



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
CRIMINAL APPEAL 284 OF 2005

SHALEN SHAKIMBA OLE BETUI

SHADRACK KOITIMET OLE BETUI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Nairobi*

*(Lesiit & Makhandia, JJ) dated 6<sup>th</sup> May, 2004*

in

H.C.Cr.A. Nos. 1400 & 1401 of 2000)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**Shallen Shakimba Ole Betui** and **Shadrack Koitimet Ole Betui**, the appellants herein were charged in the court of the Senior Resident Magistrate at Kajiado with three counts of attempted robbery contrary to **section 297(2)** of the Penal Code. The facts of the charges were that on 25<sup>th</sup> January, 2000 at Rombo Masai Reserve in Kajiado District of Rift Valley Province while armed with dangerous weapons, namely a rifle, pangas, rungus and stones attempted to rob **John Muita, Daniel Thuo** and **Mutuku Manyara** of their properties and immediately before or immediately after the time of such attempt used actual violence to the said **John Muita** (PW1) and/or wounded the said **Daniel Thuo** and **Mutuku Manyara** (PW2), the complainants. PW1 and **David Thuo** who was not called as a witness were respectively driver and owner of motor vehicle lorry registration number **KAL 132R** canter. PW2 was a passenger therein. On that date PW1 was driving the lorry from Mombasa to Rombo but when he reached a place called Mile (**sic**)Tatu, a group of six people who stood in the middle of the road tried to stop the lorry but PW1 did not stop. Some of the people had pangas and rungus while one had a gun. When PW1 failed to stop the lorry and drove very near past the thugs, he heard two gun shots, then PW2 and **Thuo** complained that they had been injured on the leg and buttocks respectively. When the lorry reached Rombo, PW2 and Thuo were rushed to hospital while PW1 went to report the matter to Rombo Police Station and gave names of some of the suspects. Investigations were carried on and the appellants were arrested on 19<sup>th</sup> February, 2000 by **Cpl. Wilson Kuria** (PW3) of Rombo Police Patrol Base and escorted to Loitokitok Police Station where they were charged with the offence subject of this appeal.

They denied the offence in unsworn statements. The 1<sup>st</sup> appellant stated that he had attended a group ranch meeting at Njukiini on 19<sup>th</sup> February, 2000 when he left to mend his bicycle in order to return home. He was arrested on the instructions of the area Chief for an offence he did not commit. He was taken to Rombo Police Post and then to Loitokitok Police Station where he was beaten up and forced to sign some papers and later he was charged with this offence which he denied. The 2<sup>nd</sup> appellant also denied the offence and said that he was arrested in a police raid on liquor consumers. The Senior Resident Magistrate (**Ndungu H. N.**) wrote and delivered her judgment on 16<sup>th</sup> November, 2000 wherein she found the appellants guilty, convicted and sentenced them to death on counts 1 and 3 as mandatorily provided by law. She however acquitted them on count 2. Their appeals to the superior court were dismissed on 6<sup>th</sup> May, 2004. Being dissatisfied with that decision, the appellants now appeal to this Court, and this being their second appeal only points of law fall for this Court's consideration see **section 361(1)** of the Criminal Procedure Code.

Although the appellants had filed their home-made memoranda of appeal which listed five grounds of appeal each, their advocate, **Mr. Maina Njuguna** abandoned them at the hearing of this appeal before us and relied on a supplementary memorandum of appeal which listed four identical grounds of appeal as stated hereunder:-

**“1. The learned superior court Judge (sic) erred in law by not analyzing the evidence as required by law.**

**2. The learned superior court Judge (sic) erred in law in shifting the burden of proof on the accused person.**

**3. The learned Judge (sic) erred in upholding the conviction which was based on inadequate evidence to wit the investigating officers.**

**4. The learned superior court Judge (sic) erred in law upholding the conviction despite the contradictions by the witnesses.**

When the appeal was heard before us on 17<sup>th</sup> September, 2009 **Mr. Njuguna**, learned counsel for the appellant argued grounds 1, 2 and 4 together and stated that since the 1<sup>st</sup> appellant was exposed to immediate danger, he had no opportunity to observe and recognize the robbers; and the superior court should have treated the evidence of PW1 and PW2 with caution. He stated that it was surprising that Thuo who was in the motor vehicle at the time of the incident and was injured was not called to testify, nor was the motor vehicle which was apparently sprayed with bullets produced to support the evidence of PW1 and PW2 in that respect. Counsel also wondered how PW2 could know the homes of the robbers and yet not inform the police for them to be arrested earlier. He was of the view that the burden of proof was shifted to the appellants.

**Mr. Kaigai**, Learned Principal State Counsel supported the appellants conviction and sentence and stated that the evidence of PW1 was clear as to what happened and it was supported by the evidence of PW2, PW3 and PW4. He submitted that there were concurrent findings by the two courts below on the issue of the appellants' identification at the scene. That the superior court re-evaluated the evidence of the trial court and its decision cannot be faulted.

The only legal issue raised in this appeal is that of identification of the appellants during the commission of the offence. It was daytime when PW1 and PW2 encountered the robbers. On this PW1 stated as follows:-

**“Immediately the vehicle emerged to the road they began to stop it. I realized they were thieves because they were armed. I refused to stop and I drew near very near them and I heard a gunshot in front of me. The members of the gang moved away from the road and one person who had the gun remained. He is not here before the court ... I spotted the two accused when they moved away from the road. I identified Sakimba first accused. He wore a rasta hair. The second accused Koitimet I also saw. He wore nothing on his head. They were very near me when I saw them ... At the police post I reported that amongst the gangsters I had identified Sakimba and Koitimet.”**

During cross-examination by this appellant PW1 answered:

**“I had known you for six months before this incident. I used to see you at the shopping centre ... I identified you well because you were not knew (sic) to me.”**

And when PW2 testified he stated:-

**“I reside at Rombo. I have resided there for ten years. I am a farmer and I have a shop business at Rombo. Prior to this case the accused persons were known to me for more than 10 years. The first accused is known as Mboi alias Sakimba Ole Betui. The 2<sup>nd</sup> accused is known as Koitmet Ole Betui. I also know their homes. They are brothers ... I identified all the assailants because it was daytime and are all from Rombo. Those who are in court are Mboi (1<sup>st</sup> accused pointed at) and second accused. I identified the accused persons because they were facing us and I was seeing them through (sic) the windscreen. The accused persons had worn nothing on their heads.**

**... I had been shot on the left leg below the knee. From Rombo I was taken to hospital where I later find my leg had been amputated. I remained admitted in hospital for about 38 days. On 26<sup>th</sup> January, 2000 while I was still in hospital the OCS came and I recorded a statement. I mentioned all the names of the people I had identified.”**

When cross-examined by the 1<sup>st</sup> appellant he stated:-

**“The OCS came to hospital on 26<sup>th</sup> January, 2000 I told him I saw you. I explained you wore rasta hair.”**

And when **IP. Samuel Okweny** (PW4) testified in court, he confirmed what PW2 told him on 26<sup>th</sup> January, 2000. The trial Magistrate relied on the evidence of the two eye-witnesses to convict the appellants. It is on that evidence also on which the learned Judges of the superior court (**Lesiit and Makhandia, JJ**) founded their decision to dismiss the appellants appeals when they said:-

**“On the whole however and on the basis of the evidence of PW1 and PW2 that was not shaken at all in cross-examination, we are satisfied that the appellants were properly and positively identified. We do not think that there**

**existed chances of mistaken identity. We therefore uphold the trial (sic) Magistrates finding that each of the two accused persons were positively identified by recognition by each of the two witnesses – (PW1 and PW2).**

**The trial Magistrate rejected the appellants' defences and rightly so in our view. The defences merely rehearsed the circumstances under which each appellant was arrested. They did not address the events of 25<sup>th</sup> January, 2000. At best they should have been able to say where they were on the material day”.**

Thus the Judges of the superior court concurred with the finding of the trial Magistrate on the question of identification. They did not take any issue with non-recovery of any exhibits and failure on the part of the prosecution to call some witnesses. On the former they stated that since the offence committed was that of an attempt to rob it would not entail recovery of exhibits while on the later they quoted the case of **Bukenya v Republic [1972] E.A. 549** where it was held that “*the Court can only draw an adverse inference that had the witnesses been called their evidence would have been adverse to the prosecution case,*” after they found the trial Magistrate was right in not drawing such an inference.

We were referred to a number of authorities by counsel for the appellants all of which related to offences committed during night time. Identification in those cases was done either by use of a torch or moonlight. That was not the case here. The appellants were known to both PW1 and PW2 whom they used to meet in Rombo market for six months and/or one year respectively. In fact PW1 showed he did not come to the trial court to testify against the appellant merely to fix them. If this was his purpose he would have planted the gun used to shoot at PW2 and the owner of the motor lorry on one of them. He did not do so. He said the person who had the gun was not in court. It was during day time when PW1 and PW2 were attacked and they said they saw the appellants at 30 metres away. This was close enough for a witness to recognize someone known to him. This is unlike cases where offences are committed in darkness where identification is difficult and where the trial court should warn itself of a special need for caution before convicting the accused in reliance on the correctness of the identification – see **R. vs. Turnbull [1976] ALL E.R. 549** quoted with approval in **Joseph Ngumao v R. [1988-92] 2 KAR 212**. The present case was a case of recognition rather than identification and on our part we have considered this issue and are satisfied that in view of the concurrent findings of the two courts below the appellants were positively identified and recognized by PW1 and PW2. There could be no possibility of a mistaken identity. We are satisfied that the appellants were convicted on very sound evidence of recognition in circumstances which were conducive to proper identification/recognition, see **Anjononi and Another v. R. [1980] KLR 54 at p. 60**. We are also satisfied that the superior court analyzed and considered the evidence adduced before the trial court as a whole and came to its own independent conclusion thereon and we find no substance in the submissions of contradictions in the evidence of the witnesses.

In the result we find no merit in these appeals and we order that the same be and are hereby dismissed. It is so ordered.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of October, 2009**

**D. K. S. AGANYANYA**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**