



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEALS NO 137, & 138 OF 2014

DAVID ARUM OKULLO.....1ST APPELLANT

GEORGE GACUGU WARUTUMO.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal against the original conviction and sentence of Hon. M.K Mwangi Ag. SRM in Criminal Case No. 301 of 2011 arising from a judgment delivered on 4th July 2014 in the Chief Magistrate's Court at Machakos)

JUDGMENT

The 1st and 2nd Appellants were among three accused persons charged in the trial court with six counts of the offence of robbery with violence (being counts I to VI) contrary to section 296(2) of the Penal Code; two counts of attempted robbery with violence (being counts VII to VIII) contrary to section 297(b) of the Penal Code; and one count of possessing paper of forgery (being count IX) contrary to section 367(a) of the Penal Code. The 1st and 2nd Appellants were convicted of the first two counts of robbery with violence and sentenced to death for count I. The sentence for count II was held in abeyance.

The particulars of the two counts were as follows: for count I that on the 17th day of February 2011 at Ngoluni trading centre in Mbooni East District of Makueni county jointly with others not before court, while armed with a dangerous weapon namely a pistol, they robbed Stephen Muendo Paul of Kenya shillings forty nine thousand (Kshs. 49,000/=) and a Samsung mobile phone B2100 valued at Kshs 8,000/=, and immediately before the robbery threatened to use actual violence on the said Stephen Muendo Paul. For count II that on the 17th day of February 2011 at Kwakavemba trading centre, Mbooni East District of Makueni County, jointly with others not before the Court, while armed with a dangerous weapon namely a pistol, they robbed Caroline Mwikali Kyema of Kenya shillings a hundred (100/=) and a nokia C-5 valued at Kshs. 4,000/=, and at the time of such robbery used actual violence to the said Caroline Mwikali Kyema.

The 1st and 2nd Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal by way of their respective Amended Petitions of Appeal both filed in court on 8th June 2016. The Appellants also availed to the Court written submissions on their appeals during the hearing.

The grounds of appeal by the 1st Appellant in his Amended Petition of Appeal are as follows:

1. The Trial Magistrate erred in law and in fact by relying on the Identification parade to hold the

Appellant as positively identified despite the same have been conducted contrary to the Judges Rules provisions and the law.

2. The Trial Magistrate erred in law and in fact by convicting the Appellant on contradictory and uncorroborated evidence.

3. The Trial Magistrate erred in law and in fact by convicting and sentencing the Appellant with the offence of robbery with violence yet the ingredients of the offence was not proved as set out under section 296(2) of the Penal Code.

4. The Trial Magistrate erred in law and in fact by convicting the Appellant with the offence of robbery with violence without any evidence brought in court that the complainant in was actually robbed.

5. The Trial Magistrate erred in law by convicting the Appellant when clearly the evidence on record did not meet the required standard of beyond reasonable doubt as required by the law.

6. The Trial Magistrate erred in sentencing, and the sentence imposed against the appellant is illegal and unconstitutional.

The same grounds of appeal were relied on by the 2nd Appellant in his Amended Grounds of Appeal, and in addition he also raised the ground that the trial magistrate erred in giving weight to the evidence of the prosecution witnesses that was favorable and/or exonerated the Appellant, and in particular that the Appellant was not in possession of the alleged stolen items at the time of the arrest.

The main issues therefore raised by the Appellants was that their identification was not proper, that they were convicted on the basis of contradictory and insufficient evidence, and that the sentence meted on them was illegal.

The 1st and 2nd Appellants faulted their identification on several fronts. The 1st Appellant, while relying on the decision in **Mburu vs Republic (2008) 1KLR** where the court held that witnesses should be asked to give a fair description of the accused and the police should then conduct a fair parade on this description, submitted that the witnesses in their case described the 2nd Appellant as wearing a grey T-shirt while they identified him as tall dark man wearing a black jacket. Therefore that as these descriptions were different each parade was supposed to be conducted by aligning different people not the same persons used in the 2nd Appellant's identification parade.

Further, that it was held in the said case that in cases involving multiple suspects, multiple identification parades should be conducted and it is improper to line up the same persons in more than one parade.

The 2nd Appellant on his part urged that firstly, the identification parade was irregular because it was not preceded with the witnesses giving a clear description of the assailants. Secondly, that the identification parades were conducted with the same members occasioning prejudice to the appellant. Thirdly, that the members of the parade were not similar to the Appellant.

Further, that he was convicted and sentenced on the sole evidence of identification of PW1 which was unsafe. Reliance was put on the decisions of the Court of Appeal in **Abdalla Wendo v- Republic [1953] 20 E.A.C.A 166** and **Roria v-Republic [1967] EA 573**, On the identification by PW2, the 2nd Appellant submitted that the witness relied on a grey T-shirt worn by the Appellant which description she did not point out while she was recording her statement

Lastly, it was submitted that PW13 also gave evidence of how the identification parade was conducted, and testified that there were the same people in both identification parades conducted in respect to the 1st and the 2nd Appellants which was prejudicial given the variance in their descriptions and appearance. Reliance was placed on the decision in **David Mwita Wanja & 2 Others v. Republic**

On the issue of whether there was proof of the offence of robbery with violence, the 1st Appellant submitted that the prosecution did not tender the alleged stolen money as evidence in support of the charge of robbery with violence in count 1 and 2, and therefore failed to prove the ingredients of robbery with violence.

The 2nd Appellants also reiterated that the ingredients for the offence were not proved for ground 1 as he was not at the time of his arrest caught with any weapon as alleged by the complainant, but that the said weapon was discovered from the vehicle allegedly used by the assailants. Further, that the complainant alleged to have been hit by a muzzle of the pistol which injury was treated, but there was no medical evidence produced to prove any injury he suffered.

The Appellants further faulted the trial court's conviction and sentence on contradictory and uncorroborated evidence, and contended that the evidence did not meet the required threshold of beyond reasonable doubt. The 1st Appellant stated that PW1, Stephen Muendo Paul, in his statement and testimony stated the motor vehicle registration number used was KAX 227 and later in his testimony stated that it was he states that the registration number was KAY 22T. Further, that PW2 stated that the registration number of the motor vehicle the people who attacked her were travelling was KAH 227 T while PW12 stated in his testimony that they had received a report that robbers were travelling on motor vehicle registration number KAC 227T which he found abandoned.

The 2nd Appellant on his part pointed out the contradiction in the testimony of PW 10 (CIP Edward Mueke) that the said Appellant was brought to the scene by the members of public and that PW10 rearrested him at the same scene and took him to the station, which was contradicted by PW11 (PC Wilfred Beret) who testified that he was at the station of Mbumbuni Police station when the 2nd Appellant was brought by 3 members of public to the station and he detained him in the cells.

Reliance was placed on the decision in the case of **Elizabeth Gitiri Gachanja & 7 others vs Republic (2011) eKLR** that the evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt.

Lastly, the Appellants contended that as the evidence adduced did not meet the required standard of beyond reasonable doubt, the sentence imposed on them was excessive in the circumstances. Further, the 1st Appellant submitted that everyone is entitled to the right to life as per the provisions of Article 26 of the Constitution and sentence of death is unconstitutional bearing in mind that the constitution is the superior law in the law .

The Prosecution did not file any submissions in response to the appeal, despite being given the opportunity to do so.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). I note in this respect that although the Prosecution called fifteen witnesses to testify, it was only the evidence of PW1, PW2, PW6, PW10, PW11, PW12, PW13, PW14 and PW15 that will be analyzed, as it's the evidence that linked the 1st and 2nd Appellants to the two counts that they were convicted of.

I have considered the issues raised and arguments made by the Appellants. Before I proceed to substantively decide on the issues raised in light of the evidence adduced in the trial Court, I will make some observations about an irregularity the Court noted in the trial Court proceedings. Firstly, the hearing appears to have commenced before Hon. Omenge PM who heard one witness, and on 29th September 2011. On 27th June 2012, the hearing appears to have proceeded before M.K. Mwangi who appears to have started the hearing *de novo*. There is however no record of any compliance with section 200 of the Criminal Procedure Code in this regard.

In light of this irregularity, this Court can take one of two courses of action. It can either order a retrial or dismiss the appeal. The principles governing whether or not a retrial should be ordered were enunciated in

Fatehali Manji v Republic [1966] EA 343 by the East Africa Court of Appeal as follows:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

The circumstances of this appeal militate against a retrial for various reasons, Firstly as regards proof of the two offences the 1st and 2nd Appellant were convicted of, this Court notes that as regards proof of the robbery, on count I, PW1 who was the complainant, identified a Samsung telephone he testified belonged to him and stolen during the robbery which was marked as PMFI 1. Likewise PW2, the complainant in count 2, identified a Nokia phone C5 as the phone which was taken from her during the robbery by the Appellants as PMFI 7. However there was no record of PW10 who testified that he recovered the said phones producing the same as exhibits. He produced several other exhibits but not the two phones which had been marked PMFI 1 and PMFI 7.

In addition as regards these two exhibits, there was contradictory evidence as regards their recovery. PW10 testified that he recovered PMFI 1 from the 2nd Appellant, and at the same time testified that the said phones together with the PMFI 7 were recovered from the 1st Appellant. PW15 also testified that when he arrived at the scene the 1st Appellant was the one found with phones in his hand and from his pockets by members of the public.

PW13 on the other hand testified that after receiving the report of the robberies, they gave chase and found a motor vehicle registration number KAX 022T abandoned and upon searching it they found a handbag, mobile phones therein, a handmade gun and 3 dry cell batteries before they gave chase and arrested the 1st and 2nd Appellants.

Lastly, on the items alleged to have been stolen, the money was not recovered on the Appellants, and the prosecution did not bring any evidence as regards the ownership by PW1 and PW2 of the recovered phones.

A fundamental flaw in the prosecution evidence was the identification of the 1st and 2nd Appellants. It is in this regard notable from the evidence of PW10, PW11, and PW15 that the 1st and 2nd Appellants were not arrested at the scene of crime, and were not known to the complainants prior to the alleged offence. In addition while PW1 gave different registration numbers of the motor vehicles that the 1st and 2nd Appellants are alleged to have used in the robberies and escaped from as KAX 227I, KAY 022T, and KAX 022T, PW2 on the other hand confirmed during her examination-in-chief that she could not remember the registration number of the vehicle, but could identify it by its colour and make. She was only able to identify the vehicle after being shown a photograph of the same, and which she stated was registration number KAH 022T.

Therefore from the outset, the evidence linking the 1st and 2nd Appellant to the motor vehicle used in the robbery and in which the alleged stolen items were recovered was contradictory.

As regards the identification of the Appellants, PW1 only gave a description of the 2nd Appellant, while PW2 gave a description of both the 1st and 2nd Appellant as observed during the robbery. SP Joseph Mumira of the CID Training School who was PW13 conducted the identification parade of the Appellants on 18th February 2012 which he detailed as follows in his testimony:

“I arranged an identification parade after speaking to both suspects who agreed to participate. I explained to them that if they wanted advocate to be present. Accused 2 said he wanted George Warutumo to be his witness. Accused 1 in turn also said that he wanted David arum to be his witness.

In the first parade I got 9 persons and the 2 suspects who said that they wanted each other to be the other witness. In case of David Arum 4 witnesses Peter, Caroline, Thomas and Stephen Mwendu. For the first witness he was identified by touching 2nd witness was able to identify Him. After the parade, Okullo said the parade was not fair. He also said that there was no similarity between him and others.

In the case of the 1st accused I had the same 9 members, 1st witness (Peter Mutie) did not identify, 2nd witness (Caroline) identified him, 3rd witness (Thomas) was unable to identify and the 4th witness Stephen was able to identify him.

I got members of the parade from person of similar physical characteristics with the accused person. I then prepared these 2 parades forms I wish to produce the same.1st for mpex 24, pex 25 for accused 1.”

It is notable that failure to adhere to the identification parade guidelines will affect the evidential value of a resulting identification, as explained by the Court of Appeal in **Samuel Kilonzo Musau vs Republic (2014) e KLR** thus:

“The purpose of an identification parade, as explained in KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act.(Cap 46) which has since been repealed. The procedure for identification parades were also laid out in the cases of **R V. Mwangi s/o Manaa (1936) 3 EACA 29** and **Ssentale v Uganda (1968) E.A.L.R 365**. The rules include the following:

- The accused has the right to have an advocate or friend present at the parade;
- The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
- Witnesses should be shown the parade separately and should not discuss the parade among themselves;
- The number of suspects in the parade should be eight (or 10 in the case of two suspects);
- All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
- Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

- As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

The first irregularity the court notes is that while PW1 only gave a description of the 2nd Appellant, and did not testify as to having seen the 1st Appellant, he was asked to identify the 1st Appellant. Likewise, PW6 who was at the scene of crime for Count 1 gave a description of the 1st Appellant but did not participate in the identification parade. Secondly, there were nine members including the two Appellants in the identification parade instead of the required ten members. Thirdly, it is notable that all identifications by four witnesses took place on the same date, with the same parade members.

In addition, the description given by the witnesses of the two suspects showed that they were different in appearance, with one being described by PW2 as tall and dark and medium built, and the other as medium height and stout. PW1 described one of the suspects as a short man with a grey t-shirt, while PW6 described one of the assailants as being tall and black and the other wore a white t-shirt. There was therefore no possibility of the persons of similar appearance as the two suspects being in the same identification parade as testified by PW13. It was thus easy to pick out the persons with similar descriptions in the said parade.

The identification parade was therefore flawed. In addition as PW1 was the only identifying witness for Count 1 and PW2 the sole identifying witness for count two, it is the finding of this Court is that the identification of the 1st and 2nd Appellants was not safe, particularly in light of the other shortcomings noted in the foregoing.

I am therefore convinced that this is not a proper case for retrial for the foregoing reasons. I accordingly allow the 1st and 2nd Appellants' appeals and quash the convictions entered against the said Appellants for Counts I and II of the offence of robbery with violence under section 296(2) of the Penal Code. I also set aside of the death sentences imposed on the 1st and 2nd Appellants for these convictions.

I further order that the 1st and 2nd Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly

DATED AT MACHAKOS THIS 2ND DAY OF AUGUST 2017.

P. NYAMWEYA

JUDGE