REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 84 OF 2014

ALEX WAMAGU WAITITU *alias* MAGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 3620 of 2011 delivered by Hon. E. Juma, SPM on 5th May 2014).

JUDGMENT

Background

The Appellant herein was with the offence of attempted robbery with violence contrary to **Section 297(2) of the Penal Code**. The particulars of the offence were that on 11th September, 2011 at Bangladesh slums along Magadi road within Nairobi County, jointly with others not before court while armed with dangerous weapons namely pistols attempted to rob Eliud Kakai Nyoike of one laptop make HP serial number CN 0624198G valued at Kshs. 70,000/- and immediately after the time of such attempted robbery used actual violence to the said Eliud Kakai Nyoike by shooting him.

The Appellant was convicted and sentenced to suffer death. He was however dissatisfied with both the conviction and sentence as a result of which he preferred the present appeal. He relied on amended grounds of appeal filed on 13th November, 2017 namely that he was not properly identified, that the prosecution's case was riddled with inconsistencies and contradictions, that his conviction was based on evidence of a hostile witness, that crucial witnesses did not testify, that the case was not proved beyond a reasonable doubt and that his defence was not considered.

Submissions

The Appellant relied on written submissions filed on 13th November, 2017. His first point was that he was not properly identified. He stated that amongst the people who testified that they saw the robbers as they fled from the deceased's house was PW1, the mother to the deceased. He submitted that in her statement, she recorded that she identified the attackers as Ochi and Magadion. However, in the first report, she did not indicate that she had recognized the robbers in those respective names. Furthermore, although PW6, the identification parade officer testified that PW1 took part in the parade, it was her testimony that she did not participate in it. In addition, the trial court did note that the identification parade forms had been tampered with and dismissed them as inadmissible.

The Appellant took issue with the fact that the prosecution did not call crucial witnesses. She pointed to those who allegedly arrested him whose failure to testify was an indication that the prosecution could not piece up evidence of his involvement in the offence. He also pointed to some women who were mentioned by PW4 as having given a tip off information that he was involved in the robbery. For these reasons, the Appellant submitted that the case for the prosecution was greatly weakened.

The Appellant further submitted that the elements of the offence of attempted robbery with violence were not established. For this reason, it was his view that the trial court invited extraneous theories to piece up an unfounded case against him. He submitted that the prosecution failed to discharge its burden in proving the case beyond a reasonable doubt and urged that the appeal be dismissed.

Learned State Counsel, Ms. Atina opposed the appeal whilst submitting that the prosecution had proved their case beyond a reasonable doubt. On the identification of the Appellant, she submitted that he was identified by PW1, 2,3 and 4. She submitted that although there was a doubt on whether PW1 participated in the identification parade, she urged the court to take judicial notice of the fact that the identification parade form was inadmissible and could therefore not be used as piece of evidence of the identification of the Appellant. On failure to call crucial witnesses, counsel submitted that it was of no value to call the alleged women who gave a tip off leading to the arrest of the Appellant

because the evidence in that respect had been covered by other witnesses. Furthermore, the said women were not at the scene and had not witnessed the incident. She added that the Appellant's defence was properly considered but dismissed as it was lacking in merit. She persuaded the court to dismiss the appeal by quashing the conviction and upholding he sentence.

Evidence

This was a case in which the victim of the alleged attempted robbery with violence died in the incident. On the material date, 11th September, 2011 between 8.00 and 8.30 p.m., he was inside his barber shop which doubled as his residence within Bangladesh in Langata. **PW1** and **2 Lucy Thame** and **Samuel Nyoike Kagai** were his father and mother respectively. They ran a shop on ten metres from the deceased's barber shop. They were alerted to the incident by the sound of a gunshot. PW1 was the first to hear the same. She ran to the scene on hearing the sound of the gunshot and on opening the door of the barber shop found her son lying on the floor bleeding from the chest. She referred to the suspects as Magu and Magedion. In the same footstep, PW2 also rushed to the scene and in corroborating the evidence of PW1, they took their son to Wama Hospital where he was pronounced dead.

Other persons within the vicinity had heard the gunshot which attracted them to the scene. Some of these people dared pursue the gunmen. According to PW1, she saw two men leaving the barbershop but PW3 testified to seeing three men. Those who were nearby included **PW3 Stephen Ondari Asiaya** and **PW4, Chrispinus Maceke**. According to PW3, he heard about three gunshots and suddenly saw two men emerge from the direction of PW2's shop which was about 50 metres from where he was. He testified that he identified the two men, one as a short man with black jeans and a tall man with a white jacket. He was with other members of the public who confronted the two men asking them why they were running away but the men still fled. PW4 on the other hand decided to run after the suspects and intercepted them. As he tried to interrogate them what they were doing and why they were running away, one of the suspects shot at him but the gunshot missed his head and they managed to flee. Members of the public also milled around the deceased but none was able to apprehend the suspects.

Meanwhile, PW3 raised police from Langata Police Station. Amongst the police officers who visited the scene were **PW5, CPL Cyrus Maswai** and **PW7, CPL Richard Kipsang**. From the house of the deceased, they recovered two spent cartridges and one life bullet and another spent cartridge from where PW4 intercepted the suspects. Inside the house of the deceased was also a laptop on the floor which they took possession of. PW7, partly participated in the investigations as he is the one who requested that an identification parade be carried out, a task that was done by **PW6, Chief Inspector Indris Yusuf.** He also preferred the charges against the Appellant. The investigations were later taken over by **PW9, PC Hillary Kimuyu**. According to PW6, two witnesses, namely PW1 and 4 participated in the identification parade. He testified that PW1 was not able to identify any suspect whereas PW4 identified the Appellant as one of the suspects.

PW8, Chief Inspector Alex Chirchir was a ballistic expert from CID headquarters. He was tasked to do an examination of the cartilages and the life bullet collected from the scene and determines whether they were fired from a life ammunition and were life ammunition respectively. Whilst he confirmed affirmatively, he also testified that the three fired bullets as well as the cartilages were fired from the same gun.

After the close of the prosecution case, the court ruled that the prosecution had established a prima facie case and accordingly put the Appellant on his defence. He opted to give an unsworn statement of defence and did not call any witness. He stated that he was arrested after he went to Ongata Rongai Police station to claim his personal properties which the police had stolen from his house. At that point he was charged with a separate criminal case No. 3580 of 2011 at Kibera Law Courts. He was later taken to Industrial Area Police Station after which he was charged with the instant case. He stated that although PW4 claimed to have identified him in the identification parade, the said parade was flawed because he had seen him at Ongata Rongai Police Station when he was being arrested. He claimed he was innocent and urged the court to allow this appeal.

Determination

It is now the onerous duty of this court to determine whether the Appellant was positively identified and whether the offence of attempted robbery was proved beyond a reasonable doubt.

I find it paramount to first determine whether evidence on record established the offence charged. The offence of attempted robbery with violence is defined under Section 297(2) of the Penal Code as;

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

The charge sheet spells that the Appellant was attempting to rob the deceased of a laptop. The evidence on record does however present a different scenario. The initial investigating officer, PW7, testified that according to PW1 the assailants entered the deceased's house and demanded the laptop and a bangle. This assertion is not corroborated by PW1 who testified that she heard people call her son who opened the door and let them in. PW2, who was with PW1 at this point in time testified that he heard the deceased being urged to open the barber shop and shave a customer. Both witnesses testified that the next thing they heard was the gunshot. They did not testify to hearing any commotion or indicator of an attempt to rob the deceased. Given their proximity to the deceased's shop they could easily have heard any demands issued by the robbers. This is also corroborated by PW2's testimony that it appeared that the thugs sole intention was not to steal but kill his son. Further, there is also the fact that the laptop was found on the ground which cannot be deemed as conclusive indicator of intent by the attackers to steal it. In the circumstances, my view is that if the court finds that the Appellant was positively identified, it would only find him guilty of other offence other than the one charged.

I now consider whether the Appellant was sufficiently identified. The evidence of PW1 was that she identified the Appellant as he left the scene. She knew him as he was a regular customer at her shop. This was therefore evidence of recognition. However, the evidence from the

identification parade was that she failed to identify the Appellant. She denied taking part in the parade. The trial magistrate when evaluating this contradiction found that the parade form was tampered with which meant it could not be relied on as sufficient evidence of identification. The officer who undertook the parade presented the same to court and testified that PW1 and PW4 took part in the parade. He produced the form but did not testify to any tampering. I have looked at the parade form and it is clear that it is filled in different ink throughout and in some instances the handwriting appears different. The court however notes the absence of any marked deletions or alterations of information. I am therefore unable to make a conclusion that the parade form was tampered with. The mere presence of different colour of pen and seemingly different hand writing without an expert confirmation in my view is not sufficient reason to warrant a conclusion that the form was tampered with. The court would then have to reevaluate other evidence in determining whether the Appellant was properly identified.

It is clear that PW1 denied participating in the parade, which then puts into question evidence of PW6 that the witness participated in the parade. Whether or not she identified the suspect is a matter of evidence. The contradiction between the evidence of the two witnesses clearly casts a doubt in the mind of the court on who spoke that truth. It definitely points to a discredited identification process.

There is also the fact that PW1 in her initial report indicated that the offence was committed by two robbers and that her statement mentioned *Ochi* and *Magidion* as the culprits. Her statement did not however mention the Appellant as a suspect. This then vindicates her position that she could not have participated in the parade if she had not indicated that she knew any of the robbers.

The Appellant was positively identified at the parade by PW4. PW4 testified that he encountered the Appellant while responding to the commotion related to the offence. That he tried to stop them and during the encounter they got into an argument with the Appellant who shot at him. He testified that given that he could easily identify the Appellant after the encounter he started his own investigation to find the thugs and was informed by a lady called Nthenya of their names. He testified that he did not know the Appellant before the incident and later took part in a parade to identify him. PW7 testified that PW4 informed him that he recognized the Appellant and informed him that it was one "Wamagu" whom he recognized as part of the gang that had been terrorizing the neighborhood.

It is noteworthy that PW4 testified that he had never seen the Appellant before. The Appellant's defence was that PW4 saw him when he was arraigned in court on 16th September, 2011 which was before the identification parade was carried out. The parade took place on 19th September, 2011 after the Appellant was charged. The investigating officer testified that he arraigned the Appellant on 21st September, 2011 although the Appellant was brought to court on 16th September, 2011 without his knowledge. This is contrary to his evidence that he found the Appellant under arrest at Ongata Rongai Police Station on 14th or 15th September, 2011. The investigating officer testified that he arraigned the Appellant after the identification parade. This is contrary to the date of plea to court indicated in the charge sheet and the record of proceedings which indicates the date was 16th September, 2011

Needless to state then the identification parade having been carried out on 19th September, 2011 succeeded the plea. I would in the circumstances be inclined to uphold the Appellant's assertion that PW4 saw him in court on 16th September. 2011 before he participated in the parade. The prosecution could not then rely on the identification of the Appellant in the parade as positive identification. In the same spirit the trial court could not uphold that the Appellant was positively identified by PW4 as a basis for his conviction. In the court's candid view, the entire process of the Appellant's identification was flawed and his conviction was therefore not safe.

I add that there was also no clear evidence on how the Appellant was arrested. Besides the Appellant's defence that he was arrested while at the police station, none of the prosecution witnesses attempted to illuminate any information in this respect. The police officers who visited the scene namely PW5 and 7 only testified that they found the Appellant at Ongata Rongai Police Station. On the other hand, PW1, 2, 3 and 4 did not attempt to state how the Appellant was arrested, save that they learnt of his arrest later. The main investigating officer PW9 did not make it better for the court. In fact, his evidence was limited to informing the court that he took over investigations from CPL Kipsang as well as the postmortem form which he adduced as evidence. He also confirmed to the court that the deceased died of hemorrhage due to a gunshot. With the gap on the evidence leading to the arrest of the Appellant and the identification of the Appellant being grossly flawed, it begs questions how investigations concluded that the Appellant was culpable. In addition to the foregoing observations, this is a reason that the court must find that the conviction of the Appellant was not safe.

In the result, I find that the case was not proved to the required standard, beyond a reasonable doubt. I accordingly quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 15th February, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person.

2. Miss Atina for the Respondent.