REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CRIMINAL APPEAL 102 OF 2007

HARWARD SHIKANGA alias KADOGO

SILAS CRISPUS OBURA alias PROFESSOR ……. APPELLANTS

AND

REPUBLIC ……..……..……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu

(Mwera & Mugo, JJ.) dated 3rd July, 2007

in

H.C.CR.A. NO. 102 OF 2004)

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JUDGMENT OF THE COURT

Harward Shikanga Osoyi alias "*Kadogo"* and *Saul Chrispus Obura* alias "Professor" were jointly tried on two counts, one of robbery with violence contrary to *section 296 (2)* of the Penal Code and a second one of rape contrary to ***section 140*** of the Penal Code. The particulars contained in the charge of robbery with violence were that on the 19th October, 2003 at Vihiga District, Western Province, the two of them, jointly with others not before the Court, while armed with offensive weapons, robbed WSH of her jacket valued at Kshs.800/= and at or immediately before or immediately after the time of the robbery used actual violence to the said WSH. The second charge of rape stated in its particulars that on the same day, time and place the two appellants, jointly with others not before the Court "*had a carnal knowledge of [WSH] without her consent"*. The appellants were tried before a Senior Resident Magistrate at Maseno; she found them guilty on both counts and sentenced them to death on the first count and to ten years imprisonment on the second count of rape.

The appellants then appealed to the High Court at Kisumu and by its judgment dated and delivered on 3rd July, 2007, the High Court (Mwera & Mugo, JJ.) confirmed the conviction and sentence on the charge of robbery with violence but rightly allowed the appeals on the second count of rape on the basis that the charge was fatally defective.

The appellants now come to this Court by way of second appeals on the charge of robbery with violence and that being the position the Court's jurisdiction is limited to considering only matters of law – see ***section 361 (1)*** of the Criminal Procedure Code.

Mr. Ogesa Onalo, learned counsel, represented both appellants before us and in his view, the first matter of law he felt we should consider was based on the fact that the police officer who investigated the charges against the appellants was never called to testify before the trial magistrate. It was not quite clear to us if Mr. Onalo was contending before us that since the prosecution had offered no reason for their failure to call the investigating officer to testify, the Court should draw the inference that had that officer been called, he would have given evidence adverse to the prosecution but favourable to the appellants.

If this was Mr. Onalo's position, he did not make it clear or apparent to us what sort of evidence the investigating officer could have given which would have been adverse to the prosecution's case. But Mr. Onalo appeared to have been contending that merely because the investigating officer had not been called, the prosecution's case had not been probed as required by law. That submission is now frequently made in the courts and it shows that for some unexplained reason or reasons investigating officers are often not called to testify. Sir Udo Udoma, the then Chief Justice of Uganda, had this to say on that point in the case of ***BWANEKA VS. UGANDA*** [1967] EA 768 at page 771 Letters H to C at page 772.

"***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. But in the appeals we are dealing with the complainant herself and her cousins, Ben Otiato (PW2) and Benjamin Emusiko (PW4) all swore that they saw these two appellants during the attack on the complainant. Police constable Benard Rono (PW5) also said he arrested the appellants on 27th October, 2003 after he had received information about their involvement in robberies. Rono said he was not the investigating officer but there can be no doubt from the recorded evidence that it was him who arrested the appellants and took them to Luanda police station. So in the circumstances of these appeals, the failure to call the investigating officer did not occasion to the appellants any failure of justice and we reject Mr. Onalo's contention to the effect that we allow the appeals because the investigation officer was not called. 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.

The other ground argued by Mr. Onalo was that the burden of proof was shifted to the appellants and that the defences raised by each appellant was never considered by the two courts below. Mr. Onalo pointed out certain remarks in the judgment of the trial court which tended to indicate that the magistrate

had expected the appellants to prove certain things. Having cited the case of ***KARANJA VS. REPUBLIC***, [1983] KLR 501 where this Court held that:

"***The word 'alibi' is a Latin verb meaning 'elsewhere' or at another place. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said the accused has set up an alibi. The appellants story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged".***

The magistrate went on to remark as follows:

"…… ***As was held in Karanja v. Republic, CR. AP. NO. 65 of 1983 it is not enough to mention in passing that he was not at the scene of offence. It was incumbent upon him to set up the alibi at an early stage so that it could be tested by those responsible for investigating and prevent any suggestion that his defence was an afterthought. Accused person didn't tell the police when he was arrested that he was not at scene of offence. He said that in the house where he was, his mother and 3 of his sister's children were also in but he failed to call them. He didn't even cross-examine prosecution witnesses through his counsel in regard to his defence of alibi. In consideration of prosecution witnesses evidence, particularly that of P.W.1 who had closer encounter with accused persons by way of sexual harassment. I do find that A1's last minute set up of alibi compared to evidence on record can't stand due to the casual manner in which accused who was even represented took it".***

Basing himself on this passage, Mr. Onalo told us that the magistrate expected the appellants to prove their alibi, particularly where the magistrate says the appellant ought to have called his mother and three other people whom he claimed were with him in the house at the time the complainant was being attacked. Of course, it is now well settled that an accused person who raises the defence of an alibi does not have the burden of proving that defence – see ***SEKITOLEKO V UGANDA*** [1967] EA 531. Nor does the burden of proof at any stage of a trial shift to an accused person. The trial magistrate's remark that the appellant ought to have called certain witnesses was unfortunate but read in the context in which it was stated, we are far from being convinced that the magistrate was saying the burden was upon the appellant to prove the alibi. She was clearly considering the alibi alongside the entire evidence on record and she was of the view that weighing that defence against the available evidence the defence could not stand. For their part, the learned Judges of the High Court stated as follows their judgment:

"…… ***Having examined the recorded proceedings and judgment of the lower court, we are equally persuaded to accept the submissions of the learned State Counsel that the appellants were convicted and sentenced on sound evidence, having been properly identified by 3 prosecution witnesses both physically and by names. We are not, therefore, inclined to interfere with the judgment, conviction and sentence of the lower court on the offence of robbery with violence under section 296 (2) of the Penal Code".***

In the face of these concurrent findings of facts by the two courts below, there is really no basis upon which we, on a second appeal, can conclude that the alibi defence had not been dislodged or that the defence of each appellant was not considered. Their defences were considered and rejected. Nor can we find any substance in Mr. Onalo's last submission that the first appellate court failed to discharge its legal duty as set out in ***OKENO V REPUBLIC*** [1972] EA 32. The learned Judges clearly set out the case for each side and made their own findings thereon. No doubt the two Judges appear to have misapprehended some portion or portions of the prosecutions case but where they did so, the said misapprehension did not lead them to any wrong conclusion either on facts or the applicable law. We are equally satisfied that the conviction recorded against each appellant on the charge of robbery under ***section 296 (2)*** of the Penal Code was sound and there is no basis upon which we can interfere. We dismiss their appeals against the conviction. The sentence imposed on each of them was the only lawful one which could have been imposed and we have no jurisdiction to interfere. The appeals wholly fail and we order that they be and are hereby dismissed.

Dated and delivered at Kisumu this 27th day of June, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR