



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 199, 200 & 201 OF 2012

JOHN MWANGI MACHARIA.....APPELLANT (199)

PAUL MAINA ESTHER.....APPELLANT (200)

MICHAEL WANJOHI WACHIURI.....APPELLANT (201)

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon. W.A. Juma at Nyeri delivered on the 4th December, 2012 in Criminal Case No. 154 of 2012)

JUDGMENT

FACTS

1. The Appellants, **John Mwangi Macharia, Paul Maina Esther and Michael Wanjohi Wachiuri**, were charged with the offence of Robbery with Violence contrary to **Section 296 (2) of the Penal Code**;
2. The particulars of the charge was that on the 22nd January, 2012 at Nyeri township within Nyeri County the appellants robbed Robert Onchiri (**the complainant**) of a Samsung mobile phone valued at Kshs.70,000/- and other personal documents and immediately before or after such robbery used violence on the complainant.
3. After the trial, the Appellants were found guilty of the offence and were convicted accordingly; the sentences that were meted out were the mandatory death sentences;
4. Being aggrieved by the conviction and sentence, the Appellants filed their respective Petitions of Appeal and Grounds of Appeal which grounds are summarized as follows;
 - (i) That their fundamental and constitutional rights were violated;
 - (ii) That the trial magistrate erred in law and fact when she failed to take into consideration that the stolen items mentioned in the charge sheet were never produced as exhibits;
 - (iii) That the learned trial magistrate gravely erred both in law and fact when she failed to consider that the prosecution failed to avail crucial witnesses;
 - (iv) That the trial magistrate erred in both law and fact by convicting the appellants when the prosecution failed to prove its case to the desired threshold;
 - (v) That the trial magistrate by rejecting the appellants defences with no good reason or explanation given violated the provisions of Section 169 (i) of the Criminal Procedure Code.
5. At the hearing hereof the appellants were ably represented by Learned Counsel Mr Wahome Gikonyo and Mrs Gicheha was the Prosecuting Counsel for the State; both Counsels made oral submissions hereunder is a summary of their respective submissions;

APPELLANTS' SUBMISSIONS

Counsel submitted as follows;

6. **Violation of rights:** the appellants were described by the complainant as boys; **PW5** also described them as boys; and throughout the proceedings in the lower court they were unrepresented;

7. **Accomplice evidence;** **PW5** was the one found with the memory card; therefore the doctrine of recent possession ought to have been applied to him; **PW5** was arrested by police officers was charged and later released; he was in custody for fourteen (14) days and no reasons were given for his release; he was released so as to implicate the appellants; it was the appellants contention that he was therefore an accomplice and that his evidence needed to be treated with caution and that it required collaboration;

8. **On identification:** **PW2** stated that he did not know the appellants prior to the incident; the only description given of 2nd appellant was that he was a thin, tall man and had long hair which didn't amount to a peculiar feature; that the identification of the appellants amounted to mere dock identification;

9. **PW2** stated that he was present when the 2nd appellant was arrested at his house; but no evidence was adduced by **PW4** as to who accompanied him to this house and arrested the 2nd appellant;

10. The robbery took place at night and therefore the circumstances for identification were unfavorable; that the trial court failed to test this evidence; the trial court ought to have treated such evidence with care; the cases of **Kiarie vs R [1984] KLR739 and Maitanyi vs R [1986] KLR 198** were cited in support.

11. As for **PW5** he never gave any receipts for repair to the appellants, this would have enabled the police to connect the appellants to the stolen phone;

12. **Ownership:** that there was no proof of ownership of the phone; nothing was recovered from the house of the 2nd appellant; **PW2** never produced any receipt of ownership; neither did he produce any record from Safaricom Centre on the phone and the serial number; in the absence of proof of ownership the trial court misdirected itself and made a wrong finding that the stolen phone belonged to the complainant (**PW2**);

13. **Failure to call crucial witnesses;** that the prosecution failed to call a student named Kihara and Frankline Wachira a brother to **PW1**; Kihara had sold the phone to the younger brother of **PW1** who was found in possession of the phone;

Section 143 of the Evidence Act provides that by failing to call crucial witnesses an inference can be drawn that their evidence would have been unfavourable;

14. **Medical evidence:** the doctor was absent and no foundation laid on production of the P3 Form; this Form was irregularly produced and this was done in flagrant breach of Section 77 of the Evidence Act.

15. **Statement of Defence;** the trial court stated in its judgment that the alibis had no weight as the same did not refer to dates and only dealt with the whereabouts of the appellants; that it was wrong for the trial court to state that the alibis were mere excuses; the dismissal of the defence was casual;

16. That it was not correct for the trial court to place the onus on the appellants; no burden of proving alibi is placed on an accused person; the case of **Kiarie vs Republic (supra)** was relied on; Counsel urged the court to allow the appeal and to quash the conviction and set aside the sentence and to release the three appellants.

RESPONDENTS' SUBMISSIONS

In response counsel submitted as follows;

17. **Age;** that the trial court addressed this issue; the 2nd appellant told the court that he was 17 years old; the trial court directed that he be taken for an age assessment and the Age Assessment Report indicated that he was aged between 19-22 years;

18. **Identification of phone;** that there was no doubt that the phone belonged to **PW2**; that he identified it by the serial number, the cracked screen; and when the recovered memory card was inserted his contacts and music that had been saved therein were found intact;

19. There was no contradictory evidence between that of **PW5** and that of **PW3**; **PW5** stated he couldn't work on the phone and placed it aside for **PW3** to work on; **PW3** was also unable to work on it; there was no dispute that the stolen phone was the one they were working on;

20. **Identification of the appellants;** the appellants were arrested on information received from an informer; the complainant gave a general description of the 2nd appellant and stated that he was slim and tall and had rastas; that even though the robbery took place at mid-night he was also able to identify the 2nd appellant; but was candid to state that he was not able to identify the other attackers;

21. **PW5** was arrested because he was found with the memory card; he gave reasonable explanation on what happened and when remanded he stated that he found the three (3) appellants there whom he recognized as the customers who had left the phone for flushing and a memory card as security; the dates of arrest confirm this;

22. **Crucial witnesses;** not all the witnesses were called to testify; failure to call these witnesses does not mean that the case was not proved; that the prosecution had the discretion to know which witness to call; Section 143 of Evidence Act provides that no particular number of witnesses need to be called to prove a fact; it was counsels' contention that the witnesses the prosecution called proved the case beyond reasonable doubt;

23. **Proof of robbery;** the robbery was not disputed that it took place; and that the three (3) appellants took part;

24. **Accomplice evidence;** PW5 was found in possession of the 4GB memory card which was produced as an exhibit; he was arraigned in court whilst investigations were still ongoing; he was released and the reasons for his release were stated by PW6 in evidence that after finalizing investigations the prosecution arrived at a decision that PW5 be treated as a witness as opposed to an accused person; PW5 was released by the court under the provisions of Section 87(A) of the Criminal Procedure Code;

25. **Trial court's rejection of the defences;** the trial court found that the alibis of the appellants to be far-fetched and they failed to give an account as to their whereabouts; the appellants called no witnesses to corroborate; the defences did not leave any holes in the prosecutions case;

26. Counsel submitted that the prosecutions' case was based on water-tight evidence; the 2nd appellant was identified by the complainant; the other two appellants 2nd and 3rd were identified by PW5 who connected them to the offence; counsel urged the court to dismiss the appeals and to uphold the convictions and the sentences.

REJOINDER

27. The trial court ordered for the age assessment of all the appellants; when the report was brought only the age assessment report of 1st appellant was recorded; there was nothing recorded on the 2nd and 3rd appellants' age.

28. PW6 made the recoveries of the stolen items but did not prepare an inventory; the absence of an inventory meant that there was no recovery; refer to Section 25 of the Criminal Procedure Code;

29. The evidence of PW2 was that the 2nd appellant was arrested in his presence; when recalled he contradicted himself when he stated that knew the 1st appellant and not the 2nd appellant; this also contradicts what the trial court stated in its judgment.

30. The onus is on the prosecution to disprove the defence of alibi; the trial court dismissed it casually and failed to analyze it and instead placed the burden on the appellants;

31. PW5 fitted the definition of an accomplice; the memory card was recovered from him and he gave no explanation; he was charged and spent 14 days in custody;

32. Counsel reiterated the prayer that the conviction be quashed, the sentence be set aside and the appellants be set at liberty.

ISSUES FOR DETERMINATION:

33. After taking into consideration the submissions made by the Appellant and the Respondent this court finds the following issues for determination;

- (i) Whether the appellants fundamental and constitutional rights were violated;
- (ii) Whether the appellants were positively identified;
- (iii) Whether the offence of robbery with violence was proved by the prosecution to the desired threshold;
- (iv) Whether the trial magistrate had good reason to reject the appellants' defence of alibi.

ANALYSIS

34. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the appellants fundamental and constitutional rights were violated:

35. The appellants contend that their rights to be tried as minors and to be represented were violated as they were unrepresented throughout the trial; the court record indicates that on the 16th March, 2012 the trial court made an order directing the accused (the 1st appellant herein) in Criminal Case 147/2012 be taken for age assessment; also on the same date the trial court directed that the 2nd appellant be taken for age assessment after he told the court that he was aged 17 years;

36. On the 19th June, 2012 the trial court stated that it had sighted the 1st appellants age assessment report which gave his age as being

between 19-22 years; this court has taken time to peruse the court record at length and finds no mention of the outcome of the 2nd appellants age assessment and this court has further noted that the trial commenced notwithstanding the absence of this report and or a finding on whether the 2nd appellant was of age;

37. All this court will say on this issue is that there are legions of decisions where it has been held that the appellants remedy lies in damages and not in an acquittal;

38. This ground of appeal is therefore disallowed.

Whether the appellants were positively identified:

39. Counsel for the appellants submitted that the robbery took place at night and therefore the circumstances for identification were unfavorable; that the trial court failed to test this evidence and ought to have treated such evidence with care;

40. **PW2** stated that he did not know the appellants prior to the incident; that the only description he gave to the police of 2nd appellant was that he was a thin, tall man and had long hair which didn't amount to a peculiar feature; he further testified to being present when the 2nd appellant was arrested at his house;

41. The evidence on record was that the appellants were arrested on information received from an informer; and whilst in custody **PW5** who was also in custody recognized the appellants as the customers who sold the phone to him.

42. On the issue of identification of the appellants the trial court made a finding of identification by recognition and stated in her judgment as follows;

“PW5 may have been arrested in the case but his identification of the three accused persons corroborates PW2 evidence that of those who robbed him he recognized the second accused who is one of them.

The court is satisfied that phone was properly identified and accused persons were properly identified. The accused person could not have been put on parade when PW1 and PW5 had already seen them in police custody.”

43. This court concurs with the findings of the trial court that there was no need for an identification parade as both **PW2** and **PW5** had already seen the appellants; the option that was left for the trial court was to test the evidence on identification particularly when the conditions favoring a correct identification were difficult.

44. In this appeal the evidence of **PW2** was that the incident occurred at around mid-night; the only description he gave of the attackers was that one of them was thin, tall and had rastas; this description was of the 2nd appellant; he was candid enough to state that he was not able to identify the other appellants;

45. When evaluating the evidence of **PW2** on identification the trial court ought to have taken into consideration the guidelines on visual identification set down in the renowned case of **R vs Turnbull & Others [1976] 3All ER 54**; which are whether the conditions and circumstances for identification were favorable; the source of lighting; the length of time the witness observed the accused person(s) and the description given of the accused to the police.

46. This court finds that trial court in its judgment failed to follow the guidelines set down in **R vs Turnbull (supra)** on any of the above circumstances which would have been capable of supporting the evidence on the correctness of the identification; failure to follow the guidelines renders the evidence of **PW2** on identification, unsatisfactory and unsafe;

47. In this instance this court finds that the quality of the identifying evidence of **PW2** of the appellants was poor;

48. As for the evidence of **PW5** on identification; he stated that he met the appellants whilst they were all in remand and he recognized them as the customers who had brought the stolen phone; that he had been charged with the same offence with the appellants and was released for unknown reasons; it was the contention of counsel for the appellants that **PW5's** evidence on identification was not safe nor reliable as he was an accomplice;

49. This court opines that after perusing the court record finds no evidence to support the involvement of **PW5** in the crime; in **Appeal No.58 of 1981 Obiri-vs- Republic KLR 1981 493**. The judges of appeal JJAs Madan, Miller and Potter gave a definition of an accomplice; the JJAs held that an accused person who was at the crime scene but found not to have been involved in the crime is not an accomplice and his evidence is not accomplice evidence;

50. Even if **PW5** had been an accomplice it is trite law is that the evidence of a co-accused is admissible; but his sole evidence would not have been sufficient to found a conviction; reference is made to the case of **Karanja & Anor vs Republic (1990) KLR**; therein it was held that corroboration was required for accomplice evidence so that it is reasonably safe to act upon;

51. Nevertheless the evidence of **PW5** was the only evidence that connected the appellants to the crime and this was still circumstantial and needed corroboration; the only other corroborative evidence on identification would have been that of **PW2** as had been correctly pointed out by the trial court; but this evidence has been found by this court to be of no evidentiary value;

52. This court concurs with the submissions of counsel for the appellants that their identification amounts to mere dock identification; and finds that the appellants were not positively identified; and that the conviction is found to be unsafe.

53. On the above issue alone the appeal succeeds and this court will not belabor itself in addressing the remaining two issues; which are whether the offence of robbery with violence was proved by the prosecution to the desired threshold; whether the trial magistrate had good reason to reject the appellants' defence of alibi.

FINDINGS

54. In the light of the forgoing this court makes the following findings;

(i) This court finds that the appellants remedy on any violation of their fundamental rights lies in damages;

(ii) This court finds that trial court in its judgment failed to follow the guidelines set down in **R vs Turnbull (supra)** on any of the circumstances and conditions which would have been capable of supporting the evidence on the correctness of the identification; failure to follow the guidelines renders the evidence on identification unsatisfactory and unsafe;

(iii) This court finds that the appellants were not positively identified; the conviction is found to be unsafe;

DETERMINATION

55. The appeals are found to be meritorious and are hereby allowed.

56. The convictions are hereby quashed and the sentences set aside; the appellants be set at liberty forthwith unless otherwise lawfully held;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 19th day of October, 2017.

HON.A.MSHILA

JUDGE