



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 107 OF 2015
(CONSOLIDATED WITH CR.A NO. 106 OF 2015)
(CORAM: J.A. MAKAU-J)
TITUS ECHESA ADAMS 1ST APPELLANT
MICHAEL JUMA BWIRE 2ND APPELLANT
VERSUS
REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 11.11.2015 in Criminal Case No.327 of 2014 in Ukwala Law Court before Hon. R.M. Oanda-SRM)

JUDGMENT

1. The two Appellants **Titus Echesa Adams** and **Michael Juma Bwire** (hereinafter the 1st and the 2nd Appellants respectively) were charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the charge were that on the 2nd day of June 2014 at Kirindi Village Kathieno “B” sub-location in Ugenya District within Siaya County jointly with others while armed with dangerous weapons namely a rifle and a pistol, robbed Kevin Onyango Oponyo of his cash KSh.160,000/= Safaricom credit cards, Airtel credit cards, orange credit cards Yu credit cards, Safaricom sim cards, one *Nokia* mobile Phone, one Samsung Mobile phone and one *Itel* Mobile phone all valued at KSh.218,350 the property of the said Kevin Onyango Oponyo.
2. After full trial the appellants were convicted and sentenced to suffer death.
3. The Appellants aggrieved by the conviction and sentence lodged separate appeals which appeals have been consolidated. The grounds of appeal can be summed up as follows:-
 - a. *The charge was defective.*
 - b. *The Appellants’ constitutional rights as regards fair trial were violated.*
 - c. *The prosecution failed to prove the charge to the required standard of proof.*
 - d. *The appellants were not identified and the identification parade was conducted in contravention of the standing orders.*

4. At the hearing Mr. Mukele, Learned Advocate, appeared for the 2nd Appellant whereas Mr. Otieno, Learned Advocate, appeared for the 1st Appellant. M/s. Odumba appeared for the State.

5. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case **Okeno V. R. (1972) E.A. 32** where the Court set out the duties of a first appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”

6. Mr. Mukele, Learned Advocate, for the 1st appellant urged the charge was defective as the ingredients of the offence of robbery with violence were not proved, plea was not properly taken, that **Articles 48 – 50 of the Constitution of Kenya, 2010** were not complied with. Mr. Otieno, Learned Advocate, for the 2nd Appellant associated himself with the grounds raised by Mr. Mukele, Learned Advocate. He urged the plea of guilty was equivocal.

7. M/s. Odumba, Learned State Counsel, concedes the appeal on the grounds that plea taking process was irregular, as the language used was not indicated, the elements of the offence were not explained. Plea was taken at different times, and that the appellants were not identified as the identification parade was not properly conducted.

8. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same in this judgment but shall summarize the prosecution case and the defence.

9. The facts of the prosecution's case are as follows:- PW1, Kelvin Onyango on 2.6.2014 at 9.30 a.m. on his way from his home he met two people who had parked a motorcycle on the road at the Bridge, as he neared them, they advanced to the road, removed a gun and told him to stop. He was removed from his bicycle and robbed KShs.160,000/= plus KShs.50,000/= worth of airtime from different networks and three phones: *Itel, Nokia and Samsung*, that one of the attackers was in marvin with a brown jacket and he was able to identify them. They had a red motorcycle registration number KMCP 642W with damaged rear indicators. PW1 after robbery reported the matter at Bar Ober Patrol Base. PW1 was later informed a certain motorcycle had been recovered and he went to check on it. He went and identified it (MFI-P1). That the following day PW1, went to Bumala Police Patrol Base for identification parade (MFI-P2(a) and MFI-P2(b)). He identified the jackets the attackers were wearing, a black jacket (MFI-P3) which was worn by the 1st Appellant who tied PW1 and took the money as the 2nd appellant took guard. He identified another black jacket for the 2nd appellant (MFI-P4) and the rope MFI-P5. PW1 was informed nothing was recovered.

10. The 1st appellant denied the offence and stated that on 3.6.2014 his motorcycle broke down after he had gone to Flood Disaster Management Centre at Sio Port and as he could not get a mechanic he kept it at a relative's house. DW1 then took another motorcycle to Butula. The lady from where DW1 had left the motorcycle called DW1 at night asking him many questions. The following day DW1 went to the lady's home and proved the motorcycle was his. He was later arrested and arraigned before Court. During cross-examination DW1 stated that on 2.6.2014 he went to Port Victoria at 8.00 a.m. to do patching for government.

11. The 2nd appellant stated that on 3.6.2014, he was at home in his farm where the 1st appellant came in motorcycle and asked DW2 to take him to Butula where they were to pick his motor cycle from Bar Ober. They went and met a certain lady who told them to wait and as they waited in her house they were arrested, taken home and search carried out. That an identification parade was carried out and they were later charged.

12. DW3, Mary Barasa, stated on 2.6.2014 the 1st appellant, who is her husband, woke up to take his mother to church, returned and started collecting charcoal. That at 10.00a.m. one Richard Omondi asked him to accompany him to Port Victoria and they both went. The 1st appellant returned at 7.30p.m. with a motor cycle, Stating that his motorcycle had broken down between Murumba and Bukhalarire and left it at the place of the aunt of the 2nd appellant and he was to pick it the following day. That when he went for it, he was arrested at the home of that lady. That police came with the 1st appellant and carried out search.

13. DW4, Beatrice Nabwire, testified that on 3.6.2014 the 1st appellant came to her home, found the 2nd appellant working and asked the 2nd appellant to escort him to get his motorcycle from Bar Ober and they left. She later learnt that the two were arrested.

14. The first issue raised by the appellants' counsel and which calls for consideration is whether the charge as drawn is defective? It is urged for the appellants the omission of the words "and at or immediately before or immediately after the time of such robbery threatened to use actual violence or used actual violence on the said complainant" in the particulars of the charge makes the charge defective.

15. In a charge of robbery with violence contrary to **Section 296(2) of the Penal Code**, the prosecution is required to prove the essential ingredients which are as follows:-

a. At the time of Commission of the Offence the offender is armed with any dangerous or offensive weapon or instrument or

b. He is in company with one or more other person or persons or

c. At or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to anyone.

16. Section 295 of the Penal Code defines robbery as follows:-

"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

17. I have perused the charge sheet in this case and indeed as submitted for the appellants the words "and at or immediately before or immediately after the time of such robbery threatened to use actual violence or used actual violence on the said complainant" is lacking. The charge is not framed in accordance with the definition of the offence of robbery nor does it contain the essential ingredients of an offence of robbery with violence. The prosecution did not after calling evidence nor did the court cause the charge to be amended to meet the requirement of the offence with which the appellant's were charged with. The particulars of the charge did not disclose an offence of robbery with violence.

18. The appellants further contend the three phones illustrated in the charge sheet had no serial numbers indicated thereto nor did the complainant have receipts in support of ownership of the phones and it was not clear what exactly the actual type of the two phones were as appeared in the charge sheet. The Appellants urged it was essential for the prosecution to ascertain the type of the mobile phones stolen to distinguish them from other phones of similar companies.

19. Section 137 (c) (i) of Criminal Procedure Code provides:-

“137. The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this code:-

(c) (i) the description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;

In the instant case all the alleged stolen mobile phones, credit cards and sim cards serial numbers were not disclosed in the particulars of the charge sheet nor their specific valuation. I find that **Section 137 of the Criminal Procedure Code** sets out mandatory rules for framing of charges and information. **Section 137 c (i)** requires that any property in a charge be clearly identified. I note that was not done in this case and such omission is in my view fatal to the entire charge as framed and presented before the trial court and the subsequent conviction and sentence. I find the charge sheet as framed in its entirety and for serious omission of the necessary ingredients of an offence of robbery coupled with non-compliance with mandatory provisions of framing the charge under **Section 137 of the Criminal Procedure Code**, makes the charge defective and subsequent conviction and sentence meted void.

20. I now turn to examine whether the appellants’ constitutional rights as regards having a fair trial were violated? The appellants counsel urged the appellants constitutional rights were violated as they were denied right to prepare their defence, were denied witnesses statements, were not taken to court in time and were not explained their rights. **Article 50 (2) (b) (c) (j) and (m) of the Constitution of Kenya 2010** provides:

“Section 50 (2) (b) (c) (j) and (m) of the Constitution of Kenya 2010 provides:-

(2) Every accused person has the right to a fair trial, which includes the right—

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

21. I have very carefully perused the court record. The court record is silent on the language the appellants understood and chose to have the proceedings conducted in. The records starts in absence of the appellants and it states the substance of the charge and every element thereof has been stated by the court to the accused person, in the language that he/she understands (English/Kiswahili) replies English/Swahili/Dholuo. When the 2nd appellant appeared before court for the first time the language that he understands and wished used was neither recorded. The charge and every element of the charge was not explained but stated. Similarly, when the 1st appellant was brought to court the language used was not indicated. On 27.6.2014 the court’s ordered the appellants to be supplied with witnesses statements. The court’s record is not clear whether this was even done. I therefore find from the court’s record that it is not clear whether the appellants were following the proceedings as language of interpretation was never stated nor the language which the appellants understood and wished the proceedings conducted in. I further find in absence of evidence that appellants were supplied with the witnesses statements and exhibits used at the trial, **Article 50 (2) (j) of the Constitution of Kenya, 2010** was breached. In absence of provision of witnesses statements to the appellants, the trial before the trial

court cannot be said to have been fair as the appellants were ambushed in the trial and could not effectively defend themselves. Our constitution has specifically spelt out the duty of the prosecution in a criminal trial and the prosecution's duty is to create level play ground for the prosecution and the defence by disclosing to the defence all relevant material evidence that the prosecution intend to rely on and furnish the defence with same evidence whether requested for or not and always in advance and ensure the defence has sufficient time to prepare for the defence. The failure to do so creates unlevel ground of contest which our Constitution do not condone at all. In view of the above, I find that the appellants' constitutional rights to fair trial was breached and the convictions and sentence in this matter was unconstitutional and null and void.

22. Whether the prosecution proved the charge against the appellants to the required standards of proof? The evidence of identification in this case is of a single identifying witness PW1. In the case of **Charles O. Maitanyi V. Republic (1986) KLR 198**, the Court of Appeal held:

“Although it is trite law that a fact may be proved by the testimony” of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness requesting identification.”

23. The testimony of PW1 is that he was attacked by two people at 9.30 a.m. who were armed with a gun. The appellant's counsel contends though the conditions were favourable for position identification the appellants were not positively identified. I have perused evidence of PW1's PW2 and PW4, PW1 in his report to PW2 and PW4 he never mentioned to them that he recognized or identified his attackers. PW1 to the trial court as follows:-

“It was during the day and I was able to identify them they had a red motor cycle registration number KMCP 642W with damaged rear indicators. I went and reported the matter at Bar Ober Patrol Base”

PW2 stated in his statement as follows:-

“On 2.6.2014 I got a call from Bar Ober Patrol Base and informed of persons who stolen money I was given description and we laid an ambush the motor cycle is red in colour, Bajaj.”

PW4, Investigating Officer stated:

“the robbers had a motorcycle red in colour.....”

24. It is my duty to examine if the trial court erred in law in dealing with the evidence of identification of the appellants. In the case **R V Turnbull & others [1973] 3 ALL ER 549**, the court considered what further factors the court should take into account when the only evidence turns on identification by a single witness. The court said:

“.....the Judge should direct the jury to examine closely the circumstances in which 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? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?Recognition may be more reliable than identification of a stranger; but even when the 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.”

25. In the instant case PW1's evidence is that at the Bridge he met people who had parked the motor cycle on the road, who removed a gun, took him from his bicycle, took away his money, airtime and phones. One of the attacker was in a marvin brown jacket. I have no doubt that when the offence was committed it was during time. I have no doubt to state the condition as such were favourable for positive identification.

26. A critical issue for consideration is whether PW1 identified the appellants and whether there is sufficient evidence to prove positive identification of the appellants by PW1?

In **Wamunga V R (1989) KLR 424**, it was stated that:-

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

In **Simiyu & Another V R (2005) 1 KLR 192**, it was stated:-

“there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises.”

27. In the instant case, was there a first report made to the police or any other person in which PW1 stated he could recognize the appellants or gave the description of the appellants? PW2, No. 90085943 Sgt. John Aloo was the first officer to receive first report and stated he was given description of the attackers but did not state in his evidence what description he was given and of what. PW4, No. 51554 Cpl. Richard Machasio, the Investigating Officer was not given description of the robbers but was informed that they had a motorcycle red in colour. PW4 and PW2 did not state PW1 was robbed by people known to him or of what description. In the case of **Morris Gikundi Kamunde V Republic CRA 332 of 2012 (2016) eKLR** the Court Appeal sitting at Nyeri stated:-

“It is our considered view that failure by PW1 and PW3 to give description of appellant or mention his name or to state they were attacked by a person they knew weakens their testimony. Being a person known to them, PW1 and PW3 should have given the name or description of the appellants as was stated the case of Moses Munyua Mucheru -V- R Criminal Appeal No. 63 of 1987 and Juma Ngondio -V- R Criminal Appeal No. 13 of 1983 and Peter Njogu Kihika & Another -V- R Criminal Appeal No. 141 of 1986, in Lesarau -V- R (1988) KLR 783.”

28. In the instant case if PW1 identified the appellants as he claimed, the complainant should have given the description as terms of that description are matters of highest importance of which evidence ought always to be given first by the person or by the person to whom the description was given. The failure to give that description or the omission on that part of the complainant to mention his attackers description to the police shows that the complainant was not sure of the attackers or did not identify the attackers. I find the quality of identification was not good enough and a great danger of mistaken identification in the circumstances arises. I have no doubt that appellants' conviction are both unsafe and unsatisfactory.

29. On the identification parade, the appellants were not probably identified as the identification parade was conducted in complete contravention of **Chapter 46 of The Force Standing Orders**. PW3, No. 217757 CI Timothy Opudo was asked by Investigating Officer PW4 to conduct the identification parade on 4.6.2014 between 12.20p.m. and 2.30 p.m. and organized identification parade bringing in eight members of similar stature. PW1 identified the first appellant by touching who was standing between No. 6 and 7 who complained he was picked by mistake. He stated between 12.00 and 12.10 p.m. at Butula Police station he organized a second parade in which PW1 identified the 2nd appellant by touching. PW3 filled the parade form and produced them as exhibit P2 (a) and (b).

30. Proper identification is based on first report by the complainant in which he should have given description of the attackers before identification parade is organized. The complainant should in his report give description of the attackers before identification parade is organized. PW4, the Investigating Officer, in his evidence did not state that PW1 had given him the description of the attackers and that he had put that report to that effect in the OB report nor did PW2 mention that PW1 in the first report he gave the description of the attackers. The description of the motor bike by its colour and failure to give the description of the occupants could not be used as a basis to organize an identification parade. The identification of attackers by the black jacket and a black marvin with brown shoes, which were not made even in the first report were insufficient, as black jacket, black marvin and brown shoes are readily available in open market and one can buy and use them. My view is that a proper identification parade can only be organized if the complainant had in the first Report given the description of the attackers to the police in the first report, and then that is when the alleged identification can be tested by the subsequent identification parade. Organizing an identification parade without complainant having given description of the attackers in first report can if allowed breed alot of injustices to an accused person as the complainant in such situation is encouraged to go into a fishing expedition and can pick any person who in his mind appears as a robber. In the instant case as no description was given first to the police, I find such identification parade was therefore not free from possibility of mistakes or error and had no probative value.

31. I have perused the identification parade forms exhibit P 2(a) and 2(b) as well as evidence of PW3. The two forms and PW3 evidence clearly reveal that the Force Standing Orders were not complied with. PW3 did not in his evidence state that he complied with the Force Standing Orders, he did not state the accused were informed of the reason of the parades. He did state he placed the witness in a place that he could not see the accused persons before the parade, that the accused was allowed to take any position he choose, that care was taken to see that witnesses did not communicate with each other or anyone, that unauthorized persons were excluded amongst other requirement of the Force Standing Orders. The identification parade form is incomplete on objections, if any, made by the suspect concerning the arrangements or on person on the parade and action taken concerning the objections and also on details on the witnesses accommodation arrangements. I therefore find that the identification parade was flawed and served no purpose. The same was improper and the trial court was in error in relying on flawed identification parade.

32. The appellants urged that the prosecution case was not proved beyond any reasonable doubt. PW1 testified the motorcycle which the robbers had was Registration No. KMCP 642W red in colour. PW2 who received the report after robbery did not state PW1 gave him the registration number of the motorcycle but at around 7.30 p.m. he got a report of some suspicious people who had been seen. PW2 proceeded to the Police found a motorcycle which had been left behind and when the owner of the motorcycle came for it, the following day they arrested them. PW2 during cross-examination stated he did not know how the motorcycle was presented to the court and that he could not recall its registration number. PW4, the Investigating Officer did not state that PW1 was robbed by people having motorcycle KMCP 642W but he later received information motorcycle registration number KMCP 642W Bajaj red in colour had been seen at Bukhalarire area. PW4 received the motorcycle, the jackets and one rope. PW2 did not produce the O.B. to demonstrate that the first report concerned the said motorcycle and the recovered items. In absence of evidence connecting the motorcycle KMCP 642W with the robbery and in view of evidence of PW2 and PW4, the said motorcycle was taken by police on mere suspicion, and it is trite law that suspicion however strong it may be it cannot be a basis for conviction. On the other hand the complainant informed court he was robbed of KSh.160,000/= plus KShs.50,000/=worth of airtime from different networks and three phones: *Itel*, *Nokia* and *Samsung*. PW1 did not in his evidence produce evidence that indeed he had such amount of money on him at such time or that he had such credit cards and from which network nor did he give the particulars of the phones or his respective mobile telephones numbers or receipt in respect of ownership of the alleged phones. The appellants were arrested within a short time after the alleged robbery and search carried in their respective places of residence but the searches did not yield any positive results. No alleged items was recovered from any of the appellants. The gun allegedly used at the time of robbery was not recovered from any of the appellants. In the instant case, the prosecution failed to prove that the complainant was robbed the items stated in the charge sheet or any and further failed to adduce evidence connecting the appellants with the theft. The prosecution

failed to connect motorcycle KMCP 642W with the alleged robbery. I therefore find the evidence of the prosecution not sufficient enough to prove the charge of robbery and the appellants should get the benefit of doubt.

33. Whether appellants defence was given due consideration? The appellants' defence is a defence of alibi. They each gave a different defence of alibi as they were not together on the material date of the robbery. They called different witnesses. I have perused the judgment and indeed I have found that their defences were considered, however, the court failed to note where an accused person offers a defence of alibi he has no burden to prove its true. The burden always lies with the prosecution to disapprove a defence of alibi. In this case, the prosecution through the evidence of PW1 failed to place the appellants at the scene of robbery. I have already found that PW1 did not identify the robbers by failing to give their description and that the identification parade was flawed and of no probative value. The prosecution failed to dislodge the appellants defence of alibi. I therefore find and hold the prosecution failed to prove the appellants were indeed the people who robbed PW1. I find the appellants defence was merited and should not have been brushed aside. Had it been considered, the trial court would have found that the prosecution had not proved their case beyond reasonable doubt and would not have convicted the appellants with an offence of robbery with violence.

34. M/s. Odumba, Learned State Counsel concedes this appeal. I have considered the appeal and I am satisfied the Learned State Counsel quite correctly concedes the appeal.

35. Having come to the conclusion I have of this case, I find that the prosecution failed to prove the charge of robbery with violence against all the appellants as to the required standard of prove beyond any reasonable doubt. In the circumstances, I find that the appeals have merits and should be allowed. I accordingly, allow the appellants appeals, quash the conviction and set aside the sentence. I order that the appellants should be set at liberty forthwith unless they are otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 23RD DAY OF FEBRUARY, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN THE PRESENCE OF:

MR. MUKELE FOR THE 1ST APPELLANT

MR. OTIENO FOR THE 2ND APPELLANT

M/S. ODUMBA FOR THE STATE

C.A.

1. GEORGE NGAYO

2. PATIENCE .B. OCHIENG

3. SARAH. OORO

J.A. MAKAU

JUDGE