



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 171 OF 2017

EDWARD MWAURA NGUGI.....REPUBLIC

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Casa No. 706 of 2016 delivered by Hon. Jalang'o, SRM ON 4th December, 2017)

JUDGMENT

1. In count I, the Appellant was charged with the offence of robbery with violence contrary **296 (2) of the Penal Code**. The particulars of the offence were that on the 1st day of December, 2011 at Kayole Corner, Kayole Estate in Embakasi Sub-County within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely an AK 47 rifle and pistol robbed Mungai Kinuthia of his motor vehicle registration number KAZ 307K make Toyota Corolla white in colour valued at Ksh. 500,000/, mobile phone make Samsung worth Ksh.8000/, wrist watch make Seiko 5 valued at Ksh.2000/, cash Ksh. 91,000/= and a wallet containing personal documents all totaling to Ksh. 602,000/ and at or immediately before or immediately after the time of such robbery used actual violence to the said Mungai Kinuthia.

2. In Count II, he was charged with abduction contrary **Section 256** as read with **Section 259 of the Penal Code**. The particulars were that on the 1st December, 2011 at Kayole Estate in Embakasi Sub-county within Nairobi County with others not before court with intent to extort money abducted one Mungai Kinuthia took and confined him within Dandora Estate for three days demanding for lump sum of Kshs.1,000,000/= .

Evidence

3. The summary of the prosecution case was that on the on 1st December, 2011 at about 9.00 p.m., **PW1**, the complainant had just left his house to go and close business. Five men emerged from a kiosk near his residence in Kayole. One had an AK 47 Rifle and another with a pistol. He knew the man with a pistol. The robbers demanded for the car keys. He was bundled in the back seat between two men. On arrival at an area called Mugendi, the car engine went off. He was ordered to disconnect the cut out. When he took long to do so, he was taken to Kayole River where he was beaten up using pangas and runkus. He sustained injuries to the head and face. He was later forced to disclose the pin for his mobile phone after which Kshs. 2,000/= was withdrawn for his mobile phone.

4. PW1 testified that he was taken to Maili Saba area where he was put in a holding room. The robbers demanded for Kshs. 1,000,000/= ransom at gun point. On the following day, he remained with two men while other went to his home where they demanded money from his wife. On the third day, the robbers withdrew Kshs. 20,000/= from Co-operative Bank ATM. He had been left with one robber to guard him. On the fourth day which was a Saturday, he noticed that the robber was dead asleep whereupon he managed to escape. He reported the matter at Dandora Police Station. He was later taken by friends to Kayole Police Station and later went to hospital for treatment.

5. PW1 testified that he later spotted the Appellant at the Kayole bus stage. He informed the police and he was arrested. He stated that among the items he lost to the robbers were a watch, a wallet, a Samsung Phone, ATM cards and a Toyota Motor vehicle. In addition, his wife sent Kshs. 69,000/= to his mobile phone which was withdrawn by the robbers. He said he identified the robbers using the security lights in his compound.

6. In cross-examination, PW1 stated the robbers had walked him for a long distance before he was bundled into the car during which period he was able to identify them. He added that he was unable to take the members of public back to the house where he was confined because the Appellant had a gun.

7. **PW2, Rosemary Nyambura Mungai**, the wife of PW1 testified that she was informed by their watchman that her husband had been

kidnapped by five men and driven him away in their car registration number KAZ 307 K. She reported the matter to the police. On the following day, he was telephoned using her husband's mobile number by a person who was demanding Kshs. 1,000,000/=. She informed the police who told her to inform the robbers that she was looking for money. She told them she had Kshs. 800,000/=. The money was to be collected at Kencom area. The robbers notice that she was accompanied by police and they warned her not to involve the police. The police advised her not to communicate with the robbers any longer. After three days, he sent Kshs. 69,000/= to her husband's mobile phone. Later, she was informed by the police that her husband had escaped from the hands of the robbers and was safe. She took him to hospital.

8. The case was investigated by **PW3, CPL Mark Lipale** of DCI, Kayole alongside two other police officers. He summarized the evidence of PW1 and 2. He added that PW1's vehicle was found abandoned at Mugendi area after fuel cut out system failed. His evidence was that PW1 resurfaced on the third day after the abduction that is 3rd December, 2011. Further that the Appellant was arrested on 7/12/2011 after he was identified by PW1. PW3 produced before the court the log book from the stolen motor vehicle, M-Pesa and account statements relevant to the case.

9. **PW4, Dr. Zepahnia Kamau** of Police Surgery examined PW1 on 13/12/2011. He had a wound on the left back side of the head, a healing wound on the left lower part of the mouth and an injury on the front side of the head. The injuries were caused by a blunt object. He assessed the degree of injury as harm. He filled a P3 Form which he adduced in evidence.

10. **PW5, CPL Stanley Mohamed** of Embakasi Sub-County DC's office arrested the Appellant within Kanyole and escorted him to Kayole Police Station. The Appellant was identified to him by PW1 and an informer.

11. After the close of the prosecution case, the court ruled that the appellant had a case to answer. He gave an unsworn statement of defence and called no witnesses. He stated that he was arrested from his place of work by three police officers who took him to Kayole police station. He denied he knew PW1. He stated that he was beaten by the police after his arrest. He was charged after three days on 9/12/2011. He denied he committed the offence.

Determination

12. The main issue for determination herein is whether the appellant was properly identified as one of the robbers. In fact, the Appellant's submissions singled out the fact that he was not properly identified as a basis for the merit of the appeal. He pointed to the fact that the robbery was committed at 9.00 p.m., at night when it was dark and conditions for a positive identification of recognition difficult. He submitted that in as much as PW1 testified that he knew him prior to the incident, the court was enjoined to re-examine that evidence carefully and be satisfied that the circumstances of identification were conducive or favorable and therefore, there was no possibility of a mistaken identify. In this respect, he cited the case of **Wamunga V R [1989] KLR 424** in which the court noted that in as much as recognition is more reliable than identification of a stranger, mistakes in recognition of close relatives or friends can be made.

13. The Appellant did also take issue with the fact that the informer who directed the police to the arrest of the Appellant was not called. In that regard, he submitted that it was difficult to clear the air on how what informed the police to arrest him. He took issue with the fact that PW1 did not give a description of how he knew the Appellant or any of his attackers. He referred to a description relating to either his name or physical appearance. He cited several cases to buttress this submission.

14. On the part of Respondent, learned State Counsel, Ms. Nyauncho submitted that the Appellant was positively identified. She submitted that the identification was by way of recognition as the complainant knew the Appellant prior to the incident. Furthermore, PW1 stayed with the appellant for three days during which period he was able to mark his physical features. She argued that the trial magistrate warned himself before convicting the Appellant based on the evidence of a single witness, PW1.

15. The court has re-evaluated the evidence of identification. It was the testimony of PW1 that he was abducted by five men, one of whom was the appellant whom he knew prior to the incident. His testimony must be critically evaluated right from the time he claims he was seized by the five men. He testified as follows:

“On 1st December, 2011 at 9.00 pm, I was in the hose. I decided to go and close business. I left my house. I have security lights at home. There is a kiosk near my house. Five men emerged from the kiosk. One was armed with AK 47 riffle. The other had a pistol. He showed me his pistol. I noticed the person. It was a person I know. He asked for my car keys. He asked if my car had an alarm. I disconnected the alarm. I was placed inside the car at the back seat...”

16. At that point, one would easily conclude that PW1's car was abducted by the robbers either in his home compound or just outside his house near a kiosk. This is more informed by the Appellant's assertion that he was able to identify the assailants using security lights in his compound.

17. However, in a departure from this testimony, PW1 in cross-examination said:

“I was attacked at 9.0 pm. We walked for a long distance with the assailants. There were security lights near my home. I saw you when you approached me. I recognized you. I knew the assailants, I didn't mention names. I stated that I knew the assailants physically”

18. The above excerpt clearly indicates that after PW1 was accosted, he was not immediately bundled into his car but walked by the robbers for a long distance. What he failed to clarify in cross-examination is how he returned to his compound so that the vehicle could be seized and he be bundled into it.

19. A further contrast is borne from the evidence of PW2, PW1's wife who testified that he was informed by the watchman that her husband

had been kidnapped by five men who took him away their vehicle. It was evidently not clear how PW1 was kidnapped, whether he was accosted by the five men and immediately bundle into the car or was accosted, walked on foot and later brought back home when the vehicle was taken away. Still, from the evidence of PW1, one would also easily conclude that probably he was accosted by the robbers who asked for the car keys and driven from the compound to where he was walking with the assailants.

20. The only person who would have easily shed light on exactly what transpired outside the compound was the watchman who it is said witnessed the kidnapping. In the absence of his testimony, the court must reevaluate the testimony of PW1 with the greatest care with a view to arriving at a finding whether the circumstances of identification were favorable.

21. His evidence in chief was that he was kidnapped outside his compound after he decided to go and close business. He further testified that he was able to identify his assailants using the lights in his compound. He failed to inform the court how far he was from the light so as to gauge whether or not the lighting was sufficient for a positive identification. More so, it was important that it was disclosed the nature of the lighting for a similar purpose.

22. The events following the kidnap did not make the situation better. PW1 was bundled into the back seat of the car after which he was locked up in a single room with one gang man left to guard him. This only arose in cross-examination when in an apparent reference to the Appellant testified that ***“you were armed with a gun and that’s why i didn’t take members of the public back to house”***.

23. This statement would be a guide that indeed, while in captive for three days, he was able to mark the physical appearance of the Appellant, after all, he knew him before the incident. It is surprising that he never testified in his evidence in chief that the robber who was guarding him was the Appellant. Even when he reported the matter to the police, he did not attempt to describe his appearance which creates a doubt as to how the appellant was linked to the robbery and kidnapping.

24. I would sum up the above observations with the words that although PW1 claimed he knew the appellant before and therefore his identification was by recognition, his evidence ought to have been examined with considerable circumspection so as to ensure that it cannot be but true that he identified the appellant before a conviction was arrived at. See ***Kiilu & Another vs Republic [1995] 1 KLR 174*** where the Court of Appeal held as follows:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error.”

25. Again, in ***Wamunga –Vs- Republic (1989) KLR, 424***, the Court of Appeal held as follows:-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

26. This is a case I have noted that the circumstances of a positive identification were difficult; so true because it is not merely sufficient for a witness to state they knew the assailant and so when a person is arrested he falls into the trap. A witness should candidly state how he had known the accused even if it is through a single interaction. PW1 in this case was in difficulties throughout his evidence to state in what respect he had known the Appellant so much so that even after he had allegedly been with him for three days in captivity he could not narrate to the police how he looked like. I am unable, therefore, to come to terms with the narration that merely because the Appellant was arrested he was one of the robbers.

27. It may be true that he had previously seen him before the date of the incident; but with the difficult conditions of identification, he may have fallen as a case of mistaken identity. See ***Republic V Turnbull & Others (1976)3 ALL ER, 549*** in which the Court of Appeal in Criminal Division in England, Lord Widgery CJ pointed out that;

“Recognition is more reliable than identification of a stranger, but even when a witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....”

28. I cannot add more under this head save to emphasize that I am convinced beyond all doubts that the Appellant was not positively identified and could not therefore be linked to the offences.

29. I cannot also wish away the Appellant’s submission that the failure to dust the abandoned motor vehicle for finger prints rendered a fatal blow to the prosecution case. This would probably have given a lead as who handled the vehicle on the fateful night. The failure to do so implied that investigations were handled in a casual manner, which partly should have contributed to the failure of the prosecution case.

30. The Appellant did also take issue with the fact that crucial witnesses were not called in support of the prosecution case. He cited a personnel from the Safaricom mobile phone provider who ought to have adduced the M-Pesa statements as proof that money was sent from the Appellant’s and his wife’s mobile phones which money was later transmitted to other numbers by the robbers. This, in my view would have pointed to the assertion that PW1 had been abducted for purposes of demand of a ransom. The statements were adduced by the investigating officer, whose evidence in my view was very casual. He failed to state the source of his M-Pesa and bank account statements. He also was not explicit in whose respect the said statements were adduced.

31. The law on admissibility of documentary evidence is clear. The same must be produced by the maker subject to exceptional circumstances provided by the law. The Appellant was not represented by an advocate and may have been greatly prejudiced as he did not object to their production yet their source was unknown. I hold that the said statements could not form a basis that money changed hands for want of proper procedure in their production.

32. I underscore the fact that the burden to prove the case beyond a reasonable doubt always lies with the prosecution. It never can shift to the accused as the same would be tantamount to calling on him to prove his innocence. With respect, it is my humble finding, after reevaluating the evidence on record that the prosecution did not discharge this burden. Accordingly, the conviction of the Appellant was not safe. I quash the same, set aside the sentence and order that he be forthwith set free unless otherwise lawfully held.

Dated and delivered at Nairobi This 29th Day of October, 2018.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Miss Nyauncho for the Respondent.*