



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS NOS. 98 & 99 OF 2014

RASHID YUSUF WANJALA.....1ST APPELLANT

SIMON MBUTHIA WANJIKU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of J. Wekesa, Ag. Senior Resident Magistrate,

Murang'a in Criminal Case No. 756 of 2011 dated 18th June 2014]

JUDGMENT

1. The appellants were convicted on two counts of *robbery with violence* contrary to section 296 (2) of the **Penal Code**; and, *possession of an imitation firearm* contrary to section 34 (3) of the **Firearms Act**.
2. They were sentenced to *death* on the first count. The punishment for the other count was held in *abeyance*.
3. The particulars of the first count were-

On the night of 6th May 2011 at Kiharu Estate of Murang'a Township within Murang'a County jointly while armed with offensive weapons namely pangas, somali sword and an imitation firearm, robbed Norman Thuo Kimari of a Samsung DVD Machine and a pair of safari boot shoes all valued at Kshs 9,000 and immediately after the time of such robbery used actual violence against the said Norman Thuo Kimari.

4. The particulars of the second count were that on the same date and place they were jointly in possession of an imitation firearm.
5. The appellants lodged separate appeals which were consolidated on 10th July 2017.
6. The grounds in the consolidated appeals can be compressed into six: Firstly, that both appellants were not positively identified either at the scene or in the subsequent police parades; secondly, that there was no nexus between the exhibits and the appellants; thirdly, that the initial police report never implicated the appellants; fourthly, that their rights to a fair trial were violated; fifthly, that their defence was not taken into account; and, lastly, that the charges were not proved beyond reasonable doubt.

7. The 1st appellant acted in person. He relied wholly on his home-made submissions filed on 17th September 2020. Learned counsel for the 2nd appellant, *Mr. Ndumu Kimani*, also relied entirely on his written submissions dated 30th April 2020.
8. The core of the combined submissions is that the robbery occurred in the the night; that there was insufficient lighting; and, that the complainant (PW2) and his wife (PW3) may have been drugged. The appellants contend that the identification parades were unprocedural or worthless. They also disputed any connection with the exhibits produced at the trial. They submitted further that the learned trial magistrate disregarded their *alibis*.
9. Lastly, and though not originally pleaded, the appellants challenged the mandatory death sentence in view of the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic*** Petition 15 & 16 of 2015 [2017] eKLR.
10. The Republic contests the appeal. Learned Prosecution Counsel, *Mr. S. Mutinda*, relied wholly on his submissions dated 28th September 2020.
11. The position of the State is that the trial was fair; and, that on the totality of the evidence of the seven prosecution witnesses, *all* the ingredients of the offence were proved. Regarding the sentence, counsel submitted that the 2nd appellant elected not to mitigate; and, that the punishment was lawful.
12. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.
13. The attack took place at 4:00 a.m. The complainant was woken up by his wife (PW3) and alerted about the presence of thugs in the house. He said that the bedroom door was slightly ajar; and, that he saw three men armed with *pangas*, a *somali* sword and pistol. He said he identified both appellants from the electric light in the bathroom and the children's room.
14. The attackers cut him on the head, neck and right leg. The screams from his wife startled the assailants and they took off. But they left their caps and a toy pistol at the scene. Some neighbours also came to the scene. The complainant was taken to Murang'a Hospital for treatment.
15. Those injuries were corroborated by PW7, a clinical officer, who produced the treatment card and P3 Form. He assessed the degree of injuries as *grievous harm*.
16. The robbery was reported the same night to Corporal Charles Lew (PW4) who visited the scene and recovered some exhibits. He said it was raining heavily in the night and that the complainant "*suspected [the thugs] could have sprayed*" a substance into their bedroom before they cut through the burglar proofing. The complainants also discovered that the intruders had stolen a DVD Machine and safari boots.
17. It is instructive that the appellants were arrested weeks later in the course of other unrelated criminal investigations. The 2nd appellant was arrested on 9th July 2011 by Corporal Mundalia (PW6). The complainant attended the identification parade nearly a month after the incident. He denied in cross examination that the thugs had sprayed the house with some chemicals; or, that the attackers had flushed some torchlights into his face. He said that he only switched on the lights in the sitting room and bedroom after the assailants vanished. He said that he never gave the identities of the attackers to the police when he made the first report.
18. PW3 on the other hand said that she identified the appellants from "*the light behind the house that filled [sic] the bedroom window*". She testified that the brutes did not enter her bedroom as her husband repulsed them and pushed them into the corridor. Later, she and her husband found two black and light blue caps, a *somali* sword, sheath and wooden toy gun left at the scene (exhibits 1, 2, 3a & b). She did not

participate in the identification parade.

19. The identification parade in respect of the 1st appellant was carried out by Chief Inspector Nyaga (PW1) on 9th April 2012. He said that the suspect was lined up among 8 persons of “*his height, complexion and age*”. He said that the suspect chose to stand between positions 7 and 8 on the line. PW2 picked him out by touching him. PW1 then signed the certificate after confirming that the suspect had no complaints about the parade.

20. The other identification parade for the 2nd appellant was conducted on 9th July 2011 by Inspector Mutua (PW5). He said there were 8 members of the parade and that it was conducted in an enclosed space 20 metres away from the office block. He said that a person in the cellblock or report office could not see what was taking place. The suspect did not wish to have a friend or lawyer at the parade. However, the suspect said he was not satisfied with the parade because “*the witness had a habit of attending the identification parade whenever he [the suspect] was arrested*”.

21. When the appellants were placed on their defence, they protested their innocence. Each of them raised an *alibi*.

22. A number of issues arise from the prosecution’s evidence. The first question is whether *all* the ingredients of the offence of *robbery with violence* were established. Section 296 (2) of the **Penal Code** provides-

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

20. There were *three* robbers. They were *armed* with *pangas*, a sword and a toy pistol. They attacked and injured the complainant in the course of the robbery. The injuries were corroborated by medical evidence. The intruders stole a Samsung DVD Machine and some shoes. I readily find that *all* the key elements of the offence were present.

21. The next key question relates to *identification* of the appellants. In **Kiarie v Republic** [1984] KLR 739, the Court of Appeal held-

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.

22. In **Maitanyi v Republic** [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. 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, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the “greatest care” the evidence of a single witness?

23. The conviction was based on the evidence of a *single* identifying witness. The learned trial magistrate

was alive to the issue. In his judgment, he warned himself of the danger but found that there was sufficient light from the “75 watts bulb...and additional light from the chicken house just behind”. He also concluded that during the scuffle “that lasted 7-15 minutes they [complainant and the robbers] stood face to face.....and he even managed to wrestle the somali sword from one of them”.

24. I with great respect disagree with that analysis. The offence took place during the wee hours of the night. It was raining heavily. The conditions of identification were less than ideal. The complainant had just been woken up by his wife. The couple’s bedroom was unlit. While the complainant claimed that he identified both appellants from the electric light in the bathroom and the children’s room, his wife conceded that she saw the appellants from “the light behind the house that filled [sic] the bedroom window”.

25. Furthermore, neither the complainant nor his wife gave specific details of the looks of the attackers in their first report to the police. I agree with the appellants that there was no clear evidence connecting them with the exhibits left behind in the house. The complainant’s wife (PW3) did not attend the identification parade or give any reliable description of the assailants. Her dock identification was thus worthless. See **Ajode v Republic** [2004] 2 KLR 81.

26. I cannot say that the procedures adopted at the two identification parades completely violated the *Force Standing Orders*. But the value of the parades was diluted by two key reasons: Firstly, there was a lengthy duration between the incident and the parades. The first parade for the 1st appellant was conducted on 9th July 2011, *two months* after the robbery. The second in respect of the 2nd appellant was carried out on 9th April 2012, nearly *a year* after the robbery.

27. Secondly, neither the complainant nor his wife gave a clear description of the suspects *at the scene* on the *material day*. The probative value of the identification parades was thus rendered inconsequential.

28. There is then the matter of the *alibis* set up by the appellants. The trial court weighed the appellants’ explanations against the evidence tendered by the Republic. It reached the conclusion that the appellants did not prove that they were not at the scene of the robbery.

29. The 1st appellant was arrested in Nyeri. He had been in conflict with the law previously and, by his own admission, he had been jailed for three years. The 2nd appellant claimed he left Murang’a for Nairobi on 1st May 2011 and did not return until 1st July 2011.

30. True, the *alibis* were being set up well after the close of the prosecution’s case. But that did *not* shift the burden of proof to the accused. See **Republic v Johnson** [1961] 3 ALL E.R. 969, **Saidi Mwakawanga v Republic** [1963] EA 6. The legal burden of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

31. In the end I find that there were glaring gaps in the identification of the two appellants. There is also a dearth of reliable *direct* or *compelling circumstantial* evidence connecting them with the robbery. For the same reasons, I cannot say with confidence that the appellants were in *possession* of the wooden toy gun discovered in the complainant’s house *after* the robbery.

32. In the end, I am *not* satisfied that the prosecution proved *all* the ingredients of the *two* offences beyond reasonable doubt. It follows as a corollary that the conviction on both counts was *unsafe*.

33. The upshot is that the consolidated appeals are allowed. The conviction and sentence on *both* counts is *set aside*. The appellants shall be released *forthwith* unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 21st day of October 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Both appellants absent due to Covid-19 pandemic prison protocols.

Counsel for the 2nd appellant absent.

Mr. S. Mutinda for the Republic instructed by the office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.