



IN THE COURT OF APPEAL OF KENYA

AT NYERI
Criminal Appeal 320 of 2006

SAMUEL KARANIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 6/11/06

in

H.C.C.R.A. NO. 237 OF 2000)

JUDGMENT OF THE COURT

The appellant **SAMUEL KARANI KIAMBATI** and **DAVID MUTETHIA ISAACK** were tried by Senior Resident Magistrate Nkubu apparently on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The appellant who was the first accused at the trial was convicted on the two counts and sentenced to death while the co-accused was acquitted of the two offences.

The appellant duly appealed against conviction and sentence to the superior court but his appeal was dismissed precipitating this appeal.

On the night of 30th May, 1998, **Silas Mbaabu Itithia (PW1)** (first complainant) and wife **Beatrice Mbida Mbaabu (PW2)** were asleep in their house, Kiria village Kariene in Meru District when robbers broke open the door of the house using a stone and proceeded to the bedroom. A total of six people entered in the bedroom. All the robbers had torches, one was armed with a rifle and the rest with rungs. Beatrice who was thrown out of the bed offered to give the robbers money. She removed Shs.7,200 from her husband's coat pocket and surrendered the money to the robbers. Thereafter, they ordered Beatrice to lead them to the neighbouring house of **Japhet Gikunda (PW3)** (2nd complainant) who is a brother to the 1st complainant. Beatrice was led from the bedroom to the living room where one robber broke open the box containing cigarettes and stole five bundles of cigarettes. Beatrice testified at the trial that she identified the appellant while at the sitting room. She stated:-

“In the sitting room I was able to identify, accused 1. All had torches. I knew him before. I earlier used to teach at Kariene. He comes from there. While at the sitting room I looked at the accused one who slapped me and ordered me not to look anybody in the face(sic)”

Beatrice was led to the house of the 2nd complainant and forced to call the 2nd complainant's wife **Martha Kaimuri (PW4)**, (*Martha*), on the pretext that Beatrice's child was sick and she required the 2nd

complainant to take the child to hospital in his vehicle. Upon being called, *Martha* awoke the 2nd complainant who opened the door. When the 2nd complainant opened the door he saw many people and he was cut on the head. He immediately realized that the people were robbers and he closed the door immediately.

The robbers started pushing the door open, while the 2nd complainant was shutting the door and at the same time shouting for help. His children came to his aid and in a struggle which lasted for about ten minutes one robber was mistakenly cut with a panga on the head by a member of the gang. The robbers ultimately forced the door open and the 2nd complainant fled towards the coffee plantation. He was pursued by two robbers who beat him and left him for dead.

Meanwhile, *Beatrice* was forced into the house and two robbers stormed into the bedroom and demanded money from *Martha* who gave them Shs.3000/=. The robbers also stole a T.V. set.

Beatrice testified again at the trial that there was bright moonlight and that she identified the appellant properly. She testified that after she was forced into the 2nd complainant's house she saw the appellant remove a radio cassette. She said in part:-

“The accused 1 had been cut on the head, left side. He was bleeding. He removed a radio cassette with detachable speakers. He took one speaker. Another came to take the other speaker but the commander told them time was over. The commander took a jacket. Then they went away into the coffee (sic).”

The robbery was immediately reported at Nkubu Police Station. ***P.C. Julius Mwanthe (PW6)*** and ***S/Sgt. Julius Siengo (PW7)***, a dog handler, went to the scene with the tracker dog at about 5 a.m. The dog followed the scent to a house about 300 metres from the scene of robberies. The occupants were asked to open the door but when they failed, the door was forced open. The appellant, ***Doris Kiende (PW5)*** who was treated as a hostile witness and a boy were found inside the house. The appellant had a cut wound on the head and bloodstained clothes. The three were arrested but the boy escaped as he was being led to the police vehicle.

The appellant stated by way of defence that on the material day he left Kariene market in the company of his wife at midnight and went home and after that on the following day police broke into his house and arrested him.

The trial court convicted the appellant on the basis of the evidence of identification by *Beatrice*, the tracking by the police dog and the cut wound on his head at the time of arrest.

On appeal to the superior court against conviction and sentence, the superior court agreed with the findings of the trial court and dismissed the appeal.

It is convenient to deal with ground 4 of the appeal first which ground states:-

“That the appellate Judges erred in law in upholding my conviction without considering that there was no charge sheet in support of PW1's allegation and in light of no plausible explanation to had (sic) been tendered by State of which this occasioned a failure of natural justice which was a violation of section 77 (2) of the Constitution of Kenya.”

In support of this ground, *Mr. Ndirangu* learned counsel for the appellant submitted that the superior court proceeded with the appeal without a charge sheet on record; that in the absence of the charge sheet, the date of apprehension, the date of the offence and whether the charge was defective cannot be ascertained. *Mr. Ndirangu* further submitted that in the absence of the charge sheet the appellant was not afforded a fair trial in contravention of **section 77** of the Constitution.

Mr. Orinda Senior Principal State Counsel, on the other hand, submitted that the absence of the

charge sheet would not be prejudicial to the appellant, that record shows that the charge was read; that the appellant did not plead guilty and that the date of the arrest is clear from the evidence of witnesses.

It is true that the charge sheet was missing from the record of appeal filed in the superior court. *Mr. Anampiu* who appeared for the appellant in the superior court told the court:

“The original charge sheet has disappeared and we are unable to trace it. I am otherwise ready to proceed.”

Mr. Muteti learned State counsel informed the superior court that he had written to District Criminal Investigating Officer (D.C.I.O) to supply a copy but he was not given a copy because the police file itself was unavailable. He applied for a court order whereupon the court ordered the D.C.I.O. to avail a copy of the charge sheet. However, a copy of the charge sheet could not be obtained and ultimately the State counsel asked the superior court to fix a hearing date for the appeal as the record was sufficient for hearing and determination of the appeal. *Mr. Anampiu* agreed saying:-

“I agree we can fix it for hearing.”

The appeal was ultimately heard and nothing was said about the missing charge sheet either in the respective counsel’s submissions or in the judgment. When *Mr. Ndirangu* raised the issue in this Court for the first time we ordered the Senior Resident Magistrate, Nkubu, Meru and D.C.I.O. Meru to take urgent steps to trace the whereabouts of the original charge sheet or a copy thereof but neither of them could trace it.

The record of the subordinate court shows that there was a charge sheet in which the appellant and another were charged with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and plea on those charges was taken and that on the day of the trial the plea was taken again. On both occasions the appellant and the co-accused pleaded not guilty. Further the judgment of the subordinate court contains the substance of the charges. It states thus:-

“The two accused persons, Samuel Karani and David Muteithia are charge (sic) with two counts of robbery with violence c/s 292(2) of the Penal Code. On 30/5/98 at 3.00 a.m. at Kiria Kenene, jointly with others not before the court the two are alleged to have robbed two brothers Silas Mbaabu and Japhet Gikunda of various items including cash, T.V., radio cassette, cigarettes and during the robbery they used actual violence on the victims.”

In addition, the two complainants gave evidence which established that they were robbed of various goods by a gang of robbers.

Section 134 of the Criminal Procedure Code (CP Code) requires that the offence alleged to have been committed should be specified on the charge or information. That provision was complied with in this case.

The only problem is that the copy of the charge was not included in the appeal file. The Criminal Procedure Code, however, does not specify the documents to be included in the appeal file on an appeal from subordinate court to the High Court. **Section 350 (1)** the **Code** merely states that the petition shall be accompanied by a copy of the judgment or order appealed from. There is reference in **S. 350 (2)** to “documents connected with the appeal” and “record of the proceedings” but no specific provision that the charge should be incorporated in the appeal file. Nevertheless it is clear from **Rule 61(4)** as read with **Rule 61(2)** of the Court of Appeal Rules that for purposes of an appeal from the superior court in its appellate jurisdiction to this Court the record of appeal should contain a copy of the charge amongst other documents. We have observed above that the record of appeal does not contain the copy of the charge. It is submitted that the absence of the charge is prejudicial to the appellant as it denied them a fair trial. **Section 77** of the Constitution which guarantees a fair trial to a person charged with a criminal offence requires, among other things, that the accused should be informed of the charge in a language that he understands, that he should be given adequate time and facilities for preparation of his defence; he should

be given the services of an interpreter free of charge and that he should be allowed to attend the trial.

Those provisions were evidently observed at the trial by the subordinate court. Furthermore, we are of the view that, there was substantial compliance with **rule 61(4)** as the judgment of the subordinate court containing the substance of the charges is incorporated in the record of appeal and that the absence of the charge has not caused any prejudice to the appellant. We reject ground four of the grounds of appeal.

The main ground of appeal relates to the identification of the appellant. The appellant complains that the superior court erred in relying on the evidence of visual identification in difficult circumstances.

At the trial the first complainant who was in the bedroom did not claim to have identified the appellant. He claimed to have identified the appellant's co-accused who was acquitted. Beatrice claimed to have recognized the appellant but she did not say that she identified the appellant's co-accused. The 2nd complainant claimed to have identified the appellant with the aid of moonlight at the time the robbers were pushing the door of his house open. *Martha* claimed to have identified two other people who stormed into her bedroom whom she named. The two people are not however the appellant and the co-accused.

The trial magistrate concluded that the robbery took place "in the dead of the night" when victims had been "dead asleep" and appreciated that the circumstances for identification were extremely difficult. Having appreciated the prevailing circumstances the trial magistrate rejected the evidence that the first and second complainants identified the appellant. The trial magistrate however believed the evidence that Beatrice indeed recognized the appellant saying:-

"Beatrice (PW2) claimed to have met accused 1 in her sitting room. She recognized him and he slapped her. He is the same person who led her to her brother-in-law's house (Gikunda's). He was giving her instructions. She was there when Gikunda resisted entrance into his house. She was there when accused one was cut on the head (sic). She was also there when accused 1 entered house after Gikunda left. She was inside the house of Gikunda when accused 1 took a radio cassette. She had known the accused even before. I am of the opinion that the witness spent enough time with the accused person to be able to adequately identify him. She had the opportunity to adjust herself to the situation."

The superior court equally expressed doubt that the 1st and 2nd complainant identified the appellant. However, like the trial magistrate, the superior court believed the evidence of Beatrice that she recognized the appellant. The superior court made a finding that Beatrice had four opportunities to identify the appellant; first through torchlight in her house at the sitting room; second, through moonlight as she was being frog-matched to 2nd complainant's house and during the struggle to gain entry into the 2nd complainant's house; third, when she saw appellant bleeding after returning from chasing the 2nd complainant, and, lastly, when the appellant was removing the cassette recorder from 2nd complainant's house.

The superior court further took into account Beatrice's evidence that she had described the clothes the appellant was wearing and that she had known the appellant for three years before the robbery.

The law is clear that on second appeal the appellate court would not lightly interfere with the concurrent findings of fact by the trial and first appellate courts unless no reasonable tribunal would on the evidence adduced have arrived at such findings or there were errors of law. (***MWITA V. REPUBLIC* [2004] 2 KLR 60; *BURU V REPUBLIC* [2005] 2 KLR 533.**)

In this case the two courts below after careful consideration of the evidence reached concurrent findings of fact that in the circumstances of the case Beatrice had opportunity with aid of torchlight and moonlight to see and recognize the appellant. On our analysis of the evidence we have no reasons to interfere with that finding.

There was also consistent evidence from both Beatrice and the 2nd complainant that one of the robbers was cut on the head with a panga outside the house of the 2nd complainant as the robbers were trying to gain entry into the house of the 2nd complainant. Beatrice particularly testified that she saw the appellant bleeding from the head.

There was also evidence that the appellant was arrested after the police dog tracked scent from the scene of the robbery to the appellant's house. *Mr. Ndirangu*, however, submitted, quite correctly in our view, that no basis was laid on the training and ability of the dog to track accurately.

In ***ABDALLA BIN WENDO AND ANOTHER VS. R (1953) 20 EACA 166*** the predecessor for this Court said at p. 169 2nd para. in respect of evidence relating to police dogs:-

“We are fully conscious of the assistance which can be rendered by trained police dogs in tracking down and pursuit of fugitives but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by homo sapiens. We do not wish to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dogs did and how they did it is most scanty. This kind of evidence will not do in a case where an accused person is arraigned on a capital charge-----”

That case seems to lay an onerous test because the person who trained the dog may not in most cases be readily available.

In ***OMONDI V. R [1967] E.A. 802*** the High Court of Kenya said in respect of such evidence at page 807 para D:-

“It is evidence which we think should be admitted with caution, and if admitted should be treated with care. Before the evidence is admitted the court should, we think, ask for evidence as to how the dog has been trained and for evidence as to dog's reliability.”

This Court has recently expressed the view that this kind of evidence should be received and applied with caution - (See ***KENNEDY MAINA VS. REPUBLIC*** – Criminal Appeal NO. 14 of 2005 (Nakuru)).

We think, however, that a dog handler is competent to testify on at least the tracking ability and reliability of the dog if not on its training

In this case, however, *S/Sgt. Justus Siengo (PW7)* the dog handler who said that he had 13 years experience as a dog handler did not give evidence of the training and reliability of the dog. For that reason it cannot be safely concluded from the mere fact that the scent led to the house of the appellant that the appellant was one of the robbers.

Nevertheless, the circumstances of arrest of the appellant cannot be ignored. The appellant was arrested about 300 metres from the scene of the robberies about an hour later. There was credible evidence that a member of the gang was cut on the head during the robberies. The appellant had a fresh injury on the head.

The appellant did not in his statement explain how he sustained the injury. Those circumstances in our view corroborated the evidence of Beatrice that she recognized the appellant as one of the robbers.

In the final analysis we are satisfied that the appellant was properly convicted. Accordingly, we dismiss the appeal.

DATED and DELIVERED at NYERI this 15TH day of MAY, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR