



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO.2 OF 2016

PAUL MURIGI WAKARINDI.....1ST APPELLANT

REUBEN MWANGI MACHARIA.....2ND APPELLANT

SILA MAWEU.....3RD APPELLANT

JOSEPH WACHIRA KINYUA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The four Appellants were arraigned before the Thika Chief Magistrate's Court charged with a single count of robbery with violence. The charge sheet described the offence as "robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code."

2. The particulars in the charge sheet were that on 10/03/2010 at Kenol Township in Murang'a County, the four Appellants, together with others who were not before the Court, while armed with dangerous weapons namely pistols, robbed Patrick Wambua Athanas, a motor vehicle Registration number KBA 713T Mitsubishi FH Lorry valued at Kshs. 2.8 Million and at the time of such robbery used actual violence on the said Patrick Wambua Athanas.

3. The four Appellants were convicted of the charge after a fully-fledged trial in which the Prosecution called twelve witnesses and each of the Appellants and one Defence witness testified. Each of the Appellants was sentenced to death upon conviction as stipulated in the law.

4. The Appellants, aggrieved by both the convictions and sentences, have each appealed before this Court. Each of the Appellants filed a Memorandum of Appeal and later filed written submissions. They also orally submitted either in person or, in the case of the 1st and 2nd Appellants, through their advocates.

5. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality

and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

7. I will rehash the evidence that emerged in the Trial Court in an abbreviated fashion for the reasons that will become clear soon.

8. Patrick Wambua Athanas testified as PW1. He had been employed by Philip Munyoki (PW2) to drive Lorry Motor Vehicle Registration number KBA 713T Mitsubishi. On 10/03/2010, two people posing as a couple came and purported to hire the lorry to transport their household goods from their house in Kenol, Murang'a. Patrick was accompanied by Jackson Mwau (who testified as PW3) and Jeff Methenya (who testified as PW5). On their way to Kenol from Umoja where the vehicle was parked, Patrick drove the lorry with Jeff and the couple seated with him in the front cabin while Jackson was in the back of the lorry.

9. When they got to Murang'a, the "customer" asked Patrick to stop the lorry at a particular location. Shortly thereafter, five people swarmed them. They claimed they were Police Officers. They descended on them assaulting them and, at some point, even handcuffed them. Patrick, Jeff and Jackson were then bundled into a Saloon car which then drove off. By this time, the assailants had demanded the keys to the lorry from Patrick.

10. Inside the Saloon car, the assault continued. The assailants also relieved the three victims of the money, phones and wallets they had on them. At some point, one of the assailants gave the three victims a substance in a bottle and forced them, at gun point, to drink. While the assailants called the substance "dawa", it was clear to the victims that it was an intoxicating substance. They soon lost their consciousness although it would appear that Jeff remained somewhat lucid.

11. When the three victims regained their consciousness, they found themselves abandoned near a river deep in Muranga. Through the help of Good Samaritans, they made their way to Kigumo Police Station where they reported the incident. At the station, they were received by PC Kimei Kipchirchir, who confirmed as much in his testimony.

12. The connection between the Appellants and the robbery was made by Sergeant James Muriithi. Sgt Muriithi tracked the Saloon car that had been used in the robbery which led him to the 1st Appellant. The 1st Appellant led him to the 4th Appellant. Meanwhile, a friend of the owner of the vehicle, who testified as PW4 helped organise for the arrest of the 2nd and 3rd Appellants when he learnt about their complicity in the robbery.

13. Upon the arrests of the Appellants, three different Identification Parades were organised by Paul Kanyiri Mutwara and CIP Wilson Majo and Jack Muriithi. At the Identification Parades, Patrick, Jackson and Jeff identified the Appellants as the assailants.

14. Each of the Appellants denied the charge.

15. The 1st Appellant's narrative is that he was hijacked by three people when he was driving the Saloon Car. The three people were armed with a pistol and so he acquiesced. He stated that he was forced to follow the lorry. He claimed that the 4th Appellant was one of those who had hijacked him. He reported the incident to Kayole Police Station before his arrest.

16. The other three Appellants' theories were straight denials: according to them, they simply know nothing about the robbery. The 2nd Appellant said that he was set up by a friend and arrested. The 3rd Appellant claimed that he was initially arrested in connection with a different criminal case in Makadara and knows nothing about the robbery. The 4th Appellant claimed that he was arrested for being in possession of bhang and was only later framed up with the present charges.

17. Silas Mwangi Maina testified on behalf of the 1st Appellant. He works as a taxi driver and claimed that the 1st Appellant was also a taxi driver in Kayole. He testified that on 03/10/2010, the 1st Appellant had told him that he had been hired by three people posing as Police Officers who then hijacked him before they hijacked a lorry. Silas testified that he and his friends escorted him to Kayole Police Station to report the incident. He later learnt that the 1st Appellant had been arrested.

18. On the strength of the evidence presented, the Learned Trial Magistrate had no doubts that each of the elements of robbery with violence had been established beyond reasonable doubts against each of the Appellants. In particular, the Learned Trial Magistrate was persuaded that each of the Appellants had been positively identified. She was also persuaded that there was theft of the lorry and that there was both use of actual violence on the victims as well as possession and use of a deadly weapon (pistols) in the course of the commission of the crime. The Learned Trial Magistrate, hence, convicted each of the Appellants and duly sentenced them to death.

19. On appeal, cumulatively, the four Appellants have faulted the convictions on four points:

- a. First, that the charge sheet was defective for duplicity and therefore cannot sustain the convictions.
- b. Second, that the evidence presented in Court was at variance with the charges preferred against the Appellants.
- c. Third, that the evidence presented fell below the requisite standard of proof.
- d. Fourth, that it was unsafe to convict on the evidence of identification that was tendered in the case.

20. Mr. Amtallah argued the case for the 1st Appellant. In both his written and oral submissions, he focused on the first ground of appeal: that the charge sheet was defective.

21. Mr. Amtallah's argument is simple enough. It is that the Appellants were convicted on a duplex charge, in that they were charged with a charge of robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. He submitted that it was wrong to frame a charge of robbery with violence under the two sections of law, and that they were charged with two offences in one charge sheet under the two sections. He relied on the Court of Appeal decision in ***Joseph Njuguna Mwaura and Others vs R, (2013) eKLR*** in this respect.

22. In ***Joseph Njuguna Mwaura Case***, the Court of Appeal was categorical framing a charge of robbery as happened here under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu V Republic [2007] Eklr (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008)***, stated as follows:

Indeed, as pointed out in ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)*** the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.

23. Many other cases have since followed this reasoning in the *Joseph Njuguna Mwaura Case*. I see no facts, context or circumstances to distinguish the rule announced in this case from the present case. I, thus, find that the charge as framed in this case against all the four Appellants was duplex and therefore defective. As Joseph Mwaura and its progeny have announced, duplicity is not a curable defect under section 382 of the Criminal Procedure Code.

24. Having come to this conclusion, this disposes this appeal: the conviction cannot stand. However, it does end the matters. I am still left with the question whether the other grounds of appeal would have independently succeeded so that I can make a determination whether a retrial is appropriate in the circumstances.

25. Having perused the record of the trial Court with the keenness and evaluative eye demanded of an appellate Court, I have come to the conclusion that a retrial would be appropriate here. The case of *Makupe v Republic*, Criminal Appeal No 98 of 1983, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the *view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result*.

26. I am persuaded here, from my view of the case that properly prosecuted there might be sufficient admissible evidence to result in a conviction. The less I say about this, the better.

27. In the end, therefore, the orders and directions of the Court are as follows:

- a. The conviction entered in Thika Law Courts Criminal Case No. 2269 of 2010 is hereby set aside. In its place a plea of not guilty shall be recorded in the case.
- b. The sentenced imposed on the Appellant is hereby consequently set aside.
- c. The four Appellants shall be released from Prison forthwith and shall, instead, be placed on remand pending their presentation before the Magistrates' Court to take plea in a properly framed charge sheet.
- d. The Appellant shall be presented before the Chief Magistrate's Court, Thika on Monday, 25th September, 2017 to take plea. The case shall be allocated to a magistrate other than the Learned Honourable Martha Mutuku who initially heard the case.
- e. The Deputy Registrar is directed to send back the Trial Court file in Thika Law Courts Criminal Case No. 2269 of 2010 and a copy of this file and ruling to the Chief Magistrate's Court, Thika for compliance.

Dated and delivered at Kiambu this 21st day of September, 2017.

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JOEL NGUGI

JUDGE