



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 34 OF 2018

MOSES NYAGA NTHIGA.....1ST APPELLANT

IBRAHIM MWITI KIRIA.....2ND APPELLANT

ALEX MWENDA MUTHONI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon.L.K. Mwendwa (SRM) at Runyenjes delivered on the 5thSeptember, 2018 in Criminal Case No.586 of 2018)

JUDGMENT

1. On Count I the appellants, **Moses Nyaga Nthiga, Ibrahim Mwiti Kiria and Alex Mwenda Muthoni**, were jointly charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**; the particulars of the offence are that on the 17thday of November, 2016 at Sheriff's Bar and Restaurant in Runyenjes within Embu County jointly robbed **Brian Njeru Kinyua** of cash in the sum of Kshs.22,000/- and immediately before and after such robbery used actual violence to the said **Brian Njeru Kinyua**.

2. On Count II the appellants **Ibrahim Mwiti Kiria and Alex Mwenda Muthoni**, on the same date at 2 a.m. at Maka Supermarket jointly robbed **Evans Njeru Njoka** of one mobile phone make ITEL and cash in the sum of Kshs.400/- and immediately before and after such robbery used actual violence to the said **Evans Njeru Njoka** .

3. The prosecution called a total of six (6) witnesses to support its case; the 1st appellant was found guilty on Count I and the 2nd and 3rd appellants were found guilty on Count II; they were all convicted and sentenced to the mandatory death sentence;

4. Being aggrieved by the conviction and sentence, the appellants filed their respective Petitions of Appeal which appeals were consolidated; the Grounds of Appeal are summarized as follows;

i) The Charge Sheet against the 2nd appellant was defective and the evidence on record was contrary to Section 214(1) and (2) of the Criminal Procedure Code;

ii) No description of the appellants was given in the first report made to the police; the ID parade carried out by **PW5** was not conducted according to the Police Standing Orders; the conditions for positive identification were not favourable; the appellants were not positively identified;

iii) The prosecution failed to prove its case beyond reasonable doubt;

iv) The trial court erred in rejecting the appellants' defence.

5. At the hearing hereof the 1st and 2nd appellants were unrepresented; the 3rd appellant was represented by Learned Counsel Ms. Kijaru whereas Ms Chemenjo was the Prosecuting Counsel for the State; all the parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the rival submissions;

1ST APPELLANT'S SUBMISSION

6. The 1st appellant submitted that the Charge Sheet was defective as it did not indicate that the robbers were armed yet the evidence of **PW2**

was that the robbers were armed with an axe; the amount robbed on the Charge Sheet is indicated to be Kshs.22,000/- yet the evidence of the complainant was that he was robbed of Kshs.20,500/-;

7. **PW2** never gave any names or descriptions of the attackers/robbers to the police; and never made a first report to the police when the incident occurred on 17/11/2016 but waited until the 27/11/2016 to make his report; that he was not connected with the offence as he had been arrested on 18/11/2016 for the offence of being in possession of *bhanghi* and had been released on a free bond;

8. He further submitted that the conditions were not favourable for **PW2** to enable him to identify the 1st appellant; **PW2** had stated that the robbers wore masks and that they hit him on the head and that he lost consciousness; when he came around he found himself locked up in the toilet; therefore there was not enough time for **PW2** to observe the 1st appellant at length and the whole of this witness's testimony was contradictory; case law relied on **Dominic Musa alias Dida vs Republic CR.APP.No.53 of 2015** and **Robert Onchiri Ogeti vs Republic [2004] eKLR**;

9. The trial court erred when it relied on the evidence of **PW2** a single identifying witness as a basis for convicting the 1st appellant;

10. The witness **PW6** was not the officer who carried out the investigations; and crucial witnesses were not called to testify; case law referred to **Bukenya vs Uganda EACA 1972 549**;

11. The trial court rejected the 1st appellant's defence without giving any reasons; particularly the existence of a grudge between the 1st appellant and the Deputy OCS which led to the 1st appellant being framed with the charges;

2ND APPELLANT'S SUBMISSIONS

12. The 2nd appellant submitted that the Charge Sheet did not indicate that the robbers were armed with dangerous weapons; the Charge Sheet indicated that the robbers were two yet the record reflects that there were three robbers; therefore, the indictment was defective as it failed to disclose the offence and the evidence was also not in accord with the Charge Sheet;

13. That he was not properly identified by **PW1** whose evidence was that the robbers hit on the head with a crowbar and inflicted injuries to his face; that the medical evidence produced was a P3 Form that had been filled seven (7) months after the incident; he had stated that he was ordered to lie face down therefore it would not have been possible for him to have identified the robbers in such circumstances; that he stated in evidence that he struggled with the robbers till he removed their masks; but no masks were recovered or collected at the crime scene;

14. The witness' evidence was that he knew the 2nd appellant by name yet he did not mention this to the police; the identification parade was null and void as the witness had stated that the 2nd appellant was a person known to him by name; **PW1** was a single identifying witness and his evidence was shaky and unreliable and it was also contradictory and inconsistent and ought not to have been relied on; case law relied on **John Barasa vs Republic HCRA No.22 of 2005 at Kitale**;

15. **PW6** had stated that he had arrested the 2nd appellant on 19/11/2016 in connection with being in possession of 10 rolls of *bhanghi* and not in connection with the offence of robbery; **PW6** had admitted that there had been insufficient time to conduct proper investigations into the case;

16. The prosecution had failed to call crucial witnesses to testify in particular the owner of Maka Supermarket to prove that the incident had indeed taken place; a businessman called '**Blackie**' and his watchmen were also not called to testify to confirm that the robbery had taken place; case law relied on **Bukenya vs Uganda [1972] EACA 549** and **Peter Mutiria Mitambo vs Republic [2016] eKLR**;

17. He submitted further that his defence had not been considered by the trial court; that on the night of the incident he was at Kigaa in his rented house; that he was arrested on the 19/11/2016 at a local bar and was framed by the OCS for the robbery with violence offence as he was unable to raise money that he had requested for;

3RD APPELLANT'S SUBMISSIONS

18. On identification the 3rd appellant's contention was that the trial court wrongly relied on the evidence of a single identifying witness; that there was need for caution before accepting the identification parade; **PW1** and **PW2** gave contradictory evidence on the colour of the masks worn by the robbers; and also on the weapon used by the robbers; **PW1** said he was hit by a metallic rod whereas **PW2** stated he was hit with an axe; the P3 Form relied on during the trial was filled seven (7) months after the incident and was introduced after the trial had commenced; case law relied on **Thomas Patrick Gilbert Chomondelay vs Republic CR.APP.No.116 of 2007** where it was held that the prosecution is under a duty to provide the accused person with copies of relevant documents in advance;

19. **PW1** never gave a description of the robbers to the police to enable them to pick persons with related complexion, age and body weight for the identification parade contrary to the Forces Standing Orders;

20. The incident is said to have occurred at 4.20am and the lighting and conditions may not have been conducive for positive identification of the appellant by **PW1** who had also been hit with a metallic bar and had lost consciousness; and his interactions with the robbers was also minimal; case law relied on **Charles O. Matianyi vs Republic [1968] KLR 198**;

21. The owner of Maka Supermarket did not lodge any report of the alleged robbery; which robbery was a mere fabrication based on personal issues the appellant had with the police.

RESPONDENT'S SUBMISSIONS

22. In response to the appellants' submissions the respondent conceded only to the ground of appeal that the death sentence was harsh and excessive provided the circumstances under which the offences were committed be taken into account;

23. Counsel submitted that the key ingredients that ought to be proved in a case of robbery with violence are as set out in the case of **Johana Ndungu vs Republic CR.APP.No.116 of 1995**; which ingredients are as follows;

- i. The offender is armed with a dangerous or offensive weapon or instrument;
- ii. The offender is in the company of one or more person(s);
- iii. Immediately before or after the robbery the offender uses violence to any person.

24. The ingredients of the offence are three in number but evidence on any of the elements is sufficient proof to found an offence of robbery with violence; case-law **Dima Denge Dima & Others vs Republic CR.APP.No.300 of 2007**.

25. The appellants contend that **PW1, PW2 and PW5** gave contradictory evidence on identification; but counsel submitted that these witnesses gave clear, consistent and well corroborated evidence in relation to the robbery and remained unshaken during cross-examination; **PW1** stated in his evidence that he was able to identify the 2nd and 3rd appellants as there was sufficient electric lighting at the scene of crime; the trial court found these witnesses evidence to be credible and disregarded the appellant's defences;

26. As for the contradictions alluded to in the submissions of the 2nd and 3rd appellants, counsel for the respondent submitted that these were not substantiated by the appellants; and relied on the case of **Twehangane Alfred vs Uganda (2003) UGCA 6** where it was held;

'...that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they do not affect the main substance of the prosecution's case.'

27. On the identification parades having been improperly conducted the trial court highlighted the reasons in its judgment for rejecting this line of defence and made a finding that the identification parades were properly conducted and were in strict compliance with the Kenya Police Force Standing Orders;

28. The trial court found that the appellants' defences were mere denials and made a finding that the appellants' testimonies did nothing to dislodge the overwhelming evidence provided by the prosecution witnesses; and made a determination that the key ingredients of the offence were proved and submitted that the trial court complied with the provisions of Section 169(1) and (2) of the Criminal Procedure Code as it outlined the reasons for rejecting their defences in its lengthy judgment;

29. In conclusion counsel submitted that the prosecution proved its case to the desired threshold; that the trial court evaluated the evidence on record and arrived at a safe conviction of the appellants; counsel prayed for the dismissal of the appeals as they were not merited.

ISSUES FOR DETERMINATION

30. After reading the respective written submissions made by all the parties this court has framed the following issues for determination;

- i. Whether the Charge on Count II was defective;
- ii. Whether the appellants were positively identified; whether the identification parades were properly conducted;
- iii. Whether the prosecution proved its case to the desired threshold;
- iv. Whether the trial court rejected the appellants' defences without giving reasons.
- v. Whether the death sentences imposed by the trial court were manifestly harsh and excessive;

ANALYSIS

31. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified; reference made to the case of **Okeno vs Republic (1972) EA 32**.

Whether the Charge Sheet on Count II was defective;

32. The 1st, 2nd and 3rd appellants submitted that the omission of the words **"armed with dangerous weapons"** rendered the Charge Sheet as defective as it was contrary to the provisions Section 214 of the Criminal Procedure Code; that these wordings ought to have been included so as to be in accord with the evidence adduced particularly by **PW1**;

33. Upon perusal of the court record it indeed shows that on the Charge Sheet the words “*armed with dangerous weapons*” were not included; but upon perusal of the contents of the Statement of Facts this court notes that the other two key ingredients of the offence of robbery were set out in clear and unambiguous terms; the particulars on the Charge Sheet clearly stated that the appellants ‘*jointly robbed*’ which means they were more than one offenders; the other key element that was clearly stated on the Charge Sheet is that ‘*before and or immediately after used actual violence*’;

34. The record reflects that the pleas were taken in accordance with the law; the Charges and particulars thereof were read out to the appellants in a language they understood; they answered to the Charges, that they followed the entire proceedings and appreciated the evidence tendered against them and were able to cross-examine all the prosecution witnesses and were also able to prepare their defences; and the record shows that they ably defended themselves;

35. For those reasons this court is satisfied that despite the non-inclusion of the words ‘*the dangerous weapons or instruments used*’, the appellants were at all material times aware of the charges brought against them and that the particulars and the essential elements of the offence had been disclosed to them; and sufficiently disclosed and established the nature of the offence that the appellants were faced with as required by Section 134 of the Criminal Procedure Code; and finds that the omission was not fatal nor did it cause any prejudice to the appellants nor did it occasion any miscarriage or failure of justice;

36. The ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the appellants were positively identified; whether the identification parades were properly conducted;

37. The main ground of the appeal lies on the issue of identification; in this instance no stolen property was found in the possession of the appellants, therefore, the issue as to whether the appellants were properly identified takes centre stage as their conviction was dependant mostly on positive identification;

38. **On Count I;** the evidence of **PW2** was that the robbers wore masks and that they hit him on the head and that he lost consciousness; when he came around he found himself locked up in the toilet; they assaulted him by hitting him on the head and he lost consciousness; when he regained consciousness he found himself locked up in the toilet;

39. The trial court relied on the evidence of **PW2** a single identifying witness as a basis for convicting the 1st appellant; when a conviction depends on the identification of the robber by a single witness it is incumbent upon the trial court to test and treat such evidence with the greatest of care and it must satisfy itself that it was safe to convict on such evidence;

40. In this instance the evidence of **PW2** was that the robbers wore masks throughout the incident; that the 1st appellant had dreadlocks; and that the robbers beat him up till he lost consciousness; it is noteworthy that this witness never invited to any identification parade to verify identification;

41. The court record reflects that the trial magistrate had warned himself of the danger of convicting on the evidence of a single witness but did not correctly apply this warning to the evidence; **PW2** was never invited to any identification parade conducted by **PW5** for the 1st appellant so there was nothing to support or corroborate **PW2**’s identification evidence;

42. Upon re-evaluating **PW2**’s identification evidence of the 1st appellant on the count he was convicted on this court is satisfied that it was neither full-proof, reliable or cogent evidence; and this court is satisfied that the 1st appellant was not positively identified;

43. This ground of appeal on identification of the 1st appellant is found to have merit and it is hereby allowed; the basis for conviction is found to be unsafe.

44. **On Count II:** the 2nd and 3rd appellants contend that they were not positively identified by **PW1**, **PW2** and **PW5**; that their evidence on identification was contradictory and also contend that the identification parade was not conducted in accordance with the Kenya Police Standing Orders;

45. The evidence of the prosecution witness **PW1** points to the incident having taken place at night at 4.20am and that there was electric lighting at the scene of crime; this witness stated that there were two robbers in number and both wore masks; that he managed to struggle with the two till the masks came off and he was able to see the faces of the two robbers; and that he had time to observe and converse with the robbers;

46. Being night time and there being electrical lighting and the ordeal having lasted for 10 minutes during which time **PW1** stated that he was able to observe and converse with the robbers; for those reasons the trial court was satisfied that the conditions and circumstances for the identification of the 2nd and 3rd appellants were favourable; and the case law the trial court referred to was **R vs Turnbull & Others [1976] 3 ALL ER 549**;

47. **PW1** was a single identifying witness and therefore it was incumbent for the trial court to warn itself of the dangers of relying on such evidence or in the alternative look for corroboration of this witness’ evidence; it is noted that the trial court in its judgment indeed cautioned itself on this and stated as follows;

“Identification by a single witness ought to be treated with the utmost thoroughness owing to the possibility of mistaken identity on the part of the witness. The court should remind itself that sometimes mistake in recognition of close relatives and friends are sometimes made.”

48. The trial court then proceeded to evaluate **PW1**'s and **PW5**'s evidence on the Identification Parades; the trial court carefully evaluated the evidence of **PW5** and after perusing the reports on the parades it made a finding that the parades were conducted in compliance with the Force Standing Orders and noted that the same were duly signed by 2nd and 3rd appellants; the trial court upon being satisfied that the evidence of **PW1** and the evidence on the identification parade was reliable evidence on identification, concluded that the 2nd and 3rd appellants were positively identified;

49. In this case, the question is whether the identification parades were properly conducted and whether the parades supported the evidence of **PW1** the single identifying witness on identification;

50. The evidence of **PW5** was that he conducted two Identification Parades which had eight participants in each which he maintained was in compliance with the Force Standing Orders; **PW1** was invited to attend both and was able to identify the 2nd and 3rd appellants by their faces;

51. The Police Force Standing Orders are clear that the parades require a ratio of one to eight as the minimum; and this was the evidence of **PW5** that he conducted two separate Identification Parades where each suspect was mixed with eight other persons; and the Report Forms also supports this fact and it is noted that the reports were duly signed by the 2nd and 3rd appellants who indicated thereon that they were satisfied with the manner in which the parades had been conducted; the resulting evidence was of great value as it bolstered and corroborated the identification evidence of **PW1** of the 2nd and 3rd appellants.

52. Upon re-evaluating the evidence on the identification of the 2nd and 3rd appellants this court finds no reason to interfere with the trial court's finding that the conditions and circumstances prevailing for the identification of the 2nd and 3rd appellants were favourable and that **PW1** was able to observe the appellants for a length of time; and also finds no reason to interfere with the trial court's finding that the identification parades were properly conducted and also its finding that the 2nd and 3rd appellants were positively identified;

53. This ground of appeal is found lacking in merit and it is hereby disallowed; finds no reason to interfere with the trial court's finding as to identification of the 2nd and 3rd appellants.

Whether the prosecution proved its case to the desired threshold:

54. The key ingredients of the offence of robbery that ought to be proved in a case of robbery with violence are as set out in the case of **Johana Ndungu vs Republic CR.APP.No.116 of 1995**; which ingredients are as follows;

- i. The offender is armed with a dangerous or offensive weapon or instrument;
- ii. The offender is in the company of one or more person(s);
- iii. Immediately before or after the robbery the offender uses violence to any person.

55. On whether these ingredients were established the trial court stated as follows;

“In this case the offenders are 2, they wounded PW1 as reflected in the medical evidence of PW3 and stole a sum of Kshs.400/- from PW1.”

56. After satisfying itself that the 2nd and 3rd respondents had been positively identified the trial court came to the following conclusion;

“Therefore the prosecution has succeeded in establishing the elements of the offence of robbery with violence against the 2nd and 3rd accused as set out in count 2.”

57. Upon re-evaluating the evidence on record this court notes that the evidence of **PW1** and **PW2** confirms that the robbers were more than one in number; **PW1** said he was hit by a metallic rod whereas **PW2** stated he was hit with an axe, therefore there was corroborated evidence on a weapon or instrument being used by the robbers which also established the use of violence during the robbery; which violence was proved by the production of the P3 Forms for **PW1** and **PW2**;

58. It is trite law that evidence on any one of the key ingredients is sufficient to sustain a conviction for the offence of robbery with violence; refer to the case of **Dima Denge Dima & Others vs Republic (supra)**; this court finds no reason to interfere with the trial court's finding that the prosecution had proved the key ingredients of the offence of robbery with violence to the desired threshold;

59. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court rejected the appellants' defences without giving reasons.

60. In their defences all the appellants alleged that they were arrested for being in possession of '**bhangi**' and were framed with the instant charge by the OCS Runyenjes Police Station upon being unable to raise the extortion monies demanded by the said OCS to secure their release from custody; their contention is that the trial court disregarded their defences and gave no reasons;

61. The trial court made a finding in its judgment that;

‘This being a grave allegation on the integrity of the OCS, it would have been prudent for the 2nd accused to shed light by giving credible details of how it; None was offered. I am also wondering why such grave allegations were not raised at the start of the trial or in the course of the trial. Why raise it in the last minute? Is it an afterthought? My answer is in the affirmative.....’

62. Indeed, it is noted from the court record that the trial court only addressed 2nd appellant’s defence and gave its reasons for rejecting his defence; upon re-evaluating the defences of the 2nd and 3rd appellants it is not in dispute that the angle adopted by the two was exactly the same; and this court concurs with the trial court’s observation that this line of defence was raised belatedly; the ideal position would have been to have raised it either during cross-examination of **PW6** or to have brought it up at the earliest possible moment in order to give the prosecution an opportunity to inquire into it;

63. The court record reflects that none of the appellants called any witnesses; the 2nd appellant made reference to his mother but never called her to corroborate his evidence on the alleged extortion by the OCS; this belated disclosure goes to the credibility of the 2nd and 3rd appellant’s evidence; and upon weighing the 2nd and 3rd appellants’ defence against the prosecution’s evidence this court finds that both were mere denials and afterthoughts and did not dislodge the prosecution’s case;

64. This court finds that the trial court was justified in disregarding the appellants’ statements of defence; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the death sentences imposed by the trial court were manifestly harsh and excessive;

65. The appellants submitted that the sentence imposed was harsh and excessive; and counsel for the respondent correctly conceded to this ground of appeal;

66. There is now jurisprudence relating to the mandatory sentence as explained in the case of **Francis Muruatetu & others vs Republic [2017] eKLR** the Supreme Court declared that a mandatory sentence denies an accused person the right to mitigate and also takes away the trial courts discretion when sentencing; and that the mandatory provisions of law must not be interpreted in a manner so as to take away the discretion of the court when sentencing; therefore, a court of law should be left to freely exercise its discretion and the sentence imposed by the trial court should be dependent on the facts and circumstances of each case;

67. This court has had the occasion to peruse the facts of the case;

68. This court opines that the trial court’s hands were tied by the mandatory provisions of Section 296(2) of the Penal Code; and that it is evident that the trial court interpreted the provisions of Section 296(2) in a manner that took away its discretion when sentencing; there is no doubt that the trial court accorded the maximum sentence to the appellants who were deemed to be first offenders which then means that the mandatory death sentence was not justified;

69. This ground of appeal has merit and it is hereby allowed; the death penalty is found to be manifestly harsh and excessive and therefore warrants interference by this court;

FINDINGS & DETERMINATION

70. In the light of the foregoing this court makes the following findings and determinations;

i. **On Count I;** this court finds that the 1st appellant was not positively identified; the conviction based on identification is found to be unsafe;

ii. The appeal of the 1st appellant is found to have merit and is hereby allowed; the conviction on Count I is hereby quashed and the sentence imposed is hereby set aside; the 1st appellant be set at liberty forthwith unless otherwise lawfully held.

iii. **On Count II;** The Charge against the 2nd and 3rd appellant is found not to be defective;

iv. This court finds that the 2nd and 3rd appellants were both positively identified by **PW1**; there was sufficient evidence presented to make the identification of the 2nd and 3rd appellant free from the possibility of error; the Identification Parade is found to have been properly conducted;

v. The prosecution is found to have proved its case on Count II to the desired threshold;

vi. The trial court is found to have considered the defence of the 2nd appellant and gave reasons for rejecting that defence; the 3rd Appellants’ defence is found to be a mere denial as it did not dislodge the prosecution’s case.

vii. The appeals on conviction on Count II are found lacking in merit and are hereby disallowed; the convictions of the 2nd and 3rd appellants are found to be safe and are hereby upheld.

viii. The appeals on sentences on Count II are found to have merit and are hereby allowed; the mandatory death sentences are hereby set aside and substituted with a term of thirty (30) years imprisonment for each appellant; the period spent in remand to be reduced from the sentence.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 26th day of November, 2020.

HON. LADY JUSTICE A.MSHILA

JUDGE