



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 109 & 112 OF 2012

JOSEPH MURIITHI MWANGI.....1ST APPELLANT

GILBERT MWANGI GITHINJI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the judgment of the Hon.W.A.Juma Chief Magistrate, Nyeri dated 29/06/2010 in Criminal Case No. 189 of 2011)

JUDGMENT

1. The Appellants, **Joseph Muriithi Mwangi and Gilbert Mwangi Githinji**, 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 25/02/11 at Kihumbas Butchery in Nyeri Town the appellants jointly with others whilst armed with an offensive weapon, namely a gun, robbed Ruth Wambui Mathenge of the sum of Kshs.109,000/- and used threats of violence before and after the robbery.
2. The prosecution called a total of seven witnesses and after being tried the Appellants were both found guilty and were both convicted and sentenced to the mandatory death sentence.
3. Being aggrieved by the convictions and sentences, the Appellants filed their respective Petitions of Appeal and Amended Grounds of Appeal which grounds are summarized as follows;

1st & 2nd APPELLANTS GROUNDS OF APPEAL

- (i) The death sentence is inconsistent with the provisions of Articles 26(1) and (3), 2(1) and (4) of the current Constitution 2010;
- (ii) They were detained beyond the stipulated period prescribed by Article 49(1)(f) of the Constitution 2010;
- (iii) There were inconsistencies and contradictions in the evidence of the prosecution witnesses;
- (iv) The convictions were based on the evidence of a single identifying witness;
- (v) The trial magistrate failed to consider the defence of alibi raised by the appellants.

4. At the hearing of the Appeal the 1st appellant was represented by learned counsel Mr.Kingori, the 2nd

appellant by learned counsel Mr.Nganga and the Mrs. Gicheha was the Prosecuting Counsel for the State; all the counsels present made oral submissions and hereunder is a summary of their presentations;

1ST APPELLANTS SUBMISSIONS

5. Counsel submitted that;

(i) There were inconsistencies in the evidence of the prosecution witnesses; **PW1** stated in her evidence that the robbers had not worn face masks and that she was able to identify them; **PW7** the son to **PW1** stated that the robbers had covered their heads with sheets and their eyes were the only things visible and he was not able to identify them; **PW6** confirmed that he could not identify them;

(ii) **PW1** stated that she had known the 1st appellant for a long time yet she did not give out his name when making the first report; she never explained how she was able to identify the 1st appellant;

(iii) The prosecution witnesses gave conflicting evidence on what they saw; inconsistencies that are not resolved go to the root of identification; Reference was made to the case of **Omutebele vs State CA.(2013) Port Harcourt** where it was held that when eye witnesses contradict each other the court should not choose who to believe or not; such evidence should be disbelieved and disregarded;

(iv) The trial court disregarded the appellants defence of alibi without giving any reasons; the trial court suggested that the appellant did not prove the alibi; the law requires no standard of proof on the appellant who is only required to adduce evidence to establish an alibi and the burden of proof never shifts; the alibi therefore remained unchallenged;

(v) The trial court did not take into consideration the existence of a grudge between the 1st appellant and the complainant arising from his relationship with her sister; which the appellant took as the reason that led to his arrest;

(vi) That the trial court had a duty to consider the appellants defence; it also did not address the inconsistencies and dismissed the appellants viable defence without giving reasons;

(vii) Counsel urged the court to uphold the appeal, quash the conviction and set aside the sentence.

2ND APPELLANTS SUBMISSIONS

6. His Counsel's submissions were;

(i) **On identification;** **PW7** stated in evidence that the robbers had covered their faces with sheets with slits left for their eyes; and therefore he was not able to identify them; **PW1** stated that she knew all the suspects; but if their faces were covered identification was not possible; **PW1** tendered no evidence on voice recognition; that the circumstances for recognition were not favourable and the finding on identification by the trial court was based on assumptions;

(ii) **On the defence of alibi;** that the trial court failed to consider the defence of the 2nd appellant; that the law provides that the accused person only needs to set an alibi and it is upon the prosecution to disprove it; the trial court shifted the burden of proof to the appellant when it stated that the 2nd appellants travel could not be confirmed; the dismissal of the alibi occasioned a miscarriage of justice;

(iii) **Identification parade;** the prosecutions' case was pegged on identification; that the circumstances were not conducive for positive identification; the identification parade was flawed as all the accused were in on one parade; reference was made to the case of **Samuel Kimenju**

Mbuthia and 2 others vs Rep. CA. No. 44 of 2014 where it was held;

“It is trite law that where the evidence against the appellant is on identification, the trial court is enjoined to examine such evidence carefully and ensure that the circumstances of identification are free from error before making it a basis for conviction.”

(iv) The husband of **PW1** was at the scene of the crime but was not called to testify as a prosecution witness; the inference that can be drawn is that his evidence could have been adverse to the prosecutions' case;

(v) That the appeal of the 2nd appellant had merit; that it be allowed and the appellant be set free.

RESPONDENTS SUBMISSIONS

7. Prosecuting Counsel for the State made the following submissions in response;

(i) **On identification of 1st appellant; PW7** was a minor; he told the court that the robbers had wrapped themselves with sheets; that during the incident he lay on the ground face down and was not able to see and identify the robbers;

(ii) The evidence of **PW1** was that the incident occurred at night and that the crime scene was well lit by electric light; that all the appellants were persons known to her; that the 1st appellant was not a stranger and she recognized him as he had been her customer for a period of over five years; and during the robbery he talked to her and told her that he was a friend and all he wanted from her was the money;

(iii) The trial court found the identification parade conducted to have been unnecessary; that **PW1** was candid and truthful and the trial court made a finding that the identification was by recognition and that **PW1** had not been mistaken that the 1st appellant was one of the assailants;

(iv) **On identification of 2nd appellant; PW1** testified that he had been a former employee of hers and that she knew him very well; that he also dated her sister; that there was electric lighting at the scene; and he had not covered his face; that he was the one who was armed with a pistol; she pointed him out to the arresting officer; that identification was by recognition; and it was not a case of mistaken identity.

(v) **On the issue of 1st appellants defence being disregarded;** the 1st appellant told the court that he left work at 6.30pm and went straight home and never left the house until the following day; he called his wife (**DW2**) as a witness and she reiterated the same; the trial court had occasion to observe and analyze the demeanor of the witnesses and it considered his defence of alibi and had good reasons to reject it; the existence of a grudge was raised in cross-examination of **PW1** but was not raised in his defence and the trial court found it to be a mere excuse with no credibility;

(vi) On the issue of 2nd appellants defence being disregarded; his evidence was that he had visited his mother at 8.30pm accompanied by his fiancée and left the following day; he called his mother as a witness; but her evidence was that the 2nd appellant visited her at 8.00am on the day of the robbery;

(vii) In cross examination he recanted the contents that were in his statement under inquiry where he had indicated that on the material night he was at the Ladies Pub; he stated that he was not the one who had written the statement.

(viii) That the trial court didn't note the contradiction; but the record speaks for itself; that there was no credibility in the appellants defence and the trial court correctly disregarded the same;

(ix) **On the identification parade;** the same was unnecessary as the appellant was well known to the complainant;

(x) **On crucial witnesses;** the husband of **PW1** was not called to testify as a witness but this did not create any gaps; reference was made Section 143 of the Evidence Act; that the prosecution was satisfied with the numbers of witnesses it called; that failure to call the husband did not mean that his evidence was adverse;

(x) Counsel urged the court to find that the appeals had no merit and to uphold the trial courts' decision on conviction and sentence.

REJOINDER

8. The rejoinder was made only by the counsel for the 2nd appellant;

(i) It was reiterated that there were inconsistencies in the evidence of the prosecution witnesses on identification;

(ii) The husband of **PW1** was a crucial witness; no reasons were given why this witness was not called to testify; the only presumption was that his evidence would have been adverse to the prosecution's case; counsel made reference to the case of **CA No. 136 of 1983: Juma Ngodia vs R.**

(iii) The trial court did not weigh the evidence of the prosecution against that of the defence before disallowing the latter; that the appeals were merited.

ISSUES FOR DETERMINATION;

9. After taking into consideration the rival submissions made by the respective Counsels for the Appellants and the Respondent this court finds the following issues for determination;

(i) Whether the appellants were positively identified;

(ii) Whether the trial magistrate considered the defence of alibi and gave reasons for disregarding both defences.

ANALYSIS

10. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the appellants were positively identified;

11. The evidence of **PW1** and **PW7** was that the incident occurred at night; **PW1** stated that the appellants had not covered themselves the evidence of **PW7** who was a minor was that the robbers had covered themselves with sheets leaving only space for the eyes; he was forced to lie down on the floor with his face down; and his evidence was that he was unable to identify the robbers;

12. The appellants case is that there are inconsistencies in the evidence on identification; **PW7** told the trial court that the robbers had covered themselves with sheets and therefore he was unable to see their faces; **PW1** testified that the robbers did not cover their faces making identification possible; that she was able to see the appellants who were persons well known to her; that 2st appellant had previously worked for her and that the 1st appellant was a regular customer at the butchery; based on this evidence the trial magistrate made a finding on recognition; and proceeded to convict the appellants;

13. It is not in dispute that the appellants were convicted on the evidence of recognition by a single witness; it is also not in dispute that the incident happened at night and even though there was electric lighting the conditions and circumstance for identification were unfavorable; therefore this kind of evidence calls for the greatest of care; reference is made to the case of **Abdalla Bin Wendo & Anor vs R (1953) EA 20**; and that there was need for the trial court to caution itself on the dangers of relying on the evidence of a single identifying witness before basing a conviction on it;

14. In this instance this court has noted that in its judgment the trial court failed to caution itself beforehand on the dangers of basing a conviction on the evidence of a single identifying witness; the trial court ought to have also looked for any other direct or circumstantial evidence that would have pointed or linked the appellants to the commission of the crime.

15. After carefully perusing the evidence recorded by the trial court this court notes that the evidence of the arresting officer **PW3** was that nothing was recovered from the suspects; this court is thus satisfied that there is no other direct or circumstantial evidence that can be taken into consideration to link the appellants to the commission of the crime;

16. For those reasons this court finds good reason to interfere with the trial courts finding in relying on the evidence of recognition by a single identifying witness without taking care to caution itself on the dangers of so doing;

17. The ground of appeal that the evidence on identification of the appellants was unsatisfactory is found to be with merit and is hereby allowed.

Whether the trial magistrate considered the defence of alibi and gave reasons for disregarding both defences.

18. The appellants convictions are solely based on identification and having found that the appellants were not positively identified this court finds no need to belabor itself on addressing this issue;

FINDINGS & DETERMINATION

19. In the light of the forgoing this court makes the following finding and determination;

(i) The evidence of identification by a single identifying witness cannot be safely relied upon in supporting the conviction; the conviction is found to be unsafe;

(ii) The appeals are found to be meritorious and are hereby allowed;

(iii) The convictions recorded against each appellant are hereby quashed; and the death sentences are hereby set aside;

(iii) The appellants be set at liberty forthwith unless otherwise held for some other lawful cause.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 23rd day of March, 2017.

HON. A. MSHILA

JUDGE