REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 142 of 2011

(From original conviction and sentence in Criminal Case No. 2971 of 2009 of the Senior Principal Magistrate's Court at Naivasha- P.M. Mulwa.)

SIMON KAGWI NGECHU ….. APPELLANT

VERSUS

REPUBLIC …... RESPONDENT

JUDGMENT

Simon Kagwi Ngechu, jointly with others not before the court, was charged with four counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. He was convicted and sentenced to death. Aggrieved by that conviction and sentence, he filed this appeal. The grounds of appeal are found in the petition of appeal and further grounds were adduced in the submissions filed by the appellant. The grounds of appeal can be summarized as follows:-

1. That the appellant's constitutional rights of a fair and impartial trial have been breached because the trial was conducted in a language he was not familiar with.

2. That the court based its conviction on evidence of an identification parade without warning itself of the apparent flaws during the parade;

3. That the offence was not proved to the required standard;

4. **That the judgment of the senior principal magistrate is undated and therefore invalid.**

The brief facts of the case are that Evans Gekonge (PW3), a driver with Prestige Shuttle, was on duty on the evening of 18/11/2009 and was ferrying 10 passengers in motor vehicle registration number KBA 800K from Nakuru to Nairobi. They left the Matatu terminal at about 7pm and made a routine stop at a police station where the passengers were searched by a police officer for purposes of inspection of the persons and goods on transit. Nothing out of the ordinary was discovered. PW3 together with the 10 passengers set off for Nairobi. At Kinungi, near Naivasha Town, three men who were among the 10 passengers hijacked the motor vehicle and forced the driver onto a dusty road and into a forest. Armed with knives, they robbed their fellow passengers of mobile phones, money, earphones and a car radio (face) and ran away on foot. The remaining 7 passengers and the driver drove to Naivasha police station where they reported the incident.

The Investigating Officer, PC Kirimi (PW5), on inspecting the motor vehicle discovered a mobile phone which all the victims denounced owning. Soon thereafter, the phone rung and was received by PW5, a

man who referred to himself as “Kagwi” said he was the owner of the phone and was dining at a local butchery. PW5 accompanied by Sgt. Musonik (PW1), a passenger in the vehicle and Sgt. Mworia, followed the lead and arrested the appellant at the butchery called *Staff Complex.* The appellant was searched and was found with a Nokia 1600, an Orange mobile phone and Ipod. PW4 identified the Ipod as his which he had been robbed of.

The appellant denied committing the offence. He testified that he was at his place of work on 18/11/2009 between 6-11pm. After closing his business, he passed by a local butchery where he was arrested as he ate dinner. One of the arresting officers, Joshua Mworia, had threatened to fix him in a case after they got into a fight about 6 months earlier; that during the identification parade, he was the only one wearing a reflector jacket and Sgt. Joshua Mworia showed the complainant who to pick. He said Sgt. Mworia conducted the parade.

The appeal was opposed. Miss Idagwa, Learned Counsel for the State submitted that the appellant was found with the stolen items a few hours after the robbery. He had been identified by PW1. The two chatted at the matatu terminus as they waited for the matatu to fill up. At the time there was sufficient light.

We have considered the submissions made by the appellant and the State Counsel. As the first appellate court, it is required of us to evaluate and analyse the evidence afresh and make our own findings on fact and law, always bearing in mind that we did not have the advantage of seeing the witnesses testify, so that we could weigh their demeanor.

On the first issue of whether the appellant's constitutional rights were violated, the appellant submitted that he was not accorded a fair and impartial trial and in particular the testimony of PW1, PW5 and PW6 because their testimony is recorded to have been in English. However, we note that the appellant cross-examined the three witnesses at length and did not complain to the trial court of any difficulty in communicating. He then went ahead to enter his defence meaning he understood the proceedings. Constitutional issues are supposed to be raised at the earliest opportunity possible. In **Mwalimu v Republic (2008) KLR 112,** Court of Appeal said that where there was an allegation of breach of one's constitutional rights before a court could be called upon to make a determination, on the issue, the allegation should have been raised at the earliest opportunity. In this instance, the allegation is being made about 4 years after plea and 1 ½ years after conviction. It is made late in the day. In my view, this allegation is an afterthought as there is no evidence that the appellate raised the issue of infringement of his rights during trial. However, this court must caution the trial court that it is proper for the court to state whether there is interpretation of the court proceedings. This is because the record clearly states that the plea was taken in the kiswahili language and the court should have mentioned that. We however find that it is a mere mistake but it did not prejudice the applicant’s case at all.

Whether the identification parade was marred by flaws: The appellant submitted that the identification parade was carried out by the investigating officer, PW5 and that the witnesses (PW2 and PW4) had not described the robbers prior to the parade; the identification parade was contrary to **Rule 6 (iv) (a), (c), (d)** and **(k)** of the **Forces Standing Orders** and the evidence of the identification parade was not corroborated. Firstly, we do agree with the observation of the trial magistrate that there is no evidence that the identification parade was conducted by the investigating officer, Sgt. Joshua Mworia. From the records it was PW6, Chief Inspector Alloys Orioki who conducted the parade and the appellant indicated that he was satisfied with its conduct. For the appellant to turn around and claim the parade was conducted in violation of the **Forces Standing Orders** is clearly an afterthought.

Secondly, despite the appellant's contention that PW4 had been shown the suspect before the parade and the fact that PW2 and PW4 did not give a description of the robbers the trial magistrate not only relied on the identification parade evidence but also considered the evidence in its totality before arriving at his decision. He noted at page 57 that:-

“Even besides the identification parade, there was distinct link between the accused person and the offence as he was arrested barely hours after the robbery incident and some property suspected to

have been stolen from the passengers recovered from him"

In the case of **Achieng V Republic (1981) KLR 174** the court held that identification parade evidence can still be accepted as reliable if there is any other evidence such as finding goods in the possession of the appellant. The court said:-

"Where an identification parade was held, the officer who conducted it must be questioned about it. Where such officer is not questioned, the evidence of identification can still be accepted as reliable if there is other evidence such as finding of goods in the possession of the appellant."

The Court of Appeal in **Isaac Nganga alias Peter Njenga Nganga Kahiga Vs Republic Criminal Appeal No. 272 of 2005** laid down what must be considered before a conviction can be based on the doctrine of recent possession. It stated:-

"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice not matter how many witnesses."

Being guided by the above finding, we are satisfied that there is a link between the robbery and the appellant. The appellant did not say anything in respect of the three mobile phones recovered in his possession nor did he deny being in possession.

Whether the offence was proved to the required standard: the appellant stated that there was no evidence that linked communication between the two mobile phones, Exhibit 2 and Exhibit 3, neither was there any evidence that he was the owner of Exhibit 2. PW1 testified in detail that when he entered the 'matatu' at Nakuru stage, there were 3 passengers chewing miraa. He said there were lights at the stage, he conversed with the people and he even bought them coffee as they waited for the matatu to fill up. PW1 had sufficient opportunity to see and identify the passengers who turned out to be robbers. After they were robbed, he was at Naivasha Police Station when a phone was picked up in the 'matatu'. According to PW1, after finding the phone it rang, the police picked it and communicated with the other person and it led to the appellant's arrest at a cafe. It is PW1 who changed clothes, disguised himself , entered the cafe and saw the appellant communicate with police who were strategically positioned outside the café for him to call them. In the circumstances, we do not find it necessary to establish the owner of Exhibit 2 and a communication link between it and Exhibit 3 because firstly, the appellant was arrested while using the phone to communicate with the arresting officer. This to us is watertight evidence. Secondly, when the appellant was searched, he was found to be in recent possession of goods which had just been stolen in a robbery which were later identified by passengers as their property which they were robbed of, PW4 identified the ipod as his, Lastly, PW1 identified the appellant at the time of the arrest and soon after the robbery. PW2 also identified him during the identification parade. Even without considering the evidence of PW6's identification parade, we find the evidence against the appellant overwhelming. The prosecution proved its case beyond any reasonable doubt.

Lastly, the appellant's allegation that the judgment of the trial court is undated is misconceived. From perusing the subordinate court file, we are satisfied that the judgment of the Senior Principal Magistrate was signed and dated on 21/6/2011.

In criminal cases the burden of proof always lies with the prosecution to prove its case beyond any doubt. The trial court held that the appellant's defence was superfluous as it did not discharge the prosecution evidence against him. We do not exactly know what the trial magistrate meant, maybe he meant to say **"displace"** instead of **"discharge".** We have considered the defence. We find that it is unfounded and an

afterthought. PW5 testified that he was with Sgt. Mworia at the time of arresting the appellant. PW5 explained in detail how they arrested the appellant and recovered some items from him. He even wrote an inventory which the appellant also signed. This was also in the presence of PW1. At no stage during the hearing of the prosecution case did the appellant allege that Sgt. Mworia had threatened him and that this was a frame up. Had he raised this allegation, Sgt. Mworia would have been called to testify.

Having re-evaluated the entire evidence including the appellant's defence, we are in agreement with the trial magistrate's finding that the evidence against the appellant was overwhelming and he was properly convicted.

In the end, we agree with the learned trial magistrate’s finding and find no reason to fault his judgment. Consequently we uphold the conviction. On sentence, our view is that since the complainants did not suffer any serious injuries, we set aside the death sentence and substitute it with a sentence of life imprisonment. The appeal succeeds to that extent. It is so ordered.

DATED and DELIVERED this 14th day of March, 2013.

R.P.V. WENDOH

JUDGE

JUSTICE ANYARA EMUKULE

JUDGE

PRESENT:

The appellant present in person

Mr. Chirchir for the State

Kennedy – Court Clerk