REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, GITHINJI, JJ.A. & ONYANGO OTIENO, AG. J.A.)
CRIMINAL APPEAL NO. 103 OF 2001

BETWEEN

1. PIUS MUKABE MULEWA

2. KAZUNGU KENGA……...……. APPELLANTS

AND

REPUBLIC……. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Mombasa (Waki, J. & Mrs. Khaminwa, Commissioner of Assize) dated 3rd April, 2000
in
H.C.CR.A. NOS. 289 & 288 OF 1995)
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JUDGMENT OF THE COURT

Julius Mukabe Mulewa first appellant who was the 4th accused at the trial, and *Kazungu Kenga Kenga* , second appellant who was the 6th accused at the trial, were charged with five others in the Chief Magistrate's Court Mombasa with two counts of robbery with violence contrary to section 296(2) of the Penal Code.

In the first court the appellants and co-accused were alleged to have robbed one Mwongo of a motor vehicle valued at Shs.800,000/=. The particulars of the charge alleged that at or immediately after the time of such robbery used personal violence on *Michael Kazungu* thereby killing him. In the second count, the appellants and the co-accused were alleged to have robbed one *Richard Haidn* of 7000 Austrian shillings and personal effects including one pair of shoes.

The two appellants were convicted and sentenced to death being the sentence authorised by the law. The appellants' co-accused were acquitted. Their first appeals to the superior court (Waki J & Commissioner of Assize Mrs. Khaminwa, as she then was) were dismissed. They now appeal to this Court.

On the morning of 25th February, 1992 Joseph Mathanga Mungoye (Mungoye), a driver employed by African Safari Club was driving eleven tourists including Richard Haidn from Mombasa International Airport to Watamu Beach (Hotel). Michael Kazungu, a tour leader and Julius Shikoli, (Shikoli), a porter

were also in the vehicle. When they arrived at Vipingo at about 7.15 a.m. two people in police uniform stopped the vehicle, inspected it for about 5 minutes and then asked Mungoye to produce his driving licence. Mungoye alighted from the vehicle to find out what was going on whereupon a third person in civilian clothes jumped into the vehicle and sat on the drivers seat. The two persons in police uniform then said that the driver was wanted by police and the vehicle would be taken to the police station.

As the vehicle was being driven away, ostensibly to the police station, Shikoli demanded to see the certificates of appointment of the two people in police uniform. Michael Kazungu protested. One of the two people in police uniform then pulled out a knife while the other pulled out a pistol. They then, ordered the passengers to lie down. Michael Kazungu tried to grab the pistol and he was shot dead.

The vehicle was driven on the tarmac road for 2 km and then turned to a side road. After about 15 kms the vehicle stopped and all the tourists were ordered to alight without their luggage. Mungoye and Shikoli were then thrown out. All were ordered to lie down and the vehicle was driven off with personal effects of the tourists and the dead body of Michael Kazungu.

The robbery was reported to I.P. Njenga of Kilifi Police Station on 25th February, 1992 at about 10.30 a.m. He went to the scene and arranged for the body of Michael Kazungu to be taken to the hospital. On 28th February, 1992, SP Shiundu, DCIO Kilifi, recovered motor vehicle Reg. No. KAB 585M in the bush, and it was driven to Kilifi Police Station.

On 29th March, 1992, at 7.30 Sgt Mwangi of CID Malindi arrested the first appellant in the house of his girlfriend in Malindi. The first appellant was interrogated and he took Sgt. Mwangi to Kisumu Ndogo, Malindi, where Sgt. Mwangi retrieved a pair of boots (Ex. 9). The first appellant was wearing a pair of sports shoes (Ex. 20).

On 11th April, 1992 at 8.30 a.m. Sgt Mwangi arrested the second appellant. Sgt. Mwangi had earlier arrested Sebastian Matheka Kimeu on 23rd March, 1992 and detained his vehicle Reg. No. KJT 524 Peugeot 504 station wagon. Sebastian Matheka Kimeu was one of the people charged with the offences but his case was withdrawn and he was treated as a witness (PW4).

On 31st March, 1992 IP Waluvuga took statements under inquiry from the first appellant. He also took a statement under inquiry from the second appellant on 13th April, 1992. Those statements were admitted as evidence after trial-within-trial and after the trial magistrate had ruled that the statements were recorded voluntarily. On 22nd April, 1992 IP Randak recorded a charge and caution statement from the second appellant. It was admitted as evidence after trial-within-trial.

On 31st March, 1992 the first appellant was identified at an identification parade conducted by IP Ngugi. On 14th April, 1992 the second appellant was identified by Mangoye (PW2) and Shikoli at an identification parade conducted by IP Langat.

The first appellant gave sworn evidence at the trial. He testified that he was arrested on 29th March, 1992 at 7.30 p.m. by Sgt. Mwangi; that his house was searched and a pair of shoes which he had was seized; that he was also wearing shoes which were his; that he was assaulted and tortured; that at the parade he complained that police officers had taken his photographs which were in an album; that he was the only one wearing a police cap and that is why he was identified and that he was forced to sign a statement on 1st April, 1992. On cross-examination he testified that police recovered some boots, which were under the set.

The second appellant made unsworn statement at the trial. He stated that he went to Taveta on 28th March, 1992 and returned on 1st April, 1992 when he found his wife arrested. He then went to Kilifi Police Station where he introduced himself and was locked up while his wife was released; that he was tortured and signed a statement as a result of torture; that at the identification parade he was the only one wearing a police uniform and that he was later taken to PCIO’s office where, after torture he was forced to sign a statement which was dictated to him. He called his wife Mariam Kazungu as a witness. She testified, among other things, that the second appellant left for Taveta on 28th March, 1992; that she was

arrested on 31th March, 1992 and placed in custody for 2 weeks.

The learned *Chief Magistrate Mr. J. K. Kanyi* considered the evidence and the submissions by appellants' respective advocates. The first appellant was represented by Mr. Ongera while the second appellant was represented by Mr. Sereje. He appreciated that for the evidence of Mungoye (PW2) and Shikoli (PW3) on identification of appellants to be acceptable the same had to be safe and free from possibility of error. He considered the tests to be applied in deciding whether such evidence was safe as expounded in ***REGINA V TURBULL*** [1976] WLR 445. He also appreciated that the extra judicial statements made by appellants required corroboration as they were repudiated/retracted. The learned magistrate recognised that Sebastian Matheka Kimeu (PW4) fully participated in the commission of the offences and that as an accomplice his evidence required corroboration. He did not forget to set out the defence put forward by each appellant.

After analysing all the evidence he came to the following conclusion:

> ***"THE CASE AGAINST ACCUSED NO. 4 & 6***
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> ***I have noted that for identific ation evidence to be exempted (sic) it must be safe and free from any possibility of error. The identification witnesses here are PW2 and 3. The robbery was committed in broad daylight. The two were in the van which was driven for some distance before t he complainants were robbed of their properties.***
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> ***This is therefore not a case of a single identifying witness in difficult circumstances. The rigid tests in (Wendo and Roria) not therefore strictly applicable in this case and the questions posed by the H ouse of Lords in Turbull would clearly be answer (sic) against the accused.***
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> ***The two witnesses had more than a fleeting grace (sic) at the robbers. They were very close to them and there were no obstructions or impediments.***
>
> ***The two witnesses later identi fied the two accused persons in an identification parade save that Maganga (PW2) (the driver) was not able to identify accused No. 4. The two accused persons did not raise any objection during the parade and in fact remarked that they were satisfied with the manner the parades were conducted. Having regard to the direct testimonies of the two witnesses, I would not attach any significance to their counsel's observations that Mr. Shikoli (PW3) had requested that the suspect wears a police cap and the other observations made by accused No. 4 that the police were retaining his photographs. I am satisfied that the witnesses were able to and did infact identify the two accused persons.***
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> ***The direct evidence of identification would in my view corroborate Mr. Mat heka's evidence and Extra Judicial statement made by them. For accused No. 4 there is also the additional evidence of the complainant that the shoes he was found with was his and among the items stolen from him on the material day. The complainant Mr. Hai din was not cross - examined on this piece of evidence by accused No. 4's counsel.***
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> ***His belated attempt therefore during his evidence in chief to claim ownership of the pair of shoes was in my opinion an after thought. I am satisfied therefore that the pair of shoes belonged to the complainant and that it was one of the items stolen from him. It was recovered from accused No. 4 a few months after it had been stolen. In law a rebuttable presumption that the accused was either a thief or a handler arises. H e has not been able to rebut this presumption. Having regard to other bits and pieces of evidence incriminating him in this robbery, it appears probable that he was a thief and not a handler".***

In the High Court, the first appellant challenged his conviction on six grounds. He contended, among other grounds, that the trial magistrate erred in law by holding that the pair of shoes belonged to the complainant; that trial magistrate erred in law in basing conviction on the weight of retracted statement; that the trial magistrate erred in law and in fact by relying on the evidence of identification by PW3 which

was unsafe and that the learned magistrate erred in law in holding that the identification parade was not flawed.

The second appellant, on his part, contended that the trial magistrate erred in law and fact in convicting him on a charge which was defective and duplex; that there was no proper evidence of identification to sustain a conviction; that the evidence of identification parade was a nullity; that trial magistrate erred in holding that the statement under inquiry and the cautionary statements were voluntary and in admitting them and that the trial magistrate erred in holding that portions of the evidence of Sebastian Matheku Kimeu objected to were admissible in evidence.

The proceedings of the superior court show that although each of the two appellants was not represented by a counsel each most valiantly and comprehensively presented his appeal to the court.

The superior court after observing that it was impressed by the trial magistrate's depth of analysis of the evidence and the issues for determination proceeded to evaluate the evidence which was before the trial magistrate and concluded:

> ***"with respect we find the conclusions reached by the lear ned Chief Magistrate were well supported infact and in law and we come to the same conclusion he did on the culpability of the two appellants".***

The first appellant now appeals to this Court on 13 grounds. The first ground is that the High Court erred in law and fact by failing to find that it was unsafe to regard the present record as a certified copy of the original proceedings in the absence of the charge sheet. The other grounds considered cumulatively substantially raise the same grounds which were raised in the superior court. On his part the second appellant appeals on 13 grounds. The first ground is similar to the first ground in the memorandum of appeal filed by the first appellant. Similarly the other grounds are substantially the same as those he raised in the superior court.

Regarding the first ground, Mr. Magolo for appellants submitted that the record of proceedings of the trial relied on by the superior court is so inaccurate that it does not represent what had happened in court and cannot therefore be an authoritative record from the court. He particularly complained that page 3 of the record is missing, that the charge sheet is missing; that the evidence of PW9 is not recorded verbatim and submitted that if the court finds that the record is correct then the proceedings are nullity as the evidence of PW9 is not recorded in accordance with the provisions of Criminal Procedures Code.

It is true that the original record of the trial magistrate was missing and could not be traced at the time the appeal was heard by the superior court. The typed proceedings and judgment were not also available. The judgment of the superior court explains the circumstances under which the record was reconstructed. One of the appellants had a typed copy of proceedings and judgment and he supplied it to the court registry for the preparation of the record of appeal and ultimately Hayanga J ordered that the appeal record be compiled and that the appeals be admitted and heard on the basis of those records.

The superior court further observed that before the appeals were heard, the appellants and the State accepted the record as fairly and accurately representing the proceedings in the lower court and raised no objections on the propriety of hearing the appear on the basis of the record. The superior court was satisfied that it could use the record for purposes of ***sections 357*** and ***354*** of the Criminal Procedure Code.

When this appeal came for hearing on 21st January, 2002, Mr. Magolo made an oral application for acquittal of the appellants on the ground that the original file of the trial magistrate had disappeared and was not traceable and because the retrial was not feasible as the police file had also disappeared. But this Court, differently, constituted rejected the application in an exhaustive ruling and concluded:

> ***"There is more than sufficient material before the court upon which their appeals can be determined one way or the other and that being our view of the matter, we over -rule their preliminary arguments for acquittal at this stage and order that their appeals be heard and***

determined on merit".

So both this Court and the superior court have found that the record which was reconstructed and used in the superior court without any objection is sufficient for the determination of the appeals. The defects in the record referred to relate to events before the trial on 17th November, 1992. The prosecution called eighteen witnesses. Thereafter the appellants gave evidence and submissions were made. There was no complaint that there was any error in that record or in the judgment that followed. It is clear from the respective memorandum of appeal that the only reason why the appellant challenge the record is because it does not contain a copy of the charge sheet and not because of the other matters now raised by their counsel. This Court in the earlier ruling on 15th February, 2002 found in effect that the charge is substantially reproduced in the judgment of the trial magistrate. The complaint that the charge relating to the charge of robbing Joseph Mathanga Mungoye of a motor vehicle was duplex as it referred to robbery and murder in the same count was investigated by the superior court and found to be unmeritorious. We are satisfied that the charge was not bad for duplicity and that the superior court came to the correct conclusion. We find no merit in the first ground of appeal.

Before we consider the other grounds of appeal, it is appropriate to remind ourselves that this is a second appeal. An appellate court in a second appeal cannot upset concurrent findings of fact by the two courts below unless it is satisfied that the findings of fact were based on misdirections of such a nature that it is reasonably probable that without them the appellant would not have been convicted. See ***KARINGO V REPUBLIC*** [1982] KLR 213.

The two courts below heavily relied on the evidence of identification of appellants given by Mungoye and Shikoli. The first appellant states in the memorandum of appeal that the evidence of Mungoye and Shikoli was unreliable as they failed to say who stopped the vehicle and asked for driving licence; that the identification was difficult as the robbers had disguised themselves as police officers and that the observation within the first 2 km was inadequate.

For his part, the second appellant states in the memorandum of appeal that the visual identification was not reliable as witnesses were not composed during the first five minutes that vehicle was inspected and that there was no sufficient time to observe the robbers during the first 2 km journey as such distance could be covered within a short time. Their counsel submitted that the identification of appellants was not sufficient; that witnesses would not have taken any particular interest on police officers and that a journey of 2 km could be done in seconds. He particularly referred to the contradiction in the evidence of Mungoye and Shikoli regarding whether it is the porter or tour guide who was shot and submitted that the witnesses were so terrified as not to know which one was shot.

According to the evidence of Richard Haidin the vehicle was driven for about 2 kms on tarmac and it is immediately after it turned to a side road that Michael Kazungu was shot dead and passengers ordered to lie down. That evidence is amply supported by the evidence of Shikoli who testified that it is after the vehicle was diverted to a side road that the two people in police uniform produced weapons and ordered everybody to lie down. The evidence of the three witnesses Richard Haidin, Mungoye and Shikoli was consistent that the vehicle stopped after the two people in police uniform stopped it and that the driver talked with the two people in police uniform. The three witnesses were in agreement that after the vehicle was stopped another person jumped into the vehicle and drove it thenceforth. According to Mungoye the two people inspected the vehicle for about 5 minutes. Mungoye said that he would only identify the second appellant who was seated next to him during the journey. Shikoli identified the first appellant and the second appellant as the two people who were in police uniform. He testified at the trial that time was 7.15 a.m. and that he exchanged words with the appellants. According to him it is the first appellant who pulled out a pistol while the second appellant pulled out a knife. He explained that the second appellant was standing next to the door facing the passengers.

It is the law that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction – see ***R V. ERIA SEBWATO*** [1960] EA 174; ***KIARIE V. REPUBLIC*** [1984] KLR 739. This, the learned Magistrate appreciated.

From the evidence it is clear that the witnesses had two good opportunities of clearly seeing the appellants. The first opportunity is when the vehicle stopped and the appellants inspected it for about five minutes. The passengers must have become aware that things were not well when another person took over the driving of the vehicle from Mungoye.

The second good opportunity was during the 2 km journey before the vehicle turned to a side road and before Michael Kazungu was shot dead. The contention of the appellants that the witnesses were frightened and that the 2 km journey took a shot time is not supported by evidence. It was rejected by the two courts below. We see no basis for interference.

The evidence of the three witnesses was consistent that one person had a pistol while the other had a knife. It is true that Mungoye said that it was the porter who was shot dead while Shikoli who was infact the porter said that it was Kazungu the tour leader who was shot dead. There is no doubt that Michael Kazungu was shot dead. Both Richard Haidin and Shikoli described him as a guide/tour leader while Mungoye described him as a porter. This discrepancy is not material, as it does not reflect on the credibility of the witnesses. It was during the day. The witnesses were confined in a vehicle with the robbers and travelled in the same vehicle for 2 km before they were ordered to lie down. We are satisfied, as were the two courts below, that there was overwhelming evidence that the two appellants were infact identified by Mungoye and Shikoli.

There was also the evidence of Sebastian Kimeu, a taxi driver. His motor vehicle Reg. No. KJT 524 was used to take some of the people involved in the robbery to Vipingo. Those people included the first and second appellant. His vehicle was driven by another person upto Vipingo while the two appellants and others were seated inside. According to him after the robbery the two appellants were among the people who carried the goods from the tourists' bus. This witness fully participated in the robbery and was properly treated as an accomplice. The trial Magistrate directed himself properly on the weight to be given to evidence of an accomplice and the requirement that such evidence should be corroborated. He found that the accomplice evidence was corroborated by the identification of appellants by Mungoye and Shikoli.

There was also the respective repudiated confessions. Again, the trial Magistrate properly directed himself on the law that that such repudiated confessions required corroboration. The evidence of visual identification of appellants by Mungoye and Shikoli was found to be corroborative of the repudiated confessions. There was evidence that Mungoye and Shikoli identified the appellants at identification parades. The learned trial Magistrate found that the appellants did not raise any objections during the parade and that each remarked that he was satisfied in the manner the parades were conducted. The first appellant complained that police took his photographs during arrest which he claimed were shown to the witnesses. The police officer who arrested him however denied taking the photographs and Shikoli denied that he was shown the photographs. IP Ngugi who conducted the identification parade in respect of the first appellant said that he was not aware that police were retaining first appellant's photographs. The trial Magistrate did not believe this complaint and the superior court confirmed that position. The two courts below were also satisfied that the pair of shoes recovered from the first appellant was identified as property of Richard Haidn. These are findings of fact by the two courts below and they are fully supported by the recorded evidence. There is no basis upon which we can interfere. The complaint by second appellant that his defence of alibi was not considered has no merit as his defence did not amount to an alibi as he went to Taveta after the date of commission of offence.

The trial Magistrate directed himself correctly on both law and evidence and it is not without justification that the superior court found his work impressive.

We are further satisfied that the superior court re-evaluated and reconsidered the evidence as it is required to do after which it came to the same conclusions as the trial Magistrate. We can find no misdirections in the judgment of the superior court.

In the final analysis, we are satisfied that there was overwhelming evidence to support the findings of the two courts and we do not find any merit in the appeal of either appellant. Accordingly the appeals are

dismissed.

Dated and delivered at Mombasa this 23rd day of July, 2004.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR