REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 55 of 2012

(Appeal from the judgment of H. M. Nyaberi [Principal Magistrate, Mwingi]

JULIUS MWENDWA MUSYOKA…..……..…….....….APPELLANT

VERSUS

REPUBLIC ……...…….....……..RESPONDENT

JUDGMENT

The State appeals against the judgment of the Principal Magistrate Mwingi where the Respondent was acquitted of a charge of **robbery** with **violence** contrary to **Section 296(2)** of the **Penal Code** in the judgment delivered on the 20th March 2012.

The State in its petition of appeal dated 17th April 2012 and filed the same day relies on several grounds. Represented by Mr. Gitonga, the State contended that the Principal Magistrate erred in finding that the prosecution had not discharged the burden of proof and that the provisions of **Section 57**, **68** and **153** of the **Evidence Act** were not complied with in admitting and relying on the evidence of PW11 whereas such evidence had not been subjected to cross examination. It was further contended that it was wrong to rely on the contents of previous written statements of PW11 which resulted in a mistrial and urged the court to order a retrial.

The Respondent was represented by Mr. Kinyua who opposed the appeal on grounds that the evidence in question was properly admitted and that the evidence of PW11 was contradictory and could not have been relied on by the court to convict the Respondent. The Respondent said the copies of PW11's statements were admissible because the originals were in the possession of the prosecution. The person who recorded the statements from the witness was DW2 and he was therefore best placed to produce them.

Section 153 of the **Evidence Act** provides:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The provision allows cross-examination of a witness on his previously recorded statement which is relevant to the matters in question. The latter part of the provision requires that if the cross-examination is intended to contradict a witness by a previous written statement, the attention of the witness must be drawn to the parts of the previous statement to be used for the purpose of contradicting him. It is this

latter part of the provision which the State alleges was not complied with.

The first issue for determination is whether the two statements recorded by PW11 and copies of which were produced by the defence can be referred to as previous statements. The word ***"previous"*** is defined in Concise Oxford English Dictionary as ***"existing or occurring before in time or order."***

A previous statement is, therefore, one which was recorded for purpose of the current proceedings or in an inquiry for earlier proceedings or matter. The two statements produced were recorded by PW11 as a witness in the proceedings which went before the Principal Magistrate. The first statement was recorded on 25/05/11 while the further statement was recorded on 27/05/11. These are the two statements on which the prosecution based their evidence as they led PW11 in his evidence in chief before the principal magistrate. Our understanding is that the two statements were recorded by PW11 as the police investigated the case of robbery with violence in which the respondent was the accused before the Principal Magistrate. The two statements were previous statements within the provisions of **Section 153** of the **Evidence Act**. The proceedings show that the statement was shown to the witness during cross-examination when he said:

"I did record my statement with the police. This is my statement dated 22/05/2011. The other is dated 27/05/2011. I signed both of them."

The cross-examination continued and which we believe was based on both the testimony of the witness and the two statements. PW11 said:

"In my statement, I have said I saw Kalunda Mukuni. The lady I saw was like Kalunda Mukuni because there was some darkness."

The proceedings show that the witness was referred to his statements during cross-examination and that he was questioned on the said statements. The statements were also marked for identification as DMFI 1 and DMFI 2 on application by the defence counsel. It is borne by the record that the court did not record which specific paragraphs were intended to be used by the defence to contradict the testimony of the witness as required by **Section 153** of the **Act**. The witness was cross-examined on the statements generally. The issue which arises is whether the omission to point out the specific paragraphs or sentence to be used to contradict the witness amounts to a mistrial. A mistrial is defined in Black's Law Dictionary, 9th Edition as:

"A trial that a judge brings to an end without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings."

In other words, a mistrial is an abortive trial where a serious procedural mistake occurs. In the case before us, we observe that the procedure was followed and the provisions of **Section 153** of the **Evidence Act** were complied with savethe failure to point out, or to record the specific sentences or paragraphs intended to contradict the testimony of the witness. It is our finding that there was no mistrial in the trial.

DW2 was the one who recorded the statements from PW11. In producing the statements he was required to give evidence on how and in what circumstances he recorded the statements. He was also subject to cross-examined by the prosecution.

Section 67 of the **Evidence Act** provides that documents must be proved by primary evidence except in the cases stipulated under **Section 68** of the **Act**. The State argued that **Sections 67** and **68** were violated by producing photocopies of PW11's statements. **Section 68(1)(a)** allows production of copies where the original is shown or it appears to be in the possession or power of the person against whom the document is sought to be proved. The originals of the statements recorded by PW11 were in the possession of the prosecution. The defence had photocopies of the said documents to assist them to prepare their defence during the trial. The calling of DW2 to testify and produce the photocopies which were available to the defence at that time was within the ambit of the provisions of **Section 68(1)(a)**. The prosecution did not raise any objection against producing of the documents during the defence of the

appellant. Had the prosecution raised an objection, the court would have addressed the issue. It is also highly unlikely that the prosecution would have been willing to provide to the defence on request the original statements. We find that no violation of **Sections 67** and **68** of the **Act** was committed by producing the photocopies of the statements.

Precisely, the evidence of the prosecution witnesses was that the deceased was killed on his way home from Katambauku market on 09/03/10 around 8.00 p.m. The deceased lived in Ngombeni village of Kalatine sub-location in Mwingi County. He was riding his motorbike along and across river Umu when he passed PW11. At a distance of about 10 metres ahead of the witness, the deceased was attacked by the accused and another person who is not before the court. The injuries inflicted on the deceased led to his immediate death. Twelve witnesses testified in this case most of whom were close relatives and friends.

The evidence of PW1, PW2, PW3, PW4, PW5 and PW6 was that the deceased had a land case in court where one Mukuni Kimalai, the uncle of the accused was a party. The deceased complained to the witnesses that he had been severally threatened by the accused that in the event that the case ended in his favour, the accused would kill him. Some witnesses named three other people namely Kalunda Mukuni, Mukuni Kimwele and Kyalo Mukuni to have threatened the deceased with death for the same reason. None of these witnesses was present at the time of the incident. There was no evidence either that the threats had been reported to the police prior to the incident by either the deceased or by any of the witnesses.

PW11 testified that he was working as a herdsman of one Kithua Maluki at the material time. On 09/03/10, the witness had gone to look for the animals of his employer at Mumoni hill which had disappeared while under his care. PW1 said that around 8.00p.m., he was walking home when the deceased came riding his motorbike along the downstream of river Umu. The deceased later crossed the river and as he ascended the hill, the deceased was attacked by the accused and one Kisili Musee also known as Manzi. One of the attackers hit the deceased on the chest with a metal rod while the other one hit deceased on the head with an axe. PW11 said there was moonlight and he was able to identify the attackers using the said light.

PW11 was the only eye-witness in the trial before the court. The principal magistrate evaluated PW11's evidence and found it contradictory and unreliable. The court came to a conclusion that there was no credible evidence as to the identification of the assailants consequently acquitting the respondent of the offence.

The respondent gave an alibi that he had travelled to Garissa prior to the incident. He came to learn of the death of the deceased on 13.09.10 when he returned home from one Mwikali Mutemi. As chairman of the Mutembe family clan, the respondent said he was the one overseeing the sub-division of the land between deceased and Mukuni Kimwele which may not have pleased some of the interested parties. This grudge may have led to some relatives framing the case against the appellant.

The attack took place at around 8.00 p.m. PW11 said there was moonlight and he could see someone about 15 metres away. The deceased was attacked when he was about 10 metres from the witness. PW11 said he saw and identified the attackers and gives details of what part each of them played in the killing of the deceased. The witness continued to testify that the night was cloudy because it looked like it would rain. He further said it drizzled that night. In his statement, PW11 said that one of the assailants namely Kisili had a torch. The combination of moonlight, cloudy night, drizzles and torch casts a lot of doubt as to the visibility. The torch must have been flashed for PW11 to know Kisili had a torch. With bright moonlight, there was no need of using the torch. PW11 added that the attackers were using the torch without caution thus exposing their identities to him. In normal circumstances, moonlight will not be witnessed in a cloudy night. There is evidence that the cloudy night resulted in drizzles which confirms that the moonlight was non-existent at the material time. The witness said he did not recognize the clothings worn by the attackers, not even their colours. How then did the witness see the faces, appearances of the attackers and identify them by their facial features? Moonlight with such intensity as to enable a person see another about 10-15 metres away at night and see the face clearly should also

enable one to see the clothing worn by that person. In his testimony, PW11 said that the motorcycle headlight was on implying that the scene was also lighted by the headlight. In his statement recorded on 25/05/11, PW11 stated that it was about to rain and that the motorcycle light was switched off. The question which arises is how the headlight could have been switched on and was off at the same time. This was a serious contradiction by the witness of his own statement.

PW11 said that he retreated when he saw the deceased being attacked and hid in a bush about 20 metres from the scene. At that distance PW11 said he could still see what was happening at the scene. According to him the incident took about five (5) minutes. PW11 further said that a lady came to the scene and he could not identify her due to darkness. In his testimony PW11 gave the name of the lady as Kalunda Mukuni.

The trial magistrate observed that the evidence of PW11 on lighting at the scene was very unreliable. He said in his judgment:

"It is my observation that the degree of light intensity is not clearly brought out by PW11 as to be free of mistaken identity where it will appear to this court that moonlight might have been very poor."

We agree with the magistrate that it is highly doubtful that there was moonlight which lighted the scene for PW11 or anyone else to see and clearly identify the attackers. Such identification as described may lead to mistake. It was held in the case of **Kamau vs. Republic 1975 E.A. 139** ***"that the most honest of witnesses can be mistaken when it comes to identification".*** This is a case of a single identification witness which calls for extra caution by the court when dealing with such evidence as was held in the Court of Appeal case of **Abdullah Bin Wendo vs. Republic 1953 EACA 166**.

We come to the conclusion that the conditions and circumstances at the scene were not conducive to positive identification and that PW11 did not positively identify the respondent or any other person at the scene.

The defence took issue with the evidence of PW11 arguing that it was riddled with contradictions which led the defence to call for the producing of the statements recorded by the witness. The court in its judgment brought out some of the contradictions and concluded that PW11 was an unreliable witness.

PW11 contradicted himself on the lighting at the scene which has already been dealt with herein. In addition to that, we find a few more contradictions in the evidence. In his evidence in chief PW11 told the court that he saw the respondent, Mwendwa Musyoka strike the deceased with a metal on the chest while one Manzi Musee struck him with an axe on the head twice. In his statement recorded on 22/05/11, PW11 reversed the roles of the attackers during the incident. He said that the respondent struck the deceased with an axe on the head while Musee struck him with a metal on the chest. This was a very important piece of evidence in the trial. The contradiction casts doubt on whether PW11 was at the scene or assuming that he was, whether he saw what transpired.

The witness testified that after the attack, he saw the respondent and Musee remove deceased from the road and keep him on the side and went on to say:

"At the time he was removed from the scene, the deceased was dead."

PW11 was about 20 metres away hiding in the bush at that time. How then did he know that the deceased was dead, without going near him? PW11 further testified that the following morning, he went to the scene to confirm whether that man (meaning deceased) was dead. Do these parts of the witness's evidence portray PW11 as someone who can be trusted to tell nothing but the truth? The doctor PW12 did not find any injury on the chest of the deceased. The injuries were on the skull including the forehead. This evidence reduces the testimony of PW11 as pure lies.

PW11 testified that he never discussed the incident leading to the death of the deceased with

anyone. In his statement, PW11 states that when he reached home that night, he told his co-worker Musyoka Mutemi that the deceased had been killed.

At the scene, the witness testified that the two attackers never spoke. He said that "Everything was done in silence." In his statement recorded on 22/05/11, PW11 stated that he knows the voices of the attackers and that he heard them speak. To support this statement, PW11 said that Kisili Musee said: "Wacha tuue hii kasia" (let us kill this rubbish) while the respondent said after striking deceased: "Amekufa sasa" (He is now dead). This is no doubt a major contradiction of evidence of one witness regarding what he saw at the scene of crime.

The statement further shows that there were only two people at the scene of the crime while in his testimony, he said he saw two at first who carried out the attack, then two other people came who included Kalunda Mukuni. Again this evidence comes from one witness, yet it is highly contradictory. The trial magistrate came to the conclusion that "PW11 appear not to be a straight forward person and that he is an unreliable witness." We find this description an understatement. It is our considered opinion that the witness demonstrated a deliberate effort to exaggerate the evidence he had (if any) with a view of driving the case of the prosecution towards a certain direction.

The witness gave various explanations as to why he recorded his statement about one year after the incident. He said that he feared the respondent and his accomplice who were known hardcore criminals. Yet he did not explain why he changed his mind after one year and two months and decided to cooperate with the police. Neither did the witness explain why he had the guts to tell the story to his co-worker the same night and not to his employer. The other explanation he gave was that he left employment after the incident. In cross-examination, he said that he left employment about two months after the incident. The period was more than enough to record a statement. None of these explanations sounds convincing in the circumstances.

The investigating officer did not give an explanation as to why PW11 came into the case that late. The respondent was charged on 09/03/10 and hearing commenced on 04/10//10. PW11 came on board to record his statement on 22/05/11 and was to testify one month later.

The respondent was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The ingredients of the offence are as follows:

(a) That violence was used immediately after or immediately before the robbery;

(b)That the accused was in the company of one or more persons;

(c) That the offenders were armed with dangerous weapons;

(d)That the offenders were positively identified.

We have evaluated the evidence of the single witness who said he witnessed the incident and concluded that his evidence was highly contradictory and incapable of proving the offence charged. The prosecution tended to give evidence of murder in the trial as opposed to robbery with violence. The trial magistrate correctly made this observation when he said:

"If the investigating officer found that the motive of the murder was land, then the accused ought to have been charged for murder. It therefore appears that the prosecution was torn between the offence of robbery with violence and murder."

It is our finding that the trial magistrate reached a correct find that the identification by PW11 of the attackers was not positive and that there was a possibility of error or mistake. The offence of robbery with violence was not proved.

The State called for an order of retrial. Such as order can only be made where in the opinion of the

court the prosecution has credible evidence against the respondent and where it would be in the interest of justice to make such an order. It was held in the case of **John Mwangi Chege vs. Republic (2004) eKLR** that ***"a retrial will be ordered only when the original trial was illegal or defective …..... and not because of the insufficiency of evidence for the purpose of enabling the prosecution to fill in the gaps …..but where the interests of justice require it."*** This is a case which is completely lacking of any evidence to sustain a conviction. It would not therefore serve the interests of justice to order a retrial. We have examined all the grounds of appeal and find that they have no merit. The appeal is therefore dismissed and the judgment of the trial magistrate is hereby upheld.

The respondent is set at liberty as far as these proceedings are concerned.

F. N. MUCHEMI **S. N. MUTUKU**

JUDGE **JUDGE**

Judgment dated and delivered on the 30th day of January **2013** in open court in the presence of……N/A…….for appellant, the respondent and his counsel……N/A……..

S. N. MUTUKU

JUDGE