REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 63 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.1381 of 2015 of the Chief Magistrate's Court at Naivasha before P. Gesora - CM)

ANDERSON KAMAU GATUTU.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant Anderson Kamau Gatutu was charged with two counts of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars relating to the first count state that on the night of 29th and 30th day of May, 2015 along Maai Mahiu Naivasha Highway in Naivasha Sub-County within Nakuru County, jointly with others not before court, being armed with dangerous weapons namely pistols, iron bars and rungus, he robbed **Gilbert Mburu Kariuki** of a motor vehicle registration number **KCC 178P** make **Isuzu FRR Lorry** valued at Kshs 5 million, assorted electrical appliances valued at Kshs 681,760, assorted motor vehicle tyres, car batteries and engine oil valued at Kshs 1,581,100/=, mobile phone make Techno valued at Kshs 3,000/= and cash Kshs 2,000/= all totaling to Kshs 7,267,860 and immediately before the time of such robbery used actual violence to the said **Gilbert Mburu Kariuki**.

2. Regarding the second count, the particulars state that on the night of 24th day of June, 2015 along Maai Mahiu Naivasha Highway in Naivasha Sub-County within Nakuru County, jointly with others not before court, being armed with dangerous weapons namely pistols, iron bars and rungus, he robbed **John Muraya Wachira** of a motor vehicle registration number **KCC 639W** make **Isuzu FRR Lorry** valued at Kshs 5 million, 600 outers of 10 by 2Kg Kensalt valued at Kshs 242,208/= and cash Kshs 3,000/= all totaling to Kshs 5,245,208/= and immediately before the time of such robbery used actual violence to the said **John Muraya Wachira**.

3. He denied the charges but following a full hearing, he was convicted and sentenced to death on the first count, while sentencing on the second cunt was held in abeyance.

4. Aggrieved with the outcome, the Appellant filed the present appeal. In amended grounds of appeal filed on 5th October, 2017 the Appellant complained as follows:

> **"1. THAT, the learned trial magistrate erred both in law and fact in accepting the prosecution case on IDENTIFICATION without considering the fact the PW1 and PW7 did not disclose in their first report the descriptions, physical feature, ways of dressing or nay marks of identification, they did not disclose the intensity of light that existed and the distance the assailants were from the complaint. It was an error to convict without considering these were difficult circumstances which prevailed by the time of the commission of the offence.**
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> **2. THAT, the learned trial magistrate erred in both law and facts in finding that the identification parades were properly conduced when there were glaring irregularities, procedural technicalities were flawed, the Appellant had been taken to court in Naivasha Criminal Case 1322 of 2015 on 27th July 2015 this case would later be consolidated with criminal case file number 1181 of 2015; the prosecution would later arrange for an identification parade for the Appellant on 29th July 2015, and another parade on 30th July 2015, which was prejudicial for the Appellant as he had been exposed to his complainants.**
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> **3. THAT, the learned trial magistrate erred in both law and facts in misconstruing the circumstances of the arrest of the Appellant in connecting him with the purported stolen goods hence arriving at an erroneous finding.**
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> **4. THAT, the learned trial magistrate erred both in law and fact by convicting the Appellant but failed to note that the prosecution case was not well investigated not corroborated there glaring contradictions thus the evidence against the Appellant was insufficient to support a conviction.**

5. THAT, the learned trial magistrate erred in law by failing to evaluate conclusively the Appellants defence of ALIBI and shifting the burden of proof to the Appellant which was a wrong procedural approach. It was an error in law." (sic**)**

5. Through written submissions, the Appellant particularly challenges the identification evidence, and in arguing grounds 1 and 2 asserted that the conditions subsisting at the time of the two robberies did not favour identification, as both complainants were robbed at night. He took issue with the evidence by the two complainants (**PW1** and **PW7**) that they were able to identify the Appellant, using the cabin lights in their vehicles or vehicle headlights, pointing out that none of them gave descriptions of the physical appearance of the persons who robbed them.

6. He relied on several authorities including **Said Bakari Ali & 2 Others -Vs- Republic [2001] eKLR.** He faulted the identification parade conducted by **PW10** stating that it was irregular as he had already been arraigned in court, itself creating an opportunity of exposure to the would-be witnesses.

7. In grounds 3 and 4 the Appellant takes issue with the inadequacy of police investigations leading to his arrest pointing out that on his arrest, there was nothing recovered that tended to connect him with the offences. Finally he complains that the trial magistrate failed to evaluate the prosecution evidence alongside his defence and therefore his defence was not given adequate consideration. He cited the case of **Ouma -Vs- Republic [1986] eKLR** to support this submission.

8. The DPP in opposing the appeal reiterated the evidence tendered though the prosecution witnesses during the trial.

9. The duty of the first appellate court remains as succinctly set out by the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336** namely:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

10. The prosecution case at the trial was that **Gilbert Mburu Kariuki** (**PW1**) the driver of a Lorry **KCC 178P Isuzu FR,** belonging to **Dorcas Njoka Nyaga** (**PW5**) a transporter , had been robbed of the lorry while driving along Mai Mahiu Naivasha Highway on the night of 29th and 30th May , 2015. At the time, the lorry was loaded with assorted electrical appliances and vehicle accessories worth Shs 1,581,100/= destined for various customers including **Charles Theuri Njuki** (**PW4**), a trader based at Eldoret. On the same night, a report was made to police and the vehicle tracking company.

11. The vehicle was found abandoned at Maai Mahiu on the 30th May 2015. The goods had been removed from the vehicle. A similar robbery had occurred on the same highway on the night of 24th June, 2015, involving a vehicle **KCC 639W** Isuzu **FR** lorry which at the time was being driven by **John Muraya** (**PW7**). It was owned by a transporter **Margaret Wanjiru Maina** (**PW6**). The lorry was ferrying goods including salt worth about Sh 5,000,000/= loaded at Mombasa by Kensalt Kenya Limited, for transportation to Nakuru. The robbery was reported to police who recovered the lorry on 25th June, 2015. It had been stripped of its cargo, and abandoned at Maai Mahiu.

12. Police investigating these robberies were tipped off about the presence of the Appellant at a pub in Maai MAhiu on 25th July, 2015. PC Malele **(PW9)** and **PC Kimathi (PW10)** proceeed to the bar where they found the Appellant. They arrested him. On 30th July 2015 CI Nzioka Singi **(PW11)** conducted an identification parade attended by **PW1** and **PW7**. The witnesses picked out the Appellant. He was charged on both counts.

13. In his defence, the Appellant stated that he was a resident of Maai Mahiu. That on the date of his arrest, he had had an argument over money with customers for whom he had ferried maize from Suswa to Maai Mahiu. Police came to the pub where the incident occurred and demanded that he makes payments to his adversaries before searching and arresting him. Police searched his home on the next day. He was arraigned before the court as police sought to extend his detention, pending investigations. In subsequent identification parades, the complainants were unable to identify him. He denied the offences.

14. The court has duly considered the trial record and appeal submissions. The prosecution case in the lower court was primarily based on the identification evidence of the two complainants, **PW1** and **PW7**. In **Joseph Muchangi Nyaga & Another -Vs- Republic [2013] eKLR** Court of Appeal stated that:-

> **"Evidence of visual identification should always be approached with great care and caution (See Waithaka Chege versus Republic (1979) (KLR 217). Greater care should be exercised where the conditions for favourable identification are poor. (Gikonyo Karume and Another Versus Republic (1980) KLR 23) ……before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him……"**

15. Admittedly, the two complainant drivers were robbed at night, by more than one person. Both drivers claimed that close to a month, for **PW7** and 2 months for **PW1**, since the robberies, they could identify the Appellant. In his evidence, **PW1** had narrated in great detail how a probox saloon vehicle had on several occasions during his trip, attempted to block his path. The first attempt was at Limuru but he drove on

to Maai Mahiu where a second attempt to intercept his lorry was was made by the same probox vehicle.

16. Notwithstanding this \, he drove on towards Longonot, where after he slowed down due to a vehicle ahead of him, his lorry was eventually blocked by the said saloon car and the robbery occurred. He claimed that he saw a man brandishing a firearm appear on his side while another smashed the window to his side. That using headlights, he was able to see the said armed robbers as well as a group of three others.

17. Quite apart from the fact that **PW1** was allegedly aware of the attempts by the probox vehicle driver to block his path, which he claimed to have "resisted" twice, it is difficult to understand how the lorry was eventually blocked by the probox saloon car at Longonot when there was allegedly a lorry ahead of **PW1**, causing him to slow down. Secondly, it begs the question why, despite noticing the evident blocking attempts by the probox saloon car before reaching Maai Mahiu town, the driver drove on past Maai Mahiu towards Longonot.

18. A prudent man would have stopped at the closest town or police station to report the previous incidents. Even more strange is the allegation by **PW1** that he did not observe the registration details of the probox vehicle during these alleged interception attempts. But he stridently claims that he saw the Appellant alight and smash his side window, by use of head lights. All this sounds incredulous. **Pw1** says that 7 persons in total were involved in the robbery, several of them alighting when his lorry stopped.

19. Assuming it is true that **PW1's** head lights were on, and that the Appellant having alighted first, ran to smash his side window, it is quite unlikely that there was adequate opportunity for **PW1** to observe the Appellant. Apart from the affirmation by the investigating officer **(PW13)** to the effect that the two complainants herein stated they could identify the robbers, no description was recorded in the respective statements.

20. The arrest of the Appellant a month after the robbery against **PW 7** was as a result of a tip -off by an unidentified informer. There is no evidence that on arrest the Appellant had anything connected with the two robberies. He was subjected to an identification parade after he had been presented in court. The identification parade conducted by **PW11** in my view added no value to the prosecution case. The complainant in the first count came to the parade two months after the offence was committed.

21. In my view **Pw1**'s own description of the robbery incident is suspect and his claim to have identified the Appellant at the robbery scene incapable of belief. The circumstances of the alleged robbery against the second complainant (**PW7**) also present difficulties. He claimed that a probox saloon vehicle blocked his path and a man armed with a pistol, with 3 others in tow, came out.

22. The Appellant allegedly went to the side and opened the cabin door as his accomplices dragged him out of the vehicle. Where was the opportunity to observe the men and with what aid? He claimed that the lorry cabin lights were on, enabling him to observe the Appellant when he entered, and with others dragged him out of the vehicle. He too did not describe his attackers in any detail in his recorded statement. He was called to an identification parade about a month later.

23. Having lost goods of high value that were destined to 3rd parties, the two drivers must have felt obligated to assist the police resolve the so-called robberies. It was an error of judgment for police to expose the Appellant in court prior to the conduct of identification parades. In my considered view, identification of the Appellant by **PW7** in the circumstances of the robbery is fraught with doubt.

24. Equally, there is no explanation for the Appellant's arrest prior to his identification. He was not found with any item connected with the offences, nor had he been described in any meaningful way by the key witnesses, **PW1** and **PW7** to enable police and arrest him. The prosecution case stood or fell on the credibility of the evidence by **PW1** and **PW7**. Although the Appellant's defence sounded contrived, the prosecution evidence was dubious and could not properly support a conviction for the offences charged.

25. I agree with the Appellant that the prosecution case did not rise up to the required threshold and he ought to have been given the benefit of an acquittal. In the circumstances, I must quash his conviction on both counts and set aside the death sentence imposed on him. Unless otherwise lawfully held, the Appellant is to be set at liberty forthwith.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 31st day of July, 2018.

R. MWONGO

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : Anderson Kamau Gatutu - present

Court Assistant : Quinter