



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 72 OF 2018

DOMINIC MWANZIA MWENDWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Principal Magistrate's, Court at Winam (Hon. B. Kasavuli SRM) dated the 30th February 2017 in Winam PMCCRC No. 1816 of 2014]

JUDGMENT

The Appellant, **DOMINIC MWANZIA MWENDWA** was convicted for the offence of **Robbery with Violence** Contrary to **Section 296(2)** of the **Penal Code**. He was then sentence to suffer death as by law prescribed.

1. In his Amended Grounds of Appeal he complained that he had been substantially prejudiced because the charge against him was duplex.
2. Secondly, he said that the Charge Sheet was incurably defective.
3. Thirdly, the Appellant said that the trial court failed to accord him a fair trial. He complained that he had been threatened by the learned trial magistrate, during the trial.
4. The fourth issue raised by the Appellant was that the alleged identification was under very hectic and difficult circumstances, thus rendering it unreliable.
5. In any event, the learned trial magistrate is said to have failed to caution himself of the dangers of relying upon the evidence of a single Identifying Witness.
6. The Identification Parade at which the Appellant was allegedly identified was also described as totally lacking in terms of the procedures which are intended to ensure scrupulous fairness.
7. As far as the Appellant was concerned, there were fatal contradictions in the prosecution case, which ought, therefore, to have led to an acquittal.
8. In a nutshell, the Appellant contended that the prosecution had failed to prove the case against him, to the standards required.
9. Furthermore, the trial court was criticized for rejecting the Appellant's plausible defence, without any proper reason for so doing.
10. Finally, the learned trial magistrate was faulted for handing down the death penalty without considering that the mandatory nature of the death sentence was arbitrary and unconstitutional.

Duplex Charge

11. As the Appellant submitted, the charging of the same offence in more than one count or the inclusion of two or more distinct grounds of complaint in one charge, renders the charge duplex.
12. The Appellant submitted that an injustice would be occasioned to an accused person where evidence is called relating to many separate offences, all contained in one count, because the accused cannot possibly know what offence he is charged with.
13. I agree with the Appellant that when an accused is unclear about the exact charges he is confronted with, he may not be in a position to

properly prepare his defence.

14. In this case the Appellant complained that;

“..... the charge sheet indicates two different offences in one count; namely one of robbery with violence contrary to section 295 of the Penal Code and the other of robbery with violence contrary to section 296 (2) of the Penal Code, Cap. 63 of the Laws of Kenya.”

15. I have perused the Charge Sheet in this case. I am satisfied that the Appellant’s contention is not founded on fact. I so find because the offence which the Appellant was charge with is;

“Robbery with Violence Contrary to Section 295 as read with Section 296 (2) of the Penal Code.”

16. Clearly, the Charge Sheet identifies only **ONE** offence, which is **Robbery with Violence**.

17. There is no merit in the contention that the charge was duplex.

Defective Charge Sheet

18. According to the Appellant, the Charge Sheet was incurably defective because it indicated that the Complainant was robbed of Kshs 17,000/= plus other items, whereas the Complainant testified that he had been robbed of Kshs 51,000/= and other valuables.

19. Even assuming that the evidence tendered by the Complainant did not mirror the particulars cited in the Charge Sheet, that would not render the Charge Sheet defective.

20. Inconsistencies between the particulars of an offence, as specified in a charge sheet, and evidence tendered at the trial may lead to the conclusion that the prosecution failed to prove the case which they had charged the accused with.

21. I find that there is no basis for the contention that the Charge Sheet was incurably defective.

Threats by the Trial Court

22. Although the Appellant mentioned the alleged threats in his Amended Grounds of Appeal, he did not provide this court with any particulars of the same.

23. I therefore presume that the said ground of appeal was abandoned.

Identification Parade & Other Issues of Identification

24. In order to determine this issue, the court will delve into the task of re-evaluation of all the evidence on record, as is required of a first appellate.

25. **PW1** testified that he was accosted by 5 people as he was locking his gate, after he had parked his vehicle within his compound at Arina Estate.

26. He said that he saw the said persons clearly as there was a security light at the gate.

27. **PW1** said that none of the 5 people were masked at the time they confronted him.

28. After the robbers first took about Kshs 1,500/= which was in **PW1**’s wallet, they demanded more money. **PW1** said that he could give them more money, which was inside the house.

29. Therefore, the robbers led him into the house.

30. As **PW1** said, all the indoor security lights were on. Therefore, **PW1** testified that he saw the robbers very well.

31. He testified that three of the robbers entered the house. However, he identified two of them.

32. During the trial, **PW1** identified the 2 accused persons as the ones he had identified during the robbery.

33. The Appellant was the 2nd Accused. His co-accused was **MICHAEL OKOTH OKEYO**.

34. The record of proceedings reveals that Michael was shot dead whilst the trial was still ongoing. Apparently, he was shot when he was out on Bond.

35. The learned trial magistrate was satisfied that the Complainant **PW1**, had positively identified the Appellant because there was sufficient lighting at the scene and also because of the relatively long duration when the robbery took place.

36. The trial court also noted that **PW1** had made it clear that the Appellant did engage him in conversation, at the time when he warned him against giving a wrong **PIN** Number for his **ATM** Card.

37. The Complainant is also said to have positively identified the Appellant at an Identification Parade.

38. In the light of the fact that the Complainant was robbed by more than one person, and because the robbers were armed with guns and a panga, and because the Complainant was threatened by those who robbed him, I am satisfied that the ingredients of the offence of **Robbery with Violence** were proved beyond any reasonable doubt.

39. As there was sufficient lighting both at the gate and inside the house where the Complainant was robbed, the likelihood of positive identification was real.

40. The Complainant even described two of the robbers to the police, prior to their arrest; and after they were arrested the descriptions given earlier matched the particulars of the arrested persons.

41. The learned trial magistrate, who had the benefit of observing the accused persons, verified from their appearances that the descriptions earlier provided by the Complainant mirrored the appearances of the accused persons.

42. However, there is only one disturbing issue, and it is in relation to the composition of the Parade at which the Appellant was identified.

43. The Complainant testified that the parade;

“... Had a mix of tall and short people.”

44. In effect, the members of the parade were not generally persons who were similar in build.

45. On the other hand **PW3, PC PETER OYOI**, testified that the people in the parade were of the same size as the Appellant. He denied the suggestion that the members of the parade were not people of the same size as the Appellant.

46. Clearly, if the members of the parade were the same in size with the Appellant, the witnesses who testified about the parade would have said the same thing.

47. If that was the only issue, I would have had to ask myself whether or not, given the totality of the rest of the evidence tendered, the identification of the Appellant was nonetheless positive.

48. I note that the Appellant did not suggest that there was any particular mark on him which made him stand out, so as to “assist” the Identifying Witness to pick him out.

49. In other words if there were some people who were short and some who were tall, in the parade, it may still be possible to have a process which can be said to have been fair, in the identification of a suspect; subject to other circumstances prevailing.

50. I say so because in practical terms, it appears to me that it is not at all easy for the police to regularly get 8 persons of the same height and physique, for use whenever parades are to be conducted.

51. But I hold no brief for the police officers who are tasked to conduct Identification Parades. Therefore, if there should arise a situation in which the members of a parade were not similar as anticipated by **Rule (d)** of the rules governing Identification Parades, the police would be under an obligation to satisfy the court that the said parade was still scrupulously fair.

52. In this case, I find myself troubled with one issue; the particulars of the statement which the Complainant recorded with the police prior to the arrest of the suspects.

53. When **PW1** was being cross-examined on 29th March 2016, after being re-called, he said;

“In my statement I said I identified you. According to my statement I said I identified one person; black, tall and with a scar.”

54. In effect, the Complainant had identified one, **NOT** two suspects.

55. The said suspect was “black, tall and with a scar.”

56. Yet when the Complainant had been giving evidence in-chief, he said;

***“Accused 2 is the brown one I saw*”**

57. Those two pieces of evidence are irreconcilable, because on the one hand the Appellant was black whilst on the other hand he was the brown one.

58. I therefore find that the evidence of identification cannot be safely relied upon.

59. Accordingly, as the Appellant was not found in possession of any of the Complainant’s stolen property, the only evidence linking him to the offence was the identification by the Complainant.

60. As the said evidence is of doubtful integrity, the Appellant’s conviction cannot be sustained.

61. I therefore allow the appeal, quash the conviction and order that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISUMU This 25th day of September 2019

FRED A. OCHIENG

JUDGE