Wako & another v Republic (Criminal Appeal E005 of 2022)
[2023] KEHC 1409 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 1409 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E005 OF 2022

JN NJAGI, J

JANUARY 19, 2023

BETWEEN

GOLICHA WAKO ..... 1ST APPELLANT

KURI ROBA SORA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Mbayaki Wafula, SRM, Marsabit Senior Resident Magistrate's Court Criminal Case No.E002 of 2021 delivered on 12/5/22)

JUDGMENT

1 . The two appellants were convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code and each was sentenced to suffer death as provided by the law. The particulars of the offence were that on the 2nd day of January 2021, at about 1900 hours in Matarba area of Marsabit Central Sub County within Marsabit County, jointly with others not before court while armed with offensive weapons namely AK 47, robbed George Cuyo Ume cash. 1.5 million shillings, two mobile phones make Oppo and Nokia valued at Kshs and 3,000/—respectively and at or immediately before or immediately after the time of such robbery they used personal violence against the said George Guyo Cume (herein referred to as the complainant).

2. The appellants were aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:

    l That the learned trial magistrate erred in both matters of law and facts by failing to note that this case was stealing not robbery with violence according to the evidence tendered before court.

2. That the learned trial magistrate erred in both matters of law and facts by failing to note that there was contradiction and inconsistency in the evidence tendered by the prosecution witnesses.

3. That the trial magistrate erred in both matters of law and facts by failing to note that the evidence of the prosecution shows that the robbers had covered their faces with masks and scarves.

4. That the trial magistrate erred in both matters of law and facts by failing to note that the appellants were not found with any exhibit stolen from the complaint.

5. That the learned trial court erred in both matters of law and facts by failing to note that the complainant did not bring the permit, the cash sales book, and the receipts of the alleged phones to proof the allegations that the robbers robbed him.

6. That the learned trial magistrate erred in matters of both law and facts by failing to take into considerations the alibi defence adduced by the appellants.

Submissions —

3. The appeal was canvassed by way of written submissions. The appellants submitted that the ingredients of the offence of robbery with violence were not met in the case as there was no evidence that the complainant was injured nor was there evidence that the robbers threatened the complainant during the incident.

4. The appellants submitted that they were not found with anything stolen from the complainant. That there were material contradictions in the prosecution case in that PW 2 in his evidence stated that he was able to identify the 1st appellant as he had not covered his face.

   However, that PW3 said that when they saw the people they were trying to cover their faces and some had masks and scarves. That there was also discrepancy on how the 1 st appellant was dressed during the identification parade with the complainant saying that he was dressed in a suit while the police officer who conducted the identification parade, Inspector Joseph Mwonga PW7, said that though the 1st appellant was dressed in a suit on that day he was dressed casually during the parade. Further that the complainant said that he saw 4 robbers who were armed with AK 47 rifles while the scenes of crime officer, PW 8, said that the CCTV showed that there were 3 robbers one of whom was armed.

5. It was submitted that the guiding principle where there are discrepancies in evidence is as was stated by the Court of Appeal in the case of *Joseph Maina Mwangi v Republic*, CA. No.73 of 1992.

6. The appellants further submitted that there was no evidence that the identification of the appellants was free from the possibility of error.

   That one of the witnesses who claimed to have been at the scene, PW 2 and the complainant PW5, in their evidence said that they did not give a description of the appellants' physical features to the police. Therefore, that the arrest of the appellants was based on nothing more than suspicion.

7. It was submitted that the trial magistrate relied on the evidence of a single identifying witness to convict the appellants which evidence was not tested as required by the law as was held in the case of *Roria v Republic* (1967) EA 583.It was further submitted that the trial magistrate did not consider the appellants' defences

8. The appellants challenged the sentence meted out on them on the ground that the death sentence is unconstitutional because it deprives the court the discretion to determine the appropriate sentence to be imposed on the appellants.

9. The state through the Senior Principal Prosecution Counsel, Mr. Ochieng, on the other hand submitted that the ingredients of the offence of robbery with violence were sufficiently proved beyond reasonable doubt. That the 1 st Appellant was identified by the complainant PW5, by PW2 and by PW 3. That the black veil that he was wearing during the incident was produced as exhibit. That the three witnesses were able to pick the 1 st Appellant in an identification parade. That he was in a CCTV footage and that the clothes that he was wearing were found in his house. Therefore, that the identification of the I st Appellant was conclusive.

10 It was submitted that he 2nd Appellant was tied to the robbery as his tuk tuk christened the "Scania" was identified to have been the one used in the robbery.

11. It was submitted that the fact of violence was buttressed by the evidence that a cartridge was recovered at the scene which was examined by a ballistics' expert.

12. It was further submitted that the Appellants' defences were mere denials which did not answer the accusations levelled against them.

13. On the issue of sentence the state left it to the determination of the court.

The Evidence —

14. It was the evidence of the complainant that he was on the material day at his shop at 5.45 pm. He saw 4 people who were armed with AK 47 rifles. They started to shoot in the air. Members of the public scampered for safety. Two of the persons entered into his shop and took Ksh. 1.5 million from the counter, a wallet containing his identity card and driving licence and 2 phones. That in the course of the incident one of them who was wearing a blue jumper and a black headscarf pulled out the headscarf and he saw his face. That on 12/1/2021 he was called to the police station. An identification parade was organized and he picked the person, the 1 st appellant, in a parade of 8 people.

15. Hamza Galgalo PW2 testified that on the material day he was riding a motor cycle towards the shop of the complainant. He was in the company of Hussein Buri, PW3. That as they approached the shop he saw 4 people alight from a tuk tuk motor vehicle christened "Scania". They were armed with rifles. They got scared and took cover. Shortly after they heard a gun-shot. They went to the shop and came face to face with the tuk tuk. He was able to identify one of the people who was wearing a blue jacket and had not covered his face. Later he picked the person, the 1 st appellant, in an identification parade at Marsabit Police station.

16. Hussein PW3 on his part testified that he and PW2 were riding to the shop of the complainant at 8 pm. That as they approached the shop he saw people in a tuk tuk motor vehicle. The people were armed with rifles and were trying to cover their faces. They took cover. Shortly afterwards they heard a gun-shot. They emerged from the place they had taken cover and they saw the tuk tuk christened "Scania" take off. He saw one tall person and marked him. They went to the shop of the complainant. They heard him saying that he had been robbed. He later picked the person he had identified, the 1st appellant, in an identification parade.

17. The 2nd appellant, Kuri Roba, was said to have been connected with the offence because he was the driver of the tuk tuk christened the "Scania". His employer Osman Chure PW 1 testified that he had employed the 2nd appellant as a driver of his tuk tuk christened "Scania". That on the material day he

received a phone call that his tuk tuk had been used to rob the complainant. He went to the shop of the complainant. He was briefed of the robbery. He tried to call the 2nd appellant but he did not pick the call. He went to look for him at his home at Kiwanja Ndege but did not find him. On the following morning the complainant called him and told him that the tuk tuk was near a certain house at Kiwanja Ndege. He went to the place and found the 2nd appellant with his tuk tuk. He denied that he was involved in the robbery committed against the complainant.

18. Daniel Ume PW4 testified that he is a brother to the complainant. That on the evening of the material day he was called by his mother who informed him that there were gun shots at the shop of the complainant. He went there and he was informed that the complainant had been robbed by people who were in a tuk tuk christened "Scania". He knew the driver of the said tuk tuk, the 2nd appellant. He went to his house but he did not find him. He was given the 2nd appellant's phone number and called him. The 2nd appellant told him that he was at stage 44. He went there but did not find him. On the following day they found him at Kiwanja Ndege. He was questioned about the robbery and he denied any knowledge about it.

19. Inspector Josphat Mwoka PW7 testified that he conducted an identification parade on the 1 st appellant at Marsabit Police Station.That the suspect was picked by the complainant (PW5), Hamsa Galgalo PW2 and Hussein Boru PW3. The witness produced the parade identification form as exhibit, Pexh.2.

20. The scene of Crime Investigation Officer, PC Jillo PW8, testified that he visited the scene and took photographs. He also processed footage of a CCTV camera which was inside the shop and processed photos from the memory card of the camera. He produced a flash disc containing CCTV footage as exhibit, Pexh. 10.

21. The Investigating Officer, Sgt Robert Naibei PW9, told the court that he was deployed to investigate the case on 3/1/2021. That on 11/1/2021 he received information that one of the suspects was at Manyata Jillo. He proceeded to the place and arrested the suspect, the 1st appellant. That on 12/1/2021 the suspect led them to his house where they retrieved a blue jumper and a black veil (hijab), Pexh.4.

    An identification parade was then conducted. One cartridge of caliber 7.62 was recovered from the scene and was sent to the ballistic examiner. The same was examined by a ballistic expert CI Kenneth Chomba PW6 who found it to be a fired cartridge in caliber 7.62x39mm. PW6 prepared a ballistics report that he produced in court as exhibit, Pexh.7. The driver of the tuk tuk, the 2nd appellant, was also arrested. He charged the two appellants with the offences of robbery with violence.

Defence Case —

22. In his defence the 1 st Appellant stated in a sworn statement that he was working as a watchman for a person called Mohamed Chute. That on 2/1/2012 he was off duty and did not go to work. In the evening at 5 pm he went to attend a wedding for one Wario Calgallo. He left the wedding a 9 pm and went home. He was later arrested while at home. He was told that he had stolen a motor cycle yet the owner had given it to him. On 12/1/2021 an identification parade was organized. He was not informed of his rights during the parade. H said that he was the only person in a suit during the parade. He was the tallest and none of the other parade members were his size. That none of the participants changed their dressing. That there was only one parade and the three witnesses who took part in the parade pointed fingers at him. Further that on the same day he was escorted to his home at Manyatta Jillo. His house was locked. It was broken into and his wife's hijab taken from the house. Also picked from therein was a yellow jumper. On the following day he was charged with the offence.

23. The 1st Appellant further stated that he was not one of the robbers.

That he was not found with anything stolen from the complainant. That the blue jumper produced in court is not the one that was picked in his house. He said that the charges were a fabrication.

24. The 2nd Appellant stated in a sworn statement that he was the driver of the tuk tuk christened "Scania". That he used to work between 6 am and 6pm. That on the 3/3/2021 he heard a person called Wako Maliki alleging that he, the 2 nd appellant, had been involved in a robbery. That he had previously differed with the said person. He was arrested and taken to the police station. Wako Maliki and his wife went there and made the same accusations.

25. The 2nd Appellant further said that he did not know the 1st Appellant before they were charged. That his employer had called him on the material day but his phone was off because his battery was low.

Analysis and Determination —

26. This being a first appeal, the duty of the court is as was stated by the Court of Appeal in *Okeno vs R* [1972] EA 32:

> An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination . . . and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses... "

27. The trial magistrate in this case found that the ingredients of robbery were proved. That the appellants were at the time of the robbery identified by the complainant (PW5) and 2 other witnesses — Hamsa PW 2 and Hussein PW3.

28. The appellants however submitted that the ingredients of the offence of robbery with violence were not established as there was no evidence that the complainant was injured nor was there evidence that he was threatened.

29. The offence of robbery with violence is stipulated under sections 295 and 296 (2) of the *Penal Code*. The sections provide as follows:

Section 295-

> 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.

Section 296(2) -

> If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or 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, he shall be sentenced to death.

30. In the case of *Johana Ndungu vs. Republic* CRA 116/1995 the Court of Appeal set out the three ingredients that constitute the offence of robbery with violence and held thus:

> "In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

l) If the offender is armed with any dangerous or offensive weapon or instrument; or

2. If he is in company with one or more other person or persons; or

3. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

31. In the instant case there no doubt that the complainant was robbed by a gang of people. The robbery was witnessed by Hamsa PW2 and Hussein PW3. There was ample evidence that the robbers were more than two. There was evidence that they were armed with rifles and they shot in the air to scare members of the public. A spent cartridge was found at the scene. The fact that the robbers were more than one, that they were armed with rifles and that they shot in the air did establish the offence of robbery with violence. The submission by the appellants that the ingredients of the offence of robbery with violence were not met does not hold water.

32. The appellants submitted that the trial court relied on the evidence of a single identifying witness to convict them. This is however not the case as the court relied on the evidence of the complainant (PW5), Hamsa PW2 and Hussein PW3 as far as identification was concerned. It was therefore misleading for the appellants to argue that the trial court relied on the evidence of a single identifying witness to convict them when the court relied on the evidence of three witnesses.

33. The question that was before the trial court is whether the prosecution witnesses identified the 1st appellant to have been in the gang that robbed the complainant.

34. It is trite law that evidence of identification that takes place in difficult circumstances ought to be examined with a lot of care so a to ensure that there is no possibility of error in convicting an accused person on such evidence. In *Cleophas Otieno Wamunga v Republic* [19891 eKLR the Court of Appeal held thus:

> It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction....
>
> Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

35. st appellant before the date of the incident. The complainant stated that he identified the 1st appellant when he uncovered his headscarf during the robbery. He later on picked him at an identification parade.

The evidence in the instant case was that the robbers had covered their faces with masks and head scarves. It was the evidence of the three witnesses that they never knew the 1

36. It was further evidence of the complainant that the incident occurred at 5.45 pm. Hussein PW3 stated in his evidence-in-chief that the incident occurred at 8 pm but stated in cross-examination that it was at 7pm. Hamsa PW2 did not give the time when the incident took place but he said that the headlamps of his motor cycle were on which meant that the incident took place at night. I do not think that the complainant was telling the truth that the incident took place at 5.45 pm. The evidence of Hamsa and Hussein is more convincing that the incident took place after night fall. The question then is how the complainant identified the 1st appellant at night

37. The complainant did not tell the court how he was able to identify the 1st appellant at night. He did not tell the court what his source of light was that enabled him to identify the 1st appellant. The trial magistrate did not address the issue in his judgment. It was the duty of the trial magistrate to satisfy himself that there was enough light that enabled positive identification as was stated by the Court of Appeal in the case of *Maitanyi v Republic* (1986) eKLR that:

> " It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect.

38. And in the case of *John Muriithi Nyagah v Republic* [2014] eKLR, the same court held: -

> " In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."

39. In this case the complainant, PW5, did not adduce evidence as to the source of light that enabled him to identify the 1st appellant. The evidence that he identified the 1st appellant during the robbery was not reliable.

40. Hamsa PW2 testified that he managed to identify the 1st appellant in the headlights of his motor cycle when the lights shone on him. He said that the 1 st appellant had not covered his face when he saw him.

That he was wearing a blue jacket. That during the parade the appellant was wearing a black jacket. He saw his face and recalled { having seen him during the robbery. However, the witness did not tell the court the distance he was from the appellant when the headlights of the motor cycle shone on him. He did not tell the court the intensity of the motorcycle's lights nor did he say the length of time the appellant remained in his eye sight. He admitted in cross examination that he did not describe the appellant's features. The trial court did not consider all these deficiencies in the prosecution case. With all this in mind, there was no sufficient evidence that Hamsa, PW 2, identified the 1 st appellant during the robbery.

41. Hussein PW 3 on the other hand stated that when they saw the people, they were trying to hide their faces. That some had masks and scanzes. That he identified the 1st appellant among the people as he did not have a mask on. The witness however did not tell the court the source of light that enabled him to identify the 1st appellant. Whereas the witness said in his evidence-in-chief that the incident occurred at 8 pm, he changed this in cross-examination and said that it took place at 7 pm when "it was not too

dark". Does this then mean that he identified the 1st Appellant in some other unstated light because it was "not too dark?" What was this light? The evidence of the witness left doubt that he identified the 1st Appellant during the robbery.

42. The three witnesses managed to pick the 1st Appellant in an identification parade. The question was whether the parade was properly organized and whether that aspect of the evidence was reliable.

43. The purpose of holding an identification parade is meant to test the correctness of a witness's evidence on identification of a suspect — see *John Mwangi Kamau v republic* [2014] eKLR. It is therefore of utmost importance that identification parades are conducted in compliance with the law.

44. National Police Service Standing Orders, at Regulation 7 (5) (d) provide the following on how identification parades are to be conducted:

> the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her.

45. It further provides that:

> ...(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified; "

46. The 1st Appellant stated that he was the only person who was dressed in a suit during the parade. This was confirmed by the complainant, PW5, though the same was disputed by the officer who conducted the identification parade, PW7. If the 1st Appellant was the only one wearing a suit during the parade as stated by the complainant, then it would mean that the parade was not properly conducted. The members of the parade cannot have been of same general appearance when the 1st Appellant was the only one wearing a suit. Not much weight should therefore be placed on the identification parade.

47. Investigating officer testified that he found a blue jumper in the house of the 1st Appellant. He produced it in court as exhibit. The Complainant testified that the 1st Appellant was wearing a blue jumper during the incident. He identified a blue jumper when he testified in court but led no evidence as to whether it is the same one that was being won by the 1st Appellant and why he believed that it was the same one. Hamza PW2 similarly said that the 1st Appellant was wearing a blue jumper but he never identified such a jumper in court. The sum total of all this is that there was no evidence that the jumper found in the house of the 1st Appellant was the same one that was being won by the 1st Appellant during the robbery. Neither was there evidence that the veil found in his house is the same one that he was wearing during the robbery.

48. The trial magistrate in his judgment relied on the evidence of CCTV footage and said that:

> The CCTV footage shows a number of people more than one forcefully entering the complainant's shop and the customers scampering for safety. One of the robbers dressed in a blue jumper used a gun.

49. The evidence on CCTV footage was in the form of electronic evidence but the procedure for production into court of such evidence as set out in Section 106B of the *Evidence Act* was not complied with. The complainant also never identified the CCTV footage as having been captured in his house. There is no record that the CCTV footage was played in court, yet the trial magistrate made it a basis of his judgment. In view of the above, the evidence was of little probative value and ought to have been dismissed.

50. As regards the 2nd Appellant, the evidence against him was that his tuk tuk motor vehicle christened the "Scania" was identified to have been the one that ferried the robbers to the scene and was used for

escape from the scene. Whereas this could have been so, there is no guarantee that another person could not have painted his tuk tuk with similar inscription. There was thus no evidence that only the 2nd Appellant's tuktuk could have such inscription.The evidence against the 1st Appellant was wanting, insufficient and based on speculation.

51. The trial magistrate stated in his judgment that the Appellants' defences were mere denials that did not impeach the evidence adduced by the prosecution. I find that the learned trial magistrate did not sufficiently consider the defences offered by the Appellants in face of glaring deficiencies in the evidence tendered by the prosecution. If he would have done so, he would have come to the inevitable conclusion that the charge against the Appellants was not proved beyond reasonable doubt.

52. In view of the foregoing, it is my finding that the appeal is merited and is thus upheld. I therefore quash the conviction on the charge of robbery with violence and set aside the sentence imposed on the Appellants. I order that the Appellants be set at liberty forthwith unless lawfully held.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JANUARY 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Appellant — Present in person at Marsabit Law Courts

Court Assistant -Abdow

14 days R/A.