



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 264 of 2006

PETER KIOKO KISILU..... APPELLANT

AND

REPUBLICRESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera & Khamoni, JJ.)
dated 31st May, 2005***

in

H.C.CR.A. NO. 547 OF 2005)

JUDGMENT OF THE COURT

Peter Kioko Kisilu appeals against his conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. It had been alleged that he had on the 16th day of February, 2003 at Kwa Hola village, Changamwe, in Mombasa, jointly with others not before court, being armed with a dangerous weapon, namely a pistol, robbed one ***Nyanje Mangare*** of KShs.5,650/=. Upon his conviction he was sentenced to suffer death as by law provided. His appeal to the superior court was dismissed and he now comes before us on a second and final appeal.

As this is a second appeal, it must be confined to points of law since this court will not interfere with concurrent findings of fact arrived at in the two courts below unless they were based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did – see **Reuben Karani s/o Karanja v Republic (1950) 17 EACA 146.**

In a memorandum of appeal drawn by the appellant in person no less than 13 complaints are raised but they were argued globally by learned counsel for him Mr. Kadima. It is however

on two issues of law raised by Mr. Kadima that we intend to focus for determination of the appeal. They relate to, firstly, the identification and arrest of the appellant, and secondly the *alibi* defense raised by him.

The facts of the case were fairly simple:

Shida Mwambia Befu (PW3) owned a butchery in Changamwe and had employed **Nyanje Mangare** (PW1) to work there. At about 9 or 9.15 p.m. on 16th February, 2003, both of them were in the butchery when a customer, who was a stranger to them, arrived and asked for a ½ kilo of meat. As PW1 was about to serve him, two other strangers arrived and one of them, who held a small pistol, ordered them to lie down. Terrified and urinating on himself, PW1 immediately lay face down. PW3 also obeyed the gunman's order. Within three minutes the cash box had been emptied of its coins and PW1 had handed over some Kshs.5,650/= which he said was in his pocket and the robbers walked out. PW1 and PW3 continued to lie down for another minute before they rose up and came out of the butchery shouting "*thieves, thieves.*" The shouts were heard by two youths, **Hassan Abdalla Kombo** (PW2) and his friend **Paul Inda**, who was not called as a witness. The two youths ran along an alley and caught the appellant some 100 metres away from the butchery. PW1, PW3 and other members of the public who were behind them also arrived at the scene and the appellant was severely beaten up before he was handed over to **Pc Moses Mwangi** (PW4) of Changamwe Police Station who took him to hospital and later preferred the charges of robbery against him.

When the appellant was questioned, he denied that he was at the butchery or was involved in any robbery. He explained that he was coming from duty at Akamba Handicraft at Changamwe where he worked. His intention was to catch a bus to take him upcountry to Machakos, but as he ran home to collect his travel bag, he heard people behind him shouting "*thieves*". As he turned, he was knocked down and hit with all manner of missiles until he passed out. He woke up in hospital.

Both courts below believed the evidence of PW1, PW2 and PW3 that they identified the appellant and that they all gave chase and arrested him within a short distance of the butchery. The learned trial magistrate stated: -

"All three witnesses told the court that the offence occurred at about 9.00 p.m. that there were lights in the butchery where the robbery occurred, that there were lights outside for security purposes, that the accused was arrested within metres of the butchery and that none of the three witnesses lost sight of him from the time he emerged from the butchery to the point of arrest."

And the superior court in considering the same issue found: -

“The robbers asked for more cash and PW3 told PW1 to give out the cash. He saw robbers run out of the butchery. He says Hassan and Paul (PW2 and his friend) were seated outside. PW3 and PW1 came out of the butchery shouting “thieves! thieves!” they all chased the robbers and caught the appellant. They chased the appellant without losing sight of him until he was caught. It is clear to us that there was no problem about identification.”

Learned counsel for the appellant Mr. Kadima took issue with those conclusions which he submitted were not supported by any or any consistent evidence on the record. We have carefully examined the recorded evidence and we think, with respect, that there was no sufficient basis for making the finding that the appellant was identified beyond reasonable doubt.

There may well have been lights in the butchery as stated by PW1 and PW3, but there is no evidence to show how the two witnesses identified the appellant inside the butchery as they lay facedown terrified throughout the three-minute ordeal. Nothing is said about the robbers' features, attire or other descriptions. There is also an erroneous perception of the evidence that PW1 and PW3 left the butchery without losing sight of the gun-totting robbers and pursued them until they apprehended the appellant. On the evidence however, the robbers had gone before the two came out shouting and attracting other members of the public. PW2 who said he and his friend (not a witness) were the first to apprehend the appellant did not say, as concluded by the trial court, that he arrested him “within metres”. He said it was 100 metres away and the lighting at the scene was not close to them. We quote him: -

“The house had security lights but they were not so close. The scene of arrest was some 100m from the butchery.”

PW1 also said: -

“From the time you left the butchery to the time we subdued you five minutes could have passed”;

while PW3 confirmed that the chase was in “*an alley not on the main road*”.

In all the circumstances we think the findings of fact made on identification and arrest were based on the wrong evaluation of the evidence and we are entitled to interfere with those findings.

The second issue of law taken up by Mr. Kadima, was the manner in which the appellant's

defence, which amounted to an *alibi* was treated. The trial court stated: -

“The court finds that the evidence tendered by the prosecution is overwhelming and that the accused’s own story is weak and not worthy of credit and has not succeeded in casting any doubt on the prosecutions case let alone a reasonable one. This is the accused who told the police just as he told the court that he had come from market at Akamba Handcrafts. The officer visited the said society only to learn that the accused did not work there and was not even known there.”

The superior court accepted that assessment stating; -

“The appellant put up a defence that he was that day working at Akamba Handicraft (in Changamwe area) and was confronted by a crowd. His allegation that he worked in that place was checked out by PW4 who found it to be untrue. The trial Magistrate found the evidence of defence not credible. We also find the same to be unworthy of credit.”

The law on alibi defences is well settled and we need only refer to **Sekitoleko v Uganda [1967] EA 531** where the Chief Justice, Sir Udo Udoma held: -

“(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R v. Johnson [1961] 3 All E.R. 969 applied; Leonard Aniseth v. Republic [1963] E.A 206 followed);

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself;”

The appellant denied at the first opportunity when questioned by the police that he was involved in the robbery. He informed the police, and repeated it in court, that he was working at a stall identified as No. C35 at Akamba Handicraft Society premises in Changamwe and was paid his wages the same day. He gave details of his intended travel upcountry including the bus and his conversation with the conductor who confirmed there was seating space in the bus. As he ran home to collect his bags he was set upon by the crowd. What did the police do about that story? PW4 ***Pc Mwangi*** simply said in his evidence in-chief: -

“I went to Akamba Handicraft and made inquiries and learnt that this accused does not work there.”

Cross-examined by the appellant, he stated: -

“Yes, you said you were just passing by and that you were coming from stall No. C35

Akamba Handicraft. I went there to investigate your alibi. No one there knew you and you did not work there”.

And with that the story of the appellant dissipated! It is not clear why the police found it unnecessary to obtain statements from the persons mentioned by the appellant as his employers or even the bus owners. Such statements may either have supported the appellant's story or might have shown beyond doubt that the story was a tissue of lies. As it is, there is little to show that the alibi was properly investigated if at all. As was stated by this Court in Kiarie v. Republic [1984] KLR 739 at page 745.

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable; *Said v Republic* [1963] EA 6. The judge erred in accepting the Senior Resident Magistrate's finding in the alibi because the finding is not supported by any reasons. It is not possible to tell from the judgment of the Senior resident Magistrate if the correct onus was applied and if the prosecution was required to discharge the alibi - *Raphael v Republic*, [1973] EA 473. The defence of alibi was rejected for unrevealed reasons. That was a grave omission. The errors of law on the finding on identification and on the alibi are of such a nature that it is reasonably probable that without them the Senior Resident Magistrate would not have convicted the appellant. “

And so it is in this case.

We think we have said enough to satisfy ourselves that there were reasonable doubts in the evidence on record and it was not safe to convict the appellant for the offence charged. We extend the benefit of those doubts to the appellant and order that this appeal be and is hereby allowed. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 19th .day of January, 2007.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR