REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 178 OF 2010

SAMWEL MWANGI GIATHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.M.Nyakundi (S.R.M) vide CR. No. 1169 of 2008 at Nyeri delivered on 16th day of July 2010)

JUDGMENT

This appeal is conceded.

It is the classical case caught in the judicial times we live in. It demonstrates both the pathos of the life of the convict chasing an appeal through a system still finding its structural base cleansed by the fresh breath of the New Constitution. He was convicted of both the main charged and the alternative charge. The new Constitution came to life while he was a few months, condemned convict. His first round of appeals was affected deeply by the **Karisa Chengo** case, and while he was working on the second round, the **Francis Muruatetu** case came along. All this time he was in custody having been arrested at a time when capital offence suspects were not eligible to bond.

The Case

The appellant Samuel Mwangi Giathi was jointly charged with Stanley Njuguna Nduta with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and an alternative count of handling stolen properties contrary to **section 322(2)** of the same code. The particulars of both counts were set out in the charge sheet viz:-

> ***On the 10th day of September 2008 at Ichuga village in Nyeri North District within Central province, jointly with another not before court while armed with offensive weapons namely guns, pangas and knives robbed SAMWEL MUTHEE GITHUI of one motor vehicle Toyota Corolla DA white in colour Reg. No. KAT 112T Engine number 5E-1119712, one phone Nokia 1100 and cash Kshs.3000/- all valued at Kshs.457,000/- the property of SAMWEL MUTHEE GITHUI and at the time of such robbery injured the said SAMWEL MUTHEE GITHUI.***
>
> ***In the alternative that on the 16th Day of September 2008 at Kimoson farm in Trans-Nzoia East District within the Rift Valley Province, otherwise in the course of stealing, dishonestly received or detained motor vehicle Reg No. KAT 112T Toyota Corolla DX station wagon knowing or having reasons to believe it be stolen.***

The trial court heard 9 witnesses and the defence by each of the accused persons.

The learned trial magistrate by a judgment dated 16th July 2010, found the two guilty of both the main charge and the alternative charge. She proceeded to sentence each of them to death on the main charge leaving the sentence on the alternative charge in abeyance.

Both filed this appeal against the conviction and sentence on 21st July 2010. The appeal was heard by Abuodha and Ougo JJ. By judgment dated 6th November 2013 they upheld the conviction and sentence on the robbery charge and quashed the same on the alternative charge.

The appellants filed Court of Appeal, CR Appeal No.89/2014. The court upheld the decision of the High Court and sustained the conviction and sentence on the robbery charge and quashed the same on the alternative charge.

Then came- Supreme Court Petition **No.5/2015 Republic vs.Karisa Chengo & 2 others (2017) eKLR** where the Supreme Court upheld the Court of Appeal decision that " the *'High Court Bench' which affirmed the convictions of the respondents herein was unconstitutionally empaneled"*. The fact that Justice Abuodha was serving as a Judge of the ELRC court rendered the judgment a nullity. This was the

determination of the Court of Appeal in a Ruling delivered on 13th February 2019 which quashed the High Court decision and also quashed its own judgment of 17th March 2015 and vacated it. An order was made that the appeal be heard afresh.

The appellant had filed amended Grounds of Appeal on 18th September 2013; That:

1. The learned trial magistrate erred in both points of law and facts or misdirected herself in both in failing to resolve the inconsistency and shoddy manner in which the arrest was made from the suspicions basis.

2. The learned trial magistrate gravely erred in both points of law and facts or misdirected herself in both in failing to approach the alleged possession and the circumstantial evidence with the due circumspection owing the fact that, such evidence can be fabricated to cast suspicions on to another.

3. The learned trial magistrate gravely erred in both points of law and facts or misdirected herself in both in treating the co-accused statement as evidence giving credence or corroboration to the other prosecution evidence and thus acting on such to base the conviction.

4. The learned trial magistrate gravely erred in both points of law and facts or misdirected herself in both in not giving the defence the due protection of the law as is reflected on the constitution of the Land.

5. The learned trial magistrate gravely erred in both points of law and facts or misdirected herself in both in provisionally shifting the burden of prove to the defence and thus failing to give it its due consideration.

Following the order for fresh hearing of the Appeal, the appellant through his counsel Paul Ng'arua & Co. Advocates, filed supplementary Grounds of Appeal: That;

a) The mandatory nature of the death sentence as provided for under Section 296(2) of the Penal Code is manifestly cruel and degrading treatment. Furthermore, it takes away the discretion of the trial magistrate and as such it undermines fair trial guaranteed under Article 50 of the Constitution of Kenya 2010, and is therefore unconstitutional and should be set aside.

b) The appellant's trial was manifestly unfair as he was denied exculpatory information held by the prosecutor to this day.

c) The learned trial chief magistrate failed to weigh the value of dock identification on the correct and applicable standard and instead placed more weight than is applicable.

d) The trial magistrate failed to follow laid down mandatory procedure with respect to amendment of charge sheet.

Counsel also filed a list of authorities and written submissions.

List of Authorities

1. Thomas Cholmondeley v Republic Court of Appeal.Cr Appeal 116 of 2007

2. Vincent Omondi v Republic HCR Appeal 170 of 2002

3. James Omondi Were HCR.Appeal 217 of 2012

4. Peter Wanjohi Mbogo HCR.Appeal No.38 of 2007

5. Gabirel Kamau Njoroge v Republic Court of Appeal No.149 of 1986

6. Harrison Mirungu Njuguna v Republic Court of Appeal No.90 of 2004

7. Erick Arum v Republic Court of Appeal at Kisumu Cr.Appeal 85 of 2005

8. Francis Kariuki Njiru and others v Republic Court of Appeal at Nairobi Cr.Appeal No.6 of 2001

9. Kamotho Kiarie v Republic Court of Appeal Cr.Appeal No.93 of 1983

10. Samuel Karioko Muruatetu petition No.15 of 2015

The state through Mr. Magoma responded by way of oral submissions and did not file any authorities.

The facts of the case are that: -

The appellant pleaded not guilty to both charges and the prosecution called a total of nine witnesses. It was the prosecution's case that on 10th September, 2008 at around 7:30pm PW2, Samuel Muthee Githui was driving PW1's, Peter Ndegwa motor vehicle registration number KAT 112T to visit his sister in Ichuga. Upon arriving at his sister's home, Samuel came out of the vehicle and as he was opening the gate he saw a man pointing a gun at him; the armed man was in the company of two other men. One of the men dragged Samuel into the back seat of the vehicle wherein he sat with two of the assailants while the other drove the vehicle. The assailants stole his mobile phone and Kshs.3,300/-. Samuel was tied up and ordered to sit. He testified that the robbers threatened to kill him and he pleaded with them to spare his life. According to Samuel, while he was pleading for his life he was able to get a good impression of the robbers with the aid of the light in the vehicle.

Thereafter, the car was stopped and Samuel was dragged into Gathioro forest. One of the robbers who he identified as the accused told him to say his last prayers and ordered him to lie down. Samuel was hesitant and the 2nd accused removed a sword and cut him on his back and left thigh. They then heard a vehicle heading towards the scene and the appellant told the 2nd accused to finish Samuel as the t appellant and the other assailant went to look at the vehicle which was approaching the scene. The 2nd accused proceeded to cut Samuel's index finger and left ear. Samuel struggled with the 2nd appellant and fortunately managed to escape. He was assisted by members of the public and rushed to hospital.

On 15th September, 2008 at around 7:30 a.m. while PW3, Henry Kopsi Lelei was in his shop he saw a motor vehicle stop in front of his shop. Thinking it was his visitors Henry went to the vehicle and saw two men therein. One of the men said that the moto vehicle had a puncture and requested to leave the vehicle there as they went to Kitale to buy a spare tyre. Hey identified the other occupant as the 2nd accused. He asked the appellants to write down their particulars which they did and they left on foot. By around 12noon the two men had not returned Hebecame suspiciou and called called the area chief, PW8, Francis Kimeli Morogo who went to his shop in the company of PW5, PC Doughlas Naibei. They noticed that the vehicle bore registration number KAU 242T on its number plate while the windows of the vehicle had registration number KAT 112T at the back seat. Thereafter, the police lay an ambush around Henry's shop.

According to PW3 and PW4 on 16th September, 2008 at around 6:00 a.m. they heard gunshots around from the plantation nearby. The appellant was arrested at Maili Saba 20km away while the 2nd accused was arrested thereafter at around 11:00 a.m. by members of the public allegedly on his way to collect the motor vehicle.

PC Douglas circulated a signal of the details of the stolen vehicle country wide. Subsequently, on 29th September, 2008 PW1r identified the recovered vehicle as the one which had been stolen. The appellant and his co accused were arraigned and charged in court.

In their defence each gave a sworn statement. The appellant denied committing the offences he was charged with and maintained that on the material day he was at home in Kitale. On 16th September, 2008 at around 10:00 a.m. while on his way to Maina Wambui's home he was accosted by three men who started beating him until he was rescued by the police officers and taken to Maili Saba Police Station. He also denied knowing the 2nd accused.

The 2nd accused appellant testified that on 15th September, 2008 the 1st appellant who was well known to him asked him to accompany him to Ngonyeki. The 2nd appellant agreed to do so on the condition that the 1st accused would give him some work. He gave evidence that the 1st accused had at the material time been driving motor vehicle registration number KAU 242T. After a while one of the tyres had a slow puncture and the appellant stopped and left the vehicle in front of PW3's shop. Thereafter, they proceeded on foot and separated at the junction at Maili Saba.

On 16th September, 2008 one James Etabo inquired from the 2nd accused the whereabouts of the appellant, the 2nd accused agreed to take him to PW3's shop where the appellant had left the vehicle. At about 100 metres away from Henry's shop they were attacked by members of public and beaten, they were rescued by the area chief.

Mr.Ng'arua argued the appeal and submitted in detail on the grounds of appeal.

Laying emphasis on the issue of identification he argue that the trial magistrate had relied wholly on dock identification. That the prosecution had failed to completely lay a basis for the dock identification see Mohammed Elibite Hibuya and Another vs. R [2001 eKLR. That the trial magistrate noted in the judgment that the complainant identified the 2 accused 'on' the dock.

> ***"PW1 stated that he was shown two people who had been arrested in possession of the motor vehicle at Cherangany Police station. PW1 identified the two accused person (sic) of the dock".***

It was argued for the appellant that despite his clear statement by PW1, the prosecution failed to avail any other evidence to support PW1's dock identification i.e. evidences to show that there was a basis for the dock identification for example that he had given descriptions of the accused persons to the police at the point of reporting the robbery.

It was also argued that the prosecution refused to avail the OB upon the appellant's request which would have confirmed whether the police had received any description from the complainant. Relying on **Bukenya vs.Uganda (1967) EA 341**, he urged the court to find that the failure/neglect/refusal by the state to avail the said evidence ought to be held against the state- and the court to draw the inference that the evidence would have been adverse to the case for the state.

He also argued that the appellant's defence had not been considered.

Finally he addressed the issue of the constitutionality of the death sentence. Relying on Francis Muruatetu, he pointed out that the court now

had discretion to mete out the appropriate sentence befitting the offence. In this case he urged the court to find that the conviction and sentence suitable for setting aside. That even if the appeal was to fail on conviction, the appellant who had been in custody since 200eight deserved to be freed as he had served sufficient time

In his response Mr. Magoma appeared to have noted the prosecution's failure to prove the fact of identification of the appellant and was quick to concede to the ground that on that basis alone the state had not proved its case beyond a reasonable doubt. That the offence was allegedly committed on 10th September 2008 at night, that the complainant was admitted in hospital for 5 days before admission he had reported to the police.

> ***"That dock identification was insufficient considering time and duration, that Identification Parade was necessary for the offence of this nature, that complainant when he reported to police never gave a description of the assailants".***

He cited the case from the Supreme Court of India- **Vijayan Rajan Vs.State of Kerala Sc 1086/1999.**

> ***"Though PW7 also had identified accused in the Test Identification Parade which had been conducted by the Magistrate PW6 but in the court he could not identify the accused and, therefore, the so called identification in Test Identification Parade loses its importance. That apart the reasons for vitiating the Test Identification parade already indicated would apply so far as the identification for PW7 in the Test Identification Parade is concerned. In this view of the matter we are of the considered opinion that the High Court erroneously relied upon the so called identification of Vijayan by PW7 in the Test Identification Parade even though in court he did not identify Vijayan."***

He did not argue the other grounds**.**

Analysis

My duty as the 1st appellate court is settled as was held in **Okeno vs Republic (1972) EA 32** is to re-evaluate the evidence and draw my own conclusions from the same. I must be conscious of the fact that I neither saw nor heard the witnesses see **Kimeu vs Republic (2003) KLR 756**

I have carefully considered the evidence, submissions and authorities relied on by parties. The only issue is whether the appellant was properly identified as the person who committed this offence.

From the record, the complainant was Samuel Muthee Githui. He told the court that after the robbers put him in the car, they left the interior lights on a very unlikely scenario. The 2nd accused was to his right, the appellant herein to his *"left front but again drove the motor vehicle"*.

From the record he gave evidence in detail of what the 2nd accused did to him. He said very little with regard to the appellant except that he sat to his left, he also drove the motor vehicle, he came out of the car with the others, he told the others to leave when another motor vehicle stopped on the road side.

He testified that he was admitted in hospital following injuries inflicted by Accused 2 and discharged on 15th September 2008. He said he recorded a statement upon discharge from hospital. That he described the appellant to the police as tall, slim and brown, yet he also testified that it was the slim gangster who attacked him with a Somali sword. In his testimony the person who attacked him with the Somali sword was the 2nd accused (not the appellant) and it is only with respect to the 2nd accused that he testified as having seen him clearly.

It is also on record that he said he saw the clothes the attackers were wearing on that day but he did not give any description. According to Mr. Magoma this was necessary because it is on the basis of all this that the complainant alleged to have 'recognized' the appellant in court.

I am also well guided by the Court of Appeal case of **John Nduati Ngure vs R (2016) eKLR** where it was held that:

> *"Evidence of visual identification can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. However, the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. See Wamunga vs. Republic (1989) KLR 424"*

In Maitanyi vs R [19eighty6 eKLR the Court of Appeal dealing with the issue of the identifying evidence of a single witness rendered itself thus:

> *In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel.*

It cannot be that careful scrutiny of evidence is a thing of fireside tales. Evidence must be scrutinized at all stages of the criminal charge, at investigation, at the point of charging the suspect, during prosecution by the prosecution and by the court. It is a standard that should never have been let go of, a standard that should maintained at the highest level at all times, with improved skills, knowledge and appropriate attitudes. The nature of the criminal charge cannot be dealt with less. The mistaken identity of a suspect will lead to a miscarriage of justice, prosecuting the wrong person, while the culprit gets away with it to commit the offence another day. The stakeholders in the Criminal Justice System must uphold the Constitutional fiats around the criminal trial. The Court went on to state:

In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness"

There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.

Though this was not a case of a single witness the inquiry was necessary taking into consideration the manner in which the appellant was arrested. Clearly therefore the concession of the issue of identification of the appellant as having been among the people who attacked the complainant is tenable as the state did not produce any evidence to support the alleged recognition by PW2 to support the dock identification.

"Time without number, this court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested.

In the case of **Republic -vs-Turnbull and others (1976) 3 All ER 549**, Lord Widgery C.J had this to say:-

"*First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? 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 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 the actual appearance?"*

In **James Tinega Omwenga –vs- R – Criminal Appeal No.143 of 2011,** this Court expressed itself as follows:-

"*The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."*

It is noteworthy that the PW3 and PW4 were not present when the two accused were arrested. The complainant's description of the persons of the assailants could not be relied on because it was clear the person he was describing was the 2nd accused who spent time with him beating him, and with whom he alleged there was a a physical struggle.

The I.O made no effort to connect this evidence with the evidence of alleged possession of the alleged stolen motor vehicle. This brings me to the alternative charge.

The trial magistrate had found the appellant and his co-accused guilty of the alternative charge.

Clearly that was a misdirection by the learned trial magistrate. An alternative charge is alternative to the main charge and an accused person cannot be convicted on both. It is either the main charge or the alternative charge.

With regard to this charge, the key witness was PW3 Henry Kopsi Lelei. He testified that he spoke to both appellant and his co-accused, who told him that their motor vehicle had a problem- a station wagon, white in colour. They needed to leave it outside his shop while looking for spare tyre. He demanded that they leave him with their particulars. He gave them a small piece of paper where they wrote the same.

He testified he had given the note to the police. The note was not availed in court but he testified that the 2 persons who left the motor vehicle recorded their particulars including ID numbers on the note. The motor vehicle stayed there from 7:30 a.m. to 3:00 p.m. when he called the chief. The police took the motor vehicle away the same day.

The following day at 7:00 a.m., he heard gun shots. He says

"The thieves ran to the maize plantation. The 1st accused (appellant) was arrested by the public and the police. The 2nd accused came at around 11:00a.m and he was arrested by the public……The 1st accused was arrested at Maili Saba……."

On cross-examination by the appellant he told the court he saw him at police cells at Maili Saba and recognized him. He did not know the registration number of the motor vehicle that was left at his shop. He did not participate in any Identification Parade.

PW4, Joash Kipleting Lelei confirmed that the persons who left the motor vehicle wrote on a piece of paper their particulars- names, phone

and ID numbers and where they came from which paper was given to the chief. He also testified that he found these persons speaking to his father PW3. That when the 2 did not return by noon, they tried calling them through the phone numbers they left but they could not be found.

> ***"The following day in the morning the 1st accused came and we heard the noise of shooting. Kitale is around 30km from my home. The 1st accused ran for about 20km……the 2nd accused and another was arrested while coming to our home……..I recognized the 2nd accused and the 1st accused……."***

On cross-examination he conceded he had not given any description to the police officers.

PW8 Francis Kimeli Morogo the chief Kaplamal Location testified. He was categorical that he was not given the particulars of the persons who left the motor vehicle at the PW3's shop.

Clearly therefore the evidence on record speaks for itself. The appellant was not arrested at the scene where the motor vehicle had been left but 20km away. Neither PW3 nor PW4 saw him at the scene where the motor vehicle had been left, and although they were with the police the day before the arrest they gave no description of the suspect to the police.

Of greater importance is the piece of paper where the appellant and his co-accused there alleged to have recorded their particulars for PW3. Why was that piece of paper not produced?

The presumption would be it did not exist and by extension that the alleged conversation between PW3 and PW4 did not take place. Nothing was placed before the learned trial magistrate to prove that the same people who were arrested – 20km away from the scene, and a part were the same as the persons who allegedly left the motor vehicle in the hands of PW3. The fact that PW3, a shopkeeper did not know the registration number of the motor vehicle only adds to the presumption that he never spoke to the 2 suspects.

Hence, even with regard to the alternative charge, the identity of the suspects was not properly established.

The evidence of arrest further removed the appellant from the scene where the motor vehicle was.

Clearly without proper identification of the appellant, the prosecution had all the reasons to concede the appeal.

Disposition

I allow the appeal, quash the conviction and set aside the sentence.

The appellant is to be set at liberty unless otherwise legally held. To that end a release order to issue.

Dated, signed and delivered in open court at Nyeri this 24th June 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

State counsel-Mr. Mururu

Appellant present

Mr. Ng'arua for appellant present

Judge