REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 168 of 2005

1. JOHN SIMIYU WALIBWA

2. MICHAEL NGUGI GITAU……APPELLANTS

AND

REPUBLIC…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Muga Apondi & Kimaru JJ) dated 1st April, 2005

in

H.C.CR.A Nos. 365 & 366 of 2001)

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JUDGMENT OF THE COURT

The appellants herein **JOHN SIMIYU WALIBWA**, and **MICHAEL NGUGI GITAU** were arraigned before the Chief Magistrate's Court at Nakuru in Criminal Case No 2352 of 2000 on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence stated as follows:

"1. JOHN SIMIYU WALIBWA 2. MICHAEL NGUGI GITAU on the 23rd day of October 2000 at Shik Park View Hotel Nakuru Town within Nakuru District of the Rift Valley Province jointly while armed with dangerous weapons namely a short gun, robbed John Gichuru Jomo of a Motor Vehicle Reg. No. KAJ 30N Toyota corolla white in colour valued at Kshs. 290,000 and cash 50/- all valued at Kshs. 290,050/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Gichuki Njomo".

The two appellants were jointly charged with a third person, ALLAN GICHUKI NGANGA on a second count of conspiracy to commit a felony contrary to section 393 of the Penal Code but since they were acquitted on this count we shall not concern ourselves with that count.

The trial of the appellants commenced on 25th January 2001 before the learned Senior Resident Magistrate (N.M. Kiriba Esq). The prosecution relied upon the following facts. The complainant John Gichuki Njomo (PW1) a taxi driver, was at Shirk Bar waiting for passengers on 23rd October, 2000 when

the 2nd appellant herein approached him (PW1) and requested to be taken to MTC. On the way the 1st appellant opened his bag and in that bag PW1 saw what he recognized as a gun. The two appellants told PW1 that they were at work and that he should drive towards Kabarak. When they reached near the showground they ordered PW1 to stop, open the boot of the vehicle and enter therein. The two started the vehicle and returned to the Town Centre where the vehicle stopped. The two abandoned the vehicle and PW1 managed to come out of the boot. Then police officers requested him to help them to follow the suspects but their efforts were fruitless. PW1 was then asked to go and make a statement at the Police Station. While making the statement the two appellants were brought in and he recognized them.

It was the evidence of PC Maurice Otieno (PW2) that on 23rd October, 2000 at about 9.00am he was with Cpl Kemboi along Court Road when they saw two people carrying a small bag. They suspected the two people and challenged them. The 2nd appellant dropped the bag as the 1st appellant ran away. PC Otieno chased the 1st appellant and arrested him at the Police lines. The 1st appellant had a bag which had items which looked like bullets. PC Otieno then arrested both appellants and took them to the Police Station where they handed them over to the Flying Squad Officers. PC Japheth Rotich (PW3) and PC Koech (PW4) of Flying Squad testified that they received the two appellants and after interrogating them decided to charge them.

When put to their defence each appellant elected to make an unsworn statement but it would appear that they gave evidence on oath, since the record shows that each of them was sworn and cross-examined.

In his defence the 1st appellant stated that he was a businessman in Nakuru where he sells second-hand clothes and shoes next to Barclays Bank. On the day in question he had come from Njoro when he heard gun shots. He saw people running away. He was immediately arrested and taken to the Police Station and then charged jointly with people he did not know.

The 2nd appellant in his defence stated that he was a hawker in Nakuru Town. On the material day while walking to work he met two people in civilian clothes who stopped him, took him to Central Police Station and then to court where charges were read to him.

In a reserved judgment which was delivered on 14th August, 2001 the learned Senior Residents Magistrate convicted the appellants and sentenced each of them to death as mandatorily provided by the law. In convicting the appellants, the learned trial Magistrate in the course of his judgment stated, *inter alia*:-

"**The court carefully considered all the evidence on record and noted that the 1st and 2nd accused were positively identified by the complainant as having been the ones who robbed him of his motor vehicle, put him in the boot and as the persons who had been taken to the Police Station as he was making his report.**

PW2 identified the 1st and 2nd accused persons as the ones he had chased and arrested with the said gun and bullets and the ones he had personally taken to the Police Station. There was overwhelming evidence against the 1st and 2nd accused persons. They were identified by the complainant and the PW2. Their arrest and identification by the complainant was so immediate and proximate between the time of the commission of the offence that there was no doubt that the 1st and 2nd accused committed the 1st offence. The court was convinced there was overwhelming evidence against the 1st and 2nd accused. The court therefore convicted the accused person with the offence of robbery with violence contrary to section 296(2) of the Penal Code."

Being aggrieved by the decision of the trial Magistrate the appellants preferred an appeal to the High Court at Nakuru (Apondi and Kimaru JJ) who after re-evaluating the evidence dismissed the appeal. In their judgment the learned Judges stated *inter alia:*

"**In his evidence, the PW2 – PC Maurice Otieno recalled that on 23rd October, 2000 at around**

9.00a.m while accompanied by Cpl Kemboi and IP Tirop he saw two people carrying a smallbag exhibit 1. When they challenged them to stop, the 2nd appellant dropped the bag and the 1st appellant ran away. The PW2 chased the 1st appellant and arrested him at the Police Lines. The 1st appellant had in his possession 15 rounds of ammunition of short gun. The police officers managed to arrest both the 1st and 2nd appellants with the shot gun and rounds of ammunition before handing them over to the flying squad. From the above evidence, it is apparent that the offence was committed in broad-daylight between 8.00 a.m to 9.00a.m that means that the complainant was able to see the appellants very clearly because there was sufficient light. In addition to the above, the appellants were arrested on the same day after about an hour. That clearly gave the PW1 an advantage of recognizing the people who had attacked him. Besides the above, the conduct of the appellants after being confronted by the PW2 and other Police Officers clearly showed that they had participated in the robbery. That was later confirmed by the PW2 who found them in possession of a gun. Given the above facts, there was no need for an identification parade. We are satisfied that the overwhelming evidence showed how the appellant had committed the offence. That apart, we are of the considered opinion that the learned Magistrate had evaluated the evidence properly and reached the correct conclusion. Since the conviction is safe and well merited, we hereby uphold the same. The appeal is hereby dismissed since the same has no merits at all"

The appellants now come before us by way of second and final appeal. That being so, only matters of law fall for consideration by virtue of **section 361** of the Criminal Procedure Code.

Mr P.O Lutta the learned counsel for the 1st appellant argued only two grounds of appeal:

(i) the alleged stolen vehicle was not identified either by being produced before the trial court or its log-book or photographs produced.

(ii) identification of the appellant(s) was not free from possibility of error.

In his submission as regards the first ground Mr Lutta took us through the particulars of the charge and the evidence of the complainant and pointed out that while the particulars of the offence alleged that the complainant was robbed of a vehicle and shs. 50/- there was no evidence from the complainant to support the allegation as the vehicle was not produced in evidence or its photograph shown to the trial court. Mr Lutta complained that there was no description of the alleged vehicle.

On the second ground of identification, Mr Lutta submitted that the complainant did not state the time he was alleged to have been robbed. Mr Lutta then referred to contradictions in the evidence of the Police Officers who arrested his client.

Mr Gakinya the learned counsel for the 2nd appellant associated himself with the submission of Mr Lutta. It was Mr Gakinya's submission that it was doubtful whether the offence of robbery with violence indeed took place. He therefore asked us to allow the appeal and set his client free.

In this appeal two points of law are raised, viz particulars of the charge not having been proved by the evidence and identification of the appellants. There is then even a more important issue and that is whether, in view of the two legal issues the first appellate court carried out its mandate.

At the commencement of this judgment we set out the particulars of the charge. It is trite law that it is upon the prosecution to prove the charge as laid. In the particulars of the charge it was alleged that the complainant was robbed of his vehicle "Reg. No. KAJ 370H Toyota Corrolla white in colour valued at Kshs. 290,000/= and Kshs 50/=……" In his evidence the complainant did not talk of being robbed of Kshs. 50/=. He did not show the court the vehicle stolen from him and the vehicle was never produced in evidence. No explanation at all was offered as to what happened to the vehicle after the alleged robbery.

He never gave the description of the vehicle in his evidence. Indeed the complainant testified as follows

in his evidence in chief before the trial court:-

"I live in Langalanga Estate. I am a Taxi Driver. I know the accused persons.

On 23rd October, 2000 I was at work at Shirk Bar waiting for passengers. The 2nd accused came and asked me to take him to MTC. When we were on our way the 1st accused opened his bag (MFI-1) and I could see it was a gun (MFI-2). They told me they were at work. They told me to drive towards Kabarak somewhere near the showground towards the Golf Club where they told me to stop the car, open the boot and enter therein.

They started the vehicle and returned to the Town Centre. Somewhere near the Railway the vehicle had an alarm. The vehicle stopped and started to make noise. They abandoned the vehicle. I was able to get out of the boot and soon thereafter some policemen on patrol requested me to help them with my motor vehicle which I did. We tried to follow and look for the suspects.

We did not find them. I was sent to the Police to make a statement.

While making the statement the police from the Flying Squad brought the accused persons who I recognized. I identified them. The time was 8.00 a.m."

From the foregoing it is not clear as to what time this incident took place. This could only have come out from the evidence of the complainant. That is why the issue of identification became important in this appeal. It is not unreasonable to assume that the incident could have taken place before dawn since there is mention of the appellants being arrested at about 9.00 a.m. There was then the complainant's evidence that when he saw the appellants at the police station it was about 8.00 a.m. The evidence of the police officers did not assist as regards the time of the offence. Accordingly the learned Judges of the superior court had no basis for concluding, as they did, that the offence took place "in broad day-light between 8 a.m. and 9 a.m."

It was upon the prosecution to prove its case against the appellants. In a criminal case an accused person is under no obligation to prove his innocence. The burden of proof remains on the prosecution throughout the trial.

One final aspect of this appeal is whether the fist appellate court discharged its duty of subjecting the evidence as a whole to a fresh and exhaustive examination. In **Mwangi v. R [2004] 2 KLR 28** at page 30 this Court said:-

"**In Okeno v. R [1972] EA 32 at p 36 the predecessor of this Court stated, inter alia:-**

"**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 [1975] EA 336). 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] EA 424."**

What is the outcome of all the foregoing? We have carefully considered what has been urged before us and it is our view that the first appellate court fell short of its duty of re-evaluating the evidence. Had it done so, we think, it would have detected the shortcomings in the evidence as regards prosecution's duty to prove the charge as laid and the contradictions in evidence of prosecution witnesses.

The learned State Counsel Mr. Njogu had made efforts to oppose the appeals but in the end conceded that there was a doubt as to whether the vehicle which is alleged to have been stolen indeed existed.

For the foregoing reasons, we allow this appeal, quash the conviction of the appellants and set aside

the sentence of death passed on each appellant. The appellants are to be set free forthwith unless otherwise lawfully held.

Dated and delivered at NAKURU this 28th day of September, 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR