REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.48 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2199 & 2214 of 2013 by: Hon. A.P. Ndege – P.M.)

1. JAMES MWANGI WACHIRA

2. JOSEPH MUTHEE NYAMBURA

3. IAN WARURU MUTHONI

4. PAUL NJOROGE WANJIRU..APPELLANTS

V E R S U S

REPUBLIC...RESPONDENT

J U D G M E N T

The four appellants namely, James Mwangi Wachira Joseph Muthee Nyambura, Ian Waweru Muthoni and Paul Njoroge Wanjiku (1st to 4th appellants) were convicted by Hon. Ndege – P.M. on 2/9/2014 for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge are that on 14/12/2013 at Maina Market, within Nyahururu Town, Laikipia County, jointly robbed Henry Cheruiyot of Kshs.3,000/=, National Identity Card, Kshs.20/= Safaricom Credit all worth Kshs.3.220/= and at the time of the robbery, threatened to use actual violence on the said Henry Cheruiyot.

The appellants were sentenced to suffer death. They are aggrieved by the said conviction and sentence and each appellant filed an appeal. Before the hearing, the appeals Nos.161/2015, 164/2015, 165/2015 and 184/2015 Nakuru were consolidated to proceed as Nyahururu CRA.48/2017.

The 1st and 4th appellants appeared in person while learned counsel Mr. Obutu appeared for the 2nd and 3rd appellants. The state was represented by Mr. Mutembei.

The first appellant, James Mwangi filed his grounds of appeal on 6/8/2015 and further grounds on 2/5/2017. The grounds of appeal can be summarized as follows:

> ***(1) That the trial court erred in convicting him based on uncorroborated evidence of identification and recognition;***
>
> ***(2) That the court erred in accepting the confession which was irregularly obtained and which was a violation of Article 49(1)(d) of the Constitution;***
>
> ***(3) That the conviction was based on a defective charge sheet;***
>
> ***(4) That the appellant was not provided with the investigating officer's statement;***
>
> ***(5) That the appellants defence was not considered;***
>
> ***(6) That the charge was not proved to the required standard;***
>
> ***(7) That the appellant requested for O.B.25/16/12/2003 in Cr.2200/2013 in which he was acquitted for same offence.***

I have looked at the grounds of appeal of the other appellants and they are similar.

Further grounds were filed by counsel for 2nd and 3rd respondents for the effect that:

(8) The court failed to evaluate the prosecution's contradictory evidence to the benefit of the appellants.

The appellants therefore urge this court to quash the convictions and set aside the sentences and set them free.

The appeal was opposed by counsel for the respondent. The 1st and 4th appellants had nothing to add to their grounds. However, Mr. Obutu made submissions and argued all the grounds together. He urged that the evidence does not support the charge in that the complainant never mentioned having been robbed of a scratch card; that PW1's evidence was that 4 people emerged from behind and he had no occasion to see them; that no evidence was adduced as to the intensity of the light at the scene; that PW2 is not a credible witness because his evidence as regards how the 3rd appellant was arrested differs from PW1 & 3; that PW3 found 3rd appellant standing outside a shop and arrested him and the court was not told what the duration between the attack and arrest was; that PW3 never mentioned 2nd appellant in his statement and admitted to have been told the name Ian. Counsel further submitted that PW4 arrested 2nd appellant on suspicioun for having been arrested in other cases. Counsel argued that identification parade should have been conducted to verify the identification of the appellants. Counsel also argued that the prosecution evidence (PW1, 2, 3, 4 & 5) was contradictory and the trial court failed to analyze the evidence.

On the other hand, Mr. Mutembei argued that the ingredients of an offence of robbery with violence was proved; that PW1 and 2 were attacked, PW2 freed himself called his father who on appearing, the robbers ran off except one who appeared drunk; that on interrogation he led to the arrest of the 3 others who were then identified by PW1 & 2. Counsel denied that there were any contradictions in the prosecution case; that PW2 recognized the appellants whom he knew before while PW1 recognized 3rd appellant as he was attacked where there were security lights. Counsel also submitted that the defence was considered and it only dwelt on the arrest of the appellants.

It is the duty of this court, as the first appellate court, to examine all the evidence tendered in the trial court, analyze it and make its own determinations and draw its own conclusions. (***See Okeno v Republic 1972 EA 32***). To achieve that end, I must review the evidence in the trial court.

PW1 Henry Cheruiyot, the complainant, was in company of PW2 Joseph Ndirangu Kingori at Maina in Nyahururu at about 10.00 p.m. They were coming from the shop when they were attacked by 4 men who approached them from behind; that 3 men held PW1, they removed his trouser and took Kshs.3,000/= and staff identity card from him. The 3 threatened PW1 with violence and told him to run away. In the meantime, one of the men attacked PW2. Meanwhile, PW2 managed to free himself and went to call the father (PW3), PW3 came to the scene but 3 of the robbers had escaped while one who appeared drunk remained near the road where there were security lights; that PW2 identified him and they took him to the Administration Police Camp. PW1 identified accused 3 – Ian as the person they arrested at the scene. PW1 denied having known 3rd appellant but used to see him. PW1 also denied having seen the other three robbers who escaped.

PW2 further stated that he overpowered the person who attacked him, made him fall and escaped and that he grabbed 3rd appellant and made a call to his father. PW2 said he was able to identify the other 3 robbers who attacked PW1 using security lights and that he knew them before that day; and identified them by name.

PW3 Bernard King'ori, father of PW2 was in his house about 10.15 p.m. when PW2 called him on phone and he rushed to the scene. He found PW1 & 2 were struggling with 3rd appellant Ian, while Joseph 2nd appellant and Njoroge 4th appellant were behind them. He did not see 1st appellant then. He helped arrest the 3rd appellant and took him to Administration Police Post where they recorded statements and went in search of others; that 2nd appellant was arrested while gambling; PW3 admitted knowing 1st appellant who had a case with PW2 there before.

PW4 Sgt James Njuguna of Maina Administration Police Camp told the court that on 14/12/2013, PW1 and 2 took Ian 3rd appellant to the camp with allegation of assaulting PW1; that on 10/12/2013, PW1 called to say that he had seen Joseph Muthee (2nd appellant) whose number he had. He called 2nd appellant to the camp and arrested him and that the complainant identified him. PW4 also sent for 1st appellant from the bus stage and he arrested him and the complainant identified him; that complainant also pointed out 4th appellant outside a bar.

PW5, PC Jarso Galgalo was investigating officer in this case which was assigned to him on 15/12/2012. He found when the four appellants had been arrested. He visited the scene, where he found that there were street lights. PW5 only knew 4th appellant out of the 4 suspects.

When placed on their defence, each appellant opted to make an unsworn statement. The 1st appellant, James Mwangi Wachira recalled that on 17/12/2013, he was going about his business as a motorcycle rider (boda boda) when about 11.00 a.m., police arrested him, took him to his home, searched the home, found nothing and he was charged with the co-accused.

The 2nd appellant Joseph Muthee recalled that on 15/12/2013, when going about his chores, a police officer called him to go to see him which he did. The complainant was called on phone but did not come and he was taken to Nyahururu Police Station. He denied having been involved in attacking PW1.

The 3rd appellant, Ian Waruru Muthoni, said he works as a butcher. He stayed at the butchery till 10.00 p.m, then went to a club. When coming from the club, he was stopped by 3 people and he was arrested and taken to Nyahururu Police Station. He denied knowing anything about the offence.

DW4 the 4th appellant Paul Njoroge went to the club at 10.00 p.m. on 16/12/2013. When leaving the club he was arrested together with others who were released next day. Police told him he was a suspect of theft but the complainant did not go to identify him but he was

charged. He denied knowing the other appellants.

Before the hearing of the appeal, the appellants stated that they no longer required O.B.25 of 16/12/2003 as they had seen it.

The offence of robbery with violence will be proved when any of the following ingredients are present and proved:

> ***(1) If the offender is armed with any dangerous or offensive weapon or instrument or***
>
> ***(2) If he is in the company with one or more other persons or***
>
> ***(3) If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***

In ***Oluoch v Republic (1985) KLR 549,*** the court held that proof of one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296(2) of the Penal Code.

In the instant case, PW1 was attacked by three men while the other one attacked PW2 and I am satisfied that one of the ingredients already exists.

This offence was allegedly committed about 10.00 p.m. It was at night, on a public road. This case therefore turns on the question of identification. No doubt identification was under unfavourable conditions. PW1 said he was attacked from behind by three people and he was therefore not able to see or know any of the robbers. PW1 did not identify any of the robbers. The trial court's finding that all the complainants saw and identified the robbers was therefore erroneous.

It means that the only identifying witness is PW2. Being the only identifying witness, this court warns itself of the dangers of founding a conviction on the evidence of one witness.

In the case of ***Wamunga v Republic (1989) KLR 424*** the court of Appeal held:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more or mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

See also ***Roria v Republic (1967) EA 583***, and ***Republic v Turnbull (1977) QB 224***. The latter case provides guidelines in so far as identification as concerns what the court has to consider; for example the intensity of the light; where was the source of the light? how far the light was from where the accused was; did the witness know the suspect; how long had he known him, how long did he have him under observation, e.t.c.

I will go ahead to examine PW2's evidence on the identification. PW2 was attacked by one person. PW2 said he overpowered the person, made him fall and he escaped but PW2 did not go for that he called his father on phone PW3 and went back and caught the 3 rd appellant. PW3 confirmed that by the time he reached to the scene which was not far, he found PW2 holding the 3rd appellant. Both PW2's evidence was corroborated by PW1's evidence that the 3rd appellant did not escape but remained nearby as he appeared drunk. PW1, 2 & 3 all told the court that there were electric lights at the scene and their evidence was corroborated by that of the investigation officer PW5 who later visited the scene and confirmed that the place had security lights. From the foregoing, I am satisfied that PW2 did arrest the 3rd applicant at the scene and was able to see him very well using the available security lights and arrested him at the scene. I find that the 3rd appellant was the person who attacked PW2 but he was overpowered by PW2 and never escaped from the scene.

As respects the 1st, 2nd and 4th appellants the only identifying witness is PW2. PW2 told the court that he knew all the accused before as they hail from the same village. As regards 1st appellant, apart from PW2 saying that he saw the 1st appellant, he never told the court what in particular the first appellant did to PW1 or how he was dressed neither did he describe him or name him to the police soon after the event.

As regards the 2nd appellant, PW2 did not tell the court what he did during the robbery nor did he name him or describe him to the police immediately after the attack. The same applies to the 4th appellant. Despite the fact that PW2 claimed to have known the 1st, 2nd and 4th appellants before, upon reporting to the police, he never gave the police their names. During cross examination in court, the witness' statement to the police was referred to and there was no mention of the names of the suspects. I believe the 1st, 2nd and 4th appellants were arrested after the 3rd appellant allegedly named them as his accomplices.

The importance of a first report to the authorities cannot be underscored. In the case of ***Terekali & others v Republic (1952) EA 259***, the then East African Court of Appeal had the following to say:

> ***"Evidence of the first complains made to a person in authority has not been adduced………their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can 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 has been no opportunity for consultation with others."***

As observed above, PW2 never mentioned the names of the 1st, 2nd and 4th appellants to the police even as he handed over 3rd appellant to

the police. He did not even mention them in his statement. No good reason has been advanced by PW2 as to this failure to name the robbers soon after the incident. PW2's mentioning of 1st, 2nd and 4th appellants was an afterthought and the only conclusion I can draw is that PW2 never saw the other three assailants. The attack happened so fast, PW2 was also under attack trying to subdue the person who had accosted him and I doubt that he was able to see anybody else. As found above the 1st, 2 and 4 appellants must have been arrested following their being named by 3rd appellant.

The 3rd appellant is an accomplice of the three who escaped. 3rd appellant did not record a confession with the police or judicial officer. Neither did 3rd appellant admit in court that he was with 1, 2 & 4th appellants.

The rule of practice is that accomplice evidence is of the nature that requires corroboration. In the case of ***Kinyua v Republic (2002)1 KLR 257***, the Court of Appeal stated as follows:

> ***"7. The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself… on the dangers of doing so.***
>
> ***8. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail; if the court decides that the witness though an accomplice witness is credible, then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.***
>
> ***9. If the court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence."***

In the instant case, the accomplice evidence if any was not availed to the trial court for the court to consider. I believe the court based the conviction of the 1st, 2nd and 4th appellants on hearsay evidence of the 3rd appellant led to the arrest of the 1st, 2nd & 4th appellants.

PW3, who is PW2's father was called to the scene of crime by PW2 after the robbery. PW2 said that when PW3 arrived, he found when PW2 had already arrested the 3rd appellant. Neither PW1 nor PW2 told the court whether PW3 found the 1st, 2nd or 4th appellants at the scene. PW3 told the court that he found 2nd and 4th appellants at the scene and recognized them because they are people he knew but that they ran away. Curiously however, PW3 never mentioned the names of the 2nd appellant in his statement to the police. During cross examination by the 4th appellant, PW3 said that he did not know the 4th appellant properly before but knew him during that incident.

He said ***"I know you. I have known you for……. I knew you in this incident. I know the others very much. I did not know you before. We however stay in same area so I used to know you before as a village mate."***

Soon after stating the above, PW3 went on to contradict himself when he said: ***"I called out your names and Jose's name."***

If PW3 did not know the 4th appellant before, how could he have called him by name? These contradictions raise doubt in my mind as to whether PW3 found the 2nd and 4th appellant at the scene of crime or that he identified them. As found earlier, he must have heard the names from the 3rd appellant.

Whether the charge was defective, counsel argued that the evidence did not support the charge because the complainant never mentioned that he was robbed of a scratch card worth 20/=. The fact that PW1 did not mention one of the items that were allegedly stolen from him cannot make the charge defective. The charge was properly framed and the particulars of the charge were specified. Cure for such defect is available by virtue of Section 382 of the Criminal Procedure Code which states:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

That ground must fail.

I have read the judgment of the lower court and I am satisfied the court did summarize and analyze the evidence as required under Section 169 of the Criminal Procedure Code. However, I do not agree with some of the trial court's findings on the 1st, 2nd and 4th appellants which I have alluded to earlier, that PW1 & 2, saw and identified the robbers. But I am satisfied that the 3rd appellant was arrested at the scene soon after the robbery. He never managed to get away.

Whether the 3rd appellant had a common intention with the others who robbed PW1; I believe that even if the 3rd appellant did not take anything from PW2, he was with those who robbed PW1. This is because the attack was spontaneous and the 3rd appellant never disassociated himself from the others. Section 21 of the Penal Code provides what common intention which was discussed in the case of

Dickson Mwangi Munene & another v Republic 314/2011 (2014 KU)

> "***Where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention, it implies a pre arranged plan. Although common intention can develop in the cause of the commission of an offence."***

> ***In Republic v Tabulayenka S/O Kirya (1943) EACA 51*** the court said ***"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."***

In the instant case, the attack was simultaneous as PW1 & 2 walked together and were attacked from their back. In fact the 3rd appellant purported to name those he was with though. It is accomplice evidence that was not corroborated and hence did not meet the standards of admissible evidence. I am convinced beyond any doubt that the 3rd appellant had a common intention with those who escaped with PW1's property.

The appellants also complained that they were not given the investigating officer's statement. That complaint was never raised in the Lower Court. Besides, the investigating officer testified and the statement could have referred to. There is no prejudice that was suffered as a result of failure to get the statement.

I will find that the 3rd appellant was with others when they attacked and stole from PW1. The 3rd appellant was properly convicted and I confirm the said conviction. However the conviction of 1st, 2nd and 4th appellants is unsafe and I quash their convictions, set aside that sentence and set them at liberty forthwith unless otherwise lawfully held.

In view of the recent decision by the Supreme Court in Petition ***15/2015 Francis Karioko Muruatetu & another v Republic*** which challenged the Constitutionality of the death sentence, the court will take the 3rd appellant's mitigation and reconsider the sentence meted by the trial court.

Dated, **Signed** and **Delivered** at ***NYAHURURU*** this ***20th*** day of ***December***, **2017**.

....

R.P.V. Wendoh

JUDGE

Present:

Mr. Mutembei- for Prosecution

Elizabeth – court assistant

Appellants - (all 4) present