



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 294 OF 2011

(as consolidated with Criminal appeal No. 295 of 2011.)

JOHN GICHUNGE MWANGI.....1ST APPELLANT

SAMUEL GATERI KERU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original sentence by Hon. B.A. Owino S.R.M. dated 9th November, 2011 at Thika SRMCCR Case No. 1956 of 2009.]

JUDGEMENT

The appellants, **Samuel Gateri Keru** and **John Gichunge Mwangi** were charged and convicted of robbery with violence contrary to S.292 of the Penal Code. When the appeals came for hearing on 16th October, 2013, counsel for the state Mr. Kadembe applied for a consolidation of both appeals on grounds that the same arose out of similar acts and circumstances. Mrs. Rashid for the appellant did not raise any objection and the court ordered a consolidation of Criminal appeals No. 294/2011 and 295/2011 and further ordered that both proceed under File No. 294/2011 with Samuel Gateri Keru as the 1st Appellant and John Mwangi as the 2nd Appellant.

The appellants were charged at the Chief Magistrate's Court at Thika with three counts of robbery with violence as follows;

'Robbery with violence contrary to Section 296(2) of the Penal Code'

The appellants and another accused, **Grishon Kamau Kuria** were charged on three counts of robbery with violence. Count No. 1 was that on the 19th of April, 2009 at Rolex Pub in Membley Estate in Ruiru Municipality in Thika District of the Central Province, jointly with others not before court, were armed with a pistol, robbed **Emily Wanjiru Kamau** cash of Ksh.20,000.00 and Nokia mobile phone make 6210 valued at Kshs.30,000.00 and immediately after the time of such robbery used actual violence to the said **Emily Wanjiru Kamau**.

Count No. 2 was that on the 19th of April, 2009 at Rolex Pub in Membley Estate in Ruiru Municipality in Thika District of the Central Province, jointly with others not before court, while armed with a pistol, robbed **Charles Njaramba** cash Kshs.800.00, a mobile phone make 6080 all valued at Ksh.20,000.00 and immediately before the time of such robbery used actual violence to the said **Charles Njaramba**.

The particulars of the third count are that on the 19th of April, 2009 at Rolex Pub in Membley Estate in

Ruiru Municipality in Thika District of the Central Province, jointly with others not before court, were armed with a pistol, robbed **Charles Mahinge Githinji** of Ksh.1,000.00, a mobile phone Nokia 6300 all valued at Ksh.9,000.00 and immediately after the time of such robbery used actual violence to the said **Charles Mahinge Githinji**.

These incidents are alleged to have taken place simultaneously at a bar premises within Membley Estate, Ruiru.

At the trial, the prosecution called five witnesses whereas the appellant made unsworn statements in Kiswahili. PW1, Charles Njaramba, a male adult in a sworn statement testified that he is No. 45405, a Police Constable from Mumias Police Station. On 19th April, 2009, he was based at Mumias but was on leave and at home in Ruiru. At around 9 p.m. he was at Rolex Bar within Membley Estate with friends. The bar has two sitting areas at the front and rear and they sat at the rear. A commotion suddenly ensued at the front area and as one of his friends rose to go and check on what was happening, a tall slim man burst into their area. He was armed with a gun and had covered his head with a black stocking. He raised the gun and ordered everybody to lie down. Instinctively, he tried to confront the man but he was shot at. It was painful and he submitted. The man frisked him and took his wallet which had Ksh.800.00 and a mobile phone Nokia 6070, valued at Ksh.6,000.00 and other personal effects.

People started screaming and raising alarm whereupon the assailants fled. The man fled on foot. After their departure, he was rushed to a nearby hospital and first aided.

The following day he went to another hospital in Githurai. He testified that he later recorded a statement after one week but told police that he could not identify the assailants. He had not seen any of their faces. Later, he was issued with a P3 Form which he filled and returned to the police.

He further testified that the entire incident lasted about 3 minutes. He would not be able to identify the assailants even now and that he learnt that his friends had also been relieved of their phones and cash. His property has to date not been recovered.

All three accused chose not to cross examine the witness. There was no re-examination either.

PW2. No. 56341, Corporal George Maitha of Ruiru Police Station duly sworn testified that on the material date he was on duty at the station at about 2200 hours when he received a call from the Officer Commanding Station CIP Kavilla informing him of a robbery incident in a certain bar in Membley Estate. He and Police Constable Kimaru rushed to the bar which he knew. At the scene, they were informed that a gang of robbers had descended on the bar and robbed patrons and staff. Some of the victims were injured and rushed to Wellington Hospital along Thika Road. He further testified that the victims had been attacked by a gang of gun wielding men.

The witnesses further testified that he went to the hospital to ascertain the conditions of the victims. One victim was **Emily Wanjiku**, a witness who informed him that she was robbed of Ksh.20,000.00 and a mobile phone. She said she was able to see the people who robbed her. She had also struggled with one robber who hit her on the face. The other was Njaramba (PW1). He said he was shot on the left leg and robbed of Ksh.800.00 and a mobile phone. He was attacked from behind and did not see the attacker. He also met a third victim called Githinji who was robbed of Ksh.1,800.00 but confessed he would not be able to identify the attackers as he was slightly drunk.

On enquiries from the hospital, the witnesses established that a motor vehicle, Reg. No. KAK 134Y had fueled at Astrol Petrol Station, Thika Road and fled without paying. It was suspected that the car was involved in the robbery. Its particulars were made to the witnesses by the petrol pump attendants. Later, this car was tracked to Makuyu and three persons arrested. These are the accused. Makuyu Police informed the witness that the car had been used in another robbery in the area. Emily Wanjiku was called for an identification parade and she identified the appellants who were the accused 1 and 2 in the parade lineup.

PW2 testified that the accused were not identified by any other witnesses but only Emily Wanjiku said she was able to see the attackers.

There was ample light in the bar premises during the incident. He did produce identification parade forms for Accused 1 and 2 (now appellants.) No recoveries were made except for the motor vehicle which was kept at Makuyu for other robbery cases.

The witness further testified that this witness, **Emily Wanjiku**, has relocated to an unknown place and is unwilling to testify due to threats by the accused persons. He testified that he believed the accused persons got the witness's contact through the statements. Mr. Githinji has been reluctant to come to court on grounds that he never identified any of the attackers.

This evidence was reinforced by the witnesses on cross examination.

PW3 – Emily Wanjiku Kamau duly sworn testified that she is a businesswoman. On 19th April, 2009 she worked as a barmaid for Stephen Maina at Rolex Bar. She testified that on this date at 2200 hours she served at the main counter bar. The bar was to open up to midnight. There was a night watchman who would come for a drink once, twice. On his third round, he came and told me to close the corridor door. I sent another bar maid to do this. By this time three men entered through the main entrance. Of the three, one was tall and had a black marvin. The other two were shorter, one of the men came to the counter and asked for a cigarette. The other tall man shot in the air. She recoiled in fear. The 3rd man immediately kicked open the counter and came towards me. She testified that the man slapped her and pushed her towards the wall.

The witness further testified that she saw the tall man going to the back of the bar. They ordered everybody down and frisked them. The witness lost a Motorola phone worth Kshs.6,000.00 and about Kshs.20,000.00 from the counter drawer. As the men left, one of them smashed a bottle on her face and left her bleeding. There were other injuries and they were taken to hospital. The police was called to the scene.

She testified that later, she was called by police to identify some of the thugs. She was told that three people had been arrested. She identified two – Accused - 1 and 2. Accused No. 1 had a gun and No. 2 entered the counter and took cash and hit her with a bottle as well. The witness testified that she identified the two at an identification parade and that none of her things were recovered.

On cross-examination, the witness reiterated her evidence as presented. She testified that she lost a motorolla L6 phone and about Ksh.20,000.00 in the counter drawer for which she would not have anything to show. She however, testified that there was a receipt book at the bar which was not produced in evidence. She also clearly recounted the identification parade in which she identified the two appellants.

PW4 – George Maingi, duly sworn on 3rd August, 2011 testified that he is a clinical officer at Thika District Hospital. He produced a P3 Form - MF1 for one, Charles Njaramba. He had gone for treatment with gunshot wounds afflicted by an unknown person. He was treated at Wellington Hospital, Ruiru and at St. John Hospital. He had suffered a gunshot wound on the right fore arm. The forms were filled three months after the incident and that the wound was inconsistent with the mode of injuries. The injuries are in my classification grievous harm. He produced the P3 Form – Exh. 1 and said that the wound had healed leaving a residual scar.

Cross-examination for this witness was negligible and eventless.

PW5 – Police Constable Asha Dubo of Tourist Police Unit duly sworn testified that on 24th April, 2009 she was based at Ruiru Police Station as Officer-In-Charge of Crime. She recalls the case and had conducted an identification parade and compiled the results – MF1 – 2 and 3. The suspects were informed of the procedures of the parade and they agreed. They did not require or ask for a friend or any counsel representation. The line ups were made with all members of the parade coming from the call.

The accused were identified by touch and did not complain. They said they were satisfied.

Her two witnesses were being held at the crime office next to the CID office. She lined up the parade members with all members from the cells. She had chosen parade members who were of the same height as the accused. The accused did not complain but said they were satisfied. The accused (now appellants) were easily identified from the parade by the first witness Emily Wanjiku Kamau.

At the close of the prosecution case, the appellants were put on the defence. They all chose to make unsworn statements in defence. The 1st appellant Samuel Gateri Keru testified that on the 21st April, 2009 he woke up as usual and went to work. He had left late and reached town at 1000 hours. At the stage he found accused No. 3, Grishon Kamau Kuria who was going to the same area and they took a taxi. The taxi broke down near Kenol whereupon arrived a landrover came and they were shoven into it. He was later taken to Makuyu and Juja Police Stations and subsequently brought to court on these charges. He denies the charges.

Appellant No. 2 also did an unsworn statement in defence. He testified that on 21st April, 2009, he reached home from work at 500 hours. At 1700 hours, he woke up and set off for work. He is a taxi driver for motor vehicle registration No. KAE 546Y. At Maskat Hotel he was hired by accused No. 2 and No. 3 to take them to Karugia at a fee of Ksh.1,200.00. On the way and before Kenol Trading Centre he had problems with his wipers and stopped. It is here that he was arrested and taken to Kabati Police Station upon a thorough search of himself and the passengers. He denied the charges and pleaded not guilty.

At the conclusion of the trial, the court convicted both appellants and sentenced them to death as provided by law. The now appeal against conviction and sentence

The 1st appellant, John Gichunge Mwangi grounds his appeal on the issue of being convicted on the basis of reliance on identification by a single witness, in adequacy of evidence used in conviction, reliance on an improper mode of arrest and also faulted the trial court for rejecting his evidence in defence.

The 2nd appellant, Samuel Gateri Keru faulted and relied on the same grounds but added that there was a default in the identification parade utilized to pin the appellants and also that there was no arresting officer and therefore doubt as to the mode of arrest.

He prays that may this appeal be allowed, conviction quashed and death sentence imposed to be set aside.

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The appeal came for hearing before us on 16th October, 2013 when we heard oral submissions from Betty Rashid, counsel for the appellants and Mr. Kadembe for the state/respondent. Counsel for the appellants sought to rely on the authority of **Gabriel Njoroge vs Republic [1980] eKLR** which authority lays emphasis on the imminent duty of the 1st appellate court to deal and curiously scrutinize the issue of facts, evidence and law on appeal.

Counsel further rubbished the evidence of PW1 and PW2 in that PW1 could not identify anyone due to the black cloth cover that was donned by the tall slim man who was armed with a gun. PW1 confesses that he was not able to identify the assailants in the melee due to the split second events. She also found fault with the evidence of a motor vehicle fuelling at Astrol Petrol Station, Ruiru and failing to pay and this being the motor vehicle which was intercepted by the police and the appellants arrested and deems this hearsay. She prays that this be expunged from the record of court for its lack of probative value.

She also raises issues with identification parade whereby she argues that it was conducted contrary to the four standing orders of section 46 of the criminal procedure code. She submits that it is trite law that before a parade is conducted the witnesses have recorded that they could identify the assailants. The identification parade was lacking in authenticity and is therefore not reliable. She also cautions against reliance on evidence of a single witness and warns that this should be taken cautiously. Further, the

evidence of the parade was through the head and this could not be seen due to its black marvin cover. Yet this was used as basis for conviction. This was a misdirection by the magistrate and therefore prays that the appeal be allowed and appellants acquitted.

Mr. Kadembe conceded the appeal on grounds of reasonable doubt of identification of the appellant on the material night at Rolex Bar. The requirements of identification are expressed in section 46 of the Forces Standing Order.

We have carefully considered the appellants written submissions. They dwell on four key issues. Firstly, counsel submits that there was no evidence to secure his conviction on the 2nd count as the complainant who testified as PW2 clearly told the court that he did not recognize his attacker. Secondly, he submits that the court erred in convicting him on the evidence of a single identifying witness without testing that evidence to ensure that it was free of error. Thirdly, the appellant faults the court for believing and relying on the testimony of (PW)1 as a single identifying witness who also identified him under difficult circumstances.

As a first appellate court, we are under duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. This duty has been stated and restated in many decisions both by the High Court and Court of Appeal See **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32**. See also **Mwangi –vs- Republic [2004] 2 KLR 28** where the court held that “an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence.”

In this appeal we find from our independent analysis of the evidence and agree with the respondents that the possibility of error in identifying the appellant was enormous. The appellant’s case is that PW3 was not in a position to positively and easily identify the appellants due to the circumstances prevalent at the time of the offence. She was shocked and anguished and was hiding under the counter. She was pushed, kicked and ordered to lie down in fear. There was no opportunity of a proper identification of the appellant’s.

The identification parade was irregular and contradicted section 46 of the Forces Standing Orders. PW3 as is usual had not recorded a statement of identification prior to the identification parade. There is no clarity as to whether she had not seen the appellants before the parade. It is also alleged that there was consultation between the investigating officer and PW3 thereby diluting the value and authenticity of the identification parade.

At the close of the day, there is no evidence directly linking the appellants to the goings-on at Rolex Bar, Membley on the fateful night. The only likely evidence that may have led to a conclusion of a conviction for the appellant is the evidence at Astrol Petrol Station, Thika Road and a later arrest of the appellants at Makuyu in the same car that had taken fuel without paying for the same. There is no linkage between the fuel saga, the incident at Rolex Bar and the arrest of the appellants. This is mere speculation and suspicion and could not safely be relied on in a conviction.

The concession of counsel for the respondent/state comes in to break the camel’s back. He concedes on grounds of doubt in a proper identification of the appellants. Looking at the entirety of the evidence and the circumstances of the case, we agree on this point. The trial court’s finding therefore falters in favour of the appeal. We therefore allow the appeal and set the appellants at liberty unless otherwise lawfully held.

Delivered, dated and signed the 27th day of June, 2014.

R. LAGAT-KORIR

D.K.NJAGI MARETE

JUDGE

JUDGE

In the presence of:

.....: Court clerk
.....: Appellant
.....: For the Appellant
.....: For the State/respondent