



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 137 of 2003

AUGUSTINE MWENDA KIAMA APPELLANT

AND

REPUBLIC RESPONDENT

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

Nyeri (Juma & Mitey JJ.) dated 19th March 2003

in

H.C.CR.APPEAL NO.303 OF 2001)

JUDGMENT OF THE COURT

This is a second appeal against the conviction of the appellant on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence in respect of the two counts were as follows:

Count I

“AUGUSTINE MWENDA KIAMA ALIAS MAINA ALIAS BAITE. On the 31st day of January 2001 at Kwa MUKABURU trading Center in Nyeri District within Central Province, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifles and pistols robbed STEPHEN WERU NGATIA of cash Kshs.80,000/=, one and a half cartons of sportsman cigarettes valued at Kshs.29,991 and Motor vehicle registration number KAG 910B make Toyota hillux valued at Kshs. 1,600,000/=, all to a total value of Kshs.1,709,991/= and at or immediately before or immediately after the time of such robbery used actual violence to the said STEPHEN WERU NGATIA”.

Count II

“AUGUSTINE MWENDA KIAMA ALIAS MAINA ALIAS BAITE. On the 31st day of January 2001 along Mathira Gatung’ang’a road in Nyeri District within Central Province, jointly with others not before court, while armed with dangerous weapons namely AK 47 Rifles and pistols robbed ANTONY KOGI MUNYAGA of a MOTOR VEHICLE registration number KAH 381D make Peugeot 504 station wagon valued at Kshs.1,500,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said ANTONY KOGI MUNYAGA”.

Upon his conviction, the appellant was sentenced to death on both counts as mandatorily provided by law.

The appeal before us can only be on a matter of law as provided under **section 361** of the Criminal Procedure Code (Cap. 75 Laws of Kenya).

The concurrent findings of fact made by the two courts below upon consideration of evidence tendered by the prosecution witnesses and the appellant were as follows:-

On 31st January 2001 **Stephen Weru Ngatia** (PW1) a salesman with Mathira Wholesalers and his driver **Moses Kanyua Mbiri** (PW2) went out to sell cigarettes in markets within Kiameriga area. The two were in a vehicle registration number KAL 910B a Toyota Hilux Pick-up. It was Mbiri (PW2) who was driving the said vehicle. They sold cigarettes in several markets and eventually reached Kwa Mukaburu trading centre at about 11.30 a.m. They went to the shop of **Cecilia Marigu** (PW3), and before they had come out of their vehicle four men armed with rifles and pistols appeared and ordered them to get into the back of the vehicle. The two obeyed the order of the armed men who then separated into two groups so that two of them got into the driver's cabin while the other two joined PW1 and PW2 at the back of the vehicle. When the vehicle failed to start PW2 was ordered to go and start it. PW2 obliged and having started it was ordered to go at the back of the vehicle. The vehicle was then driven towards Mt. Kenya forest where it was parked. The robbers took all the money PW1 and PW2 had. They also took two cartons of cigarettes and abandoned PW1 and PW2 in the bush.

On that same day (31st January 2001) and about the same time (midday) within Kiamariga area PC Anthony Munyago, (PW6) a driver with CID Nyeri was on patrol duties with other police officers. He was driving a CID vehicle registration number KAH 318D a Peugeot 504 Station Wagon. The other police officers were Sgt. Gitanga (PW9), PC Kubabi and PC Wachira. These police officers received information of robbery and as a result proceeded towards Kiamariga. On the way they met a black saloon car, with six occupants, being driven in the opposite direction. The police officers stopped the other car to inquire if they had seen the cigarette van. The other vehicle stopped briefly but then drove off raising suspicion. The police vehicle turned and gave chase. The other vehicle turned into a murram road at high speed. One of the occupants in the other vehicle drew out a pistol and started shooting at the police officers who also returned fire. It was a muddy area and both vehicles got stuck. As the robbers had superior arms (AK47) while police officers had only pistols this forced the police officers to retreat leaving their vehicle stuck in the mud. The robbers then pushed the police vehicle and drove off in it. The police officers then called for assistance and a landrover from Kiganjo Police Station came to the scene and towed the other vehicle from the scene. That vehicle did not have its ignition key.

On the following day (2nd January, 2001) the appellant went to Nyeri Police Station claiming that he had been carjacked the previous day and abandoned in the forest within Mukurweini area. But as the appellant made the report PC Anthony Munyago (PW6) immediately recognized the appellant as the person who had been driving the other vehicle which had six occupants and which had been abandoned in the muddy section during the shoot out between the police officers and the robbers. When that other car was searched two cartons of cigarettes were found. Sgt. Gitonga (PW9) also recognized the appellant as one of the robbers and as the driver of that other vehicle. PW6 and PW9 testified that it was the appellant who had driven off the police vehicle from the scene of the shoot out. When the appellant was searched he was found with the key of the vehicle that had carried the robbers, abandoned at the scene and later towed to the police station. The three police officers (PW6, PW8 and PW9) stated that the key for the abandoned vehicle was recovered from the appellant when he went to make a report at Nyeri Police Station.

The appellant in his defence maintained that the key was not found from him but rather from his house in Nairobi and that it was a spare key.

The learned trial magistrate was in no doubt that the appellant was positively identified as one of the robbers and in his judgment expressed himself thus:-

“The main issue to consider is whether accused was one of the robbers who executed the two robberies. Having considered all the evidence and the circumstances thereto I am satisfied beyond all reasonable doubts that he was one of the robbers. True PW1, 2 and 3 told court that accused was not one of the four robbers they saw. However as I have stated earlier I am convinced that they were more than the four men PW1, 2 and 3 saw. Accused and another/or others were hiding somewhere in the car and they have followed the stolen vehicle and left the forest with others. I am convinced of this because accused was fully identified by PC Munyagia (PW9) (sic) and Sgt. Gitonga (PW9) as the man who was driving the car KAD 198 W and as the same person who drove away the CID car Reg No. KAH 398 D after the fire exchange. PW6 & 9 were very emphatic that they saw accused very well first when they stopped the car and secondly when the robbers stalled (sic) and accused and others came out shooting. I was satisfied that the two positively identified the accused person. In the same car he was driving the two cartons of cigarettes were found. This therefore convinces me he was involved in the two robberies.

Further accused had the car’s ignition keys when he went to report at Nyeri Police Station. The robbers had not left the keys in the car when they abandoned it. They were found in his pockets when he was searched. Though he denied this I was satisfied this was so. The police had no reason to fabricate the case against the accused person. He was arrested and charged because he was well identified. Identification parade could not be held as PW6 & 9 are the ones who identified him in the office.

As I said I too had considered evidence by the defence and did not find it plausible. Accused was not car jacked as he said. He went to report so as to get back his car. He believed nobody would identify him.

Accused and his colleagues were armed with dangerous weapons at the time. They threatened PW1 & 2. accused shot at the police officers. No doubt they have used or threatened to use actual violence on their victims. All in all I find both charges against the accused satisfactorily proved. I find him guilty as charged on both counts and convicts him accordingly.”

The appellant filed an appeal to the superior court and the superior court (Juma & Mitey JJ.) considered all his grounds of appeal but came to the same conclusion as did the trial magistrate that the appellant had been positively identified by the three police officers i.e. **PW6, PW8 and PW9**. In their judgment the learned Judges of the superior court stated inter alia:-

“We have evaluated the evidence adduced in the lower court and we note that the time the appellant came to report to Nyeri Police Station, he stated that he had not gone to his house after the car jacking. It follows therefore, that he could not be having the spare car keys in his pockets when he was being searched. PW8 PC Muriuki, Sergeant Gitonga and PC Munyago all stated that the keys were recovered from the appellant when he came to report. The trial Chief Magistrate went to a great length in analyzing the evidence adduced before him. He properly directed himself on the issue of identification and came to the proper conclusion that the appellant was one of the robbers. After analyzing the evidence adduced we find no reason to differ with his finding. The appellant was properly identified and we therefore dismiss this appeal.”

It is from the foregoing that the appellant comes to this Court by way of second and final appeal. In her submissions before us Ms Lucy Mwai the learned counsel for the appellant addressed us on two important issues viz, identification and evaluation of evidence by the first appellate court. It was Ms. Mwai’s contention that the circumstances prevailing were not favourable for positive identification as PW1, PW2 and PW3 did not identify the appellant. Ms. Mwai went on to argue that the Judges of the superior court failed to evaluate the evidence and that had they done so they would have arrived at a different conclusion. A number of authorities were cited in support of these submissions.

On his part Mr. Orinda who appeared for the State submitted that both courts below found as a fact that the key in question was found in the appellant’s pocket and that both PW6 and PW9 had sufficient opportunity to identify the appellant. He pointed out that the incident occurred in broad daylight and that

the two cartons of cigarettes were recovered from the vehicle in which the appellant was seen by the two police officers – PW6 and PW9.

This appeal raises the issue of identification for consideration. As it has been stated by this Court on numerous occasions the proper identification of robbers is always an important issue in a case of robbery. It was submitted that it was necessary for the two courts below to weigh the evidence with the greatest care and inquire into circumstances that made it possible to identify the appellant. In Maitanyi v. Republic [1986] KLR 198 at pp. 200 – 201 this Court had the following to say on the issue of identification:-

“Although the lower courts did not refer to the well known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

‘Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error’

In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did?”

In Maitanyi case (supra) the court was dealing with the issue of a single identifying witness, unlike in the present case where we have three identifying witnesses (**PW6, PW8 AND PW9**) all police officers on patrol duties saying that they clearly saw the appellant as one of the robbers in the other car and that, indeed it was the appellant who was driving that other car. The same police officers testified that it was again the appellant who drove the police vehicle from the scene of the shoot out. There was other evidence to the effect that inside the other vehicle two cartons of cigarettes were recovered. And finally the appellant was found in possession of the keys for that other vehicle in which the stolen carton of cigarettes were recovered. So that if we are to reconstruct the sequence of events the picture one gets is that PW1 and PW2 were victims of robbery with violence when they were driven into the forest and robbed of their money and two cartons of cigarettes. Then immediately thereafter the appellant and others are confronted by police officers and a shoot out ensues. The appellant was identified as one of the robbers who opened fire against the police officers. The appellant and his group abandoned the other vehicle as they escaped in the police car and the appellant was identified by three police officers as the one who drove away the police vehicle. Inside the other abandoned vehicle two cartons of cigarettes were found. The following day the appellant was found in possession of the key for the abandoned vehicle. Taking into account all these pieces of evidence they lead to only one conclusion: the appellant was positively identified as one of the robbers. The fact that the appellant was found in possession of the car key to the abandoned vehicle really gave him no chance of escape. Indeed circumstantial evidence coupled with evidence of identification and possession of ignition key to the abandoned vehicle shows that the appellant’s guilt was beyond any shadow of doubt. As was said in R v. Taylor, Weaver and Donovan [1928] 21 Cr. App. R.20:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.”

We have anxiously considered this issue of identification particularly because of the gravity of the consequences but have nevertheless come to the conclusion that there was no error of law or principle committed by the two courts below in their finding that the appellant was properly identified.

On the issue of evaluation of evidence by the superior court we think Ms. Mwai had in mind the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions. That duty was clearly stated in **Okeno v. R.** [1972] EA 32 at p. 36 where the predecessor of this Court said:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957]E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

We have already set out elsewhere in this judgment how the superior court dealt with the appeal before it. The learned Judges of the superior court clearly evaluated the evidence by dealing with the evidence of each prosecution witness together with the defence of the appellant. They evaluated the evidence, analysed it and came to their own conclusions. They cannot be faulted. We find no merit in that submission on the issue of evaluation of evidence.

The only matter that invites our intervention is the sentences meted out by the trial court and upheld by the superior court. The appellant herein was sentenced to death on both counts of robbery with violence. In that respect we need only repeat what we have severally and more recently said in **Abdul Debanu Boye & Another vs. R** – Criminal Appeal No. 19/2001 (unreported) as follows:-

“We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the Court dealing with the appeal would consider all the counts and if necessary, impose the appropriate death sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately.”

In the result we dismiss this appeal against the convictions recorded against the appellant on both counts. We, however, set aside the sentence of death imposed on the second count and uphold the death sentence imposed on count 1. These shall be our orders.

Dated and delivered at Nyeri this 9th day of February, 2007

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR