



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NOS.92 & 93 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. J.Kibosia – (SRM) CM delivered on 4th May 2018 in Makadara CM CR. Case No.1797 of 2015)

FRANCIS OKUMU OMBUSI *alias* EDU1ST APPELLANT

JOHN MWANGI MBIU2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellants, Francis Okumu Ombusi *alias* Edu and John Mwangi Mbiu were jointly charged with six (6) counts of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars in the 1st Count were that on 4th June 2015 at Kariadudu Estate within Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely iron bars and a pistol, robbed Richard Olum of one TV set make LG, one DVD make Sony, one RADIO make Panasonic and cash Kshs. 1,000/= and during the time of such robbery used actual violence to the said Richard Olum.

In the 2nd Count, the particulars of the offence were that on 4th June 2015 at Kariadudu Estate within Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely iron bars and a pistol, robbed Fredrick Ogola of one TV set make Toshiba, one DVD make LG, one mobile phone make Nokia and cash Kshs.1,500/= and during the time of such robbery used actual violence to the said Fredrick Ogola.

In the 3rd Count, the particulars of the offence were that on 4th June 2015 at Kariadudu Estate within Nairobi County, the Appellants, jointly with others not before court while armed with dangerous weapons namely iron bars and a pistol, robbed Charles Odhiambo of one woofer, a mobile phone and cash Kshs.1500/= and during the time of such robbery used actual violence to the said Charles Odhiambo.

In the 4th Count, the particulars of the offence were that on 4th June 2015 at Kariadudu Estate within Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely iron bars and a pistol, robbed one Elly Omondi of one mobile phone make LG and cash Kshs.1,200/= and during the time of such robbery used actual violence to the said Elly Omondi.

In the 5th Count, the particulars of the offence were that on 4th June 2015 at Kariadudu Estate within the Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely iron bars and a pistol, robbed one Abdilaziz Musa of one TV set make GLD, One DVD make Sony, one woofer make GLD, two mobile phones and Kshs.6,000/=, and during the time of such robbery used actual violence on the said Abdilaziz Musa.

In the 6th Count, the particulars of the offence were that on 4th June 2015 at Kariadudu Estate within Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely iron bars and a pistol, robbed one Isaiah Nyamalo of one woofer make APEX and two mobile phones all valued at Kshs.9,000/= and during the time of such robbery used actual violence to the said Isaiah Nyamalo. When the Appellants were arraigned before the trial magistrate’s court, they pleaded not guilty to all the charges. After full trial, they were convicted as charged. They were sentenced to serve twenty (20) years imprisonment for each count. The sentences were ordered to run concurrently. The Appellants were aggrieved by their convictions and sentences. They have filed separate appeals to this court.

The Appellants’ appeals were premised on the following grounds: that the learned trial magistrate erred in law and facts when he convicted them, that the case against them was not proved beyond reasonable doubt. The Appellants were aggrieved that the trial court convicted them after it relied on contradictory and conflicting evidence given by hostile witnesses. That the trial magistrate failed to consider the Appellants’ alibi defence that was plausible. In the circumstances, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them.

The appeal was argued by way of written submission. This court also heard oral rival submission made by Mr. Ndungu for the Appellants and Mr. Momanyi for the Respondent. Mr. Ndungu submitted that the prosecution failed to prove their case to the required standard of proof to secure the convictions of the Appellants. The Appellants cited that the identification process was faulty, for a crime involving 10 suspects the only proper identification would have been an identification parade which was not conducted. The prosecution failed to establish any evidence to prove the existence of *actus rea*. They failed to produce any photographs or avail any exhibits to prove that the houses of the prosecution witnesses had been broken into. The witnesses testified that their household items were stolen. No documentary evidence was produced to support these allegations. Further, PW3 stated that he was hit by the 1st Appellant with a panga which caused injury on his head.

The Appellants submitted that there were inconsistencies regarding PW1's testimony when he stated that during the robbery, he was in the toilet outside the house. The Investigation Officer did not provide any evidence to establish the distance between the toilet and the houses, the distances between each house and whether there was a security light which illuminated the area during that time of the robbery. In their submission, they stated that they were aggrieved that the trial court did not consider their respective defences in his judgment. He did not analyze and compare the evidence by the defence witnesses. The learned trial magistrate failed to consider that there was no relationship or connection provided by the prosecution between DW1 and DW2, no evidence was adduced to connect or establish a pre-existing relationship between DW1 and DW2.

Learned counsel took issue with failure of the trial magistrate to consider the evidence by 1st Appellant who told the court that there had been bad blood between him and the prosecution witnesses. On several occasions, the 1st Appellant had reported the prosecution witnesses to the Area Chief for failure to pay garbage collection fees. The Appellant stated that the prosecution witnesses had a motive to have DW1 punished and therefore the trial magistrate ought to have considered the prosecution's evidence with extreme caution. The Appellants also submitted that the investigating officer who arrested the Appellants and recorded their statements was suspended from the police force. The Appellant argued that since the investigating officer was suspended from the police force on account of lack of integrity, then, the charges preferred against them were invalidated.

Mr. Momanyi for the State submitted that PW1 who was the key witness testified that he had seen the 1st Appellant as he peeped through a hole in the toilet. His evidence was corroborated by the other prosecution witnesses. They testified that the Appellants were armed with dangerous weapons namely a pistol and pangas and were in company of other persons not before the court. With regard to the identification of the Appellants, the witnesses stated that the Appellants were well known to them prior to the robbery incident. Learned State Counsel submitted that the identification of the Appellant was positive and was free from the possibility of error.

Before this court gives its decision, it is imperative that we set out the facts of this case, albeit briefly. On the material night of 4th June 2014, PW1 Bernard Otieno testified that he had gone to the toilet when he heard people entering into one of the houses within their estate. He stated that they were armed with pistols, metal bars and pangas. They secured entry into Boaz Ali, Gabriel Onyango and Richard Olum's houses and took away household items from their houses. He stated that there was security light which enabled him to identify the 1st Appellant. He testified that the 1st Appellant wore a black marvin and black pants. PW1 told the court that he knew the 1st Appellant as a garbage collector and that at the time of the robbery he was armed with a pistol. He saw him pointing at the houses that were broken into. He also identified the 2nd Appellant who was picking the stolen items from the scene of crime. He knew the 2nd Appellant prior to the robbery incident.

PW2 Richard Olum testified that on the material night, he was in his house when he heard footsteps outside his house. The 1st Appellant was the first to enter his house. He was armed with a pistol while his accomplices had pangas. He stated that the 2nd Appellant was also part of the gang and was also armed with a panga. He asserted that they threatened him by pointing a gun at him and demanded from him cash and phone. PW3 Elly Omondi Ouma was asleep in his house within the same neighbourhood when he heard someone breaking his door. He averred that the 1st Appellant was armed with a pistol when he entered his house. He ordered him to lay down and went ahead and took a panga from one of his accomplices and hit him on the head with the side of the panga. He lost consciousness. When he regained consciousness, he realized he was bleeding from the injury on his head. In his testimony, he told the court that he knew both the Appellants. That he had known the 1st Appellant for about three years while the 2nd Appellant used to work in the neighbourhood.

PW4 Fredrick Ogola was the Caretaker of their residential building. He testified that on the material night, while he was asleep in his house, he heard someone inserting a metal bar on his door. He woke up. He saw the Appellants and their accomplices forcefully enter his house. He was slapped by one of them and hit on the back. His household items were stolen.

Charles Odhiambo, who was PW5, testified that he knew the 1st Appellant as a garbage collector and the 2nd Appellant used to do business near their plot. PW5 stated that he was able to recognize the both Appellants since his house's electric lights had been switched. The Appellants and their accomplices stole household items from his house.

The investigations were conducted by PW7 PC James Githaiga of Ruaraka Police Station. He went to the scene of crime. He was accompanied by Cpl. Mugo, PC Otieno and PC Muchai. They found the robbers had already left the scene of crime. They found the victims who told them that they had been robbed by a group of about 10 men who were armed with pistols and pangas. The officers were also told by the victims that they could identify two of the men in the group. They assessed the doors and found they had been broken. Upon concluding his investigations, PW7 established that indeed a case had been made for the Appellants to be charged with the offence of robbery with violence.

PW8 PC. Josphat Otieno was the arresting officer. He was given instructions by the OCS to arrest two accused persons with several other people. Acting on a tip-off, he arrested the 1st Appellant.

PW9 PC Japheth Muthini from Ruaraka Police Station took over the investigations from where PW8 had left. He told the court that PW8 had since been suspended from the police force. He took over investigations on 7th June 2015. When he took over the matter, only two witnesses were remaining. He told the court that PW8 did not indicate in his statement the date when he commenced his investigations. He

further told the court that the accuseds' names were not indicated in the witness statements and that the investigations were conducted before the accuseds persons were charged.

When the Appellants were put on their defence, the 1st Appellant testified that on the material day, he was at work, collecting garbage till 6.00 p.m. He was arrested by the police while taking porridge at some 'Kibanda'. The 1st Appellant attributed his arrest to a grudge that existed between him and the prosecution witnesses. The grudge emanated from the fact that the said witnesses refused to pay garbage collection fees. The 1st Appellant reported the prosecution witnesses to the Area Chief when they failed to pay the garbage collection fees.

The 2nd Appellant testified that he was an electrician and sold electronics and repaired radios and phones. On the material day, he was at his place of work from about 7.00 a.m., when he closed his shop and decided to go and watch a video at one of the video dens. The police officers raided the place and arrested the people who were there. The 2nd Appellant stated that he did not know the witnesses neither did he know the 1st Appellant. He told the court that no identification parade was conducted to confirm the assertion by the prosecution witnesses that they had identified him at the scene of crime. Both Appellants denied the allegation that they had committed the offences.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellants ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (See **Okeno vs Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charge of **robbery with violence** contrary to **Section 296(2) of the Penal Code**.

This court has re- evaluated the evidence adduced in the trial court, in light of the grounds of appeal and submissions made by the Appellants and the prosecution on this appeal. It was clear from the evidence adduced before the trial court that the prosecution relied on the evidence of identification to secure the conviction of the Appellants. Where the prosecution relies on the evidence of identification, in **Nzaro v. Republic [1991] KAR 212**, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to secure a conviction.

Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in **Wamunga v. Republic [1989] KLR 424** at page 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

In the present appeal, it was clear that the prosecution relied solely on the evidence of visual identification that was made in circumstances that for intent and purposes can be said to be difficult. The robbery incidences occurred at night. The identifying prosecution witnesses who testified told the court that their plot was attacked by a gang of about ten (10) robbers. Some of the robbers were wearing masks. They were armed with pangas and a pistol. They terrorized them and robbed them after breaking into their houses. Some of the victims of the robbery were injured. The prosecution identifying witnesses testified that they were able to identify both Appellants as being members of the gang that robbed them on the material night by virtue of the fact that they knew them prior to the robbery incident. The witnesses testified that the 1st Appellant was a garbage collector within their estate while the 2nd Appellant ran a small scale business within the neighbourhood.

What was instructive from their testimony was that, immediately after the robbery, they said witnesses did not give the names of the Appellants to the police. If indeed the identifying witnesses knew the Appellants prior to the robbery incident, *why didn't they give their names to the police who were investigating the case?* Secondly, the circumstances in which the identifying witnesses said they identified the Appellants raised reasonable doubt in this court's mind that they properly identified the Appellants as being in the gang that robbed them. The Appellants were arrested as a result of the police's own investigation and not on account of the report made by the identifying witnesses that they knew the Appellants were members of the gang that committed the robbery.

The identifying witnesses gave contradictory evidence in regard to how they were able to identify the Appellants. Some of the identifying witnesses told the trial court that the Appellants and particularly the 1st Appellant wore a marvin while others claimed that they did not wear any disguise. For the witnesses who told the court that they were able to identify the 1st Appellant despite him wearing a marvin, *how were they certain that it was the Appellant who was wearing the marvin?* Furthermore, this court takes note of the fact that in the hectic circumstances of the robbery, and where many robbers are involved, the likelihood that the victims may be mistaken that they had positively identified the Appellants as being among the gang that robbed him is high. In the hectic circumstances of the robbery where the victims were stressed and panicked, the probability of mistaken identity was high.

This court was not convinced that the evidence adduced by the prosecution identifying witnesses was watertight as to exclude the possibility of error. The Court of Appeal in **Kimotho Kiarie v Republic [1984] eKLR** held thus:

“The Senior Resident Magistrate and the Judge thought that PW1 and PW2 were honest witnesses. We do not quarrel with that assessment. However, a witness may be honest but mistaken: Roria v R [1967] EA 583 and a number of witnesses could all be mistaken: R v Turnbull & Others [1976] 3 All ER 549. The trial and the first Appellate Court excluded altogether the possibility of a mistake on the part of the complainant and his wife. In the circumstance of this case, that, in our view was a substantial error.”

In the present appeal, it was clear that the trial court did not interrogate the possibility that the identifying witnesses may have been mistaken in their assertion that they had identified the Appellants during the course of the robbery taking into consideration the circumstances in which the robbery took place. The source of light *vis a vis* the position of the identifying witnesses did not clearly come out in evidence.

The 1st Appellant told the court that there existed a grudge between him and the said identifying witnesses because of their refusal to pay garbage collection fees. He had even reported them to the Area Chief. The possibility that the said identifying witnesses may have been motivated by a grudge to frame the 1st Appellant cannot be ruled out. This was more so taking into consideration the paucity of the evidence regarding the description of the robbers by the said identifying witnesses. The said identifying witnesses did not tell the court what identifying features of the Appellants made them to be certain, nay, sure, that it was the Appellants and no one else who was in the gang that robbed them. They did not give their description of the clothes that the Appellants wore on the material night. This court formed the view that the entire evidence of identification was not properly evaluated by the trial court leading to the erroneous conviction of the Appellants. This court therefore holds that the Appellants' grounds of appeal raise reasonable doubt regarding the entire evidence of identification. None of the robbed items were recovered in the Appellants' possession. There was no other evidence that connected the Appellants with the robbery.

In the premises therefore, this court finds merit with the Appellants' respective appeals. They are hereby allowed. Their conviction is quashed. Their custodial sentences are set aside. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF JUNE 2019

L. KIMARU

JUDGE