



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 161, 162, 163 of 2005

JOHN MUREITHI.....1ST APPELLANT

BENSON OCHIENG'2ND APPELLANT

FRANCIS KIBE3RD APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya Nakuru (D. Musinga & L. Kimaru, JJ) dated 18th March, 2005 In H.C.CR.APP. NOS. 108A, 279 & 280 OF 2003)

JUDGMENT OF THE COURT

The three appellants *John Mureithi* (1st appellant); *Benson Ochieng* (2nd appellant); *Francis Kibe* (3rd appellant) and one *Marcurias Opondo Odweso* (co-accused) were jointly charged with three counts of robbery with violence contrary to *section 296(2)* of the penal code in Chief Magistrate's Court Nakuru.

The co-accused apparently died while in custody and the charges against him were withdrawn under *section 87(a)* of the Criminal Procedure Code.

The appellants were acquitted of counts I and III but convicted on count II in which they were charged that on 11th January, 1999 at section 5, Nakuru, they being armed with dangerous weapons, namely pistols they robbed ***TSANDRA KENT SHAH*** (complainant) of motor vehicle Reg. No. KAD 135H Toyota Corolla saloon, cash Kshs. 10,000/=, and cartons of sweets all valued Kshs. 716,000/=.

Upon conviction each of the appellants was sentenced to death. Their respective first appeals against conviction and sentence were dismissed by the superior court on 18th March, 2005. Their second appeals to this Court have been consolidated.

The complainant is a business man in Nakuru Town. On 11th January 1999 the complainant closed his business premises at 6.30 p.m. and drove to his house at section 58, Nakuru. He arrived home and stopped his car Reg. No. KAD 135S, a red Toyota Corolla saloon in the compound. Before he alighted from the car three people who were armed with pistols ran to the car and demanded money. The appellant alighted from the car and gave them Kshs. 10,000/=.

One of the three people entered into the car and reversed it. The second person boarded the car and the car was driven off. There were two cartons of assorted sweets in the car. The third person ran to the gate, entered into a white car and drove off. The complainant reported the robbery at Nakuru police station.

On the following day 12th January 1999, six armed robbers robbed a businessman at Chavakali Town, Kakamega District of some money and escaped towards Kisumu in a red Toyota Corolla Reg. No. KAG 049V. Upon arrival at Vihiga Town the vehicle left Kisumu road and turned to Luanda/Siaya road. Some police officers from Vihiga police station who had already received the report of robbery at Chavakali saw the robbers' vehicle pass Vihiga Town and shot at it. The robbers in turn shot at the police and drove away towards Luanda.

Police officers from Vihiga police station including CPL James Odhiambo (PW4); CPL Nicholas Sore (PW9); Sgt. Johstone Kemori (PWII) pursued the robbers in a vehicle. They found the car Reg. No. KAG 049V which the robbers were using abandoned on a side road. The members of public and the police pursued the robbers on foot and saw the six robbers at a distance. The six robbers followed different directions. CPL James Odhiambo arrested the co-accused Marcurias Opondo Odweso who had hid in the forest and recovered false foreign car registration numbers.

Odweso was armed with a panga. As police and members of the public were pursuing the robbers CPL Nicholas Sore (PW9) saw the first appellant John Mureithi at a distance. He looked tired and could not run. When CPL Nicholas Sore reached him the first appellant threw a gun which he had in a nearby farm. CPL Nicholas Sore took the gun. It had two rounds of ammunition. The first appellant was beaten by members of public but was saved by CPL Nicholas Sore.

The third appellant Francis Kibe (who was the second accused at the trial) was arrested by P.C. Kinyua in possession of a gun. He had been beaten by members of the public. The third appellant who was the 4th accused at the trial was handed over to the police by members of the public. He had a cut wound on the head and bruises. The police shot dead two of the six robbers and recovered three guns in the operation.

The first appellant testified at the trial that he was a businessman in Eldoret selling and buying bananas; that on 12th January, 1999 he had gone to Mbale to buy bananas when he heard noise and a gun shot; that he ran away and later met a crowd of people and enquired from them what had happened, but instead the people said he was one of the robbers and beat him.

The second appellant testified in his defence that he is a businessman buying and selling used shoes in Kisumu; that on 12th January, 1999 he went to Luanda where he bought a bale of shoes; that when he boarded a matatu he disagreed with the conductor about the fare whereupon he was beaten and handed over to the police.

Lastly, the third appellant also testified at the trial and stated that he used to stay in Nairobi where he was a businessman buying and selling groundnuts; that on 12th January, 1999 he went to Muchanga where he bought 10 bags of groundnuts and carried them using handcart; that he was stopped by police and arrested for no reason.

The trial magistrate disbelieved the evidence of each appellant and made a finding that the appellants were at the time of arrest in possession of the complainant's motor vehicle which had been stolen in Nakuru. The superior court agreed with the findings of fact by the trial magistrate and dismissed their respective appeals.

The three appellants filed their supplementary grounds of appeal through their common advocate, Mr. Simiyu. The first appellant did not however attend the hearing of the appeal. Mr. Gumo learned Assistant Deputy Public Prosecutor informed us that the first appellant escaped from custody on 4th March 2007 and that he has not been apprehended. A report from Nakuru prison has been filed verifying that information. He asked for the court's directions. By **rule 70(7)** of the Court of Appeal Rules, an

appellant who does not attend the hearing of his appeal and is not in custody and it appears to the court that he cannot be traced or cannot be traced without unreasonable delay or expense and if it appears that no injustice will be done the court has power to order that the appeal shall abate. The first appellant's appeal was consolidated with the appeals of the 2nd and 3rd appellants in the superior court. The three appeals have similarly been consolidated in this Court. By the act of escaping from custody we infer that the first appellant did not intend to prosecute the appeal. In the circumstances, we order that the appeal of the first appellant shall abate under **rule 70(7)** of the Court of Appeal Rules.

The second appellant filed one supplementary ground of appeal to the effect that the learned Judges erred in law and fact when they relied on proceedings which were a nullity. Mr. Simiyu addressed us only on this ground. He submitted that the proceedings were a nullity for two reasons, first that the plea was irregularly taken and secondly, the second appellant was convicted of robbery in count II when he had not been charged with that offence. Mr. Simiyu contended that the plea was irregularly taken because the language used in court was not clearly specified. He submitted that the language shown in the court record as "*English/Swahili*" is not known and that the language should have been shown as either English or Swahili or both English and Kiswahili. The record shows that all the four accused persons including the second appellant pleaded not guilty to the charge. The second appellant has not complained that the charge was read in a language that he did not understand. Thus if there was error at all in the proceedings regarding the language used in court it has not been shown that the error has occasioned a failure of justice. The error complained of is curable under **section 382** of the Criminal Procedure Code.

Mr. Simiyu's contention that the second appellant was not charged with the offence of robbery in count II is not, with respect, correct. The confusion has arisen because of the inclusion in the record of appeal of the original charge sheet dated 12th February 1999. It is true that according to that charge sheet the 2nd appellant was not charged with the offence of robbery in count II. However, the record shows that the original charge was substituted with a new charge sheet on 28th October 1999 in which the 2nd appellant was jointly charged with others with the offence of robbery in count II and fresh pleas taken on 29th October 1999. Mr. Cheche who appeared for the appellants in the superior court indeed appreciated this fact. The new charge which was contained in the original record of the trial court was erroneously omitted in the record of appeal.

The 3rd appellant has two supplementary grounds of appeal which are the only grounds that Mr. Simiyu submitted on. The first ground is that the 3rd appellant was deprived of his constitutional rights as enshrined in **section 77(2) (d) and (e)** of the Constitution by being forced to go on with the trial in the absence of his counsel.

There seems to be a confusion because the record shows that the 3rd appellant herein Francis Kibe who was the 2nd accused at the trial was not represented by a counsel during the trial. Indeed, the 3rd appellant conducted his own defence. The second ground of appeal is that the 3rd appellant was convicted on a count that he was not charged with. That is not, with respect, correct because the 3rd appellant was charged in count II both in the original charge sheet and in the amended charge sheet with robbing the complainant herein.

Lastly, Mr. Simiyu submitted that the respective defence of alibi of the 2nd and 3rd appellants was not evaluated by both the trial and first appellate courts.

It is trite law that a second appeal must be confined to points of law only and that the Court of Appeal will not normally interfere with concurrent findings of fact of two lower courts unless they are shown to have been based on no evidence (see ***Karingo v Republic* [1982] KLR 213**).

Secondly an appellate court will not normally interfere with those findings by the trial court which are based on the credibility of witnesses unless no reasonable tribunal would make such findings or if it is shown that there existed errors of the law.

(see **Republic v Oyier [1985] KLR 353.**

Although the trial magistrate did not evaluate the evidence she nevertheless made findings of fact and disbelieved the respective defences of alibi.

The superior court cognisant of its duty as a first appellate court scrutinized the evidence, re-evaluated it itself and made its independent findings and concluded:-

“The trial magistrate did not comment on the defences advanced by the appellants but on our part we have considered them and in our view the defences were mere fabrications advanced in a desperate attempt to hoodwink the trial court to believe that the appellants were innocent businessmen who were wrongly arrested. We are convinced beyond doubt that the prosecution evidence clearly revealed that the appellants were among the people who were passengers in the said motor vehicle and they abandoned it when they realised that they were being pursued by police and members of public. There was no case of mistaken identity when they were arrested.”

Thus the two courts below made concurrent findings of fact, among other things, that, the appellants were in recent possession of the complainant’s stolen motor vehicle. There are no grounds for disturbing the concurrent findings of fact. Although the complainant did not identify the robbers, the 2nd and 3rd appellants and four others including two who were gunned down by police were found in possession of the complainant’s stolen motor vehicle one day after the theft hundreds of kilometres from Nakuru. Although the motor vehicle has false registration numbers the complainant proved by documents and other evidence that the vehicle was his. The appellant’s denial of possession of the motor vehicle was disbelieved by the two courts below. In the circumstances a presumption arose that the 2nd and 3rd appellants were among the people who robbed the complaint of the motor vehicle (***Andrea Obonyo v Republic [1962] EA 542***).

For the above reasons the appeals have no merit and are hereby ordered dismissed.

Dated and delivered at Nakuru this 28th day of September, 2007.

P.K.TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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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