



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OMOLO, GITHINJI JJ A & ONYANGO OTIENO AG JA)

CRIMINAL APPEAL NO. 26 OF 2004

BETWEEN

SOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Mr Justice Wambilyangah) dated 7th May, 2003

in

HCCRA No 347 of 2002)

JUDGMENT

The charge that was brought against the appellant in the subordinate court at Homa Bay was that of robbery with violence contrary to section 296 (2) of the Penal Code. On 10th March, 2002, at night Peterlis Anduko Ayuago (PW1), (whom we shall refer to in this judgement as the complainant) and his wife Roselida Owino (PW2) were in their house. It would appear that it was raining at the relevant time as Roselida Owino went out to tap water. As she was returning in to the house, two people attacked them. They cut Roselida on the hand and demanded money. When she said she had no money, they turned to the complainant and cut him on the hands, on the head and stepped on him. The complainant told them to take all the money he had which Kshs 12, 000/= being the proceeds of 2 bulls he had sold recently and which money the complainant had kept in his pocket. They took the money. They had a *panga* and *simis*. Complainant said in evidence that he was able to recognise one of the attacks and that was the appellant. There was a lamp in the house which enabled him to see the attackers. Further, the complainant knew the appellant before the incident as the appellant was the son of the complainant's uncle and came from the same village with the complainant. After the attackers left, the complainant raised an alarm and his neighbours came to his compound. One of those who came was (PW3) who alleged that he could not rescue the complainant earlier because the door to his house was tied with a rope from outside and could not open until he forcefully made it open. The complainant and some neighbours reported the incident to the Chief and then went to Magunga Health Centre for treatment. Complainant was treated and discharged. He then made a report at Magunga police post on the next day 11th March, 2002 where he was issued with a P3 form which he took to Magunga Health Centre. In the meanwhile the appellant had also reported to the Chief of Gwasi location (PW4) whom we shall refer as the Chief) complaining that he

was being wrongly implicated in the robbery. The Chief escorted him to Magunga police post and handed him over to the police who included PC Jomo Chapia (PW5) who arrested him and later escorted him to Mbita police station where he was charged with the offence.

In his defence the appellant first raised an alibi, stating that on the date of the incident he had transported farm produce on a donkey to a customer at Sindo. As the customer arrived at the meeting venue late at 5 pm and as it rained briefly that day, he could not return home and he stayed the night at a lodging at Sindo. Next morning on 11th March, 2002, he boarded a *matatu* back home. He produced a receipt for the lodging and a receipt of a *matatu* as Exh D1 and D2 respectively. On arrival home, he together with the wife took some crates of tomatoes to Magunga and that was when the Chief told him for the first time that he was a suspect in a robbery that had taken place against the complainant. The Chief arrested him and took him to police post where he was rearrested and later taken to Mbita police station and he was later arraigned before court. Secondly, the appellant also claimed that, the complainant had a land dispute with his father.

After full hearing the trial court found the appellant guilty, convicted him of the offence and sentenced him to death. He appealed to the superior court and the same court dismissed the appeal.

This is a second appeal and thus, we are bound to consider the appeal on matters of law only. We reiterate and emphasize this Courts' decision in the case of *Gabriel Kamau Njoroge vs Republic* (1982-88) 1 KAR 134 where it was held, *inter alia*, as follows:

“1. It is the duty of the first appellate court to remember that parties are entitled to demand of the Court of first appeal a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions, bearing in mind always that it has neither seen nor heard the witness and make due allowance for this.”

It is with the above in mind that we now consider this appeal. The appellant, as we have stated raised mainly two defences. The first was one of alibi and the second was that there were grudges between the appellant's father and the complainant. Our understanding of the appellant's defence is that he could not be properly identified as he was not at the scene of the robbery and the complainant's evidence together with that of his wife and his grandson were all fabricated stories against him. On the other hand the complainant and his wife were certain in their evidence that the appellant was one of their attackers. These were conflicting versions and demanded that the trial court had to carefully consider, analyse and to evaluate the evidence that was before him both by the prosecution's witness and the appellant. He had to consider whether the circumstances for identification were favorable or not. He had to consider whether the defence of alibi was well founded and whether it was properly displaced by the prosecution case. The consideration had to clearly be born out by the record. Equally, the first appellate court, as was stated in the case of *Gabriel Kamau Njoroge vs Republic* (*supra*) had a duty to carefully analyse and weigh conflicting evidence and draw its own conclusion on the same bearing in mind that it had not seen or heard the witnesses.

On the defence of alibi raised by the appellant, the learned magistrate mentioned the same in his summary of the evidence before him but in his consideration of the same, he stated as follows:

“ Turning to the accused alibi defence to the effect that he spent the night in question at Sindo trading centre where he had gone to sell maize and tomatoes and that upon his return back home the following day he was summoned by PW4 at about 4 pm and asked if he knew about the robbery which he denied, PW4 did confirm before the Court that in fact it was the accused who presented himself at his office on his own account to report that he was being wrongly implicated with robbery that had taken place in PW1's home the previous night. The open lie by the accused is an indication of guilty. The receipt and ticket (Exh D1 & 2) did not appear genuine and are documents that can only be obtained without any difficulty. I reject the accused alibi defence as an afterthought.”

We have perused the entire record of appeal and particularly the proceedings. We cannot see any evidence adduced either by the prosecution or by the appellant that would justify the conclusion the

learned magistrate came to, namely that the appellant's libi was an open lie and an indication of guilt. He may not have been truthful when he said that PW4 summoned him and asked him if he knew about the robbery at the complainant's home but the burden was on the prosecution to displace his alibi.

The prosecution did not lead any evidence from which one could conclude that the two receipts produced by the appellant were false. The learned trial magistrate rejected them on the basis that the appellant might have told a lie on a different point. The High Court did not make any findings of its own on the alibi defence. We do not know if the High Court would have come to the same conclusion as the magistrate on that point. On a second appeal, we must resolve that doubt in favor of the appellant with the result that the appellant's defence of alibi was wrongly rejected by the trial court and the first appellate court merely endorsed that rejection. That entitles us to interfere with the findings of the two courts.

The appellant also claimed that the complaint was made as a result of a grudge between the complainant and the appellant's father over a piece of land that was in dispute between the two. The learned trial magistrate did not consider this defence and never made any finding on it. The superior court dismissed it stating that the issue was introduced by the appellant late and it was not afforded an opportunity to be tested and countered and stated further as follows:

“ In most cases it can be assumed to have been an afterthought.

In our minds, it is our believe (sic) that had the appellant genuinely known that there was a land dispute in existence and that was going to form the basis of his (sic) defence, then this should have come out much earlier rather than (sic) keeping it in his bosom as last weapon which could not be tested in cross examination when raised.”

The Court ended its observation by saying that the trial magistrate must have seen the issue was of no probative value. It did not make any decision on the issue and in our humble opinion, abdicated its role of analyzing that evidence (considering that the appellant was unrepresented, and that the appellant was facing a serious charge which carried death sentence) and making its own conclusion on the same. As it stands, all that the superior court did was to state that the matter was late and as there was no opportunity to cross examine on it, the trial court found it was not of probative value. That evidence was on record and deserved to be fully considered and either dismissed or accepted.

There was one other matter that we feel should have been given some consideration. The Chief stated in his evidence in chief as follows:

“They informed me that they had been attacked the previous night by some thugs and that they could identify one of them. They reported that they were robbed of money and they suspected one Lucas Okinyi because he had seen them selling an animal.”

The record does not show that both the trial magistrate and the superior court considered this evidence which did show that the complainant suspected the appellant merely because, the appellant was present when the complainant was selling his (complainant's) animals. This was conflicting evidence when one considers complainant's other evidence that he saw the appellant at the scene of the robbery and the definite evidence that it was the appellant together with another person who actually attacked them. We do not say that anything would have necessarily turned on this evidence, but it was the duty of two courts below to consider it together with other evidence. If that was done, it is possible that a different conclusion could have been arrived at.

The consequence of all the above is that we do not have the benefit of the evaluation by the superior court of the effect in its analysis of the evidence against and for the appellant on the defence of alibi raised by the appellant. Equally we do not have the benefit of the trial court's analysis of evidence on the question of grudge between appellant's fathers and the complainant and the effect of the same on the entire case. That situation was not made better by the superior court in its declining to analyse the defence raised by the appellant of the grudges and the effect of the same on the case and lastly, the trial court and the superior court did not consider the effect of the evidence of PW4 on the entire case. As we have stated

herein above, after analyzing the same, they might have reached the same conclusion or they might have reached a different conclusion, but what is important is that they should have analyzed the same defences and the evidence of PW4 before reaching a conclusion either way. Without the same analysis, there is a doubt as to what would have been their conclusion had they analyzed the same. The same doubt must go to the appellant.

Before we allow this appeal, as we must do, we need to comment on the manner PW3 (Exh 1) was produced and the way it was dealt with by the trial court and the superior court. Section 77(1) allows any document purporting to be a report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross examine the maker of P3 if he so wished. That was not done but we make haste to add that in our view, nothing turns on that omission as in any case the ingredients of the offence of robbery were satisfied even if injuries were not proved.

We allow this appeal, quash conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.

Dated and Delivered at Kisumu this 26th day of March 2004.

R.S.C.OMOLO

.....

JUDGE OF APPEAL

E.M.GITHINJI

.....

JUDGE OF APPEAL

ONYANGO OTIENO

.....

Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR