and the 4th person sat as the co-driver to the 1st appellant. After driving for sometime they met a police vehicle from the opposite direction. The 3rd appellant ordered the 1st appellant to block the police vehicle but the 1st appellant would not do so in view of the fact that the vehicle from the opposite direction was a police vehicle, hence the 1st appellant continued driving. The police vehicle turned and started following them as the occupants of the police vehicle started firing at the stolen vehicle. In a bid to escape the 1st appellant started driving at high speed but in the process lost control and hit a nearby kiosk. The complainant and the three appellants were arrested while the fourth person escaped. From the vehicle the police recovered an identity card in the name of the 1st appellant and a voter's card in the name of the 3rd appellant. Also recovered from the vehicle was a Somali sword and a toy pistol. The complainant identified himself as a victim of robbery and the three appellants were arrested and charged with robbery with violence.

In his defence, the 1st appellant stated that he was walking along the road when a vehicle overturned and as he ran to the scene to help the passengers of the overturned vehicle he was arrested.

The 2nd appellant in his defence stated that on the material evening he was walking along the road when a vehicle hit a kiosk only for a police vehicle to appear. The police officers alighted from their vehicle and ordered all the people to lie down. He was then arrested.

On his part, the 3rd appellant stated that he was a passenger and a victim of hijacking together with the complainant.

In the course of their judgment delivered on 8th March, 2007 dismissing the appellants' appeal, the learned Judges of the superior court (Lesiit & Makhandia, JJ.) stated inter alia:-

“The evidence before the court was that the vehicle crushed into a kiosk and stopped. PW3, the only arresting officer to testify in this case said that he and his colleagues surrounded the motor vehicle. He stated thus:-

“We fired in the air. The motor vehicle lost control however, and it hit a kiosk by the road side. The car stopped. We surrounded the occupants. We arrested 4 and one escaped before we could arrest.....”

The complainant corroborated PW3's evidence when he said that except for one who had a long gun who escaped, the other occupants were arrested still seated inside the vehicle. It is therefore clear that no one was arrested outside the complainant's motor vehicle and that the 1st and 2nd appellant's defence to that effect was exaggerated.

There was other evidence which added credence to the evidence of the complainant and PW3. The recovery of the identity card bearing the name of the 1st appellant inside the complainant's vehicle. As for the 2nd appellant, it was the complainant's evidence that he sat next to him throughout the period he was hijacked and that the 2nd appellant was still seated next to him at the time of his arrest. PW3 also said he knew the 2nd appellant before and that he was the person he personally arrested from the complainant's vehicle.

We are satisfied from the evidence of the prosecution by the complainant and PW3, that the appellants were seated inside the vehicle and that they had not had any chance to leave by the time they were arrested. Even though the complainant may not have been able to identify the 1st and 2nd appellants

had they escaped, given the fact that they were arrested inside the complainant's vehicle, then the issue of their identity did not arise as the evidence adduced against them was watertight."

When this appeal came up for hearing before us on 20th May, 2010, Ms. B. Rashid appeared for the 1st appellant, while Mr. N.N. Mutua appeared for the 2nd and 3rd appellants. Mr. V.S. Monda (Senior State Counsel), appeared for the State.

In her submissions, Ms. Rashid stated that the trial Court had misapprehended the facts in that the 1st appellant was a good Samaritan who rushed to the scene to assist the injured passengers and hence his role was misconstrued. Ms. Rashid faulted the superior court for upholding her client's conviction. She further complained that her client was not accorded a fair trial as part of the proceedings was conducted in English language which the 1st appellant did not understand.

On his part Mr. Mutua adopted the submissions of Ms. Rashid in so far as they related to the 2nd and 3rd appellants.

On behalf of the State Mr. Monda submitted that the two courts below believed the prosecution witnesses to the effect that the three appellants were arrested in the motor vehicle which had been stolen from the complainant. As regards the complaint that the 1st appellant did not understand the proceedings, Mr. Monda pointed out that the 1st appellant had put in written submissions in English language when he (1st appellant) appeared before the superior court; and that the 2nd appellant had been represented by an advocate, (Mr. Obuo).

For the foregoing reasons, Mr. Monda asked us to dismiss this appeal.

As already stated elsewhere in this judgment this is a second appeal and that being so only matters of law may be considered – see **section 361(1)(a)** of the Criminal Procedure Code. It is trite law that in a second appeal the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that on recorded evidence no reasonable tribunal could have reached that conclusion – see ***M' Riungu v. R. [1983] KLR 455***; and ***Karingo v. R. [1982] KLR 213***. Indeed in ***M'Riungu v. R.*** (supra) this Court agreed with the views expressed in an English case as follows:-

"That where a right of appeal is confined to questions of law only an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law."

It is also trite law that an appellate court would not normally interfere with the findings by the trial court which are based on credibility of witnesses unless it be shown that no reasonable tribunal could have made such findings – see ***Republic v. Oyier*** [1985] KLR 353.

This is a case in which the crucial evidence was that of the complainant (PW1) who was the victim of the robbery and ***Pc Samwel Wambugu*** (PW3) who was in the police party that chased the stolen vehicle, shot at it and eventually arrested the three appellants inside the stolen vehicle. The two courts below believed the evidence of these two witnesses.

The 3rd appellant's contention that he was also a victim of the robbery was considered and rejected by the two courts below. In their judgment, the learned judges of the superior court stated as follows as relates to the 3rd appellant:-

"The 3rd appellant's defence was that he was a victim of the carjacking just like the complainant in the case was. We have considered in detail the evidence adduced by the complainant and have no doubt that the 3rd appellant acted in concert with the 1st and 2nd appellants and the escaped accomplice.

The complainant's evidence was that it was the 3rd appellant who managed the entire episode because

he ordered him to stop right at the spot where his accomplices were waiting. At the time he ordered him to stop, the 3rd appellant was armed with what the complainant thought then was a pistol. It turned out to be a toy pistol and was also recovered by the police from the vehicle and produced in evidence. After his accomplices entered the complainant's vehicle, the 3rd appellant demanded to know how much money the complainant had. He then stole the Kshs.100/= the complainant said he had. During the time that the 1st appellant was driving the complainant's vehicle, the complainant said that the 3rd appellant kept giving him orders and that just before the arrest the 3rd appellant had commanded him to block the oncoming GK vehicle unaware it was carrying the police who eventually arrested them. The 3rd appellant was actively involved in the carjacking incident and clearly from his role, he had one common intention with his accomplices, which was to rob the complainant of his vehicle."

It would appear that the two courts below were satisfied that the complainant was a truthful witness who was a victim of robbery on the material evening and that the three appellants who were arrested inside the complainant's vehicle were the robbers together with the fourth man who escaped. We have carefully considered what has been urged before us by counsel appearing for the appellants and the entire record of appeal and we are of the firm view that the appellants were convicted on very sound evidence. We decipher no error in the manner the two courts below dealt with the evidence and the applicable law.

For the above reasons, we find no merit in this appeal and we order that it be dismissed in its entirety. Those shall be the orders of this Court.

Dated and delivered at NAIROBI this 2nd day of July, 2010.

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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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.