



IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE -J)

CRIMINAL APPEAL Nos. 123 AND 143 OF 2016

(CONSOLIDATED)

BETWEEN

JOHN GATURA WANJIKU.....1ST APPELLANT

SIMON THUO WANJIRU.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 1105 of 2012 in the Chief Magistrate's Court at Gatundu by Hon. A.M.Maina (PM) on 11th May, 2015)

JUDGMENT

Background

1. **JOHN GATURA WANJIKU** (who was the 1st accused in the lower court) and **SIMON THUO WANJIRU** (who was the 2nd accused in the lower court) (*hereinafter referred to as the 1st and 2nd Appellants*) have appealed against conviction and sentence on two counts of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The offences were allegedly committed on 14.11.12 against **EDWARD MURAI WAWERU** and **MARY GATHONI MUHIA**. Appellants were also charged with alternative counts of handling some of the stolen property contrary to section 332(2) of the Penal Code.

The prosecution's case

2. The prosecution called 8 witnesses in support of the charges. **PW1, MARY GATHONI MUHIA**, the complainant in the 2nd count recalled that on 14.11.12 at about 05.00 am, she went to Gatundu Mexico Bar to get her husband **EDWARD MURAI WAWERU** who'd been drinking there the whole night and a commotion ensued. That after they went out of the bar, two young men that she did not know and who were armed with pangas confronted them and attacked her husband with pangas and kicks and robbed them of their Samsung phones. It was her evidence that her husband sustained panga cuts whereas she was slapped. That the young men later went to where her husband's car was parked and damaged it. She said there were bright security lights that enabled her to identify the young men because one was short and the other tall and that their faces were not concealed. The witness was later called to the police station together with her husband where they identified their phones and later identified the 1st Appellant who was tall and the 2nd Appellant who was short as the people that robbed them.

3. **PW2 RICHARD KIPRONO KURGAT**, stated that on the material date, he was at his place of work a distance from Mexico Bar when he saw the 2nd Appellant who was armed with a panga attacking a man. He said he had seen the 2nd Appellant in the streets of Gatundu town and that there was electricity lighting at the scene that enabled him to see the 2nd Appellant. He stated that the 2nd Appellant went away briefly and returned with the 1st Appellant whom he also knew with whom they damaged the man's vehicle.

4. **PW3 EDWARD MURAI WAWERU**, the complainant in the 1st count recalled that on 14.11.12 at about 05.00 am, he was leaving Gatundu Mexico Bar with his wife, PW1's herein when two men whom he did not know before but whom he identified as Appellants herein because there was security lighting, and who were armed with pangas attacked them, injured him and the 1st Appellant stole his Samsung phone after which they went away and damaged his vehicle. The witness was later called to the police station together with his wife where they identified their phones and he later identified the Appellants in an identification parade.

5. **PW4 JAMES WAWERU**, brother to PW3 was not at the scene of crime and did not know the Appellants or why they were arrested.

6. **PW5 AP CPL PETER NJUGUNA** stated that acting on information received from a good Samaritan on 14.11.12, he in company of his colleagues IP. Chengo; APC Fredick Karanja and APC Mburu went to a house near where complainants had been robbed where they arrested Appellants and two others and recovered a Samsung phone from each of the Appellants. That from the room was also recovered 2 pangas, a somali sword, 3 pieces of metal bars and a plant material suspected to be cannabis sativa. He stated that complainants identified the two phones as theirs. In cross-examination by the Appellants, the witness conceded that he did not prepare an inventory of the items that he recovered from the Appellants.

7. **PW6 PETER MUTUA** a clinical officer examined PW3 on 14.11.12 and produced a P3 Form showing that he had suffered grievous harm.

8. **PW7 IP ISAACK TENAI** conducted an identification parade on 15.12.12 in which the Appellants were identified by PW1 and PW3 as the persons that robbed them.

9. **PW8 CPL EKIN KIRKSON**, the investigating officer stated that he met complainants immediately after they were robbed on 14.11.12 and they told him that the robbers who included one tall and the other short had stolen their Samsung phones and injured PW3. Later in the evening, the Appellants and two others were handed over to him by APs who also handed over 2 Samsung phones, 2 pangas, a somali sword, 3 pieces of metal bars and a plant material suspected to be cannabis sativa. He requested PW7 to carry out an identification parade where Appellants were identified after which they were charged.

Defence case

10. In his unsworn defence, the 1st Appellant denied the offence and stated that he was arrested in Gatundu town on 15.11.12 and that nothing was recovered from him.

11. In his unsworn defence, the 2nd Appellant similarly denied the offence. He stated that he was arrested on 15.11.12 and that scrap metal and not a phone was recovered from him.

Conviction and sentence

12. The trial court found the two charges of robbery with violence proved and sentenced the Appellants to suffer death. Appellants were convicted for the offence of malicious damage of a motor vehicle belonging to **PW3** contrary to Section 339(1) of the Penal Code but no sentence on the same was passed on them.

The Appeal

13. The conviction and sentence provoked these appeals. In their separate petitions of appeal and written submissions, Appellants raised the following main grounds of appeal:

1) The prosecution case was not proved beyond any reasonable doubt

2) Identification parades were not supported by prior description

3) That their defences were not considered

14. When the appeals came up for hearing on 12.09.19, the appellants sought to wholly rely on their grounds of appeal and written submissions.

15. Mr. Ndombi, learned State Counsel opposed the appeal and stated that the complainants and PW2 who stated that they had identified the Appellants said that there was electricity lighting at the scene of crime and that the Appellants were later positively identified by complainants in identification parades. He also submitted that phones stolen from complainants were recovered from the Appellants.

Analysis and Determination

16. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005**.

17. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants and for the state.

18. The gravamen of this appeal really turns on the issue of identification of the appellants by the complainants and PW2 and recovery of the stolen items. The offence was committed at night and hence, the means by which the appellants were identified by recognition becomes critical. According to the complainants the Appellants were unknown to them. PW2 stated that he knew the Appellants physically. The witnesses also stated that there was security lighting at the scene that enabled them to see the Appellants clearly.

19. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in **Anjononi and Others vs The Republic [1980] KLR**:

“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”

20. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of Maitanyi vs Republic (1986) KLR 198, the Court of Appeal held: -

“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

21. In the recent case of John Muriithi Nyagah v Republic [2014] eKLR, the Court of Appeal held: -

“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

22. The court record shows that the learned trial Magistrate did not at all, evaluate the nature of the light, the strength of the light, its size, and its position relative to the Appellants to test the reliability of the evidence of identification at night.

23. The absence of inquiries as to the light condition at the scene of crime by the trial Magistrate notwithstanding, this court is under a duty to consider if there is other evidence that point to the Appellants' culpability. Whereas the complainants and PW2 told court that they had clearly seen the assailants, they stated that one was tall and another short but such description in my considered view is not sufficient description that would help identify any one particular person considering that there are many young men that are tall and others short. In the case of Simiyu & Another V. R (2005) 1 KLR 193 the Court of Appeal expressed itself on this point as follows: -

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant's to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identify.”

24. In light of the above, I have come to the conclusion that complainants and PW2 failed to give the description of the Appellants immediately they made a report to Police because the circumstances were not favourable for positive identification. I similarly hold that the conduct of identification parades in the absence of prior description of the Appellants was an exercise in futility.

25. Failure by complainants and PW2 to give the description of the robbers ought to have sowed a seed of doubt in the mind of the learned trial magistrate concerning the identification of the Appellants and such doubt should have been resolved in favour of the Appellants.

26. The other evidence that the prosecution tendered in an attempt to link the Appellants to the robbery was the alleged recovery of complainants' phones from them. **PW5 AP CPL PETER NJUGUNA** stated he was with his colleagues IP. Chengo; APC Fredick Karanja and APC Mburu when they arrested Appellants and recovered complainants' phones from them. Appellants denied that any phones were recovered from them. IP. Chengo; APC Fredick Karanja and APC Mburu who were alleged to have witnessed the recovery were not called as witnesses to corroborate PW5's evidence bearing in mind that no inventory of recovery was tendered in evidence. The evidence of recovery is by a single witness and having been denied by the Appellants, they cast doubt on the recovery which ought to have been construed in their favor.

27. *Having considered the evidence in its totality, the appeals succeed.* Had the Appeals been unsuccessful, I would have had a duty to resentence the Appellants in line with the Supreme Court decision in Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR which declared the mandatory death sentence unconstitutional.

27. In the end, the convictions are hereby quashed and the sentences set aside and unless otherwise lawfully held, it is ordered that Appellants shall be set free forthwith.

DELIVERED AND SIGNED IN KIAMBU THIS 25th DAY OF October, 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Nancy

Appellants - Present in person

