



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 96 OF 2015

JOHN WANJOHI WANGUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Othaya Senior Resident

Magistrates' Court Criminal Case No. 11 of 2015 (Hon. Ben Mark Ekhubi,

Senior Resident Magistrates) on 22nd December, 2015)

JUDGMENT

The appellant was charged with the offence of attempted robbery with violence contrary to **section 297 (2)** of the **Penal Code, cap. 63**. The particulars were that on the 12th day of January, 2015, at Miiri village within Nyeri County, he used violence against Lydia Mukami Muteru in order to steal from her. He pleaded not guilty to the charge but after the conclusion of the trial the learned magistrate held that the prosecution had proved its case beyond reasonable doubt and convicted the appellant accordingly; he was subsequently sentenced to death as by law provided.

Being dissatisfied with the conviction and sentence the appellant appealed to this court in the amended petition of appeal filed by his counsel, the appellant raised the following grounds against the decision of the magistrates' court:

1. The identification of the appellant was not free from possibility of error;
2. The learned trial magistrate erred in law and in fact in failing to find that corroboration of the evidence of PW2 in respect of identification of the appellant was necessary;
3. The learned trial magistrate erred in holding that the appellant was bound to prove his alibi;
4. The learned trial magistrate erred in law and in fact in failing to note that the charge sheet was defective; and,
5. The learned magistrate erred in law in convicting the appellant when he, the appellant, was not duly represented by an advocate and therefore his constitutional rights under articles 48 and 50 of the Constitution were violated.

The record shows that state called four witnesses to testify on its behalf; of these witnesses, **Lydia Mukami (PW1)**, the complainant, testified that on 12th January, 2015 at about 10:00 AM she was coming from her bedroom when she found the accused in her house rolling together a cloth fabric (or 'leso' as is locally called). He then locked the house and demanded for money from the complainant. A physical confrontation ensued and the complainant struggled and managed to escape and get out of the house. Before she escaped the accused person hit her on the chest, the upper lip and the back. She fell down in the process. She screamed for help and members of the public responded and came to her rescue. They pursued the appellant and caught up with him; he was then re-arrested by the police.

Amongst the members of the public who responded to the complainant's screams was **Peter Waithaka (PW2)**; according to the complainant Waithaka was the first to arrive. Mr Waithaka himself confirmed in his testimony that on the material date at about 10:30 AM he was working on the appellant's farm when he heard her scream from her house. As he rushed to the house he met the appellant at the gate; he was apparently coming from the complainant's house. Waithaka started pursuing him and he was joined in this chase by other members of the public. They managed to apprehend the appellant after a while. They then set upon him and beat him up; he was however, rescued by the police.

At about that time on the same date, corporal **Gerald Atoni (PW3)** who was then attached at Chinga police station, received a call from the chief of Chinga North location to the effect that members of the public had arrested a suspect at Miiri village and wanted to lynch him. He rushed to the scene together with the officer in charge of the station and found the appellant surrounded by members of the public who were assaulting him. They arrived in the nick of time to rescue the appellant because members of the public were about to set him on fire.

Apart from visiting the scene, he also received a report from the complainant that the appellant attacked and attempted to strangle her using a cloth fabric as he demanded for money. He established that the complainant sustained an injury on her upper lip as a result of the attack. He escorted the complainant to a health centre where she was treated of the injuries. He also established the complainant to be over 85 years old.

The clinical officer who examined the complainant and filled her P3 form, **Mr Peter Maina (PW4)** confirmed that the complainant had a scar on her upper lip which in his opinion was probably occasioned by a blunt object. He assessed the injury to be 'harm'. He also confirmed that the complainant was treated on 12th of January, 2015 the same day she was attacked, but he filled the P3 form on 18th February, 2015.

When the appellant was put on his defence he chose to give a sworn testimony. He said that he was a farmhand and that he resided at Chinga. On the 12th January, 2015, at about 10 AM he was at his employer's farm. He then went to the shopping centre to buy cattle feed and while he was on his way he heard people shouting. He then ran towards the direction of the noise. Shortly thereafter a crowd of people came after him claiming that he was a thief. He was then hit with a stone; he lost consciousness as a result and he only came back to his senses in hospital. He denied having committed the offence.

This is the evidence that the trial court was confronted with and it is the evidence which, being the first appellate court, I have a legal obligation to evaluate afresh and come to my own conclusions; my conclusions may or may not necessarily be consistent with those of the trial court but I have to be cautious that whichever course I take, the trial court had the advantage of seeing and hearing the witnesses and thus was in a better position to appreciate such elements of the evidence as their candour, demeanour or disposition. **(See Okeno versus Republic (1972) EA at page 32).**

The evidence at the trial has to be analysed in the context of **section 297** of the **Penal Code** and in particular **section 297(2)** under which the appellant was charged.

Section 297 of the Penal Code generally deals with the offence of attempted robbery; subsections (1) and (2) of that section are, in a way, inter-linked and therefore in order to understand subsection section (2) which formed the basis of the charge against the appellant, it is necessary that the entire section is reproduced here; it states as follows: -

297. *Attempted robbery*

(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

The first issue to determine is whether the available evidence was sufficient enough to sustain a charge of the offence of attempted robbery with violence. I have no hesitation in coming to the conclusion that the established facts strongly suggest that this offence was committed. I say so because the evidence that the complainant was confronted in her house by a stranger who not only demanded money from her but also physically assaulted her constitute facts which fall within the four corners of an offence of attempted robbery with violence as defined under **section 297(2)**.

There was no basis to doubt the complainant's evidence and, as far as I can see, her evidence that she was attacked by a stranger who demanded money from her but escaped when members of the public responded to her cry for help was not controverted. As a matter of fact, her evidence was corroborated by three other people; these were **Peter Waithaka (PW2)** who testified that he heard the complainant scream and rushed to her house, apparently to help her; **Peter Maina (PW4)** the clinical officer who testified and produced documentary proof to the effect that he treated the complainant of bodily injuries on the same day she was attacked; and, the **investigations officer (PW3)** who took the complainant to hospital on the material day and also received the complainant's complaint.

In a nutshell, the assault or the physical attack of the complainant by a stranger and the assailant's demand for money from the complainant are elements that constitute the offence with which the appellant was charged and which therefore, in my humble view, was proved beyond all reasonable doubt.

The next, equally important question, is whether the appellant was the person who attacked the complainant. The answer to this question revolves around the issue of identification which, no doubt, is a recurrent or a familiar issue in trial of offences such as the one the appellant was charged with. The question was, as always is in such cases, whether the appellant was positively identified as the complainant's assailant.

Whenever this question arises, the trial court would of necessity consider such matters as whether the identification was an 'identification' as understood in its technical sense; that is, identification of a stranger as contrasted with *recognition* of a person who, in this instance, would ordinarily be someone the complainant is familiar with in some respect. In the case of 'identification' the pertinent question would be whether an alleged attacker left some impression in the complainant's mind such that the complainant is capable of 'identifying' him if he (the complainant) saw him again. Irrespective of the mode of picking out the alleged attacker, the court would also consider whether the identification or recognition was visual or audio or both visual and audio. Underlying all these factors is the question whether the conditions for a positive identification were favourable.

Turning back to the appellant's case the attack was staged at 10. AM meaning that it happened in what one would call broad daylight. From the testimony of the complainant, she not only saw the appellant but she was also engaged in some sort of conversation with him. This is what she said:

While I was coming from the bedroom, I saw the accused person who is before court, he was holding a leso and rolling it. The accused person locked the house and demanded for money. I told him that I did not have any because I was a poor woman. A struggle ensued and I

managed to get out.

In answer to a question put to her during cross-examination, she was categorical that she saw the appellant well.

It was stated that the complainant was probably above 85 years old and if that is the case, she was, by any standards, well stricken in age; however, there is nothing on record to suggest that she suffered any form of incapacity, mental or otherwise, as a result of her advanced age. To put it straight, no aspect of her testimony could be said to have been vitiated by reason of her age.

The learned magistrate who saw and heard her found her to be a truthful and credible witness. It has already been noted that her evidence on the attack was corroborated by the rest of the prosecution witnesses. On my part I have no reason, and I have not found any on record, to doubt her credibility and truthfulness. Considering the time of the day when she was attacked, her engagement with her attacker and finally, the confrontation that ensued between them, I am satisfied that, all these factors put together, were favourable enough to leave an impression in the complainant's mind of the appellant's physical appearance to the extent that she could identify him, without any possibility of error, if she saw him again.

There is no evidence that before she pointed the appellant out in the dock as the person who attacked her, she had seen him after the attack. There is, therefore, no doubt that no identification parade from which the appellant could possibly be picked was ever conducted; the complainant's identification of him was thus a dock identification. Now, I am cautious that the worth of such identification has been questioned in certain cases (see for instance, **Ajode Vs. Republic (2004)2 KLR 81**); however, I am also aware that it has been held elsewhere that its value has not been ruled out altogether (see **Muiruri & Others versus Republic (2002) 1KLR 274**; **Bernard Mutuku Munyao & Another versus Republic, Nairobi Criminal Appeal No. 222 of 2004 (2008 eKLR)**).

In **Muiruri & Others versus Republic** (supra) the Court of Appeal addressed two possible scenarios, one in which dock identification should be rejected and the other in which it should be accepted; as for the first scenario, the court stated as follows:

“It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...”

But it proceeded to state, referring to the second scenario, that:

*“...we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like **Abdulla bin Wendo versus Republic (1953) 20 EACA 166**, **Roria versus Republic (1967) EA 583** and **Charles Maitanyi versus Republic (1986) 2KLR 76** among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasised the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification.” (Underlining mine).*

My impression of the Court's position on this issue is that whether or not dock identification is taken on board in a conviction or acquittal of an accused person, as the case may be, depends on the circumstances of each particular case. Where it is a basis of a conviction, all that the trial court needs to demonstrate is

that it has tested such evidence with the greatest care so as to exclude the possibility of a mistaken identity.

The same Court suggested in **Bernard Mutuku Munyao & Another versus Republic (supra)** that an identification parade is not always necessary for the reason that it is nothing more than a piece of evidence that has to be considered alongside other evidence. To quote it, the court said at page 3 that:

“Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in R v Turnbull (1976) 63 Cr. App. R. 132. The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One would think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt that the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification.”

I understand the Court to be saying, by necessary implication, that a conviction of an accused person cannot and ought not to be rendered fatal merely because the trial court relied on the evidence of a dock identification rather than that of an identification parade. Where the court can safely convict on the evidence of dock identification alongside the other evidence available, it should do so.

Now, it has to be understood that the dock identification of the appellant was not the only evidence of identification of him. **Peter Waithaka (PW2)** who was the first person to respond and rush to the complainant’s rescue encountered the appellant at her gate, leaving her home. The appellant took to his heels with this witness in hot pursuit. He was joined in the chase by other members of the public who managed to apprehend the appellant. He was rearrested by the police while in the hands of the members of the public who beat him up and were about to lynch him.

Contrary to the submissions by counsel for the appellant, this witness never lost sight of the appellant in his attempt to flee; he was categorical in his evidence that:

When I got at the gate I met the accused person coming from the house. I started pursuing him. I was joined by a group of people. We managed to apprehend him at the river. The mob started beating him but he was rescued by the police.

In my humble view, this evidence corroborates the complainant’s evidence on identity of the appellant. The mere fact that he was seen coming from the complainant’s house moments after the complainant had raised alarm and that he attempted to flee when he was accosted by **Peter Waithaka (PW2)** and other members of the public and that Waithaka together with other members of the public pursued him until they caught up with him, is sufficient evidence that he is the person the complainant identified as having attempted to rob her violently.

I am persuaded, for the reasons I have given, that the appellant was positively identified.

Counsel for the appellant also took issue with the form of the charge sheet. In his respectful view, the charge sheet was defective and the appellant shouldn’t have been tried and convicted with the charge sheet in its current form. Counsel’s bone of contention arose from the fact that, despite having been charged with the offence of attempted robbery with violence, it was not indicated anywhere in the particulars of the charge that the appellant was armed with any sort of dangerous or offensive weapon. According to the learned counsel, failure to state these particulars rendered the charge sheet fatally defective.

The particulars of the charge sheet read as follows:

JOHN WANJOHI WANGUI: on the 12th day of January 2015, at Miiri village within Nyeri County, used violence against Lydiah Mukami Muteru in order to steal from her.

If to sustain a conviction for the offence of attempted robbery with violence requires that the offender must be armed with an offensive or dangerous weapon, counsel is right that the charge sheet is defective by reason of omission of the information concerning the arming of the appellant and the nature of weaponry he was armed with. However, I do not understand the definition of the offence of attempted robbery with violence to mean that it is only when one is armed that this offence is committed. **Subsection (2) of section 297** which is the particular provision in issue here states as follows:

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

According to this provision of the law, being armed with offensive weapon or instrument is only one of the alternative components or elements that constitute this offence. If one is armed in the manner prescribed, he could be culpable; he will, however, still be culpable if he is not armed but he is in the company of one or more other persons; or if he wounds, beats, or strikes or employs any other form of personal violence to any person at the time of attempted robbery. In the case against the appellant, he was not armed but he still employed personal violence against the complainant and wounded her in the process. In the absence of the evidence that the appellant was armed, the charge sheet would have been rendered defective if the state proceeded in the manner suggested by the appellant's counsel and stated in the particulars of the offence that the appellant was armed. For this reason, I found the decisions of **Cyrus Wanguku Kago & Another versus Republic (2014) eKLR** and **David Odhiambo & Another versus Republic (2005) eKLR** cited by the appellant's counsel in support of his argument on the alleged defect in the charge sheet to be of little help to his course.

The other issue was that of the appellant's defence; as noted the appellant offered an alibi. On this particular question, I agree with the appellant's counsel that it is not up to the appellant to explain his alibi. It is sufficient for an accused if his alibi creates a reasonable doubt that he was at the *locus in quo* at the time the offence was committed; he has no further obligation to explain it. The converse, however, is also true; where the alibi offered does not create any reasonable doubt to the prosecution case that is otherwise firm, concrete and unshakeable then the trial court is bound to dismiss it. My assessment of the appellant's evidence on his alibi leads me to the conclusion that it did not cast any doubt on the prosecution case against him.

The final question is the alleged violation of the appellant's constitutional rights under **article 50(2)(h)**. According to the learned counsel, the appellant was denied access to justice because the appellant was not given legal representation and he was not informed of this right in any event. This omission, so counsel submitted, violated **article 52 (2)(h)** of the Constitution. This particular article reads as follows:

50. (2)(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

With due respect to the learned counsel for the appellant, I do not understand an accused person's right under this provision to be absolute. His entitlement to this right, in my humble opinion, is more or less conditional; it is conditional in the sense that if it can be demonstrated that substantial injustice was visited upon him merely because he was not represented by an advocate, then he has a valid course to enforce his right to representation under this constitutional provision. The flip side of it is that where there is no evidence that an accused person was subjected to substantial injustice in the course of his trial, then that trial court cannot be faulted for the sole reason that the accused person was not represented or that he was not informed of this right at the earliest opportunity possible. If my interpretation of this constitutional provision is correct, and I hope it is, it follows that the burden is upon the appellant in an appeal such as this to demonstrate to the satisfaction of the court that as a result of the failure by the state to assign him an advocate and, since the trial court did not inform him of this right at the appropriate time

or at all, he suffered substantial injustice.

“Substantial injustice” is, of course, not defined in the Constitution but I suppose that what amounts to this scale of injustice would vary from one case to another depending on the peculiar circumstances of each particular case.

I must not be mistaken to be saying that where the trial court has a reasonable apprehension that an accused person may suffer substantial injustice if he is not represented it cannot take a proactive step to have him duly represented; of course, it can do so and forestall any attempt to impinge its proceedings on the ground that the accused person suffered substantial injustice, in the course of his trial, for want of legal representation. Such an appointment would now be subject to the provisions of the **Legal Aid Act No. 6 of 2016** which came into force on 10th May, 2016.

This Act was created to, *inter alia*, give effect to **article 50 (2) (h)** which is the provision in issue in this appeal. It has elaborate provisions on, among other things, eligibility of an applicant for legal aid, the sort of cases in which legal aid may be provided and how one can access such aid. If this Act was applicable to the appellant’s case, one of the issues that this court would have had to grapple with is whether he had duly applied for legal aid according to the provisions of that Act. And if such an application had been made and perhaps rejected, it would have been reasonable to consider whether the rejection would be deemed a violation of the appellant’s right under article 50(2)(h) of the Constitution. Since the Act came into force after the appellant’s trial, these questions are moot and of no relevance to the present appeal; all that this court should be concerned with at the moment is whether **article 50(2) (h)** of the Constitution was violated as suggested by the appellant.

As noted the burden is on the appellant to demonstrate that he suffered substantial injustice because the state did not accord him legal representation when it should have. Looking at the grounds of appeal there is none that suggests that he suffered any sort of disadvantage that can be attributed to lack of legal representation. Questions of whether the appellant was positively identified; or whether the evidence of any of the prosecution witnesses against him required corroboration; or whether it was wrong for the trial court to conclude in its judgment that he was required to prove his alibi; or, finally, whether the charge sheet was defective, are all matters that can arise in any trial regardless of whether an accused person is represented or not. In other words, if the trial court erred and came to the wrong conclusion on any of these matters, such an error would not necessarily arise from the fact that the appellant was not represented. Such matters would ordinarily arise when the trial court misapprehends the facts or the law or both of them. But if it is the appellant’s case that the misapprehension can be traced to his lack of representation, then he has not discharged the burden of demonstrating such a link; on my part I have not found any. In the absence of any evidence that the appellant suffered any injustice, let alone a substantial one, I am reluctant to come to the conclusion the appellant’s constitutional rights under **article 50(2)(h)** of the Constitution were violated.

In the final analysis, I have reached the conclusion that the appellant’s appeal is deficient of any merit. It is hereby dismissed.

Signed, dated and delivered in open court on 28th July, 2017

Ngaah Jairus

JUDGE