



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.553 OF 2010

MARY WANJIRA MWANGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

Consolidated with

CRIMINAL APPEAL NO.554 OF 2010

ROBERT MAINA TAIRUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. M. M. Muya Chief Magistrate) in Makadara Chief Magistrate’s Criminal Case No.1969 of 2009

delivered on 6th October, 2010)

JUDGMENT

Both appellants, Mary Wanjira Mwangi and John Kimunya were charged alongside four others with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

Particulars of the offence were that on the 24th day of April, 2009 at Komarock estate in Nairobi East district within Nairobi area province, jointly and while being armed with dangerous weapon namely a pistol robbed Robert Wanguchu Mungai a motor vehicle registration number KAU 070 M Toyota premio valued at Kshs.940,000/-, Nokia phone valued at Kshs.5,000/-, one coat valued at Kshs.2,000/- and cash Kshs.800, allvalued at Kshs.947,800/- and at or

immediately before or immediately after the time of such robbery used actual violence to the said Robert Wanguchu Mungai.

For purposes of this appeal, Mary Wanjira Mwangi shall be referred to as the 1st appellant whilst Robert Maina Tairus as the 2nd appellant.

Before the trial court, the 1st appellant was the 3rd accused whereas the 2nd appellant was the 5th accused. The 1st and the 2nd accused persons separately appealed in **High Court Criminal Appeal Numbers 539**

of 2010 and 540 of 2010 respectively. The same were consolidated, heard and disposed of in a judgment dated and delivered on 15th November, 2013. The appeal of the 1st appellant was dismissed whilst that of the 2nd appellant was allowed.

The appellants herein were found guilty as charged and sentenced to death. The 1st appellant has appealed both against the conviction and the sentence while the 2nd appellant appealed against the conviction. The main grounds of appeal raised by the 1st appellant are that she was not positively identified, that the trial magistrate acted on inconsistent evidence, that the identification parade in her respect was not properly conducted and that the sentence imposed was too harsh. The 2nd appellant on the other hand has advanced the grounds that he was tried for the wrong offence and that the trial court relied on insufficient evidence.

Miss Aluda for the respondent opposed the appeal. She submitted that the complainant was able to identify his two assailants who were negotiating the price of a taxi for hire. He was able to identify the 1st appellant in the identification parade. That the complainant was injured in the robbery in which he lost four teeth. Further that the vehicle stolen from him had a tracking device. It was found in a garage belonging to PW3, and it is the 2nd appellant who drove it to Mombasa. That it is also the 2nd appellant who helped the police to trace the 1st appellant and other co-accused persons. Hence, there was no mistaken identity as to who attacked the complainant.

Miss Aluda further submitted that the appellants were positively identified in the identification parade. Again, they were found in possession of the stolen vehicle through a tracking device. It was traced in the garage of PW3. It is the 2nd appellant who drove the vehicle to Mombasa and assisted the police to trace it. She urged the court to invoke the doctrine of recent possession in that the 2nd appellant was arrested as he was trying to erase the vehicle's yellow sticker so as to conceal the identity.

This being the 1st appellate court we have to reconsider and re-evaluate the evidence on record and draw our own conclusion but bear in mind that we have neither seen nor heard the witnesses. See **OKENO – VS- REPUBLIC (1972) E.A 32, KARIUKI KARANJA –VS- REPUBLIC (1986) KLR, 190 AND PANDYA –VS- REPUBLIC (1957) E.A. 336.**

In total, the prosecution called seven (7) witnesses whose testimonies we summarize as hereunder:-

PW1, Robert Wanguchi Munyori, who was the complainant testified that he operated a taxi along Tom Mboya street opposite Odeon Cinema in Nairobi. On 24th April, 2009 he was operating a taxi registration No. KAU 070M. He was hired by the 1st appellant and the 1st accused to take them to Komarock. On arrival at Komarock, the 1st accused (John Kamunya) grabbed him by the neck and asked him to surrender. The 1st appellant put the car on neutral gear. The 2nd accused emerged from the bush while armed with a pistol. PW1 opened the car for him and was ordered to the rear seat. He was hit with a pistol and ordered to drink a soda the 1st appellant had. He then became unconscious. When he came at 6.00 a.m., he was in a police station and was naked. He called his wife who brought clothes for him. He was taken to hospital for treatment where he was admitted for some days. He was later issued with a P3 form.

PW1 testified that he identified his assailants in identification parades carried out at Kayole Police Station. He stated that he was enabled to do so because he had earlier identified them at the time of the robbery since there was sufficient light at the taxi parking yard.

He also testified that the stolen car was recovered in Mombasa as it had a tracking system.

PW2, Douglas Ngugi Mungai and a brother to PW1, testified that he owned motor vehicle registration NO. KAU 070 U but was registered in the name of PW1. At about 11.00 pm on 25/4/09, he called PW1 by phone but he could not reach him. On the following morning, he called his wife who informed him

that PW1 had been robbed and dumped in Ruai. Both of them met at Njiru Administration Police Post where they found PW1 who only wore a jacket. They took him to hospital.

PW2 further testified that the car was tracked in Mombasa that evening with the help of a tracking device. He travelled to Mombasa on 26/4/09 and reported the matter at Mtwapa police station. The vehicle was found in a garage owned by PW3. The 2nd appellant was arrested as he came to make some payments to PW3 who he had engaged to erase the yellow mark on its body. It is the 2nd appellant who then led the police to arrest the 4th and 6th accused persons who he had delivered the vehicle to them.

PW3, David Waweru Mwangi testified that he operated a garage in Mtwapa. On 25/4/09 at about 4.00 pm motor vehicle registration No.KAU 070 M was taken to him for repairs by both appellants whilst the 5th accused claimed to own it.

PW4, PC Joseph Ngatia then attached to CID Mtwapa patrol base testified that on 24/4/09 he received information from the OCS Bamburi that motor vehicle registration No. KAU 070U Toyota Premio had been stolen at gun point and was about 50 metres from Mtwapa patrol base. On 27/4/09 they had an ambush and as the 2nd appellant went to collect the vehicle, he arrested him. The latter had just paid PW3 for the work he had on the vehicle.

PW4 went on to testify that the 2nd appellant led him to Nakumatt Nyali where the 4th accused was arrested.

PW5, Doctor Zephania Kamau testified that on 2/5/2010 he examined PW1 who had four incisor teeth missing. He had been injured with a blunt object. He assessed the degree of injury as harm. He filled his (PW1) P.3 form which he produced in court as an exhibit.

PW6, Painito Bera of CID Kayole recalled that on 4/5/09 he conducted an identification parade in respect of the 1st and 2nd accused and the 1st appellant. All the suspects were positively identified by PW1.

PW6 testified that none of the suspects had a complaint with the manner in which the respective parades were carried out.

PW7, Corporal Aden Roba of CID Kayole testified that on 24/6/09 at about 4.00 pm he received information that a taxi driver had been car jacked from Central Business District and taken to Kayole and then dumped in Njiru. He went to Njiru AP camp where the victim was and recorded his statement. The said taxi driver had broken teeth, no shoes, shirt and mobile phone. He told him that three people who posed as customers hired him to take them to Kayole and whilst in Kayole they drugged him, robbed him of the car and later dumped him in Njiru. He issued him with a P.3 form.

PW7 further testified that the vehicle was traced in Mtwapa Mombasa. It was taken to Nairobi alongside the 4th accused and 1st appellant who had been arrested. He interrogated the 4th accused who told him that he had been given the vehicle by three people. A lady called Emily Wambui took him to the 1st and 2nd accused's house. Later the two together with the 1st appellant were identified in identification parades and were charged accordingly. PW7 further said that the said Emily Wambui was released so that she could be a witness.

Upon the close of the prosecution case, both appellants were found to have a case to answer. They each gave unsworn statement of defence.

1st appellant stated that she lived in Dandora where she operated a salon. She stated that on 11/5/09 she was in her house when two men who were accompanied by a lady, one Emily Wambui knocked on her door. On entering into the house they took her mobile phone. They searched her house for guns. They then took her outside where she found her boyfriend John Kimunya, They were all taken to Kayole police station where they were held for eleven days before they were charged.

The 2nd appellant stated that he lived in Mtwapa, Kilifi where he operated a curio shop and taxi business. He stated that on 25/4/09, he was with one Monica Njeri who supplied him with baskets for sale. They parked their vehicle at a garage owned by Waweru who was known to him. Mr. Waweru told him that he wanted to engage in taxi business but he advised him to hire the vehicle instead. On 27/4/09, Mr. Waweru called him and asked him to go to the garage. He had asked him to erase the yellow line on the vehicle. It was while he was in the garage that the police arrested him and was later charged.

We accordingly find the issues for determination to be whether the 1st appellant was positively identified, whether the identification in her respect was properly conducted, whether the 2nd appellant was charged with the proper offence and on the whole whether there was sufficient evidence to convict the appellants for the offence of robbery with violence.

On the issue of identification the 1st appellant submitted that the circumstances under which the complainant stated he identified her were not reliable. She submitted that, although PW1 claimed to have identified her and other assailants at the taxi parking yard, he was not emphatic on the amount or nature of the light that aided him in the identification. She further submitted that PW1 did not identify her voice as to link her with the attack.

In this respect we are aware that there was only one identifying witness. We have warned ourselves of the danger of relying on a single identifying witness in difficult circumstances – see – **Maitanyi – vs – Republic (1986) KLR 198.**

“Although the lower court did not refer to the well-known authorities Abdulla bin Wendo & another vs Republic (1953) 20 EACA 166 followed in Roria Vs Republic (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.”

Furthermore, this is a case in which the only meaning evidence against the appellants was by identification. Hence, the court must be satisfied that such identification must be free from any error, as was held in the case of **WAMUNGA – VS- REPULIC (1989) KLR, 424.**

“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.”

PW1 testified that there was sufficient light at the taxi parking yard where the appellants approached him as they hired the taxi. He stated that it took about seven minutes to negotiate with them the amount of hire and it is at this time he was clearly able to see who was hiring the taxi. According to PW1 the 1st accused was accompanied by a lady who he later identified as the 1st appellant herein. He also clearly described where they sat in the taxi after they agreed on the amount for hire. An extract of his testimony is as follows:-

“While there, two people a lady and a man came and asked to be taken to Komarock. These were the 1st and 3rd accused. We agreed at Kshs.1,700/-. They took the rear seats. The 1st accused was immediately behind me. The accused was carrying coke bottle.”

It is worthwhile to note that, although PW1 was not specific about the time of the robbery in his evidence in chief, we conclude that the time must have been at night as he stated he identified the 1st appellant with help of some light at the parking yard. In this respect, it was important that he described both the amount and nature of the said light. This vital requirement lacked in his evidence. But again we take into account that PW1 had a cool seven minutes with the assailants as they negotiated the hire fare. We think that this was sufficient time during which he was able to identify particularly the 1st appellant who participated in the negotiation.

We now consider whether the identification parade of the 1st appellant was conducted in a proper manner. The said identification parade was carried out by PW6. According to PW6, he conducted three separate identification parades in respect of the 1st and 2nd accused and the 1st appellant in which PW1 positively identified them.

The 1st appellant submitted that the identification parade in her respect was not conducted in accordance with the laid down procedure. This procedure is well laid down in the case of **REPUBLIC – VS MWANGO s/o MANAA (1936) 3 EACC, 3939 and SSENTALE –Vs- UGANDA (1968) EALR, 365.** In particular, the parade officer must ensure that the suspect is placed among at least eight people as far as possible of his/her similar age, height, complexion and general appearance. PW6 instead conducted the identification parade in a casual manner and did not allude to having observed the basic requirements as set out in the cited cases.

There is also the evidence of PW7 which incriminated the appellant. He testified as to having been shown a lady by the name Emily Wambui who nevertheless did not testify. This Emily Wambui then took him to the **“1st accused, No.2 and No3.”** He also testified that he found them **“each in the house”.** Suffice it to say, the said Emily Wambui did not testify as a prosecution witness. But the 1st appellant admitted to knowing her and going to her house in the company of the 1st accused and the police where she identified her as one of the robbers. His evidence in addition to the fact that PW1 had a cool seven minutes with her as they negotiated the fare, we think, was sufficient corroboration that she was one of the robbers. We thus conclude that she was positively identified.

As for the 2nd appellant he was arrested at PW3's garage as he was inspecting the stolen car and paying for its repair. PW3 did in fact confirm that he is the person who took the car to his garage and requested to do repairs on it. He testified that he was his customer who was known to him even before he took the car to him. He did also positively identify him in court in this respect.

There is no doubt that the vehicle the 2nd appellant took to PW3 was then robbed of PW1. It thus did not belong to him. His defence that he had used the garage so as to negotiate a business with PW3 did not add up and was ousted by the strong prosecution evidence that the vehicle was that robbed of from PW1.

However, there is no 'iota' of evidence that the 2nd appellant was among the persons who robbed PW1. Although he knew about the incident, his role was only to help in distorting the identity of the car. He obviously handled the said vehicle with the full knowledge that it was a stolen vehicle. We do accordingly concur with him that he ought to have been charged and convicted with the offence of handling stolen goods contrary to section 322(1) as read with Section 322 (2) of the penal code.

Back to the case of the 1st appellant as to whether the offence of robbery with violence was proved beyond all doubts, we examine the provisions of Section 296(2) of the penal code. The same reads as follows:-

“ If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, 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, he shall be sentenced to death”.

This provision lays down the elements of the offence of robbery with violence as,

- a. **If the offender is armed with any dangerous or offensive or instrument, or,**
- b. **Is in the company of one or more person or persons, or**
- c. **If, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence against the victim.**

In the present case, the 1st appellant was in the company of two other persons when she accosted PW1. One of them was armed with a pistol whilst she was armed with a soda (coke) bottle. Actual violence was also meted against PW1. He was struck from the back and forced to drink the substance that was in the coke leading him to become unconscious. When he came to, he found himself with four broken teeth. He was taken to hospital. The P3 form produced by PW5 attested that he indeed suffered physical injuries. We are therefore of the view that the offence of robbery with violence contrary to section 296(2) of the penal code was proved to the required standard.

We accordingly uphold both the conviction and sentence against the 1st appellant. We dismiss her appeal in its entirety.

As for the 2nd appellant, we find that sufficient was adduced only in proof of the offence of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal code. We find him guilty of the said offence and convict him accordingly. However, since he has been in prison since October, 2009, we consider that period to be sufficient punishment. We thus order that he be and is hereby set free unless otherwise lawfully held.

It is so ordered.

DATED and DELIVERED at NAIROBI this 21st Day of MAY, 2015.

L. KIMARU

JUDGE

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. 1st appellant in person
2. 2nd appellant in person
3. Ms. Ndombi for respondent