



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 9 OF 2015

JULIUS MATI KAMITI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal arising out of the judgment and sentence of P.N. Gesora SPM in Criminal Case No. 351 of 2012 delivered on 12th September 2014 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged in the original trial Court with the offence of robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the offence were that that on the 26th January 2012 at Kavumbu sub-location, Masii Division, Mwala District within Eastern Province, the accused armed with dangerous weapons or offensive weapons namely panga and an axe jointly with others robbed Augustine Munyao Kioko of Kshs. 19,500/=, and immediately before or immediately after the time of robbery used actual bodily violence to the said Augustine Munyao Kioko.

The Appellant was arraigned in the trial court on 27th February 2012 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, has preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition of Appeal dated 23rd December 2014 and filed in Court on 24th December 2014.

These grounds are that there the trial magistrate erred in law and fact by:- convicting the Appellant when there was no evidence adduced to prove the charges to the standard required in law; not properly evaluating the evidence on record; not considering material inconsistencies in the evidence adduced by the prosecution witnesses; failing to consider flaws and irregularities in the investigations; shifting the burden of proof to the Appellant; considering irrelevant evidence and extraneous matters, disregarding and not considering the Appellant's defence and submissions; failing to treat with circumspection the evidence with regards to identification; and by failing to identify the issues for determination.

The Appellant's Advocates, Karanja Kiarie & Company Advocates, filed submissions dated 7th July 2015 which were highlighted by learned counsel, Mr. Karanja during the hearing. The Appellant's counsel gave a summary of the evidence by the various prosecution witnesses, and the inconsistencies and contradictions in the evidence of PW1, PW2 and PW3 as regards the source of light at the time of the

alleged attack and how they came to know of the Appellant. Further, that there was also inconsistency in the evidence of PW5 and PW6 as to the filling of the P3 form.

It was further submitted that the conduct of the identification parade was not done in accordance with the law, as the Appellant's name was called out and made known to PW1, PW2 and PW3 during the identification parade, and the Appellant was shown to the PW1, PW2 and PW3 before the identification parade. The decisions in **Kinyanjui & 2 others vs Republic (1989) KLR 60**, **Samuel Kilonzo Musau vs Republic (2014) eKLR**, and **Ntelejo Lokwam vs Republic, (2006) eKLR** were relied on in this regard.

Lastly, it was submitted that PW6 who was the investigating officer did not conduct any credible investigation of the crime, and knew and was intent on framing the Appellant, and that the trial magistrate did not consider the issues raised as to the above inconsistencies and irregularities and the Appellant's alibi and thereby reached the wrong conclusion.

The Prosecution opposed the appeal by way of written submissions filed in Court dated 7th September 2015 by Mrs Tabitha Saoli, the Prosecution counsel, and by oral submissions made during the hearing of the Appeal on 19th November 2015 by Mr. Shijenje, learned prosecution counsel. They submitted that the witnesses who testified got to know of the Appellant's name on the date of the identification parade due to the fact that they had no familiarity with him and only knew him by his nickname "Mate" as he was a bodaboda rider in the area, hence his identification.

It was further submitted that the P3 form was properly filled by a qualified clinical officer. On the issue of the torch the prosecution argued that all the witnesses confirmed that there was light from the torches that aided them in seeing the Appellant, and that the colour of the torch was a non-issue. Lastly, it was submitted that if the Appellant sought to rely on the defense of alibi, he should have informed the prosecution at the earliest time possible, and not during defense, in order to give prosecution enough time to establish reasonable time as regards the alibi establishes reasonable doubt. The decision in **Basil Okaroni vs Republic, (2013) eKLR** was cited in this respect. It was the Prosecution's submission that the decision of the trial Court was well reasoned and supported by the evidence.

As this is a first appeal, we are required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that we never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called seven witnesses. PW1 was the complainant Augustino Munyao Kioko, who testified that on 26/1/12 at 11.00 p.m. they were sleeping in their house together with his wife and two children when he was woken up by banging on the door. He put on a torch and moved to the door where he met with the Appellant wielding an axe and a torch. He stated that his torch was brighter than that of the Appellant and he was able to see him, and that he had not seen the Appellant before that day. PW1 stated that he disarmed the Appellant, who snatched PW1's torch and attacked him with a panga he got from one of the other assailants. Further, that the Appellant cut him on the head thrice. He further stated that he was also cut on the back and neck before falling down and losing consciousness. PW1 was taken to hospital where he was admitted for 2½ weeks.

PW1 testified that he was robbed of Kshs. 19,500/= from his wallet that day, which was the proceeds from sale of his cows on that day which was a market day. He later filled a P3 form upon recovery. He also testified that he had been called for an identification parade at Masii police station and was able to identify the Appellant during the parade. He stated that there different people of different sizes at the parade. He was able to pick out the Appellant whom he said that he had seen for the second time on that day. Upon cross-examination PW1 stated that he heard the investigating officer call out the Appellant's name before the identification parade. He noted that he started seeing the Appellant who was a bodaboda operator after the incident.

PW2 was Regina Mutindi Kiilu, the complainant's wife, who testified that on 26/1/12 at 11.00 p.m., she was at home with her family when she heard a bang on the door. She stated that PW1 woke up and she followed him to the corridor when they encountered the robbers who had gained entry into the house. She

stated that she was able to see 2 assailants. Further, that she was pushed into the children's room by one of the assailant while the other one attacked PW1. She stated that the Appellant was carrying an axe. She recounted that she was later taken by the Appellant to her bedroom where they demanded for money, and that she removed the PW'1s wallet from his trouser pockets and gave it to him.

PW2 further testified that she was able to see the Appellant's face with the aid of the torches that were on during the attack. She stated that she saw other attackers running away through the window. Further, that after the attackers had left, PW2 and her children called for help and PW1 was taken to hospital where he was admitted for 2 weeks. PW2 stated that they were later called for an identification parade where she picked out the Appellant in a group of 9-10 people. She also stated that she had not seen the Appellant before the parade, and heard his name called out before the identification parade.

PW3 was Mercy Munyao, the complainant's daughter, who testified that on 26/2/12 at 11.00 p.m. she was at home sleep when she heard knocking on the door. She stated that people entered their house and there was commotion for about an hour. She recounted that her mother was pushed into their bedroom and they were ordered not to look at the robber. She stated that she saw four people but only two entered the house. She stated that she managed to see one of the robbers through the aid of the torches by the attackers and was able to identify him as she had seen him before at the local market at the bodaboda stage. She recognised him as the Appellant who had taken her mother from their bedroom. She confirmed that her father had been severely injured and had fallen on the floor. She stated that she did not hear the assailants demanding for money.

PW4 was I.P Joseph Muguna who testified he had been approached by the investigating Office PC Adan Gedi to conduct the identification parade. He proceeded to conduct the parade and he described the procedure he used. He stated that PW1; PW2 and PW3 went on to identify the Appellant by touching him. Further, that the Appellant signed off as having been satisfied with the parade. PW4 stated upon cross-examination that the identification parade was conducted in the report office, and that he was not aware of what transpired in the branch office where PW1, PW2 and PW3 were waiting before the identification, or in the cell where the Appellant was, and that he did not hear the Appellant's name being called.

Daniel Kioko Nzioka, a clinical officer was PW5, and he recounted that he had filled a P3 form for PW1 on 23/7/12. He stated that the complainant had first been seen at Masii Health Centre before being moved to Bishop Kioko Hospital. He stated that PW1 had sustained cuts on his head, back, neck and knee. Further, that he relied on the on PW1's treatment notes to fill the P3 form.

PW6, PC Ibrahim Gedi Muslim, testified that he is currently attached to Machakos Police Station but was initially at Masii Police station, where on 27/1/12 he received a report that the complainant had been attacked on the previous night. The report was made by PW2 and PW3. Further, that they relayed what had transpired during the night. He produced the axe used during the crime before court. He stated that upon discharge the complainant had at first told him that the stolen amount was Kshs. 15,960/=, but upon full recovery he stated the amount to be Kshs. 19,500/=.

He stated that PW2 and PW3 had already identified one of the robbers as a bodaboda rider as they recorded a statement with him. She noted that the Appellant was familiar to him as a common face in the market. He stated that the reporters had called him by the name "Mate". He stated that he charged the Appellant with the offence after the identification parade had been conducted.

The last prosecution witness was Dr. Justus Obiero (PW7), a doctor at Bishop Kioko Hospital, who stated the complainant had been admitted to the said hospital on 27/1/12 and discharged on 3/2/12. He stated that complainant had multiple cuts on the scalp, cuts on the neck and back and left knee. Which been inflicted by a sharp object. He produced the medical reports in evidence.

After the close of the prosecution case, the Appellant was put on his defence. The Appellant gave sworn evidence and called 2 witnesses. He stated that on 26/1/12 he was working at Masii the whole day as a bodaboda operator. He stated that he had seen his cousin at home treating their cows and later on he went

to sleep with his wife. He stated that he continued working until 28/2/12 when he was arrested at his work station. He was taken to Masii police station where he was told the charges which he claimed to know nothing about. On the next day he stated that a parade was conducted. He stated that there were five people at the parade. He also said that he saw the complainant and PW2 for the first time that day.

DW2 was the Appellant's wife Jennifer Mwende who stated that she has been married to the Appellant for 3 years, and had been living together in the same compound with his parents. She stated that on 26/1/12 she was at home and the Appellant came in at 9.30 p.m and they ate supper and slept together. The following day he woke up as usual at 7.00 a.m. and left for work. She stated that the Appellant had been injured in 2011 and has had a limp to date.

DW 3 was Dunson Kimiti Ndunda the Appellant's father. He stated that he was at home on 26/1/12 and the Appellant had come home at 9.00p.m. He stated that he saw him but they did not talk. He further stated that the Appellant had taken his supper and went to sleep thereafter. He confirmed that DW2 was married by the Appellant but there had been no marriage ceremony.

We have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise three issues. These are firstly, whether there was proper identification of the Appellant; secondly, whether the Appellant's conviction for the offence of robbery with violence was based on consistent and sufficient evidence; and lastly, whether the trial Court in its judgment considered the issues raised by, and the defence of the Appellant.

On the issue of identification, it was urged that the conduct of the identification parade in which the Appellant was identified was flawed. Identification parade procedures are regulated by Police Force Standing Orders now under the National Police Service Act 2011, and previously under the Police Act. (Cap 46) which has since been repealed. The procedure for identification parades were also laid out in the cases of **R V. Mwangi s/o Manaa (1936) 3 EACA 29** and **Ssentale v Uganda (1968) E.A.L.R 365**. The rules include the following:

- The accused has the right to have an advocate or friend present at the parade;
- The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
- Witnesses should be shown the parade separately and should not discuss the parade among themselves;
- The number of suspects in the parade should be eight (or 10 in the case of two suspects);
- All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
- Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
- As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

In the present appeal, PW4 was the police officer who conducted the identification parade, and he described the procedure he used as follows at pages 41-42 of the record of proceedings in the trial court as follows-

“I went to the cells where accused was held and introduced myself to him and the purpose of my mission and he accepted to participate. I arranged the members of the parade who have similar features as accused from cells and general public.

I then called the witnesses whom I had accommodated in the crime branch office. I asked accused whether he has friend to witness the same and he called his employer one Japhet Muthusi Kanyonda and his father Danson Kivuti Ndunda.

I then conducted the parade. The investigating officer never took part in the arrangements or conduct the same. The same was conducted within Masii police station compound. The parade

started at 10.12 am and ended at 11.20 am, accused counter signed the parade form.

I invited accused to take the position he wanted and he opted to stand between the 3rd and 4th witness. I called Augustino Munyao Kioko who came and identified the witness by touching. Accused opted to stay in the same position when Mercy Munyao Kioko came to do the identification and she also touched him.

I asked accused for his remarks and he said that the witnesses were known to him as they are his neighbours. He was however satisfied with the parade and signed on it. I also signed the same, I wish to produce the form.”

While the actual conduct of the identification parade on its face appears to have been conducted according to the applicable rules and procedure, there were glaring errors in the procedure before the conduct of the parade which greatly reduces its probative value. The Appellant in his evidence gave an account of what happened before the identification parade as follows at page 71 of the proceedings of the trial court:

“On that day a police officer came to the cells and opened the door. We were 5 of us inside and he assigned one of us to go and empty the bucket containing our urine. PC Gedi (PW6) came n overruled his colleague and he directed that I do it. He led me to the pit. He directed me to take a long route to the pit. My friend Makau Muta had come to see me. On my return he told me to wash my hands near crime office. Five minutes later the parade was conducted”

Upon cross-examination PW4 who conducted the identification parade stated that the witnesses who identified the Appellant were kept in the branch office before the identification parade, and that there was a window therein that one could see through. He also stated that he was not aware what had transpired in the branch office before the identification parade. In addition, PW1, PW2 and PW3 testified upon cross-examination that they were told the Appellant’s name and heard the Appellants name being called by the investigating officer (PW6) before the identification parade.

PW6 stated that at the time of the report of the attack one of the attackers had been named as “Mate” who was a common figure in town who he knew, and was able to arrest him. He however denied mentioning the name Mate during the parade. Lastly PW1, PW2 and PW3 all the witnesses were put together in the same room before the identification parade, even when PW3 had stated that she knew the assailant facially. In a nutshell, the identification parade was not conducted with fairness and important rules were disregarded.

Failure to adhere to the identification parade guidelines will affect the evidential value of a resulting identification, and the Court of Appeal held as follows in this regard in **Samuel Kilonzo Musau vs Republic (2014) e KLR:**

“The purpose of an identification parade, as explained in KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

In addition, the identification by PW3 of the Appellant at the time of the alleged attack on the night of the robbery was that of a single identifying witness, as PW1 and PW2 stated that they had never seen the

Appellant and did not know him before the said attack. In *Maitanyi vs. Republic*, (1986) KLR 196 the Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

We are also persuaded by the holding in the case of *Wamunga vs. Republic*, (1989) KLR 424 in which it held *inter alia* as follows:-

“1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”

In the present appeal, the robbery took place at night. PW3 testified that the robbers ordered her to stay in her bedroom during the robbery, and she saw the Appellant by way of light from a mobile phone when he came to get PW2 from her bedroom. She also gave contradicting evidence by stating that she saw the Appellant by way of torch light. It was not clear from her evidence who had the torch and whether it was being shorn on the Appellant. PW3 further testified that there other assailants besides the Appellant outside her bedroom.

It is our view that due to the prevailing circumstances when the attack happened, the evidence of PW3 required corroboration, as the said circumstances were difficult in terms of the available lighting and length of time in which PW3 observed the Appellant. We are thus of the opinion that considering the conditions of identification by PW3 and the flawed identification parade, it was unsafe to convict the Appellant.

This finding is sufficient to dispose of this appeal as the identification evidence is the only evidence that linked the Appellant to the commission of the offence he was charged with. We accordingly quash the conviction of the Appellant for the charge of robbery with violence contrary to Section 296(2) of the Penal Code, and set aside the sentence imposed upon him for this conviction. We also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF JANUARY 2016.

P. NYAMWEYA

E. MURIITHI

JUDGE

JUDGE

