



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 155 OF 2003

IRENE NDUKU NDETO 1ST APPELLANT

JACKSON KIMATU MUTUNGA 2ND APPELLANT

DUNCAN KYALO MUANGE 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Machakos (Nambuye & Mutitu, JJ.) dated 3rd December, 2002 in

H.C.CR. APP. NO. 100 OF 2000)

JUDGMENT OF THE COURT

The three appellants herein, Irene Nduku Ndeto, Jackson Kimatu Mutunga and Duncan Kyalu Muange were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that:-

“On the 28 th day of April 1999 at Kariobangi Estate in Machakos District within Eastern Province, jointly with others not before court, being armed with dangerous weapons namely pistols robbed Richard Mutua Musyoka Kshs.700,000/- and a motor vehicle Reg. No. KAG 319H make Nissan Sunny all valued at Kshs.1,500,000/- and at or immediately before or immediately after the time of such robbery killed the said Richard Mutua Musyoka.”

After a full trial before the Ag. Senior Resident Magistrate at Machakos (P.C. Tororey), the appellants were convicted and sentenced to death as mandatorily provided by the law. Their appeals to the High Court were dismissed and hence they now come before this Court by way of second appeal.

The brief facts of the case were that on 29th April, 1999 at about 9.30 a.m., Sophia Mukami Muthengi (PW1) was at her shop busy attending to customers when she sent the deceased, Richard Mutua Musyoka and Susan Mutinda Morris (PW2) to take Shs.700,000/- to the bank. The two left the shop and boarded the vehicle registration number KAG 319H. Before the driver could start off for the bank, two people appeared at the vehicle and one of them drew a pistol. Susan jumped out of the car as did the driver. The money was snatched from the deceased and in the process he was shot and died thereafter. The attackers

then drove off with the money. The vehicle which they used in escaping was found abandoned near Machakos General Hospital. This incident was witnessed by various people who were present. These included Sophia Mukami (PW1), Susan (PW2,) Teresia Kanini Kiema (PW4), Munyao Kioko Kimeu (PW5), Nelson Mutune Munyao (PW6) and Simon Makau Mwirichia (PW7). All these witnesses testified to the effect that a robbery had taken place in which the deceased was the victim and in the process the robbers stole the Shs.700,000/= which the deceased and others were taking to the bank and the vehicle in which the deceased was. While the vehicle was recovered, the money was not. The learned trial magistrate considered the evidence of prosecution witnesses vis-à-vis the defence put forward by each appellant and in the end came to the conclusion that it was the appellant and others not before court who robbed and killed the deceased.

In dismissing the appeals, the learned judges of the superior court (Nambuye and Mutitu, JJ.) expressed themselves thus:-

“From our considered evaluation of the learned trial magistrate’s judgment we are unable to find that the three appellants were wrongly convicted.”

We find that the conviction of the three appellants was arrived at safely after a careful consideration of the evidence on record by the trial magistrate.

We are therefore unable to interfere with the trial magistrate’s findings and we find that the judgment was properly arrived at.”

During the hearing of the appeal before us, Mrs. Nzei appeared for the first appellant while Mr. Nyachoti appeared for the 2nd and 3rd appellants. Mr. Karundu, the learned State Counsel appeared for the State.

One common ground of appeal was that the superior court failed in its duty when it failed to re-evaluate the evidence so as to make its own findings. This, in our view, was important ground in this appeal. It is of course the duty of the first appellate court to re-evaluate the evidence and make its own conclusion. In OKENO V. R [1972] E.A. 32 at p.36 the predecessor of this Court stated inter alia: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R. , [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. SHANTILAL M. RUWALA V. R. , [1957] E .A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.

Only then can it decide whether the magistrate’s findings should be supported.

In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see PETERS V. SUNDAY POST , [1958] E.A. 424.”

Counsel appearing for the appellants were of the view that the superior court failed in its duty in re-evaluating the evidence and making its own conclusions. We have considered that line of submission very carefully but our reading of the judgment of the superior court does not support that view. For example, the learned Judges started the examination of evidence by stating:-

“In order to reach a fair verdict in this appeal, we have perused and studied the proceedings of the lower court very carefully. We have compared the appellant’s contentions as against the recorded evidence.”

Having so stated, the learned Judge proceeded to consider the evidence of various prosecution witnesses and especially the evidence of PW4. As the evidence of PW4 was crucial to the conviction of the

appellants this was subjected to exhaustive examination. This is what the learned Judges said of this witness (PW4): -

“We have noted that the testimony of PW4 was subjected to a lot of cross -examination. This witness remained firm in her testimony to the effect that she saw the 1 st, 3rd and 2 nd appellants near PW1’s depot when the car driven by the deceased appeared. According to PW4 the 2 nd and 3rd appellants were working in concert with the 1st appellant. We have noted that the Learned Trial Magistrate considered all these facts in detail and came to the correct findings about the involvement of the three appellants during the commission of this offence.”

It is our considered view that the learned judges of the superior court were alert to their duty as a first appellate court. They discharged their duty and we cannot fault them on that score.

The other main ground of appeal related to identification. There can be no dispute that a violent robbery took place on the material day in which the deceased, Richard Mutua Musyoka lost his life. The incident took place in broad daylight at about 9.30 a.m. As already stated earlier in this judgment, the incident was witnessed by various witnesses. Out of all these witnesses, the evidence of Teresia Kanini Kiema (PW4) was most crucial. She is the one who identified all the three appellants. Her evidence went further than merely identifying the appellants during the robbery. She testified to the effect that on 25th, 27th and 28th April, 1999 she had seen the three appellants sitting on a bench outside the shop of the father of 1st appellant. She went on to state that on the day of the robbery she had seen the three appellants sitting on that same bench and that she heard the 1st appellant tell the 2nd and 3rd appellant “the car has come.” On hearing these words this witness looked ahead and saw the car in which the victim of the robbery was killed coming. We were referred to various authorities on the issue of identification, for example, GABRIEL KAMAU NJOROGE V. R (1982-88) 1 KAR 1134 , JOSEPH NJARAMBA V. R (1952-88) 1 KAR 1165 .

From the evidence recorded, it is to be noted that none of the appellants was found in possession of any property stolen during the robbery. This meant the subordinate court had to properly analyze the evidence before it and decide on whether each or any of the appellants was properly identified before a conviction could be entered. This is trite law and whether the Court is dealing with a case of recognition as evidence here seems to suggest still the court has to examine the evidence of visual identification in a criminal case very carefully to ensure that any possibility of error is eliminated. In the case of CLEOPHAS OTIENO WAMUNGA V. REPUBLIC – Criminal Appeal No. 20 of 1989 (unreported) at Kisumu, this Court stated as follows: -

“We now turn to the more troublesome part of this appeal namely the appellant’s conviction on counts 1 & 2 charging him with the robbery of Indakwa (PW1) and Lili an Adhiambo Wagude (PW13). Both these witnesses testified that they recognised the appellant among the robbers who attacked and robbed them What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant.

Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger.

Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, C.J. in the well known case of R. VS. TURUBULL (1976) 3 ALL ER 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

We have carefully considered the issue of identification in this appeal and noting that the appellants' conviction was based on evidence of recognition, it is our considered view that the conviction was based on very sound evidence. Consequently, we uphold the conviction of each of the appellant with the result that the appeals herein are dismissed in their entirety.

Dated and delivered at Nairobi this 4th 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