



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 47 OF 2019

ROBERT MUNIU GICHOGE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence from a judgment of Hon. K, Bidali CM delivered on 2nd December 2019 in Naivasha CMCR No. 729 of 2016)

JUDGMENT

1. The Appellant and one Julius Njuguna Kinyanjui were charged, convicted and sentenced to death for robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. Both accused persons were charged with ten counts of robbery with violence. Only Robert Muniu Gichoge has appealed.

2. The Appellant was found guilty in respect of Counts 8 and 9 and convicted, but sentence in respect of Count 9 was put in abeyance. The particulars in respect of count 8 are that the two accused on 9th April, 2016 at Hester Cereal shop in Gilgil armed with a rifle and knives robbed Henry Githinji Macharia of cash Kshs 6,700/= and assorted Safaricom credit cards all to a value of Kshs 8,700/= and at the time used actual violence to the said Henry Githinji Macharia.

3. The particulars of the charge in Count 9 are that the two accused at Tesis Wines and Spirits shop within Gilgil while armed with a rifle and knives robbed Sami Gathecha Ngure of Kshs 6,000/=, Techno F7 mobile phone valued at Kshs 20,000/= and at the time used actual violence to the said Sami Gathecha Ngure.

4. Dissatisfied with the judgment of the lower court, the Appellant has appealed against both conviction and sentence. His grounds are:

- that he was charged using a defective or duplex charge sheet;
- that there was no proper evidence of identification;
- that there was no proper evidence connecting him to the offence; and
- that his defence was not properly considered.

5. The prosecution opposes the appeal. Both parties filed written submissions which I have duly considered, together with the evidence on record. This court's duty is to re-evaluate the entire evidence on record and reach its own conclusions not ignoring the trial court's conclusion. In that endeavour, this court must also be cautious to note that it did not have the opportunity to hear the witnesses itself and observe their demeanour.

6. The prosecution case in respect of Count 8 and 9 made out by six witnesses. In Count 9 the victim was Sami Gathecha Ngure who gave evidence as PW2. Count 8, the victim was Henry Githinji Macharia, who gave evidence as PW3. In

7. PW2 testified that on 6th March, 2016 he drove to Tesis Wine and Spirits shop. He saw someone standing outside the shop with one of its doors open, the other closed. He called out a friend Simon Mwangi Mburu (PW1) and ordered a drink. Then the man standing at the shop pushed PW2 into the shop. PW2 looked behind and saw the man open his jacket. Inside, he saw an AK 47 gun strapped round the man's body, and the man ordered PW2 to lie inside the counter.

8. According to PW2, the robbers began to beat him while demanding money. They took his wallet containing Kshs 6,000/=, identity card

and ATM card. As the attackers left, they ordered everyone to keep lying down. After they left PW2 went outside, and the passenger he had carried in his car told him the robbers had gone behind the shop. So PW2 rushed to Gilgil Police Station to report the incident.

9. Later PW2 was called to record a statement and also went for an identification parade for some arrested suspects. However, PW2 was not able to pick out the attacker at the parade, but he said he saw the person who pushed him. He was able to identify him as the accused 2 in the dock. He said he became annoyed at being pushed and had stared at the Accused 2 for long.

10. In cross-examination PW2 re-asserted that he identified Accused 2; That Accused 2 refused to attend the identification parade, so he did not see Accused 2 in the parade but he was able to identify him in the dock. He said there were electric lights which enabled him to see Accused 2 clearly. Then in re-examination, he reconfirmed that Accused 2 was not at the parade, an improbability if he had clearly seen Accused 2 in the light on the material day.

11. PW1 Simon Mwangi Mburu testified that he was in his wines and spirits shop with his workers on 6th March, 2016. A customer came and ordered airtime, but shortly thereafter stepped on some crates and jumped into the counter. PW1 stood up and pushed him, but the man pleaded for leniency. Another man appeared and pointed a gun ordering them to lie down. It was about 7.20pm and the lights were on. The assailants beat them, demanding money and he showed them the cash box.

12. PW1 said he saw one of the men wearing a black pull neck, but did not see the other two. A customer entered calling his name, but he too was pushed in and ordered to lie down with them. The robbers stole Kshs 320,000/=; his wallet with Identity Card, NHIF Card and other things. Afterwards they went to report at Gilgil Police Station.

13. The following day he received a call from a man who said he had recovered some of PW1's documents, so PW1 went to the police station to make a further report and they assigned him officers to get the goods. Later he was called by police who said they had arrested some suspects. He was unable to identify them when he went to the police station.

14. PW3, Henry Githinji Macharia, worked in an Mpesa shop at Njuri Ncheke building within Gilgil. On 9th April, 2016 at 7.30pm he was in the shop when suddenly three men entered. There was sufficient electric light inside and outside. One of the men wore a jacket. The second wore a hat and the third one wore a hat. The one in the jacket told PW3 to close the shop; he hesitated and the man unzipped his jacket and PW1 saw an AK 47 rifle. The second man entered the counter area and the third one shut the door. PW1 lay on the floor and shortly thereafter a man and lady were pushed in and onto the floor.

15. One of the robbers started taking money using a paper bag; he took scratch cards and also ordered PW3 to give him the Mpesa float phone which he handed over. The man demanded the shop's padlock which he gave, but the robbers were unable to lock the doors.

16. The lady on the floor with them had a mobile phone and PW3 called the police. His wife then appeared and gave him the spare key. The robbers had fled and many people gathered outside the shop. Soon after, the police arrived. They asked him to report at the police station where he wrote a statement. About a month later, on 10th May, 2016, he was called to identify a suspect in a parade. PW3 was able to pick out Accused No. 2 who he remembered had worn a short sleeved shirt, had come to the counter and taken the money, and so his image got stuck in PW3's mind.

17. In cross-examination by Accused 2, PW3 said his first report had few details; that he saw Accused 2 during the robbery, and that he was not coached on how to pick the accused at the parade.

18. When recalled for cross-examination, PW3 reconfirmed the robbery was committed on 9th April, 2016 at 7.00pm. He had told the police he could identify his assailant; that he saw Accused No. 2's face clearly as the fluorescent light was on; that they were locked in the shop by the robbers, and his wife who gave him the key to open; and that he attended the parade on 2nd May, 2016 when he identified Accused 2.

19. In re-examination PW3 said he never described the robbers to the police and did not know the accused before.

20. PW10 Jacinta Bungei was within Gilgil Police Station on 10th May, 2016 when she was requested to conduct an identification parade. There were three identifying witnesses, one of whom was Sami Gathecha Ngure (PW2), the second was Jane Wanjiku (PW7) and another of whom was Henry Macharia (PW3). Accused 2 was placed in the parade and PW3 identified him standing between number 2 and number 3. Accused 2 refused to sign the Identification Parade Form.

21. In cross-examination by Accused 2, PW10 stated that she explained the parade rules to him, that PW3 identified him, but that Accused 2 refused to sign the form.

22. Sergeant Thomas Muoki PW12, was the Investigating Officer. He testified that there was an outbreak of over ten robberies on 6th March, 2016, in Nakuru where four people armed with AK 47 rifle would go around attacking shops. From informers he was tipped that their leader was one Maina Gikunda "Mjumbe". Others were John and Mwangi who were involved. He was shown John's house in Bondeni Gilgil by an informer. He surveilled the place and sent a team there on 24th April, 2016. They arrested John. It turned out that he was Robert Gichogu, Accused 2.

23. At an identification parade on 10th May, 2016 conducted by IP Jacinta, the 2nd suspect refused to participate.

24. In cross-examination by Accused 2, PW12 said nothing was recovered from the Accused; that he filed a Miscellaneous Application to detain Accused 2 for further investigations; that at the identification parade on 9th May, 2016 he was identified standing between No. 2 and No. 3; that once Accused 1 said he did not want to participate in parade, PW12 did not bother getting a parade officer.

25. In re-examination PW12 said he could not force any suspect to attend an Identification Parade; that Robert (Accused 2) participated in an Identification Parade on 10th May, 2016 and was identified by Henry Macharia PW3.

26. In his defence Accused 2 gave an unsworn statement. He said that he was at home at 5.00am on 29th April, 2016 when he was arrested. He was preparing chang'aa and tried to run, then he heard a gunshot. The police asked for Mwangi, who was later arrested. He said he knew nothing about the charges. On 10th May, 2016 he was asked to attend an identification parade and he agreed, though he was not satisfied because according to him, the witnesses had seen him the previous day as he had been removed from the cells. Thus, he said, the identification parade was not fair as the witnesses had been guided. He produced the temporary remove chit as D. Exhibit 1. He stated that he had another case in court Criminal Case No. 2627 of 2013 where he had been discharged and thought that was why he had been arrested.

Identification

27. Although the accused has filed several grounds of appeal, I think the whole case hinges on the issue of identification. Clearly the accused was not found in possession of any stolen goods, nor was he otherwise linked to the offences in Counts 8 and 9 except through identification. Equally, the learned trial magistrate correctly identified the issues for determination as being: whether there was positive identification and whether the conduct of the identification parade was proper.

Count 9

28. The offence in count 9 was committed on 6th March, 2016. The witnesses who gave evidence against the accused in respect of Count 9 or were Sami Gathecha Ngure PW2, Simon Mwangi Mburu PW1, IP Jacinta Bungei PW10 on the identification parade, and the investigating officer Sergeant Muoki PW12.

29. PW1 Simon Mwangi Mburu was mentioned by PW2 as the person PW2 called out and ordered for a drink from. PW1 confirmed in his testimony that a customer called his name, but he did not identify who he was. When PW1 eventually went to the police station, he said he could not identify any of the suspects.

30. Strangely though, the identification parade form in respect of Accused 2 does not show the name of PW1 as a witness although he was also one of the complainants. This begs the question, was PW1 at the identification parade or not? If not, how and when did he fail to identify the suspects at the police station?

31. The evidence of PW2 Sami Gathecha Ngure on identification of the accused was that he was called for an identification parade, and said:

“I was not able to pick out our attacker but I did see the person who pushed me and I was able to identify him. He is in court today as Accused 2 herein (accused in the dock). He was not known to me before..... I got annoyed when he pushed me and I stared at him for long.”

32. The identification parade form confirms that PW2 was indeed a witness – the 1st witness – at the parade but was unable to identify the accused. This is the same person he stared at for long. His evidence is shaky and contradictory. How could PW2 identify the accused in the dock but not in legally the secure, controlled and fair conditions provided for in a parade?

33. In **Kinyanjui & 2 Others v Republic [1989] KLR**, the court stated:

“The purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” (Emphasis added)

34. Further, in cross-examination PW2 said of the identification parade:

“I was the 2nd witness during the parade but you refused to attend the same from the cells. On that day I did not see you there but today I identify you.”

35. The accused was of course at the parade, except that PW2 could not identify him, except at the dock. Yet it may be noted that it was only in cross-examination that PW2 said he saw the accused because:

“There were electric lights and it enabled me to see you clearly”

If PW2 saw accused in the light clearly he should have been able identify him in the parade, and not only in the dock.

36. It is now trite law, as observed by the Court of Appeal in **Gabriel Kamau Njoroge v Republic (1982-1988) 1 KAR 1134** that:

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade.” (Emphasis added)

37. In this case, the complainant failed to identify the accused at the parade, and so his dock identification is unreliable and of little value. The trial magistrate did not discuss the failure of PW2 to identify the accused at the parade.

38. I thus find that it was unsafe to rely on identification evidence for the conviction on Count 9. The ground of appeal on this issue therefore succeeds.

Count 8

39. The complainant PW3 Henry Githinji Macharia said in his evidence-in-chief that there was sufficient light inside and outside his shop. Thus, at the identification parade he said he was able to pick out one of the robbers, namely, the one who came to the counter area and took the money. He indicated that the person's image stuck in his mind as the incident took 10 – 15 minutes. He denied being coached by the parade officer.

40. At the parade the accused refused to sign the identification parade form. He however consented to be in the parade according to PW10. The first two witnesses could not identify any suspect, but PW3 identified the accused standing between member 2 and 3 on the parade.

41. The accused argued that he had been seen by witnesses the previous day as he had a leave out. He also said that the witnesses were coached, but there is no evidence of such coaching.

42. PW3 said he saw the accused clearly from the lights inside and outside his shop. However, when recalled for cross-examination on 17th November, 2017 PW3 stated that the parade was conducted on 2nd May, 2016. In his words he said:

“On 2nd May, 2016 I attended an identification parade. I identified you. On 9th May, 2016 I was at work. The identification parade was on 2nd May, 2016..... I was not at Gilgil Police Station on 9th May, 2016.”

43. Although PW3 got the date mixed up, the accused in his unsworn statement admitted he had attended the Identification Parade on 10th May, 2016. In examination-in-chief, too, PW3 stated that the DCIO called him for an identification parade on 10th May, 2016, although he did not state the date when the parade was held.

44. The accused also complained that his arrest was based on suspicion and compounded with the fact that PW3 had not given his description to the police, there was no connection made between him and the offence.

45. That argument would of course be defeated if the identification properly linked the accused to the offence under proper identification conditions.

46. Here, the critical question is how much weight is to be attached to the identification evidence. The Court of Appeal's observation in **John Mwangi Kamau v Republic [2014] eKLR** is instructive that:

“17.....[W]e are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls our consideration is the weight to be attached to the said identification evidence.”

47. I have perused the Identification Parade Form carefully, and compared it with the evidence of PW10 Inspector Jacinta Bungei. I note that in Part B the suspect is recorded to have said “*Nakubali*” (I agree) in answer to the question whether he consents to appear in the parade. However, he did not sign that part.

48. In answer to the question whether the suspect desired to have a friend or solicitor present, he is recorded to have said “*sina mtu*” (I have no one). Again the suspect did not sign that part. In Part E where the suspect responds to whether he is satisfied with the conduct of the parade, he has responded (illegible) but the parade officer indicated:

“The suspect refused to sign the Identification Parade Form.”

49. The failure of the Parade Officer to state why the suspect's signature portions in Part B are not signed is serious. Here, the suspect allegedly said he agreed to appear on the parade, yet no explanation is given why his signature part was left blank.

50. In her evidence, PW10 testified that she followed the parade procedures, yet the form is blank or incomplete in two signature places in Part B, without explanation. The reply and explanation in Part E relates only to the “*Results of the Parade*”. Part B is the part where the Officer-in-Charge indicates the name and rank details, whether the suspect was informed of the purpose of parade; whether he consents, and whether he desires to have a friend or a lawyer present. It is a critical part of the parade process and should always be properly completed in every respect.

51. It is trite law that the parade procedures must be conducted with scrupulousness. In my view, where blank spaces appear on the parade form without explanation or comments thereon, the parade is that much less reliable as evidence and its probative value that much more reduced. And if the parade officer on giving evidence merely testifies that they followed the procedures and requirements without indicating what happened at each point of the process, that brevity or paucity of information lessens the overall value of the identification parade as a fair process.

52. On this I would echo the Court of Appeal's observations in **David Mwita Wanja & 2 Others v. Republic Criminal Appeal No. 117 of 2005** where it said:

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

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

53. In my view, given PW3’s confusion as to the date on which the parade was held; and given the dissatisfaction of the accused with the identification parade, his unexplained failure to sign Part B of the Form whilst it is indicated he consented to be involved in the parade; and given the failure by the parade officer to comment on the absence of signatures in Part B, I am not satisfied that scrupulous attention was paid to the identification parade.

54. When juxtaposed with the fact that the arrest of the accused was based on suspicion, and that he was not arrested with anything that linked him to the crime, I think the overall evidence was too shaky to be said to have reached the standard of beyond reasonable doubt.

Disposition

55. For all these reasons, I am satisfied that the conviction of the accused was unsafe in circumstances. As such I see no reason to engage in an analysis on the other ground of appeal as to defective charge sheet.

56. Accordingly, the conviction and sentence are hereby set aside and the accused shall be set at liberty forthwith unless otherwise lawfully held.

Administrative directions

57. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

58. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

59. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 12th Day of November, 2020.
