



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.167, 169 & 171 OF 2016

PAUL NGUGI NJOROGE.....1ST APPELLANT

PAUL MUHIA WAMBUI.....2ND APPELLANT

ABDALLA ISSA KIBE.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. A. Onginjo CM

delivered on 9th November 2016 in Kibera CM Cr. Case No. 988 & 922 of 2014)

JUDGMENT

The 1st Appellant (Paul Ngugi Njoroge), the 2nd Appellant (Paul Muhia Wambui) and the 3rd Appellant (Abdalla Issa Kibe) were jointly charged, alongside others, in Count I with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 18th February 2014 at Matasia within Kajiado County, the Appellants jointly with others not before court, while armed with a dangerous weapon namely a pistol robbed Charles Njonjo Miringu of cash Ksh.4,200/-, one motor vehicle registration number KAT 470T Toyota NZE silver in colour valued at Ksh.400,000/- and a mobile phone make Samsung 317 valued at Ksh.9,500/- and at the time of the said robbery used actual violence against the said Charles Njonjo Miringu.

The Appellants were jointly charged alongside others in Count II with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 18th February 2014 at Matasia within Kajiado County, the Appellants jointly with others not before court, while armed with a dangerous weapon namely a pistol robbed Hannington Nyongesa of one mobile phone make Samsung Duo valued at Ksh.6,999/- and at the time of such robbery unlawfully killed the said Hannington Nyongesa.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged in both counts. The Appellants were each sentenced to death in Count I. The sentences in Count II were held in abeyance. The Appellants were aggrieved by their conviction and sentence and have each filed separate appeals to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that their respective convictions were based on a charge sheet that was bad in law for duplicity. They were further aggrieved that their conviction was based on a defective charge sheet since it failed to disclose the particulars of the alleged dangerous weapon. They faulted the trial magistrate for failing to find that their identification was not established to the required standard of proof beyond any reasonable doubt. They asserted that the trial court improperly relied on the doctrine of recent possession in convicting them. They took issue with the trial court's decision for failing to find that essential exhibits were not produced in court. They complained that the trial court failed to consider their respective defences in arriving at its decision.

The three separate appeals were consolidated and heard together as one for the purpose of this appeal. Each Appellant presented to court written submission in support of their respective appeals. They urged this court to allow their appeals. Ms. Akunja for the State opposed the Appeals. She made oral submission to the effect that the prosecution proved its case against the Appellants to the required standard of proof beyond any reasonable doubt. She asserted that the Appellants were positively identified during the identification parades. The robbery took place at night. She stated that there was sufficient light from the security lightings. She averred that the 2nd Appellant was found in

possession of the stolen phone. She was of the view that the ingredients of the offence of robbery with violence were established. With regard to sentence, Learned State Counsel submitted that the Appellants' sentence ought to be upheld since one of the victims lost his life. In the premises, she urged this court to dismiss the Appellants' respective appeals.

The facts of the case according to the prosecution are as follows: PW2 Beatrice Nyongesa is the deceased's wife. On 18th February 2014 at about 10.00 p.m., she received a call from PW5 Eric Simiyu informing her that her husband had been shot. PW5 stated that he was in-charge of a hall where a football match was being screened on that fateful night. The deceased, Hannington Nyongesa, was among the people who showed up to watch the football match. Hannington's phone rang. He went outside to pick the phone call. One of the customers informed PW5 that Hannington had left his car windows open. PW5 went outside to inform Hannington that he had forgotten to close his car windows. When he went outside, he saw Hannington arguing with three men. They were about 10 metres away. He stated that there were security lights outside the hall. There were also motorcycle taxi operators on the opposite side of the hall. The riders had switched on their motorcycle lights. He was therefore able to identify the assailants.

Hannington saw him. He started shouting saying that the three men wanted to kill him. He knelt down and begged the men not to kill him. PW5 started walking towards them. When he got close by, one of the assailants pointed a gun at him. PW5 stepped back on seeing the pistol. He walked back to the hall. He saw the assailants and the deceased coming towards the hall. When they got to the entrance of the hall, he heard a gunshot. The assailant who had pointed a gun at him shot the deceased on the head. The deceased fell down. Everyone who was in the hall started running out of the hall. PW5 ran out as well.

After a short while, PW5 climbed on a water tank and looked into the hall. He saw the deceased lying down in a pool of blood. He raised an alarm. People came to the scene. They went to check the deceased. He was still breathing. They rushed him to hospital. He was unfortunately pronounced dead when they got Karen Hospital. PW5 stated that the deceased had two phones on the material night. The assailants stole one of the phones. PW5 identified the phone in court. On 6th March 2014, PW5 was instructed to attend two identification parades at Ngong Police Station. The identification parades were conducted by PW8 and PW9. He identified the 2nd and 3rd Appellants during the identification parades. He stated that the 2nd Appellant was the one who pointed the gun at him when he approached them. He was also the one who shot the deceased.

PW3 Charles Njonjo was one of the complainants. He lived close to the hall where the robbery Incident occurred. He arrived home sometime between 10.00 p.m. and 11.00 p.m. He was driving a Toyota NZE Corolla registration number KAT 470T. When he got to the gate, he got out of the car to open the gate. He saw a group of people running from the direction of the hall. He afterwards saw three men coming from the same direction. He decided to move his car. He entered his car and started the ignition. Before he could drive off, the car window was hit using an object. He was ordered out of the car.

When he got out, he saw three men. He was hit at the back of his head and ordered to lie down. They asked him to surrender his phone and money. He obliged. The men then shoved him into the boot of the car. They were however unable to close the boot. They ordered him to move to the rear passenger seat. Two of the men sat on him. They drove the vehicle away. After a while, they stopped the car. The two men who were sitting on him alighted. PW3 heard the assailants say that the vehicle did not have fuel. He was ordered to move to the driver seat without coming out of the car and drive off. He reported the incident at Ngong Police Station. He was later requested to go to Ngong Police station to identify a phone that had been recovered. He was able to identify his phone. He also identified the 2nd and 3rd Appellants in the identification parades conducted by PW8 and PW9 respectively.

This case was investigated by PW13, Sgt. Joseph Mugenya from Ngong Police Station. On 18th February 2014, he was on patrol duty with three other police officers. At about 10.45 p.m. he heard gunshots. He rushed to the scene. He found a crowd of people who informed him that robbers had shot the deceased, Hannington Nyongesa. There was blood stains and spent cartridges at the scene. The assailants stole a phone from the deceased. PW3 also reported that he had been robbed. PW3 lost his phone and cash Ksh.4,200/-. With the assistance of PW12, Cpl Daniel Hamisi a Liaison Officer from Safaricom, PW13 was able to track the stolen mobile phones. PW13 found PW3's phone in PW1 Peter Karanja's possession. PW1 stated that a Patrick Irungu had left the mobile phone with him as security for a Ksh.1,500/- loan. The said Patrick Irungu stated that he bought the phone from PW4 Paul Musamba Kimulu. PW4 on his part stated that the 1st Appellant sold him the phone. The 1st Appellant first gave the phone to PW6 Joseph Maingi. PW6 refused to buy the phone since it was expensive. The 1st Appellant later sold the phone to PW4. The deceased's phone was recovered from Kelvin Mwangi Njuguna on 5th March 2014. Records showed that DW2 started using the phone on 26th February 2014. DW2 stated that he bought the phone from the 2nd Appellant for ksh.1,200/-. The 2nd Appellant stated that he bought the phone from the 3rd Appellant for Ksh.600/-. The 3rd Appellant told the police that he bought the phone from DW5. Erick Wekesa Njuguna. DW5 told the court that he had picked the phone in the course of his work as a garbage collector.

When the 1st Appellant was put on his defence, he gave an unsworn statement. He stated that on 11th March 2014, he was on his way home from work. He met police officers. They asked him to take them to his house. They searched the house and took away two mobile phones. The phones were later returned to him. They also took two wrist watches. They asked him to accompany them to Ngong Police Station. At the station he was asked to identify a phone. He told the police that he had never seen the said phone before. They asked him if he knew PW4. He told them that PW4 was once his neighbour. His wife was also a customer at PW4's butchery. He stated that he once had a disagreement with PW4 after PW4 made advances to his wife. He was later charged with the present offences. He denied taking part in the robberies.

In his unsworn statement, the 2nd Appellant stated that the 3rd Appellant came to his place of business on 26th February 2014 at about 2.00 p.m. He needed a loan of Ksh.600/-. He gave the 3rd Appellant the money. The 3rd Appellant gave him a phone make Samsung Duos as security for the loan. At about 7.00 p.m. on the same day, the 3rd Appellant came back. He informed him that he had secured a vacancy at a secondary school. He told him that he didn't have the money to refund the loan. He however told the 2nd Appellant to keep the phone since he was going to school and did not need it anymore. The 2nd Appellant kept the phone. He sold the phone to DW2 on the same day. He was later arrested on 26th February 2014. He informed the police officers that he got the phone from the 3rd Appellant. He accompanied the

police officers to the 3rd Appellant's house. The 3rd Appellant confirmed that he sold to him the phone at Ksh.600/-. The police officers took him and the 3rd Appellant back to the police station. He was later arraigned before the trial court on 7th March 2014 to answer to the present offences. He denied the charges against him.

The 3rd Appellant was also put on his defence. He stated that on 26th February 2014, DW5 offered to sell him a phone at Ksh.800/-. He told DW5 that he could buy the phone for Ksh.500/-. DW5 sold him the phone. Later that afternoon, he went to see the 2nd Appellant. He needed a loan of Ksh.600/-. He gave the 2nd Appellant the phone as collateral. His aunt later informed him that she had secured for him a vacancy at a high school. She told him to prepare himself since he was required to report to the school soon. He informed the 2nd Appellant that he could keep the phone since he would not need it anymore. On 6th March 2014, police officers came to his house at about 3.00 a.m. They asked him if he sold a phone to the 2nd Appellant. He answered in the affirmative. He told the police officers that he bought the phone from DW5. DW5 was arrested.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching at its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanor of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the Appellants' guilt with regard to the charges preferred against them to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification and the doctrine of recent possession to secure the conviction of the Appellants in the robbery with violence charge in Count I. This court has re-evaluated the evidence of identification. PW3 was the only identifying witness. He testified that he identified the 2nd and 3rd Appellants in identification parades conducted by PW8 and PW9 respectively. The robbery occurred at about 11.00 p.m. PW3 stated that when he got to the gate of his compound, he stepped out of the car to open the gate. He saw a number of people running from the direction of the video hall. He afterwards saw three men coming from the same direction. He entered his car and started the ignition.

Before he could drive off, the car window was hit by an object. He saw the three men outside the vehicle. He was ordered out of the car. He got out. He was ordered to lie down. He was hit at the back of his head. They asked him to surrender his phone and money. He did as he was ordered. The men then shoved him into the boot of the car. He could not fit in the boot. They ordered him to move to the rear passenger seat. Two of the men sat on him. They drove the vehicle away. After sometime, they stopped the car. The two men who were sitting on him alighted. He was ordered to move to the driver's seat without coming out of the car. He then drove off. PW3 stated that he was able to identify his assailants. During cross-examination, he stated that he identified the assailants at the gate on account of security lights that illuminated the scene.

The court was not informed as to the type of light or how bright the security light was in order to determine whether the same favoured a positive identification. When PW3 was ordered out of the car he was hit on the back of his head and ordered to lie down. The court was not informed whether he lay down facing the ground or whether he was facing his assailants. He was shoved into the boot. When the assailants were unable to close the boot, he was ordered to move to the rear passenger seat. In these hectic circumstances, this court is not convinced that PW3 was able to positively identify and memorize the physical features of his assailants. He was exposed to the assailants for a short period of time before they shoved him in the car. He told the court that two assailants sat on him while the other drove the car. He was therefore not in a position to identify the assailants while he was in the car.

This court notes that PW3 did not give a description of his assailants in the first report made to the police. This court would have been reassured that PW3 had positively identified the Appellants if he had given such description in the first report that he made to the police. The subsequent identification parades that were conducted by the police were not useful in the absence of an initial description given by PW3. The robbers did not have any distinguishing marks that would have enabled the complainant to recall their appearance without fear of the possibility of mistaken identity. This court agrees with the Appellants that the hectic circumstances in which the robbery took place was not favourable for PW3 to have been certain that he identified the Appellants as the robbers.

The police did not conduct an identification parade in respect of the 1st Appellant. His subsequent identification in court therefore amounts to dock identification. This court therefore holds that the evidence of identification was not watertight as to exclude the possibility of mistaken identity or error.

In Kiilu & Another V. Republic [2005] 1 KLR 174, the Court of Appeal held thus:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

In the present appeal, the prosecution adduced other evidence other than the evidence of identification. PW3's phone was recovered and traced back to the 1st Appellant. The investigating officer (PW13) stated that he recovered PW3's phone from PW1. PW1 stated that a Patrick Irungu had left the phone with him as security for a Ksh.1,500/- loan. The said Patrick Irungu stated that he bought the phone from PW4. PW4 on his part stated that the 1st Appellant sold him the phone. The 1st Appellant first gave the phone to PW6. This was on 20th February 2018, two days after the robbery occurred. PW6 refused to buy the phone since it was expensive. The 1st Appellant later sold the phone to PW4.

The 1st Appellant on his part failed to give any explanation of how he came to be in possession of the recovered phone. In his defence statement, the 1st Appellant denied being in possession of the phone. He stated that he saw the phone for the first time at the police station when he was arrested. However, the evidence of PW4 and PW6 displaces the 1st Appellant's defence. They both testified that the 1st Appellant had possession of the phone two days after the robbery. He first tried to sell it to PW6 who refused to buy it. He later sold it to PW4. He did not rebut this evidence when he cross-examined the two witnesses. There is no doubt that the 1st Appellant was in possession of the stolen phone two days after the robbery occurred. PW3 identified the phone as the one that was stolen from him. The burden of proof in this case shifts to the 1st Appellant to explain possession of the stolen item (See Malingi v Republic [1989] eKLR). He failed to give the court an explanation as to how he came to be in possession of the same. The doctrine of recent possession applies in this case.

The ingredients of the offence of robbery with violence were established by the prosecution. The assailants were more than one at the time the robbery was committed. This court therefore holds that the prosecution proved the 1st Appellant's guilt with respect to the charges in Count I to the required standard of proof beyond any reasonable doubt. The 1st Appellant's conviction on the charge in Count I is hereby upheld. The prosecution did not adduce further evidence connecting the 2nd and 3rd Appellants to the robbery charge in Count I. As stated earlier in this judgement, their identification was not watertight and sufficient to sustain a conviction on its own. In the premises, the convictions of the 2nd and 3rd Appellants on the charge of robbery with violence in Count I is hereby quashed. Their sentences are subsequently set aside.

The Appellants were jointly charged in Count II with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. From the facts of the case, the prosecution relied on direct evidence of identification and the doctrine of recent possession to secure the conviction of the Appellants. PW5 was the only identifying witness. PW5 identified the 2nd and 3rd Appellants in the identification parades conducted by PW8 and PW9 respectively. This court notes that no identification parade was mounted for the 1st Appellant. His identification by PW5 in court amounts to dock identification which is deemed worthless. PW5 testified that he went outside the hall to look for the deceased person. When he went outside the hall, he saw the deceased arguing with three men. He stated that there was security light outside the hall. There was also light from motorcycles that were parked opposite the video hall.

PW5 told the court that he was therefore able to identify the three men. This court notes that the investigating officer, on cross-examination, stated that PW5 did not indicate in his statement that there was source of light. When the deceased person saw PW5, he called out to him saying that the three men wanted to kill him. PW5 stated that he was about 10 metres away from where the assailants were. He started walking towards them. When he approached them, one of the men pointed a gun at him. The man asked him if he knew the purpose of the gun. PW5 stepped back. He started walking back to the hall. The men started walking towards the hall while struggling with the deceased. When they got to the entrance of the hall, PW5 heard a gunshot. There was a commotion as everyone who was in the hall started running away fearing for their safety. PW5 stated that the man who had the gun was the one who shot the deceased person since he was closest to him. He told the court that the man with the gun was the 2nd Appellant. This court notes that PW5 did not give a description of the assailants in the first report made to the police.

The investigating officer (PW13) stated that PW5 said that the robbers were three in number. He however did not give any description of the assailants. He said that PW5 did not indicate whether he was able to identify the assailants in the first report made to the police. In the case of Maitanyi vs. Republic [1986] KLR 198, the Court of Appeal held:

“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 feature of an assailant; the witness will usually be able to give some description.”

The court proceeded to hold further that:

“In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions.”

The robbery occurred at night. PW5 must have naturally been terrified by the sight of the gun. PW13 recorded PW5's initial statement made to the police. He admitted that PW5 did not state whether he was able to identify the assailants if he saw them again. He did not say whether he was able to identify any physical attributes of the assailants. He only stated that the assailants were three men. This court is not convinced that PW5 positively identified the Appellants. If the description of the assailants is not given to the police in the first report, then, the evidential value of the identification parade from which the assailants were purportedly picked would be substantially diminished though the parade itself may not, merely for that reason, be rendered invalid. The robbers did not have any distinguishing marks that would have enabled PW5 to recall their appearance without fear of the possibility of mistaken identity. For the above reasons, this court is of the opinion that evidence by PW5 on identification on its own cannot form a basis for the Appellants' conviction. The same would require other direct or circumstantial evidence to corroborate it.

The prosecution did adduce other evidence other than the evidence of identification. PW13 stated that they recovered the phone that was stolen from the deceased person. The deceased's phone was recovered from DW2 on 5th March 2014. Evidence adduced by PW12 showed that DW2 started using the phone on 26th February 2014. DW2 told the trial court that he bought the phone from the 2nd Appellant for Ksh.1,200/-. The 2nd Appellant did not deny selling the phone to DW2. He stated that he got the phone from the 3rd Appellant. The 3rd Appellant gave him the phone on 26th February 2014 as security for a loan of Ksh.600/-. The 3rd Appellant failed to pay back the loan and instead asked him to keep the phone. He sold the phone to DW2 on the same day.

The 3rd Appellant confirmed that he indeed gave the phone to the 2nd Appellant. He testified that he bought the phone from DW5 on 26th February 2014. He gave DW5 Ksh.500/- in exchange for the phone. He afterwards went to the 2nd Appellant's place of business and requested for a loan of Ksh.600/-. When he learnt from his aunt that he was going to be attending high school, he asked the 2nd Appellant to keep the phone as he would no longer be needing it. This court has perused the trial court's record. DW5 confirmed that he sold the phone to the 3rd Appellant for Ksh.500/-. He told the court that he picked up the phone in the course of collecting garbage. He was a garbage collector. DW5 was acquitted by the trial court.

The 2nd and 3rd Appellants were able to explain to the court how they ended up in possession of the deceased's phone. DW5 corroborated the 3rd Appellant's testimony. The fact that DW5 was acquitted means that the trial court believed that he was telling the truth. The prosecution did not adduce any evidence to demonstrate that the 2nd and 3rd Appellants knew or had reason to believe that the said phone was stolen. They were able to sufficiently tell the court how they came to be in possession of the deceased's phone. The doctrine of recent possession does not apply in this case. Looking at the evidence in its entirety, this court is left with doubt as to whether PW5 correctly identified the Appellants as the assailants involved in the robbery and death of the deceased person. There was no other evidence linking the Appellants to the robbery. From the foregoing, the evidence of identification, taken into totality, is not watertight and free from errors as to support the conviction of the Appellants.

In the premises therefore, this court finds merit in the appeals lodged by the Appellants with respect to the charge in Count II. Their respective Appeals are hereby allowed. The 1st, 2nd and 3rd Appellants' convictions in Count II are quashed. The Appellants are acquitted. The 2nd and 3rd Appellants are set at liberty forthwith and released from prison unless otherwise lawfully held.

The 1st Appellant's appeal in respect of Count 1 was upheld by this court. The 1st Appellant was sentenced to death by the trial court with regard to the charge in Count I. Following the recent decision of the Supreme Court in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, this court has discretion to re-sentence the Appellants on the basis of severity of the offence. This court notes that the 1st Appellant has been in lawful custody for five (5) years before and after his conviction by the trial court. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted with an order of this court sentencing the 1st Appellant to serve twenty (20) years imprisonment with effect from today's date. This court has taken into consideration the period that the 1st Appellant was in lawful custody both before his conviction and after his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE