IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 73 of 2008

JEREMIAH GATUIKU KIRIUNGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Makhandia, J) dated

15.5.2008

in

H.C.CR.A. NO. 74 OF 2005)

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JUDGMENT OF THE COURT

JEREMIAH GATUIKU KIRIUNGI (the appellant) comes before us on a second and final appeal against his conviction by Kerugoya Senior Resident Magistrate, J.N. Onyiego, for the offence of robbery with violence contrary to *Section 296(2)* of the Penal Code. It had been alleged in the charge sheet laid before that court that on the 14th day of April, 2004 at Kiamichiri village in Kirinyaga District, jointly with others not before the Court, the appellant robbed *Elijah Mwaniki Ngarari* one bicycle, make Avon, size '24' a pair of shoes, a shirt and cash Kshs.3,000/= all valued at Kshs.7,500/= and at or immediately before or immediately after the time of such robbery used actual violence on the said *Elijah Mwaniki Ngarari*. Upon his conviction he was sentenced to death as the law provides. His first appeal was dismissed by the superior court (*Kasango & Makhandia, JJ)*, hence this appeal.

The appellant drew up a memorandum of appeal in person and raised six grounds, but four of these were abandoned by learned counsel subsequently appointed to represent him before this Court, *Mr. Maina Karingithi. Mr. Karingithi* argued two grounds which in his view raised, as they should in a second appeal, issues of law. We reproduce them as drawn:-

"4. The learned judges erred in law when(sic) dismissed the appellant's appeal in reliance to (sic) evidence by prosecution and failed to find the inconsistencies the prosecution case contain (sic) that leaves doubts as to whether the witness PW1 was attacked by one person or more than one, or PW1 was of doubtful integrity.

6. The learned judges erred in law when (sic) convicted the appellant and failed to consider the defence of the appellant, and that the prosecution did not spell (sic) out on the intensity of the light which is described (sic) "not dark" and it was approaching 7.00 p.m. which was not conclusive light."

We shall revert to the submissions of counsel on those grounds shortly.

On 14th April, 2004 at about 4.00 p.m. *Elijah Mwaniki Ngarari (Elijah) (PW1)* was sent to Kutus Market by his neighbour, *Amos Njogu Nyamu (Amos) (PW2)* to buy a bag of sugar. Amos gave Elijah Shs.3,000/= and a bicycle to transport it. Elijah went to Kutus but did not buy the sugar since it cost more than the money Amos gave him. He decided to return home. As he reached Kimoni bridge on the way home, he met four people. The time was approaching 7 p.m. and, according to Elijah it was not dark, and he was able to recognize one of them. He was ordered to stop, remove his shoes and shirt, and surrender the cash he had. He complied with those orders. The bicycle was also taken away. The person who demanded the money as he held a knife on Elijah's throat was the appellant, and when Elijah called out his name, "Jeremiah", the appellant threw him into the river. Elijah moved out of the water to safety and immediately thereafter reported the incident to Amos and a neighbour *Anthony Ndambiri (Anthony) (PW3).* He was half naked, all wet and crying when he narrated the incident naming the appellant, whom Amos and Anthony also knew, as one of the assailants. The three went back to the scene at about 7.30 p.m. and flashed torches at a group of people at the bridge. Anthony saw and recognized the appellant before the group fled into a bush. The three were afraid of pursuing them and instead called *Assistant Chief Gitari Kaburu (PW4)* on telephone and met him at Rukenya. The four then went looking for the appellant at his home but did not find him that night. The following day the matter was reported to the police at Kutus Patrol base and the appellant was arrested within the town and subsequently charged as stated earlier. None of the stolen property was recovered. The appellant in his defence put forward an alibi and called his brother, *Joseph Gitari Kiriungi, (DW2)* whose evidence was not helpful to him.

In convicting the appellant, the trial court relied solely on the identification evidence of Elijah because, according to the learned magistrate, the evidence of the rest of the witnesses was hearsay. That assessment was obviously not borne out by the record and was promptly corrected by the superior court which stated:-

"*In any case, if there is any other evidence linking the appellant to the crime, it is found in the testimony of PW3. He testified that when he in the company of PW1 and PW2 went back to the bridge, they found a group of people and when they flashed their torches at them, the group, which included the appellant fled. However PW3 managed to recognize the appellant whom he knew very well. That evidence was not challenged or contested. Was it coincidental that the appellant was found at the same scene which a while ago he had been accused of robbing PW1 and on being flashed with a torch he ran away with the group of people? We do not think so."*

The learned magistrate nevertheless believed the sole evidence of Elijah, which he found:-

"*-----consistent and from his demeanour he appeared to be truthful honest and reliable. Why could (sic) PW1 frame up a case against the accused person. Accused is a neighbour to the complainant. He knew him before. He recognized him as it was not dark and even by his voice. I have no reason to doubt his testimony."*

The superior court had no reason to interfere with that assessment and after its own re-evaluation of the evidence, and in rejecting the sole ground argued before it that the trial court erred in relying on the sole evidence of Elijah on identification, stated:-

"*The offence took place as it was approaching 7 p.m. According to PW1 it was not yet dark. He was able to see and positively recognize the appellant among the assailants. He was a person well known to him as they come from the same village. Indeed it was him who demanded the money from him. Having recognized the appellant, he called out his name. Apparently and fearing that one of them had been recognized, the assailants then threw PW1 into the river, whether it was to drown him so that he could never live to tell what transpired we shall never be able to know. When the appellant managed to escape, he was able to tell whoever cared to listen that he had been robbed by a group of people at the bridge who included the appellant. He told PW2, PW3 and PW4. This was soon after the incident. Much as the appellant claims that the circumstances obtaining during the attack on PW1 were such that he could ill afford to observe and identify any of the assailants, we are however, on the recorded evidence, unable to agree with that proposition. The attack on PW1 was not sudden. PW1 was pushing his bicycle when he met the gang at the bridge. The gang then ordered him to stop. Thereafter he was*

ordered to remove his shoes and shirt. The gang then took possession of his bicycle. The gang thereafter demanded money from him. It should be noted that as all these (sic) was going on no violence was being visited upon PW1. PW1 had even opportunity to call out the Christian name of the appellant. Incidentally that name coincides with appellant's Christian name herein. It was then that he was pushed in (sic) the river. The totality of the foregoing is that PW1 had ample opportunity to observe the assailants and was able to identify the appellant whom he knew very well."

The appellant has revisited the same issue of law in ground (6) above and *Mr. Karingithi* urges us to make a finding that the two courts below were proceeding on the wrong assumption that at 7 p.m. it was not dark and that visibility was clear. In his submission, there was no evidence on record about clarity of visibility and it was doubtful that Elijah identified the appellant positively. Elijah, in his view, may well have been an honest witness but mistaken. Furthermore, he submitted, there was no cogent evidence that the appellant spoke to Elijah at length or at all for the voice identification to register, as purported by that witness. It was erroneous therefore for the superior court to hold, as it did that "*evidence of voice identification was mere (sic) secondary"* and that "*there was an exchange of sorts between the appellant's gang and PW1 when they were ordering him to remove shoes, shirt and money"*.

We have considered that ground of appeal and we do not, with respect, find any merit in it. Elijah, the star witness, gave no reason to the two courts below to doubt his credibility. He was not only honest but truthful. We have no reason to depart from that assessment of the witness. He stated that it was the appellant who held a knife to his throat as the appellant demanded money from him. He also stated that it was the appellant who threw him into the river when he called out his name after recognizing him. In both instances the appellant was at arms length from Elijah and clearly visible. We do not fault the concurrent finding of the two courts below that Elijah visually and positively identified him at the scene. He also recognized the appellant's voice when the appellant spoke to him asking for money. That is when he called out the appellant's name. We do not accept the suggestion by *Mr. Karingithi* that the money was demanded through gestures as there is no evidence to support such conclusion. Even without any other evidence on identification, there is a long line of authorities in support of reliance on the evidence of a single witness to convict, subject only to a warning by the convicting court of the risks involved, which risks were discounted in this case. Furthermore, the evidence of Elijah on identification did not stand alone. *Anthony (PW3)* lent support to it when, shortly after Elijah reported the incident, they went to the scene and he also managed to identify the appellant. In attacking this piece of evidence, Mr. Karingithi submitted that this may well have been a different gang which had nothing to do with Elijah. The short answer, if that be so, is that the appellant was the common factor in both and was properly identified. That ground of appeal fails.

On ground (4), *Mr. Karingithi* sought to argue that there was no evidence of violence in the commission of the offence; that there was no evidence that the assailants were more than one; that there was no allegation in the charge sheet that the assailants were armed; and that there was no evidence of any involvement by the police in the investigation, arrest or prosecution of the offence. All those glaring omissions, in his view, took the offence charged, outside the provisions of section 296(2) of the penal code, and rendered the offence charged unproved.

It is indeed so, that the prosecution did not call any police officer to testify and, according to the record, they intended to call the investigating officer as the last witness but he was not readily available after several adjournments and therefore the prosecution case was closed. It is not clear from *Mr. Karingithi's* submissions whether the investigating officer would have tendered evidence which was prejudicial to the prosecution but he speculated that the evidence would have provided the link between the appellant's arrest and the charge before the court and also provided confirmation of the report made by the complainant. In the absence of the evidence of police officers, and in particular the investigating officer, *Mr. Karingithi* suggested, the trial would be vitiated.

The complaint made by *Mr. Karingithi* in relation to failure by the prosecution to call police officers and investigating officers as witnesses is not uncommon, and the courts have severally pronounced themselves on such complaints. We take it from this Court's decision in *HAWARD SHIKANGA alias KADOGO & ANOTHER VS. REPUBLIC Cr. Appeal No. 102 of 2007* where the Court relied on the

Uganda case of *BWANEKA VS. UGANDA* [1967] EA 768 stating:-

"*The prevailing practice of not calling police officers during trials in magistrate's courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecutions in the magistrates' courts in criminal cases. Generally speaking criminal prosecutions are matters of great concern to the State and such trials must be completely within the control of the police and the Director of Public Prosecutions. It is the duty of the prosecutors to make certain that police officers, who had investigated and charged an accused person do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person. Criminal prosecutions should not be treated as if they were contests between two private individuals. In the instant case the evidence was that after the appellant had been arrested by local government police, he was taken and handed over to the central government police station at Mbarara. There was no evidence as to which police officer had taken charge of the case and what steps, if any, he had taken when he had decided to arrest and charge the appellant. The absence of such evidence necessarily creates a lacuna in the case of the prosecution because it gives the erroneous impression that the central government police officers had nothing to do with the case and had taken no part whatsoever in investigating and deciding on the charge to be preferred against the appellant.*

It is to be hoped that in future this practice would be discontinued, because without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial with respect to the prosecution case appear to be incomplete."

We can also only hope that the prosecuting authorities in the country will stop the emerging practice of not calling investigating officers to testify and there may well be circumstances in which such a failure may well be fatal to the conviction.

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We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution."

This Court again recently dealt with a similar issue in *REUBEN GITONGA NDERITU VS. REPUBLIC Cr. Appeal No. 349 of 2007* (decided in Nyeri on 15th May, 2009) where it stated:-

"*With regard to the complaint that the investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution case. There is no such argument here, nor do we believe his evidence would have added value to the overwhelming evidence before the court. We are of the view that the learned magistrate came to the correct conclusion that the case against the appellant was proved beyond reasonable doubt."*

So that, the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to that prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged. We do not accept the submission that there was no evidence that the assailants were more than one as indeed, both *Elijah* and *Anthony* confirm that they saw other people with the appellant. Nor do we accept the submission that there was no violence meted out on Elijah by the mere fact of throwing him into the river. The orders issued to Elijah which he had to comply with were at the pain of harm with a knife which the appellant held at Elijah's throat. The act of throwing him into the river was also violent as he did not volunteer to swim. Finally we do not accept the suggestion that the charge sheet was defective in that it did not properly charge the offence stated in *Section 296(2)* of the Penal Code. As

correctly pointed out by learned Senior State Counsel *Mr. Makura*, there are several elements of that offence under *Section 296(2)* of the Penal Code, each of which, if proved, would constitute the offence. It was proved in this case that the robbery was committed by more than one person and that it was violent. This ground of appeal also fails.

In the result, we find no merit in the appeal and we order that it be and is hereby dismissed in its entirety.

DATED and DELIVERED at NYERI this 30th day of OCTOBER, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR