



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 19 OF 2017**

**FRANCIS MUTURI KIARO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(An appeal arising from the Judgment of J. Kituku (PM) at Kiambu Law Courts,***

***on 10<sup>th</sup> December 2015 against sentence and conviction***

***at Kiambu Law Courts Criminal case NO. 3432 of 2014)***

**JUDGMENT**

1. On the 24<sup>th</sup> November 2014, the appellant with another were charged with five counts of the offence of **Robbery with Violence Contrary to Section 296(2) of the Penal Code**. He Denied the offence.

Upon full trial, he was convicted on Count two and three and acquitted of counts four and five. He was sentenced to death as provided under the law.

2. This appeal is against both conviction and sentence upon grounds of appeal filed on the 14<sup>th</sup> June 2017 and amended on the 14<sup>th</sup> June 2018.

In summary, the grounds of appeal are based on

***1. Identification***

***2. Uncorroborated evidence***

***3. Appellants defence not considered***

3. The particulars of the charge are that on the 23<sup>rd</sup> day of November 2014 at *Riara* Village of Kiambu County jointly with others not before the court while armed with crude weapons namely, *rungus*, *pangas* and metal bars robbed **Eliud Mukanda Makokha** of his mobile phone make Samsung, a torch, a belt, bunch of keys and whistle all valued at Kshs.6,870/= and immediately before the time of such robbery used actual violence to the said Eliud Mukanda Makokha.

**Count II** was to the effect that on the same day at the same place and duly armed as aforementioned, the appellants with others robbed **Paul Mwangi Warukiira** of his mobile phone make Nokia 305 and Kshs.3000/= all valued at Kshs.11,000/= in the same manner as aforesated.

4. The burden of proof in a criminal case always lies with the prosecution to adduce satisfactory and sufficient evidence to connect an accused person to the commission of the offence, and the evidence must be so clear, cogent and credible that there would be no possibility of an error, and beyond any reasonable doubt that the accused committed the offence. In **Simiyu & Another -vs- Republic (2005) I KLR 192**, the court dealt extensively with issues of identification and description of attackers. The court is mandated to consider the quality and credibility of the evidence. - **Morris Gikundi Kamunde -vs- Republic (2015) e KLR** – for a conviction to be sustained.

5. The duty of the first appellate court is to re-analyse and re-examine the entire evidence adduced before the trial court and come up with its

own findings and conclusion-**Republic -vs- George Anyango Anyang & Dennis Oduol -vs- Republic.**

6. **PW1 Paul Mwangi** testified that on the material day at around 5.00p.m., he and his friends **PW2, PW3**, were walking home when they were attacked by three men armed with *pangas*, sticks and a torch, that they looked like police officers and stated that he could identify the appellant (1<sup>st</sup> accused) who was carrying a *panga*, stick and a torch. He testified that they were ordered to lie on the ground as they directed the torch light at them as the area was dark, then the appellant hit him on his right shoulder and took his wallet with Kshs.3,000/=.

7. It was his further evidence that he left his colleagues lying down and on his way met a watchman who also claimed to have been robbed of his berret and later recovered his empty wallet and Identity card. This watchman did not testify.

On cross examination, **PW1** stated that the incident occurred at 7.00p.m. and that the appellant was the one wearing a blue berret. He did not describe any of the other attackers.

8. **PW2 Henry Kamau's** evidence was that the incident occurred at about 8.00p.m. and it was dark when the four men ordered them to sit down. He did not say how he identified the appellant but stated he was carrying a *rungu* and wearing a black jacket and a police berret, pointed his lighted torch on him, hit him on right hand, took his Samsung phone and soccer boots that were in his bag, and ordered him to leave.

9. **PW3 was Richard Njogore.** His testimony was that three men attacked them about 8.00p.m. together with **PW1** and **PW2**, but he managed to run away but saw **PW1** and **PW2** lie down and that he had seen one of the robbers wearing a police beret. He spoke of three men who attacked them.

10. **PW4 CPL Geoffrey Kinuthia** was based at the Kanunga patrol base. His evidence was that a group of **five armed** men were attacking and robbing people around the area and were wearing police uniform, that on the material day, **PW1** and **PW2** lead him and other police officers to the direction the attackers went while in a police vehicle. He testified that they searched in the bars at Kanunga shops but were told of some suspicious men who went into a house nearby.

At the house, his evidence was that they found the robbers and recovered the torch they used, the jacket worn by the appellant, a *rungu* and a pair of shoes.

11. He further testified that the appellant was wearing the same jacket the victims reported the attacker was wearing. Other items recovered in the house as in the inventory prepared by **PW4** among them were five mobile phones and several rolls of bhang – PExt No. 1-13. Upon cross examination by the appellant, the police officer testified that the victims identified the robbers by their attires that resembled ones worn by police, and that the appellant claimed the phones were his. He further confirmed that no identification parade was done.

12. In his unsworn evidence, the appellant testified that on the material date, he returned from work at Nairobi at 6.00p.m. and as he walked home, he was arrested by two police officers who took away his Kshs.2,250/= and his phone, that they took him to a bar by name Farm View where he was put into a police vehicle, and later other suspects were brought to the vehicle. It was his evidence that a man was brought and told to identify any of his attackers, and hence were taken to their houses. That nothing was recovered in his house then thereafter he was taken to Kanunga police station and charges preferred against him.

Upon the above evidence, the appellant was convicted and sentenced to death.

I have considered the trial court's judgment delivered on the 10<sup>th</sup> December 2015.

### 13. Identification/Recognition

The victims of the alleged robbery gave contradictory evidence of the time the offence is alleged to have been committed which is a crucial issue in this appeal. **PW1** stated 5.00p.m., **PW2** stated 8.00p.m., **PW3** talked of 8.00p.m. while **PW4** spoke of about 7.55 p.m.

The area was said to be dark and the robbers shone their torch lights on the victims, from which they alleged were able to identify them, and in particular the appellant by his attire – a blue jacket and a berret that looked like the ones worn by police officers. That is the description the victims gave to the police officers of the appellant. They did not describe any of the other attackers, save the appellant.

14. Further **PW1** spoke of three attackers, **PW2** talked of four men while **PW3** spoke of three men. The investigating officer **PW4** spoke of five men wearing police uniform.

The appellant denied having committed or involved in the offence he was charged with. It is therefore important to examine this issue critically because wrong identification can land an innocent person to a sentence of death.

15. In the case **Turnbull and Other -vs- Republic(1973) ER 549**, the court considered what factors should be taken into account when evidence of identification is at issue, and rendered that:

*“---the Judge should direct the jury to examine closely how the identification by each witness came to be made. How long did the witness have the accused under observation. At what distance?*

*In what light? Was the observation impeded in any way---? Had the witness ever seen the accused before? How often? --- recognition maybe more reliable than identification of a stranger---*?

16. The above safeguards are necessary as failure to observe them may lead to a mistaken identity. In the instant case, it appears like the only reason the complainants picked on the appellant as one of the robbers is the jacket and beret he was wearing, apparently at the time of his arrest a few hours after the commission of the offence.

17. In an offence under **Section 296(2) of the Penal Code**, three conditions must be satisfied for conviction to be sustained:

**1. That the offender is armed with any dangerous and offensive weapon or instrument.**

**2. The offender is in the company with one of more persons, or**

**3. At or immediately before or immediately after the time of the robbery the offender wounds, eats strikes or uses other personal violence to any person.**

18. The court of appeal in **Mohamed Ali -vs-Republic (2013) e KLR**, upon stating the above pre-conditions further rendered that proof of anyone of the ingredients is sufficient to establish an offence under the section.

There is no recorded evidence that any of the alleged items to have been stolen were positively identified as property of the victims.

The appellant laid claim to the two phones that he said were taken away from him by **PW4** upon his arrest as clearly evidenced by his request to the court at time of taking plea, when he urged the court to direct the police officers to return his telephones back to him. These are the same telephones that the victims claimed to have been robbed of.

19. It was therefore important that the victims **PW1**, **PW2**, and **PW3** to tender positive identification by production of documents to prove ownership. This failure to offer positive identification of the alleged phones and shoes goes against the doctrine of recent possession, and therefore casts doubts as to whether the said items were recently stolen from the victims by the appellant – See **Erick Otieno Arum -vs- Republic (Supra)**. The Court in **Erick Otieno Arum -vs- Republic(2006) e KLR** while defining the doctrine of recent possession stated thus:

***“in our view before a court of law can rely on the doctrine of recent possession as basis for conviction in a criminal case, the possession must be positively proved.***

***In other words, there must be positive proof first that the property was found with the suspect.***

***Secondly, that the property is positively the property of the complainant, thirdly, that the property was recently stolen from the complainant.***” (emphasis mine)

I have stated that no proof or positive identification of any of the alleged items was tendered that the items belonged to any of the victims.

20. The other offences facing the appellant were under the **Narcotic Drugs and Psychotropic Control Act No. 4 of 1994** and **possession of public stores contrary to Section 324(2)** as read with **Section 36 of the Penal Code**. As stated above, evidence of identification was adduced by **PW1** and **PW2** as **PW3** run away and did not identify any of the robbers. At the time of arrest, the appellant is said to have been found in the house of accused No.2 in the trial court Dancan Mwaura Kinyanjui, who was acquitted by the trial court on all counts. It is noted that this person was not charged under the above Act.

21. It is in the house of the said **accused No.2** that items under the Narcotic Drugs and Public Stores were found, not in the appellant's house, and for which the appellant was convicted of, but sentence held in abeyance in view of the conviction and sentence under **Section 296(2) of the Penal Code**.

22. The only item upon which **PW1** and **PW2** implicated the appellant in the robbery is a black jacket and a beret. No description at all of the torch or any other item was given.

23. It is not clear going by the evidence of the prosecution witnesses what time the alleged offence was committed. What is clear is that it was dark. It is also not clear how many the alleged robbers were as each victim spoke of a different number and different time and that they were aided by the robbers' one torch light that was shone onto them.

If this is the case, the quality and quantity of the light comes into question – **David Gathu Kangethe -vs- Republic (2015) e KLR**.

If the torch light was shone onto the victims and they complied with orders to lie down, how then did they identify and recognise the attackers? Did they have enough time to see and confirm the type of attire the appellant wore? What of the other attackers? Ordinarily if a torch light is directed to someone's face it would be difficult to see the person holding the torch. No description whatsoever was given of the other three, five or four attackers.

24. I have considered the trial magistrate's analysis of the evidence especially on identification. To say the least it is a narrative without any reasons given for arriving at the decision that the appellant was positively identified by the victims. It is evident that the magistrate did not consider the circumstances under which the alleged identification by recognition by each of the victims was based. If the victims were lying down, in darkness, why and how did they identify the appellant alone, and not the rest of the attackers that they did not know, whether three, four or five?

25. The jacket and berret that “**looked like the one sworn by police officers,**” were they ever confirmed to be police uniform as suggested by **PW4**, the investigating and arresting officer? He repeated what, in my view, he heard from the complainants which is hearsay and therefore inadmissible. He did not do any meaningful investigations and if he did, it is not demonstrated in his evidence.

26. Further **PW1** stated that the robbery took place at 5.00p.m. If that was so at 5.00p.m. there is no darkness, and one is able to observe and make proper identification of someone at close vicinity and no torch light would be necessary. It is doubtful that the robbery took place at 5.00p.m. This witness would have had better visual identification than his companions, **PW2** and **PW3** whose evidence was that the robbery took place at 8.00p.m., when it was dark. A difference of three hours was not explained.

27. It is also interesting that the three victims could only state what the appellant was carrying, a *rungu*, a *panga* and torch, but said nothing about the other robbers.

**PW3** who managed to run away from the robbers saw all the three robbers in police berrets, contrary to what the other victims stated.

With this very conflicting and contradictory evidence how safe could the appellant's conviction be? - **Morris Gikundi Kamunde -vs- Republic(2015) e KLR.**

28. In the case **Simiyu & Another (Supra)**, and **Morris Gikundi Kamunde (Supra)**, a court is mandated to scrutinise evidence of identification and facts of description given and terms of the said description as being of highest importance as given by those who purport to have identified the offenders. See also **David Gathu Kangethe (Supra)**.

In his evidence **PW4** the investigating officer purportedly found and collected the “**look like police uniform**” from the appellant but failed to confirm that the said uniform, being a jacket and a berret were indeed police uniform or were camouflaged to appear as police uniform.

29. It was upon the prosecution to put forth watertight evidence that at the close of its case, it would leave no chance at all of any error that the appellant committed the offence – See **Simiyu & Another (Supra)**. **PW4** evidence was that they found the appellant with accused No.2 in his house. This accused No.2 was acquitted by the trial court. In the house, five phones and narcotic drugs and other items were found. If that evidence is truthful that the house where the appellant and accused No. 2 were found, and the exhibits including the narcotic drugs, phones, one would then wonder why the 2<sup>nd</sup> accused was not charged with the offence under the Narcotics Drugs Act. Was it selective justice and if so, on what basis?

30. In its entirety, the evidence upon which the trial magistrate based the conviction of the appellant is contradictory and is muddled up with clouded findings, without proper basis.

The reasons for the judgment being the foundation for the conviction of the appellant are not well stated by the trial magistrate. The points of determination are not clearly stated as demanded of a trial court in terms of **Section 169 (1) of the Criminal Procedure Code**. See also **David Njoroge Macharia -vs- Republic (2011) e KLR.**

31. Though it is not the duty of the accused to prove his alibi, failure by the trial court to consider the defence of alibi was a serious failure in view of the seriousness of the offence and the contradictory evidence adduced by the prosecution witnesses.

What an accused is required to do is to raise a defence that casts doubts in the court's mind as to the credibility of the prosecution case, and once that doubt is established, the court is bound to come to a decision in favour of the accused - See **DMW -vs- Republic (2016) e KLR and Solomon M'rukaria -vs- Republic(2014) e KLR.**

32. Upon consideration and re-analysis of the entire evidence, I have serious doubts as to whether the appellant actually committed the offences he is charged with, more so as no proper identification was proved by the victims.

Failure by the investigating officer to call for an identification parade too casts doubts in my mind as to whether the appellant was positively identified as the person who actually committed the offences. To that extent the prosecution failed in its duty to prove the case beyond reasonable doubt, being the standard of proof in a criminal case.

33. For the foregoing I find that the conviction of the appellant by the trial court to have been unsafe and unsatisfactory on both counts. Consequently, I set aside the conviction and sentence meted upon the appellant. Unless otherwise lawfully held, the appellant is set at liberty.

**Dated and signed at Nakuru this 26<sup>th</sup> Day of July 2018.**

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**J.N. MULWA**

**JUDGE**

**Delivered at Kiambu this 2<sup>nd</sup> Day of August .2018.**

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**J.N. MULWA**

**JUDGE**