REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 388 OF 2010(as consolidated with Criminal Appeal No. 389 of 2010

THOMAS MURATHI WACHIRA ……..…..IST APPELLANT

LAWRENCE MWAURA WANYOIKE ..…2ND APPELLANT

Versus

REPUBLIC…….RESPONDENT

[Being an appeal from the original conviction and sentence by Hon. T. Ngugi P.M. dated 8th July, 2010 in Makadara CMCCR Case No. 4392 of 2007.]

JUDGEMENT

These appeals were consolidated at the hearing on 16th October, 2013 with the consent of the appellants. The appellants opted to rely on their written submissions and did not have anything to add.

The appellants **Thomas Murathi Wachira** and **Lawrence Mwaura Wanyoike** were arraigned before the Principal Magistrate's Court at Makadara on a charge of robbery with violence contrary to S. 296(2) of the Penal code. The particulars of the offence are that on the 2nd day of October, 2007 at Ruai stage 26 in Kayole division within Nairobi area, being armed with a dangerous or offensive weapons namely pistol robbed **Erustus Mwangi Macharia** of his cash Ksh.500/= one mobile phone make 1018, one pair of shoes, 1 wrist watch and personal document all valued Ksh.25,630/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Erustus Mwangi Macharia**.

The prosecution called five (5) witnesses while the appellant gave a sworn statement and called DW2, Thomas Mwaniki Wachira who testified in defense.

The prosecution case was that on 2nd October, 2007, PW1 Erustus Mwangi Macharia was coming from shopping when he was accosted by the two appellants and robbed of his money (Ksh.5,000/=), mobile phone Ericsson 1018, 2 torches, a pair of shoes and personal documents. The 1st appellant (Wachira) was armed with a gun and pointed it at PW1.His(PW1's) hands were tied to the back. After the robbery he went home and was untied by his wife, Rosemary Mwangi. He was tied by Mwaniki. He asked the houseboy/servant if he had seen Mwaura that day and the servant said he had not. He reported the matter to the police. He mentioned the names of the suspects and was told to look for them. He found them counting money. They had no motor vehicle and he feared using his car. After one week Mr. Muturi called him and informed him some people had been arrested by members of the public. He found Mwaniki and Mwaura under arrest. There was full moon and lights from car. He had stayed with the

accused for long and had seen them as they ransacked him for about 5 minutes.

PW2, Rosemary Njeri Mwangi testified that she is the wife of the complainant. She further testified that she stays at Innercore-formerly Ruai. She is a nurse and did not know the accused. On 2nd of October, 2007 she was woken up by a Waithaka, a young man who stayed with her and who had been sent by her husband. She found her husband, the complainant with hands tied with shoe laces to the back. He only had socks and no shoes. He asked her to cut the tight laces and reported that he had been robbed at the stage. He had previously called me at the stage. He said he had lost the things he had bought and on going back to the stage, found dog meat strewn all over. We also recovered a bag containing foodstuffs.

At the close of the prosecution case, the appellants were put on their defence. They gave their sworn statements in defense. Ultimately and at the conclusion of the case, they were convicted and sentenced to death as per the law on the subject. They have now appealed against the sentence and conviction as follows;

1. ***THAT*** *the evidence of identification was wanting in so far as identifying witness had not given prior description of the appellant.*

2. ***THAT*** *the subordinate court erred in law and fact in accepting that the appellant was properly identified whereas there was no evidence by the prosecution to demonstrate that indeed identification parade was conducted for the purpose of identifying the appellant.*

3. *THAT the learned trial magistrate erred in law and fact by convicting the appellant on contradictory, uncorroborated and unreliable evidence.*

4. ***THAT*** *the learned trial magistrate erred in law and fact by basing her conviction on extraneous which had not been adduced by either party.*

5. ***THAT*** *the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant.*

6. ***THAT*** *the entire proceedings are incurably defective in that the court failed to comply with mandatory provisions of* ***C.P.C. Sec. 200(3).***

7. ***THAT*** *the learned trial magistrate erred in law and fact in applying the wrong standard of proof in a case of this magnitude.*

8. ***THAT*** *the learned trial magistrate erred in law and fact by rejecting the appellant's defence without assigning any good reasons for so doing.*

The above grounds were for the 1st appellant whereas the 2nd appellant raises the following as grounds of appeal;

1. *THAT the learned trial magistrate erred in law and facts when she convicted me in this case while relying on recognition without her considering that the circumstances prevailing to the recognition were not favourable.*

2. *THAT the learned trial magistrate erred in law and facts when she convicted me in this case without her considering that there is Nothing which a nexus me into crime in question since there was No exhibit that was recovered on my possession.*

3. *THAT the learned trial magistrate erred in law and facts when she convicted me with a single witness.*

4. *THAT the learned trial magistrate erred in law and facts when she convicted me in this case while rejecting my defence without explaining the proper reasons for rejecting thus violating the law*

provision under section 167(1) of c.p.c.

5. *That, My lordship I can't recall the whole evidence that was adduced during the trial now beg leave to this Honourable court to furnish me with trial proceedings so that they may assist me to add more grounds during the hearing of this appeal and same. I pray to be present during the hearing date*.

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 fist 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."

Having considered the record and the respective submissions of the parties, and bearing in mind our duty as a first appellate court, we find that this appeal raises several issues namely identification, contradictory, uncorroborated, unreliable and extraneous evidence, shifting of the burden of proof to the appellants, recognition of the appellants, conviction on a single witness and rejection of the defence of the appellants by the trial court. These issues basically arise from the grounds of appeal.

We shall deal with these issues as hereunder;

1. **Identification**

The respondent opposed the appeals and argued and submitted that the ground of identification was shallow as this was very well done as both appellants were well known to the complainant. PW1 had employed the 2nd appellant and knew the 1st appellant as the 2nd appellant's good friend. At the time of commission of the crime, there was enough moonlight and he identified them vividly and therefore there was no need for an identification parade.PW1, the complainant, clearly described the cap worn by the 1st appellant and also that the 2nd appellant was in a truck trouser. This was a clear case of not only identification but also recognition.

2. **Contradictory, uncorroborated, unreliable and extraneous evidence**

Counsel for the state, Ms. Ikal also submitted that PW1 testified that he lost Ksh.500.00 in the robbery. A contradiction on the amount being Kshs.300.00 is not fatal. She further submitted that what is critical and material is evidence of an attack and money stolen-robbery. This was corroborated by the testimony of PW2 that PW1's shoes were missing.

3. **Shifting of the burden of proof to the appellants**

This complaint by the appellants have no foundation whatsoever. The prosecution adduced ample evidence linking the appellants to the offences committed. There is no evidence from the record that indeed a trial court called upon the appellants to prove the case. They were only called upon to make a defence at the close of the prosecution case. This does not amount to shifting the burden of proof or at all.

4. **Conviction on a single witness**

Overall, the prosecution called five witnesses who clearly and co-ordinately adduced evidence in favour of their case. It is therefore not true that the trial court convicted the appellants on the evidence of a single witness. This cannot be sustained as a ground of appeal.

5. **Rejection of the defence of the appellants by the trial court**

At the close of the prosecution case, the appellants were called to the defence. They gave sworn

testimonies but these were unbelievable and unconvincing to the trial court. The 1st accused testified that he was from a construction site while the 2nd accused testified that he was from taking a shooting incident victim to hospital where he had sustained blood stains. They did not call any witnesses to corroborate and support their testimonies and therefore the conclusion of the trial court that this was not believable. Disregard of the defence is therefore not tenable, or at all.

On the ingredients of the offence of robbery with violence, S. 296(2), Penal Code, counsel for the respondent submitted that there was testimony that the 1st appellant had a gun which he pointed at PW1, the complainant, while the 2nd appellant tied his hands. The 1st appellant asked him to give him money and his phone. The prosecution proved their case beyond reasonable doubt and the accused persons were put in their defence but would not exonerate themselves. They merely made denials. She urged the court to uphold the convictions.

On the issue of recognition and the unfavourable circumstances surrounding the same, this would not stand. There is evidence of a robbery and PW1 – the complainant testified that he knew the two accused well, both being his neighbours and 2nd appellant having been his worker and the other a friend of his. Lack of exhibits is not fatal to the prosecution as all other factors are constant and the evidence overwhelmingly in favour of the prosecution. This also applies to the ground of conviction on a single witness.

The 1st appellant's 4th ground of appeal fails in that the proceedings and judgement bear out the learned magistrate on this. The conviction was based on solid grounds.

Counsel for the state cleared the first two grounds on identification adequately. Grounds No. 3 and 4 by the 1st appellant on contradicting, uncorroborated, unreliable and extraneous evidence were fully satisfied by the submissions of the state in that both appellants were well known to PW1, the complainant, one having been his worker and the other his former worker's good friend. PW1 also testified clearly on the dress by the appellants and also that there was adequate moonlight to enable him identify the appellants clearly. There was no need therefore for an identification parade in the circumstances.

The trial court is also accused of shifting the burden of proof to the appellant. This is not so. Compliance with S.200(3) CPC is had. The ground of application of the wrong standard of proof and rejecting the appellant's defence without assigning any good reason are also not supported by the record and any tangible evidence and therefore fail.

In **Wamunga Vs. Republic [1989] KLR 424**the court of appeal called for special caution in use of visual identification. It stated thus:-

> *"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…"*

When all is said and done, and from the totality of the evidence as already analysed above, we have found sufficient proof that the robbery did take place and that the appellants were involved. They were not only armed but exerted violence on the complainant. They subdued him and made away with his shopping, cash and shoes. This clearly demonstrates the ingredients of the offence.

In the circumstances, we dismiss the appeal and uphold the conviction and sentence.

Delivered, dated and signed the 20th 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