



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, SHAH & BOSIRE, JJ.A.

CRIMINAL APPEAL NO. 186 OF 2000

BETWEEN

JANE WANGUI WANYOIKE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and Judgment of the High Court of Kenya

at Nairobi (Aluoch, Githinji, JJ) dated 26th March, 1998

in

H.C.CR.A. NO. 591 OF 1997)

JUDGMENT OF THE COURT

On 12th May, 1997, **Jane Wangui Wanyoingi** alias **Wanyoike**, the appellant, was convicted on one count of robbery with violence contrary to **Section 296(2)** of the Penal Code and sentenced to death by Kathoka Ngomo Esq., Senior Resident Magistrate at Kisii. She was acquitted on two other counts she was facing, to wit, being in possession of a firearm and being in possession of ammunition contrary to **Section 4(1) of the Firearms Act, Cap. 114, Laws of Kenya**.

The charge upon which the appellant was convicted alleged that the appellant on 24th April, 1996 at **Scooby Enterprises** in Kisii Township in Kisii District of Nyanza Province, jointly with others not before court while armed with a dangerous weapon namely a pistol robbed **Praful Chandra Kantilal Sumana Shah** of Shs.25,000/- and at or \ immediately before or immediately after the time of such robbery wounded Isaak Nyakundi Ototo and Kesh Shah both workers of Scooby Enterprises.

The **Republic** called 10 witnesses and the sum total of their evidence, as found by the learned Magistrate, was that the prosecution had established the case against the appellant beyond any reasonable doubt.

On 24th April, 1996 as **Praful Chandra Shah (PW2)** was about to close the premises occupied by Scooby Enterprises, a man and a woman came into the shop whilst the day's takings were being counted. The man produced a pistol and demanded the money. A sum of Shs.25,000/= was handed over to him.

Fred Nyanaro (PW3) stated in the Magistrate's court that, earlier the woman had come into the shop, talked to Praful Shah and left before she returned some 10 minutes later with the said man, both of them with cocked pistols. The man ordered all those in the shop to lie down. After the intruders got some money from Praful Shah, they hurriedly left the shop in a motor vehicle which was outside the Shop. As they did so some of the money dropped. There were two accomplices waiting outside. All four boarded the vehicle and drove off. Fred Nyanaro rushed to the police station in the firm's car, a Toyota Corolla, registration number **KXM 360**. Along with two police officers the Toyota driver chased the gangsters towards Migori direction. Fred Nyanaro had noted the registration number of the gangsters' car. It was **KAE 278Z**. They spotted the getaway car about 200 metres from Nyangweta forest. The vehicle had stopped and appeared to have a mechanical problem. The bonnet was open. The vehicle had four occupants who, on seeing the police approach ran away on foot. One of the four people was a woman. As the three men could run faster, they disappeared. The woman was slower and could therefore not make it. She exchanged fire with the police officers. She was however eventually arrested with the pistol in one hand and a hand bag on her other hand. Fred Nyanaro recognized the woman as the one he had earlier seen in the shop at the time of the robbery. Fred, in cross-examination, denied that he and the police officers had merely stopped the woman who was the present appellant, to find out from her if she had seen the getaway car.

Bakul Patel (PW4) confirmed the fact of the robbery at the Scooby Enterprises Shop. He talked of two men and a woman entering the shop. He stated that he did not see the appellant during the time of the robbery.

Rakesh Hariya (PW5) who like PW4 was in the shop at the time of the robbery, testified he did not see the appellant face to face in the shop but said that he saw a woman from the backside with similar clothing as those she was wearing.

Isaak Nyakundi Ototo (PW6) who was a security officer at Scooby Enterprises testified that he saw the appellant entering the shop on that day at about 5.15 p.m. She stayed in the shop for about 5 minutes, got out and returned to the shop with two men. He accosted the woman as she emerged from inside the shop brandishing a pistol. But because her companions threatened to injure him, he let her escape. Isaak identified the appellant in an identification parade on 25th April, 1996.

P.C. Donald Emedele (PW7) was one of the Police officers who was involved in chasing the robbers. His evidence was similar to that of Fred Nyanaro, the gist being that the appellant was arrested as she escaped with three men. She was, he said, armed with a revolver and surrendered after some exchange of fire. He saw the handbag the woman had and the identity card therein. He identified the card as bearing the name of **Jane Wangui Wanyonyi** and numbered **3645134/66**. He also saw a wallet in the handbag containing Shs.4,600/=. He was in the company of the police officers who led the appellant to Kisii Police Station. The getaway car was also taken to the Police Station. He denied a suggestion by the appellant to the effect that she was accosted by him and others as she waited for public transport by the roadside, and also that he threatened the appellant by aiming a gun at her private parts.

Inspector Daniel Langat (PW9) conducted an identification parade in respect of the appellant. He said she voluntarily participated in the parade. She did not request for a friend or an advocate to be present at the parade. Three witnesses were lined up to identify the suspect; these were Praful Shah, Bakul Patel and Isaac Nyakundi. There were nine women on the parade. He stated that Praful Shah identified the appellant by touching her. Bakul Shah also identified her by touching her. Isaac Nyakundi did the same. It is important to note, at this stage that Praful Shah did not say anything about identifying the appellant at any parade. Bakul Patel did talk of a parade but could not recall the appellant at the time of trial. Isaac Nyakundi was the one who positively identified the appellant at the parade. We will revert to these discrepancies later on in this judgment.

Sgt. Richard Mugo (PW10) was with Fred Nyanaro and P.C. Donald Emedele in vehicle registration number KXM 360 whilst chasing the getaway car. His version of events was similar to that of P.C. Emedele. The appellant on finding her chances of escape cut off, surrendered. As we stated earlier she was found with a gun and handbag containing her National Identity Card. She was taken to Kisii Police

Station.

As against all the evidence that was adduced against the appellant, her version of events was that she had reached Kisii on 23rd April, 1996 to buy bananas. She bought some on that day and some more the next day. She was on the road, having bought her bananas, waiting at "a stage" (presumably bus stage) when a motor vehicle approached at high speed. The vehicle stopped all of a sudden. The occupants of the vehicle talked to her in Kisii language which she does not understand. In an answer to a question they asked, in Kiswahili, she told the occupants of the vehicle that she had not seen any people passing there. She was nevertheless, arrested, and told to enter the vehicle. She was slapped by a police officer and thereafter, was taken a mile away and stripped. Eventually she was taken to Kisii Police Station where she met two Asians and an African. She was taken to an enclosed place at the back of the police station where she met five women. Realizing that she was to attend an identification parade she asked to have a bath and change her clothing before doing so allegedly because she was "very dirty". She was not allowed that and was made to stand in the parade. The two Asians pointed her out from a distance, whereas the African gentleman came and stood next to her. She was told to sign the identification parade forms. Although she did so, she stated that she did not really know why she was signing those papers. She was taken, next day, to a sugar cane plantation by the police where they beat her up, threatened to kill her, removed her clothes and made her to lie down.

The learned trial Magistrate had this to say about her unsworn statement:

"The accused's evidence is not believable. It is too inconsistent with facts and removed from common sense. In the face of the tremendous and overwhelming, concrete and cogent, evidence by the prosecution the accused's statement fails miserably."

Before we come to the grounds of appeal as put forward by Mr. Nyakeriga for the appellant there is one matter we would like to comment on. It is that the learned Magistrate in considering the evidence in the case before him first considered the defence case before that of the prosecution. With due respect to him that was an incorrect approach. The proper way is to first consider and evaluate the evidence adduced on behalf of the prosecution and if satisfied that it *prima facie* proves the offence charged then proceed to consider the defence case.

The approach the trial Magistrate adopted appears at first blush to cast an onus on the appellant to show reasons for her alleged actions. However, the learned Magistrate put the matter in its correct perspective when he later said:

"But I have cautioned myself that it is not for the accused to prove her innocence but for the prosecution to prove her guilty."

Having said that he proceeded to fully analyse the prosecution evidence and in these circumstances we are unable to say that there was any miscarriage of justice.

Mr. Nyakeriga directed his main argument to the manner in which the identification of the appellant was carried out at the identification parade. We have already pointed out the discrepancies on the parade identification evidence. According to Inspector Daniel Langat, Praful Shah and Bakul Patel identified the appellant by touching her whereas the two did not bring this factor out in their evidence. It was Isaac Nyakundi who actually pointed her out by touching her. In normal circumstances if the quality of the identification evidence was such as pointed out by the appellant's counsel and if there was no other credible and cogent evidence connecting the appellant with the crime in question, the appellant would have had the benefit of the doubt. However, in all, the prosecution evidence, considered from all angles, pointed a direct finger at the appellant as having been one of the robbers. She was seen in the shop. The robbers were actively pursued in their getaway car which turned out to be a stolen car with different number plates. The appellant was actually found in the car and was apprehended immediately. This evidence was accepted by the learned Magistrate and also by the superior court (Aluoch & Githinji JJ). The finding of fact in this regard by the two courts below cannot be faulted. In fact, the evidence was overwhelming.

Mr Nyakeriga also took issue as regards the alleged refusal to allow the appellant to wash and change her clothing prior to being placed on the identification parade. He said that the appellant was "dirty" as she alleged whilst being put on the parade. Both courts below resolved this issue of fact against the appellant and we cannot re-inquire into it. We will only say that we do not see where the two courts below erred on that issue. The first two grounds in the memorandum of appeal must therefore fail. The two grounds relate to the alleged weaknesses, unreliability and irregularities of the identification evidence as well as the alleged conflicting and uncorroborated evidence of prosecution witnesses. We have already pointed out that the cumulative effect of all the evidence on record is that it fully supports the appellant's conviction. The evidence is watertight.

By her third ground of appeal the appellant complains that the P3 forms as regards injuries suffered by those who were injured in the course of the robbery were produced by a witness who was not the maker thereof. In normal circumstances, the maker of a document has to be called as a witness in case the defence would wish to cross-examine him or if the defence objects to the production thereof by a person other than the maker. But in the absence of such objection such forms were properly produced by virtue of the provisions of **Section 77(1) of the Evidence Act, Cap. 80, Laws of Kenya**. The case of **RAJAB SAID ABDALLAH VS REPUBLIC (Criminal Appeal No. 86 of 1996)** (unreported) which counsel for the appellant cited stands on its own as the effect of Section 77(1) of the **Evidence Act** was not brought to the attention of the Court. The third ground of appeal therefore fails.

The fourth ground of appeal as propounded by the appellant refers to the allegation that the appellant was forced to sign some papers by police officers during investigations and that the appellant did not know their contents. There was no confession statement, if any, tendered in evidence. Nothing turns on that issue.

In her fifth ground of appeal the appellant complains that the Judges in the first appellate court failed to consider, analyse and assess the issues raised and evidence adduced by the appellant in her defence. That is not correct. The learned Judges rewww. evaluated the evidence of all material witnesses as they were supposed to do. They set out the substance of such evidence and finally said:

"On our own independent evaluation of the evidence by the learned Magistrate, we find that he arrived at the correct verdict in this case, and we uphold his conviction of the appellant."

The judgment of the superior court bears out the fact that the learned Judges fully considered and re-evaluated all the evidence in some detail. Grounds 6 and 7 in the memorandum of appeal are as follows:

"6. The learned Magistrate and the appellate Judges misdirected themselves and erred in failing to appreciate that the prosecution did not meet the standard of proof required of it to prove beyond any reasonable doubt the charge or offence which the appellant was convicted of."

7. The learned Magistrate and appellate Judges above misdirections and errors therefore rendered the appellant's conviction and sentence unsafe and unsatisfactory."

This is of course a second appeal. We cannot and will not disturb concurrent findings of fact by the two courts below, unless there are glaring and obviously wrong findings of fact or inferences therefrom amounting to an error of law. We see nothing of the sort in this appeal.

We see no merit in this appeal. It is accordingly dismissed.

Dated and delivered at Nairobi 30th day of November, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR