REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 38 OF 2012

DAVID MAINA NJOROGE.....APPELLANT

versus

REPUBLIC ….....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 40 OF 2012

DAVID MAINA KINGORI.....APPELLANT

versus

REPUBLIC ….....RESPONDENT

(arising from the judgment of Hon. D. O. Ogembo Senior Principal

Magistrate Nyeri in Criminal Case No. 1022 of 2008)

JUDGMENT

1. The Appellants DAVID MAINA NJOROGE and DAVID MAINA KINGORI together with CHARLES NDUNGU WANJIRU were all charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 16th day of July 2008 at Munaini village within Nyeri South district of Central Province jointly with others not before court while being armed with dangerous weapons namely pangas robbed ELISHIBA WANGARI MURIITHI cash 20,000/- and a mobile phone make Nokia 1112 serial No. 353648012460134 all valued at Kshs. 23,500 and at or immediately before or immediately after the time of such robbery killed ELISHIBA WANGARI MURIITHI
2. On count two they faced a charge of robbery with violence contrary to section 296(2) of the Penal code, the particulars of which were that on 16th day of July 2008 at Munaini village within Nyeri South district of the Central Province jointly with others not before court while being armed with dangerous weapons namely pangas robbed VIRGINIA MUTHONI WARUTA cash 1,000/- and a mobile phone make Samsung serial No. 354363007568859 all valued at Kshs. 6650/= and at or immediately before or immediately after the time of such robbery used personal violence to the said VIRGINIA MUTHONI WARUTA.
3. The appellants each faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal code particulars of which were as follows: DAVID MAINA NJOROGE and CHARLES NDUNGU WANJIRU on the 26th day of July 2008 at Naivasha town within Rift Valley Province jointly or otherwise than in the course of stealing knowingly handled one mobile

phone Make Samsung Serial Number 3543630027568859 valued at Ksh. 56000/- the property of VIRGINIA MUTHONI WARUTA having reason to believe it to be stolen or unlawfully obtained. DAVID MAINA KINGORI on diverse dates between 16th and 223rd July 2008 at Othaya town within Nyeri South district of Central province, otherwise than in the course of of stealing knowingly handled one mobile phone make Nokia Serial Number 353648012460134 valued at Ksh. 3500/- the property of ELISHIBA WANGARI MURIITHI having reasons to believe it to be stolen or unlawfully obtained.

4. They all pleaded not guilty and were tried and the 1st and 2nd appellant were convicted on both count I and II of robbery with violence and sentenced to death on both counts.
5. Being aggrieved by the said conviction and sentence the appellants each filed appeals against the conviction and sentence and raised the following grounds of appeal.

a. ***First appellant.***

1. The learned senior Principal Magistrate erred in law in convicting the appellant on insufficient, contradictory, inconsistent and uncorroborated evidence. A miscarriage of justice was occasioned to the appellant.

2. The learned trial Magistrate erred in law in failing to consider the evidence both for the prosecution and for the defence in their entirety and/or totality hence arriving at an erroneous finding. Prejudice was occasioned to the appellant.

3. The learned trial Magistrate erred in shifting the burden of proof to the appellant when in law he had no such burden. A miscarriage of justice was occasioned to the appellant.

4. The learned trial Magistrate erred in law in convicting the appellant on the evidence of the two minors who were never victims of the robbery and their evidence was uncorroborated and inconsistent. Prejudice was occasioned to the appellant.

5. The learned trial Magistrate erred in law in failing to appreciate that vital witnesses were never called and no explanation was offered and failed to make the necessary inference against the prosecution. A miscarriage of justice was occasioned to the appellant.

6. The learned trial Magistrate erred in law in sentencing the appellant to suffer death in the two charges which sentence was illegal and erroneous. Prejudice was occasioned to the appellant.

7. The learned trial Magistrate erred in law in allowing the prosecution to amend the charge sheet very late in the proceedings yet the same was not defective either in form or substance. Prejudice was occasioned to the appellant.

b. 2nd appellant.

In his home grown grounds of appeal

a. His identification was not proper

b. He was not accorded fair and just trial and therefore his constitutional rights were violated.

c. His defence was rejected without giving reasons for the same.

d. The prosecution case was not proved beyond reasonable doubt.

6. When the appeals came up for hearing before us we consolidated the same for trial and determination. The 1st appellant was represented by Mr. Njuguna Kimani, the 2nd appellant was unrepresented while Mr. Isaboke appeared for the state and opposed the appeals.

7. The 2nd appellant who was unrepresented filed an amended grounds of appeal and written submission which he relied upon. It was submitted that his conviction was based upon visual identification whereas the trial magistrate did not inquire the circumstances under which the alleged identification occurred and whether the witness had time and opportunity to observe and or identify their attackers. It was submitted that court had a duty to warn itself of the inherent danger of visual identification and the case of JOSEPH NGUMBAO NZARO v R [1991] CR APPEAL NO. 44/87 CA was used.
8. It was submitted that there was a doubt as to the prevailing light, it was further submitted that the identification parade was unfairly conducted in contravention of force Standing Order. It was submitted that his defence was not challenged by the prosecution and that no death certificate was produced to confirm the death of the victim.
9. It was further submitted that the prosecution failed to prove their facts upon which their case was founded which were: identification, identification parade and the recovered cell phone. It was submitted that the prosecution case raised a lot of doubt the benefit of which should have been accorded to the appellant.
10. On behalf of the 1st appellant it was submitted by Mr. Njuguna Kimani that the appellant was convicted on the basis of the evidence of P.W.1, P.W.2 and P.W.3 which the court said was corroborated by the evidence of P.W.5 and P.W.6 her children and that it is the evidence of the minors which should have been corroborated. In support thereof he relied upon the case of KARISA KWISA MONI & ANOTHER V R Court of Appeal at Mombasa CRIMINAL APPEAL No. 220 of 2007 where the court held that corroboration of the evidence of children of tender years is required as a matter of law except in respect of sexual offences.
11. It was further submitted that the evidence of the minors were taken in violation of statutory declaration Act in that voire dire was not conducted. In support thereof case of PATRICK WAMUNYU WANJIRU v R NYERI HIGH COURT CRIMINAL APPEAL NO. 6 OF 2009 was relied upon in which the court quoted with approval the court of appeal decision in JOSEPH OPONDO v REPUBLIC CRIMINAL APPEAL NO. 91 OF 1999 as follows:

"***There are two stages which must be followed and must appear on the record of the trial court. First the examination must endevour to ascertain whether the witness understands the meaning in nature and purpose of an oath. The question or questions by the court must be directed to that. If the court from the answers it receives form the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence. Stage two of the matter then goes into play.***

Where however the witness does not understand the meaning, nature and purposes of an oath, stage two of the examination then follows: The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his/her evidence though not under oath..."

12. It was further submitted that the evidence of P.W.1 was contradictory in respect of the description of the 1st appellant. It was submitted that vital witnesses were never called and no parade forms produced and on the authority of JUMA NGODIA v Rep. The court was urged to find that those witnesses would have given advise evidence.
13. It was further submitted that the appellants defence was not taken into account and that the trial court shifted the burden of proof to the appellant.
14. Mr. Isaboke for the state submitted that both the appellants were properly identified since there was sufficient light at the scene which were never put off during the attack which took between 10-20 minutes. It was submitted that P.W.5 minor aged 15 years identified the 1st appellant and that the tracking of the mobile phone placed the 1st appellant at the scene. It was submitted that the 2nd appellant sold the phone to P.W.13.
15. This being a first appeal we are under law required to reassess the evidence tendered before the trial court and to come to our own conclusion though taking into account the fact that we did not have the advantage of seeing and hearing witnesses.
16. We must point out at this stage that case against the appellants was first heard by Mr. K. Bidali then SRM who took the evidence from three witnesses and on 15th October 2009 the matter was

listed before Ole Keiwua then SRM where the 2nd appellant requested that the matter proceed denovo and on 1st April 2010 the matter proceeded denovo before the said magistrate who was thereafter transferred.

17. On 4th November 2010 the matter was listed before Ogembo D.O then PM where the 2nd appellant again made an application that the matter start denovo which application was allowed having complied with the provisions of section 200 of CPC.
18. P.W.1 Virgina Muthoni Waruta's evidence was that on the material day at 8.30 pm while washing utensils inside the kitchen saw three men armed with pangas enter her house. One of them proceeded to where the deceased was while tow of them went for her. She could see them well since there was bright electricity from the fluorescent tube when she reached the door to the main house in the company of the two attackers they found that her children aged 12 and 8 had locked the door from inside when they heard her screams they ordered her to tell them to open the door and robbed her of the items on the charge sheet.
19. She further testified that when she called out for the deceased after the attackers had left she did not respond having been cut on the neck. It was her evidence that she could identify the attackers through their appearances and clothes and that the one who had attacked was familiar having seen his face before. On 18th August 2008 she spotted one of those who had attacked them and called the police. She further identified the 2nd appellant as the one who had placed a panga on the deceased. She finally identified her stolen mobile and the deceased mobile phone which had been marked 'shosho E'. Under cross examination she confirmed that it was the first appellant who had cut her.
20. P.W.2 p.c. LUKE KIMAIYO testified that on 9th September 2008 they arrested on Florence Wangari Kimani, with a motorolla phone C 1184 which the tracking had shown was in communication with Samsung No.700 which was owned by p.w.1 She had then to Naivasha where they arrested one Muturi and recovered the phone. They tracked the deceased phone Nokia 1112 to one Florence Ndune Mburi and arrested the 2nd appellant who had sold the phone and had used the mobile phone two days after the robbery before selling it. P.W.3 Cpl Anekea Julius confirmed having arrested the first appellant when he was pointed out to him by P.W.1.
21. P.W.4 C.I Charles Marangu conducted an identification parade against the appellants who were positively identified. P.W.5 Ian Murithi Waruta Minor aged 15 years testified that he was able to identify those who attacked them and pointed out the 1st and 2nd appellant. P.W.6 CWW Minor then aged 7 years testified that he saw the 2nd appellant taking the TV remote while P.W.7 produced the P3 form and post Morten report. P.W.9 Isaac Makori Ondori who the appellants had earlier wanted to sell the phone to was able to pick both on identification parade.
22. P.W.10 Stephen Njege Kabiru confirmed a waiter named John Muturi asked for advance of Ksh. 1000/- which he used to purchase the sumsang mobile phone while P.W.11 Richard Mathenge conducted an identification parade in respect of the 2nd appellant who was positively identified. P.W.13 Florence Ndune Mburi confirmed having bought Nokia 1112 from the 2nd appellant.
23. When put on their defence 1st appellant stated that on 16th July 2008 he was at home in shamata and was arrested on 13th August 2008 no item was recovered from him the 2nd appellant stated that on 17th September 2008 he was sleeping at night when he was ordered to open the door by police officers and that no item was recovered from him.
24. In convicting the appellant the trial court had this to say:

> "S***o were the accused before the court identified as the attackers at the scene? The evidence of P.W.2 on this issue was that she identified accused 1 and 2 as the ones who got her from the kitchen into the main house. Both did not cover their faces and that the incident took at least 20 minutes.... This court further notes the other unchallenged evidence of P.W.1 that indeed because she had identified accused 1 at the scene as one of the attackers she easily identified him on 13th August 2008 when she came face to face with him leading to his arrest."***

25. Having analysed the evidence tendered before the trial court we agree with his finding of fact that the appellants were properly identified during the robbery. There is evidence that the electric lights were on and bright enough to identify the appellants during the attack. We further agree with the finding of fact by the trial court that having identified him in the street leading to his arrest.

26. The appellants were adequately identified and picked up by witnesses many independent witnesses at the identification parade have been connected with the stolen mobile phones which they sold to those witnesses. We find that the appellants were placed at the scene of the crime having been found in possession of the mobile phones recently stolen from the victims.
27. On the issue of the evidence of minor witnesses we note that the trial court did not conduct voire dire as is required in law and that it is their evidence which ought to have been corroborated by the evidence of P.W.1. However having analysed the evidence tendered we are of the considered view that even in the absence of the evidence of the minors the appellants convictions were still safe and that the same suffered no prejudice by the omission on the part of the magistrate to conduct voice dire.
28. In the final analysis we find that the prosecution case against the appellants was proved beyond reasonable doubt and that their conviction was safe and would therefore not interfere with the trial courts finding on fact.
29. We however find that the trial court fell into error in sentencing the appellants to death twice as one can only suffer death once. We would therefore put in abeyance the death sentence on count II.
30. We therefore find no merit on the appeals herein where we hereby dismiss.

Dated, signed and delivered at Nyeri this 19th day of September 2014.

J. WAKIAGA

JUDGE

J. NGAAH

JUDGE

Court: Judgment read in open court in the presence of the appellants, their advocates and Miss Maundu for the state. The appellants have right to appeal.

J. WAKIAGA

JUDGE

J. NGAAH

JUDGE