REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 231 of 2004

JOHN KAMAU ALIAS KAMAA ……...…… APPELLANT

AND

REPUBLIC ……..……..…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos

(Lesiit & Wendoh, JJ) dated 2nd November, 2004

in

H.C.CR.A. NO. 291 OF 2003)

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JUDGMENT OF THE COURT

The appellant ***JOHN KAMAU ALIAS KAMAA*** and his co-appellant ***MUSTAFA MUJUMBE ODHIAMBO*** (MUSTAFA) were convicted by the Senior Resident Magistrate, Kajiado of the offence of robbery contrary to ***section 296 (2)*** of the Penal Code and sentenced to death. The superior court dismissed their respective first appeals against the conviction and sentence. They have subsequently filed separate appeals in this Court which have been consolidated. Mustafa, however died before his appeal was heard and his appeal thereupon abated.

The complainant Peninah Yuko (Peninah) and her sister, Janet Atieno Yuko (Janet) were asleep in the complainant's house at Majengo, Kajiado on the night of 23rd June, 2002. At about 4.30 a.m. they heard a bang. Peninah woke up. Two people armed with *pangas* and *rungus* entered into the bedroom, switched on the lights and ordered Peninah to produce money. When she said that she had no money, she was hit on the head with a panga and the robbers ordered her to go back to bed and sleep. The robbers stole various goods from the bedroom including an iron box, singer sewing machines, mobile phone and clothes. After the robbers had left Peninah went to the sitting room and found that her Television set, another sewing machine and a radio had been stolen. She found a huge stone which had been used to break the door lying outside the house. She reported the robbery at Kajiado Police Station. On 8th July, 2002, Mustafa, the deceased appellant, was taken to Kajiado Police Station by members of public who reported that he was in possession of a Television set which was suspected to have been stolen. The Television which was in a sack was taken to the police station and subsequently identified by another complainant as the one he was robbed of on the night of 8th July, 2002, at Majengo, Kajiado.

After interrogation, Mustafa led I.P. Hansen Kaloki to Mathare in Nairobi where he pointed out the appellant. The house of the appellant was searched but none of the goods belonging to Peninah were recovered.

On 10th July, 2002 the appellant recorded a statement in English under inquiry before C.I. Victor Mathenge and on 12th July, 2002 the appellant was identified by Peninah and Janet at an identification parade conducted by I.P. Joshua Murema.

The appellant gave sworn evidence at the trial. He denied committing the offence and stated that Peninah and Janet identified him at the identification parade, only because they had seen him on the previous day. He denied making the statement voluntarily and stated that he was beaten and that I.P. Mathenge dictated to him what to write.

The trial magistrate convicted the appellant on the basis of the evidence of identification and his statement under inquiry which was a confession.

The superior court evaluated the evidence of Peninah and Janet on the identification of the appellant and Mustafa. The superior court correctly found that there were contradictions in the evidence of Peninah and Janet on the role the appellant played during the robbery. According to Peninah it was Mustafa who was standing by the bedside guarding while the appellant was collecting goods in the bedroom. But according to Janet it is the appellant who was guarding while Mustafa was removing the goods.

The superior court considered the contradictions and stated:

"***On our part, we find that the contradictions were material and that they lessened the weight of evidence of the two witnesses".***

After evaluating and reconsidering the evidence, the superior court concluded:

"***We have analysed the evidence carefully as demonstrated above. We find that as against 1st Appellant*** (that is the appellant here) ***he was properly identified in an identification parade. His statement under inquiry materially corroborated the evidence of PW1 and 2 (***that is of Peninah and Janet) ***in regard to the robbery in question. The evidence of PW1 and 2 had contradictions on roles played by the appellants in this incident. That contradiction was not of material importance. What was needed was some other evidence that would implicate the appellants with the offence to corroborate that evidence. We looked for and found corroboration. In respect of the 1st appellant*** (appellant herein) ***we find the corroboration in the statement of inquiry by the 1st appellant".***

There are several grounds of appeal raising wide ranging issues. However there are two important legal issues contained in the supplementary memorandum of appeal which relate to the admissibility of the statement under inquiry and the identification of the appellant. Those two grounds deserve serious consideration.

On the admissibility of the statement under inquiry, the appellant complains, in effect, that the superior court erred in relying on the confession of the appellant when the confession was not made in court. Mr. Ondieki learned counsel for the appellant contended that the statement under inquiry was admitted three months after ***The Criminal Law (Amendment) Act 2003 – Act No. 5 of 2003*** (2003 Act) came into effect on 25th July, 2003 which, among other things, outlawed the admissibility of confessions by accused persons unless made in court. Mr. Ondieki specifically referred to the new ***section 25A*** of the *Evidence Act* introduced by the 2003 Act which provides:

"***A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court".***

In this case the statement under inquiry which is a confession was made on 10th July, 2002. The

appellant retracted the statement at the trial but it was admitted as evidence after trial within a trial on 4th August, 2003. It is true as Mr. Ondiek submitted that the 2003 Act came into operation on 25th July, 2003. It is clear from the record that although the statement was recorded nearly one year before the 2003 Act became operative the prosecution proved the statement against the appellant after 25th July, 2003 when by the virtue of ***section 25A*** of the *Evidence Act* extra judicial statements were no longer admissible as evidence as against an accused person. The new ***section 25A*** of the *Evidence Act* did not exempt statements made before the law came into force. In our respectful view, ***section 25A*** of the *Evidence Act* prohibited the admission of all extra judicial statements made before 25th July, 2003 and which had not been proved and admitted against an accused person at a trial held before the 25th July, 2003. Thus, we respectfully agree with Mr. Ondieki that the superior court erred in law in relying on a statement under inquiry which had been admitted as evidence in contravention of the law.

On the identification of the appellant the appellant faults the superior court for relying on the evidence of identification which did not meet the required legal standards. Mr. Ondieki referred to the contradictions in the evidence of Peninah and Janet and to the complaint of the appellant that the identifying witnesses had seen him before the identification parade and submitted that the evidence of identification was not free from error. It is the law that where the evidence to implicate an accused person is entirely based on the identification such evidence should be absolutely watertight to justify a conviction and must be free from any possibility of error (see ***Kiarie v Republic*** [1984] KLR 739. This Court also recognized in ***Kiarie's*** case (supra) that it is possible for a witness or witnesses to be honest but mistaken on the identity of an accused person.

After the exclusion of the confession of the appellant as we have done, the only evidence to connect the appellant with the robbery is the evidence of the identification by Peninah and Janet. At the material time, Peninah was asleep in one room with her child and her two sisters Janet and Maureen Awour. According to Janet, she was sharing one bed with Peninah. However, Maureen Awour did not give evidence at the trial, although she participated in the respective identification parades which were held on the same day, one after the other. The identification parade in respect of the appellant was held immediately before the identification parade in respect of Mustafa. Maureen Awour identified the appellant but she did not identify Mustafa. There was evidence from I.P. Joshua Murema on cross – examination by the appellant at the trial that the appellant and Mustafa had similar general appearance. I.P. Joshua Murema said:

"***You*** (appellant) ***look similar in general appearance with Accused 1*** (that is Mustafa)"**.**

When I.P. Hansen Kaloki was cross – examined by the appellant at the trial regarding the contents of O.B. 4 of 23rd June, 2003 relating to the robbery, he stated:

"***The reportees reported that during the robbery they had been made to cover their faces".***

It is clear from the judgment of the superior court that the superior court did not re-evaluate and reconsider all the evidence and circumstances surrounding the identification of the appellant and thus failed to make its own independent finding.

It is however fair to say that the superior court considered the contradictory evidence of Peninah and Janet on the role that the appellant played during the robbery. But even after such consideration, the superior court misdirected itself by making two contradictory findings. The superior made a finding that the contradictions were material and lessened the weight of the evidence of Peninah and Janet and in the same breath made a second finding that the contradiction was not of material importance.

This was a case of identification at night under difficult circumstances. The evidence should have been tested with the greatest care and should have been accepted only if it was free from the possibility of error. On analysis, having regard to the failure by the superior court to re-evaluate and reconsider the evidence, the misdirection by the superior court regarding the contradiction in the evidence of Peninah and Janet and the grave error made by the superior court with respect to admission of the confession, we

agree that the appellant was not properly convicted.

Mr. Kaigai, the learned Senior State Counsel did not support the conviction for another reason which we do not consider to be valid.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 30th day of March, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR