



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT ELDORET
CRIMINAL APPEAL NO. 300 OF 2006

SAMSON MOGAL LONGALAMOI.....APPELLANT

AND

REPUBLICRESPONDENT

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

(Tunya, J) dated 8th February, 2002

in

H.C.CR.A. No. 138 of 1999)

JUDGMENT OF THE COURT

The appellant **SAMSON MAGAL LONGALAMOI** who was the third accused at the trial was jointly charged with two others namely **SAULINE KIBET KIPLAGAT (KIPLAGAT)** (*first accused at the trial*) and **LOTUL LOLINGANYA (LOLINGANYA)** (*third accused at the trial*) with Attempted Robbery with Violence contrary to **section 297(2)** of the Penal code before Senior Resident Magistrate Eldoret. Kiplagat was separately charged with two other counts – count 2 and count 3 being in possession of a firearm without a firearm certificate and being in possession of ammunitions without a firearm certificate contrary to **section 4(2)(a)** of the Firearms Act respectively. The appellant and the two co-accused were on 10th November, 1999 convicted, after the trial, of the lesser offence of Attempted Robbery with Violence contrary to **section 297(1)** of the Penal Code. Kiplagat was sentenced to 12 years imprisonment with 6 strokes of the cane with hard labour for attempted robbery with violence and to 5 years imprisonment each for unlawful possession of firearm and possession of ammunitions respectively the sentences in the three counts to run concurrently. The appellant and **LOLINGANYA** were each sentenced to 10 years imprisonment with hard labour and 6 strokes of the cane. On appeal to the superior court, the superior court was satisfied that the appellant was guilty of the AGGRAVATED robbery with violence contrary to **section 297(2)** of the Penal Code as charged and faulted the trial Magistrate for reducing the offence to simple attempted robbery with violence contrary to **section 297(1)** of the Penal Code. The superior court ultimately set aside the sentence passed by the trial Magistrate and substituted therefor a sentence of death. This appeal is against that decision of the superior court.

The prosecution case against the appellant and the two co-accused was briefly as follows:

On 9th July, 1998 Philemon Kipnyekwei (PW1) the complainant locked his shop premises at Kabarnet Town and went to his home at Sakasak Village about 5 kilometers from Kabarnet Town. Thereafter at about 10p.m. his home was raided by about 5 gangsters 4 of whom were armed with rifles. When the complainant saw the robbers breaking into his house, he screamed and rang the police.

The neighbours went to the home of the complainant. Salome Sokome Kangogo (PW2), (Salome) one of the complainant's neighbours was shot by the robbers on the left shoulder with a rifle as she went to the complainant's house. The robbers left after failing to gain access into the house. Both the complainant and Salome testified at the trial that they recognized Kiplagat whom they knew before as one of the robbers with the aid of security lights at the home of the complainant. After the robbers left Police Officers including Pc. Peter Oruko (PW7) - (should be PW8) went to the home of the complainant and complainant gave the police the name of Sauline (Kiplagat) as one of the robbers.

On 14th July 1998 the investigating officer got information that Kiplagat was expected to appear at Kabarnet Court in connection with a charge of robbery and waited for him at the Court. Kiplagat did not however attend the court. Instead his wife Priscilla attended and tendered a medical sheet to court indicating that her husband was sick and bed ridden. The presiding Magistrate directed the police to accompany Kiplagat's wife to her house to confirm whether the allegation was true. The Police did and find Kiplagat at his house. The Police searched his house and recovered some properties. They also towed motor vehicle registration number KMS 570 Datsun 120 which they found parked in the compound to Kabarnet Police Station. On the same day Kiplagat surrendered at Baringo CID Office and was arrested.

On 17th July, 1998 Priscilla led police to the house of the appellant in Marigat, Baringo. The appellant led police to the house of LOLINGANYA who was arrested. Both the appellant and LOLINGANYA led police to different homes where 3 rifles and 48 rounds of ammunition were recovered.

On his part Kiplagat led police to his home where an AK 47 rifle and 4 rounds of ammunition were recovered. There was evidence from the investigating officer that the live round of ammunitions was tested by the ballistic expert against the spent cartridge found at the scene of attempted robbery and that they tallied.

There was also evidence of Michael Kembu Mukuru (PW3) (Mukuru) and Kariuki Maina (PW4) – (Kariuki) – should have been (PW5), that on 9th July, 1998 Kiplagat hired Mukuru's pick-up registration number KSZ 979 from Marigat to – L-3 about 5 kilometres from Marigat; for Shs.400/=; that on arrival at L-3 Kiplagat alighted near a river and told Mukuru to wait for him; that Kiplagat returned to the vehicle carrying some luggage wrapped in a manila bag and accompanied by 5 people including Lolinganya and the appellant; that Mukuru took him back to Kabarnet where they alighted; that later at 8.30 p.m. Kiplagat went to Marigat bus stage and again hired the pick-up to Kabarnet at shs.2,000/=; that Kiplagat and 5 other people including Lolinganya and the appellant boarded the vehicle with the luggage that they had earlier collected at L-3; that the 6 people alighted from the vehicle about 5-7 km before reaching Kabarnet Town at about 9.00 p.m., that Mukuru drove to Kabarnet Town; that on his way back to Marigat, he, Mukuru, heard a gun shot near the home of the complainant; that Mukuru drove on and saw 4-5 people by the headlights of the vehicle who waved him to stop; that he identified appellant as one of the 5 people and that he did not stop and drove away to Marigat.

The appellant stated at the trial that he was born in 1931, that he is herbalist and that he never committed the robbery.

The trial Magistrate considered the evidence against Kiplagat at length and concluded that he not only committed the offence of the attempted robbery but also that he was in possession of the rifle and 4 rounds of ammunition.

The trial Magistrate however considered the prosecution case against Lolinganya and the appellant very

briefly thus

“As regards accused 2 and accused 3 the evidence of PW1 wholly implicated them as it is accused who went led police to their arrest. The fact that guns EXH. 11-13 were recovered after they police (sic) to the recovery gave evidence to the prosecution evidence. Add to these the evidence of PW3 and PW5 in whose hired pick-up they travelled together with the accused 1 and left at scene of robbery completely implicates accused 2 and 3 to the attempted robbery.”

The superior court (Omondi Tunya J) similarly dealt with the appeal perfunctorily saying only that:

“On the evidence presented before the learned trial Magistrate, the prosecution sufficiently established that during the night of 9th July, 1998 the appellant and others were within the vicinity of the scene of robbery. PW3 and PW5 ferried him and the others to the scene at about the time attempted robbery took place. These two witnesses positively identified the appellant. They saw him and the others that night long enough for an accurate identification. PW1 and PW2 who were neighbours to the accused No. 1 identified him during the robbery attempt and thus amplified the evidence of PW3 and PW5. In his unsworn statement in defence the appellant totally evaded the issue of the taxi hire and had no answer to PW8’s evidence that the appellant and his accomplices had planned the robbery at his home.

Although the weapons were not found in his possession after his arrest, he was able to show police investigators where they had been disposed of.

Upon the learned Magistrate warning himself with regard to the dangers of relying on accomplice evidence, and convinced that PW8 was a truthful witness, he entertained no reasonable doubt that taken with other inculcating facts (sic), the appellant had committed the offence charged.”

Mr. Kitigin, learned counsel for the appellant relied on the grounds in the Memorandum of Appeal filed by the appellant. There are 5 grounds of appeal but the main grounds of appeal are numbers 1 and 4 thus:

1. That the learned Judge and trial Magistrate erred in law and fact in putting reliance on the purported identification by PW3 and PW5 which was not watertight as it was not tested with any description from a person in authority.

2.

3.

4. That the learned Judge and trial Magistrate erred in law and fact in concluding that the prosecution had proved their case whereas the evidence at hand is insufficient.”

Although Mr. Kitigin did not put it directly the appellant is complaining in his grounds of appeal on the failure by both trial and superior court to reconsider and to re-evaluate the evidence. The first appellate court had a duty to reconsider the evidence, re-evaluate it itself and come to its the independent conclusion(s).

It is clear from the evidence that both the complainant and Salome did not identify the appellant during the attempted robbery and none of them claimed to have identified him. It was therefore a gross misdirection by the superior court to find that both PW1 and PW2 identified the appellant at the home of the complainant.

There was also evidence that it is the wife of Kiplagat who led the investigating officer to the house of the appellant who in turn led police to the house of Lolinganya. The finding by the trial Magistrate that it is Kiplagat who let police to the arrest of the appellant is again a gross misdirection:

Both the trial Magistrate and the superior court considered the evidence that the appellant and Lolinganya

led police to the recovery of 3 AK 47 rifles and 48 rounds of ammunitions as incriminating. The recovery of the three guns and rounds of ammunitions did not however connect the appellant with the offence as there was no evidence that any of the guns and rounds of ammunition were used at the time of the robbery.

Indeed the prosecution case was that it is the A.K. 47 rifle which was recovered after Kiplagat led police to his home that was used at the time of the robbery.

Had the superior court re-evaluated the evidence it would have appreciated that it is only the evidence of Mukuru (PW3) and Kariuki (PW4) that tended to show that the appellant may have been involved in the commission of the offence. That evidence, if credible, shows that the appellant was in the company of Kiplagat whom the investigating officer described as the **ring leader of the robbery**”, on the 9th July, 1998 and that the appellant; Kiplagat and others were dropped near the home of the complainant sometime before the offence was committed. The superior court did not however re-evaluate the evidence of identification of the appellant by Mukuru and Kariuki on the two occasions when Kiplagat had hired the vehicle. On the first occasion the vehicle was hired at 7p.m. It is at L-3 that the appellant boarded the vehicle. Both witnesses did not say at what time the appellant boarded the vehicle. On the second occasion the appellant, Kiplagat and others boarded the vehicle at about 8.30 p.m. and were dropped near the home of the complainant between 9p.m. and 9.30p.m. It is clear that on both occasions the appellant boarded the vehicle at night. The superior court did not investigate whether the circumstances were conducive to positive identification. Moreover the evidence of identification of the appellant by Mukuru and Kariuki remains evidence of dock identification and therefore weak evidence after the evidence of the identification by the appellant by Mukuru and Kariuki at the identification parades was rejected by the trial Magistrate. More importantly, the superior court failed to appreciate that the evidence against the appellant was purely circumstantial and to inquire whether it met the required standards before convicting the appellant on such evidence.

Lastly Mr. Kitigin brought to our attention at the hearing of the appeal that Kiplagat appealed to the superior court against his conviction and that the superior court allowed his appeal.

Mr. Omutelema confirmed that Kiplagat appealed to the superior court in Eldoret High Court Criminal Appeal No. 121 of 1999 which appeal was allowed by the superior court holding that the prosecution case was contradictory and that most of the prosecution witnesses were not honest. He did not support the conviction for that reason. The appellant’s appeal No. 138 of 1999 was filed after Kiplagat’s appeal No. 121 of 1999. But appellant’s appeal was determined by Omondi Tunya, J on 8th February, 2002 while Kiplagat’s appeal was determined by Gacheche, J on about 24th November, 2004. The failure by the Registry to bring to the attention of Omondi Tunya, J. that Kiplagat’s earlier appeal from the same judgment was pending resulted not only in the two appeals being heard separately but also in two contradictory judgments. This appeal illustrates why the Court Registries should be computerized urgently.

In ***Criminal Appeal No. 121 of 1999***, the superior court made a finding that the evidence of Mukuru (PW3) was unreliable. The acquittal of Kiplagat referred to by investigating officer as the “**ring leader of the robbery**” has absolutely discredited the prosecution case against the appellant.

In the light of the foregoing we are not satisfied that the appellant was properly convicted.

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

Dated and delivered at ELDORET this 26th day of September, 2008

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR