



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CRIMINAL APPEAL NO. 41 OF 2016**

*(Being an Appeal from Original Conviction and Sentence in*

*Criminal Case No. 2094 of 2014 of the Chief Magistrate's Court*

*at Naivasha – P. Gesora, CM)*

PAUL KIMANI NJERI.....1<sup>ST</sup> APPELLANT

AMOS NDUATI GITAU.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

REPUBLIC.....RESPONDENT

**J U D G M E N T**

1. The two Appellants herein were tried alongside other accused persons with five counts of Robbery with violence contrary to Section 296 (2) of the Penal Code. The first appellant faced an alternative charge of Handling stolen goods contrary to Section 322 (2) of the Penal Code and a further charges of being in possession of an imitation firearm and Being in possession of ammunition without a firearm certificate contrary to Section 21 (2) as read with (2) of the Firearms Act. The particulars are stated in the respective counts.

2. Following a full trial, the Appellants who were the 1<sup>st</sup> and 3<sup>rd</sup> Accused were found guilty and convicted in respect of Robbery with violence in count 1 and 2 but acquitted in respect of counts 5, 6 and 7 for lack of evidence. 1<sup>st</sup> Appellant was also found guilty and convicted on the 3<sup>rd</sup> and 4<sup>th</sup> counts which related to possession of an imitation firearm and ammunition. They were sentenced to death on the first robbery count while sentencing in respect of other counts was properly held in abeyance.

3. Aggrieved with this outcome, the Appellants appealed to this court. The 1<sup>st</sup> Appellant, also the 1<sup>st</sup> Accused in the trial raised five grounds of appeal as follows:-

**“1. THAT the learned trial magistrate erred in law and in fact by convicting the Appellant in reliance of the evidence of identification by PW1 and PW2; but failed to note that, this evidence was acquired erroneously thus not free from the possibility of error.**

**2. THAT, the learned chief magistrate erred in law in misconstruing the circumstances of the arrest of the Appellant in connecting him with the purported robbery which, by the evidence adduced; the Appellant had no knowledge of the same**

**3. THAT, the learned trial magistrate erred in law and fact by holding that the Appellant was found in possession of a homemade gun without a firearms licence and was in possession of one round of 9mm caliber ammunition without a firearm certificate but failed to note that these allegations were not proved in evidence.**

**4. THAT, the learned trial magistrate erred in law and fact, by convicting the Appellant on evidence of handling stolen goods but failed to note that handling as defined in law was not proved against the Appellant; it was therefore an error in law to convict on such shoddy evidence**

**5. THAT, the learned trial magistrate erred in law by convicting the Appellant but failed to appreciate that; the defence tendered was plausible and crated doubts to the prosecution case. It was an error in law to convict the Appellant without giving reasons as to why his defence was not admissible.”(sic)**

4. The 1<sup>st</sup> Appellant submitted regarding ground 1 that **PW1** could not have identified any of the robbers accurately in light of the difficult circumstances obtaining at the scene of offence and the fact that one of the robbers wore a mask. Equally, for the same reasons, **PW2** could not identify the robbers because she was attacked suddenly and blindfolded. Pointing out that the witnesses did not offer any description of the robbers before the suspects were brought to them, the Appellant pours cold water on the identification evidence especially as no identification parade was conducted. He sought to rely on the case of **Wamunga -Vs- Republic (1989) KLR 424**.

5. Grounds 2, 3, and 4 relate to the circumstances of arrest of the Appellant. The Appellant submitted that he was arrested on a public road by members of public who came to the scene and was not found in possession of any stolen goods on arrest, or in any way connected to the robbery. Moreover, there was no evidence that he was in physical possession of the imitation firearm or live bullet at the time of arrest and the circumstantial evidence was inadequate. With regard to the recovered household goods the 1<sup>st</sup> Appellant submits that he was not connected through evidence to the said recovery. He finally complained that his otherwise plausible defence did not receive adequate consideration.

6. The 2<sup>nd</sup> Appellant was the 3<sup>rd</sup> Accused in the lower court. He has raised 3 amended grounds of appeal as follows:

**“1. THAT, the learned trial magistrate erred in law and in fact by convicting the Appellant in evidence of identification by PW1 and PW2 and erred in holding that; the identification parades conducted were fairly conducted; while by the evidence in record; procedural technicalities were flawed thus rendering the whole evidence of identification unreliable thus unable to support a conviction.**

**2. THAT, the learned trial magistrate had erred in law and in fact by convicting the Appellant in a prosecuting case which was not well-investigated, lacked corroboration thus insufficient to support a save conviction.**

**3. THAT, the learned trial magistrate erred in law and fact by failing to evaluate conclusively the mode of arrest of the Appellant and failed to analyse the plausible defence given by Appellant.” (sic)**

7. On the first ground, the 2<sup>nd</sup> Appellant takes issue with the evidence of **PW1** and **PW2** stating, that in the circumstances described by the witnesses the identification cannot be free from error. Pointing out further that none of the witnesses outlined his specific role in the robbery or gave any special features which assisted identification. He takes issue with the identification parade which he says was flawed as it did not have people with close resemblance to him, stating he was the only member of the parade with one bad eye. That he raised the issue during the parade. Equally he complains that a police officer **PW9** was present at the parade. Citing **Njihia -Vs- Republic [1986] KLR 422** he dismissed the identification parade as flawed and prejudicial.

8. The remaining grounds challenge the manner in which **PW9** went about investigations emphasising the fact that he was not arrested in possession of any item linking him to the offences. He takes issue with the evidence of the investigating officer **PW9**, whom he accusing the witness of framing him and concocting evidence against him merely because he knew him in relation to other offences. He complains that the trial court peremptorily dismissed his defence.

9. Initially the DPP confused his files and made submissions relating to other matters. The DPP later withdrew his erroneous submissions. Eventually, through Mr. Koima, the DPP submitted in opposition to the appeals that the Appellants were properly identified by the robbery victims. Re-enacting the robbery scene, Mr. Koima stated that the 1<sup>st</sup> Appellant was arrested at the scene when police acting on a tip off went to the victim's home. That the 2<sup>nd</sup> Appellant was arrested pursuant to a description pointing to his bad eye and that police were able to trace him after he failed to attend other cases facing him.

10. In a first appeal, the court is obligated to consider a fresh the evidence adduced at the trial and to form its own conclusions.

The Court of Appeal for the Eastern Africa explained that duty in **Pandya -Vs- Republic [1957] EA 336** as follows:-

**“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.”**

11. The prosecution case in the lower court was that the complainants in Count 1 and 2 were an employer and her househelp, respectively. **Fidelis Mwhaki Gachie (PW1)** is the wife of **Appollo Kamau Wamae (PW3)**. They lived at Kayole Naivasha. **Peninah Wangui Wanjohi (PW2)** worked for and lived with the couple, as a house help. On the night of 30<sup>th</sup> October, 2014 **PW1** and **PW2** were at the residence of **PW1** going about their normal evening activities. **PW2** opened a door to pour out some waste water. She was confronted by a gang of five men who wielded firearms and dagger. They slapped her and forced their way into the house.

12. Pointing a gun at **PW1**, the men demanded that the occupants lie down. They beat the two women while demanding money and also ransacked the house in search of valuables. **PW1** had only Shs 50/= and **PW2** was forced into a bedroom and forced to fork out some Shs 1,000/=. The robbers wanted more. **PW1** begged them to give her opportunity to ask a friend to send money to her phone via MPESA and took the opportunity to notify **PW3** by text about the ongoing robbery. The robbers ate food as they waited and presently, three of the men went outside leaving two in the house. In the meantime **PW3** had notified police who drove to the home.

13. Soon gunshots rent the air as police officers including **PC Kahoya (PW5)** and **PC Muiruri (PW6)** surrounded the compound. The robbers scaled the wall surrounding **PW1's** home as they fled but the 1<sup>st</sup> Appellant was not lucky to escape and fell while clambering down over the wall. He was caught. Beside him was a homemade gun containing one live round of ammunition. A pistol was also recovered at the same scene. The arrested suspect was led back into the compound of **PW1** where some of the stolen electronic and household goods were found abandoned. These included an iron box, speakers and a Nokia phone handset.

14. Also recovered was a mask said to have been worn by the 2<sup>nd</sup> Appellant who was in the group of robbers and had been armed with the recovered pistol. Pursuant to inquiries by police, the 2<sup>nd</sup> Appellant was sought. He was presented to police by his uncle who had stood as a surety for him in a different ongoing criminal case. During an identification parade held on 15<sup>th</sup> November, 2014, the complainants identified the 2<sup>nd</sup> Appellant as a member of the gang of robbers who had attacked them.

15. In an unsworn defence statement the 1<sup>st</sup> Appellant claimed that he was headed to his home at Kayole on the material night when gunshots rang out forcing him to lie on the ground. He was attacked by members of public before being taken to the police station. He denied the offence. The 2<sup>nd</sup> Appellant testified that he resides in Huruma, Nairobi. That he was involved on a motor cycle accident on 2<sup>nd</sup> November, 2014 and hospitalized. He failed to attend a criminal different case in which he was being tried and his father was arrested. His uncle pressured him to present himself to police at Naivasha. He was arrested. He claimed that he was falsely implicated, and tendered evidence of hospital admission between 2<sup>nd</sup> and 9<sup>th</sup> November, 2014.

16. Concerning the 1<sup>st</sup> Appellant, there is no dispute that he was arrested while lying on the ground at a place close to the scene where police were firing their guns in a bid to arrest suspects, following a report which brought them to the homestead of **PW1** and **PW3**. That there was a robbery at the said home is not in dispute. As for 2<sup>nd</sup> Appellant, there is no dispute that he was arrested when police who were pursuing him arrested his father forcing him to present himself at Naivasha Police Station.

17. The key sticking point in the case is the involvement of the two Appellants in the robbery at the home of **PW1** and **PW3**. In their defences and submissions, the Appellants have unsurprisingly attacked the identification evidence, and for the 1<sup>st</sup> Appellant, the circumstances of his arrest.

18. In his judgment the trial magistrate restated at some length the evidence by **PW1** and **PW2** before concluding:

**“The robbers were on close proximity to their victims and the conditions prevailing at the time offered them an opportunity to identify them positively.”**

Dismissing the 1<sup>st</sup> Appellant's defence, he found that he had been arrested before the members of public could get to the scene subsequent to the gunshots.

19. In **Joseph Muchangi Nyaga & Another -Vs- Republic [2013] eKLR** the Court of Appeal reiterated the need for trial court to carefully examine evidence of identification in difficult circumstances stating:

**“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.....”**

20. No doubt, the robbery committed in **PW1's** house occurred at night but inside the house. **PW2** was the first person to come face to face with the robbers as she stepped outside the house. She testified that:

**“.....as I met with 5 people. They were led by a short man and I screamed. The leader slapped me and I fell on the floor. He ordered me to wake (get) up and I was led to the sitting room. He also beat PW1 seriously. He ordered us to give out money. They mistook me to be the owner of the house. PW1 offered to ask a friend to send her money. She was sent (shs) 20,000/=. I was taken to the bedroom and the short man beat me as I declined to give out the (shs)1,000/= I had. The other three were in kitchen. I was brought back to the sitting room and they decided to wait for PW1's husband. They had 2 guns and knives. The three went to the gate to wait for PW1's husband. I was taken to the bedroom once again and I was blind folded and left there. I freed myself and went back to the sitting room. One of the robbers beat me and demanded for food which they ate. PW1 had freed herself and I was taken back to the bedroom.....we heard gunshots..... A suspect was arrested and brought inside. He wore brown shoes, blue jeans and blue jacket. He was the one who had a big gun and was beating PW1..... There was sufficient electric light inside the house. I saw the (2<sup>nd</sup> Appellant) well. He had one bad eye and I saw it through the mask....”**

21. The witness described the big gun identified (Exhibit 1) wielded by the 1<sup>st</sup> Appellant and the small one pistol (exhibit 2) which the 2<sup>nd</sup> Appellant carried. In answer to questions by the 1<sup>st</sup> Appellant **PW2** stated:

**“I saw you clearly dealing with PW1. The attack was not normal but I was not confused. I saw clearly what happened. There is electric lighting inside our house. I did not go outside to see the person who had been arrested. I positively identified you at the scene.”**

22. To the 2<sup>nd</sup> Appellant's question, PW2 stated:-

**“One of the robbers had a bad eye. I recorded my statement to that effect. I did attend an identification parade.....I had seen you in the house on that day. You were wearing a mask but I saw your eye.”**

23. This evidence is consistent with the testimony by PW1. She stated that the robbers beat and harassed her and PW2 while demanding money even as they ransacked the house for valuable. She stated: -

**“I pleaded with them to let me call my friend to send me money. They gave me my phone back and I texted my husband and told him we had been attacked..... I called my husband to send money .....also Samuel Muhoro to send me 20,000/= and he did so. They (robbers) appeared confused (as to) what action they should take but finally tied us with seat covers. They ate our food and two of them were left in the house while three of them went to wait for my husband. As we were in the house we heard gunshots and the two robbers who were in the house jumped out and I managed to free myself. We went out and heard members of public say one person be lynched. I saw the person. He was outside the compound. Our house is fenced by a perimeter wall. That person was one of our attackers. I identified his clothing a blue jeans trouser, blue jacket and brown shoes. He was the one brandishing a big gun. We also saw a black mask he was wearing .....at the scene electric lights were on and I saw the attackers clearly. The security lights were also on and I saw the people clearly.”**

24. She identified his mask and when cross-examined by the 1<sup>st</sup> Accused stated that she saw the five robbers with the use of the electric light illuminating the area confirming that the 1<sup>st</sup> Appellant also wore a mask. She reiterated that she saw the said Appellant clearly and she identified his clothes soon after he was arrested.

25. While I agree with the 1<sup>st</sup> Appellant that police erred by exposing him to the witness upon his arrest, and therefore reducing the value of the identification evidence, the circumstances of the 1<sup>st</sup> Appellant's arrest were different from those in **David Letira Lekai -Vs- Republic [2016] EKLK**. Because the present Appellant was caught right outside the compound of PW1, in a swift development of events.

26. It is PW3's evidence that upon receiving the SOS text from his wife, he immediately reported to police and with his worker Jackson Kithingo (PW4) proceeded to Total Petrol Station where they picked PW5 and PW7 among other police officers before proceeding to the scene. In PW4's words:-

**“We met them (police) and went as a convoy. We surrounded the compound and police started shooting in the air. The robbers started jumping over the perimeter wall. I moved and turned my vehicle and put on the headlights. One officer said one of the robbers had fallen and we rushed and arrested one suspect and recovered two guns. The mob started beating the suspect and he named his accomplices.....”**

27. At that point the police, PW3 and PW4 entered the compound where PW1 saw the arrested suspect, the 1<sup>st</sup> Appellant. Other stolen goods were recovered inside the compound. PW5 testified that the mob that had gathered wanted to lynch the 1<sup>st</sup> Appellant. He therefore pulled him inside the complainants' compound. PW5's description of the arrest of the 1<sup>st</sup> Appellant tallies with the account by PW4 and PW3, the latter stating during his testimony that the 1<sup>st</sup> Appellant fell into a trench after jumping over the perimeter wall and that he saw a gun fall out of the 1<sup>st</sup> Appellant's body.

28. PW3, PW4 and PW5 described the scene where the 1<sup>st</sup> Appellant was caught as a plot adjacent to PW3's property. PW3 denied that the 1<sup>st</sup> Appellant was on his way home insisting that the 1<sup>st</sup> Appellant “surrendered in a vacant plot” and not on the road.

29. PW1 and PW2 were inside the house during the arrest of the 1<sup>st</sup> Appellant and therefore could not accurately state where the arrest occurred. Thus the question of the public road close to the home, emphasized by the 1<sup>st</sup> Appellant is of no significance. PW5 denied there was a road where the 1<sup>st</sup> Appellant was caught. This scene was illuminated by security lights and PW3's vehicle headlights. While PW6 admitted the presence of a road close by, he stated that the Appellant had fallen flat at the place he found and subdued him. Thus the 1<sup>st</sup> Appellant's claims to have been an innocent man going home are not believable.

30. Considering the progression of events since PW1 informed her husband about the attack, the arrival of police and others at the scene and the arrest of the Appellant, it is evident that the 1<sup>st</sup> Appellant was one of the robbers who was seen jumping out of the compound of PW3 but fell down and was, unlike his accomplices, unable to make good his escape. Secondly, the fact that the big homemade gun fell out of his person per PW3 and was recovered by police right next him is confirmation that the 1<sup>st</sup> Appellant was one of the robbers who terrorized the family of PW3 and robbed them at gun point.

31. The recovered gun had live ammunition and was identified by PW1 and PW2 alongside the pistol as the weapons totted by the robbers. Thus, it matters not that the 1<sup>st</sup> Appellant was exposed to potential witnesses PW1 and PW2 soon after arrest. The trial magistrate was in my view entitled to record a conviction based only on the circumstantial evidence presented.

32. In my considered view the evidence in this case was watertight and met the criteria set out in **Kipkering Arap Koskei -Vs- Republic [1949] 16EACA 135** to the effect that:-

**“....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable**

**hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

33. And in **Simoni Musoke -Vs- Uganda (1958 E.A.)715** the Court of Appeal for Eastern Africa further stated:

**“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”**

34. The 1<sup>st</sup> Appellant’s conviction was proper and based on solid and credible evidence. I find no merit in his appeal and dismiss the challenge regarding his conviction on the two robbery counts (1 and 2). Regarding the two counts of being in possession of an imitation firearm and live bullet, there was evidence by **PW7** that upon being tested, the exhibit 1 and the ammunition were capable of firing and being fired.

35. The 1<sup>st</sup> Appellant was not licensed to hold such firearms and moreover used them to commit a robbery at the home of **PW1**. His denials were completely displaced by the prosecution evidence. It is hard to believe that the police picked on an innocent man who was lawfully going about his business and framed him up with two counts of robbery and even procured firearms for the purpose. In the result, I agree with the finding of the trial magistrate that there was credible and strong evidence to support the 1<sup>st</sup> Appellant’s conviction on the 3<sup>rd</sup> and 4<sup>th</sup> Counts. The entire appeal fails and is dismissed.

36. As regards the 2<sup>nd</sup> Appellant however, the evidence against him was firstly through an accomplice (1<sup>st</sup> Appellant) who allegedly named him upon interrogation . However, no confession was recorded. It did appear that both **PW1** and **PW2** saw a man with one bad eye among the robbers. Two errors were committed by police. First, they did not record the description of this attacker as they recorded the statements of these key witnesses.

37. Secondly, they admittedly paraded the 2<sup>nd</sup> Appellant among people who did not suffer a similar disability. Granted, it is difficult to round up enough members on short notice with similar eye features to participate in a parade. However, the police ought to have attempted at the minimum to have the parade members wear a mask similar to that recovered at the scene so that the 2<sup>nd</sup> Appellant’s eye disability was not a complete give away.

38. It may well be that the 2<sup>nd</sup> Appellant’s failure to attend his other criminal cases had something to do with the robbery at **PW1’s**. The investigating officer however failed to tighten some loose ends in the evidence brought up against the 2<sup>nd</sup> Appellant. Moreover, upon his arrest no object connected with the robbery was found on the 2<sup>nd</sup> Appellant. The pistol the said Appellant had allegedly totted was not subjected to forensic analysis upon recovery. In my view therefore the 2<sup>nd</sup> Appellant’s conviction may not be safe. I do quash the convictions in respect of counts 1 and 2. The second Appellant will be set at liberty unless otherwise lawfully held.

**Dated and signed at Kiambu, this 26<sup>th</sup> day of June, 2018.**

**C. MEOLI**

**JUDGE**

**Delivered and signed at Naivasha, this 31<sup>st</sup> day of July, 2018.**

**JUDGE**

In the presence of:-

For the DPP – Mr. Koima

Appellant: Paul Kimani Njeri 1<sup>st</sup> - present

Amos Nduati Gitau - 2<sup>nd</sup> present

C/C – Quinter Ogutu