



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 151 OF 2014

THOMAS MUHINA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 598 of 2013 in the Principal Magistrate's Court at Taveta delivered by Hon R.M. Ondieki (PM) on 3rd July 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Thomas Muhina, was tried and convicted by Hon R.M. Ondieki, Principal Magistrate for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death as prescribed by the law.
2. The particulars of the charge were that :-

“On the 18th day of July 2012 at around 5.30 pm along Eldoro Kitobo Road within the Taita Taveta County, jointly with others not before the court, being armed with (sic) offensive weapon namely a panga robbed ROBERT OKWEMBA cash 67,000/=, Co-operative ATM Card and Administration Police certificate of appointment all valued at Ksh 67,000/= and immediately before or immediately after the time of such robbery wounded the said ROBERT OKWEMBA.”

3. Being dissatisfied with the said judgment, on 2nd September 2014, the Appellant filed a Memorandum of Grounds Appeal. The grounds of appeal were that:-
 1. **The Learned Magistrate erred in laws (sic) and fact by failing to note that the material particulars enshrined with (sic) charge sheet did not conform to the evidence at the charge sheet (sic) and evidence before the court in line with the complaint.**
 2. **The Learned Magistrate erred in law and facts by using the perceived weakness of his defence case to buttress the whole prosecution (sic).**
 3. **The judgment of the trial was against the weight of evidence in records (sic).**
 4. **The sentence imposed on him was too harsh and excessive in the circumstances.**
 5. **The Trial Magistrate erred in law and fact by failing to appreciate that the prosecution witnesses contradicted themselves while giving their testimonies in court while giving their testimonies (sic) in court over the allegation of robbery with violence.**
 6. **The Trial Court erred in (sic) both law and fact by failing to appreciate that the item brought to court as exhibit were (sic) not proved by the complainant, in that no document or receipt**

was produced by PW 1 to prove the ownership.

4. He subsequently presented to this court Amended Grounds of Appeal and Written Submissions. Both were undated and did not bear the stamp of the court acknowledging receipt. He relied on the following grounds of appeal:-
 1. **That the trial magistrate erred in law and fact by failing to consider that the prosecution case was founded on the evidence on a single witness.**
 2. **That the trial magistrate erred in law and fact by failing to consider that the trial proceedings were a nullity.**
 3. **That the trial magistrate erred in law and fact by failing to order the prosecution to disclose all the evidentiary materials as he had applied for prior to the start of his trial.**
 4. **That the trial magistrate erred in law and fact by failing to consider the variance, discrepancies (sic), inconsistencies and contradictions in the OB Reports and medical evidence and P3 Form.**
 5. **That the trial magistrate erred in law and fact by shifting the burden of proof in his alibi defence upon him to explain it (sic).**
5. The Appeal was heard by Muya J who was initially seized of this matter. In a Ruling dated on 9th December 2015 and read by this court herein on 16th December 2015, the said learned judge noted that the appeal herein had not been admitted and that the same ought to have been heard by two (2) judges. He opined that the Appellant's right to a fair hearing would be prejudiced if he heard the said appeal as a single judge. He therefore admitted the Appeal for hearing by two (2) judges.
6. However, before a bench of two (2) judges could be constituted, the High Court (Organisation and Administration) Act was assented to on 2nd January 2016 empowering a single judge to hear an appeal such as that that the Appellant had brought herein.
7. Section 9(1) of the said Act stipulates that **"Except as otherwise provided under any written law, the Court shall be properly constituted for the purposes of any proceedings before the Court by a single judge."**
8. It was on the basis of this change in the law that this court re-admitted the Appeal herein for hearing before one (1) judge. Both the Appellant and the State indicated that they would rely on the submissions they had made before the aforesaid learned judge.
9. However, as the State had made oral submissions before him, this court directed that it files written submissions. It therefore filed its undated Written Submissions on 28th April 2016. The Appellant had attached copies of the OB No 29/19/07/12, Charge Sheet and P3 Form to his application dated and filed on 23rd March 2016, which the court did not deem to have been necessary as it already had the record from the Trial Court.
10. When the matter came up for the hearing of the appeal on 28th April 2016, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety as they did not wish to highlight the same. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

11. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

12. In establishing whether or not the Appellant's guilt was proven in the charge of robbery with

violence, this court identified the following issues, that were dealt with under separate heads hereinbelow, to really have been pertinent for its determination:-

- a. **Whether or not the Appellant was positively identified?**
- b. **Whether or not there was a mistrial and/or nullity of the proceedings?**
- c. **Whether or not the Prosecution adduced contradictory evidence?**
- d. **Whether or not the Appellant was given a fair hearing?**
- e. **Whether or not the Appellant had established an alibi?**

I. IDENTIFICATION OF THE APPELLANT

13. The Appellant argued that the Learned Trial Magistrate did not warn himself of the dangers of relying on the evidence of a single witness, the Complainant herein (hereinafter referred to as “PW 1”) before he convicted him. He referred the court to the case of **Roria vs Republic (1967) EA 583 at page 584** where the holding was that there was greater responsibility where identification was made by one (1) witness.
14. He also placed reliance on the cases of **Abdalla Bin Wendo vs Republic (1953) E.A.C. 166, Republic vs Turnbull (1976) A LLER, Anjononi & Others vs Republic (1980) KLR 50** to buttress his argument that PW 1 was did not positively identify him. He did not, however, furnish the court with the complete citation of the case of **Swaleh Suleiman Bonge** that he also relied upon.
15. He further submitted that no identification parade was ever conducted as he was not arrested at the scene or on the same date when the offence was said to have been committed. He further argued that the light conditions were not disclosed to demonstrate that PW 1 was able to identify him.
16. He relied on the case of **Joseph Ngumbau Nzalo vs Republic (1991) 2 KLR pg 212** where he said the court therein had held that the conditions prevailing at the time of identification of an accused person and the length of time a witness had such an accused person under observation were essential to remove any possibility of error in the identification.
17. On its part, the State relied on the case of **Kiilu vs Republic [2005] eKLR** where it was held that a judge or jury can conclude that the evidence of identification, although based on a single witness can be safely accepted as free from the probability of error where the conditions of identification favouring a correct identification can be established.
18. It was evident from PW 1’s evidence that he was able to identify the Appellant as one of the persons who robbed and injured him while in company of others on the material date and time of the said occurrence. Firstly, PW 1 previously knew the Appellant herein physically and by name as they both hailed from Eldoro. He even knew his nickname, namely “Jiga.”
19. Secondly, he struggled with the Appellant and his fellow attackers for some time before he overpowered them. The length of time was therefore sufficient not to have led to an error of his identification of the Appellant herein. Thirdly, it was his evidence that the said attack took place at 5.00 pm. Undoubtedly, there was good visibility that permitted PW 1 to positively identify the Appellant herein. It cannot be disputed that lighting at 5.00 pm was good as there was still daylight.
20. As the Appellant was previously well known to PW 1 both physically and by name, the need for an identification parade was thus rendered useless. Such a parade need not be conducted as a matter of course more so where an accused person is known to any of the witnesses who can positively identify him or her.
21. Indeed in the case of **James Tinega Omwenga v Republic [2014] eKLR**, the Court of Appeal expressed itself on the purpose of an identification parade when it rendered itself as follows:-

“...the purpose of an identification parade is to test the correctness of the identification of an accused person by a witness who did not know him prior to the incident...”

22. Consequently, bearing in mind all the case law that was submitted by both the State and the Appellant herein relating to his identification, this court was satisfied that all the conditions favouring a positive identification of the Appellant by PW 1 with no probability of error prevailed at the material time of the incident herein.
23. In this regard, Ground 1 of the Appellant’s Amended Grounds of Appeal was not merited and the

same is hereby dismissed.

II. MISTRIAL AND NULLITY OF PROCEEDINGS

24. It was the Appellant's further submission that his plea was taken by a Resident Magistrate contrary to the law as a Resident Magistrate had no jurisdiction to take a plea where the offence is capital in nature. It was his contention that the Trial Magistrate misapplied the law when he directed that the matter be heard *de novo* but PW 1's evidence still formed part of the record.
25. Notably, the holding in the case of **Rose Ouma (sic) Otawa vs Republic [2011] eKLR** that the Appellant relied upon to support his aforesaid argument was not relevant in the circumstances of the case herein as the said case related to a defective charge sheet which was not counter-signed by the trial magistrate therein.
26. On its part, the State conceded that the plea had initially been taken by a Resident Magistrate but stated that the Appellant was given the option of starting the case heard *de novo* whereat he insisted on the case proceeding from where it had reached. It argued that it would be an injustice for the Appellant to argue that the court did not have any jurisdiction as it did not negate the facts or the evidence that was produced in court.
27. A perusal of the proceedings showed that W.K. Kitur, Resident Magistrate took the Appellant's plea on 10th December 2013. The said Magistrate also granted him bond of Kshs 100,000/= with one surety or cash bail of Kshs 50,000/=. On 20th May 2014, after taking the evidence of Reuben Mwawasi, the Clinical Officer (hereinafter referred to as "PW 2"), the Learned Trial Magistrate herein noticed that the plea had been taken by a court which had no jurisdiction to do so.
28. He caused the Charge to be read afresh to which the Appellant pleaded not guilty. A plea of "Not guilty" was entered. The Learned Trial Magistrate then enquired from the Appellant whether he wished to start the case *de novo* or to continue from where the same had reached to which the Appellant opted for the latter. He granted the Appellant a bond of Kshs 1,000,000/= with one similar surety.
29. The following day, on 21st May 2014, the Prosecutor applied to substitute the Charge as the initial Charge had not indicated that the Appellant was acting jointly with others not before the court. The said substituted Charge was counter-signed by the Learned Trial Magistrate.
30. The particulars of the said Charge were read to the Appellant to which he pleaded not guilty. A plea of "Not guilty" was once again entered. On being asked by the Learned Trial Magistrate if he wished to start the case *de novo* or to continue from where the case had reached, the Appellant stated that he wished to have the case continue from where it had reached. The bond terms remained the same as those that had been granted to the Appellant on 20th May 2014. The Prosecution then applied for the re-call of PW 2 to produce the treatment notes to which the Appellant indicated that he had no objection.
31. It is clear that although there were irregularities at the time the Appellant took his plea before the said Resident Magistrate, the proceedings were regularised and/or sanitised when the Learned Trial Magistrate caused the Charge to be read afresh to the Appellant and he sought to know from him if he wished to start the case *de novo* or from where the same had reached and more so when the Charge was subsequently substituted and read to the Appellant who pleaded "Not guilty."
32. The mere fact that the Appellant opted to proceed with the case from where it had reached more so after the particulars of the initial and substituted Charges were read to him and he took pleas, barred him from raising the issue of jurisdiction of the Learned Trial Magistrate or that of the Resident Magistrate or the proceedings that the latter had recorded.
33. The Appellant was deemed to have waived his right to object. He cannot be allowed to flip flop on his choices on how the trial was to be conducted to suit his circumstances or at his own convenience. Entertaining and allowing such an argument would be a travesty of justice against the Prosecution as it had proceeded with its case based on the Appellant's preference.
34. In this respect, this court was not persuaded that the Learned Trial Magistrate had no jurisdiction to hear and determine the matter and as a result, Ground No 2 of the Appellant's Grounds of Appeal is hereby dismissed as the same had no merit.

III. CONTRADICTORY DOCUMENTARY EVIDENCE

35. The Appellant argued that while the offence he was charged with was alleged to have been committed on 18th July 2012, it was reported to Taveta Police Station on 9th December 2013. He contended that No 70929 PC Protus Irungu, the Investigation Officer herein, (hereinafter referred to as “ PW 4”) stated that on 2nd July 2012, at about 5.45 pm, PW 1 reported that he was attacked by three (3) people the previous day, which was 1st July 2012.
36. He said this was at variance with what he told the court on 5th June 2014 when he produced OB No 29/19/7/12 after having been stood down the previous day. Further, he pointed out that the Charge Sheet signed on 21st May 2014 showed the OB number as OB15/9/12/2013, which he argued, was not the subject matter of the proceedings herein.
37. He also cast doubts on the P3 Form which he said showed that PW 1 was taken for examination on 25th January 2013 yet it was not clear when PW 1 reported the alleged incident. In addition, he pointed out that the P3 Form was completed on 13th December 2013, three (3) days after he had been arraigned in court. He therefore contended that the P3 Form was forged, authored, doctored and/or reconstructed by the police so as to suit the framed charges against him.
38. A perusal of the OB for 19th July 2012 that was produced by PW 4 and marked as Exhibit 2 showed that the report of the alleged offence was made to the police on 19th July 2012 at about 0545 hours. It was made a day after the alleged incident, which was 18th July 2012, which was said to have occurred at 0500 hours. The occurrence was thus recorded as OB No 29/19/07/2012.
39. During his Cross-examination, PW 1 stated that the Appellant was arrested after the expiry of one (1) year. According to the evidence of No 51109 Corporal Geoffrey Kaunda (hereinafter referred to as PW 5”), the Appellant was arrested on 9th December 2013 hence the OB No 15/9/12/2013.
40. This court was thus persuaded by the State’s submissions that there was no inconsistency in the date of the alleged occurrence in the OB reports and the Learned Trial Magistrate actually heard and determined the offence the Appellant committed against PW 1 on 18th July 2012.
41. As regards the P3 Form that was marked Exhibit 5, the same was signed on 13th December 2013. It was indicated therein that the original P3 Form that had been completed by a Mr Joto Leyawa on 29th March 2012 had got lost. The treatment notes from Taveta District Hospital (marked as Exhibit 2) showed that PW 1 was treated on 18th July 2012 which was the same date he was alleged to have been attacked by PW 1 and his co-attackers. The letter of referral to Kenyatta National Hospital (marked as Exhibit 3) was dated 19th July 2012.
42. Although the Appellant argued that Mr Joto Leyawa was not mentioned during the proceedings, he did not challenge the production of the said P3 Form by PW 2. He was therefore barred from raising the said issue at the appellate stage.
43. The court carefully considered the submissions by both the Appellant and the State regarding the issue of the P3 Form and did not find any proof that the same was doctored or authored. This was a mere allegation by the Appellant that was not backed by any evidence. If it was, then the Appellant did not demonstrate the same.
44. Instead, this court was more persuaded by the submissions of the State that the treatment notes, the P3 Form and the details in the Charge Sheet were consistent and showed that PW 1 sustained the injuries on 18th July 2012, a fact that was also contained in the OB Report No 29/19/07/12. In any event, the hospital treatment notes and PW 1’s evidence were sufficient to have proven that PW 1 sustained the injuries to his wrist. The evidence that was adduced in this regard was therefore consistent, cogent and not contradictory.
45. Accordingly, this court found and held that Ground No 4 of the Appellant’s Amended Grounds of Appeal was without merit and the same is also hereby dismissed.

IV. RIGHT TO FAIR TRIAL

46. It was the Appellant’s further submission that he was denied a fair trial in accordance with Article 50 of the Constitution of Kenya, 2010 as there was non-disclosure of evidentiary material. He argued that despite his numerous requests, the Learned Trial Magistrate adjourned the matter several times and proceeded to hear the case without him having been furnished with the witness statements. It was his contention that the failure by the Learned Trial Magistrate to compel the Prosecution to furnish him with the said statements denied him his legitimate right of expectation

- to a fair trial and hearing.
47. On its part, the State argued that the court record showed that the Appellant asked to be furnished with witness statements twice on which occasions, the Learned Trial Magistrate ordered that he be furnished with the same. It contended that the Appellant never raised the issue of the said witness statements when he indicated that the matter ought to proceed for hearing and that he was accorded a fair trial as he was given an opportunity to Cross-examine all the Prosecution witnesses.
 48. This court noted that although the Resident Magistrate who took the initial plea did not have jurisdiction to hear the matter herein, on 10th December 2013, he directed that the Appellant be furnished with the witness statements and a copy of the charge sheet at his own cost. On 9th January 2014, the Learned Trial Magistrate herein also directed that the Appellant be supplied with the said witness statements when he pointed out that he had not been supplied with the same.
 49. The order for the Appellant to be supplied with the written statements was re-stated on 27th January 2014 by the Learned Trial Magistrate when the Appellant still indicated that he had not been furnished with the same. Indeed, the Appellant indicated that he was not ready to proceed on 10th February 2014 as he had not been supplied with the said witness statements. Subsequently, on 1st April 2014, he complained that the case had taken too long when the Prosecution sought an adjournment. The Learned Trial Magistrate thus granted the Prosecution the last adjournment.
 50. On 17th April 2014, the Prosecution sought to adjourn the matter on the ground that PW 1 was still sick. The Learned Trial Magistrate rejected the said application and directed that the matter proceed for hearing. He did not ask the Appellant whether or not he was ready to proceed, which appeared to have been rather high handed. He was, however, justified to proceed as he did as the Appellant had on 1st April 2014 complained that the case had taken too long and that PW 1 was not coming to court and more so because he had granted the Prosecution the final adjournment.
 51. In the opinion of this court, it is good practise to seek to know from all parties in any proceedings if they are all ready to proceed with the hearing of a case at any given time.
 52. Notably, the Appellant did not interject to say that he was not ready to proceed due to failure by the Prosecution to furnish him with witness statements, an assertion that he had confidently and assertively made previously. In fact, he proceeded to cross-examine PW 1 and PW 2, a fact that was rightly pointed out by the State. In addition, on 20th and 21st May 2014, he also complained that the case was taking long and that he was suffering in the cells, on which two (2) days, he had indicated that the case could proceed from where it had reached.
 53. The only inference that could be drawn from the Appellant's conduct was that he was supplied with the said witness statements and was thus ready to proceed with the hearing. His silence on this issue or failure to inform the Learned Trial Magistrate that he had not received the witness statements, if at all, led this court to infer that the Learned Trial Court was right in concluding that the Appellant had been supplied with the witness statements and acted properly when he proceeded with the hearing.
 54. It is important to point out that once an order for the furnishing of witness statements or any other evidence to an accused person is given by a trial court, the responsibility of following up on the proceedings lies with the Appellant and not with the trial court.
 55. Had the Appellant informed the Learned Trial Court that he had not been furnished with the witness statements and the said Learned Trial Court proceeded with the hearing of the case, then that would have amounted to an infringement of his right to fair trial as protected by Article 50 of the Constitution of Kenya. In such an instance, this court would not have hesitated to nullify the proceedings therein.
 56. It was the view of this court therefore that the Appellant was using the issue of not being supplied with the said witness statements as a ground to have his appeal upheld. From the Appellant's conduct being his failure to alert the Learned Trial Magistrate that he had not been furnished with the said witness statements or failure to inform the Learned Trial Magistrate that he was not ready to proceed with the trial on 17th April 2014, on 20th and 21st May 2014 or any subsequent dates led this court to conclude that the Appellant was accorded a fair trial herein.
 57. In the premises foregoing, Ground No 3 of the Appellant's Grounds of Appeal to the effect that the Prosecution had failed to disclose all the evidentiary materials as he had applied prior to the start of his trial was not merited and the same is hereby dismissed.

V. APPELLANT'S DEFENCE OF ALIBI

58. It was the Appellant's further submission that the Learned Trial Magistrate shifted the burden of proof on him to explain his defence of alibi for the reason that he convicted him on the evidence of a single witness and that the P3 Form and OB Numbers had been authored or doctored. However, as can be seen hereinabove, this court found that the Appellant had been positively identified and that the P3 Form or the OB had not been doctored or forged.
59. Having said so, it was clear that the Learned Trial Magistrate ably addressed his mind to the Appellant's defence of alibi. He was clear in his judgment that this defence of alibi was raised very late in the day thus denying the Prosecution an opportunity to test it. He also considered the fact that the Appellant had a right to adduce sworn evidence but that he opted to adduce unsworn evidence that had no probative value. At most, it could only be persuasive rather than evidentiary.
60. This was a position that was set out in the case of May vs Republic (1981)KLR that was also relied upon by the Learned Trial Magistrate where the Court therein stated as follows:-

“An unsworn statement...potential value is persuasive rather than evidential...”

61. Evidently, the Appellant raised his defence of alibi for the first time when he was adducing evidence. It ought to have been raised early in the trial to give the Prosecution an opportunity to test the veracity of the same. Indeed, the Prosecution was unable to test the veracity of this alibi as the Appellant gave unsworn evidence and called no witnesses who could have attested to that fact.
62. This court's position was supported by the holding in the case of Karanja vs Republic(1986) KLR 612 that was both referred to by the State and the Learned Trial Magistrate, the issue of alibi was addressed by the Court of Appeal when it rendered itself as follows:-

“The word “alibi” is a Latin verb meaning “elsewhere” or at another place”. Therefore when an accused person alleged he was at a place either than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged...”

63. This court therefore agreed with the State's submissions that the Appellant's alibi was merely an afterthought that was not supported by any evidence. His defence of alibi was properly considered by the Learned Trial Magistrate and was found to have been worthless, a conclusion this court found to have been justified.
64. In the circumstances foregoing, this court also found and held that Ground No 5 of the Appellant's Grounds of Appeal was also without merit and the same is hereby dismissed.

CONCLUSION

65. The Prosecution was able to demonstrate that all the ingredients in Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya) obtained in this case. The same are that:-
- a. **the offender must be armed with any dangerous or offensive weapon or instrument;**
 - or
 - b. **the offender must be in the company of one or more other person or persons or;**
 - c. **at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**
66. Notably, the Charge against the Appellant could be sustained if one any of the aforesaid ingredients were present. However, in this instant case, all the ingredients constituting the offence of robbery with violence were present showing the aggravated circumstances that obtained herein. The Appellant was armed with a panga, he was in the company of one Idd Rashid Wathome and another unidentified person and he also cut PW 1 on his wrist with a panga.
67. Taking the aforesaid into consideration, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt and that the evidence that was adduced by

the Prosecution witnesses actually displaced the Appellant's unsworn evidence. The Learned Trial Magistrate therefore acted correctly when he sentenced the Appellant to death as it is the only sentence that he could mete upon him under the provisions of Section 296(2) of the Penal Code.

68. On the other hand, this court was not persuaded that the conviction against the Appellant herein ought to be set aside or that the sentence that was meted upon him by the Learned Trial Magistrate ought to be quashed and substituted with any other sentence for the reason that the same was lawful, proper and fitting in the circumstances of the case herein.

DISPOSITION

69. For the foregoing reasons, this court hereby affirms the conviction and sentence that was imposed upon the Appellant herein.

70. The upshot of this court's Judgment was that the Appellant's Appeal that was lodged on 2nd September 2014 is hereby dismissed as the same was not merited.

71. It is so ordered.

DATED and DELIVERED at VOI this 21ST day of JUNE 2016

J. KAMAU

JUDGE

In the presence of:-

Thomas Muhina..... Appellant

Sirima..... State

Simon Tsehlo- Court Clerk