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

CRIMINAL APPEAL 199 OF 2006

GODFREY OCHIENG SONGA ……...……..…… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Warsame, JJ.) dated 21st September, 2006

in

H.C.CR.A. NO. 157 OF 2004)

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JUDGMENT OF THE COURT

The appellant Godfrey Ochieng Songa (1st accused at the trial) and two others, Samuel Otieno Dinga (2nd accused in the trial) and Kennedy Okoth Owino (3rd accused in the trial) were charged before Senior Resident Magistrate's Court at Maseno with three counts of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The 3rd accused Kennedy Okoth Owino apparently died after the close of the prosecution case, but before the trial court made a ruling whether or not, the three accused had a case to answer in respect of the three counts. Thereafter, the trial court ruled that the two remaining accused persons, the appellant and the 2nd accused had no case to answer in counts I and II and acquitted them under *Section 210* of the *Criminal Procedure Code*.

However, the trial court ruled that the appellant and the 2nd accused, Samuel Otieno Dinga, had a case to answer in respect of the 3rd count of robbery. The particulars of that count state, that on 5th April, 2003 at Marera sub-location, the three accused persons robbed Julius Odhiambo Okoth of a T.V. and pressure lamp all valued at Shs.5,000/= and at the time of such robbery used violence on Julius Odhiambo Okoth. The appellant and the 2nd accused were ultimately convicted of the charge of robbery in the third count and each sentenced to death.

The appellant appealed to the superior court against the conviction and sentence.His appeal was however dismissed hence the present appeal.The record does not show whether or not the 2nd accused, Samuel Otieno Dinga, appealed to the superior court or what happened to him.

The appellant was convicted solely on the evidence of identification from three witnesses, namely, Julius Odhiambo Okoth (Julius) (PW4); Dolphine Achieng Okoth (Dolphine) (PW5) and Derrick Odhiambo (Derrick) (PW6) which evidence in summary was as follows.

On 5th April, 2003 Dolphine was cooking outside the main house while her children Julius, Derrick and Lucy Achieng were in the living room. At about 8.30 p.m. Dolphine heard the dogs barking and suddenly she saw a group of people enter into a house. When she inquired who the people were she was surrounded by a group of people who were armed with *rungus* and *pangas*. She was ordered to accompany the robbers into the house and when she hesitated, she was hit with a panga and then pushed into the house where she found other robbers. The robbers hit Julius with a rungu and also cut him on the head twice. When the robbers cut Julius, Dolphine screamed and she was hit with a pang and a rungu and she fell down. When she stood up, she was again hit on the shoulder with a rungu. She however, ran out of the house. The robbers followed her and cut her on the back. The robbers stole a T.V. set and a pressure lamp from the house. Both Julius and Dolphine were taken to hospital. Both of them claimed to have recognised the appellant and the two co-accused. Dolphine claimed to have given to the police names of the appellant and the two co-accused after which the appellant were arrested by members of public and handed over to the police and Cpl. Richard Mumo (PW8) of Maseno Police Station re-arrested them.

The appellant raised a defence of alibi at the trial. He testified that he left home for Malava where he works as an electrician on 2nd April, 2004; that he returned home on 9th April, 2004 to see his sick mother and that on arrival at his home about 30 people suddenly appeared and arrested him saying that he had been mentioned at the police station as a suspect for robbery.

The trial magistrate considered the appellant's defence of alibi and concluded that the defence was brought too late in time for the prosecution to challenge it and thus, it can only be treated as an afterthought.

The trial magistrate added, thus:

"*Secondly, he did not bring any supporting evidence to show he was away ……..*

He alleged he was with his father in Malaba and only came to check on the mother who was sick but he conveniently avoided to call them as witnesses even after being given reasonable time to do so.

Pitted against the strong evidence of PW4 and PW5 I do find that the accused 1's evidence particularly the alibi cannot stand …….".

The appellant appealed to the superior court on several grounds. The main grounds related to the recognition of the appellant and the treatment of his defence of alibi. Regarding the defence of alibi the appellant complained that the trial magistrate erred in law in rejecting it and without testing it against the prosecution evidence and by shifting the burden of proof to the appellant. The superior court affirmed the decision of the trial court that the appellant was recognised during the robbery and dismissed the appeal.

One of the grounds of appeal against the judgment of the superior court is that the superior court erred in law in failing to appreciate that the evidence relied on to convict the appellant was not weighty or credible. In the course of his submissions on that ground, Mr. Maina, learned counsel for the appellant, submitted that the superior court interchangeably referred to evidence given against 2nd accused at the trial as referring to the appellant and that the superior court relied on the evidence against another person as evidence against the appellant. Mr. Musau, learned Senior Principal State Counsel, while conceding that the superior court attributed the evidence against another person to the appellant, nevertheless, submitted that the error was not fatal.

The superior court as the first appellate court was required to subject the evidence to exhaustive examination and make its own independent findings.

We have considered whether the superior court in re-evaluating the evidence mixed up the evidence given against the appellant and the evidence given against his co-accused (2nd accused).

Regrettably, the record supports Mr. Maina, that the superior court mixed up the evidence given against the appellant and the evidence given against Samuel Otieno Dinga, the 2nd accused at the trial.

In all the three counts of robbery, Godrey Ochieng Songa, the appellant herein was the 1st accused and was treated thus at the trial. The 2nd accused in all the three counts of robbery was Samuel Otieno Dinga who was convicted and sentenced by the trial magistrate but was not an appellant in the superior court. The confusion arose from page 1 of the judgment of the superior court where the superior court stated:

"*The appellant was accused No. 2 in all the counts"*.

Thenceforth, the superior court treated the evidence given against Samuel Otieno Dinga (2nd accused) as the evidence given against the appellant and the defence given by the 2nd accused as the defence given by the appellant. A few instances will illustrate the enormity of the misdirection.

At page 8 of the typed judgment, the superior court said:

"*With that clear in mind this appellant gave unsworn statement in defence ending with:*

'*I was charged with an offence that is strange to me' "*.

The record of the trial shows that the superior court was erroneously referring to the defence of the second accused Samuel Otieno Dinga. The appellant indeed gave evidence on Oath and raised a defence of alibi.

At page 9 of the typed judgment, the superior court quoted the evidence of PW4, thus:

"*PW4 said of the appellant who was accused 2 in the lower court:*

'*Accused stood by the door and was wearing a Nike T-Shirt. He was not known to me' "*.

That evidence referred to Samuel Otieno Dinga and not to the appellant.

At page 11 of the typed judgment, the superior court attributed the evidence given by Dolphine and Derrick against the second accused as evidence given against the appellant. At page 13 of the typed judgment, the superior court again attributed the defence of the 2nd accused to the appellant and at page 15 of the typed judgment the superior court disregarded the defence of alibi raised by the appellant at the trial saying:

"*We did not find it (defence of alibi) in the evidence before the learned trial magistrate and most strikingly, the appellant did not raise it in his unsworn statement even as an after-thought. Seemingly that was the defence of Godfrey (Accused 1) on oath – not the appellant"*.

The effect of the mix up of the evidence and the defence relating to the appellant with the evidence and defence relating to the 2nd accused at the trial is discernible. The superior court not only totally failed to consider the appeal of the appellant but also '*crucified'* the appellant, so to speak, on the basis of the evidence against the 2nd accused and the defence of the 2nd accused. It is clear that the trial magistrate misdirected himself on the burden of proof regarding the defence of alibi by shifting the burden of proof on the appellant. The law is clear that an accused person who raises the defence of alibi does not thereby assume the burden of proving it and that it is sufficient if the alibi establishes reasonable doubt as to whether or not the accused was at the scene of the crime, (see *Kiarie vs. Republic* [1984] KLR 739). The superior court in finding that the appellant had not raised a defence of alibi and failing to consider the misdirection by the trial magistrate grossly misdirected itself in both fact and law.

In our view, the misdirection in this case, not only rendered the decision of the superior court inherently erroneous but also occasioned a failure of justice.

In the result, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 20th day of June, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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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