REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: OMOLO, BOSIRE & OWUOR, JJ.A.
CRIMINAL APPEAL NO. 171 OF 2000
BETWEEN

JUSTUS GITUNGO KOINANGE ....APPELLANT
AND
REPUBLIC ....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Waki J & Khaminwa, Comm. of Assize) dated 10th April, 2000
in
H.C.CR.A. NO. 140 OF 1997)
****

JUDGMENT OF THE COURT

Following his trial and subsequent conviction on a charge of robbery with violence contrary to **Section 296 (2) of the Penal Code** by a Senior Resident Magistrate at Mombasa, ***Justus Gitungo Koinange***, the appellant hereinafter, was given the only sentence provided by law, namely, death by hanging. He appealed against the conviction and sentence to the High Court, but on 10th April, 2000, that court constituted by Waki, J. and Mrs Khaminwa, a Commissioner of Assize, dismissed his appeal against both conviction and sentence. The appellant now appeals to this Court and his appeal to the Court being a second one, only matters of law are of concern to us.

The appellant's appeal before us was argued on his behalf by Mr Kiarago who concentrated largely on the issue of whether the trial magistrate and the first appellate court correctly appreciated and understood the nature of the evidence that the prosecution placed before them and from his submissions before us, we understood Mr Kiarago to be contending that had the two courts below done so, they would not have convicted the appellant. We would take this opportunity to repeat that on a second appeal such as this one, it is not the function of the court to, as it were, go into a fresh re-evaluation and re assessment of the evidence to see if the findings of the lower courts is or is not supportable.If, for example, a witness "A" says in his evidence that he saw the accused person doing a particular act, and the trial court in its judgment finds as a fact that "A" saw the accused doing what was alleged, and the first appellate court, after an exhaustive re-evaluation and re-assessment of the evidence before the trial court also comes to the same conclusion that "A" saw the accused doing the alleged act, it is not the business of this Court to interfere with such concurrent findings of fact unless the Court is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence. But where there is evidence upon which a reasonable tribunal, properly directing itself on that evidence and the law applicable to it could reasonably convict, this Court will really have no justification in interfering - see for example, ***SHANTILAL MANEKLAL RUWALA V R [1957] EA 570.***

The robbery, the subject matter of the charge, took place between 7 p.m. and 8 p.m., and it was agreed the only source of light which enabled the driver of the vehicle (P.W.1) and his turn-boy (P.W.2), - the victims of the robbery and who testified in the trial - to identify the appellant whom they did not know

before was the moon. The robbery took place on the 10th December, 1995 and on the 5th January, 1996, some three weeks after the incident, P.W.1 and P.W.2 were able to identify the appellant at an identification parade which both courts below found to have been properly conducted. We listened to Mr Kiarago on the issue of identification by P.W.1 and P.W.2 and the nature of the identification parade itself but if that was all we had to consider, we doubt whether we would have come to any different conclusion from the two courts below, bearing in mind what we have already stated with regard to concurrent findings.

But apart from the evidence of identification by P.W.1 and P.W.2, the prosecution produced in evidence a charge and caution statement which the appellant was alleged to have made to a police Inspector Job Khaemba (P.W.6). Before that statement could be tendered in evidence the appellant told the magistrate that:

> ***"I recorded this statement but it had been recorded on a paper which I just copied."***

For some unknown reason, the magistrate thought the appellant was admitting that he had made the statement voluntarily and the magistrate proceeded to admit the statement as having been voluntarily made without going through the process of a trial within the trial.The High Court correctly rejected the statement as having been improperly admitted in evidence and the High Court then concentrated solely on the identification of the appellant by P.W.1 and P.W.2 and the Judges then concluded their judgment as follows:

> ***"The crucial point in this appeal is whether or n ot failure to hold a trial -within -trial by the magistrate before admitting the Appellant's statement has caused miscarriage of justice. And whether if the said statement was not admitted there was sufficient evidence to convict. We have already said th at the trial magistrate failed to conduct the trial -within -trial and this was a serious omission to the trial. The remaining evidence is therefore of identification of the Appellant. We have said that it is our view that the evidence of identification wa s strong and on it alone the conviction could safely have been grounded."***

The trouble, however, is that apart from the evidence of identification the magistrate had, in her judgment, devoted a lot of consideration to the appellant's charge and caution statement. Before going into a detailed consideration of the evidence of identification, the magistrate said and we quote her:

> ***"Moonlight is not the best light by which a witness may identify a suspect especially when he has never seen him before, but the court considers the long period of exposure and the fact that in the fact that (sic) in the case of P.W.1 he was standing face to face with the accused as he stripped him and cut his trousers and shirt into strips and bound and gagged him. He even spoke with him as he gave him his Driving License back telling him he would need it the next day to find himself another job."***

What the trial magistrate was saying here was that P.W.1 and P.W.2 were with the appellant for a long time and that in the case of P.W.1, he even had a better opportunity of seeing the appellant when the latter did the things enumerated in the quoted passage. That was clearly a proper consideration of the evidence.

But then the magistrate goes on to state in her judgment:

> **"To further corroborate the two prosecution witnesses P.W.1 and P.W.2 and the identification parade officer's evidence I.P. Khaemba of Lungalunga Police took a statement under charge and caution from the accused. In that statement the accused tells of how one Peter, and a John came to get him from his house to help them with home work. ....**..."

The magistrate then sets out the details in the appellant's statement and concludes as follows:

> **"The court finds that the details in that statement could have only been known to a person who was in on the operation."**

So that despite the fact that the trial magistrate was prepared to and did hold that P.W.1 and P.W.2 were able to identify the appellant during the robbery and were subsequently able to identify him at a properly conducted identification parade, yet the magistrate still thought it was necessary to look for corroborative evidence to support the identification by P.W.1 and P.W.2. She found such evidence in the charge and caution statement of the appellant. We have carefully gone through the judgment of the trial magistrate, and we can find nowhere in that judgment where she says that she would have been prepared to convict even in the absence of the charge and caution statement of the appellant.

We have already set out the views of the High Court who correctly rejected the charge and caution statement and having done so all they say is that in their view the evidence of identification was strong and on it alone the conviction could safely have been grounded. But it is to be remembered that it was not the High Court who tried the appellant and at no stage of their judgment do they refer to the fact that the magistrate looked for corroboration and found it in the rejected statement. Nor does the High Court say in their judgment that if the magistrate had properly directed herself, she would have inevitably convicted the appellant.

In these circumstances, we think it would be unsafe to sustain the conviction of the appellant. We allow the appeal, quash the conviction, set aside the sentence of death and order that the appellant be released from prison forthwith, unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 9th day of February, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR