REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 83 and 85 OF 2014

PETER NJAU MUTHEE.....1ST APPELLANT

DANIEL MUTUA TENDE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Milimani in Cr. Case No. 6267 of 2011 delivered by Hon. Wanjala, CM on 4th April 2014).

JUDGMENT

Background

Peter Njau Muthee and Daniel Mutua Tende, herein the 1st and 2nd Appellants respectively, were charged alongside another with three counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. They were the 2nd and 3rd accused respectively. The particulars of the Count I were that on the night of 22nd/23rd December 2011, at ESKIS premises on 4th Parklands Avenue within Nairobi County, jointly and while armed with offensive weapons namely iron bars and metal cutters robbed Francis Kitheka of one Nokia mobile phone, one hat and a torch all valued at Ksh. 4,100/- and at or immediately before or immediately after the time of such robbery, used actual violence which resulted in the death of the said Francis Kitheka.

The particulars of Count II were that on the night of 22nd /23rd December, 2011, at ESKIS premises on 4th Parklands Avenue within Nairobi County, while armed with offensive weapons, namely; iron bars and metal cutters, robbed Vincent Otieno Onyango of a Sonitec ST 5400 radio, and Ksh. 2,200/- in cash, items all valued at Ksh. 2,750/-, and at or immediately before or immediately after the time of such robbery used actual violence to the said Vincent Otieno Onyango.

The particulars of Count III were that on the night of 22nd/23rd December, 2011, at ESKIS premises on 4th Parklands Avenue within Nairobi county, jointly and while armed with offensive weapons, namely; iron bars and metal cutters, robbed Jacob Musee Mwendwa of a Samsung mobile phone valued at Ksh. 2,500/- and that at or immediately before or immediately after the time of such robbery used actual violence on the aforementioned Jacob Musee Mwendwa.

The Appellants and the 1st accused were found guilty in all the counts. They were convicted accordingly

and each sentenced to suffer the death penalty. The appellants were dissatisfied with their conviction and have filed the instant appeal. In the Supplementary Grounds of Appeal filed on 13th June, 2017, the 1st Appellant was dissatisfied that his identification was not proved, that the doctrine of recent possession was not properly applied, that the manner of his arrest cast doubt on his involvement in the robbery, that crucial witnesses did not testify and that his defence was not considered.

The 2nd Appellant in the Amended Supplementary Grounds of Appeal dated 11th May, 2017 was dissatisfied that he was not accorded a fair and impartial trial as enshrined in Article 25(c) of the Constitution, that the prosecution case was riddled with inconsistencies and contradictions, that crucial witnesses were not called and that his defence was not considered.

Submissions

The appellants canvassed the appeal by way of written submissions. Those of the 1st appellants were filed on 13th June, 2017. In summary, he faulted the fact that the trial court upheld that he was positively identified. His case is that the robbery took place at night when the conditions for identification were not conducive. More so, PW1 and 2 who were the complainants in counts II and III testified that they were frightened during the robbery and they could therefore not be able to identify their assailants. In any case, according to their evidence, the assailants faces were covered which made it even more difficult for the witnesses to identify them. The 1st appellant also took issue with the fact that they were asked to identify them (accused persons) by use of photographs which were shown to them instead of an identification parade. As such, it was clear that the prosecution was concocting a case against them.

It was the 1st Appellant's submission that the doctrine of recent possession could not have been applied to found a conviction against him. He cited that the prosecution did not establish the factors that required to be proved before the doctrine of recent possession is applied. He cited the cases of **David Kiragu Thuo and 5 others vs. Republic [2008] eKLR** and **Samuel Mutheru Kariuki** and **another vs. Republic (2005) eKLR-C.A, Cr. App. No. 185 of 2004** to buttress the submission. In this regard, he submitted that the exhibits which were produced in court were not proved to belong to the complainant. Further. There were contradictions in the evidence relating to their recoveries. In addition, an inventory evidencing their recovery was not adduced in court.

The 1st appellant also challenged the prosecution case citing that it was marred by contradictions. This was with respect to where he and his co-accused were arrested within and around the scene of the robbery and also with regard to the recovery of the stolen goods. He specifically cited the contradictions in this respect of the evidence of both PW3 and 6. According to PW3, he was arrested outside the compound whereas PW6 testified that he was arrested in the compound. He submitted that had the court given regard to his defence that he was arrested on his way to work, it would have exonerated him from the offence. Furthermore, according to PW6, the report of the robbery was made at 5.30 a.m. whereas PW3 testified that the report was made at about 3.30 a.m. He submitted that the contradictions were material and weakened the prosecution's case.

Finally, the 1st appellant submitted that the prosecution failed to call crucial witnesses being the investigating officer and a caretaker within the premises that were robbed. He submitted that the failure to call this evidence further weaken the prosecution's case. He submitted that the case was not proved beyond a reasonable doubt and urged that he be set free.

The 2nd Appellant filed his submission on 11th May, 2017. He first submitted that his right to a fair trial as provided under **Article 25(c) of the Constitution** was violated. This was with regard to the failure to allow him to recall PW6 for further cross-examination. He also took issue with the inconsistencies and contradictions of both PW3 and 6 as set out by 1st appellant. He was also of the view that the failure to call the investigating officer and the premises' caretaker impaired the prosecution case. In addition, he was of the view that the trial court did not consider his defence which if it had, would have vindicated him.

Learned State Counsel Miss Sigei opposed the appeal. In her oral submission, she was of the view that the prosecution proved its case beyond a reasonable doubt. It was her case that the elements of a case of robbery with violence were proved and that the doctrine of recent possession was properly applied. With respect to the latter, she submitted that the prosecution established that the recovered goods belonged to the complainant and that they were recovered only moments after the robbery. On proof of identity of the appellants, she submitted that the appellants were arrested at the scene of robbery and therefore the issue of mistaken identity could not arise. On recalling of PW6, she submitted that the prosecution had intended to recall the witness but he failed to turn up. As a result, the 2nd appellant had to contend with the evidence already on record. Further, counsel submitted that the prosecution had called the necessary witnesses who sufficiently established their case. She urged the court to dismiss the appeal.

Determination

The first issue for determination arose from the 2nd Appellant's submission that his right to a fair trial was infringed when he was denied the opportunity to cross examine PW6. He submitted that this violated Article 25(c) of the Constitution. The contention at the heart of the submission was an application made by the 2nd Appellant during the trial to have PW6 recalled for cross examination as he was not feeling well when the witness in question was initially cross examined. On 29th October, 2013, the honorable magistrate granted the request by the appellant and asked the prosecution to avail the witness in question for that purpose. However, this never happened. On the same date, the prosecution submitted that PW6 was around before changing its narrative and submitting he was not in. The prosecution then submitted that the absent witness had already testified and was only being recalled at the behest of the accused persons. The 1st accused and 1st appellant then informed the court that they did not wish to cross examine the witness in question. The 2nd Appellant insisted he wanted witness recalled "but the court can decide". The court then adjourned the case to await the investigating officer who was the only remaining witness.

Needless to state is that the right to a fair trial shall not be limited under any circumstances. It is a non-derogatory right as envisaged under Article 25(c) of the Constitution. The failure therefore to allow PW6 to be recalled for cross examination by the 2nd Appellant violated his right to a fair trial as set out under Article 50(2) (k). That is to say that he was not accorded an opportunity to challenge the prosecution evidence which ultimately was prejudicial to him. In that regard, should the court hereunder uphold that the evidence sufficiently proved the prosecution case, would order for a retrial. This is premised on the fact that a retrial will not be ordered if on consideration of the evidence on record, the same will not likely result in a conviction. Other factors that the court should take into account is that a retrial should not aid the prosecution to fill up gaps in their case, that it should not occasion injustice to the accused and must serve the interests of justice. In the present case, the material consideration is the strength of the prosecution case. But before I evaluate the same I think it is important that I briefly set out a brief background of the prosecution case.

PW1 and 2, Vincent Otieno Onyango and Jacob Musee Mwendwa respectively were security guards with Kong Security Company and were guarding Eski premises in Parklands. A third guard was **Francis Kitheka Mwendwa,** who was killed in the robbery on the morning of 23 December, 2011. PW1 was tasked with patrolling the compound. PW2 was keeping guard at the roof top of the premises on 3rd floor whilst the deceased manned the main gate. PW2 was approached by two robbers from a veranda who forced him to kneel down as they beat up his legs. He was hit with a metal bar on the right eye. He was warned not jump off the roof top. He described the robbers as a short and a tall man with one wearing a red and blue coloured jacket. His hands were then tied up and frog- marched to the main gate. That is when he saw the deceased lying near the gate on his stomach in a pool of blood. He was breathing heavily. PW2 identified his assailants as the 1st and 2nd Appellants. PW2 was left at the gate whilst PW1 was taken into premises. The latter was approached by two men whom he identified with help of security lights from the compound. He ran to the changing room in the compound. The robbers who had a torch followed him there and warned that they would shoot him if he failed to open the room. He was then tied up on the hands with a rope. The robbers stole his wallet which had Ksh. 2200/. Thereafter he was taken to the main gate where PW2 and the deceased were.

The caretaker called **PW3, Jamin Simiyu Wafula** who went to the scene. He testified that he saw the 2nd Appellant wearing a red jacket. He reported the matter at Parklands Police Station. Amongst the police officers who visited the scene was **PW6, PC Richard Kimei.** The police searched the compound as they tracked the robbers. They found the 2nd appellant in the Kei apple fence with two crow bars one metal cutter and a stainless knife which were adduced as exhibits. The 1st appellant was found inside the compound a few meters from the Kei apple fence with PW1's mobile phone. Next to him was a cap belonging to the Kong Security group. The 1st accused now deceased was found with a phone belonging to the deceased security guard, a radio of PW1 and a torch given to the complaints as a tool of their job. The appellants were arrested and charged accordingly. Earlier PW2 and the deceased were taken to Kenyatta National Hospital for treatment but the deceased succumbed to the injuries. A post mortem on the body of the deceased was done by **PW 7 Dr. Okemwa Perminius Minda**. **PW8, PC Lucy Mbithe Munyambu** of CID Parklands produced the exhibits on behalf of the investigating officer.

I then delve into the issue of whether the prosecution case was riddled with inconsistencies that vitiated their case as submitted by the appellants. I shall interrogate three scenarios; (a) the events of the night of 23rd December, 2011, (b) the arrest of the Appellants and (c) the recovery of the stolen goods.

With regards to the events of 23rd December, 2011 the one fact that seems to be agreed upon by the witnesses is that the robbers struck at around 0300hrs. From the evidence it appears that the witnesses who were at the locus in quo were in agreement that the robbers attacked the deceased first and acquired his torch before attacking PW2 and finally PW1. The robbers then tied up all the guards and left them by the gate. This was a point of contention given that although PW1, PW2 and PW6 all agreed that the guards were tied up and left at the gate when the robbers made their escape, the evidence of PW3 was contrary as he testified that there were only two guards at the gate when he arrived, PW2 and the deceased. PW1, the other guard was hiding in one of the rooms in the compound during the entire ordeal. This was a glaring contradiction that could not be wished away.

Another contradiction is with regard to what transpired after the guards were untied. PW1 testified that he was untied and after helping PW2 and the deceased into a police van he remained at the scene with PW3. He recalled that some officers had gone outside and were carrying out a search. He testified that these officers arrested all the suspects outside the fence. PW3 also testified that he took part in the search of the suspects who were arrested in the Kei apple fence around the house. Their evidence was in stark contrast with the evidence of PW6, the arresting officer who testified that they arrested one of the suspects who was hiding in a live fence, which this court takes to be the Kei apple fence. He testified that this suspect was arrested in the compound. He then testified that two other suspects were arrested lying in a garden behind the building. These are further glaring inconsistencies and contradictions which I feel weakened the prosecution case.

With regard to the arrest of the appellants, the witnesses deferred as to who was the first suspect to be arrested. PW1 testified that the 2ndAppellant was the first to be arrested. PW6 on the other hand testified that he first arrested the 1st accused.

The next issue is on the recovery of the stolen goods that were produced in court as exhibits. They were a Nokia 2300 phone, a Samsung phone, a Sonitec radio, a torch, a metal cutter, a knife, a pair of iron bars and a Kong Security cap. The evidence of PW1 and PW3 was again consistent in that the 1st Appellant was found in possession of the Samsung phone and a Kong security cap and that the 2nd Appellant was found with two iron bars and a metal cutter. To the contrary PW6 testified that the 1st Appellant was found with metal cutters and the iron bars while the 2nd Appellant was found with the Samsung phone and Kong security cap. This constitutes a material inconsistency and contradiction which, when added up to other contradictions casts a doubt on the strength of the prosecution case and by and large the involvement of the Appellants in the robbery.

It is a cardinal principle in criminal proceedings that the onus always lies with prosecution to prove their case beyond a reasonable doubt. This burden never shifts to the accused person. Where a trial court casts

even the slightest doubt on the involvement of an accused in a crime, it follows that the burden of proof beyond all doubts has not been discharged. The court must then accord that benefit to the accused. That is the scenario that obtains in the present case; I will therefore grant both appellants that benefit.

Be that as it may, that is not to say that the elements of the offence of robbery with violence were not proved as provided under **Section 296(2) of the Penal Code**. Undoubtedly, the robbery was committed by more than one person, force was used whereby one victim was killed and PW2 injured. Personal goods were also robbed of. But as aforementioned, the prosecution case was not sufficiently established as to found a concrete case against the Appellants. I accordingly quash the conviction, set aside the death sentence and order that the Appellants be forthwith set free. It is so ordered.

Dated and Delivered at Nairobi this 26th day of July, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. 1st Appellant present in person.

2. 2nd Appellant present in person.

3. Miss Sigei for the Respondent.