REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 192 OF 2012

PETER KARIUKI WANJIKU ……..…….…… 1ST APPELLANT

JOHN KAMAU WANJIKU ……..…….. 2ND APPELLANT

VERSUS

REPUBLIC ……..…… PROSECUTOR

(Being an appeal from original conviction and sentence contained in the Judgment of Hon. C..Oluoch (Principal Magistrates) in the Chief Magistrate's Court at Kiambu Criminal Case No. 1402 of 2010 delivered on 22nd May 2012)

JUDGMENT

This is an appeal against the conviction and sentence entered against the 1st and 2ndAppellants for the charge of attempted robbery with violence contrary to Section 297(2) of the Penal Code. It was alleged that on 24th August 2010, at Ruaka Village in Kiambu District within Central Province, the Appellants while armed with offensive weapons, namely a *panga*, a club and a screw-driver, attempted to rob Musa Shiti Sababu of cash Ksh.500,000/= and at or immediately before or immediately after, threatened to use actual violence to the said Musa Shiti Sababu.

The prosecution called 6 witnesses in support of its case. Both Appellants gave unsworn evidence and did not call any witnesses. At the conclusion of the trial, the court found the Appellants guilty. They were each convicted and sentenced to death.

Both Appellants filed their respective appeals which were consequently consolidated. In his Amended Grounds of Appeal, the 1st Appellant raised the following grounds: that the identification was not proper to justify a conviction; that his right to a fair trial was contravened since he was denied the chance to have PW1 recalled; that the trial court erred in relying on contradictory circumstantial prosecution evidence; that he was not accorded a fair trial contrary to the provisions of the Constitution; that the trial Magistrate disregarded his defence and that the charges against him were not proved beyond reasonable doubt.

The 2nd Appellant on his part raised the following grounds: firstly, that his right to a fair hearing was violated; secondly, that the trial Magistrate failed to point out the issues for determination and reasons for

the findings reached contrary to Section 169(1) of the Criminal Procedure Code.; thirdly, the prosecution testimony was contradictory and therefore unreliable; fourthly, that the Appellant was denied the right to offer mitigation as required by the law; fifthly that the prosecution did not prove its case beyond reasonable doubt and lastly, that the trial Magistrate disregarded his defence without any reasons.

Both Appellants filed their respective submissions .The 1st Appellant submitted that the court erred in founding its conviction entirely on the unreliable evidence of identification and that the evidence of his arrest was circumstantial and failed meet the threshold of reliability. Furthermore, the evidence of visual identification by a stranger was not reliable and it was not safe to conclude that the conditions were suitable for a positive identification. He added that the witnesses did not provide a description of the attackers to form the basis for their arrest. The 1stAppellant added that the prosecution did not prove that theywere found in the complainant's motor vehicle, and noted that there were inconsistencies among the witnesses about the particulars of the vehicle and the number of people present at the scene. He also maintained that it was improper for the trial court to dismiss his defence in light of the contradictions in the witness testimonies. The first Appellant urged the court to find that the trial Magistrate failed to analyze the weight of the evidence before dismissing his defence. He faulted the trial court for denying him an opportunity to have PW1 recalled. He also challenged the sentence of death prescribed by the trial court as unlawful.

The 2nd Appellant submitted that his right to a fair hearing was denied in that he was not given access to the witness statements despite reminders made to the court. Furthermore, he submitted that he was tried while he was of ill health and could not therefore follow and participate in the proceedings effectively. The trial court also failed to comply with Section 329 of the Criminal Procedure Code. He further submitted that the prosecution case was not proved to the required standard as there were contradictions in the testimonies of PW1 to PW4. Further, it was not plausible that one person armed with a *panga* and a *rungu* could threaten more than 10 people. He added that it was not possible to ascertain who could have been in possession of the recovered weapons. Furthermore, there was also conflicting evidence regarding the details of the motor vehicle as the complainant failed to produce evidence of ownership of the motor vehicle. It was the 2nd Appellant's view that the trial court erred in proceeding to convict him on the basis of incredible evidence while dismissing the Appellant's defence without reasons.

The appeals were opposed. Mr. Muriithi for the Respondent submitted that there was overwhelming evidence to support the charges. He submitted that the minor contradictions were immaterial and did not go to the core of the case. He added that it was not mandatory for the court to indicate the law under which the Appellants were convicted. He reiterated the testimony of PW1 adding that the chain of events was not broken from the time the Appellants held the complainant hostage to the time they were arrested, while still inside the complainant's car. He submitted further that the testimonies of PW1 and PW4 were corroborated by PW2 who gave details of the weapons in possession of the Appellants and the respective roles they played during the attack. PW5 and PW6 recovered the weapons following information given to them by the OCS who had been called by the complainant. Furthermore, the offence was committed in broad daylight when there was no possibility of mistaken identity. Since all the ingredients of the offence were established, the appeal ought to be dismissed.

Having considered the evidence afresh as we are duty bound, we shall proceed to determine the appeal and arrive at our own independent conclusions. Considering the submissions made before us, we shall proceed to determine the Appeal on the following broad issues:

a. ***Whether the Appellants' rights to a fair trial were violated.***
b. ***Whether the prosecution case was proved to the required standard.***
c. ***Whether the Appellants' defences were duly considered.***
d. ***Whether the sentence was lawful and appropriate in the circumstances.***

We must first address ourselves on the question of whether or not the Appellants' rights to a fair trial were violated. On this aspect the first issue for consideration is whether the failure to call the prosecution witness was prejudicial to the 1st Appellant's case as alleged. The 1st Appellant stated that he was denied

the right to have PW1 recalled and re-examined despite having made the request in court.

An examination of the record of proceedings shows that the 1st Appellant applied to the court on 24th July 2011 to have PW1 recalled. He renewed his application on 10th November 2011. On both occasions, the court issued an order for the witness to be summoned. However, the case eventually proceeded without the witness being recalled. The record shows that subsequently the court proceeded to hear the evidence of the remaining witnesses and the Appellants were put on their defence. This issue was not revisited. The application for recalling the witness was neither questioned nor opposed. We take note of the fact that the 1st Appellant was not represented and may by oversight have forgotten to follow up on his request. In that case, it is our view that the learned magistrate ought to have followed up with his order so as to ensure that PW1 was availed for further cross examination. The learned magistrate ought to have reminded himself that he had issued witness summons which had not been executed.

While the right to have a witness recalled is not absolute, the trial court in its wisdom granted the request in this regard, and was therefore, duty bound to ensure that the request was followed to the letter.The failure to do so ultimately negated the 1st Appellant's right to a fair hearing as enshrined under Article 50(2)(k) of the Constitution. The same provides that;

> ***"Every accused person has the right to a fair trial, which includes the right-***
>
> ***(k) to adduce and challenge evidence.''***

The right to a fair trial is sacrosanct and under **Article 24** of the Constitution cannot be derogated. As such, the failure by the learned magistrate to observe it prejudiced the Appellant. As a result, the trial of the 1st Appellant was rendered materially defective.

On whether the second appellant was furnished with the prosecution's witness statements, we note that he made the request on 29/9/2010. The case was adjourned for hearing to 25/10/2010. On this date, he did not revisit the issue of having not been furnished with the witness statements and indeed that issue never rose again even at the commencement of the witness' evidence on 2/6/2011. In those circumstances we conclude that he must have been furnished with the witness statements as at the time the hearing begun. Therefore, his constitutional right under Article 50(2)(j) of being informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to it was not violated.

Having made these observations, the next issue to consider is whether or not aretrial should be ordered. As succinctly stated by the Court of Appeal in the case of ***Opicho v Republic*** **[2009] KLR 369**;

> ***"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."***

In the case before us, the Appellants were charged with the offence of attempted robbery with violence. Considering the evidence as a whole, we find that there is a strong case against the Appellants. The offence took place during the day, when there was no possibility of a mistaken identification. Furthermore, the chain of events was unbroken from the point the Appellants accosted the complainant to the point when they were arrested while in the complainant's car in his compound. The assailants were armed with offensive weapons which were recovered at the time of arrest. We find that on the whole the evidence on record meets the ingredients of the offence of attempted robbery with violence. Suffice it to say, although it is the 1st Appellant who raised the issue that has necessitated our order for a retrial, since the evidence of PW1will tilt the outcome of the case, the retrial will be in respect of both Appellants.

While this matter commenced on 31st August 2010 and judgment was delivered in 2012, we appreciate that a considerable period of time has passed. In the same breath, we appreciate that the charges against the Appellants are serious and attract an equally serious death penalty. We are therefore, of the view that the Appellants will suffer no prejudice and it is in the interests of justice that a retrial should be ordered.

Finally we think that it is not in the interest of justice that we evaluate other issues raised in the grounds of appeal as it may prejudice the outcome of the appeal. In the result, this appeal partially succeeds. We quash the conviction and set aside the death penalties. We order that a retrial be conducted. The Appellants shall be escorted to Kiambu Police Station for drafting of fresh charges within the next 7 days. Thereafter, they shall be presented to the Chief Magistrate, Kiambu Law Courts within the period provided by the law to take pleas.

It is so ordered.

DATED and SIGNED this 22nd day of October 2015.

L. KIMARU

JUDGE

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. *Both Appellants present in person*

2. *Aluda for the state*