



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL CASE NO. 27 OF 2017

DAVID MAINA MUTHEE.....1ST APPELLANT

SAMWEL MUNGAI GATHUKU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable F. Munyi Senior Resident Magistrate,

delivered on 16th March, 2017 in Nakuru Chief Magistrate's Court

Criminal Case No. 1698 of 2012)

JUDGMENT

1. Mr. Elijah Orina resides in Kiamunyi on the outskirts of Nakuru town. On 12/05/2012, at about 7:45pm, he was on his way home. He was driving his Motor Vehicle Registration No. KPK 716M in the company of his wife, Lydia Omalua Maoto.
2. When the husband and wife got to their gate in Kiamunyi, Lydia called his brother who resided with them to open the gate. Just then, two men appeared. One of them drew a gun which Elijah thought was an AK47 Rifle. They told him they needed to take them to the Police Station. The two men, then, ordered the two of them to the back seat of the Motor Vehicle, and one of them took over the driving. Lydia's brother, Peter Mogere, who had just opened the gate, was also ordered to the back of the Vehicle.
3. As they drove away from the gate, they were joined by two more men. Immediately thereafter, the men blocked another vehicle at gun point and took control of it also. The two vehicles were commandeered along the road towards Ngata. Just before joining the Nakuru-Eldoret Highway, the men stopped a third vehicle.
4. Elijah's vehicle stalled. He, his wife and Peter were ordered onto the next vehicle. By this time, Elijah counted eight people in that vehicle. After a short journey on the Nakuru-Eldoret Highway, the vehicles took a turn on to an earth road. The road led to a forest. By now, it was clear to Elijah and his family members that they were victims of robbery. They, together with the other victims were ordered out of the vehicles. They were then made to sit down at the forest. The robbers demanded money and phones. They stole Kshs. 2,200/- from Elijah. They also stole two phones from him: a Nokia N70 and a Motorola 92. From Lydia they stole Kshs. 2,000/-; a phone Nokia 1640; and an Equity Bank ATM Card. Peter gave out his Motorola phone.
5. The other victim of the robbery was one, Joshua Cherotich. He is a lawyer practicing in Nakuru town. On that day, he was driving to his farm in Eldama Ravine using an earth road. He was alone. A vehicle ahead of him was being driven very slowly and in the middle of the road making it impossible for him to pass through. Eventually, the other vehicle stopped forcing him to do the same. A man emerged from the other motor vehicle. He was dressed in a heavy, blue jacket. He was short and dark. His colleague had a cap. Joshua was forced out of the driver's seat and onto the back seat of the vehicle. The two vehicles were then driven towards Ngata-Njoro area.
6. According to Joshua, after a while, the other vehicle stalled and the occupants of the other vehicle, some of whom he later learnt were also victims of robbery were forced onto his vehicle. Eventually, the vehicle stopped in a forest where they were all ordered out and made to sit in a forest. Joshua was robbed of his wrist watch make Seiko valued at Kshs. 20,000/=and cash of Kshs. 10,000/=.
7. After the assailants robbed them, Elijah, Lydia, Peter and Joshua said that the robbers made Lydia and Joshua take a drug which was made them drowsy or unconscious. The aim was, apparently to give all the victims but one of the tablets fell in the forest in a place they could not reach it and they abandoned the plan. The robbers made all the victims lie face down as they escaped.

8. Elijah, Lydia, Peter and Joshua testified as PW1-4 in the trial of six people who were charged with the robberies. The two Appellants herein were the first two Accused Persons. The summary above was the evidence that emerged from the testimonies of the four victims. The other four people who were charged with them were acquitted during the trial the Trial Magistrate having concluded that no prima facie case was established against them. The two Appellants were put on their defence and were eventually convicted of the robberies.

9. The four victims were rescued from the forest by Police Officers. One of the Officers was Corporal Patrick Njeru. He also testified during the trial as PW8. He testified that on 12/05/2012, the Police received a report in their control room that a robbery was afoot in the Kiamunyi area. This was around 7:45pm. They learnt that the robbery involved a motor vehicle KBK 716M which had been robbed and the victims car jacked. They tracked one of the victim's phones and realized that the motor vehicle was headed towards Njoro, then to Ngorika area. They later found the vehicle had overturned in a forested area a short distance away from the Nakuru-Eldoret Highway. They found no one at the scene but they recovered a mobile phone in the car and two bullets – 762 and 39 millimetres. Corporal Njue and his colleagues, then, found the victims. They rescued the victims and towed the vehicle to the Police Station. It turned out that the victims were Elijah; Lydia; Peter and Joshua.

10. On 16/05/2012, Peter called Corporal Njue with the news that he had seen the 2nd Appellant along Kenyatta Avenue in Nakuru. Elijah said that he was able to recognize the 2nd Appellant as one of the robbers who had terrorized them four days earlier. Corporal Njue and his colleagues rushed there and arrested the 2nd Appellant. Corporal Njue was in the company of Corporal Metkei and Kitwai when they arrested the 2nd Appellant. The 2nd Appellant was in the company of two others who were acquitted during the trial.

11. An Identification Parade was conducted by Chief Inspector Henry Gitonga with respect to the 1st Appellant. Elijah; Lydia and Peter were not able to identify him during the parade. However, both Chief Inspector Gitonga and Joshua testified that Joshua picked him up the 1st Accused Person during the Identification Parade.

12. All the four victims explained to the Court that they easily recognized the jacket and cap which the 2nd Appellant wore. That is how Peter recognized him on the street and called the Police. Each of the victims identified the jacket and the cap in Court. All four were consistent that that the 2nd Accused Person had the jacket and cap on during the robbery.

13. This is the evidence that emerged during the trial of the two Appellants. The two Appellants, together with four others, were charged with four counts as follows:

Count one: Robbery with violence contrary to Section 296 (2) of the Penal Code; particulars of the offence is that on the 12th day of May 2012 at Kiamunyi area Nakuru, in Nakuru district within the Rift Valley province, jointly with others not before court, while armed with dangerous offensive weapon namely AK 47 riffle robbed ELIJAH ORINA motor vehicle No. KBK 716M a Nissan Wingroad valued at Kshs. 600,000/=, 2 mobile phones, Nokia and Motorola valued at Kshs. 23,000/= and cash Kshs. 2,200/= all valued at Kshs. 625,200/= and at or immediately before or immediately after the time of such robbery threatened to use such violence to the said ELIJAH ORINA.

Count 2: Robbery with violence contrary to Section 296 (2) of the Penal Code; particulars of the offence is that on the 12th day of May 2012 at Kiamunyi area Nakuru, in Nakuru district within the Rift Valley province, jointly with others not before court, while armed with dangerous offensive weapon namely AK 47 riffle robbed LYDIA OMAGWA MAOTO her one mobile phone Nokia valued at Kshs. 11,000/=, one Equity ATM card valued at Kshs. 1,000/=and cash of Kshs. 2,200/= all valued at Kshs. 14,200/= and at or immediately before or immediately after the time of such robbery threatened to use such violence to the said LYDIA OMAGWA MAOTO

Count 3: Robbery with violence contrary to Section 296 (2) of the Penal Code; particulars of the offence is that on the 12th day of May 2012 at Kiamunyi area Nakuru, in Nakuru district within the Rift Valley province, jointly with others not before court, while armed with dangerous offensive weapon namely AK 47 riffle robbed WRIGHT MOGERE PETER his one mobile phone Techno valued at Kshs. 3,500/=, and at or immediately before or immediately after the time of such robbery threatened to use such violence to the said WRIGHT MOGERE PETER.

Count 4: Robbery with violence contrary to Section 296 (2) of the Penal Code; particulars of the offence is that on the 12th day of May 2012 at Kiamunyi area Nakuru, in Nakuru district within the Rift Valley province, jointly with others not before court, while armed with dangerous offensive weapon namely AK 47 riffle robbed JOSHUA CHEPKIYENG CHERUTICH his motor vehicle registration No. KBD 961K make Toyota OPA valued at Kshs. 700,000/=, wrist watch make Seiko valued at Kshs. 20,000/=and cash of Kshs. 10,000/= all valued at Kshs. 730,000/= and at or immediately before or immediately after the time of such robbery threatened to use such violence to the said JOSHUA CHEPKIYENG CHERUTICH.

14. The Appellants and their four Co-Accused denied having committed the offences charged and the case proceeded for full hearing. The Prosecution called nine (9) witnesses in support of its case. At the conclusion of the Prosecution Case, the Learned Trial Magistrate acquitted the four persons co-accused with the Appellants under Section 210 of the Criminal Procedure Code. The Learned Trial Magistrate made a finding that the Prosecution had established a prima facie case against the two Appellants and invited them to mount their defence if they so wished. The two Appellants herein gave sworn statements and did not call any witnesses. At the close of the Defence Case, the Learned Trial Magistrate convicted the two Appellants and sentenced them to death with respect to Count 1.

15. The Appellants being dissatisfied with the judgment delivered on 16th March 2017 filed separate Petitions of appeal dated 17th March 2017 while acting in person. They later on appointed the firm of Maragia Ogara & Company Advocates to act for them. The advocates filed supplementary grounds of appeal dated

16. In their submissions dated 24th January 2018 they rely on the supplementary grounds of appeal that are:

i. That the learned magistrate erred in law and in facts in failing to take note of the fact that the circumstances pertaining /surrounding the scene was difficult hence the purported identification by the prosecution witnesses could not be free from possibility of error given that they never informed the court on the lighting condition at the scene and anywhere during the event of the attack.

ii. That the learned trial magistrate erred in law and in fact in failing to take note of the fact that the identification parade carried out for the 1st appellant was devoid of prior description.

iii. That the learned trial magistrate erred in law and in fact in failing to take note of the fact that the identification parade carried but fell short of the guidelines laid out under the force standing order.

iv. That the learned trial magistrate erred in law and in fact in failing to take note of the fact that the prosecution witnesses having not given prior description of the purported assailants cannot be said to identify the appellants after they were arrested as that amounts to an afterthought and/or dock identification.

v. That the learned trial magistrate erred in law and in fact in failing to warn and/or caution herself on the dangers of relying upon the evidence of identification by a single witness (that is Pw 4) more so when the same witness failed to give description of the attackers.

vi. That the learned trial magistrate erred in law and in fact in failing to ensure compliance with Section 200 of the Criminal Procedure Code.

vii. That the learned trial magistrate erred in law and in fact in failing to have the charges read afresh to the Appellants upon them being placed on their defence thus flouting the provisions of Sections 211 (1) of the Criminal Procedure Code.

viii. That the learned trial magistrate erred in law and in fact when he ignored the defence of alibi as raised by the Appellants irrespective of having produced photographic evidence in respect to the 1st Appellant and travelling receipts in respect of the 2nd Appellant and other evidence.

ix. That the learned trial magistrate erred in law and in fact in failing to take note of the fact that it was the burden of the prosecution to disprove the defence of alibi as set by the Appellants.

x. That the learned trial magistrate erred in law and in fact in rejecting the Defence evidence without giving a proper analysis of the reasons for rejecting the said evidence.

17. The Appellants filed in their submissions relying on the supplementary grounds of appeal filed. The Prosecution counsel opposed the Appellant's appeal, but failed to file in their submissions even after being granted time to do so.

18. This being the first appeal I am guided by *Okeno v Republic [1973] EA 32* on the task of the first appellate court being to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence of the lower court bearing in mind the court has not had the opportunity of seeing or hearing the witnesses.

19. Plea was taken by the Hon. S. Mungai. After an amendment to the charge sheet, the Learned J. Mwaniki took a new plea. The Honourable Mwaniki heard all the nine Prosecution witnesses and considered the submissions on no case to answer. He also gave the ruling that the two Appellants had a case to answer and put them on their defence. The ruling was delivered on 30/03/2015.

20. The Honourable J. Mwaniki was then transferred out of Nakuru Station. After a few adjournments, it eventually fell on the Honourable F. Munyi to take over the hearing. On 18/07/2016, the Learned Magistrate made the following directions:

I have noted that the Accused Person[s] had been placed on their defence. However, typed proceedings are incomplete as they were typed up to 28/05/2015. The case shall be move on 08/08/2016 (sic) to confirm completion of typing of proceedings.

21. After a few more adjournments, the Defence hearing took off on 17/10/2016. According to the Court record, Mr. Cheche appeared and informed the Court as follows: "The Accused shall give sworn defence. I shall call one witness – The OCS Nakuru Police Station." He proceeded to call the three Accused Persons (the two Appellants and the 6th Accused Person in the Court below). He then closed the Defence case without calling the OCS as he had earlier indicated.

22. A keen review of the Court record reveals two procedural lapses happened.

23. First, when the Honourable F. Munyi took over the proceedings, she did not comply with the provisions of section 200(3) in terms of informing the Appellants their rights and options thereunder. If the Learned Magistrate complied with the mandatory provisions of the statute, she did not record it in the Court proceedings.

24. Second, when the Learned Learned J. Mwaniki put the Appellants on their defence, there is no indication in the Court record that the Learned Magistrate complied with section 211 of the Criminal Procedure Code. The section is in the following terms:

At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again

explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

25. According to the Court record, the Learned Trial Magistrate failed to remind the Appellants of the substance of the charge and inform them of their options and rights on defence. There is no evidence that the Learned F. Munyi, who completed the trial, did this when she took over the trial.

26. It is true that the Appellants were represented by counsel during the trial. However, as our Courts have variously held, both this right and the right to be informed of the option to recall witnesses under section 200(3) of the Criminal Procedure Code is a right for the benefit of the Accused Person not his legal representative. As such, the Court must take care to inform the Accused Person of the right even where the Accused Person is represented by counsel. See *PHN v Republic [2016] eKLR* and *Njoka v Republic [2001] KLR 175*.

27. In this regard, the Appellants' appeal must succeed. The trial in the Court below was vitiated by these procedural lapses. The convictions cannot, therefore, stand.

28. *Having perused the record of the trial Court with the keenness and evaluative eye demanded of an appellate Court, I have come to the conclusion that a retrial would be appropriate here. In Makupe v Republic*, Criminal Appeal No 98 of 1983, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the view *that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.*

29. In this case, I am persuaded, from my view of the case that properly prosecuted there might be sufficient admissible evidence to result in a conviction. The less I say about this, the better.

30. In the end, therefore, the orders and directions of the Court are as follows:

a. The conviction entered in Nakuru Chief Magistrate's Court Criminal Case No. 1698 of 2010 is hereby set aside.

b. The sentenced imposed on the Appellant is hereby consequently set aside.

c. The two Appellants shall be released from Prison forthwith and shall, instead, be placed on remand pending their presentation before the Magistrates' Court to take plea.

d. The Appellants shall be presented before the Chief Magistrate's Court, Nakuru on Monday, 23rd December, 2019 to take plea. The case shall be allocated to a magistrate other than the Learned Honourable F. Munyi.

e. The Deputy Registrar is directed to send back the Trial Court file and a copy of this ruling to the Chief Magistrate's Court for compliance.

Dated and delivered at Nakuru this 19th Day of December, 2019.

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JOEL NGUGI

JUDGE