REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 292 of 2005

HARUN MWANGI KANENE …………....APPELLANT

AND

REPUBLIC ………..……………….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Nairobi (Lesiit & Ochieng, JJ) dated 7th December, 2004

in

H.C.CR.A. NO. 441 OF 2002)

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JUDGMENT OF THE COURT

The appellant was convicted by Senior Resident Magistrate, Nairobi of three counts, namely, robbery with violence contrary to *section 296 (2)* of the Penal Code in Count I, being in possession of a firearm without a Firearm Certificate contrary to *section 4 (2) (a)* of the Firearms Act, in Count II, and being in possession of Ammunition without Firearm Certificate contrary to *section 4 (2) (a)* of the Firearms Act in Count III. The appellant was sentenced to death for the offence of robbery with violence in Count I and to six years imprisonment for each of the offences in Count II and III. His appeal to the superior court was dismissed in its entirety. He now appeals against the decision of the superior court on six grounds.

The complainant Lawrence Kamau Mucheke (PW1), a businessman, runs a clothes shop and a restaurant along Munyu Road, Nairobi. The clothes shop and the restaurant are located on the same premises. The shop and restaurant are separated by a wall but there is a connecting door from the shop to the restaurant. The complainant was a cashier at the clothes shop but his offices were located within the restaurant. On 13th September, 2001 at about 4 p.m., four men entered in the shop. Two of them approached Naomi Wanjiku (PW2) and Beth Wangui (PW3), the two sales girls in the shop and started enquiring about the prices of cloth materials from the sales girls. One of the four people went to the counter where the complainant was and asked for a change for Shs.100/-. The complainant gave him the change. He then walked towards the door but turned back. At that juncture one of the four people removed a pistol, pointed it at the two sales girls and ordered everyone to lie down. Two of the robbers went to the counter where the complainant was, threatened to shoot the complainant and stole Shs.7,000/- from the cash box while the other two robbed the customers in the shop of their money and valuables.

The two robbers who had already robbed the complainant of Shs.7,000/- ordered the complainant to take them to his office. As the complainant was being led to his office at gun point, and on reaching the

door to the restaurant he screamed and grabbed the hand of the appellant which was holding the gun. Both the appellant and the complainant fell down and as they were struggling, the appellant fired at the complainant, but the bullet missed him. Members of the public who now gathered in answer to the screams disarmed the appellant. They beat him and took him outside the building. Two police officers Cpl. Pixley Musyoka (PW4) and another arrived at the scene within 15 minutes of the robbery. They found the appellant being beaten by members of the public outside the shop. The police recovered a pistol, with one live ammunition. They also recovered a spent catridge at the scene.

The appellant in his sworn evidence at the trial stated, among other things, he had gone to the complainant's shop to buy cloth material; that while inside the shop armed gangsters raided the shop and robbed him of Shs.5,000/-; that as he was lying down he could hear gun shots in the shop; that he left the shop along with the other customers; and that he was hit on the head after he had left the pavement of the shop and fell down unconscious. He denied that he was arrested inside the shop.

Mr. King'ara, learned counsel for the appellant argued the third ground of appeal first which is that the trial was a nullity since the proceedings did not at all times indicate the rank of the police prosecutor who conducted the prosecution. In support of that ground, Mr. Kingara referred to three instances, namely, the proceedings of 27th September, 2001 where the name of the prosecutor is merely shown as "*I. O. Odoyo*"; the proceedings of 30th November, 2001 at 2.30 p.m. where it was merely recorded "*Coram as before*" and, lastly, the proceedings for 22nd March, 2002 where the name of the prosecutor who addressed the court after the judgment was read is not shown. The appellant's counsel relied on two decisions of this Court, namely, ***Ekimat v Republic*** – *Eldoret Criminal Appeal No. 151 of 2004* (unreported) and ***Elirema v Republic*** [2003] KLR 357.

Firstly, this ground is apparently an afterthought because Mr. King'ara who also appeared for the appellant in the superior court never raised that ground in the superior court. Secondly, the proceedings of 27th September, 2001 relates to the appearance of the appellant before the Chief Magistrate, B. Olao, Esq. when the appellant pleaded not guilty and the case was allocated to court 2 apparently to S. Ndambuki, SRM for trial. The proceedings show that it is Inspector Oduor who appeared on all occasions before S. Ndambuki, SRM and whenever the case was adjourned by the trial court, it would be referred to the Chief Magistrate for re-allocation and that "*Odoyo*" was invariably present before the Chief Magistrate wherenever a new hearing date was fixed.

The rank of "*Odoyo*" is shown in all subsequent appearances before the Chief Magistrate as either "*C.I.*", that is, Chief Inspector or "*I.P.*" that is, Inspector of Police as shown in the proceedings of 29th October, 2001, 5th October, 2001 and 1st February, 2002. It is only a police officer below the rank of an Assistant Inspector who is not authorized by law to conduct criminal prosecutions.

It can be inferred from the record that "*Odoyo*" the prosecutor who appeared before the Chief Magistrate on 27th September, 2001 was either a Police Inspector or Chief Inspector and that failure to record the rank of the prosecutor was an accidental slip by the Chief Magistrate more so because the appellant has not said as a matter of fact that "*Odoyo*" was a prosecutor below the rank of Assistant Inspector. Moreover, the appellant pleaded not guilty to the charges on 27th September, 2001 and it cannot be said that failure to record the rank of the prosecutor occasioned any failure of justice to the appellant.

The proceedings clearly show that it is I.P. Oduor who appeared before S. Ndambuki throughout the trial without any exception. The proceedings of the morning of 30th November, 2001 show that I.P. Oduor was present and by the phraseology "*coram as before*" used at 2.30 p.m. on that day was no doubt intended to refer to the presiding magistrate and the prosecutor. Similarly, the appellant does not say as a matter of fact that I.P. Oduor did not attend on the afternoon of 30th November, 2001 or that he was not in attendance on 22nd March, 2002 when the judgment was delivered.

We do not, thus, find any merit in this ground of appeal.

In the remaining grounds of appeal the appellant in general complains that the superior court erred in law in failing to evaluate the evidence and find that the evidence in support of the identification of the appellant was inconsistent, contradictory and unreliable. The appellant further challenges the decision of the superior court on the ground that his defence was not given due weight. Mr. King'ara, submitted that the evidence of the complainant was not conclusive that the appellant had the gun; that the gun was not dusted for finger prints; that there was no evidence that the appellant was taken out of the premises; that the serial number of the gun in the charge sheet and in the evidence did not tally and that the evidence of the identity of the police officer who took the gun to the Ballistic expert for examination was contradictory.

The conviction of the appellant was dependent on the evidence of Lawrence Kamau Mucheke – the complainant as the two sales girls, Naomi Wanjiku and Beth Wangui who were in the shop at the time of the robbery confessed at the trial that they did not identify the robbers. The complainant testified at the trial in part, thus:

"***The two people who came to the counter who included the accused led me to the office while they were still pointing the gun at me. The other two remained behind but they had ordered everyone to lie down. When we got to the door leading to the Fast Food Restaurant, I tried to push the door behind me to lock them on the other side but they overpowered me and they came to me. I started screaming to alert customers that there were gangsters in the premises.***

At that point, the one who was pointing the gun at me threatened to shoot but I grabbed his hand which was holding the gun. We both fell down and his colleagues managed to escape at that time. I was struggling with him while we were on the ground he shot at me but he missed the target. By that time members of the public had gathered around. We managed to disarm him and members of public started administering mob justice to him. They beat him ………".

The complainant stated in his evidence in cross – examination partly:

"***You fired but you did not get me. I had raised an alarm and members of public found us struggling. They assisted me and we managed to disarm you. They started beating you up. The police found you being beaten by the members of public outside the shop where they had taken you".***

Although Beth Wangui did not identify any of the robbers, she testified at the trial that:

"***The person who had been taken out by members of public from where he had been struggling with PW1 was taken outside".***

The trial court evaluated the evidence and believed the evidence that the complainant had identified the appellant and rejected the appellant's defence that he had gone to the shop as a customer as untrue.

The superior court re-evaluated the evidence and considered the law and concluded:

"***We are satisfied from the evidence that the issue of mistaken identify is totally ruled out. First of all, the conditions of identification were good and conducive for positive identification.***

The offence took place at 5 p.m. in broad daylight. Further, the complainant did not lose sight of the appellant from the moment he and his accomplice approached him totting a gun to the time the police re-arrested him".

Regarding the complainant that the defence of the appellant was not considered by the trial court, the superior court said:

"***We have nonetheless evaluated the judgment of the trial magistrate and are satisfied that the defence was given due consideration. He said that he had been an innocent shopper at the shop where the robbery occurred. However, the said defence did not cast any doubt on the overwhelming evidence***

adduced against him by the prosecution. Even after considering the said defence, we still come to the same conclusion, that, the learned trial magistrate's findings were correct and the conviction safe ……".

The Court on a second appeal does not normally interfere with concurrent findings of fact by the two lower courts unless the findings are based on no evidence or on misapprehension of the evidence or on the application of wrong principles. Furthermore, it is recognized that a trial court has greater advantage than an appellate court in assessing the credibility of witnesses and an appellate court would not therefore interfere with the findings of the trial court on the credibility of the witnesses unless no reasonable tribunal could make such findings. (See ***Ogol v Muriithi*** [1985] KLR 359; ***Republic v Oyier*** [1985] KLR 353).

Mr. King'ara, submitted that the evidence of the complainant and the entire prosecution case was not reliable. It is true that the complainant did not describe clearly how many of the four robbers were armed. It is also true that the superior court found that the trial magistrate did not record the evidence with circumspection. However, as the superior court correctly found, the complainant clearly described the role played by the appellant during the robbery from the moment the appellant and another advanced to the counter where the complainant was and demanded money up to the time that the members of the public disarmed the appellant. In ***Ndungu Kimani v The Republic*** [1979) KLR 282, this Court stated the minimum criteria that the evidence must satisfy before it is relied upon in a criminal case, thus:

"***The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".***

The complainant was not accused of having exhibited any of those negative characteristics.

It is true that the gun was not dusted for finger prints. However, there was clear evidence that the gun was handled by the members of the public who disarmed the appellant before the police arrived. In such circumstances, the examination of the gun for the finger prints would not have been conclusive. There was evidence from Cpl. Pixley Musyoka that a spent catridge was recovered from the scene and the evidence of William Lubanga (PW5), the Ballistic expert that the spent catridge was in his opinion fired from the Tokarev pistol, which, according to the evidence, was in possession of the appellant before he was disarmed. There was ample evidence from the complainant and the two sales girls and which was admitted by the appellant that there was shooting within the premises. The evidence of shooting within premises supports the evidence of Cpl. Pixley Musyoka that a spent catridge was recovered at the scene. The judgment of the superior court shows clearly that the defence of the appellant was duly considered but rejected. Mr. Kingara's submission that there was no evidence that the appellant was taken out of the premises is not, with respect, correct. There was the evidence of the complainant that the appellant was taken outside by members of the public and beaten. Beth Wangui supported that evidence. We do not find any material contradiction between the evidence of William Lubanga and PC Bernard Mwangi as to who took the pistol the live ammunition and the spent catridge to William Lubanga because the Exhibit Memo Form which accompanied the exhibits shows that the exhibits were taken possession by I.P. Peter Njoroge and forwarded to William Lubanga by him. The evidence of William Lubanga that he received the exhibits from I.P. Peter Njoroge is according to the official records correct. It is apparent that P.C. Bernard Mwangi was merely the courier.

Lastly, the superior court considered the variance of the serial number of the pistol in the evidence and in the charge sheet and concluded that it was a mere mis-description which did not occasion a failure of justice. We respectfully agree.

In conclusion, there was concurrent findings of fact in this case regarding the circumstances of the robbery and the circumstances under which the appellant was arrested. As we have endeavoured to show above, there was sufficient and credible evidence to support the concurrent findings of fact. We have no reasons for interfering with those findings.

Regarding sentences, the appellant was sentenced to death and to imprisonment. The trial court should have suspended the prison sentences pending the outcome of the appeal against conviction for capital robbery (see ***Kushinda v Republic*** [2002] 2 KLR 89). Now that the appeal against conviction for capital robbery is being dismissed, the prison sentence in Counts II and III should be set aside.

In the result, the appeal has no merit. It is accordingly dismissed, save that the prison sentences in Counts II and III are set aside.

Dated and delivered at Nairobi this 8th day of June, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

……………………………

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR