



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 127 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 1963 of 2013 of the Chief Magistrate's Court at Naivasha –E. Kimilu, PM)

PATRICK KOMU WAIRIMU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Patrick Komu Wairimu was charged with Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars state that on the 26th day of August 2013 at around 1000 hours at Bondeni village in Gilgil township within Nakuru County, jointly with others not before court, while armed with offensive weapons namely a knife, he robbed **Antony Mwangi Thuku** 100 sausages valued at Kshs 2,500/= and immediately after the time of such robbery wounded the said **Antony Mwangi Thuku**.

2. The second count facing him was Assault causing actual bodily harm contrary to Section 251 of the Penal Code. In that on the 26th day of August 2013 at around 1000hours at Bondeni village in Gilgil township within Nakuru County, he willfully and unlawfully assaulted **Vincent Kitoto** thereby occasioning him actual bodily harm.

3. Following a full trial, he was found guilty and convicted on both counts. He was sentenced to suffer death on the first count and to 1 (one) year imprisonment on the second.

4. Aggrieved with the outcome, he has lodged an appeal against the conviction, based on 3 amended grounds as follows:-

“1. That, the learned trial magistrate erred both in law and fact when he believed the evidence of purported identification yet failed to find that same was not free from error or mistake.

2. That, the pundit trial magistrate erred both in law and fact when she convicted me in the present case failing to find that the evidence adduced was contradictory and inconsistent.

3. That, the pundit trial magistrate erred both in law and fact when she dismissed my plausible defence.” (sic)

5. His written submissions dwell on the circumstances of his identification and the failure by police to

conduct an identification parade upon his arrest. He relied on the case of **Patrick Nabiswa -Vs- Republic [1997] eKLR** regarding evidence of visual identification. In addition, he challenged the quality of the prosecution evidence regarding the items stolen from the complainant in the robbery and his possession upon arrest, of the knife produced in court as the weapon used by the robbers. He asserts, finally, that he offered a good defence that was not given adequate consideration by the trial court.

6. On behalf of the Director of Public Prosecutions, Mr. Mutinda opposed the appeal. He asserted that the Appellant was identified at the scene of the offence and that the prosecution evidence of the robbery was consistent. The Appellant, in answer submitted that identification evidence was not fool proof.

7. As required, this court has reviewed the trial evidence with a view to making its own conclusion (see **Okeno -Vs- Republic [1973] EA 32**). In my own considered opinion, this appeal turns on the question of identification as the Appellant opened his submissions by admitting the attack on **PW1** and **PW2** while disputing his involvement.

8. Briefly, the prosecution evidence at the trial was that **Anthony Mwangi Thuku (PW1)**, the 1st complainant herein was a hawker. On the material date at 10.00am he was hawking hot sausages within Gilgil when three men stopped him and ordered sausages. He obliged but they refused to pay, instead viciously attacking the complainant who raised an alarm. One of the man who wore *rasta* hairstyle and had a knife attempted to stab him. **PW1** managed to escape when a good Samaritan, **Vincent Kitoto**, 2nd complainant (**PW2**) intervened.

9. The three attackers turned on **PW2** and threw stones at him and also punched him. He sustained injury. Members of public intervened. Both complainants reported to police before seeking medical attention. **PW1** received treatment for injuries to the head, chest, limbs while **PW2** was treated for a cut wound on the left eye. It would seem that the Appellant was arrested later on the same date and was identified by **PW1** when summoned to the station. **PW2** identified the Appellant at the police station on the next day. No identification parade was held.

10. In his defence the Appellant gave unsworn testimony to the effect that he worked at a car wash business and that on the material day while on his way to work, he met his cousin **Mike Kamau**. Kamau requested the Appellant's help in brewing *changaa* but after the work he disagreed with his cousin over pay. There was a fight and the cousin's parents escorted the Appellant to the police station for assaulting their son on the head with a bottle. He denied the offences facing him.

11. As the respective submissions reveal, this appeal turns primarily on the question of identification. The learned trial magistrate in the course of her judgment satisfactorily dealt with the issues of the robbery and assault on **PW1** and **PW2**. She was satisfied that the same had been proved. Regrettably, the judgment does not reveal a thorough consideration of the question of identification. While the offence occurred in daytime, there was no evidence that **PW1** and **PW2** were known to the Appellant prior to the material date. Secondly, the members of public who allegedly arrested the Appellant did not testify.

12. **Corporal Mogaka (PW3)**, the investigating officer, did not consider it necessary to conduct an identification parade in respect of the Appellant. He casually presented the Appellant to **PW1** and **PW2** seeking confirmation whether he was one of the robbers/assailants. The circumstances of the arrest of the Appellant and the recovery of the knife remained a mystery as none of the members of public came forward to testify. The identification of the exhibited knife by **PW1** and **PW2** as the offensive weapon used in the robbery/attack by the Appellant was therefore of no consequence. Thus the prosecution case hang on the evidence of visual identification of the Appellant at the scene of crime, by **PW1** and **PW2**.

13. In **Wamunga -Vs- Republic, [1989] KLR 424** the predecessor of Court of Appeal exhorted that:-

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

14. Further in the case of **Ajode –Vs- Republic [2004]2 KLR 81**, the Court of Appeal stated that:

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge -Vs- Republic [1982 – 88] 1 KAR 1134).”

15. The police having failed to test the identification of the Appellant through a parade, the identification evidence by **PW1** and **PW2** in the trial was rendered, dock identification and worthless. As stated in **Njoroge -Vs- Republic [1987] KLR 19:-**

“Dock identification” is worthless and the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the Accused and the prosecution should then arrange a fair identification parade”.

(See also **Maitanyi –Vs- Republic [1986] KLR 198**).

16. Although the offence herein occurred in daylight, all the eye witnesses **PW1** and **PW2** could state by way of describing the Appellant is that he had *rasta* hair style – fairly common among young males. The police compounded the matter by failing to conduct an identification parade upon arresting the Appellant.

17. In view of the foregoing, I agree with the Appellant that the identification evidence cannot be said to be free from error. Further, in my considered view the conviction based solely on such evidence is not safe. In the circumstances, the convictions in respect of the first and second count are hereby quashed and sentences set aside. Unless otherwise lawfully held, the Appellant is to be set at liberty. As a side note, it is worth pointing out that where a trial court finds an Accused person guilty in respect of more than one count which include an offence attracting a death sentence, the court upon pronouncing the latter sentence should order that sentencing in respect of other counts be held in abeyance.

18. The Appellant herein had raised other questions regarding his alleged delayed arraignment before the court. This is not a matter for canvassing on an appeal and is therefore inconsequential. (See **Julius Kamau Mbugua -Vs- Republic [2010] eKLR**).

Delivered and signed at Naivasha, this 28th day of April, 2017.

In the presence of:-

Mr. Mutinda for the DPP

Appellant – Present

C/C – Quinter Ogutu

C. MEOLI

JUDGE