



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT KISUMU
CRIMINAL APPEAL NO. 86 OF 2005

RICHARD MOKORA MONIKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Tanui & Bauni, JJ) dated 23rd February, 2005 in

H.C.CR.A. NO. 196 OF 2003)

JUDGMENT OF THE COURT

This is a second appeal by **Richard Mokora Moniko**, (the appellant) against his conviction and sentence by the Chief Magistrate at Kisii, for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. His first appeal to the superior court was dismissed on 23rd February, 2005 by a bench comprising of **Tanui and Bauni, JJ**.

Seven grounds of appeal have been proffered, but in actual fact they may be compressed into:-

- (1) Several essential witnesses were not called, and both the trial and first appellate courts should have but did not raise an adverse inference that had they been called they would have testified adversely against the prosecution case.
- (2) Both the trial and first appellate courts accepted and relied upon inadmissible confession evidence to support the appellant's conviction.
- (3) Evidence of identification against the appellant was unreliable.
- (4) Neither the trial court nor the first appellate court considered the appellant's defence and the various contradictions in the prosecution case.

The appellant was charged jointly with one **George Morara Gitebi** and another person who was not before the Court, that on 24th June, 2001, at Nyansiongo Location in Nyamira District while armed with a dangerous weapon to wit a pistol, they robbed **Florence Kemunto Nyabuto** of various items and "immediately before the time of such robbery, used personal violence on ...her". The appellant was the second accused with **George Morara Gitebi** as the first accused. The case of these two people was first heard by **O. Opondo**, Senior Resident Magistrate. However after she had received evidence from six witnesses the prosecution closed their case, and the trial Magistrate adjourned the case to enable particularly, the 1st accused to prepare his defence. When the case came for further hearing the appellant indicated that he wished to have a witness, **AP. Sgt. Oniang**, recalled for further cross-examination because he had allegedly taken some money from him. That request was granted. However, at the

resumed hearing of the case, the trial Magistrate disqualified herself from the case saying the accused persons had consistently said they were dissatisfied with the manner in which the trial was being conducted and had accordingly requested for his disqualification. Consequently the trial of the two people had to start *de novo*.

S.M.S. Soita, Senior Resident Magistrate, heard the appellant's case. The case against the appellant as presented by the prosecution was simple. **Florence Kemunto Nyabuto (Florence)**, a farmer from Riensune village, Nyansiongo Sub-Location is a married woman. By 24th June, 2001, her husband was based in the United States of America (U.S.A.). On that day at 8.00 p.m. she was at her house with three children of her brother-in-law watching television when there was a knock at the door. When the door was opened by one of the three children, two people walked in armed with pistols. They had a torch. They ordered her and her children to lie down, which they did. They demanded at least Kshs.500,000/= saying that they had been paid Kshs.300,000/= to kill her. They led her into her bedroom where she produced Kshs.3,500/= and handed it over to them. However, they retorted that they would kill her unless she produced the money they demanded, and that they had information that her husband sends her at least Kshs.60,000/= weekly. They picked two large suitcases which Florence said had been sent to her by her husband from USA and stuffed into them various household items among them shoes, assorted clothing, bed sheets and a wall clock. Among the clothes they picked was a suit belonging to Florence's husband. The appellant put on the coat but its trouser was put inside one of the two suitcases.

Before the two men left they assaulted Florence, locked her in her bedroom with her children and bolted the door from outside. The men then left. It was Florence's evidence that when two men entered her house electric light was on, and although she did not know the appellant before, she was able to identify him. He had a red hat on and had a scar on his forehead. The men remained in her house for about an hour and half and so she had ample time to observe the appellant. The appellant removed his hat from time to time, and when he did so she was able to observe his forehead. The scar was in the nature of a depression and because of it she was able to clearly identify the appellant. She did not however, give this description to the police when she later made a report of the robbery to them.

Florence raised an alarm about ten minutes after her attackers had left. Among those who responded to her alarm was **Tom Silas Nyakundi (PW2)**, a neighbour. He testified that he found Florence in shock and drove her in her car to the District Officer's (D.O.) office from where they got Administration Policemen (A.P.) with whom they went to Keroka Police Station to report the robbery. She recorded a statement there concerning the robbery after which he drove her back to her house. Both him and Florence testified that on their way home they saw two men standing by the roadside one of whom was wearing a hat resembling the one Florence said she had seen the appellant wearing at the time of the robbery. She asked the APs to confront them. However, because her party had passed the two men it took time before they turned. In the meantime, the two men disappeared into the bush.

The APs laid an ambush in a nearby shopping centre known as Kijauri. **Sgt. Austin Oniang' (Austin)** and **Cpl. Peter Ombati (Peter)** laid the ambush. Austin testified, and was supported by Peter, that when Florence saw the two men at the roadside she told them that one of them who was wearing a "dark suit" and a hat resembled one of the people who had robbed her that night; that at about 2.00 a.m. he spotted the same person coming from the direction of a bar at that centre known as Central Bar. They stopped him and after handcuffing him, conducted a quick search on him. He had a Barclays Bank ATM Card bearing the name of **Florence Kemunto**, two Barclays Bank covers with Florence's photographs and Kshs.850/= in cash. The person they arrested was the appellant. They led him towards Central Bar. On the way there they found a Post Bank Passbook bearing the names **Florence Kemunto**. A watchman at the bar had dozed off. They woke him up. The bar was closed and there was no one inside. Austin and Peter interrogated the appellant about the robbery at Florence's house. The appellant allegedly agreed to show them where he had hidden some of the property which was stolen in the course of that robbery. They boarded a bus and after traveling about two kilometers from the shopping centre they alighted. The appellant allegedly led them to an isolated place about a kilometer away, where they found two suitcases hidden. In the suitcases were several items which Florence later identified as her property. The two officers thereafter took the appellant to the D.O's office and locked him up. They later called Florence who came there, and when the appellant saw her and before she said anything the appellant called her by

name and asked her for forgiveness. He explained that her brother called *George* had led him to her house. Florence testified that George was her stepbrother.

The appellant was exposed to Florence. She observed him. He had a coat on which she identified as that of her husband. She testified that it was the same coat she had seen him put on in the course of the robbery. In court she identified a pair of trousers in one of the suitcases as matching the coat and that it was part of her husband's suit which was stolen in the course of the robbery.

At his trial the appellant in an unsworn statement stated in his defence that he was a "*mitumba*" trader in Nairobi. On the material day he was traveling from Nairobi heading to his home intending to inform his relatives about the death of a nephew in Nairobi in a road traffic accident. At about 2.00 am he arrived at Kijauri. The bus he was traveling in stopped to enable passengers to go for calls. He is one of the people who went for a call of nature at Central Bar. As he returned to the bus he was accosted by two Police Officers who searched him and took away Kshs.17,000/= which he had in his pocket. When he tried to argue with them, they hit him causing him injuries. They tore his bus ticket and threatened to frame theft charges against him. He was then arrested and taken to the D.O's office. While there he was exposed to Florence. Austin allegedly asked her to observe the appellant keenly as she would later be called upon to testify against him. In effect his case was that the charge against him was framed up by Austin in order to obviate the need for him to refund the Kshs.17,000/= he had allegedly taken from the appellant.

In his judgment the trial magistrate did not place much weight on the complainant's visual identification of the appellant at the scene of the robbery. He, quite properly, held that as the complainant did not describe the appellant to the police when she reported the robbery incident to them, her identification of the appellant was unreliable. He instead relied on the recovery of the complainant's property and conduct of the appellant upon seeing the complainant at the D.O's office as sufficient to sustain his conviction. The trial magistrate believed the two APs that they recovered the complainant's property and that it was the appellant who pointed out where the property was hidden.

The superior court, on first appeal affirmed the magistrate's findings and dismissed his appeal and this provoked the present appeal.

We earlier outlined grounds upon which this appeal is based, the first one being that essential witnesses were not called. In *BUKENYA & ANOTHER V. UGANDA [1972] E.A. 549*, the Court of Appeal for East Africa, held that the prosecution is duty bound to make available all witness necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

***Mr. Kowinoh* for the appellant invited us to draw such an inference arguing that had the prosecution called as a witness the watchman at Central Bar, he would have given evidence in support of the defence case. But an adverse inference can only be raised if the evidence in support of the charge is barely sufficient. The evidence against the appellant is overwhelming. Florence testified that he was arrested a few hours after the robbery wearing a coat which she identified as belonging to her husband. The appellant did not seriously challenge her on this evidence. Nor did the appellant challenge her on her evidence that he pleaded for forgiveness.**

Mr. Kowinoh submitted that the appellant's alleged plea for forgiveness was in the nature of a confession which required a caution, and that to the extent that such caution was not administered the evidence was worthless. That cannot possibly be a correct statement of the law. A confession which calls for a caution is one made to a person in authority. Florence was not a person in authority. The submission has no merit.

In *SIMON V. REPUBLIC [1971] E.A. 74* the appellant's conviction was based on two confessions, one to a messenger employed in the Njombe District Council, in Tanzania, and another to the Area Secretary at Njombe. The former was performing police duties. It was held that the confession to the former was inadmissible while the one to the latter was admissible.

On the third ground that the evidence of identification against the appellant was unreliable, we do not think this issue arises. The trial magistrate clearly did not base the appellant's conviction on evidence of identification for the reason we gave earlier.

As for the last issue in which the appellant laments that both courts below did not consider his defence, we say this. The appellant's counsel clearly misread the record. In his analysis of the evidence, the trial magistrate remarked, in pertinent part, as follows:-

“The accused has complained that he was framed up because he demanded 17,000/= which was taken by PW3. Plea was taken on 29th June, 2001 and he did not raise this issue. From the court record he first raised a complaint on 24th August, 2001. Then he claimed the complainant was threatening him with a conviction. The first time the issue of money was raised was on 29th September, 2002. The second accused even applied for PW4, PW5 and PW6 to be recalled for further cross-examination. Coming as it did, one year after the arrest I find it to be an afterthought. I therefore do not believe his defence of a frame up.”

The first appellate court considered the same circumstances and itself concluded that the appellant's claim was an afterthought. That court also considered the evidence as a whole and came to the conclusion that the appellant's conviction was safe.

We have no reason to interfere with the appellant's conviction in view of the concurrent findings of fact by both the courts below which findings were based on evidence which is on record.

In the result we dismiss the appellant's appeal in its entirety.

DATED and DELIVERED at KISUMU this 31st day of March, 2006.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR