REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 121 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 522 of 2013

by the Principal Magistrate's Court at Hamisi)

TEDDY MUDAVADI.....1ST APPELLANT

IGNATIUS CHIMAKAYI MASHETI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon M. Nabibya, Senior Resident Magistrate, of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63, Laws, and they were sentenced to death, and also of impersonating a public officer contrary to section 105(b) of the Penal Code and were sentenced to one year's imprisonment execution of which sentence was to be held in abeyance in view of the death sentence.

2. The particulars of the robbery with violence charge were that on the night of 31st July 2013 at an unknown time at Mudete trading centre Mudete Location within Vihiga County they were armed with *pangas* they jointly robbed Margaret Kageha of a mobile phone and money, and in the process of the said robbery injured her. The second charge alleges that at the same time and place they falsely presented themselves to be persons employed in public service as police officers and assumed searches and arrested Margaret Kageha.

3. At the trial court seven witnesses testified against the appellants. The complainant and her husband were at home in the evening of 31st July 2013 when two men dressed in administration police uniform came calling and said they were to search their house for *chang'aa.* When they entered they attacked the complainant and her husband. There was evidence from a health officer which indicated that the complainant had been injured on her left thumb. Several police witnesses also testified.

4. The appellants were aggrieved by their conviction and sentences and they lodged a joint appeal. In their joint petition of appeal, they alleged that the trial court convicted them despite their not being found in possession of anything linking them to the crimes, that the court relied on the evidence of a single identifying witness without looking for corroboration, that the identification parade lacked merit in its totality in the absence of a first report to the police and the same was conducted in a manner that contravened the law, that the case was not proved beyond doubt for some crucial witnesses was not called and that their a sworn defence was not given any consideration.

5. The appeal was argued on 14th March 2019. The case for the appellants was stated by their advocate, Mr. Maloba, and while the state was represented by Mr. Ongige. Both addressed the court. The appellants relied on written submissions that were highlighted by Mr. Maloba. In the written submissions, the appellants raised issues relating to inconsistencies in the evidence presented by the state, their inadequate identification, and insufficient evidence touching on the offence on the police uniform. The oral address by Mr. Maloba revolved around the issues raised in the written submissions. In his response, Mr. Ongige submitted that any inconsistencies in the testimonies, especially as to the time of the commission of the offence were minor. He submitted further that the conditions for identification were favourable, and the identification parade had been carried out in accordance with the law.

6. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The decision of the Court of Appeal in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> "*An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the*

appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

7. Before I consider the issues raised in the appeal herein, I shall first dispose of an issue that has bothered my mind about the appeal before me, even though the same was not raised by the state. The appellants herein filed a joint appeal as opposed to separate appeals, as is the norm. The Criminal Procedure Code, Cap 75, Laws of Kenya, makes no provision for joint appeals, and is silent on what ought to be done should convicts opt to file joint petitions of appeal.

8. My searches on this point have yielded little case law. I have, however, come across two decisions where the matter of joint appeal was addressed. In *Rex vs. Sanja Taiga and Kodheta Ndiaga* [1931] 13 KLR 79, the court stated that the appeal of each convict should be filed separately, as there was no authority for a joint appeal by convicts sentenced in the same trial. The court said that it was obvious that in many cases such a procedure would not be in the best interests of the appellant. In *Violet Muhenje & another vs. Republic* [2006] eKLR, the court took the view that the Criminal Procedure Code contemplated the filing of an appeal by an appellant, and therefore did not envisage joint appeals. It observed that consolidation of appeals did not mean the same thing as a joint appeal. The court said that joint appeals are not convenient and practical, and are burdensome. The court held that such appeals were not provided for in law, and declared the joint appeal before it as defective and not permissible and proceeded to strike it out.

9. It would appear that the High Court has in several instances entertained joint appeals, and proceeded to dispose of them without regard to the fact that the convicts before them had filed joint petitions of appeals. That was the case in *Nicholas Oucho Mogaka vs. Republic* [2009] eKLR, *Moses Mutiga Nabea & another vs. Republic* [2019] eKLR and *Republic vs. Elkana Mukaya Ragira & another* [2013] eKLR.

10. I have carefully reflected over the issue, and I have closely perused the Criminal Procedure Code, and I would agree with the court in *Violet Muhenje & another vs. Republic* [supra] to the extent that it found that the Criminal Procedure Code was silent on or did not provide for the filing of joint petitions of appeal or joint appeals. However, I am not persuaded that the mere fact that the statute does not provide for such joint appeals, or is silent on them does not mean that they are not permissible and that, should convicts file such appeals, the appellate courts should treat them as defective.

11. The cases cited above which had addressed the issue did so during the time of the old Constitution. Under the new Constitution, it would appear that that position is no longer tenable in view of Article 159(2)(d) of the Constitution of 2010, which requires the courts to dispense justice without undue regard to technicalities of procedure. For avoidance of doubt, the provision states:

"159. (1) …

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) …

(b) …

(c) …

(d) justice shall be administered without undue regard to procedural technicalities …"

12. In my understanding, whether convicts file separate or joint appeals or petitions of appeals is a technicality of procedure. A joint appeal may be inconvenient or it may even prejudice the appellants or not be in their best interests, but that of itself does not render the appeal defective. As noted above, the statutory framework for criminal appeals is silent on joint appeals, but again that of itself does not mean that such joint appeals cannot be lodged. Even if one were to argue that such appeals are not lawful, the technicalities arising from the filing of such appeals are of the kind that Article 159(2)(d) was intended to cure.

13. I will now advert to the grounds raised in the appeal.

14. The first ground is on inconsistencies and contradictions in the testimonies of the prosecution witnesses. According to the appellants, the complainant, PW1, stated that the attackers came at 7.00 PM, then later said it happened at 11.00 PM. Her husband, PW2, who was with her in the compound, is said to have talked of the attack happening after 11.00PM. I have perused through the court record. It is minuted that PW1 told the court that she was harvesting rain water at 7.00 PM when the two persons who attacked her came into the compound and proceeded to attack her. Later in the course of examination-in-chief she said the robber entered at 11.00 PM, which date she repeated at cross-examination. Where the time to have been 11.00 PM.

15. From my perusal of the record I noted further inconsistencies and contradictions. The complainant testified that police officers on patrol came to the scene almost immediately after the attack, and they were the ones who took her to hospital. PW4 and PW7 testified as the officers who were on patrol and who responded upon being informed of the attack. PW4 talked of an event that happened on 6th August 2013, while PW7 talked of a happening on 31st July 2013, but on both occasions at around midnight.

16. The decision of the Ugandan Court of Appeal in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, on inconsistencies and contradictions in the state's evidence,is persuasive. The court said:

'With regard to contradictions in the prosecution's case the law as set out in numerous authorities is 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 point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

17. I have noted that the trial court did not mention the contradictions in the judgment. However, it is my view that the inconsistencies on the actual time of the attack were minor. It would appear that the approximate time of the attack was 11.00 PM. PW1 did mention 11.00 PM, and so did PW2. The other witnesses who came to the scene shortly thereafter were the two police officers, they said that they came to the house at around midnight. I note though that they spoke of different dates. But overall, it is clear that the events happened at 11.00 PM or shortly thereafter. I do not think much turns on the alleged inconsistencies.

18. There is also the evidence of the administration police uniform that was allegedly worn by the appellants. It was allegedly recovered from them. From the record, PW1 talked of administration uniform and a black jacket. PW2 also talked about administration police uniform, but was not able to identify the jacket that was brought to court. The other two police witnesses talked of the recovery of the same jacket and a jungle green one, yet all these are to me references to recovery one jacket. It is curious that the jacket was not identified by PW1 but a woman that PW4 called Gladys, who was never called as witness.

19. There other ground raised was that the conditions for identification of the assailants were not positive. It was submitted that the robbery happened at night, when it was raining and without proper lighting. It was stated that the only lighting referred to came from a nearby petrol station.

20. The courts have counselled that where a conviction rests entirely on identity, then caution should be exercised. The court in *Roria vs. Republic* [1967] ES 583 said as follows:

"A conviction resting entirely on identity invariably causes a degree of uneasiness as Lord Gardner LC said recently in the House of Lords in the course of debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten – it is in a question of identity.'"

21. The decision in *Republic vs. Turnbull* [1976] All ER 549 is often seen as providing useful guidelines with relation to identification. The court in that matter said:

"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way …? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? … Recognition may be more reliable that identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

22. PW1, the witness who first had contact with the attackers, said that it was raining that night and she was outside the house fetching rainwater. A rainy night is usually a dark one. She did not talk of there being any light in the house, whether from a lantern or hurricane or kerosene lamp, or from electric bulbs or florescent tubes or from candles or a fire at the hearth or even from a torch. She did not mention that the attackers themselves had torches. The only light she referred to was from a nearby petrol station. She did not state the distance between her house and the petrol station where the light was allegedly emanating from. It is difficult to say, therefore, whether the light from the petrol station would have been adequate for identification purposes. Additionally, the witness did not state whether there were any particular features she picked out about her attackers other than saying they were wearing administration police unfirms and white sports shoes. PW2 said, during cross-examination, that he identified the first appellant with the light that was in the house. He said the light was on and he used that light that for identification. He did not mention the object that projected the light that he was talking about. He did not describe his assailants, except that he said they were administration police officers.

23. I am not persuaded that there is material upon which the trial court could have concluded that the conditions that night and inside the house of the complainant were conducive to proper identification of the appellants at the scene of the commission of the crime.

24. The other ground revolves around the identification parade that was mounted by PW5, and during which PW1 and PW2 are said to have had identified the appellants. The appellants argue that the conduct of the parade did not meet the requirements of the law.

25. The procedures for identification parades are governed by the Police Force Standing Orders, made under the National Police Service Act 2011. The courts havedistilled certain rules to govern such parades, critically in *R. vs. Mwango s/o Manaa* [1936] 3 EACA 29 and *Ssentale vs. Uganda* [1968] EA 365, as follows:

(a) The accused has the right to have an advocate or friend present at the parade;

(b) The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

(c) Witnesses should be shown the parade separately and should not discuss the parade among themselves;

(d) The number of suspects in the parade should be eight (or ten in the case of two suspects);

(e) All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

(f) Witnesses should not be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

(g) As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

26. PW5 was the parade officer. He explained how he put the appellants amongst a group of other six persons after he had explained their rights to them. He also said that he explained to PW1 and PW2 of the process. They identified the witnesses, even though he suspects had complained that witnesses might have seen them before the parade was mounted.

PW1 testified as follows on the identification parade:

"After a while some people had been arrested. I was to see if I could identify them. I reached when one of them was alighting from the Land Rover. It had lights on and identified them. I also saw the short one and identified them at the identification parade. I found them in a group of many people. We stayed with them for a while and even talked so I identified them … The parade had 2 *boda boda* operators.

On his part PW2 merely said:

"*I identified you at the parade as being the one who had been at my place."*

27. The Court of Appeal in *David Mwita Wanja & Others vs. Republic* [2007] eKLR underscored the importance of conducting identification parades properly, warning that the flouting of the rules governing them considerably depreciates the value of the evidence of identification. See also *Samuel Kilonzo Musau vs. Republic* [2014] eKLR.

28. In the instant case, PW1 appeared to testify that she saw the suspects before the parade as they were getting out of the police Land Rover at the police station, she said that she stayed for a while with the suspects at a place where there were other persons before they identified them. She also said that there were two motorcycle taxi operators in that parade. In the parade form put in evidence as P. Exhibit 8(a), in respect of the second appellant, the second appellant endorsed on the form the following remarks "I am not satisfied with conduct. Claims the witnesses had seen him earlier at the police station." The endorsement appears to tally with the testimony by PW1 that she had seen them alight from a Land Rover at the station.

29. It would appear the second rule, to the effect that the witnesses ought not see the suspects before the parade and that the suspects ought to be persons unknown to the witnesses, were flouted. The position stated in *David Mwita Wanja & Others vs. Republic* (supra) ought to apply to the evidence relating to the identification parade that was tendered in this case, its value was compromised by the flouting of that rule.

30. The appellants have also argued that since there was no first report to the police diminished the value of the evidence on the identification parade. It would appear that failure to describe the suspects in the first report does not render the identification parade worthless. The Court of Appeal observed on that issue in *Nathan Kamau Mugwe* Criminal Appeal No. 63 of 2008 (unreported) that:

"*As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriel's case … the court did not go so far as to say that a witness must- be asked to give a description of the person to be put on the parade for identification."*

31. In the grounds of appeal, the appellants claim that an essential witness was not called to testify. They did not submit on that and therefore I shall not dwell on the point, save to quote from the court in *Keter vs. Republic* [2007] 1 EA 135, where it was said:

"*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."*

32. The appellants faced a charge of robbery with violence. The said offence is created under section 296(2) of the Penal Code, which states as follows:

"*296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*

(2) 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."

33. The offence is established where a robbery is committed accompanied by either of the three factors set out in the provision – that is that the robbers are more than one, or use actual violence on their victim, or are armed with offence or dangerous weapons. See *Simon Materu Munialo vs. Republic* [2007] eKLR , *Odhiambo & Another vs. Republic* [2005] 2 KLR 176, *Joseph Njuguna Mwaura vs. Republic* [2013] eKLR and *Johana Ndungu vs. Republic* Criminal Appeal No. 116 of 1995).

34. In the instant case, the attackers were two in number, armed with a *panga*, which is an offence or dangerous weapon with capability to cause grievous harm and even death. There is also evidence that actual violence was perpetuated on PW1. The issue that needs to be considered is whether there was theft, for robbery can only occur in circumstances where those other elements accompany the commission of the offence of theft or stealing.

35. The charge of robbery with violence accused the appellants of robbing PW1. The question is whether the offence of theft was established. PW1 was not categorical that she was robbed. The victim of the crime, PW1, said as follows in examination-in-chief:

> "… *They decided to do a search of changaa in my house. We entered. As we entered they ordered me to sit down and removed a panga. It is when I pleaded with them not to cut me. One was brown and medium size. It is the short one who produced the panga. I then raised my hands to block them from cutting me. They told me to remain silent. It cut my left hand at the thumb. (visible scar). The one who had uniform was short one. He had white sports shoes. My husband was in the bedroom. One then entered into the bedroom. The tall one remained at the door. I had money by Kshs. 3000/=, 5000/= and techno phone. I remained in the sitting room and they entered and then talked to my husband. I could see them from the bedroom. My husband used the stool to block the panga cuts. The stool then damaged. They then left"*

36. The testimony by PW1 examination-in-chief was equivocal as to whether anything was taken away from her at all. All she said was that she had money, it is not clear how much. She talked of Kshs. 3, 000.00 and then Kshs. 5, 000.00. She also talked about a techno phone. She did not say whether any money or the phone were taken away from her. In cross-examination, she said "In total you took Ksh. 8000/= and techno phone." I need to emphasize that this was cross-examination, evidence at this stage is meant to clarify the testimony in examination-in-chief. She had not talked of the robbers taking anything at her examination in chief. And at this stage she did not say that the money and phone were taken away from her. Indeed, she did not say where the money and phone were taken from. Her husband, PW2, who was in the same house with her, said "My wife was robbed of ksh. 8000/- and a phone techno." He did not say whether he saw the robbers actually robbing her. He did not say how he got to know that she had been robbed.

37. In my view, the evidence on the element of stealing was handled very casually by the witnesses, yet it is the principal element in the robbery. Robbery is principally theft that is accomplished through force or violence or threats of violence. To prove robbery, whether simple, where only force is use, or with violence, the underlying offence of stealing must be established. In the instant case I am not persuaded that the element of stealing was established beyond reasonable doubt. There was no evidence as to where that money was and how and at what stage the same was taken away from PW1. There was no evidence that the Techno phone that was allegedly stolen existed. Its details were not disclosed, its serial number was not indicated, and so forth. PW1 made no effort to prove that she had or owned such a phone. No sales receipt was produced.

38. In view of the matters that I have stated above, I am persuaded that the conviction of the appellants was not safe. It cannot be said that the prosecution presented evidence that established proved beyond reasonable doubt that the appellants committed the crimes that they were accused of. There were gaps in the prosecution case, which ought to have been resolved in favour of the appellants. I shall accordingly quash their convictions and set aside the sentences imposed upon them. They shall be set free from prison custody unless they are otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS……28TH ….DAY OF …JUNE... 2019

W MUSYOKA

JUDGE