



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 94 OF 2019

MRINA KOMBO MRINA.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Hon. B. Koech

(SRM) on 17th May 2019 in Kwale Criminal Case No. 371 of 2016).

J U D G M E N T

Background

1. The Appellant, MRINA KOMBO MRINA alias HUSSEIN MRINA KOMBO and his co-accused MKALA DZILLA MWERO alias MOHAMED DZILLA, was charged with three counts of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code Laws of Kenya.
2. The first count was particularized that on the 20th day of January 2016 at about 0100hrs at Kasageru in Vigurungani location, Kinango sub-county of Kwale county jointly with others not before court while armed with AK47 riffle robbed Jacobo Mwendwa Muu of Kshs.1000 and immediately before or immediately after the time of the said robbery used actual violence to the said Jacobo Mwendwa Muu.
3. The second count was particularized that on 20th day of January, 2016 at about 0100hrs at Vigurungani in Vigurungani location Kinango sub-county within Kwale county jointly and with others not before the court and while armed with dangerous weapons namely AK47 riffles robbed Kamanza Rajab Beja of Kshs.150 and immediately before or immediately after the time of the said robbery threatened to use actual violence to the said Kamanza Rajab Beja.
4. The third count was particularized that on the 20th day of January 2016 at about 0100hrs at Vigurungani in Vigurungani location Kinango sub-county within Kwale County jointly with others not before court and while armed with dangerous weapons namely AK47 riffles robbed Tsuma Chilolwa was Chitumbua of Kshs.200 and immediately before or immediately after the time of the said robbery threatened to use actual violence to the said Tsumo Chilolwa Chitumbua.
5. The Appellant pleaded not guilty. The trial magistrate considered the sworn evidence of the eight prosecution witnesses and the sworn evidence of the Appellant. The trial magistrate then convicted the Appellant who was sentenced to death in count 1 while the sentence in count 2 and 3 were held in abeyance.
6. The Appellant was aggrieved by the conviction and sentence and he preferred an appeal herein on the following amended grounds of appeal:-

- a) That the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant to suffer death without considering that it was unlawful because the Supreme Court declared the same as unconstitutional.
- b) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the circumstances that prevailed at the alleged scene of crime were not conducive for proper identification.
- c) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the alleged parade conducted was unlawful because Chapter 46 of the Force Standing Orders was violated.

d) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering that the confession statement was unlawfully conducted.

e) That the learned trial magistrate erred in law and fact by convicting the Appellant without considering reasonable defence.

Prosecution Case

7. PW1, Jacob Mwendwa, was heading to Mwakijembe from Samburu driving KBB 483Z Canter. While at Vigurugani, he saw a torch waving and he slowed down because the place had bumps. There were two torches. Next to the culvert, he saw five people who had police uniform. PW1 said that he was suspicious when he stopped because he has never seen a police with a beard. The robber on the left shot at them and the window of the canter broke. They went to PW1's side and told him to get out. He fell on the ground and was bleeding. When PW1 was lying down, they tried to open the left door of the canter. They threatened to kill PW1 and his two colleagues if he did not give them money. They searched PW1 and got Kshs. 1000. PW1 was told not to lift his head. The robbers took PW1's colleagues behind the lorry and when they came back, they were told to lie next to PW1 and not to lift their heads. After 10 minutes, a motorcycle came and stopped behind them and asked why they were causing obstruction. PW1 realised that the robbers had left. PW1 was taken to Vigurugani Hospital because he was bleeding. He said that he saw the people who attacked him because they had torches. He recognized three of them with the Appellant and the 2nd Accused being part of them. He identified the Appellant and the 2nd Accused at the police station. The Appellant had a gun which was fired from the left side. The 2nd Accused is the one who searched PW1 and took Kshs. 1000 and his license.

8. PW2, Kamanza Rajab, works as a loader. In the company of Jacom Mwendwa, the driver and Tsuma Chinduro with some other young men were in a canter travelling from Samburu at around 10 pm heading to Mwakijembe market. Between Vigurugani and Kasageni, there was a culvert bridge. The driver turned on full lights and PW2 saw five people wearing jungle uniform. This was around midnight. The driver stopped and persons in uniform and one with a gun were standing in the middle of the road. The canter stopped and immediately on the conductor side, one opened it and shot a gun from that side which injured the driver. PW2 was seated next to the driver and saw the driver bleeding. The robbers ordered them to get out and lie on the ground. The driver was ordered to switch off the headlights of the motor vehicle before they lied down. The robbers searched them and took Kshs. 150 then left on foot. When the lights were full, PW2 managed to see the Appellant and the 2nd Accused. A motorbike assisted them to go to the police station. The driver was injured on the head and needed medical attention. PW2's other colleagues who were in the canter ran away. PW2 was informed that the suspects had been arrested and was asked to go and identify them. PW2 identified the Appellant in the first parade and the 2nd Accused in the second parade.

9. PW3, Tsuma Chiloto, a turn boy, left Samburu for Mwakijembe in a lorry with Jacob and Rajab at the front and five other people at the back of the lorry. Between Vigurugani and Mwakijembe, PW3 saw five people who were in jungle green uniform like police officers. It was next to a culvert and the person who had a gun stopped the motor vehicle. PW3 then heard a gunshot and saw the driver bleeding on the head. The driver was ordered to get out and he was told to lie down and remove what was there. The motor vehicle still had full lights and PW3 clearly saw the Appellant who had a gun and the 2nd Accused who was searching the driver. The 2nd Accused also searched PW3 and took Kshs. 200. The Appellant then asked PW3 to open the back of the lorry, thereafter PW3 and the rest were ordered to lie down and not to lift their heads. The robbers took five sodas and when they left, PW3 and his colleagues ran to the police station for help. The driver had gone to seek for help because he was injured and bleeding. On 2.4.2016, he was called to Kinango Police Station in the company of his colleagues Jacob and Rajab where he was asked to identify the people who attacked them. PW3 went to the identification room alone. He managed to identify the Appellant in the first parade and the 2nd Accused in the second parade.

10. PW4, No. 233638 Chief Inspector Pius Chemwor, was instructed on 2.4.2016 by the investigating officer to conduct the identification parade of two suspects who were charged with robbery with violence. There were three witnesses present who positively identified the first suspect. PW4 had placed the Appellant at parade ground with eight members including the suspect making nine members. The Appellant had chosen between 1 and 2, PW1 identified him by touching him on the right shoulder. The Appellant had no comment. When he had finished, PW4 took PW1 to the crime office. PW4 called PW3, Tsuma Chloto, and the Appellant chose to remain in the same place where he was identified by PW3. For the 3rd witness, the Appellant chose to remain on the same point between 1 and 2. The Appellant was identified by touching on the shoulder. The Appellant then said that he was satisfied with how the parade was conducted. PW4 said that for the 2nd Accused, there were eight members in the parade with the 2nd Accused being the 9th and he was placed between the 5th and the 6th. PW1 identified the 2nd Accused by touching him on the right shoulder. PW1 was then taken to the CID office. The 2nd Accused was satisfied. PW4 stated that PW2 Tsuma Chilolo did not identify the 2nd Accused and the 2nd Accused was between the 5th and 6th person in the parade. PW2 was taken to the Deputy OCS office. PW4 said that for PW3, the 2nd Accused chose to be between the 3rd and 4th persons in the lineup. He was identified and the 2nd Accused said that he was satisfied with the parade. PW4 produced the identification parade forms.

11. PW5, Titus Kamu, the Clinical Officer from Kinango Sub-County Hospital, treated PW1 on 23/1/2016 who had a cut wound on the left temporal part of the head and was bleeding. PW1 went to the hospital with the complaint that he had been attacked by people known to him PW1's clothes had blood, his shirt was torn and he had pain on his body. PW5 said that PW4 went to Vigurugani Dispensary for first aid before he was referred to Kinango Sub-county hospital. He produced a P3 form in respect to the same.

12. PW6, No. 235225 Inspector Kenneth Chomba, attached to DCI Nairobi working in the forensic section presented to court a Ballistic Report prepared by his colleague Alex Chirchir whom he had worked with for six years. The items for examination that were taken to the laboratory on 7/4/2016 by No. 233161 Inspector John Mungi were a cartridge case before court which was accompanied with duly filled memo form. Inspector Joseph Mungi wanted to ascertain if Exhibit A1 cartridge was ammunition and any other relevant information. After examination of the cartridge case, the following case came up. Exhibit A1 was a firing cartridge case in caliber 7.62×39 MM. Microscopic examination revealed that the cartridge case A1 was fired from AK47 Rifle. Further, examination with other crime cartridge cases in our laboratory revealed that Exhibit A1 i.e. the firearm use was involved in other crimes. The firearm used was an AK47 rifle in all the cases. PW6 produced spent cartridge MFI 2, Exhibit Memo MFI 3 and Ballistic Report MFI 4 as exhibits.

13. PW7, No. 42891 Corporal Adan Roba, on 20.1.2016, he was at Kinango office and got information from Vigurugani that there was an

armed robbery the night before that day that a lorry was attacked by 4 to 5 men at 1.00 am. The lorry was heading to Mwakijembe from Vigurungani. PW7 said that after the report, they started investigations. Another robbery was reported at Kambinga trading centre on 2.2.2016 where one of the victims was killed, they stole from others and a phone was taken from a lady which the 1st Accused tried to transfer money from the phone to mobile phone number 0714538115 which was registered in the name of Mbodze Koru. PW7 said that Mbodze Koru was arrested and she said that the 1st Accused who is a close relative had registered the line in her name. PW7 and his team started searching for Mrina Kombo who was arrested at midnight in his home. PW7 said that when the 1st Accused was arrested, he was interviewed and he said that he was indeed involved in the two robberies. The 1st Accused then led them to the 2nd Accused's home. The 2nd Accused was arrested and they proceeded to Kambinga to arrest the other robbers involve in the two robberies and who had been mentioned. An identification parade was conducted by CIP Chemolo where three complainants in this case managed to identify the two accused persons as among those who had been robbed while going to Mwakijembe from Vigurungani. After the identification parade, PW7 recorded further statements from complainants who told him that they identified hem because the full lights of the lorry was on and that is why the accused were charged with the offence before court. PW7 and his team took photos of the motor vehicle at scene as photographs MFI 6 (a) (b) (c), certificate of enlargement MFI 6 (d). PW7 said that while coming to court, the 1st Accused tried to take a gun from one of the police officers called Corporal Talam. He was convicted and he is serving sentence for the offence.

14. PW8, No. 60026 Corporal Emanuel Kondo from CID Crime Scene Unit Kwale, Gazette Notice No. 5353 of 31/8/2001. On 17.1.2018 at around 11 pm while in Diani. PW8 was given a memory card accompanied with Exhibit Memo from DCIO Kinango Corporal Adan Rioba. The memory card had photos of the scene of crime which PW8 was to process and print. The photos were for a lorry KBP 483Z yellow in colour. There were three photos from the side view and the driver's side roof had a bullet hole. He prepared the photos and produced them as exhibits before court. The vehicle was part of the exhibit. PW8 then prepared a certificate of photography. The photos were produced as exhibits 6 (a), (b) and (c). The certificate of enlargement was exhibit PW6 (d).

Defence Case

15. DW1, Mrina Kombo Mrina, stated that he was arrested in his house at 5.00am by police officers where he was taken to Kinango Police Station and booked on OB 4/21/3/2016 at around 6.40 am. He underwent an identification parade and stated that he did not need anyone present for him. All the complainants positively identified him.

16. DW2, Mkalla Dzilla Mwero, stated that he was arrested at around 1.00am and told the police that he knew Mrina Kombo but only as the husband to his niece. He underwent an identification parade with eight people and he was identified by being touched by two people and the other one failed to identify him. When they were being taken to court, the Appellant who was handcuffed with him tried to escape from a moving vehicle at Marereni Bridge. DW2 was injured in the process and taken to Kwale hospital.

Appellant's Submissions

17. The Appellant submits that he was prejudiced for lack of legal representation. Under Article 50(2) (g) & (h) of the Constitution of Kenya 2010, the trial court was under a mandatory and constitutional duty to have informed the Appellant and promptly so of their right to legal representation by an advocate of their choice or to apply to be assigned an advocate at the state's expense.

18. The Appellant submits that the trial court erred in both law and fact in imposing the death sentence in its mandatory nature without exercising discretion, which position was declared unconstitutional in the Supreme Court decision of *Francis Karioko Muruatetu & Another v Republic* and was equally adopted in the cases of *William Okungu Kittiny v Republic* [2018] eKLR & *Cyprian Ingira Ikobwa v Republic* [2019] eKLR which are relevant to the offence of robbery with violence.

19. The Appellant submits that the circumstances that prevailed at the time of the alleged robbery, were not conducive for a proper visual identification of the alleged robber/assailants so as to aid a subsequent & successful identification parade. The Appellant further submits that although the trial magistrate made reference to the Court of Appeal case of *Nathan Kamau Mugwe v Republic* (Criminal Appeal No. 63 of 2008) to the effect that failure to give the description to the police does not invalidate the results of a subsequent identification parade. The Appellant submits that the Ho. Learned Magistrate misinterpreted the circumstances of that case compared to the present case. In the present case, it was critical that the complainants ought to have tendered a description of the assailants to the police as a second line of inquiry and prior to the botched identification parade. This was the holding in the Court of Appeal case of *Maitanyi v Republic* [1986] eKLR.

20. The Appellant submits by citing *Mistaken Identification: The Eye Witness Psychology and the Law* (1995) the uthors B. L. Cuttler & S. D. Penrod who have opined at page 101-102 that- The Presence of a Weapon- several investigators have posited the presence of a weapon during a crime attracts the attention of the witness to the weapon leaving less attention to the perpetrators' facial and physical characteristics. The phenomenon is often referred to as 'Weapon Focus'. The Appellant further submits by citing Augustine Njoroge Ritho alias Chabah & Another v Republic, Criminal Appeal No. 99 of 1986 where the court of Appeal held:-

"...they must have been more worried about their security and self-preservation as opposed to observing the Appellant's with a view of identifying them subsequently."

21. The Appellant submits that there was a clear disconnect between the evidence of the primary prosecution witnesses with regard to identification of the vehicle which was allegedly been used by PW1, PW2 and PW3 at the time of the alleged robbery. The disconnect was further magnified by PW8 who stated that he was given a memory card accompanied with an exhibit memo, and he went on to produce the photos allegedly saved in the memory card which was never shown to the court and neither was it marked and produced as an exhibit. By the close of the prosecution case, the court was never shown the said vehicle and neither were the primary prosecution witnesses led to identify the said vehicles through photographs and the same was not possible since the photos were developed on 18th January 2018 while PW1, PW2 and PW3 testified on 30.03.2017 and 03.08.2017.

Respondent's Submissions

22. The Prosecution submits that the critical ingredients forming the offence of robbery with violence were stated in Criminal Appeal No. 163 of 2016, *Kurera Chilo Kuto v Republic* as follows that theft is a central element in robbery with violence that must be proved by the prosecution. The Respondent further submits that the other elements of robbery with violence were elaborated by the Court of Appeal in *Ganzi & 2 Others v Republic* [2005] 1 KLR and in *Johanna Ndungu v Republic*, Cr. App. No. 116 of 2005 (unreported) as:-

1. *If the offender is armed with any dangerous or offensive weapon or instrument, or*
2. *If he is in the 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 other person.*

23. The Respondent submits that on the contrary, proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under Section 296 (2) of the Penal Code as was held in *Oluoch v Republic* (1985) KLR 549.

24. The Respondent submits that facts reveal that PW1, PW2 and PW3 were attacked by 5 people dressed in police uniform. It is also clear that the said persons were armed with dangerous weapons namely a gun which they used during the course of the said robbery to inflict violence upon PW1 as evidenced by the P3 form tendered as exhibit and to threaten PW2 and PW3 with.

25. The Respondent submits that the prosecution witnesses did not give a description of the attackers to the police before the identification parade, in *John Mwangi Kamau v Republic* where the court of Appeal held that failure to describe the person to be identified does not necessarily render an otherwise valid parade worthless.

26. The Respondent submits that the trial court in its judgment while warning itself of the dangers of visual identification and bearing in mind the legal threshold regarding the same as espoused in the Court of Appeal decision in *Nzaro v Republic* (1991) found that the Appellant had been properly identified.

27. The Respondent submits that it is apparent from the evidence of PW1, PW2 and PW3 that the attackers engaged them in conversation when they were ransacking them for money and afterwards took PW2 and PW3 to the back of the canter so as to further steal the sugar that was inside. It is therefore not true that the prosecution witnesses were laboring under the phenomenon referred to as weapon focus by the Appellants. None of the prosecution witnesses alluded to the fact that their attention was shifted to the gun wielding by the attackers and neither did the Appellants raise the same in their defense. The same is an afterthought.

28. The Respondent submits on the issue of the charge sheet being fatally defective that it is true that the charge sheet as drafted was bad for duplicity as it charged the Appellants with the offence of robbery with violence contrary to section 295 as read with Section 296 (2). However, the Court of Appeal in *Paul Katana Njuguna v Republic* (2016) states that :-

'...such a defect is not fatal and can be cured by this court under Section 382 of the Criminal Procedure Code. No failure of justice occurred to the appellants as there was no risk of confusion in their minds as to the charge framed and evidence presented.'

29. The Respondent submits on whether failure to provide the Appellants with legal counsel was an infringement of their rights by citing Criminal Appeal No. 27 of 2017, *Leonard Kipkemoi v Republic* [2018] eKLR where the court held that the right to legal representation is not open ended and only kicks in when substantial injustice would occur.

Analysis and Determination

30. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

31. After considering the grounds of appeal Records of trial courts submissions and circumstances of the case, issues for determination are as follows:-

- i) Whether the death sentence was lawful.
- ii) Whether circumstances that prevailed at the alleged scene of crime were conducive for proper identification and whether parade was properly conducted.

iii) Whether appellant's reasonable defence was considered by court.

iv) Whether Article 50(2) (g) & (h) were violated.

Whether the death sentence was lawful

32. The Appellant stated in their first ground of appeal that the learned trial magistrate erred in law and in fact by convicting and sentencing the Appellant to suffer death without considering that it was unlawful because the Supreme Court declared the same as unconstitutional. However, this is a misinterpretation of the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic [2017] eKLR*. What the Court held was that the mandatory nature of the death sentence is unconstitutional and that the court has the discretion to impose a sentence other than death. However, the death sentence remains in the Penal Code as the sentence for robbery with violence and murder and has not been repealed. Following guidelines issued by the Supreme Court on 6th July 2021, it was clarified that principles in Muruatetu applied to murder cases only.

Whether circumstances that prevailed at the alleged scene of crime were conducive for proper identification

33. Evidence on identification must be interrogated with a lot of caution to ensure that the identification did not leave any room for a possibility of mistaken identity. The court of appeal emphasized this position in the case of *Wamunga V Republic, [1989] KLR 424* when it stated as follows:

“It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction.”

34. In *Kiarie V Republic, [1984] KLR 739*, the same court gave the rationale for the need to properly assess and weigh the evidence on alleged identification or recognition before making it the basis for a conviction. The court stated as follows:-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

35. The complainants state that they were attacked by the Appellants past midnight at Vigurungani. The complainants were in lorries but they were attacked at different times. PW1 stated that he was able to identify the Appellant because he was on his side. On cross examination of PW1 by the 2nd Accused, PW1 stated that it was not very dark as the lights from the motor vehicle were still on. Therefore, he was able to clearly see his face. PW1 states that when they were stopped, he was suspicious because he had never seen a police with a beard. PW1 stated that during the identification parade, the Appellant was not part of the first lineup of the identification but the 2nd Accused was identified in the 2nd parade. PW2 stated that the Appellant had a long beard during the robbery. The driver of the canter switched to full lights when the vehicle was stopped which helped him in seeing who he was. He identified the 1st Accused in the first parade and the 2nd Accused in the 2nd parade. PW3 states that the vehicle had full lights when they were attacked between Vigurungani and Mwakijembe. PW3 also interacted with the 1st Accused though shortly when he was asked to go and open the rear door of the canter. During the identification parade, PW3 was able to identify the 1st Accused the Appellant herein in the first parade and the 2nd Accused in the second parade. According to the testimonies, the Appellant and the 2nd Accused also had torches.

36. I am therefore satisfied that the evidence regarding identification of the appellants was clear. My finding is that the learned magistrate carefully interrogated the evidence on identification before coming up with the conclusion that the Appellants were positively identified.

Whether the Appellant's defence was considered by the trial court.

37. The Appellant submitted that the arrest of the Appellant was a mystery and it was never demonstrated by the prosecution by production of hard evidence, it was all based on hearsay evidence. The trial court considered the Appellant's defence and said it was a mere denial and that the Appellant did not explain where he was on 20/01/2018. The trial court went further to state that the Appellant's defence was an afterthought. I am satisfied with the position of the trial court on the Appellant's defence. After the prosecution established that the Appellant committed the offence on the nights of 20.01.2018, the Appellant failed to demonstrate to court where he was on the said night.

Whether Article 50(2)(g) & (h) of the Constitution of Kenya 2010 was violated

38. During the identification parade, the Appellant was informed that he could have an advocate but he declined. This issue was also raised in the submissions but not in the grounds of appeal.

39. In conclusion, I find that all the ingredients of robbery with violence have been met. The Appellants who were in the company of others used force in robbing the complainants and they used a dangerous weapon which is an AK47. As a result, the complainants were injured in the process. For instance, the P3 Form for PW1 is an indication of the said injury. This was confirmed by PW5, Titus Kamau, and the Clinical Officer from Kinango Sub-County Hospital who treated PW1. The Appellants' grounds of appeal that relate to their conviction are without merit, and therefore the conviction was safe and is hereby upheld.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 15TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Ms. Karanja for Respondent

Mr. Chacha for Appellant

Hon. Lady Justice A. Ong'injo

Judge