



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 187 OF 2004

PETER MATIKU MUHIRUAPPELLANT

AND

REPUBLICRESPONDENT

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

(Muga Apondi & L. Kimaru, JJ) dated 4th August, 2004

in

H.C.CR.A. NO. 47 OF 2002)

JUDGMENT OF THE COURT

The appellant **PETER MATIKU MUHIRU** and three others were jointly charged before the Senior Principal Magistrate Naivasha, with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The appellant was the second accused while **MWITA CHACHA, PETERSON OUMA OGOWO** and **PETER OTIENO NGONG'O** were the 1st, 3rd, and 4th accused respectively.

They were alleged to have robbed one **PETER MBURU GIKONYO** (complainant) of Shs. 2,750 on 3rd October, 2001 at Naivasha Town.

The relevant facts are briefly as follows:-

On 3rd October, 2001 at about 2.40 p.m. the complainant who is a businessman in Naivasha Town and a pastor deposited Shs.420,000 at Kenya Commercial Bank Naivasha and was given a deposit receipt. As he was going back to his shop he was called by a man who was inside a parked car within Naivasha Township.

When he went to the vehicle the man who was seated on the driver's seat directed him to another man behind the vehicle. That other man introduced himself to the complainant as a policeman and produced a police appointment card. Another man came from the rear of the motor vehicle and pushed the complainant into the vehicle. The complainant sat at the rear seat sandwiched between two men.

The vehicle was driven away towards Maai Mahiu and the complainant was suddenly handcuffed. On the way the handcuffs were removed and Shs. 2,750 stolen from his pockets. Later he was abandoned near Maai Mahiu Town after which he got a lift from a lorry to Naivasha Town. When he reported the robbery at Naivasha police station, he found that a report of his abduction had already been made to the police through the help of a vigilant John Mugo Mwangi (PW3). The latter had witnessed the unusual abduction of the complainant and had recorded the registration number of the vehicle as KAE 561R, a white Toyota Corolla Saloon. On getting the report of abduction of the complainant P.C. David Njogu (PW6) and other police officers went in search of the motor vehicle towards Maai Mahiu. They did not find the motor vehicle and its occupants on 3rd October, 2001.

On 5th October, 2001 P.C. David Njogu and other police officers got information that the vehicle had been seen heading towards Naivasha Town. They waylaid the motor vehicle at Lakeside Hotel. The motor vehicle registration number KAE 561R shortly appeared. It had four occupants, 1st accused, appellant, 3rd accused and 4th accused who was the driver.

The vehicle was driven to the police station where the four occupants were searched. The first accused had a pair of handcuffs in his trouser pocket.

The 1st accused had also a police appointment card bearing his name. The second accused (appellant) was in possession of the keys to the pair of handcuffs. The complainant's bank deposit slip and an army identification card were found inside the vehicle. It emerged from the evidence of I.P. Vitalis Mbowo Aula – a Deputy O.C.S. Kasarani police station and from the statement of 1st accused at the trial that the 1st accused was in fact a police constable attached to Kasarani police station and was at the material time on leave (from 26th September, 2001 – 17th October, 2001).

The 4th accused was the driver of the vehicle. He told the police that he was using the motor vehicle as a taxi and that on the two occasions the vehicle had been hired by the three co-accused for unknown mission in Naivasha. The 4th accused made a statement under inquiry to I.P. John Ndungu (PW10), which was produced as exhibit at the trial without any objection (Ex.14).

The appellant made unsworn statement at the trial. He stated that he was a seller of shoes at an exhibition at Princess Hotel along Tom Mboya street Nairobi and that he did not leave Nairobi on 3rd October, 2001. He explained that on 5th October, 2001 at 7 a.m. he went to Temple Road to board a bus to Kisumu but he found the bus full. He got information that there was a small car going to Kisumu. He proceeded there and boarded the small car. Two other people boarded it but on the way the vehicle was stopped by police at Naivasha Town. He stated that he was just a mere passenger and denied that he was found in possession of the keys to the handcuffs.

The 4th accused gave long sworn testimony at the trial, which is substantially similar to his statement under inquiry.

The trial magistrate believed the evidence that the complainant was robbed of Shs. 2,750 at Naivasha on 3rd October, 2001 by people who were using motor vehicle registration number KAE 561R, Toyota Corolla.

The trial magistrate however, convicted the 1st and 2nd accused but acquitted the 3rd and 4th accused saying in part:-

“I am satisfied that the evidence of the 4th accused exonerates himself from the counts facing him and puts into focus the roles played by the 1st and 2nd accused. I find that this evidence though from an accomplice (him being a co-accused) has been corroborated in material particulars. As regards the 3rd and 4th accused I find that their case has not been proved beyond reasonable doubt.”

The appellant appealed to the superior court on several grounds the main ones being the insufficiency of the evidence against him and the reliance by the trial magistrate on the evidence of the 4th accused at the trial – an accomplice, to convict the appellant.

The superior court at the outset appreciated that the conviction was based on the evidence of PW1, PW3 and PW6 on one part and the evidence of 4th accused as is clear from this below:-

“The appellant was convicted on basically two pieces of evidence; first on evidence of PW1, the complainant, the evidence of PW3 the bystander and the evidence of PW6 police constable Njogu who arrested the appellant with three others while inside the motor vehicle which had been identified as having been used in a robbery two days prior to the arrest. The other evidence is that of Peter Otieno Ngong’o the appellant’s co-accused.”

The superior court applying the principles in ***Okeno v Republic*** [1972] EA 32, reappraised the evidence and ultimately concluded that the appellant was properly convicted.

There are seven grounds of appeal most of which (grounds 1, 2, 4, 5 and 6) raise the issue sufficiency of the evidence to support the charge. Grounds No. 3 and 7 however, raise different issues. They state:-

“3 That the learned Judge further erred in law by convicting on the basis of a statement of my co-accused which lacked in material corroboration since it was not supported by the mode of his report.

7. That the learned Judge erred in law by rejecting my defence without any explanation.”

There were concurrent findings of fact by the two courts below that on 3rd October, 2001 the complainant was abducted in Naivasha Town by people who were in motor vehicle registration number KAE 561R Toyota Corolla and driven towards Maai Mahiu where he was robbed of Shs. 2,750; that the complainant and John Mugo Mwangi (PW3) did not identify the occupants of the vehicle; that the same motor vehicle was seen and stopped in Naivasha Town two days later on 5th October, 2001; that appellant was one of the occupants of the vehicle, that handcuffs similar to the ones used to handcuff the complainant on 3rd October, 2001 were recovered from one of the occupants of the vehicle (1st accused); that the appellant was found in possession of the key to handcuff and that the bank pay-in slip issued to the complainant when he deposited Shs. 420,000 in the bank on 3rd October, 2001 was also found in the vehicle.

It has not been shown that there was no evidence to support those findings and that a reasonable tribunal properly directing itself on the evidence could not have made those findings of fact. There are no grounds for interfering with the concurrent findings of fact.

The 3rd ground of appeal raised a substantial point of law.

Although the appellant complained in the superior court that the trial magistrate based the appellant’s conviction on the statements of his co-accused particularly the statement of the 4th accused (taxi driver), it is clear from the judgment of the trial magistrate that he did not rely on the statement under inquiry made by the 4th accused. Rather he relied on the evidence of the 4th accused given on oath at the trial.

By **section 32(1)** of the Evidence Act, a trial judge, or magistrate can, in a joint trial take into consideration only a confession implicating a co-accused against such co-accused. A confession is defined in **section 32(2)** of the Evidence Act. The statement under inquiry of 4th accused does not have the effect of admitting in term either the offence of robbery or substantially all the facts, which constitute the offence of robbery. It does not, therefore, amount, to a confession, which could have been taken into consideration against the appellant. It was a statement which had no evidential value against the appellant, (see ***Gopa s/o Gidamebanya & others v. Reginam*** [1953] XX EACA 318; ***Ezera Kyabanamaizi & others v. Republic*** [1962] EA 309 ***M’Inanga v Republic*** [1985] KLR 294

The evidence of the 4th accused on oath is however, admissible against the appellant although it is accomplice evidence.

By **section 141** of the Evidence Act,

“An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”

It is however, a rule of practice but having the force of rule of law that it is the duty of the judge or magistrate to warn himself of the danger of convicting on the uncorroborated evidence of an accomplice before basing a conviction on such evidence - (see for example ***Ayor & Another v Uganda*** [1968] EA 303 at page 305 para 3; ***Karanja & Another v Republic*** [1990] KLR 589.

In appropriate circumstances the court may convict on the uncorroborated evidence of an accomplice if it is satisfied that the accomplice witness is telling the truth (see ***Kinyua v Republic*** [2002]1 KLR 256 page 267 para 30).

Like the trial magistrate the superior court substantially relied on the evidence of the 4th accused on oath and not on the statement of 4th accused under inquiry. The superior court said in part:-

“The evidence of PW1, PW3 and PW6 was corroborated in all material respects by the evidence of Peter Otieno Ngong’o the appellant’s co-accused in the trial magistrate’s court.

This Court is aware that the evidence of accused person against his co-accused ought to be treated with caution.

And later:-

“In the instant case it cannot be said that the evidence of the appellant’s co-accused in the trial magistrate’s court was solely used to convict him. The evidence of Peter Otieno Ngong’o lent credence to the evidence of PW1.....”

The evidence of the 4th accused at the trial is detailed and consistent with his statement under inquiry.

It was tested by cross-examination by Mr. Mburu, the learned counsel who appeared for the appellant at the trial. It was not discredited. The trial magistrate believed it and hence acquitted the 4th accused. It offers a reasonable and credible description of how the robbery was committed and who committed it. The quality of the accomplice evidence was such that it could be relied on to support the conviction against the appellant and the two courts below we are right in relying on it.

In addition, it was amply corroborated by the evidence of the complainant and the circumstances under which the appellant and co-accused were arrested on 5th October, 2001 which connected the appellant with the commission of the offence and rebutted the alibi defence.

In the result, we do not find any merit in this appeal. The appeal is accordingly dismissed.

Dated and delivered at Nakuru this 3rd day of March, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR