REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 406 of 2007

1. DALMAS MAMBWA MAKAA

2. JOSEPH MUSOTSI OPANDA........................... APPELLANTS

AND

REPUBLIC..RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ) dated 9th October 2007

in

H.C.CR.A NOS. 175-178 of 2004)

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JUDGMENT OF THE COURT

DALMAS MAMBWA MAKAA (hereinafter referred to as “Makaa” and JOSEPH MUSOTSI OPANDA (hereinafter referred to as “Opanda”), the appellants herein, appeal to the Court from the judgment of the High Court of Kenya at Kisumu (Mwera and Mugo JJ) dated 9th October 2007 and by that judgment the learned Judges had dismissed the appeals the appellants had preferred against their convictions and sentences of death imposed upon them by the Chief Magistrate at Kisumu on 3rd September, 2004. Before the trial magistrate, the appellants and two others, whose appeals were allowed and were subsequently acquitted, had been convicted on two counts of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. The particulars contained in the charges were identical. It was alleged that on the night of 6th and 7th October 2001 at Ebusiralo Village in West Bunyore Location, Vihiga District, Western Province of Kenya, jointly with others, while armed with dangerous weapons namely rungus and pangas they robbed Eliud Zakaria Amaya and Oren Obando Okeyo of cash and other property specified in the charge sheet and at or immediately before or immediately after the time of the robbery, they used actual violence to the named victims.

The facts of the case as found by the Chief Magistrate are that at about 9.30pm on the material night Eliud Amaya (PW1), a clinical officer at Maseno University and Oren Okeyo (PW6), a driver at Bukura, were going home along Luanda – Maseno road. PW1 was walking while PW 6 was riding on a bicycle. At about 100 metres from his house PW1 was accosted by a group of about 8 to 10 people who posed as police officers. They ordered him to stop and when he defied them, they got hold of him and pulled him from the main road into a dark spot beside a shop. One of the group members viciously hacked him with a panga on the face, the nose and in the mouth and left him for dead. The gang then ransacked his pockets, removing cash and went away with his trousers, leather jacket, identity card and bankers plate.

After the gang left, PW1 crawled towards his gate and shouted for the watchman to open for him, but, before the gate was opened the gang went back for him and cut him on the right leg. The watchman was ordered to open the gate but he instead blew his whistle and the gang fled. PW1 was administered first aid and the police rushed him to Mukumu Hospital where he was admitted for 3 months. He had suffered grave injuries which occasioned him fractures on both legs. He was discharged on crutches. PW1 told the trial court that he identified Makaa as one of his attackers. This was because there was bright moonlight and he had known him earlier before the fateful night.

Whilst PW6 was riding home at that time he slowed down because of a pothole. He was ordered by some two persons to stop. However, he refused to obey and continued with his journey. Suddenly he was cut on the left shoulder and he fell down from the bicycle. The gang searched his pockets, took his shs. 200/-, shoes and clothes and went away with his bicycle, green in colour. PW 6 did not identify any of his attackers. He, too, had suffered serious cut injuries and was admitted for 4 days at Equator Nursing Home.

On 7th October 2001 the local Assistant Chief, Gamaliel Ososi (PW2), and the police arrested Opanda. He was led to his home where a search was carried out. The team extended its search to a banana plantation wherein PW1's two wallets, a bank plate and an employment card were recovered. Further, Opanda's father later took to the Police Station Opanda's pair of long trousers which he had retrieved from Opanda's box. It is significant that Opanda did not explain how PW1's property came to be within his compound, but, it is worthy of note that he claimed in the testimony in his defence that PW2 planted them on him. But, PW2 denied this and in our view, the two courts below were right to disregard the allegation as there was no evidence to back it up.

Alex Okinda (PW5) told the trial court that on 7th October, 2001 at about 11a.m. Opanda asked him to wash a bicycle for him at a fee. He noted that the bicycle was blood stained. Opanda was his village-mate and PW5 had never seen him ever owning a bicycle. About a week later on 12th October 2001 Opanda led the police team to the home of Makaa where PW 6's green bicycle was recovered in the shamba hidden under green maize stalk. PW 6 identified the said bicycle to be his.

In his defence Opanda denied committing the offences charged. He was not found with the complainants' property nor was any recovered from his home. He termed the allegations a frame-up by PW2. Makaa, on the other hand testified that he knew nothing about the robberies.

Both courts below believed fully the evidence of the complainants PW1 and PW6. They also believed the testimony as to the identification of Makaa by PW1 and the recovery of the victims' properties from the appellant. The superior court stated in that regard:

"**Next is the appeal of Dalmas (appellant 3). When P.C. Ouma (PW9) was investigating the case, 3 days after the robberies, Joseph (appellant 1) told him that the bicycle in question was with Dalmas. Joseph led the team into the home of the appellant. He remained in the van as Dalmas led the police team to a spot in the shamba where the bicycle Okeyo (PW6) identified as the one stolen from him during the subject robbery, was recovered having been covered with maize stalks. Only Joseph and Dalmas knew where the bicycle that Okeyo had been robbed of was. On that account of recent possession the two were properly convicted on count 2.**"

"**As for the appeal of Joseph (appellant 4) we were satisfied, as the lower court did that he was one of the people who robbed Amaya (PW1) and Okeyo (PW6) on the same night of 6th/7th October 2001.**

Evidence has it (see PW2, 3, 9) that he led the police to search his home following the robberies herein, to a spot in their compound where 2 wallets were dug up. One contained the personal items/documents of PW1. PW1 identified them. Then he spoke of PW1's blue jeans being locked in the box in the house. His father was present all the time. It would be brought when his wife or mother returned home and opened the box. His father would and he did take it to the police station. Only Joseph knew where the property of Amaya (PW1) which was stolen from him had

been hidden following the robbery a few days before. He led police to the spot. The items were recovered; they were identified. They were subject of the robbery in count 1. The case was proved on account of recent possession – not identification at time of the offence. This appellant was properly convicted on count 1."

The appellants now appeal to this Court against the said convictions and sentence on three principal grounds, namely, that (1) their trial was conducted in a language the appellants did not understand and that they were not accorded an interpreter in the lower court and that such omission occasioned a miscarriage of justice as they did not follow the proceedings effectively; (2) that they were not cautioned by the police before they were interrogated whilst they were in custody contrary to the provisions of **Rule 3** of the **Judges Rules**; and (3) that what the appellant told PC Ouma (PW9) was inadmissible in evidence as it amounted to a confession within the meaning of section 25 of the **Evidence Act** as read with the provisions of **sections 28, 29 and 31** of the said Act.

Turning now to the first ground of appeal, Mr. Oyalo for the appellants, submitted that the record does not show which language the appellants used in the trial court nor that the appellants were afforded an interpreter. The record before us explains itself on the issue. The appellants appeared before the Chief Magistrate on 22nd March 2004 for plea. It is recorded as follows:-

"**22/3/04**

Before OA Sewe (Mrs) C/M

C/IP Auma for State

C/c Jaoko

Accused present understands, Kiswahili Language.

Charge read over and explained to accused in Kiswahili Language and each replies thereto as follows in Kiswahili language:-

Count 1

A1- not true

A1 – not true

A3 – not true

A4 – not true"

(We have only reproduced part of the record of that day.)

It is plain therefore from the record that the appellants opted to speak in Kiswahili and told the court so. Again they pleaded in that language.

Further, on all subsequent days of the trial it is on record that the appellants, were cross-examined in Kiswahili language and there was always the same interpreter, a Mr. Ouma. Also the record shows that the appellants cross examined prosecution witnesses and elected to and did make sworn statements, again, in Kiswahili.

Having read the record fully, it is patently clear from the substance of the appellants' cross-examination and their own evidence that they fully understood the proceedings before the trial court and that there was an interpreter in the court throughout the proceedings. We reject this ground of appeal.

It is trite law that inadmissible confession should not be admitted in evidence so as to found a conviction. However, in this case, none of the appellants made any statement to the police nor did they make any confession to any police officer of whatever rank nor even to the Assistant Chief. In the circumstances, therefore none of the sections of the Evidence Act enumerated by Mr. Oyalo were contravened. We do not further accept the proposition by Mr. Oyalo that the amendments relating to the sections on confessions are applicable in this matter since the offences were committed in the year 2001 long before the amendment to the Act. We dismiss the two grounds of appeal as without foundation.

The sum total of the evidence before the trial court was that Opanda was identified by the PW1 and that he and Makaa were also found in possession of the complainant's property and have not given any explanation of the way in which the property came to be in their possession. The proof of possession herein without explanation justifies an inference of guilt.

In our view the convictions are safe and we uphold them.

Consequently, the appeals fail and are accordingly dismissed.

Dated and delivered at Kisumu this 17th day of July, 2009

P.K. TUNOI

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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