



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.4 OF 2020**

(An Appeal arising out of the conviction and sentence of Hon. Z. Abdul (SRM)

delivered on 4<sup>th</sup> December 2019 in Nairobi Criminal Case No.1264 of 2014)

**BERNARD KATOO MUTINDA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Bernard Katoo Mutinda, was charged alongside another in Count I with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 30<sup>th</sup> July 2014, at International Life House along Mama Ngina Street in Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely pistols, robbed Amos Thuo Ndugire of Kshs.460,000 cash, one mobile phone IMEI 352394066996240 make Nokia Lumia 520 valued at Kshs.18,000, all items of total value of Kshs.478,000, and the time of such robbery threatened to use actual violence to the said AMOS THUO NDUGIRE. The Appellant was charged in Count II with the offence of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars of the offence were that on 1<sup>st</sup> September 2014, at Samba Restaurant within Nairobi County, otherwise than in the course of stealing, the Appellant dishonestly retained one mobile phone IMEI 352394066996240 make Nokia Lumia 520 valued at Kshs.18,000 the property of AMOS THUO NDUGIRE for his own benefit and having reason to believe it to be stolen.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged in count 1 and sentenced to serve forty-five (45) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to acknowledge that the identification parade was not properly conducted, thereby relying on unsafe evidence of identification to convict him. He was of the view that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial court failed to consider his defence and relied on the evidence of his co-accused in arriving at its decision to convict him. He opined that the prosecution's case was inconsistent and full of contradictions. He asserted that his right to a fair trial was violated by the trial court for failing to inform him of his right to have legal representation. The Appellant was further aggrieved that he was convicted on the basis of the trial magistrate's judgment failed to meet the requirements of Section 169(1) & (2) of the Criminal Procedure Code. He was of the view that the sentence meted by the trial court was harsh and excessive in the circumstances. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. This court also heard oral submission made by Mr. Mutiso for the Appellant and Ms. Nyauncho for the State. Mr. Mutiso submitted that PW1 testified that he had positively identified the Appellant. PW1 stated that he identified the Appellant by a mark on his head. He however did not give a description of his assailant in the first report that he made to the police. Counsel for the Appellant averred that the Appellant was exposed to the complainant at the police station prior to the holding of the identification parade. Further, the Appellant stated that the identification parade consisted of four people as opposed to the required minimum eight. He stated that the identification parade was not conducted in accordance with the Police Force Standing Orders. To this end, he cited the case of Francis Kariuki vs. R [2001] eKLR. He asserted that the complainant recorded a further statement with the police describing the Appellant after the identification parade had already been conducted. He maintained that the evidence of identification was insufficient to sustain a conviction.

Counsel for the Appellant further submitted that there were glaring gaps in the evidence adduced by the prosecution witnesses. He stated that the investigating officer failed to appear before the trial court to adduce evidence. He averred that PW2 told the court that he recovered the complainant's mobile phone from the Appellant at the time of his arrest. He asserted that the mobile phone that was recovered from the Appellant was not the same phone that was alleged to have been stolen from the complainant. He stated that the two phones had different IMEI numbers. He pointed out that the evidence by the prosecution in support of the charge contradicted the particulars in the charge sheet. He relied on the case of Paul Muchemi Weru vs. R [2018] eKLR. He submitted that the prosecution failed to discharge its burden of proof in the present case. He faulted the trial court for shifting the burden of proof from the prosecution to the Appellant. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the complainant had just withdrawn money from a bank when he was accosted by four people. They were armed with a pistol. They bundled him into a car and drove to Rock City where he was robbed and then abandoned. She stated that while in the car, the complainant was physically assaulted. She averred that the Appellant was positively identified by the complainant in an identification parade conducted at Central Police Station. She asserted that the complainant was able to identify the Appellant by a scar on the back of his head. She pointed out that the Appellant was arrested while in possession of the stolen mobile phone. She submitted that the IMEI number quoted on the charge sheet matched the IMEI number of the phone that was recovered from the Appellant. She stated that complainant produced the receipt for purchase of the said phone as well as the packaging box that the phone was packaged. She was of the view that the doctrine of recent possession was properly applied in this case.

Learned State Counsel further submitted that the Appellant was not prejudiced by the fact that he did not have legal representation. She stated that the Appellant actively participated in the trial and even cross-examined the prosecution witnesses. She was of the view that all the elements of the offence of robbery with violence were established by the prosecution to the required standard of proof. She averred that the evidence of identification was sufficient to sustain a conviction. She stated that the robbery took place in broad daylight. The complainant spent considerable time with the assailants and was able to identify the Appellant as a member of the gang that robbed him. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Amos Thuo Ndigire, told the court that on 30<sup>th</sup> July 2014, he went to the Co-operative Bank of Kenya branch along Aga Khan Walk to withdraw cash. He withdrew Kshs.132,000 and Kshs.16,000 from two separate accounts. He then proceeded to Family Bank where he withdrew Kshs.327,900. He produced into evidence bank statements pertaining to the three bank accounts. In total, he withdrew the sum of Kshs.475,900. As he was walking towards International Life House along Mama Ngina Street, he met four men. One of them approached him. He identified himself as a member of the Kenya Air Force. They asked him for his national identity card. He Obligated. The men then told him that they were looking for persons suspected to be in possession of guns and grenades. They asked him to get into their car for further questioning.

PW1 stated that the car was a Toyota Raum, grey in colour. He sat at the back seat between two of the men. They handcuffed him immediately. One of the men started driving the car towards the direction of Mwalimu Sacco. The men told him to lie facing down. They slapped him and threatened him using a metallic object which was placed on his head. They drove the vehicle to Rock City in Kiambu County, where he was released and instructed to walk away without looking back. They stole from him the entire sum of Kshs.475,900 as well as his mobile phone make Nokia Lumia 520 IMEI No.352394066996241.

PW1 reported the robbery at Central Police Station. He stated that the phone that was recovered from the Appellant was his. An identification parade was conducted where he was able to identify the Appellant as one of his assailants. He pointed out that it was the Appellant who slapped him. He testified that the Appellant had a scar on the back of his head. He saw the scar as he was in the car, as the men were discussing where to abandon him. Upon cross-examination, PW1 stated that the robbery incident occurred in broad daylight. He admitted that he did not give a description of his assailants in the first report that he made to the police, other than that three of the men were short and one was tall.

PW2, PC Charles Kilonzo, was the arresting officer. He was attached to the Criminal Investigations Directorate at Central Police Station. He stated that the complainant reported the robbery on 30<sup>th</sup> July 2014. He arrested the Appellant on 1<sup>st</sup> September 2014 at a restaurant known as Samba Restaurant located on Moi Avenue near the Kenya Cinema Building. The Appellant was arrested in possession of the phone that was allegedly stolen from the complainant. PW2 stated that the Appellant explained that he obtained the said mobile phone from a person known as Benson Mutie (The 2<sup>nd</sup> Accused Person before the trial court). The Appellant led the police to the arrest of the 2<sup>nd</sup> Accused Person. He was arrested at his phone repair shop known as Ramogi Studio. PW2 told the court that the said 2<sup>nd</sup> Accused Person admitted to having given the Appellant the said phone.

PW3, IP Jackson Nzau, conducted the identification parade at Central Police Station. He stated that the parade comprised of 8 men who were of similar appearance and age to the Appellant. The Appellant was the 9<sup>th</sup> person. He explained to the Appellant that he was to participate in an identification parade. The Appellant opted to stand between the 5<sup>th</sup> and 6<sup>th</sup> Person. PW3 stated that the complainant identified the Appellant from the lineup. Upon cross-examination, PW3 testified that he conducted a second identification parade with regard to the 2<sup>nd</sup> Accused Person. However, the complainant did not identify the 2<sup>nd</sup> Accused Person from the said parade.

PW4, PC Andrew Njagi, was the investigating officer. He stated that he took over the conduct of investigations from Sgt. Raundu who had since been transferred to Wajir. The Appellant and the 2<sup>nd</sup> Accused Person were already in custody. He produced into evidence exhibits obtained by Sgt. Raundu including copies of the complainant's bank statements, a receipt belonging to the complainant for the purchase of recovered mobile phone, the recovered mobile phone IMEI No.35239406699241, as well as the identification parade forms.

The Appellant, when put on his defence, gave sworn evidence. He stated that he sold clothes for a living. On 1<sup>st</sup> September 2014, he went to work as usually the norm. At about 4.00 pm, he received a call from a customer who asked to meet him at Samba

Restaurant. While at the restaurant, two police officers came and arrested him. He was taken to Central Police Station. The police officers informed him that he was facing robbery charges. A short man came to the police station and identified himself as the complainant. The following day, an identification parade was conducted. The complainant identified him as his assailant. The Appellant stated that he objected to the identification parade being conducted since he had been exposed to the complainant. However, the police ignored his objections.

The Appellant further averred that the phone that was recovered from him was not the same phone that was produced in court. He stated that the phone that was recovered from him had a different IMEI number from the phone alleged to have been stolen from the complainant. He denied the charge against him. Upon cross-examination, the Appellant stated that the 2<sup>nd</sup> Accused Person was well known to him. They came from the same home area. They also schooled together. He denied PW2's assertions that he was the one who led to the arrest of the 2<sup>nd</sup> Accused Person. He was categorical that he was the owner of the phone that was recovered from him.

DW2, Benson Mutie, was the 2<sup>nd</sup> Accused Person. He stated that he repaired electronic equipment for a living. He told the court that he was arrested at his place of work on 2<sup>nd</sup> September 2014 by police officers from Central Police Station. He was taken to the said police station where an identification parade was conducted. The complainant however, did not identify him. He denied being part of the gang that robbed the complainant. He testified that the Appellant was well known to him since they had gone to the same school.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of Gabriel Kamau Njoroge vs Republic [1987] eKLR stated this on the duty of the first Appellate court:

*“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”*

In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. It was evident from the facts of the case that the prosecution relied on the evidence of identification and the application of the doctrine of recent possession to secure the conviction of the Appellant. PW1 was the only identifying witness. It was his testimony that he had identified the Appellant in an identification parade conducted by PW3. PW1 stated that the robbery took place in broad daylight, though he did not specify the exact time of the robbery. He told the court that on the material day, he withdrew a sum of KShs.475,900 from three different bank accounts located at Co-operative Bank of Kenya and Family Bank Ltd. The money was for purposes of paying school fees.

As PW1 was walking towards International Life House along Mama Ngina Street, he met four men who identified themselves as members of the Kenya Air Force. They asked him to enter their car for questioning as they were looking for suspects in possession of guns and grenades. Immediately he entered their car, they handcuffed him. They ordered him to lie facing down at the back seat. He tried to face up but one of men slapped him on his back. They placed a metal rod on his head and threatened to harm him. They drove the car to Rock City in Kiambu where they abandoned him. He was ordered to walk away from the place he had been dropped without looking back. PW1 stated that he was not able to identify the registration number of the assailant's vehicle.

The Appellant was arrested one month after the robbery incident. That was on 1<sup>st</sup> September 2019. An identification parade was conducted by PW3 the following day. PW1 testified that he was able to identify the Appellant from the parade. He stated that the Appellant was the one who slapped him while inside the car. He told the court that the Appellant was of a slender physique and had a scar on the back of his head. Upon cross-examination, PW1 stated that he did not give this description of the Appellant in the initial and first report that he made to the police. He stated that he only told the police that three of his assailants were short one was tall. If PW1 really identified the Appellant by the scar at the back of his head, why did he not give this description of the Appellant in the first report made to the police?

This court is of the opinion that PW1 did not positively identify his assailants during the robbery. He was exposed to the assailants for a short period of time before he was bundled into their car. Immediately after entering the car, they handcuffed him and ordered him to lie face down. When he tried to look up, one of the assailants slapped him on his back. They placed a metal rod on his head and threatened him to harm him. The assailants abandoned him at Rock City in Kiambu County. They ordered him to walk away without looking back. In these hectic circumstances, and the fact that the Appellant was obviously in fear of losing his life, this court is not convinced that PW1 was able to positively identify and put in memory the physical features of his assailants. While in the car, he was facing down and was therefore not in a position to have a good look at his assailants.

As stated earlier in this judgment, PW1 did not give a detailed description of his assailants in the first report that he made to the police. He told the police that three of his assailants were short and one was tall. This was a general rather than a specific description. This court would have been reassured that PW1 had positively identified the Appellant if he had given such detailed description, including the alleged scar on the back of the head of the Appellant in the first report that he made to the police. The subsequent identification parade that was conducted by the police was not useful in the absence of an initial description given by complainant in the first report that he made to the police. PW1 stated that he was able to pick out the Appellant from the identification parade since he had a scar at the back of his head. He however did not give this description of the Appellant in the first report he made to the police. This raises doubt whether indeed PW1 positively identified his assailants on the day of the robbery. This court therefore holds that the evidence of identification was not watertight as to exclude the possibility of mistaken identity or error.

Further, the Appellant in his defence raised the issue of the manner in which the identification parade was conducted. He told the court that he was exposed to the complainant the day before the identification parade was conducted. The trial court in dismissing the Appellant's defence stated that the said defence was an afterthought since the Appellant failed to raise the said issue during PW1's cross-examination. This court has however perused the trial court record and noted that the Appellant did raise his concern with regard to having been exposed to the complainant prior to the identification parade being conducted, during PW1's cross-examination. The Appellant was consistent in stating that the complainant was exposed to him prior to the conduct of the identification parade throughout the trial.

In **Kiilu & Another vs. Republic [2005] 1 KLR 174**, the Court of Appeal held thus:

JUDGE