



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.116 & 131 OF 2012

(An Appeal arising out of the conviction and sentence of D.O. Onyango – PM delivered on 31st January 2012 in Nairobi CM.C. CR. Case No.1089 of 2010 (Milimani))

JOHN MIKIA KAMAU1ST APPELLANT

ROBERT MUNGA GACHERU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant, John Mikia Kamau and the 2nd Appellant Robert Munga Gacheru stood trial together before the magistrate’s court as Accused Nos. 1 and 2 respectively alongside Joseph Ngugi as Accused No.3. They were jointly charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the night of 4th April 2010 at Gachie in Nairobi within Nairobi Province, the accused, jointly with others not before court while armed with dangerous weapons, namely a pistol, robbed John Gachiri Thuo (hereinafter referred to as the complainant) of mobile phones make LG 105 worth Kshs.5,000/=, Blackberry worth Kshs.50,000/-, Nokia 630 worth Kshs.18,000/-, LG DVD worth Kshs.6,000/-, Toshiba Laptop worth Kshs.49,000/-, Panasonic radio worth Kshs.18,000/-, Sony PlayStation worth Kshs.5,000/- and Kshs.36,200/- in cash all valued at Kshs.187,200/- and at the time of such robbery used actual violence to the complainant. When they were arraigned before the trial court, the accused pleaded not guilty to the charges. The prosecution called seven (7) witnesses to prove its case against the accused. After the close of the prosecution’s case, the trial court found that the 3rd Accused had no case to answer and proceeded to acquit him under **Section 210** of the **Criminal Procedure Code**. After full trial, the 1st and 2nd Appellants were convicted on the charge of **robbery with violence**. They were each sentenced to serve thirty (30) years imprisonment. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In his petition of appeal, the 1st Appellant raised several grounds of appeal. He was aggrieved that he had been convicted on the basis of visual identification evidence of PW1 yet the circumstances favouring positive identification were absent. He took issue with the fact that the trial court failed to assess the intensity of the light in order to satisfy itself that he could, in the circumstances be identified satisfactorily. He was aggrieved that he was convicted on the basis of the sole evidence of identification by PW1 yet there was no evidence that PW1 gave a description of his assailants to the police when he

first reported the incident. The 1st Appellant was further aggrieved that his identification was from a flawed identification parade process. He complained that his defence was not into consideration when the trial court reached its decision finding him guilty. Finally, the Appellant was aggrieved that the sentence that was imposed on him was excessive.

On his part, the 2nd Appellant faulted the trial court for failing to apply the cautionary rule to the identification evidence of a single witness. Like the 1st Appellant, the 2nd Appellant was also aggrieved that he had been convicted on the basis of visual identification yet the circumstances favouring positive identification were absent. He was further aggrieved that his identification at the identification parade was not reliable as the identification parade was not properly conducted. He faulted the trial court for placing reliance on the evidence regarding the circumstances of his arrest to find him guilty of the charge. Finally, the 2nd Appellant was of the view that the trial court failed to consider his defence when it reached the decision to convict him. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentence that was imposed on them.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. Prior to the hearing of the appeal, the Appellants filed their written submission in support of their appeals. The Respondent, the State also filed its written submission opposing the Appellants' appeal. It was the Appellants' submission that the trial court failed to comply with the principles laid out in the case of **Adan -versus- Republic (1973) E.A 445** in so far as the manner of recording pleas is concerned. The Appellants found their identification by the complainant to be unreliable considering the circumstances in which the robbery was said to have occurred. They submitted that although the complainant's testimony was that he was able to identify the Appellants since the room was illuminated, he did not state whether the light was bright enough to enable him properly identify them. In this regard, the Appellants relied on the cases of **Mutinda Kwea -versus-Republic [2004] eKLR** and **Leboi Ole Toroke -versus- Republic, Criminal Appeal No. 204 of 1987** to support this assertion.

The Appellants further challenged the trial court's decision to proceed with the trial in the absence of their legal counsel thereby infringing upon their right to representation as envisaged under **Article 50** of the **Constitution**. They further submitted that the trial court ignored the 2nd Appellant's alibi defence. In concluding their submission, the Appellants were of the view that the prosecution did not carry out its independent investigations on the robbery incident prior to reaching the decision to charge them.

The Respondent opposed the Appeal. It reiterated that the prosecution had proved its case against the Appellants to the required standard of proof beyond any reasonable doubt. The Respondent submitted that the Appellants' plea of guilty was properly recorded in accordance with the principles laid down in the cited case of **Adan -versus- Republic**. The Respondent further submitted that the Appellants were positively identified by the complainant during the robbery. In this regard, it was the Respondent's submission that the complainant had sufficient time to identify his assailants as the robbery took at least an hour. It was the Respondent's further submission that the conditions at the scene were favourable for visual identification as it was illuminated by florescent light. The Respondent submitted that the complainant was able to give a comprehensive account of what happened during the robbery and also gave a description of the identity of his assailants when he reported the incident to the police. The Appellant was also able to positively identify the Appellants at the identification parade. The Respondent submitted that the trial court was alive to the danger of relying on the evidence of a single identifying witness when it reached the decision to convict the Appellants. As regards the defence raised by the Appellants during trial, the Respondent contended that the same was considered by the trial court. Finally, the Respondent reiterated that the prosecution carried out its investigation before it reached the decision to charge the Appellants with the offence.

The facts of the case leading to the charge against the Appellants as presented by the prosecution are as follows. On 4th April 2010, the complainant, John Thuo Gachuri closed his business in Gachie Market at around 7.00 p.m. He got into his car and drove to his house which was about three (3) kilometers away. When he arrived at his home, he alighted from the car and went to open his gate. He testified that he saw a man walking towards him and turned to see what was happening. He testified that a second man then

emerged from behind him and held a gun to his head. The men ordered him to go back to the car and switch off the headlights. At that point, the complainant noticed that the first man was also armed with a knife. He testified that he saw a third man besides the car when he went to switch off the car. His assailants then searched his pockets and took his cellphone make LG KP 105 and Kshs.6,200/- cash. They showed him two bullets to alert him that they had real firearms. He was ordered to open the gate. They all entered the house.

The complainant was then asked to turn on the lights. He complied. The complainant testified that the robbers then demanded that he hands over whatever money he had in the house. He complied by handing over Kshs.24,000/- cash that was in the wardrobe. They demanded for more money as the gunman assaulted him with the butt of the gun. They ordered him to lie on the floor facing down as they rummaged and ransacked his bedroom. He testified they found a Blackberry cellphone valued at Kshs.50,000/-, a Nokia 6070 cellphone and several electronic equipment which they took. The incident lasted about one hour. When the complainant was certain that the robbers had left, he raised an alarm. PW2 Simon Gathigi Githue and PW3 Perminus Mungai Munga were the first people to arrive at the scene. They testified that the complainant told them that he could identify the people that robbed him and even gave them their description.

The robbery was reported to Gigiri Police Station. At the police station, the complainant was referred to Kihara Sub-District Hospital for medical attention. He was also examined by PW5 Dr. Zephania Kamau based at the Police Surgery. PW6 testified that he examined the complainant on 21st March 2011. At the time, the complainant had no visible injuries. He relied on treatment notes from Kihara Sub-District Hospital which indicated that the complainant sustained injuries from a blunt object during the robbery. PW5 thereafter filled a P3 form in respect of the complainant which he produced into evidence as ***Prosecution's Exhibit No.5.***

The evidence of PW4 CIP Potessan Lipa was that he received a report at Central Police Station that there were suspicious people at Mbochoini Bar situated along Kirinyaga road. He testified that he was informed that the people had been involved in a series of robberies. PW4 testified that he mobilized a group of police officers and proceeded to the said bar. They found about forty (40) people inside the bar. They rounded them up and took them to Central Police Station. He testified that the police identified about ten (10) people from the group whom they considered to be dangerous criminals. Amongst them was the 1st Appellant. PW4 testified that he called police officers from Gigiri Police Station to take up the matter since he had not been given a description of the complainant's assailants.

The complainant testified that he received a phone call from Gigiri Police Station to attend an identification parade to see if he could identify his assailants. The first identification parade was carried out by PW5 CIP Henry Kiambati on 7th June 2010. PW5 testified that the complainant was able to identify the 1st Appellant in the parade. He therefore completed the identification parade form which was produced into evidence as ***Prosecution's Exhibit No.1.*** A second identification parade was conducted by PW7 IP Joseph Muguna on the same day. PW7 testified that the complainant was able to identify the 2nd Appellant in the parade. He therefore completed the identification parade form which was produced into evidence as ***Prosecution's Exhibit No. 2.***

PW8 CPL Joseph Wandau was assigned to investigate the case. He testified that he was present when the complainant reported the robbery at the police station on 2nd June 2010. He testified that the complainant reported that he had been robbed by three men. PW8 testified that the complainant reported that he could identify his assailants and gave their description which was recorded in his statement. He testified that he reached the decision to charge the Appellants with the offence following their identification at the identification parades. He testified that he charged the 3rd Accused person alongside the Appellants as their names had been mention together more than five (5) times by various complainants. On cross examination, PW8 stated that the 3rd Accused did not attend an identification parade as there was no officer to carry out the parade.

When the Appellants were put on their defence, they denied committing the offence. In his defence, the

1st Appellant stated that they were arrested together with other patrons as they were having a drink at a bar and were booked at Central Police Station. He testified that he was later transferred to Gigiri Police Station and was later arraigned in court to answer to the present charges. He denied any knowledge of the robbery in question. On his part, the 2nd Appellant testified that on the day he was arrested, he had come to Nairobi to collect school fees from his father. He testified that he met his father and later went to the bar to have a drink. He testified that he was arrested together with other patrons in the bar and taken to Central Police Station. He testified that he was moved to Gigiri Police Station due to overcrowding at Central Police Station. The 2nd Appellant testified that he was tortured in order to confess that he was a criminal. He denied knowledge of the robbery in question and claimed that he did not know his alleged accomplices.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellants. The court has also considered the grounds of appeal that the Appellants relied on in support of their respective appeals. It has also read the written submission filed by both Appellants and the Respondent. This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charge of **robbery with violence** contrary to **Section 296 (2) of the Penal Code** to the required standard of proof beyond any reasonable doubt.

From the facts of this case, it was clear that the prosecution relied solely on the evidence of identification to secure the conviction of the Appellants. According to the complainant on 4th April 2010 at about 7.30 p.m., he was accosted by a gang of three robbers as he drove into his compound within Gachie area. The complainant testified that he was confronted by three men when he stopped the car at his gate. One man was armed with a knife while another was armed with a pistol. They robbed him of his mobile phone make LG KP105 and Kshs.6,200/-. They escorted him into his house where they further robbed him of Kshs.24,000/-, a Blackberry and a Nokia 6070 mobile phones. He was also robbed of his Toshiba Laptop. During the robbery, the complainant was forced to lie down with his face facing the ground. The robbers also managed to steal his electronic equipment including a radio and a CD player. The complainant testified that during the robbery, he was able to identify the Appellants as the persons who robbed him. He told the court that he gave the description of the persons who robbed him to the police in the first report that he made to the police because the Appellants' physical features were engraved in his memory. The fact that the complainant recorded the descriptions of the persons who robbed him in the first report that he made to the police was confirmed by PW8 Corporal Joseph Wandau who was the investigating officer of the case. From the record of the court, the complainant and PW8 did not give the actual description which was recorded in the first report made by the complainant. This court is therefore unable, with certainty, to agree with the evidence adduced by the complainant that he had indeed identified the Appellants in the course of the robbery.

The Appellants were arrested on 28th May 2010 at a bar along Kirinyaga Road in a police swoop. The Appellants were among 40 patrons who were arrested and taken to Central Police Station. This was after the police had received information that among the patrons were a gang of robbers. PW8 was assigned to investigate the case on 2nd June 2010. This was after the Appellants had been in custody for several days. This was before the coming into effect of the **2010 Constitution** that required accused persons to be produced before court within 24 hours. The Appellants were later escorted to Gigiri Police Station where identification parades were held on 7th June 2010 conducted respectively by PW5 CIP Henry Kiambati and PW7 IP Joseph Muguna, the complainant was able to identify the Appellants as being in the gang that robbed him two months prior thereto. None of the robbed items were recovered in the Appellants' possession.

The courts have over time set rules that the courts must take into consideration when assessing the evidence adduced by an identifying witness, more so, a single identifying witness. As was held in

Maitanyi –Vs- Republic [1986] KLR 198 at P.200:

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“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”.

In the present appeal, it was evident that the complainant purports to have identified the Appellants at night when the conditions favouring positive identification were absent. Although the complainant testified that he was directed to switch on the lights in his house, he also stated that he was ordered to lie while facing the ground when the gang was ransacking his house. For the court to sustain conviction based on the sole evidence of identification, it must warn itself of the dangers of relying in such evidence to convict an accused person. This is because, in the hectic circumstances of the robbery, and taking into account that the complainant had been terrorized by the robbers (including being assaulted when the robbers demanded for the complainant to disclose where he had hidden more money), it is not beyond the realm of possibility that the complainant may be honest but mistaken that he had identified the Appellants as the persons who robbed him on the material night.

From the evidence of the complainant, it was not possible for this court to assess from what position he was able to identify and memorize the physical and facial features of the robbers. The fact that the actual description that the complainant is alleged to have made in the first report that was made to the police was not disclosed before the trial court makes it difficult for this court to properly evaluate whether indeed the complainant had identified the Appellants as the persons who robbed him on the material night. The Appellants, in their defence, denied that they were involved in the robbery. In the circumstances of this case, this court formed the firm view that it cannot sustain the conviction of the Appellants on the basis of the evidence of identification of a sole identifying witness. The circumstance in which the said identification is said to have been made does not preclude the possibility that the complainant was mistaken that he had identified the Appellants as the persons who robbed him. Reasonable doubt has been raised regarding the evidence of identification. There was no other evidence which was adduced to connect the Appellants in the robbery. None of the robbed items were recovered in their possession.

In the premises therefore, this court finds merit with the respective appeals lodged by the Appellants. The appeals are hereby allowed. Their respective conviction is hereby quashed. The custodial sentences imposed upon them are hereby set aside. The Appellants are ordered released forthwith from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JULY 2016

L. KIMARU

JUDGE