REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.120 0F 2012

FORMERLY HIGH COURT OF NAIROBI CRIMINAL APPEAL NO 669 OF 2010

Being an Appeal from the Conviction and Sentence of the Principal Magistrate's Court at Garissa (Hon. J. N.Onyiego SPM) in Criminal Case No 337 of 2009

MOHAMED SANEY YUSUF……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Mohamed Saney Yusuf, the Appellant, was charged jointly with Ahmed Saney Asako with three counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of Count 1 are that on 12th April 2009 near KBC Station along Garissa-Bura Road in Tana River District within Coast Province jointly with others not before the court while armed with dangerous weapons namely AK 47 rifles robbed Osman Bare Kalmoi Kshs 2,500/- and at or immediately before or immediately after the time of such robbery used actual violence and killed the said Osman Bare Kalmoi.

The particulars of Count 2 are that in the same robbery as in Count 1, they robbed Hassan Abdullahi Kshs 2,000/-, one Nokia phone, clothing and other personal effects all valued at Kshs 6,000/- and at or immediately before or immediately after the time of the such robbery threatened to use actual violence to the said Hassan Abdullahi.

The particulars of Count 3 are that in the same robbery in Count 1 they robbed Mahat Dagane of Kshs 50,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual vilence to the said Mahat Dagane.

After a full trial where the prosecution called a total of six witnesses and the defence called a total of five witnesses, the trial court found the appellant guilty of Counts 1 and 3. He acquitted the second accused person in those counts and also acquitted both accused persons in respect of Count 2 for lack of evidence of the complainant in that count.

The appellant is aggrieved by the conviction and sentence and has come to this court to challenge the judgment of the lower court.

Petition of Appeal

The Appellant has, through Kilonzo & Co. Advocates, prepared a Petition of Appeal listing seven grounds of appeal (grounds (a) to (g) all inclusive). We will summarize them in this judgement and submissions as follows:

The Appellant is challenging identification. This issue is contained in grounds numbers (a), (b) and (c). The identification by the witnesses of the appellant as one of the robbers is being challenged. It was submitted by Mr. Shijenje, learned Counsel representing the appellant at the hearing of this appeal, that the trial court failed to consider that the appellant was not positively identified; that the witnesses used the physical condition that the appellant is "mono-eyed" to identify him to his detriment; that the witnesses did not describe the attackers to the police and therefore any identification of the appellant as one of the attackers during the trial is an afterthought; that the investigating officer did not tell the court that he was given names of the attackers.

Counsel further submitted that an identification parade in this case was necessary and the members of the parade ought to have been people of similar physical features as the appellant. Counsel took issue with the trial court's comment that the identification parade would not have served any purpose terming it as an error. Counsel termed as an error the statement by the trial court to the effect that mere absence of all the information in the police statement is not fatal submitting that the prosecution bears the burden of proving a criminal case. Counsel further submitted that the trial court misdirected itself on the demeanour of the prosecution witnesses on the issue of identification of the appellant.

Secondly, the Appellant has relied on defence of alibi. This issue is raised in grounds number (d), (e) and (g). Counsel submitted that the trial court disregarded the appellant's defence of alibi and this was prejudicial to the appellant. It was submitted that by stating that it was possible the appellant committed the offence between 9.00am and 9.30am and then attended the elders meeting the trial court was supplementing the prosecution case.

Thirdly, the Appellant is alleging that the offence of robbery with violence is not supported by evidence. This issue is contained in ground (f). Counsel for the appellant submitted that no weapon is mentioned; that the doctor testified that there was no evidence to prove gun shots and that there was no evidence of gun powder; that the doctor contradicted himself when he said the shooting was not at close range and therefore this charge cannot stand.

Mr. Allen Mulama, learned State Counsel, opposed the appeal. He submitted that the trial court was within the law (Section 199 Criminal Procedure Code) to observe the demeanour of witnesses; that the ingredients of robbery with violence were proved; that robbery took place about 9.30am and the robbers took about 30 minutes and therefore the robbers were clearly seen and recognized by the witnesses; that the identification parade would not have served any purpose and that conditions were favourable for positive identification.

Facts

Khalif Bare Kalmoi, PW3, Mohamud Mohamed, PW4 and Mahat Dagane, PW5, were all travelling in motor vehicle registration number KAB 536X from Garissa to Bura on 12th April 2009. There were other passengers on that vehicle and the driver was one Osman Bare brother to PW3 who died in the attack giving rise to this case. At about 9.30am on reaching KBC Station on Garissa – Mombasa Road the vehicle was attacked. It is said that seven thugs emerged and shot at the vehicle fatally wounding Osman Bare, deceased and driver of the ill-fated vehicle. The passengers were ordered outside and taken about 20 metres from the vehicle and robbed of money, water, miraa, tomatoes and potatoes. Evidence shows that the vehicle was operating as courier for money transfers from Garissa to Bura and back. The amount of money stolen is not given because some of the money had been sealed in envelopes.

PW3 took over driving the vehicle back to Garissa to take Osman to hospital but he died on arrival at the hospital. The matter was reported to the police leading to the arrest of the appellant and his co-accused in the lower court. They were charged with this offence.

The prosecution evidence is that the appellant was one of the attackers. PW3, PW4 and PW5 told the lower court that they saw the appellant at the scene of the robbery and recognized him because he was known to them before the robbery. Evidence shows that the appellant, who was 1st accused in the lower court, was armed. According to PW4 and PW5 the appellant was not wearing a mask like the other attackers but was holding his mask in his hands.

The appellant put in an alibi defence that on 12th April 2009 he was not at the scene of the robbery. He said that he was at Madogo in a meeting of elders arbitrating on a domestic dispute. He called Aden Ibrahim Harale, DW3, Ibrahim Aden Galgalo, DW4 and Abdi Noor, DW5 all who testified that the appellant was with them on 12th April 2009 at Madogo in a meeting. DW3 and DW4 did not specify the time when the alleged meeting took place but DW5 told the court they met 10.00am to 12.00 noon.

Determination

It is our duty as the first appellant court to examine and evaluate this evidence afresh in order to come up with our own independent findings. While doing that we are alive to the fact that we did not see the witnesses testify and therefore are not able to make a determination on their demeanour. We take note that the trial court was impressed by the demeanour of the prosecution witnesses who testified before that court. That is in line with the procedure and this court cannot doubt or fault the court for recording what it observed.

We have understood the issues in this appeal to be three and we have clustered them under these headings, namely:

i. Whether the offence of robbery with violence is disclosed.
ii. Whether the appellant was positively identified as one of the robbers.
iii. Whether the defence of alibi is available to the appellant.

The definition of the offence of robbery is found in Section 295 of the Penal Code which is couched in the following terms:

> **Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery**

The offence becomes robbery with violence under Section 296 (2) of the Penal Code if the following circumstances are established:

i. **If the offender is armed with any dangerous or offensive weapon or instrument.**
ii. **If the offender is in the company with one or more person or persons.**
iii. **If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

It is trite law that proof of any one of the above ingredients is enough to base a conviction on (see **Johana Ndungu v. Republic Criminal Appeal No 116 of 1995** and **Jairus Mukolwe Ochieng v. Republic Criminal Appeal No 217 of 2007**).

In the case before us the attackers were more than one, they were armed and they used violence. PW3 stated that the attackers were seven and they shot at them and robbed them of money and other items. PW4 stated in evidence that the attackers shot at them and PW5 stated that he saw four of the attackers armed with guns. PW5 was robbed of money, Kshs 3,500/- from his pocket and Kshs 50,000/- customers' money. He also stated that he was beaten in the course of the robbery.

We have considered this evidence and are convinced beyond reasonable doubt that the ingredients of robbery with violence were established and proved. Counsel for the appellant has raised issue that there

was no recovery of any weapon and that the evidence of the doctor is contradictory and does not show that the deceased was shot dead. We have examined the evidence of Dr. Martin Wawera, PW1. The doctor was testifying on behalf of Dr. Abdi Noor and produced the post mortem report on behalf of Dr. Abdi Noor.

PW1 gave evidence in accordance with the findings of Dr. Noor. He testified that the body was presented to Dr. Noor with a history of having been shot. The body had a frontal head wound measuring 8cm by 5 cm; that the front part of the head was hanging and brain matter exposed. The cause of death was indicated as severe head injury with hypovolemic shock (shock due to severe bleeding).

The doctor (PW1) continued to give his opinion on cross examination. He told the trial court that the wound had not entry and exit point and this depended on the target point and direction from which the shot is fired. He explained that pathologically there was no evidence of gunshot because there was no gun powder. He said the bullet did not lodge and it may have hit across the face tearing it completely as a result that no hole was left to determine entry and exit wound points. We understand the doctor as saying that pathologically there was no evidence that the deceased was shot and this could be explained by the angle at which the shot was fired. We find no contradiction in the doctor's evidence.

Even if we were to be wrong on that point, we find there is evidence of PW3, PW4 and PW5 that Osman Bare was shot in the course of the attack on the vehicle they were travelling in and which Osman was driving. We have not reason to doubt this evidence. Counsel for the appellant faults the trial magistrate for failing to note that no weapon was produced in connection with this robbery. We note the trial magistrate found the offence was committed and that there was evidence to proof that without evaluating the ingredients of robbery with violence and determining whether there was evidence to proof all or any of the ingredients. Our view is that the trial magistrate ought to demonstrate that he/she understands the legal principles applicable in the case before him/her. It is not enough to summarize the evidence of witnesses.

We think we have said enough to demonstrate that the offence of robbery with violence was committed. Further evidence establishes that the trial magistrate observed and recorded a bullet riddled motor vehicle during the course of the trial. This settles this issue. We now turn to the issue of identification of the appellant as one of the robbers who attacked the vehicle on 12th April 2009 in which PW3, PW4 and PW5 were travelling.

On this issue of identification of the appellant the evidence of PW3, PW4 and PW5 is crucial. These witnesses were present when the robbery took place. The evidence of PW3 on this issue is as follows:

> **"I recognized them. I knew them before. They came from the same place at Tana River. They come from Charidende. I have known them for over three years. I knew them physically and not by names. After we stopped, accused 1 who is mono-eyed searched the motor vehicle."**

On cross examination, PW3 told the court that he had known the accused three years before but not by their names and that he told the police that he was able to recognize the two accused and could identify the rest of the attackers.

PW4 told the trial court:

> **"I recognized one of those guys…… I saw the shiftas. I only knew one person. He was Mohamed Saney (Accused 1 pointed). I used to school at Jandeni. I used to see him there. Accused 1 was carrying a gun. He stood at the driver's side."**

On cross examination he told the court that he saw three attackers wearing masks but accused 1 was not wearing his mask, he was holding it. He said he gave the police the name of the appellant and described him.

PW5 told the trial court that:

> **"I identified accused 1. I knew him physically. We used to carry him as a passenger severally. I did not know him by name. I told police I knew one of them. I told them he was mono-eyed. I told them I could identify him is I saw him."**

PW3 said the robbery took 30 minutes and this was corroborated by PW5. PW4 said the appellant was not wearing his face mask but was holding it. This was corroborated by PW5.

We have considered and evaluated this evidence. We have taken note that other than PW3, the other eye witnesses PW4 and PW5 said the told the police that they were able to identify the suspects. PW4 went further and told the police the name of the appellant and described him. PW3 did not give a physical description. Police Inspector Moses Mwangi, PW6, told the trial court on cross examination that one of the witnesses described one of the attackers as mono-eyed. He did not say which witness gave this description.

Recognition has been held by the courts to be more reliable than identification of a stranger. In **Karanja & Another v. Republic [2004] 1 KLR 140** the court of Appeal held that:

> **"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 minimize this danger. Whenever the case against an accused persons 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 accused in reliance on the correctness of the identification."**

Courts are however cautioned that mistakes can be made even in recognition of someone known to the witness **(see R. v. Turnbull [1976] 3 All E.R 549**). We have cautioned ourselves accordingly. We however find that whatever doubts there may have been on the issue of identification of the appellant have been dispelled by the evidence of three key witnesses. These are people who had known the appellant, not by name but by seeing him, either as a passenger or at the school where PW4 used to attend. PW4 knew his name.

We take the view that to describe the appellant as mono-eyed was not derogatory. We agree it is a physical condition but this was not used with a view to prejudicing him in our view but to state a fact. We hold the view that an identification parade was not necessary in this case. This is the view the trial magistrate took and he cannot be faulted. His reasoning was that given that the witnesses knew the accused persons before that court, there was no need of an identification parade. We find the issue on identification adequately supported by the evidence. The conditions were favourable for positive identification and that the appellant was positively identified by PW3, PW4 and PW5. We are satisfied that this evidence is free from possibility of error and it can safely be relied on to make a basis for conviction.

The appellant claims that he was not at the scene of the robbery but at Madogo in a meeting of elders to arbitrate on a domestic dispute. It is instructive that the appellant did not volunteer this evidence. In his evidence in chief he told the trial court, he narrated how he was arrested as he took his child to hospital on 4th July 2009. It is during cross examination that he told the court that on 12th April 2009 he was at an elders meeting in Madogo. He did not state the time he attended that meeting.

DW3 too did not state the time the meeting of elders took place neither did DW4. It is DW5 who placed the time of that meeting to have been from 10.00am to 12.00 noon.

It is trite law that where an accused person raises the defence of alibi, the burden of proof does not shift to him. It still remains with the prosecution to prove that the accused was at the scene of the crime and did commit the crime. The prosecution must adduce credible and admissible evidence to displace the defence of alibi raised by an accused. This principle has been discussed in various cases including **Criminal**

Appeal No. 116 of 1999 R v. David Ruo Nyambura & 3 Others; R. v.Johnson 46 CR. App. R. 365 and **Ssentale v. Uganda [1968] E.A 365**.

The trial magistrate is accused of considering extraneous matters and ignoring the appellant's defence of alibi. The extraneous matters allegedly considered by the trial magistrate are contained in the statement that the appellant may have committed the offence between 9.00am and 9.30am and still attend the elders meeting later. The trial magistrate also pointed out that the scene of the accident was less than seven kilometres away from Madogo where the elders meeting is alleged to have taken place. It is true that this is not contained in any evidence by the prosecution witnesses. Other than this the trial magistrate considered the defence of the appellant and found it as a cover up.

We have examined and evaluated the defence evidence by the appellant, DW3, DW4 and DW5 that the appellant was not at the scene of the robbery but was at the elders meeting at Madogo. We have compared this evidence with that of the three eye witnesses, PW3, PW4 and PW5. We are of the view that the prosecution evidence displaces the defence of alibi raised by the appellant. We have found as a fact, proved beyond reasonable doubt, that the appellant was at the scene of the robbery and that he participated in the same. If he attended an elders meeting as it is alleged it must have been after the robbery.

We have addressed all the issues raised in this appeal. We have examined all the evidence and evaluated the same. We have satisfied ourselves that there is adequate evidence against the appellant and that the case has been proved beyond reasonable doubt. We have no doubts in our minds that Osman Bare, deceased, was killed in the course of that robbery. We have no doubts in our minds the appellant was positively identified as one of the robbers and that they were armed. We have no doubts in our minds that violence was used. We find that the appeal has not merit and must fail. Consequently, this appeal is hereby dismissed.

We make orders accordingly.

Signed and dated this 22nd day of November 2013.

S. N. MUTUKU **W. KORIR**

JUDGE **JUDGE**

Dated and delivered this 27th day of November, 2013.

S. N. MUTUKU

JUDGE