REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: OMOLO, GITHINJI, JJ.A & DEVERELL, AG. J.A)

CRIMINAL APPEAL NO. 19 OF 2001

BETWEEN
ABDUB DEBANO BOYE …….1ST APPELLANT
MORU NDENGE DUKE ……..2ND APPELLANT
AND
REPUBLIC …….....…….RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Meru (Osiemo, J & Omwitsa, Comm. of Assize) dated 30th May, 2000

in

H.C.C.C. Nos. 198 & 199 OF 1997)

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JUDGMENT OF THE COURT

We have two appellants before us. They are Molu Denge Moru the 1st appellant, and Abdub Debano Boye, the 2nd appellant. The two were among a total of seven people who were tried before a Senior Resident Magistrate at Marsabit, on various charges, six of those charges being robbery with violence contrary to ***section 296 (2***) of the Penal Code, two of being in possession of a fire-arm and ammunition contrary to ***section 4(2)*** of the Firearms Act Chapter 114 of the Laws of Kenya, two of unlawfully being present in Kenya contrary to ***section 15(1)(i)*** as read with ***section 15(2***) of the Immigration Act ***Cap 172*** Laws of Kenya and one of handling stolen property contrary to ***section 322(2)*** of the Penal Code. The first six counts of robbery with violence were brought against all the seven accused persons and the 1st appellant was Accused 1 while the 2nd appellant was Accused 3. The charges of robbery with violence under ***section 296 (2)*** of the Penal Code stated in their particulars that on 25th January 1997 at Gof Cloba area along Marsabit-Moyale Road, Sagante location, Sagante sub-location, in Marsabit District of Eastern Province the accused persons, jointly with others not before the Court and while armed with dangerous weapons, namely rifles and *rungus*, robbed Abadasso Guyo Jillo of Kshs.1,615, three dresses, one red shirt, one pink-blouse and other such like things all valued at Kshs.9,915/- (count 3), Ali Nassir of Kshs.3,000/- (count 2), Kenyatta Said Chutte of Kshs.10,000/- of the other items (count 1), Omar Abdulahi Warsame of Kshs.1,800/- and other items, all valued at Kshs.12,000/-/- (count 4), Tuke Hirbo Tuke of Kshs.3,700/- and other items all valued at Kshs.11,400/- (count 5) and Miriam Mohamed of various clothing items all valued at Ksh.500/- and that during the robberies, the accused persons used personal violence to each of the persons robbed.

In counts seven and eight the 1st appellant was charged alone of being in possession of a fire-arm and

ammunition respectively without the relevant certificate and it was stated that on 26th January, 1997 at Manyatta GorGesa, Sagante location in Marsabit District, Eastern Province, the 1st appellant was found in possession of a ***SIMONON SELF –LOADING CARBINE*** rifle serial **No. 2201259** (count seven) and four rounds of 7.62 x 39 mm ammunition (count eight) and that the 1st appellant did not have a fire-arms certificate in respect of those items. The remaining counts concerns persons who are not involved in the appeals before us. The trial magistrate convicted the 1st appellant on all the eight counts brought against him and on the robbery charges, the 1st appellant was sentenced to death as is mandatorily provided by the law while on the seventh and eighth counts he was sentenced to seven years imprisonment to run concurrently. We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the Court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately.

The 2nd appellant was also convicted on all the six counts of robbery and was sentenced to death on each one of them. The two appellants appealed against their respective convictions and sentences but in a rather perfunctory judgment dated and delivered on 30th May, 2000, the High Court (Osiemo, J and Omwitsa, Commissioner of Assize) dismissed their appeals against the conviction and sentence. The appellants now come to this Court on a second appeal and Mr. Wahome Gikonyo has argued their respective appeals before us brought in a supplementary memorandum of Appeal and based his submissions only on the grounds in that document.

In ground 2 of the supplementary memorandum of Appeal, the appellants complain in this manner:-

> ***"The learned Judges erred in law in not evaluating the whole evidence before the Lower Court, as it is incumbent upon them, as the first Appellate court weigh all the evidence and draw its own inferences and conclusions and had they done so, they would have arrived at a different conclusion. A miscarriage of justice was thereby occasioned."***

This complaint is premised on the well known case of ***OKENO V. RFEPUBLIC [1972]*** EA 32 where the then Court of Appeal for East Africa set out the duty lying upon a court hearing a first appeal. The judgment in the High Court is comprised in less than four typed pages. That of the Magistrate comprised a minimum of nine typed pages. In view of the nature of the High Court judgment in this otherwise complicated robbery case, we think it would bear repeating what was said in ***OKENO'S*** case supra, with respect to the duty imposed on a court hearing a first appeal delivering the judgment of the court which had been prepared by ***LAW, Ag. Vice-President, the President of the Court, SIR WILLIAM DUFFUS***, stated at 36 letters F to H:-

> ***"Mr. Kapila submitted that to find any positive indication that the High Court at any time made its own evaluation of the evidence, or came to its own conclusions. Wherever the magistrate's findings are supported, it is in the form of a negative, or double negative. Mr. Kapila submitted that the judgment of the High Court was so defective in this respect as to amount to no judgment at all, and so as to warrant the appeal being allowed for that reason only."***
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> ***We consider that there is substance in much of Mr. Kapila's argument in this respect. The High Court on the face of it appears to have approached the matter on the basis of whether the***

Magistrate's findings could be supported by the evidence, instead of whether they should be supported.

It is appropriate on a second appeal only to decide whether a judgment can be supported on the facts as found by the trial and first appellate courts, as this is purely a question of law.

The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well of course as deal with any questions of law raised on the appeal, see Selle V. Associated Motor Boat Co. [1968] EA 123."

The judgment of the High Court in the present appeal did not even attempt to set out the evidence before the trial Magistrate, analyze that evidence, re-evaluate it or draw its own conclusions or inferences. The Judges of the High Court merely concentrated on answering in brief paragraphs on the submissions which had been argued before them. On the vexed issue of identification, for example, the Judges merely said:-

"Finally Mr. Nyaga argued that even assuming the appellants were properly identified , the evidence of the prosecution did not support the charge of robbery with violence under section 296 (2) of the Penal Code. He submitted that where (sic) act of actual violence is alleged the prosecution must produce medical evidence and in the absence of medical evidence the offence becomes that of simple theft. Robbery is defined under section 295 of the Penal Code as follows…."

They then set out the relevant provisions of the Penal Code and proceeded as follows:-

"With due respect to counsel in the present case, the appellants were more than one, they were armed with dangerous weapon to wit rifles and immediately before or immediately after the time of such robbery shot dead one of their victims namely KENYATTA SAID CHUTE. We are satisfied that the ingredients of section 296(2) of the Penal Code were proved by the prosecution and the conviction for robbery with violence was therefore proper."

So that the High Court proceeded on the assumption that the appellants were properly identified and all the prosecution needed to do was to prove the ingredients of the offence. And yet in the supplementary petition of Appeal filed by Mr. Nyaga on behalf of the 1st Appellant ground 8 had specifically complained that:-

"The learned Senior Resident Magistrate erred in law and fact in not finding that the Appellant was not present at the scene of the offence."

That ground 8 obviously put the issue of identification of the 1st appellant in controversy and we cannot find anything on the record to show that the issue was ever abandoned or assumed in favour of the prosecution. And yet the only reference to that issue in the High Court judgment is the oblique remark that even if it was **'assumed'** that the appellants were properly identified. Clearly, the High Court judgment was most unsatisfactory and we hope that the principles set out in the ***OKENO*** case will not be shoved aside by the High Court when it deals with first appeals.

Since the High Court dismissed the appellants' first appeals, it is clear they agreed with the findings made by the learned Senior Resident Magistrate, though nothing of the kind is stated in their judgment. It by no means follow as a matter of course that where the High Court has failed to discharge its duty on a first appeal, the appeals to this Court, must, ipso fact, succeed . The appeal of ***OKENO*** did not succeed because of the failure by the High Court to perform its legal duty in respect of a first appeal. Each appeal must be considered on its own merit and the failure of the first appeal court must be considered against the available evidence, and the generalized conclusions in the first appeal.

In ground one of their memorandum of appeal before us, both appellants still complain about their

identification at the scene by the victims of the robberies. We however note that the robberies took place in broad day-light and though bullets ***"rained all round"*** to use the expression used by the appellants' counsel, quiet in the end prevailed and the witnesses were able to see those who were attacking them.

True there was tension and fear at the scene but witnesses such as Habadaso Guyo (PW1), Tuke Hirbo Tuke (PW10) and Ali Nassir (PW11) said they were able to see their attackers such as the 1st appellant. The 1st appellant was arrested on the 26th January, 1997 and on the same day, he led police officers to a spot from which a rifle was dug out. That evidence was accepted by the magistrate and the first appeal court agreed with it. Fired cartridges were collected from the scene of the robbery and the report of the ballistics examiner which was produced in the court of the Magistrate clearly showed that the two spent cartridges had been fired from the gun recovered on the direction of the 1st appellant. Mr. Gikonyo contended that the report on the gun and ammunition was not produced by the fire-arms examiner himself and that report was accordingly not admissible pursuant to section 33 of the Evidence Act. That argument can no longer stand in view of the amendment to ***section 77 (i)*** of the Evidence Act. That amendment enlarged the number of specialized reports which may be used in evidence without calling the maker thereof and the only precaution a trial court is required to observe is that if an accused person wishes to have the maker called, or if the court on its own wishes to call the maker for cross – examination or clarification, that can be done under section 77(3) of the amended Evidence Act. Mr. Gikonyo rightly relied on the decision of this Court in ***RAJAB SAID ABDALLAH V. REPUBLIC,*** Criminal Appeal ***No. 86 of 1997*** which was decided after the amendment to the Evidence Act, but as has been repeatedly pointed out in other decisions of the Court, not a single mention is made in the judgment of ***section 77*** as amended. With respect to Mr. Gikonyo, the report of the fire-arms examiner was properly produced by Chief Inspector Musyimi (PW15) and the report, as we have said showed that the two spent cartridges had been fired from the gun recovered on the direction of the 1st appellant. The spent cartridges were collected from the scene of the robberies. That the 1st appellant had this gun on 26th January, 1997 a day after the robberies clearly shows that he was a participant in the robberies and even if we were to ignore the evidence of identification and his statement under inquiry, the evidence against him was simply overwhelming and he was correctly convicted by the magistrate. The High Court confirmed his conviction and despite our reservations about the nature of that judgment the 1st appellant was correctly convicted on all the charges brought against him.

With regard to the 2nd appellant, the only evidence which really connected him to the offence was his being identified by various witnesses. The first complainant Habadaso Guyo (PW7) told the magistrate that after she was forced to lie down with her face downwards she was able to identify the 2nd appellant who had hoisted his rifle and had a stick and a rungu. In cross-examination by the 2nd appellant (PW2) said she did not know the 2nd appellant before but that it was the 2nd appellant who had beaten her with a stick.

On 15th February 1997, PW15 conducted various identification parades and at one of those parades, the one concerning the 2nd appellant PW1 who was shown as identifying witness number 3 was able to identify the appellant.

Then there was Tuke Hirbo Tuke (PW10) who stated he was also able to identify the 2nd appellant but the parade form to which we have referred showed PW10 as identifying witness number 1. He was unable to identify the 2nd appellant at the parade and his purported identification of the 2nd appellant while in court remained no more than a dock identification which is really not useful

Next there was Ali Nassir (PW11) who told the magistrate in respect of the 2nd appellant that: -

> ***" …….. I recognized the man who commanded me to alight and two others. I saw 7 thugs. Most had militia jackets. The man who commanded me to alight is in Court. He is this one (holds Accused III). He had a rifle and a stick. He addressed me in Boran ….."***

PW11 was able to identify the 2nd appellant at the parade conducted by PW15 on ***15th February, 1997.***

The robbery, as we have said took place in broad day-light at 5.00 p.m. It was on an open road and though the circumstances were stressful the witnesses had an opportunity to see their attackers as the attackers were with them for about one hour. Before the Magistrate, it was contended that the parades were a sham as PW15 had, a day before the parade, shown the suspects to the identifying witnesses. That contention was clearly false because as is obvious from the record, not all the witnesses were able to identify all the suspects on the parade. There would have been no reason for showing the suspects to a set of witnesses and not to another set. The complaint that the members of the parade were not being changed must also receive the same answer; the failure to change the members of the parade does not appear to have played any part in the witnesses ability to identify or failure to identify the suspects. The 2nd appellant was arrested after the police officers traced the foot prints of the robbers to his home. The learned trial Magistrate was satisfied that the guilt of the 2nd appellant was proved beyond any reasonable doubt as the two witnesses who saw him at the scene were subsequently able to pick him out at the parade. The cases which Mr. Gikonyo cited to us with regard to identification cases such as those of ***JOHN ZIRO KALUME V. REPUBLIC***, Criminal Appeal No. 41 of 1998(unreported), ***JOHN WANDATIWAMALWA & ANOTHER V. REPUBLIC,*** Criminal Appeal ***No. 49*** of 1999 were all concerned with witnesses purporting to identify suspects at night with the aid of artificial lighting. The situation here was totally different as the robberies were in broad day-light in an open space and the robbers were with their victims for nearly one hour. Having considered all the circumstances surrounding the appeal, we are satisfied, on our own independent assessment of the recorded word that the 2nd appellant, like the 1st appellant was rightly convicted on the six counts of robbery with violence contrary to section 296(2) of the Penal Code.

We accordingly dismiss the appeals of both appellants against the convictions recorded against each one of them. What should we do about the sentences? As regards the charges of robbery with violence , we set aside the sentences of death imposed on counts 2, 3, 4, 5 and 6. The sentence of death imposed on count one is sufficient. As regards the 1st appellant , we set aside the sentences of seven years imprisonment imposed on him in counts seven and eight. There is no reason for him to serve sentences of imprisonment when he has been given the ultimate penalty.

These shall be our orders in the two appeals.

Dated and delivered at Nyeri this 13th day of May, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

……..

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR.