



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 151 of 2015

BENSON WAMBUA MUASYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 2911 of 2013 delivered by Hon. E. Nyongesa, SRM on 8th July, 2015).

JUDGMENT

Background

Benson Wambua Muasya, the Appellant herein, was charged with the offence of robbery (sic) with violence contrary **to Section 295 as read with Section 296(2) of the Penal Code**. The particulars of the offence were that on 19th June, 2013 at around 14.30 Hrs, at Total Petrol Station along Enterprise Road Industrial Area in Nairobi within Nairobi County, jointly with others not before court, while armed with pistols, robbed Don Otieno Orimba of his wallet, a co-operative bank ATM card, an identity card and Kshs. 8,500/- in cash and immediately after such robbery used actual violence to the said Don Otieno Orimba.

The Appellant was found guilty and sentenced to suffer death as prescribed by the law. He was dissatisfied with the conviction as a result of which he preferred the instant appeal. His grounds of appeal were filed contemporaneously with the written submissions on 11th October, 2017. They were that he was not properly identified, that crucial witnesses were not called, that there were doubts in the manner of his arrest, that investigations were shoddy and that his defence was rejected without cogent reasons.

Submissions

In his written submissions, he took issue with the fact that he was not properly identified. He submitted that although the robbery took place in broad daylight in which case it would be assumed that the conditions for identification were conducive, none of the witnesses recorded that they would have been able to identify the person involved in the robbery. They also did not give a description of the assailants in the initial report to the police. Furthermore, their statements were recorded after the Appellant had been arrested which was prejudicial to him. This, according to the Appellant was vindicated by the fact that the occurrence book entry was made on 27th June, 2013, two days after his arrest. He urged the court to take note of the fact that during and after the robbery, the witnesses were frightened which made it even more difficult for them to identify their assailants. Therefore, even if it was during the day, there was a probability that the witnesses mistook who attacked them. He also took issue with the fact that none of the stolen properties were found in his possession. Furthermore, the identification parade which was carried out and in which he was identified was faulty because the witnesses saw him before participating in the parade.

The Appellant submitted that crucial witnesses were not called. He cited the police officers who arrested him which was fatal as it left a void on the evidence regarding how he was linked with the robbery. It was his case that the offence was not proved beyond a reasonable doubt and he urged the court to allow the appeal.

Learned State Counsel, Ms. Sigei for the Respondent in her oral submission opposed the appeal. She submitted that the Appellant was properly identified both physically and in the identification parade. He also did not give an account of what he was doing and where he was on the date of the robbery. On the Appellant's contention that he was under-age when he was charged, counsel urged the court to dismiss the same because the issue was not raised during the trial. In any case, he did not provide evidence that he was seventeen years old at the time. She submitted that all the ingredients of the offence of robbery with violence were established and that the death sentence imposed was legal. It was her case that the appeal was not meritorious and prayed that it be dismissed.

Evidence

PW1, Mesh Odhiambo Owuor recalled that on 19th June, 2013, at around 2.30 p.m. he was at work at Total Petrol Station situated along Enterprise road conversing with his brother, one Don Otieno Orimba, near the exit of the petrol station when he saw two men walking towards them. One was around 6 feet tall, dark and slim with shaggy hair while the other was about “5 feet something” tall, dark and slightly young in his teenage years. When the men got to around 50 feet from where they were standing they changed direction and started approaching them. The short one whom PW1 identified as the Appellant pulled his jacket aside and showed him a pistol.

When PW1 saw the pistol, he moved a few steps back. The Appellant then pulled out the pistol and pointed it at him before asking for money. PW1 shook his head to indicate that he did not have money on him. At the same time, the Appellant’s accomplice was struggling with PW1’s brother robbing him of his his wallet, which caused the Appellant to shift his attention to PW1’s brother’s side. The Appellant warned PW1’s brother before cocking the gun and shooting in his direction. Two or three other men approached them from the direction of the petrol station and started ransacking their colleagues. Thereafter, they ran into the nearby Mukuru kwa Njenga slums while shooting in the air to disperse members of the public.

On 26th June, 2013 police officers informed him that they had arrested some suspects and he should go to the police station and take part in an identification parade. He was able to identify the Appellant. He testified that this was possible because the robbery took about five minutes which was sufficient time for a positive identification.

PW2, Don Otieno Orimba a businessman recalled that on 19th June, 2013 at about 2.30 p.m. he was headed to Jomo Kenyatta International Airport when he passed by PW1’s workplace. Whilst corroborating the evidence of PW1 he testified that four men went to the petrol station. One of the men ordered another to shoot before one of them cocked a gun and shot which led him to lie on the ground. PW1 stood by a wall in fear while some men ransacked his pockets. PW2 was robbed of his wallet which had Kshs. 8,500/- in cash, his identity card, his co-operative bank ATM card, his NHIF card and other personal items.

He testified that they reported the incident to policemen who were on patrol in the area. They later reported the matter at the police station and recorded statements. His evidence was that he did not see the robbers clearly as he was lying on the ground. He only saw them as they were walking away. After the arrest of the suspects, he was called to the police station to identify them in an identification parade but was not able to. Nothing stolen from him was recovered.

PW3, IP Raphael Mutiso Mutune the then deputy OCS at Industrial Area Police Station conducted an identification parade in which the suspect was the Appellant. PW1 positively identified the Appellant. He said he was not satisfied with the conduct of the parade but signed the parade forms.

PW4, a SGT at CID Makadara was the investigating officer. He testified that investigations followed a report of the robbery on 19th June, 2009. The arrest was effected by AP Wachira and his team from Mariguini Ap Camp. He confirmed an identification parade was conducted in which the Appellant was positively identified. He preferred the charges against the Appellant.

The Appellant gave a sworn statement of defence in which he denied committing the offence. He recalled that on 25th June, 2013 he went to work before heading home at around 2.00 p.m. On his way home he was arrested alongside others after he failed to produce an identity card as he was still 17 years old. He was booked at Mariguini Police Post where the officers demanded Kshs. 3,000/- for his release which his family could not raise. That is when he was framed of committing the offence.

In cross examination he stated that he informed the court he was 19 years old but just because he did not understand what was happening in court. With respect to the identification parade, he stated that both PW1 and PW2 saw him before the parade was conducted.

Determination

It is now the onerous duty of this court to determine whether the case was proved beyond a reasonable doubt. The Appellant in this matter raised a number of issues relating to the identification evidence. The first was that the witnesses did not give a description of their assailants in the initial report. The importance of an initial report was set out in *Terekali s/o Korongozi & others v. R*[1952] 19 EACA 259, thus:

“Their importance can scarcely be exaggerated for they often provide a good test by which the truth and accuracy of the later statements are to be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often come out in a first statement taken from a witness at a time when recollection is very fresh and there had been no opportunity to consult with others.”

According to the investigating officer, the initial report did not contain a description of the suspect. This was further compounded by the fact that the witnesses made statements a day after the Appellant was arrested. This was vindicated by PW2’s evidence that he was called to participate in an identification parade two hours after he made his statement. This means that any description of the Appellant could not be relied upon.

The court was more perturbed by the manner in which the identification parade was carried out. The same was conducted simultaneously for both witnesses. Section 6(iv) of the Force Standing Orders provides that each witness must take part in his own independent parade. PW3 testified that after the Appellant agreed to be positioned between the 3rd and 4th member of the parade he “called the complainant and a witness called Mesh Odhiambo to my office”. Later on he testified that he “took the complainant and brother to the place” which is followed by the identification of the Appellant. This is corroborated by the recording of PW1 and PW2 as the witnesses in the identification parade form. PW3 did not testify to how the other witness, the complainant, failed to identify the Appellant. This raises a serious question on the propriety of the identification parade and in the circumstances the court cannot rely on the evidence arising from the parade.

I conclude that the identification of the Appellant was not safe to warrant his conviction. Although the elements of the offence of robbery

with violence were established, for want of a positive identification, I am unable to conclude that the Appellant was culpable.

I do, in sum, find that the case was not proved beyond a reasonable doubt. I quash the conviction, set aside that sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 22nd day of November, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Miss Sigei for the Respondent.*