



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEALS NUMBER 211, 208 & 209 of 2011

BETWEEN

JOHN KAMAU WANGARI alias NYURI.....1st APPELLANT

MOSES MUCAI MWANDE.....2ND APPELLANT

LUKAS KABURIO MWAURA.....13RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Principal

Magistrate's Court at Kikuyu Cr. Case No. 8 and 11 of 2006

delivered by Hon. D. Mulekyo, PM on 4th November, 2009.)

JUDGMENT

Background

The three Appellants were charged as 1st, 2nd and 3rd accused persons respectively with four counts of robbery with violence. The particulars of the count I were that on the night of the 22nd and 23rd March, 2006 at Kidfarmaco Estate in Kiambu District within Central province, jointly with others not before the court, while armed with dangerous weapons, namely; pistols, pangas and rungas, robbed Pastor Edward Njami Njuguna of several mobile phones being a Nokia 3300, a Motorola C15, Siemens C45, a Seiko 5 wristwatch, a 14 inch JVC television set, a DVD machine, an iron box, 3 CD changer machines, Kshs. 1,450/- in cash and a Toyota Corolla motor vehicle registration number KAL 208W. The items were all valued at Kshs. 438,450/- and that at or immediately before or immediately after the time of such robbery used actual violence to the said Edward Njami Njuguna.

The 1st and 2nd Appellants were charged with an alternative charge of handling stolen goods contrary to section 222(2) of the Penal Code. The particulars of the charge was that on the night of 22nd and 23rd March 2006 at Kidfarmaco in Kiambu District otherwise than in the course of stealing, dishonestly retained a JVC Television set, an Iron box, remote control of motor vehicle registration number KAL 208W, a house alarm and a Toyota Corolla motor vehicle registration number KAL 208W, knowing or

having reason to believe them to be stolen goods.

The particulars of the count II were that on the night of the 22nd and 23rd March, 2006 at Kidfarmaco Estate in Kiambu District within Central province, jointly with others not before the court, while armed with dangerous weapons, namely; pistols, pangas and rungas, robbed Samuel Kimotho of a torch, keys and remote control for an alarm system all valued at Kshs. 1,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Samuel Kimotho.

The particulars of the count II were that on the night of 22nd and 23rd March, 2006 at Kidfarmaco Estate in Kiambu District, jointly with others not before the court, while armed with dangerous weapons, namely; pistols, pangas and rungas, robbed Pastor Joyce Wangechi of her jewelry and bangles valued at Kshs. 1000/- and that at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said pastor Joyce Wangechi.

The particulars of the count IV were that on the night of 22nd and 23rd March, 2006 at Kidfarmaco Estate in Kiambu District, jointly with others not before the court, while armed with dangerous weapons, namely; pistols, pangas and rungas, robbed Irene Wairimu Njami of Kshs. 1,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Irene Wairimu Njambi.

The Appellants were arraigned in court and at the conclusion of a lengthy trial found guilty in the four counts of robbery with violence. They were sentenced to suffer death in all four counts. They were however dissatisfied with that court's decision and each of them separately filed an appeal against both the conviction and sentence. The three appeals were consolidated for purposes of this judgment.

The 1st Appellant was dissatisfied that the case was not proved beyond a reasonable doubt, that he was convicted on the basis of contradictory evidence Section 214 of the Criminal Procedure Code was not complied with, that the identification evidence was unreliable and that his defence was not considered.

The 2nd Appellant relied on amended grounds of appeal vide which he was dissatisfied Sections 150 and 214 of the Criminal Procedure Code were complied with, that he was not identified, that the learned trial magistrate erred in holding that the doctrine of recent possession did not apply, that the prosecution case was riddled with material contradictions, that he was not accorded a right to mitigate and that his defence was not considered.

The 3rd Appellant's grounds of appeal were contained in the amended grounds of appeal filed on 20th of July, 2017. They were that the recovered goods did not link him to the offence, that Section 214 of the Criminal Procedure Code was not complied with, that prosecution case was contradictory and uncorroborated, that his defence was not considered and that the case was not proved beyond a reasonable doubt.

Submissions.

The Appellants all filed written submissions while the Respondent who was represented by learned State Counsel, Ms. Sigei gave oral submissions. The Appellants filed their submissions on 20th July, 2017.

The 1st Appellant submitted that it was never proved that he had been treated at Thogoto Hospital which called into question the evidence produced linking him to the accident that occurred that evening involving the stolen car. His contention was that no medical records were produced to buttress the testimony of PW8 that he had been involved in the accident. He submitted that the prosecution also failed to dust the vehicle in question for finger prints which could have established who the occupants of the vehicle were. He submitted that the evidence adduced by the prosecution was contradictory and could therefore not form the basis of a conviction. He cited the discrepancy with the registration number of the motor vehicle; that in the charge sheet the numbers were different from those appearing in the photographs that were identified by PW3 in court.

He submitted that the trial was irregularly conducted as the provisions of Section 214 of the Criminal Procedure Code were not complied with. He submitted that the prosecution amended the charge sheet twice and that on both occasions the trial court failed to communicate the rights incidental to the amendment, namely; explanation of the right to recall witnesses who had previously testified.

The Appellant also took issue with his identification especially at the identification parade, stating that the police officers had exposed him to the identifying witnesses before the parade took place. He submitted that the charge sheet was also defective as the alternative charge to Count I was charged under Section 222 of the Penal Code which has nothing to do with handling stolen goods. He also contested the fact that his defence was dismissed without any reasons being given. His view was that his defence which was subjected to cross examination by the prosecution was not challenged which was sufficient evidence that the prosecution had no case against him. He cited **Okech Okale v. Republic [1964] EA 174** to support his submission.

The 2nd Appellant also challenged the fact that Section 214 of the Criminal Procedure Code was not complied with. He also was of the view that the failure to adduce medical evidence from Kenyatta National Hospital where he was allegedly referred to for treatment was an indicator that he was not involved in the accident that involved the stolen car. He submitted that the only reason he was charged was due to his broken leg which he explained in his defence was occasioned by something different from the accident. He also challenged the failure by the trial court to give weight to his defence merely because the witness he intended to call to corroborate it was deceased. That had the same been independently evaluated, he would have been acquitted.

On identification, 2nd the Appellant submitted that although he took part in an identification parade, the parade forms were never produced in evidence. He submitted that the trial magistrate did not place any weight on the identification evidence and instead relied on circumstantial evidence that did not link him to either the stolen car or goods. He submitted crucial witnesses including the villagers, the driver or conductor of a passing matatu that allegedly ferried him to the hospital were not called as prosecution witness to attest to how he was arrested. Finally, he added that his mitigation was not considered.

The 3rd Appellant also submitted that there was not sufficient evidence that he was involved in the robbery. That although the prosecution relied on the evidence that he was found in possession of the stolen vehicle, no inventory to that effect was adduced. Hence, such evidence remained hearsay evidence. Furthermore, there was contradiction in the evidence of PW6 and PW8 in this respect which pointed to the possibility that the goods were planted on him. He also pointed that the registration number of the stolen vehicle was not proved in evidence. Therefore, his conviction was based on circumstantial evidence which was not sufficient to found a conviction. He cited the case of **Muchiri v. Republic [1982] KLR** to buttress this submission. He submitted that he was tricked into signing forms that were later produced in court as identification parade forms. He stated that the entire identification parade process was flawed and could not be relied upon as sufficient evidence to found a conviction. He thus was convicted based on mere suspicion which is not evidence. The case of **Jane Wangui Mathenge v. Republic [1996] KLR** was cited to buttress this submission

The 3rd Appellant also submitted that Section 214 of the Criminal Procedure Code was not complied with and that his defence was not considered.

Ms. Sigei for the Respondent submitted that the Appellants were identified by the witnesses at a properly conducted identification parade. She submitted that the Appellants also failed to give plausible reasons why they were in possession of the stolen goods and that the defences they gave did not dislodge the strong case for the prosecution. She concluded by submitting that the prosecution had proved its case beyond a reasonable doubt, that the appeals had no merit and ought to be dismissed.

Determination

The court will first address itself on whether Section 214(1) of the Criminal Procedure Code was complied with when amendments to the charge sheet were made. The provision reads;

214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.(emphasis own)

The prosecution substituted the charge sheet on two occasions. The first was done on 18th April, 2007 which included an alternative charge against 1st and 3rd Appellants. The proceedings on the date were recorded as follows;

Prosecutor: The matter is part heard and we want to add an alternative charge.

Court: Alternative charge in the amended charge sheet is read over and explained to the accused.

Count I: 1st accused – Not true

2nd accused – Not true

3rd accused – Not true

Count II: 1st accused – Not true

2nd accused – Not true

Court:- Plea of guilty entered for the accused in all the amended charges.

Prosecutor:- 2 witnesses ready to proceed.

As at 18th April, 2007 two witnesses had testified. After the appellants pleaded afresh the court did not call on them to elect to recall the witnesses who had already testified for purposes of either testifying afresh or for further cross examination pursuant to Sub Sections (1) (ii). Under the provision, the court must take it upon itself to inform the accused of his right to elect to recall the witnesses especially where some witnesses had testified especially where the amendment introduces a new charge. The basic rationale for this is simple. That the accused must be accorded a right to a fair trial under the Constitution to have adequate time and facilities to prepare for his defence (Article 50 (2) (c). It follows that if a charge is introduced when some evidence has already been adduced and the accused is not accorded an opportunity to challenge it by way of cross examining the witnesses, or the witnesses testifying afresh on the fresh charge, it means that the accused cannot mount a robust defence against that charge. The failure therefore to comply with this provision vitiates not only the right to a fair trial but renders the entire trial a nullity. In the instant case, an alternative charge was introduced and the order made that the case proceeds with other witnesses was ultimately prejudicial to the accused persons. They may have wished to cross examine the witnesses who had testified on the evidence touching on the additional charge. Thus, failing to inform them of this requirement meant that their right to a fair trial was violated.

A second amendment was done on 29th August, 2007. The record on that day states:

Court Prosecutor:- I have the amended charge sheet.

Interpretation: English/Kiswahili

Every element of the charge and all the particulars thereof are now hereby read over and explained to the accused and each replies:

Count I:

Accused 1:- Not true

Accused 2:- Not true

Accused 3:- Not true

Court Prosecutor:- We are only adding counts 2,3 and 4 and so the count read as count 1 is actually count 2.

Interpretation: English/Kiswahili

Charges once more read over and explained as above and the accused reply:

Count 2:

Accused 1:- It is a lie

Accused 2:- It is a lie

Accused 3:- It is a lie

Count 3:

Accused 1:- It is a lie

Accused 2:- It is a lie

Accused 3:- It is a lie

Count 4:

Accused 1:- It is a lie

Accused 2:- It is a lie

Accused 3:- It is a lie

Court:- Plea of not guilty entered on the substituted charges.

Further order: Further hearing 17/10/2007. Further mention 12/09/2007.

On the date of this amendment five witnesses had testified although PW5 had been stood down to allow the amendments. The last order made by the court after the plea was taken was on issuance of a further hearing date. Once again the court failed to comply with sub section (1) (ii). Depending on what the accused person elects the court may or may not accede to the choice of the accused. Of course this would

depend on various factors, amongst them the availability of the witnesses, the age of the case, consideration for prejudice against the witnesses, the interest of administration of justice and the disposition of the witnesses.

Having made the above observation it is trite that the failure to comply with Section 214 rendered the entire trial a nullity. Hence, the defect can only be corrected by ordering a retrial. Before then, the court must take into account several factors most of which were set out in the case of **Mwangi vs Republic [1983] KLR 522** in which the Court of Appeal held thus;

“That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza vs Republic[1957] E.A 152(CA) 469; Pyarwa Bussam vs Republic[1960] E.A 854

Several factors have therefore to be considered. These include:

When the original trial was illegal or defective a retrial will be ordered.

A retrial will not be ordered if the conviction was set aside because of insufficient evidence.

A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.

A retrial should not be ordered where it is likely to cause an injustice to the accused person.

A retrial should be ordered where the interest of justice so demand.

Each case should be decided on its own merits.

Whether there is evidence to support the conviction.”

In the present case, the evidence on record squarely placed the appellants at the scene of crime. They were identified by the complainants at the scene and the identification confirmed in the identification parades in which PW1, 2, 3, 4 & 5 linked them to the offence. The circumstantial evidence of PW3 did also link them to the offence. This was in light of the 3rd appellant being found in possession of stolen goods which were in the stolen vehicle. The goods were positively identified by the complainant. In addition, all the elements of the offence of robbery with violence as provided under Section 296 (2) of the Penal Code were established by the evidence adduced. On whether any prejudice would be occasioned to the appellants if a retrial was ordered, the court is of the view that the demands of justice override the appellants’ undergoing a retrial. In the event that they are found guilty they shall be liable to a mandatory death sentence which sentence is timeless. Furthermore, the offence itself is very serious and the complainants await to see to it that justice is met through a fair process of trial. Accordingly, it is in the interest of justice that a retrial is ordered.

In the result, this appeal partially succeeds. I quash the conviction and set aside the respective death sentences. I order that a retrial be conducted. The appellants shall be escorted to Kikuyu Police Station not later than 1st November, 2017 for purposes of preparing them to take fresh plea. Once in police custody, they should be presented to court for plea within the time provided by the law. It is so ordered.

DATED and DELIVERED 18TH DAY OF OCTOBER, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Appellant present.
2. 2nd Appellant present.
3. 3rd Appellant present.
4. Miss Akunja for the Respondent.