



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 27 OF 2015

CONSOLIDATED WITH CR. APPEAL NO. 102 OF 2014

PAUL GITHINJI MAINA

JACOB KINYUA NJERU.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Nyeri (Hon.J.Wambilyanga) delivered on the 2nd August, 2013 in Criminal Case No.772 of 2011)

JUDGMENT

1. Paul Githinji Maina and Jacob Kinyua Njeru the appellants herein were charged with the two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

2. On Count 1 the particulars of the offence are that on the 17th day of August, 2011 at Honi River Area within Nyeri County, while armed with dangerous weapons namely firearms, the appellants jointly robbed **Esau Nderitu (PW1)** of Kshs.2,000/- and immediately before or immediately after such time of robbery threatened to use actual violence on him.

3. The particulars on Count II are that on the same date in the same area as stated in the afore-going count, while armed with dangerous weapons namely firearms, the appellants jointly robbed **Jackline Gacheri Gaderi (PW2)** of Kshs.1,000/-, a mobile phone make Nokia E71 valued at Kshs.5,500/-, a handbag, a certificate of appointment, two Co-operative Bank ATM cards, one Equity Bank ATM card, a sacco card and a passport all valued at Kshs.8,500/- and immediately before or immediately after such time of robbery threatened to use actual violence on her.

4. The prosecution called a total of five (5) witnesses to prove its case and after the trial the appellants were found guilty on both counts and the trial court proceeded to convict them on both counts and the sentence meted out was the death sentence.

5. Being aggrieved by the conviction and sentence, the Appellants filed their respective Petitions of Appeal and thereafter filed a Supplementary Petition of Appeal and the grounds of appeal are summarized as follows;

- i. The Charge Sheet as drawn was defective;
- ii. The appellants constitutional rights were infringed by failure to assign an advocate to represent them;
- iii. The appellants were not positively identified;
- iv. The identification parade was not properly conducted as it did not conform to the provisions of the Forces Standing Orders;
- v. The prosecution failed to prove its case to the desired threshold;
- vi. The trial court rejected the appellants defence without giving good reasons.

6. At the hearing of the appeal the appellants were represented by Miss Maina and Mrs Gicheha was the Prosecuting Counsel for the State; both Counsels made oral submissions.

APPELLANTS' SUBMISSIONS

7. The Charge Sheet as drawn was defective; **PW2** was not able to narrate the items stolen from her; she was also not able to identify the gun; her evidence should not have been relied upon to support a conviction;
8. There were fundamental issues that were not complied with at the identification parade; that a first description must be given of the persons who committed the crime; there was only a description of the clothes; there were no descriptions of physical features given; Case law referred to **Robert Obara Lango vs R: Cr.App.1 of 2015**.
9. It is a requirement that eight (8) persons with similar features be placed in the parade; the evidence of **PW2** was that all sorts of people were placed in the parade; and **PW2** had also seen the appellants before the parade; the basic minimum was not complied with and therefore the identification parade did not conform to the Standing Orders and was therefore of no evidentiary value;
10. The appellants constitutional rights were infringed; it was a capital offence which carried a death sentence; the case was filed in 2011 after the promulgation of the constitution and therefore the appellants had a right to legal representation; it was upon the state to make arrangements to avail counsel for the appellants; there was no fair hearing and this warrants an acquittal; Case law referred to **Douglas Kinyua Njeru vs R: Cr. App. No.28 of 2013**.
11. The trial court disregarded the 1st appellants alibi defence that he was not at the scene of crime; the 2nd appellant also gave an alibi statement of defence which was also disregarded;
12. That there were glaring inconsistencies which the trial court failed to take into account; the evidence did not support a conviction; the appellants prayed that the conviction be quashed and sentence be set aside and the appellants be set free.

RESPONDENT'S SUBMISSIONS

13. In response Prosecuting Counsel for the State submitted that it was not in dispute that a robbery occurred and that **PW1** and **PW2** were robbed; ; that no recoveries were made and there was nothing to be produced in court nor was there anything to be identified; that the omission by **PW2** in mentioning the items appearing on the Charge Sheet as having been stolen from her did not render the Charge Sheet defective;
14. On identification **PW1** stated he was driving when the appellants approached him and pointed a firearm at him; he gave them money in the sum of Kshs.2000/-; he was not able to identify the appellants and that all he noticed were the blue jeans;
15. **PW2** described to the trial court how they were stopped by persons carrying a firearm; they took her handbag that contained the items listed in the Charge Sheet; that she was called to attend a parade and was able to pick them out;
16. Counsel submitted that the narrative by the complainants on what transpired on that date was not contradictory and their evidence was credible;
17. The evidence of **PW4** was that other persons had been attacked at the same spot and a description on same manner of dress had been given; they therefore laid an ambush in that spot and the appellants emerged from the bushes; they followed them and arrested them and recovered a toy pistol from the 2nd appellant;
18. As for the identification parade it was procedurally carried out by **PW3**; the parade was of people with similar features to the appellants; no objections were raised by the appellants; only **PW2** attended the parade as for **PW1** he did not attend the identification parade as he had said that was not able to see the appellants on the material date;
19. Counsel submitted that the laid down procedure was followed for the identification parade;
20. On non-representation the Constitution provides that the appellants have a right to representation but at the time of trial Parliament had not passed any legislation to actualize this right; and that this ground ought not to be considered on appeal;
21. The alibi defence was a mere denial; the appellants were both identified through the identification parade and had used the toy pistol to intimidate victims;
22. Counsel urged the court to dismiss the appeal as it lacked merit and prayed that the conviction and sentence be both upheld.

REJOINDER

23. The Charge Sheet was defective as alluded to earlier;
24. **PW2** was a police officer with special training and ought to have been able to identify a toy pistol like the one produced in court as an exhibit;
35. The prosecution failed to call any independent witnesses to shed more light on the incident;

26. The identification was only based on the clothes as opposed to physical features; and the identification parade was a sham.

27. On representation this was a constitutional issue that warranted dismissal; Counsel urged the court to allow the appeal as it was merited.

ISSUES FOR DETERMINATION:

28. After hearing the rival submissions made by both Counsel for the appellants and the Respondent the following issues have been framed by this court for determination;

i. Whether the Charge Sheet was defective;

ii. Whether the appellants constitutional rights were infringed by failure to assign an advocate to represent them;

iii. Whether the identification parade was properly conducted and whether it was in conformity with the provisions of the Forces Standing Orders;

iv. Whether the prosecution proved its case to the desired threshold;

v. Whether the trial court had good reason to reject the appellants defence.

ANALYSIS

29. This court being the first appellate court it is enjoined to consider the entire evidence on record, re-evaluate and re-assess it and arrive at an independent conclusion bearing in mind at all times that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the Charge Sheet was defective;

30. The appellants contention is that the omission by **PW2** in mentioning the items appearing on the Charge Sheet as having been stolen from her renders the Charge Sheet defective;

31. The mere omission by **PW2** in mentioning in her evidence all the items appearing on the Charge Sheet as having been stolen from her does not render the Charge Sheet defective; the Charge Sheet would have been defective if the description of the stolen property had not been indicated in ordinary language and with reasonable clarity; such an omission in description of the property in the charge or information would have been fatal to the entire charge and the subsequent conviction and sentence would not have been upheld;

32. This ground of appeal has no merit and is disallowed.

Whether the appellants constitutional rights were infringed by failure to assign an advocate to represent them;

33. Article 50(2)(h) of the Constitution 2010 provides for legal representation for capital offences; after perusal of the court record it indeed shows that the appellants did not have legal representation at the time of trial in the lower court; but it is also noted from the record that the appellants did not raise this as an issue at the opportune time; the record shows that the appellants willingly and fully participated in the trial and this court is satisfied that no injustice occurred at that time due to the lack of representation; further this court concurs with the Prosecution Counsel's submissions that at point in time Parliament had not passed legislation to actualize this right;

34. This ground is disallowed as it is lacking in merit.

Whether the identification parade was not properly conducted and whether it was conformity with the provisions of the Forces Standing Orders;

35. The main issue for consideration is whether the identification parade was in breach of the Police Force Standing Orders and whether the appellants were positively identified by a single identifying witness;

36. The evidence of **PW1** was that he was not able to see his assailants; whereas **PW2** stated that she saw the appellants and was called to attend an identification parade; apart from the description of the blue jeans worn by the appellants the complainants did not give the police any physical description of the appellants; and apart from the toy gun none of the stolen items was recovered from the appellants;

37. The appellants contend that all sorts of people were in the parade and that **PW2** had also seen the appellants before the parade; therefore the basic minimum was not complied with and therefore the identification parade did not conform to the Standing Orders;

38. Inspector Laurence Kigano (**PW3**) stated in evidence that he conducted the parades for the two (2) appellants on the 19/08/2011; that he placed eight (8) persons with similar features to those of the appellants in the parade as required by the regulations; he explained to the appellants the reasons for conducting the parade; the appellants were asked if they wished to have a relative or friend present; and that **PW2** identified the appellants by touching them as required;

39. The record shows that the appellants both signed the parade forms and stated that they were satisfied with the manner the parade was

conducted; the exhibits marked as **Exh.2(a)** and **2(b)** indicate that there were no objections raised by the appellants before and after the identification parade on any of issues raised on appeal; the record further shows that the trial court believed the testimony of **PW3** and therefore this court finds no pointer to the fact that the parade was not procedurally carried out by **PW3**;

40. It is noted that **PW2** was the only one who identified the appellants and also that no stolen items were recovered from the appellants; this then raises the issue as to whether the evidence of a single identifying witness can sufficiently support a conviction; Refer to the Court of Appeal case of **Abdalla Wendo vs R [1953] EACA** where it was held that there was need for testing of such evidence with the greatest of care;

41. In this instance the robbery took place at 5.00pm which means it was broad daylight and that there was sufficient daylight thus making the conditions and circumstances favourable for identification; the parade was conducted on the 19/08/2011 that is approximately a time lapse of two (2) days after the incident and was still fresh in **PW2s** memory; **PW2** unhesitatingly identified the appellants at the identification parade;

42. This court finds no reason to interfere with the trial courts finding that the identification parade was properly conducted by **PW3**; the appellants had been positively identified by **PW2**; and that the identification evidence of a single witness is found safe to support the conviction;

43. This ground of appeal is found lacking in merit and is disallowed.

Whether the prosecution proved its case to the desired threshold;

44. Section 296(2) of the Penal Code sets out the key ingredients that constitute robbery with violence; three such ingredients being that;

- i. the offender is in the company with one or more other person or persons;
- ii. the offender is armed with a dangerous or offensive weapon or instrument;
- iii. the offender uses or threatens to use actual violence to any person immediately before or immediately after the time of the robbery.

45. These key ingredients of the offence were clearly set out in the Court of Appeal case of **Olouch vs R [1985] KLR 549**; it was also held that proof of any one of the ingredients is enough to sustain a conviction;

46. **PW1** gave his testimony which was corroborated by **PW2** that they were robbed by two assailants; and the appellants are said to have been armed with an instrument resembling a gun; which both complainants stated was used to threaten them immediately before and after the robbery; on pain of being shot their evidence was that the threat was sufficient and caused them to surrender their money and possessions;

47. Based on the testimony of the two complainants which the trial court found to be credible and upon re-evaluating the evidence this court is satisfied that the three key ingredients of robbery with violence were proved by the prosecution to the desired threshold;

48. This ground of appeal is found lacking in merit and is disallowed;

Whether the trial court had good reason to reject the appellants defence.

49. It is the duty of the trial court to look at the evidence as a whole and then consider whether or not the defences raised casts any doubt on the prosecutions' case.

50. Both the appellants raised the defence of alibis; the 1st appellant stated he was at work on the date of his arrest; the 2nd appellant also stated that he was headed to work on the day he was arrested;

51. The evidence of PC Sylvester Ngetich (**PW4**) and Corporal Benjamin Nyongesa (**PW5**) was that on the 18/08/2011 police laid an ambush specifically at Game Rock area since cases of highway robberies were on the rise; at around 3.00pm the two appellants appeared at the **locus in quo** dressed in blue jeans as exactly described by the complainants; upon being searched the toy gun was found on the 2nd appellant;

52. This court is satisfied with the trial courts finding that the defences did not in any way cast any doubt on the evidence tendered by the prosecution and did not dislodge or controvert the prosecution's case;

53. This court is satisfied that the trial court analyzed the appellants' statements of defence and when weighed against the evidence tendered by the prosecution the trial court had good reasons for disregarding the defences as both did not cast any doubt or discredit the prosecutions' case.

54. This ground of appeal is found lacking in merit and is disallowed.

FINDINGS

55. In the light of the forgoing this court makes the following findings;

i. The Charge Sheet as drawn is not defective;

ii. At that point in time there was no legislation formulated to actualize the right to legal representation;

iii. The identification parade was properly conducted and was in conformity with the provisions of the law; the appellants were therefore positively identified; the conviction is found to be safe;

iv. The prosecution proved its case to the desired threshold;

v. The trial court had good reason in rejecting the appellants defences.

DETERMINATION

56. The appeals are found lacking in merit and are hereby dismissed;

57. The convictions are hereby upheld;

58. The appellants being first offenders their sentences are hereby set aside and are hereby substituted and commuted to life sentences.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 11th day of January, 2018.

HON. A. MSHILA

JUDGE