



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 146 AND 143 OF 2016.

BETWEEN

GEORGE AKAMA WAMBI.....1ST APPELLANT.

WILLIAM OCHIENG KEVIN..... 2ND APPELLANT.

AND

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 3304 of 2010 delivered by Hon. Jalango, SRM on 28th October, 2016).

JUDGMENT.

Background.

1. George Akama Wambi and William Ochieng Kevin, hereafter the 1st and 2nd Appellant respectively were charged in two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the 1st count were that on 28th August, 2010 in Huruma in Nairobi within Nairobi County, jointly with others not before court while armed with dangerous weapons namely sword robbed **Simon Owino** of cash Kshs. 2,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Simon Owino. The particulars of the 2nd count were that on 28th August, 2010 in Nairobi within Nairobi County, jointly with others not before court while armed with dangerous weapons namely pangas robbed Omar Arees of cash Kshs. 3,000/-, military card, wrist watch make Seiko 5, mobile phone make Samsung, KCB Bank ATM card and Harambee Sacco card, and at or immediately before or immediately after the time of such robbery used actual violence on the said **Omar Arees**.

2. The Appellants were arraigned in court and at the conclusion of the trial found guilty accordingly. They were sentenced to suffer death. They were dissatisfied with the conviction and sentence against which they lodged the instant appeal. Their grounds of appeal which are similar are that they were not properly identified both physically and in the identification parade and that Section 200(3) of the Criminal Procedure Code was not complied with.

Submissions.

3. Both Appellants relied on written submissions whilst learned State Counsel, Ms. Atina for the Respondent made oral submissions. I shall consider the respective submissions in the determination. The Respondent opposed the appeal.

Evidence.

4. The prosecution case can be summarized as follows. On 28th August, 2010 at around 10.30 p.m., **PW1**, No. 105172 Simon Owino was alongside one Cpt. Kararo when they alighted around 50 meters from Moi Airbase. They saw three young men following them from the direction of Mathare. One walked past them while the others remained behind them before suddenly attacking them. PW1 identified the 2nd Appellant as the one who walked past them and the 1st Appellant among the two who remained behind. The young men ransacked his pockets and took Kshs. 2,000/-before he was hit with a rock on the head and fell unconscious. He sustained injuries which resulted to his admission in hospital.

5. On 30th August, 2010 the OCS Huruma Police Station went to the hospital ward where PW1 was admitted accompanied by the 1st Appellant and he was able to identify him as he was known to him. He was taken to Huruma Police Post where he took part in an

identification parade in which he identified the 2nd Appellant. He identified the 2nd Appellant from his voice and appearance. He stated that there was light at the scene and he could see the Appellants clearly.

6. **PW3**, Cpl. Omar Arees, the complainant in count 2 was also attacked on 28th August, 2010 as he alighted from a matatu outside Moi Airbase at around 9:30 p.m. His testimony was that he saw the 1st Appellant standing in a dark alley in front of him. He recognized him since he had robbed him previously. He confronted him when ten others attacked him by cutting two fingers in his right hand. He pleaded with them not to kill him. They stole his phone, ATM card, Seiko watch and Kshs. 3,000/- in cash. On the following day an officer from Huruma Police Station visited him hospital and asked him to attend an identification parade in which he identified the 1st Appellant through the clothes he was wearing. He testified that he knew the 1st and 2nd Appellants prior to the incident.

7. **PW4**, No. 21354 Raymond Kararu confirmed that he was in the company of PW2 when the latter was attacked. He raised alarm that attracted the guards at Moi Airbase Gate but by the time they arrived, the robbers had ran away leaving PW2 unconscious. They rushed him to the hospital where he was admitted. He testified that although the scene was well lit he did not identify any of the robbers.

8. **PW2**, IP Augustine Mutembei then in-charge Huruma Police Post he received a call from a PC Iruku on 29th August, 2010 at around 1.30 p.m. who informed him he had arrested two suspects at Mathare and after conducting a search he had recovered a passport size photograph and 100/- Ugandan Shillings. He ordered the officer to place the two in custody for further investigations. He later received information from an informant that the two suspects were involved in the robbery of commuters along Juja Road and on 30th August, 2010 the same was confirmed to him by the area chairman. He learnt that there were soldiers admitted in hospital following a robbery. He visited them in hospital and interviewed them. They also gave him a description of the robbers which matched that of the suspects. An identification parade was conducted during which the victims positively identified the suspects.

9. **PW5**, PC Francis Kiliku was on patrol alongside PC Kinyua on 28th August, 2010 when they came across both Appellants whom they stopped. After a search, they recovered a black wallet from the back pocket of the 1st Appellant in which there was a picture of someone who did not resemble him. They escorted them to the Police Station. The case was investigated by **PW6**, Wycliff Oguk. He summed up the evidence of the prosecution case. He also issued the victims with P3 Forms and requested for an identification parade. The P3 Forms were filled by Dr. Kamau of Police surgery and produced in court by **PW7**, Dr. Kizzie. They were filled on 28th and 30th September, 2010, respectively. PW 7 preferred the charges against the Appellants.

10. At the close of the prosecution case, the court ruled that a *prima facie* had been established to warrant both Appellants to give a defence. Both Appellants gave unsworn statements of defence. The 1st Appellant testified as DW1. He said that he was a driver and that he was on his way home from work he met two police officers who arrested him. They did not inform him of the reason for his arrest but later an identification parade was carried out where the police showed the complainants his position in the parade and was identified as a robber in the case. **DW2**, the 2nd Appellant recalled that he was arrested on his way from visiting his brother by police officers who claimed that he had smoked bhang. That at the police station he was assaulted and the police would later show the complainant his position in the identification parade.

Determination.

11. This being the first appellate court is its duty to reevaluate the evidence on record and come up with independent findings. **See Okeno v Republic (1972) EA, 32.** I have accordingly considered the evidence on record and the respective rival submissions after which I have deduced that the issues arising for determination are:

- i. Whether Section 200(3) of the Criminal Procedure Code was complied with.
- ii. Whether the Appellant was properly identified.
- iii. Whether the offence was proved beyond reasonable doubt.

Whether Section 200(3) of the Criminal Procedure Code was complied with.

12. Although the Appellants raised this issue as a ground of appeal, none submitted on it. Miss Atina on her part submitted that it was clear that when Hon. Jalango took over the matter he complied with the provision by explaining to the Appellants their rights to choose to elect how they wished the matter proceeds and they opted that it proceeds from where it had reached.

13. Section 200(3) of the Criminal Procedure Code requires that when a succeeding magistrate takes over the conduct of a trial, he/she must explain to the accused person of his right to elect on how the trial should proceed. This involves either the recalling of the witnesses who had testified previously for purposes of further cross examination or that the matter be heard *de novo* altogether or that the matter proceeds from where it had reached. The provision makes it mandatory for the succeeding magistrate to undertake this role. Suffice it to state is that it is not mandatory that the choice the accused person makes must carry the day. The circumstances of the case must be the considered in making the final decision, all in the interest of doing justice both to the accused and the case itself. In this regard the court must have regard to such factors as the age of the case, the availability of the witnesses, the ability of the witnesses to recall the evidence, the period the accused person has been in remand against the possible sentence, public interest and the gravity of the offence.

14. In the present case, the trial was conducted by three magistrates namely, Hon. Kinaro, Hon. Nyongesa and Hon. Jalango. On 24th February, 2016 when Hon. Jalango took over the conduct of the trial, he complied with the requirements under the provision and the Appellants chose to proceed from where the matter had reached. Hon. Nyongesa took over the matter from Hon. Kinaro on 26th June, 2013. The proceedings are not properly typed but a closer scrutiny of the same indicates that the trial magistrate explained the provision to the

Appellants and they chose to proceed from where the matter had reached. I therefore find that Section 200(3) of the Criminal Procedure Code was complied with and this ground of appeal fails.

Whether the Appellants were properly identified.

15. The main contestation here is that the identification parade was not properly conducted. The 1st Appellant questioned the trial magistrate's finding that the identification was by way of recognition which was not supported by the evidence before the court. He was of the view that mistaken identification was likely in the circumstances of the present case given the prevailing conditions at the scene. He argued that the evidence of PW3 pointed to the scene being dark having testified that he saw him (1st Appellant) coming from a dark alley. That in the circumstances it was impossible that he could have identified him.

16. The 2nd Appellant also questioned the identification by the witnesses by submitted that an evaluation of the evidence pointed to identification of strangers contrary to the trial magistrate's finding that there was identification by recognition. With regards to the identification parade, he submitted that in light of PW3's evidence that he knew him before the incident there was no need to carry one out. Further, that there was no initial report given to the police in which his physical description or name was indicated. He submitted that the evidence obtained from the parade was therefore worthless.

17. Ms. Atina on her part submitted that PW1 was able to identify both Appellants at the scene and later by identifying the 1st Appellant at the Hospital. He then took part in an identification parade where he confirmed the identifications. She added that PW1's evidence was corroborated by PW4 who was in his company during the incident. In addition, PW3 was able to identify the 2nd Appellant as he had previously stolen from him and he further positively identified both Appellants in the identification parade. She argued that the 1st Appellant was identified in the parade because he still wore the same clothes he wore during the robbery. She urged the court to hold that the identification of the Appellants was full proof.

18. The identification parades were conducted by PW2 whose evidence in all respects was tantamount to his role as an investigating officer. He testified that he was informed of the arrest of the Appellants by PC Kiliku (indicated from PW2's evidence as PC Iruku). Thereafter he was informed by an informer and the area chairman that the suspects who had been arrested had robbed commuters. He was informed that the instant robbery took place at the Balози Bar outside Moi Airbase. He testified that he visited the scene of crime where the bar owner identified a recovered passport photograph of one of the complainants. He went on to state that the military police directed him to the military hospital where the complainants had been admitted for treatment. He interrogated the complainant who gave him the description of the robbers. He requested the Commander of Moi Airbase to allow the Appellants to participate in an identification parade. He thereafter carried out the parade on 30th August, 2010.

19. With tremendous respect, the role of PW2 as analyzed above cannot be demarcated from that of an investigating officer. He truly was heavily involved in the investigation of the matter that he ought not to have conducted that parade as doing so offended Force Standing Order 6(iv)(b) which states;

“(b) the police officer in charge of the case, although he be present, will not conduct the parade.”

20. His intense involvement in the investigations also offended Force Standing Order 6(iv)(n) which requires **scrupulous fairness** during the conduct of the parade. For this reason, PW2 could not be deemed as an independent arbiter in his role and so the results of the parade could not be relied upon to found a case for a positive identification of the Appellants.

21. An interesting twist turns in on the number of witnesses who identified the Appellants. According to PW2, he conducted two parades each in respect of each Appellant. But in each of the parades both complainants were witnesses. However, at Part E of each of the parade forms it is clearly indicated that there were four witnesses each making a singular identification of the suspects. From paragraph C, it can be deduced that witness No. 1 and 2 were the two complainants named as Simon Owino and Omar Aress respectively. The question that begs is who witness No. 3 and 4 were and who they were identifying.

22. Further, and against the rule of a parade, both Appellants were paraded in both parades yet according to PW2 each of the witnesses identified one suspect at a time. If as shown at paragraph D of the parade forms that both Appellants were paraded simultaneously, then the witnesses would have identified them out at once, which was not the case. Needless to state then is that both parades were flawed and could not be a basis for the Appellant's conviction.

23. In any case, PW1 testified that PW2 took the 1st Appellant in the hospital ward while handcuffed where he was able to identify him. It follows that PW1 having seen the 1st Appellant prior to the parade negated the need to subject him to the parade. Besides, it was against Order no 6(iv)(c) which states that;

“the witness will not see the accused before the parade”

24. The other limb on the evidence of identification was that PW2 and PW3 knew the Appellant prior to the incidence. PW3 said he recognized the 1st Appellant because he had twice robbed him before and he tried to confront him which prompted the attack. He also said that he knew the 2nd Appellant prior to this date. As for PW1 he said in cross examination that he recognized the 2nd Appellant's voice whereas in evidence in chief he testified that he did not know any of the Appellants.

25. However, it is clear that PW3 confronted the 1st Appellant in a dark alley, which implies that the conditions for identification were not conducive. This is buttressed by the fact that he could not see other robbers who accompanied the 1st Appellant. Equally, on account of the

difficult circumstances of identification was a testament that a conviction based on a positive identification was not safe.

Whether the case was proved beyond a reasonable doubt.

26. It follows that even if all the elements of the offence of robbery with violence were established, without proof of identification, the Appellants could not be linked to the respective offences. I give them the benefit of doubt by finding that the case was not proved beyond a reasonable doubt. I quash the conviction, set aside the death sentence and order that they be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED 26TH DAY OF NOVEMBER, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.
2. 2nd Appellant in person.
3. Mr. Miiri for the Respondent.