



IN THE COURT OF APPEAL

AT KISUMU

(CORAM:TUNOI, O’KUBASU JJ A & RINGERA AG JA)

CRIMINAL APPEAL NO. 86 OF 2004

BETWEEN

IBRAHIM CHACHA MWITA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgement of the High Court of Kenya at Kisii (Mr Justice Wambilyangah & Commissioner of Assize, Birech) dated 8th February 2002

in

HCCR Appeal No 108 of 2001)

JUDGMENT

The appellant Ibrahim Chacha Mwita was after a trial convicted by the Senior Principle Magistrate, Migori, on the count of robbery with violence contrary to section 296(2) of the Penal Code; one count of grievous harm contrary to section 234 also of the Penal Code and on two counts of being in possession of a firearm without a firearm certificate contrary to section 4(2) (a) of the Firearms Act cap 114 Laws of Kenya. For the conviction of robbery with violence the appellant was sentenced to death as mandatorily prescribed by the law while for the conviction of grievous harm he was sentenced to serve 5 years imprisonment with 5 strokes of the cane. For the firearms offences the appellant received one year’s imprisonment on each count all the sentences to run concurrently. This is a second appeal, the first appeal having been dismissed by the High Court of Kenya at Kisii on 8th February 2002.

The particulars of the first count are that the appellant on the night of 23rd / 24th January, 1999, at Stella Administration Police Camp within Migori district of Nyanza province with others not before court, being armed with dangerous weapons namely *pangas*, swords, and sticks robbed AP Ojuang Opollo of G3 rifle with 20 rounds of ammunition, police lanyard and belt all to the total value of Shs 70,000/= and at or immediately before or immediately after the time of such robbery, wounded the said AP Opollo. In the second count it is alleged that the appellant on the same night within the same area jointly with others not before court, unlawfully did grievous harm to Evalyne Akinyi. The third and fourth counts allege that on 24th January, 1999, the appellant was found in possession of a firearm G3 Rifle No S/O F91789 and 11 rounds of ammunition without a valid firearm certificate.

At about 2 am on 24th January, 1999, a gang of robbers raided a small AP post of Stella within Rapogi division of Migori district of Nyanza province and proceeded to the house of AP Isaac Ojuang Opollo (PW1) who was asleep with his newly married wife Evalyne Akinyi (PW2). The gang brought down the door with a huge stone. With the exhibition of utmost cruelty and savagery the gang which had powerful search torches continued to slash and cut the couple indiscriminately all over their bodies with what appeared to be pangas and Somali swords. PW1 was cut on both hands, left wrist, forehead and thumb. He managed to wake up and ran out of the house screaming for help. One thug followed him and as PW1 fell down he was cut on the back. PW1 ran and hid in the bush. In the meanwhile the rest of the thugs continued inflicting numerous cuts on the body of PW 2 as consequence of which she sustained serious cuts on her body. One cut went across her face and ruptured both eyes rendering her totally blind. PW1 and PW2 were later rescued by some APs and other neighbors and taken to hospital for treatment. Valiant attempts by eye surgeons at both the Aga Khan and MP Shah Hospitals to restore her eyesight did not succeed. To date she remains blind.

The gang after having injured PW1 and PW2 disappeared with G3 Rifle, 20 rounds of ammunition, a belt and a lanyard. At about 4.30 am Awendo police station received a report on the robbery. PC Injene (PW7) and PC Mwongera (PW8) and other police officers were dispatched on patrol to trace the robbers. As they were entering Awendo Market Center they saw two people approaching them from the direction of Sugar View Hotel. A bus had stopped nearby and the two people were going to board it. One of the two people was carrying a big handbag. The police officers ordered them to stop. One of them ran away and PW7 gave chase but could not catch up with him. He therefore let him go. PW7 testified:-

“When I returned I found PC Mwongera had ordered the other one to sit down. The handbag was down on the ground. I decided to open the handbag to confirm its contents. I found on top were clothes, and below I found a gun which had been dismantled into two.

The gun had a magazine and 11 rounds of ammunition. On further checking I found a Masai sword saturated with fresh blood. On further checking, I found an AP red lanyard with a whistle and red AP belt.the gun No G 3F 91780.”

PW8 in this regard testified thus:-

“We met two men. One of them was carrying a bag. They came from in front going towards the stage. We stated entering Awendo town from the stage. They were walking together in a hurry. We stopped them to see what they were carrying. Both stopped. We asked them what they were carrying and they said they were carrying their clothes. We asked them to open the bag so that we could see what they were carrying. When they placed the bag down and before we could open to check, one of them started running away. We remained with one of them. We ordered him to open the bag. He opened the bag himself. The one who opened the bag was the one who said they were carrying their clothes. After he opened the bag I saw clothes on top. On checking inside I saw an AP lanyard, one belt, one Somali sword blood stained, one G3 rifle one magazine with 11 rounds of ammunition. We took all of them together with the suspect to Awendo police station.”

During his trial the appellant made unsworn statement. He said that on the material morning he set out to Nyangusu to inform relatives of a friend of a death. At Awendo where the appellant intended to catch a bus he was stopped by two people who had already detained a man with a bag. The two men demanded his I/D card as they did so the stranger who had the bag bolted and fled. When they failed to apprehend him they forced the appellant to carry the bag to the police station where they subjected him to various forms of torture with a view to securing his admission that the bag, which contained the gun, belonged to him.

The magistrate rejected the story of events as narrated by the appellant. He held that the appellant had been properly identified by PW7 and PW8, the two police officers, as one of the owners of the bag, which contained the goods robbed from PW1. The magistrate further observed that the arrest was effected the same morning not long after the robbery. These, the magistrate concluded, pointed irresistibly to the appellant as a member of a gang that raided, robbed and attacked PW1 and PW2 at Stella AP camp on the

material night.

Mr Onsongo for the appellant has in the main attacked the conviction on the ground that there were grave discrepancies and contradictions in the evidence of PW7 and PW8, which the trial court had relied upon to convict the appellant. Mr Onsongo further submitted that had the first appellate court not downplayed the significant inconsistencies in the testimony of the two witnesses, (PW7 and PW8) which we reproduced earlier on in this judgement, that Court would have resolved those discrepancies and contradictions in favour of the appellant and would have overturned the conviction. The record placed before us shows that the first appellate court evaluated the evidence as a whole and subjected it to a fresh and exhaustive examination. Indeed in its judgement the superior court set out the four counts on which the appellant was convicted and then proceeded to state:-

“We shall now proceed to set out and analyse the evidence on record and make our own findings and arrive at our conclusion.”

The superior court observed that PW7 and PW8, were the main witnesses to the prosecution. But it also found their evidence not free from discrepancies and contradictions, which emanated from answers, which arose from such questions as, for example, who opened the handbag? Who pursued the person who escaped? The first appellate court found the discrepancies minor and immaterial. It held also that, on the totality of the evidence of PW7 and PW8, it left no room whatsoever, beyond all reasonable doubt, that the appellant and the persons who fled from the police officers were acting in concert and were in joint possession of the bag. After exhaustive examination of the evidence the superior court came in to the conclusion that the appellant’s conviction on the first count was based on very sound evidence. However, the appellant’s conviction on the second, third and fourth counts were quashed. In quashing the conviction on those three counts the superior court expressed itself thus:-

“With regard to conviction we find that the death sentence on the capital robbery rendered the sentences on the other counts wholly unnecessary. At any rate those counts 2, 3 and 4 constituted the elements of the 1st count. So we quash conviction in count 2, 3 and 4 and set aside the sentences imposed on the appellant in regard to those counts.”

In view of the foregoing the appellant’s appeal to this Court is in respect of the first count only.

Mr Onsongo argues that the two Courts below were wrong so to hold and asks us to find fault with them. The appellant is in effect asking this Court to depart from concurrent findings of facts by the two lower courts. In that regard we would reiterate what we said recently in Nyeri Criminal Appeal No 131 of 2002: *Daniel Kabiru Thiong’o v Republic* (unreported). An invitation to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law. If authority was imperative for such a fundamental principle of criminal procedural jurisprudence, we would refer to what this Court had earlier posited in *Stephen Muriungi & Another v Republic* (1982-88) 1 KAR 360. In delivering the majority judgement, Chesoni, Ag JA (as he then was) said at page 366:-

“We would agree with the views expressed in the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* [1983] ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

In the matter at hand, this Court is exercising the jurisdiction of second appellate court from a decision of the subordinate court and by dint of the provisions of section 361(1) of the Criminal Procedure Code we are confined to matters of law only. Bearing in mind the principles we have elucidated above, we are far

from being persuaded that the findings of both the trial and first appellate court on the appellant's involvement in the robbery could not reasonably have been arrived at on the basis of the evidence on record. On the contrary we are of the persuasion that the evidence of PW1, PW2, PW7 and PW8 whose summary we have outlined hereinbefore, and which was believed by the trial court, squarely proves that the appellant was not innocent of the charges preferred against him. We dismiss Mr Onsongo's forceful submissions in this regard.

Mr Onsongo also submitted that the circumstantial evidence adduced for the prosecution did not satisfy the required degree of proof to warrant a conviction. He argued that the handbag itself was not in possession of the appellant and so an inference could not be drawn that robbery had taken place. It is trite that in a case depending exclusively upon circumstantial evidence the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see *Simoni Musoke v R* [1958] EA 715 where the following extract from *Teper v R* [1952] AC 480, 489, was quoted ([1958] E A at page 719):-

“ It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The prosecution demonstrated by evidence that the appellant could reasonably be deemed to be in possession of the handbag in terms of section 4 of Penal Code. Apart from the direct evidence as adduced by PW7 and PW8 relating to the possession of the handbag which contained the gun, other police property and the sword the remaining circumstantial evidence was such as to be explained only upon the hypothesis of the appellant's guilt and incompatible with any other innocent explanation. Regrettably, we, also, disagree with Mr Onsongo.

In our view, we think that the appellant was properly convicted and we uphold the conviction. This appeal is without merit and is accordingly dismissed.

Dated and Delivered at Kisumu this 11th day of June 2004.

P.K.TUNOI

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JUDGE OF APPEAL

E.O.O'KUBASU

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JUDGE OF APPEAL

A.G.RINGERA

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Ag. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR