



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEALS 166 OF 2012

STEPHEN THAMA WANJOHIAPPELLANT

VERSUS

**REPUBLIC.....
RESPONDENT**

(An Appeal arising out of the conviction and sentence of L. Gicheha PM in Criminal [Case No. 2060 of 2010](#) delivered on 5th April 2011 at the Chief Magistrate's Court at Nairobi)

JUDGMENT

The Appellant was 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 9th day of November 2010 at Gachie in Gigiri within Nairobi Area, jointly with others not before the court and while being armed with dangerous weapons namely metal bars, robbed Francis Mwaura Wanaina of one bag containing jeans trouser, a shirt, and a brush all valued at Kshs 2000/=, and at the time of such robbery used actual violence against the said Francis Mwaura Wanaina.

The Appellant was arraigned in court on 2nd December 2010 and pleaded not guilty to the charge against him. He was tried, convicted of the offence of robbery with violence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. The Appellant was represented by counsel, Mr. Macharia R.K. who argued four grounds of appeal.

The first ground of appeal was that there was no positive identification of the Appellant. The counsel submitted that the complainant stated that he recognised the Appellant at 10pm using illumination from a torch, and that he knew the Appellant who had gone to school with his children. However, that no identification parade was conducted, and that the Appellant's cousin who was the one initially identified and arrested. Further, that the complainant also testified that he was walking together with the assailant who hit him from behind and that he suffered severe injuries as a result. Counsel submitted that these events cast doubts on his capacity to identify and recognise his assailant, and he relied on the decision in **James Muthion vs Republic (2006) e KLR** for the position that it is not safe to convict on the evidence of a person who is severely injured.

The second ground of appeal was that the evidence leading to the circumstances of the Appellant's arrest and charging was insufficient to convict him of the offence he was charged with. The counsel submitted in this regard that the Appellant was identified and arrested when he was in the police cells, having been charged with another offence of being in possession of changaa, and PW5 stated in his evidence that he had no evidence that the Appellant had committed the offence when he charged him.

Further, there was no evidence led by the complainant that he had been robbed by the Appellant, neither did the trial court make a finding that there was robbery. Lastly, that the charge stated that there were other assailants, but PW1 stated that he was assaulted by only one person. The counsel relied on the decision in **Mohamed Juma vs Republic (2006) e KLR** that the prosecution's burden of proof in this regard was heavier than in ordinary cases, as the charge the Appellant was facing was a serious one.

The third ground of appeal was that the proceedings were unconstitutional as Article 50 of the Constitution states that an accused person charged with a capital offence is entitled to counsel, and that the burden was shifted to the accused in the ruling given on his application for bail at page 2 of the proceedings, thus breaching his presumption of innocence. Lastly, the counsel submitted that the sentence imposed upon the Appellant of death was also unconstitutional.

Ms Matiru for the State opposed the appeal, and submitted that it was not necessary to conduct an identification parade as the complainant knew the Appellant and recognised him, and that is why he informed the police that they had arrested the wrong person when they arrested the Appellant's cousin. Further, that the complainant was able to see the Appellant as he lay on the ground being attacked. On the evidence on the robbery, Ms Matiru submitted that the items that were stolen were never recovered as the Appellant fled with them, and that this issue was never raised in his defence.

On the issue of the constitutionality of the trial court proceedings, Ms. Matiru also submitted that the Appellant ought to have appealed the ruling on his bail application to the High Court. Lastly, Ms Matiru admitted that there was an error on the charge sheet but that it was not fatal, and the Appellant's conviction was safe.

A brief summary of the evidence adduced before the magistrate's court is as follows. The prosecution called seven witnesses. PW1 was Francis Mwaura Wanaina who testified that on 9/11/2010 at 10 pm he was walking alone on his way home when he saw a man he knew as Stephen Wanjohi come out of a bar and waited for him. As they walked together he was hit from behind and fell, and that when he looked up he saw it was the said Wanjohi who was hitting him. The said Wanjohi then took a bag which he had containing a jeans trouser, a shirt and toothbrush valued at Kshs 2,000/= and went with it.

PW1 testified that he then sought help at a house and was taken to Kiambu Hospital where he was admitted from 9th to 12th November 2010. He further testified that he reported the robbery and assault at Kiharu Police Station on 14/11/2010 and took the clothes he had worn during the attack, and he also told the police that he knew the person who had attacked him. He stated that he was given a P3 form to fill and wrote a statement, and gave the police his son to direct them to the assailant's home. However, that the police arrested the assailant's cousin, and PW1 went to the police to inform them they had arrested the wrong person and they later arrested the Appellant.

PW2 was Daniel Kariuki Kamau who testified that on 9/11/2009 at 10pm he was at home at Gachie when he heard screams, and that upon going outside he found PW1 whom he knew, and who had blood on his face. He then called PW1's brother whom he worked with, and they took PW1 to hospital and later wrote a statement.

PW3 was Simon Mwaura Maina who also testified that he lives in Gachie and that on 9/11/2009 at 10pm he got a call while at home from PW2, who told him that his brother PW1 had been beaten by thugs. He then went to the scene of the attack and found PW1 seriously injured, and took him to hospital with PW2.

PW4 was PC Alex Keyari who testified that he worked at Kihara Police Post, and that on 1/12/11 he was informed that an accused person who had been arrested the previous night for another offence had also been involved in a robbery. Further, that he called the complainant who identified the accused person, who was subsequently charged with robbery with violence, and transferred to CID Gigiri. He identified the accused as the Appellant.

PW5 was PC Thomas Bii who testified that he was attached to CID Gigiri and that on 1/12/2010 he was told that to take the fingerprints of a suspect, and was given statements including that of the complainant

and a P3 form. He then charged the accused with robbery with violence and took him to court.

PW6 was Dr. Kamau, who testified that he works with the Kenya Police, and that on 19/11/2010 he examined PW1 and found that he had injuries caused by a blunt object which he classified as grievous harm. He stated that he filled a P3 form, which he produced in court as an exhibit.

The last witness was PW7, PC Stephen Kiilo, who testified that he worked at Kihara Police Post, and that on 1/12/2010 at 11pm while on patrol, they received information that there were persons taking changaa in a house belonging to a lady. Further that upon going to the said house they arrested the lady and two men, and took them to Gigiri Police Station. One of the arrested persons was the Appellant, and PW7 testified that he later learnt that the Appellant had been charged with robbery.

After the close of the prosecution case the trial magistrate found that a *prima facie* case had been established against the Appellant. The trial magistrate put the Appellant on his defence and explained to him section 211 of the Criminal Procedure Code. The Appellant gave unsworn evidence and did not call any witnesses. He testified that he is a painter and that on 1/12/2010 he went to work and found that there were no materials, and that he then called his girlfriend who was the complainant's daughter and met her at her friend's house. He further testified that the police came and arrested him for being in possession of bhang while he was at the said house.

We have considered the arguments made by the Appellant and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

We accordingly find that there are three issues for determination in this appeal. The first is whether there was a positive identification of the Appellant; secondly, whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, and lastly whether the proceedings and sentence by the trial court were unconstitutional.

On the first issue of identification, we are aware of the danger of convicting an accused person on the basis of the evidence of a single identifying witness made in difficult circumstances. as was held in **Maitanyi –Vs- Republic [1986] KLR 198 at 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”.

However it was stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

In this appeal PW1 testified that he knew the Appellant by name and that he saw him on the material night before and during the attack and recognised him. Further, that he assisted the police in arresting the

Appellant. This was therefore a case of recognition and not identification, and this court finds that there was no need for an identification parade and that the identification of the Appellant was reliable and safe in the circumstances.

On the second issue as to whether there was sufficient evidence to convict the Appellant with the charge of robbery with violence, we are guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If he is in the company with one or more other person or persons, or**
- 3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549.**

In the present appeal PW1, PW2, PW3 and PW6 testified as to the injuries suffered by PW1 resulting from the robbery. PW1 also testified as to the fact of the robbery and stated that a bag he had containing his clothes was taken during the attack by the Appellant. The trial magistrate also did make a finding in this regard in her judgment at page 18 lines 4-7 of the proceedings as follows:

“ I have no reason to doubt that a robbery did take place that was confirmed by PW2 who went t to assist the complainant when he heard him screaming and his brother PW3. I have also no reason to doubt that the robber took off with a bag which contained his clothes”

The requirements of robbery and use of violence were therefore present in the present appeal, and it is our finding that there was sufficient evidence of commission of the offence of robbery with violence in this regard.

Lastly, on the issue of the constitutionality of the proceedings and sentence by the trial court, we note that the trial magistrate stated as follows in her ruling on the bail application at page 2 of the proceedings:

“...In order for this court to exercise its discretion properly, I find that it is necessary considering the threat that the charge poses on the life of the accused, for the accused to supply this court with such information about himself as would satisfy the court that he is a person who would continue coming to court from his house as he awaits the courts verdict as to his guilt or otherwise. No such information has been supplied to the court”

The requirements in law for an accused person to be granted bail are that the applicant must establish that he or she is not a flight risk. It is our finding that the findings by the trial magistrate with respect to these requirements in no way shifted the burden of proof to the Appellant. We agree with the State in this regard that the proper recourse for the Appellant if aggrieved by the trial magistrate’s ruling was to appeal to the High Court.

It was also argued by the Appellant’s counsel that the death sentence imposed on the Appellant was unconstitutional under the new Constitution of 2010. A five-judge bench of the Court of Appeal has had occasion to address this issue of the constitutionality of the death sentence and review previous decisions on the same in **Joseph Njuguna Mwaura & 2 Others vs R, C.A Criminal Appeal No. 5 of 2008** . The Court of Appeal in its decision stated as follows:

“The right to life under Article 26 of the Constitution of Kenya, 2010 has been fashioned in a specific manner to provide, or include, specific circumstances where life is limited, that is, to the extent is provided by law.

In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do.

We hold that the decision in *Godfrey Mutiso v R* to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carry the mandatory sentence of death.”

We are guided by this decision and adopt the reasoning of the Court of Appeal in finding that the sentence of death meted out to the Appellant was not unconstitutional.

We accordingly uphold the conviction of the Appellant for the charge of robbery with violence contrary to Section 296(2) of the Penal Code, and the sentence for this conviction is found to be legal.

Orders accordingly.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY 2014.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE