IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 85 of 2006

JOSEPH EMURIO …… APPELLANT

AND

REPUBLIC ……. RESPONDENT

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

Meru (Juma & Tuiyot, JJ) dated 15th November, 2001 In H.C. Cr. Appeal No. 130 of 2000)

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JUDGMENT OF THE COURT

During the evening of 25th July, 1997 at about 7.30 p.m. a gang of armed robbers raided Kibirichia Trading Centre of Meru District within Eastern Province. The robbers first attacked a butchery operated by ***GIDEON MANYARA (PW9)*** from whom they stole eight kilogrammes of meat, a watch and money. Then, they moved to a nearby beer joint known as Karo Bar. They shot in the air five times after which one of them who was armed with a rifle entered the bar. He ordered all the patrons who were in the crowded bar to lie down and threatened to shoot any one of them who disobeyed his orders. The bar was well lit with electricity lights. Among the patrons was a brave Administration Police Officer ***Charles Murunga (PW5)***. As the patrons lay prostrate on the floor PW5 leapt on the armed robber and disarmed him. With assistance from the bar patrons, PW5 pinned down the robber and tied him with a belt. The other robbers fled the trading centre. PW5 later handed over to the police the man he had arrested. He is the appellant now before us, ***JOSEPH EMURIO***.

The appellant and two others, who were acquitted during trial were charged with three counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The appellant was accordingly convicted as charged and sentenced to death as provided by law. His first appeal to the High Court of Kenya at Meru was dismissed on 15th November, 2001 by Juma and Tuiyot, JJ and hence this is a second appeal.

There are some most unsatisfactory aspects of what appears to be a straight forward case.

Though the appellant was caught red-handed, however, ***Joseph M'Tunga (PW3)*** and ***Pc. Rotich (PW4)*** testified that the robbery was committed inside Tharwa Star Bar and not in Karo Bar. These witnesses also told the trial court that the robbery took place at 9.30 p.m. and not at 7.30 p.m. as alleged by PW1 and PW2. Further, though the appellant had made a charge and cautionary statement which was admitted after a trial within a trial, the two courts below said absolutely nothing about it.

The first appellate court, in a most perfunctory judgment, held in a short judgment:-

"***We have evaluated the evidence adduced in the lower court and we concur with the learned Chief Magistrate that the defence by the Appellant that he was framed by the Police over a woman could not stand. The appellant was caught red handed by an Administration Policeman (PW5) and members of the public while armed. This was before the police were called in.***

The appellant did not offer any explanation as to why he was armed with a rifle at night and why he ordered the bar patrons to lie down. This is not shifting the burden of proof to the Appellant but rather that in the absence of any explanation on the part of the Appellant the facts spoke for themselves."

On our own re-consideration of the evidence on record, it is not possible to say with any certainty in which bar the appellant was arrested, and at what time of the night.

Though, it is of course true, also, that the evidence against the appellant as regards identification, which was the main point of contest in the appeal, was overwhelming, there is, however, another point of law of some importance to which the two courts below did not direct their mind. This is the defence of *alibi* put forward by the appellant. The trial court did not at all consider as a whole the testimony of the appellant. Similarly, the first appellate court said nothing about it.

It is our view that the first appellate court did not carry out its duty as required of it. In this regard we draw attention to the learned Judges to ***PANDYA V R*** **[1957] EA 336,** ***OKENO V R*** **[1972] E.A. 32** and **NGUI V. R [1984] KLR 729.** We reiterate that an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not enough for the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions.

In the circumstances, we think that a miscarriage of justice has been occasioned to the appellant by the failure of the first appellate court to carry out its duty; and as such, we are left in doubt as to the propriety of the appellant's conviction.

In the result, we allow the appeal, quash the convictions on all counts and set aside the sentence of death on each count. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 2nd day of November, 2007.

P.K. TUNOI

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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

JUDGE OF APPEAL

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

DEPUTY REGISTRAR