



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL APPEAL NO. 117 OF 2013

BETWEEN

PETER OCHIENG alia MUSALABA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.L.N. Waigera,

SRM dated 8th October 2013 at Principal Magistrate's Court

at Winam in Criminal Case No. 309 of 2012)

JUDGMENT

1. The appellant **Peter Ochieng Were alias Musalaba** and his co-accused were charged with three counts of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. According to the three counts, they with others not before the court, did on the night of 12th and 13th February 2012, at Obwollo area, Kisumu East District within Kisumu County, while armed with dangerous weapons namely guns and swords, robbed John Kennedy Nyandega, Eunice Anyango Odonda and Maurice Odunga Oyake of assorted items including household items, money and mobile phone and immediately before or immediately after the time of such robbery they threatened to use personal force on them.

2. The appellant was convicted on all three counts and sentenced to death while his co-accused was convicted of the lesser offence of handling stolen goods contrary to **section 322(1) and (2)** of the **Penal Code**. Being aggrieved by the decision of the trial court, the appellant has now appealed against the conviction and sentence of the trial court.

3. In his petition of appeal, the appellant raised several grounds of appeal but later amended his petition to include only two grounds as follows:

a. That the learned trial magistrate erred in both law and facts in failing to comply with **section 198** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

b. That the trial magistrate erred in both law and facts by failing to observe that the adduced identification evidence was not rooted on a firm first report.

4. The appellant also filed written submissions to support his appeal in which he argued that the provisions of **section 198** of the *Criminal Procedure Code* were not followed during trial as the evidence of the prosecution witnesses was not translated in a language that he understood. As such his constitutional right to fair trial was violated. The appellant also contended that the trial magistrate failed to evaluate the evidence on record and thereby reaching a wrong conclusion. He submitted that the identification evidence relied upon by the trial court was not water tight and could thus not be used to found a conviction on the basis that the identifying witnesses did not give a description of the assailants in their initial report to the Police and that the identification parade was not conducted in accordance with the Police Force standing orders.

5. The respondent opposed the appeal and submitted that there was sufficient evidence adduced at the trial to support the conviction. Counsel for the respondent submitted that the appellant was identified as the conditions were favourable for an identification as the house in which the robbery occurred was well lit and the prosecution witnesses were able to pick him out in an identification parade.

6. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion while bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] E.A 32*). In carrying out this primary task, it is necessary to set out the evidence of the 6 witnesses emerging during the trial.

7. John Kennedy Nyadenga (PW 1) told the Court that on the night of 12th Dec 2012 he arrived at Triton Petrol station in Kisumu and called his wife, Younis Anyango (PW 2), to pick him up with their car. She arrived at about 9.30pm and he drove back to their home in Mamboleo Estate. PW 2 alighted to open the gate and as he drove into their compound, he heard PW 2 screaming. He got out of the car to find out what was happening and was accosted by assailants. He rushed into a neighbour's house while PW 2 got into their house.

8. The assailants, who had guns and were clad in Police jungle jackets, followed PW 1 and accused him of being a thief. Since he thought they were police officers, he surrendered to them and they took him back to his house. He asked PW 2 to open the door. One of the assailants ordered him, PW 2 and their son to lie on the floor while one of the men went with his wife upstairs. When he came back, he and the other assailants the TV and DVD player.

9. PW 2 recalled that after PW 1 drove into their compound, a group of men appeared and started shouting, "police, police" but she sensed they were not policemen because of the manner of their dress. She raised alarm causing PW 1 to come and assist but the assailants fired gunshots in the air causing PW 2 to run away. After a while PW 1 came back with four men who ordered them to lie on the floor. One of the assailants went with her upstairs and demanded money. She gave him Kshs. 27,000/-. The assailants left with their TV set and DVD and drove off with their car which had PW 1's luggage containing his identification documents, money in foreign currency and mobile phones.

10. The investigating officer, Bernard Muriuki (PW 3), who was on duty on the night of the robbery was informed that a robbery had occurred at Mamboleo. He proceeded to the scene in the company of other officers. On the same night he was able to recover the car which had been abandoned at Nyamasaria area. On 25th February 2012, PW 3 received information that the appellant and others had been spotted at Mamboleo estate. They proceeded to Mamboleo with P.C Gilbert Kilonzo (PW 4) and arrested the appellant and his co-accused. Dominic Murau (PW 5) of Kisumu Central Police Station conducted the identification parade where the appellant and his co-accused were positively identified by the complainants.

11. Maurice Otunga Oyale (PW 6) recalled that on the material night at around 9.55pm he and his friend were walking near the homestead of PW 1 and PW2 when they were ambushed and ordered to lie down. PW 6 flashed his torch at him and saw his face. The assailant who had a gun ordered PW 6 to surrender his torch, mobile phone and Kshs. 1,200/-. During the identification parade PW 6 was able to identify the appellant as the person ordered them to lie down and took their wallets.

12. When the appellant was placed on his defence, he not only denied knowledge of the charges against him, he also denied any involvement in the robbery. He stated that when he was arrested, the police were looking for a person by the name Musalaba which he denied was his name.

13. The totality of the testimony of PW 1, PW 2 and PW 6 is that the assailants stole their personal possessions. They were more than one in number and they had in their possession guns, which they shot in the air, and other weapons with which they threatened violence. In these circumstances, I am satisfied that the prosecution proved the essential elements of the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code*.

14. The crux of this appeal is identification. The appellant case is that the circumstances surrounding the incident were not conducive to positive identification that the complainants did not provide a description of the assailants in their initial reports to the police. I must therefore decide whether the evidence of identification was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. In so doing I accept the exhortation of the Court of Appeal in ***Wamunga v Republic [1989] KLR 424*** where it was stated that:

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 one or more identifications 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.

15. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***R v Turnbull [1967] 3 ALL ER 549***).

16. As regards the description of the attackers, the Court of Appeal in the case of ***Simiyu & Another v Republic [2005]1 KLR 192*** held that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given. The Court further held that the omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity.

17. The robbery took place in PW 1 and PW 2's house. From their testimony the living room was well lit with electricity although the drive way was dark. PW 1 stated in cross-examination that he was able to identify the 1st and 2nd accused, "*easily since they were in my well-lit sitting room for about five minutes ordering us around.*" On her part, PW 2 was able to identify the assailant because he went with her upto the bedroom and order her to give him money. She stated, "*We went upstairs. I lit the room and gave him Kshs. 27,000/-.*" In my view, the length of interaction of the PW 1 and PW 2, in the confined of the sitting room and them in the bedroom with PW 2 was sufficient time for the complainants to recognize the appellant.

18. As was stated in ***Simiyu v Republic (Supra)***, the initial description given to the police by the complainants is essential in weighing whether the evidence of identification meets the required standard. In this case both PW 1 and PW 2 recorded their statements on the next day after the incident. PW 1, when cross-examined by the appellant, stated that he described him as the suspect in the second page of his statement. When cross-examined, PW 3 stated that PW 1 told him that he was attacked by unknown person whom he could identify and he gave a description of the attackers in terms of height and colour.

19. In order to test the identity of the assailants, PW 5 arranged an identity parade where both PW 1 and PW 2 were able to pick out the appellant. The appellant faults the said identification parade on the ground

that the members of the parade were not similar to the appellant in complexion. PW 5 gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailant from the parade; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. The appellant was allowed to change his position in the parade and he never objected to the manner in which the parade was conducted. I also note that each witness identified the appellant as the assailant who was armed with gun. Therefore, there was corroboration of the identification evidence. Equally the identification was carried out only 14 days after the robbery and such the minds of the witnesses were still fresh. Based on the foregoing evidence and the identification parade form on record I find that the identification parade was properly conducted.

20. When PW 3 was re-examined, he was emphatic that PW 1 and PW 2 described their assailants. I would however go further and hold that even if they did not describe the assailant, there was, as I held, the circumstances of identification were free from error and the appellant was a person whom they could recognize if he was lined up in an identification parade. On this issue, I would do no better than quote the Court of Appeal in the case of *Nathan Kamau Mugwe v Republic* NRB CA CRA No. 63 of 2008[2009] eKLR where it observed as follows;

James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade.... We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person.....As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriel Kamau Njoroge v Republic (1982 – 1988) 1 KAR 1134, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness “SHOULD” be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected. [Emphasis mine]

21. I now turn to the third count concerning PW 6. At the time the appellant was charged, he only faced two counts of robbery with violence in respect of PW 1 and PW 2. It is only after PW 6 had testified that the charge was amended to include PW 6. The charges were read to the accused who pleaded not guilty. Thereafter, the prosecution closed its case and the matter was set down for a ruling as to whether the accused have a case to answer.

22. **The power of the court to amend charges is provided for at section 214(1) of the Criminal Procedure Code** which provides as follows:

Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge sheet as the court thinks necessary to meet the circumstances of the case:

Provided that -

i. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

23. In this case, the court failed to comply with subsection (ii) of the proviso by giving the appellant to recall the witnesses who had testified either to give evidence afresh or to be cross-examined. In **Harrison Mirungu Njuguna v Republic Criminal Appeal No. 90 of 2004 (UR)**, the Court of Appeal held that *‘the right to hear the witnesses give evidence afresh on the amended charge or to cross-examine the witnesses further is a basic right going to the root of a fair trial...’* The court found the proceedings substantially defective and explained that the failure of the court to inform an accused of his rights given to him by law was not a procedural technicality which could be cured under the provisions of **section 382** of the **Criminal Procedure Code**. Likewise in **Joseph Kamau Gichuki v Republic [2013] eKLR** the Court of Appeal had the following to say:

The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held [in Harrison Mirungu Njuguna v Republic], correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as a mended and to be cross-examined.

24. Since the appellant was denied the right and opportunity to recall and or examine the preceding witnesses on the case concerning PW 6, the conviction on count 3 cannot stand and the appeal is allowed in that respect and the conviction quashed.

25. The appellant has also raised the issue of the language used in Court. It is his argument that **section 198** of the **Criminal Procedure Code** was not followed and the prosecution evidence was given in a language that he did not understand. From the record it is obvious that the appellant fully participated in the trial and even cross examined the prosecution witnesses. He did not at any time raise the issue and as such this ground lacks merit and is dismissed.

26. The totality of the evidence is that the appellant was identified by both PW 1 and PW 2. His description was given to the PW 3. When the appellant and his co-accused were arrested, the complainants were able to identify him in an identification parade as one of the assailants. The case against him is watertight and the conviction is accordingly affirmed on the 1st and 2nd count. However, the conviction and sentence on the 3rd count is quashed.

27. As regards the sentence, the appellant was sentenced to death but did not specify in which of the three counts. The magistrate ought to have specified the sentence for each count but since the appellant cannot

be executed twice over, it is now settled that on conviction on more than one count carrying the death sentence, only one sentence of death should be imposed and the other one held in abeyance. In the circumstances, the sentence is quashed and substituted with a sentence of death on the 1st count and that on the second count is held in abeyance.

DATED and DELIVERED at KISUMU this 30th day of September 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.