REPUBLIC OF KENYA

C OURT OF APPEAL AT NYERI

Criminal Appeal 37 of 2005

PETER NDIRITU KIONDO……..……..…….APPELLANT

AND

REPUBLIC…….……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu JJ) dated 7th October 2004

in

H.C.CR. Appeal NOS. 370 & 371 of 2002)

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JUDGMENT OF THE COURT

Peter Ndiritu Kiondo, the appellant herein, together with another David Muriithi Ndungu were arraigned before the Chief Magistrate Nyeri Mr. Kaburu Bauni (as he was then) on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code, the particulars of the charge being that on the 29th day of October 2001 at Weruini area along Naromoru/Ngaringiro Road in Laikipia District of the Rift Valley Province jointly and while armed with dangerous weapons namely toy pistol and stones, robbed John Gichui Ndegwa of cash Kshs 34,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said John Gichui Ndegwa. The appellant and his co-accused were after trial convicted as charged and each sentenced to death as mandatorily provided by the law under which they were convicted. The two appealed to the High Court and while the appeal of the appellant's co-accused was allowed the appellant's conviction and sentence were upheld by the High Court at Nyeri (Khamoni and Okwengu JJ) on 7th October, 2004 hence this appeal.

The evidence before the trial court was, indeed, brief and may be stated as follows:- On 29th October, 2001 John Gichui Ndegwa (PW1) and Jackson Wangungu (PW2) both employees of NACCADI Castle Beer distributors of Nanyuki were selling beer in Naromoro area using a vehicle registration number KAN 160K a lorry which was being driven by Ndegwa (PW1). At about 5.00pm they were in Matanya area and as they were driving through Weruini area on a rough road, two men suddenly jumped onto the road as if they were drunk. Ndegwa identified the two men as the appellant who had a pistol and his companion (the co-accused in the trial court) who had a stone. The appellant pointed a pistol at Ndegwa and ordered Ndegwa to stop the vehicle. The order to stop the vehicle was promptly complied with by Ndegwa. Both men got into the vehicle and ordered Ndegwa to drive on. This order was also complied with. As Ndegwa drove on, the two men pulled out the cash box and took all the money being sales proceeds of the day Kshs. 34,000/-. After taking the money the two men ordered Ndegwa to stop. He

stopped and the two disappeared. Ndegwa and his colleague drove to Naromoro Police Station where they reported the incident. Investigations commenced. The two men were later arrested in connection with another robbery incident. An identification parade was conducted on 6th December, 2001 where PW1 and PW2 identified the appellant as one of those involved in the robbery incident of 29th October, 2001.

The appellant in his sworn evidence told the trial court that he was arrested on 29th November 2001 at his place of work and then taken to Naromoro Police Station, where he told the police that he knew nothing about the alleged robbery. He went on to testify that he was taken to Karatina Police Station where an identification parade was held. He told the trial court that he did not know his co-accused.

The learned trial magistrate considered the evidence before him and believed the prosecution witnesses. In convicting the appellant and his co-accused, the learned trial magistrate in his judgment stated:-

"I have thoroughly and carefully considered all the evidence both by prosecution witnesses and by the accused in their defences. I am satisfied beyond all reasonable doubts that both accused were involved in the robbery. PW 1 and PW 2 told court in their evidence that they saw accused and identified him accused well. The incident happened at 5.00p.m. which was during daylight. The PW 2 did not identify accused 2 during the parade but PW 1 clearly identified him and even if PW 2 was not able to, I am satisfied that the identification by PW 1 was proper and enough. Accused 1 was identified by both PW 1 and 2 during the parades."

Having so expressed himself, the learned trial magistrate inevitably convicted the appellant and his co-accused and sentenced them accordingly.

Being dissatisfied by the decision of the trial court the appellant and his co-accused filed appeals in the High Court. The appeals were consolidated so that the appellant herein became the 2nd appellant while his co-appellant became the 1st appellant.

As already observed the appellant's co-appellant (the 1st appellant in the superior court) had his appeal allowed hence this appeal by this appellant. In its judgment, the superior court (Khamoni & Okwengu JJ) said :-

"With respect to the Second Appellant both PW1 and PW2 identified him not only during the robbery but also in the police identification parade. We find no evidence to show that the identification parade was not conducted properly and we accept the evidence of PW5 We note that while PW 1 told the Court that the woolen cap the second appellant had, pulled back on the head when the second Appellant was bending down to take money, PW 2 told the court that the Second Appellant's hat actually fell down at that stage. But we find that that is a minor inconsistency which does not affect the substance of that evidence.

That evidence of identification by PW 1 and PW 2 was in our view sufficient to support the conviction of the second appellant. Nevertheless, we find there was independent evidence from PW4, P.C. Joseph Kariuki, corroborating the evidence of identification. PW 4 told the court that after arresting the second appellant, the Second Appellant led him and other police officers to the recovery of a toy pistol from the fence at Naromoru Stadium Estate"

From the foregoing, it is clear that the superior court was satisfied that the appellant was properly identified by the two witnesses John Gichui Ndegwa (PW1) and Jackson Wangungu (PW2).

When this appeal came up for hearing on 31st July, 2006 Mr. Gichimu the learned counsel for the appellant submitted that the High Court did not subject the evidence to exhaustive examination and that had it done so, it would have found that there was no direct evidence of identification connecting the appellant with the offence. Mr Gichimu went on to submit that circumstances of identification were difficult, and hence this led to appellant's co-appellant's appeal being allowed by the High Court.

On his part, Mr. Kaigai, the learned Senior State Counsel supported both the conviction and sentence. Mr Kaigai submitted that the incident took place in broad daylight at about 5.00 p.m and that the two witnesses were able to observe the appellant during the robbery. Mr. Kaigai reminded us that the two courts below found the appellant guilty and that the High Court had re-evaluated the evidence and came to the right conclusion.

This being a second appeal, only matters of law fall for consideration pursuant to **section 361** of the Criminal Procedure Code. The first issue raised by Mr. Gichimu was that the superior court did not submit the evidence to exhaustive examination. It is, indeed, the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld. – see **Okeno v R [1972] E.A 32.** Can it be justifiably argued that in the instant appeal the first appellate court failed in its duty? We do not think so. We have deliberately hereinabove quoted what the superior court said as regards the evidence of identification by PW1 and PW2 in respect of the appellant herein. The superior court as a first appellate court clearly reconsidered the evidence, re-evaluated it and came to the same conclusion, as did the trial court, that the appellant was properly identified in broad daylight by the two witnesses at the scene – PW1 and PW2.

The main issue in this appeal was identification. The incident took place during the day at about 5.00 p.m. The victims of the robbery testified on how the appellant and another man jumped onto the road as if they were drunk only to turn out to be vicious robbers. The two victims of this incident testified that they identified the appellant during the robbery. That was on 29th October 2001. When the appellant was arrested and placed on identification parade on 6th December, 2001 he was identified by the two witnesses. It was never alleged that the parade was not properly conducted. This being so, it is not open to the appellant to complain that he was not properly identified. We must reiterate that a second appeal (like the present one) must be confined to points of law and this Court would not interfere with concurrent findings of facts of the two lower courts unless they are shown to have not been based on evidence – see **Karingo v R [1982] KLR 213.**

Having considered the points of law raised in this appeal and the submissions by counsel appearing for the state and the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was indeed inevitable and the superior court was entitled to uphold it. We see no reason to disturb the concurrent findings of the two courts below. Consequently, this appeal is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 4th day of August, 2006

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