REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 140, 141, 143 & 142 of 2011

JUSTUS MWIKARIA KAIRUKI alias

CORPORAL alias JOHN IRERI KITHINJI.....1ST APPELLANT

JOHN KITHINJI NJOKA…..... 2ND APPELLANT

PETER MURIITHI MUTHANJE alias KARIUKI …..... 3RD APPELLANT

NAHASHON NJIRU IRERI ….....4TH APPELLANT

VERSUS

REPUBLIC……...…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 3176 of 2005 at the Chief Magistrate's Court Embu by L.K. Mutai – Principal Magistrate on 11th AUGUST 2011

JUDGMENT

JUSTUS MWIKARIA KARIUKI alias **CORPORAL** alias **JOHN IRERI KITHINJI, JOHN KITHINJI NJOKA, PETER MURIITHI MUTHANJE** alias **KARIUKI** & **NAHASHON NJIRU IRERI** hereinafter referred to as the 1st, 2nd, 3rd and 4nd Appellants respectively were charged with the offence of Robbery with Violence contrary to section 296(2) Penal Code. The facts as stated in the charge sheet were as follows;

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:

1. **JUSTUS MWIKARIA KARIUKI 2. JOHN KITHINJI NJOKA 3. PETER MURIITHI MUTHANJE 4: NAHASHON NJIRU IRERI: On the nights of 2nd and 3rd December 2004 at Kithimu location in Embu District of the Eastern Province, jointly with others not before Court, while armed with dangerous weapons namely pangas, rungus, iron bars, axes, a jerican containing petrol and explosive devices robbed MARGARET MUTHONI GACHAMBA of cash ksh.2000/= and at or immediately before or immediately after the time of such robbery set on fire the house of the said MARGARET MUTHONI GACHANJA thereby causing the death of 1. JOSEPH MUNYI GACHAMBA 2. ERICK MUCHANGI and 3. LINCON KERU.**

The matter proceeded to full hearing and the Appellants were convicted and sentenced to death. They were aggrieved by the Judgment and filed this appeal.

The 2nd Appellant raised the following six (6) grounds of appeal;

1. The 2nd Appellant pleaded not guilty before the trial Magistrate.

2. That the trial learned Magistrate erred in law and facts when she failed to consider the fact that the 2nd Appellant's constitutional rights were seriously violated when he was held in police custody for more than 20 days before he was taken before a Court of law for plea.

3. That the learned trial Magistrate erred in law and fact when she failed to consider the fact that PW1 alleged to have identified the 2nd Appellant yet there was no initial report to that fact.

4. That the learned trial Magistrate erred in law and facts when she failed to consider the fact that KENEDY IRERI GACHAMBA the son of PW1 admitted before the Court during his testimony that he had seen the 2nd Appellant immediately prior to the identification parade.

5. That the learned trial Magistrate erred in law and fact that the intensity of the alleged light used by PW1 to identity the 2nd Appellant was not explained.

6. That the learned trial Magistrate erred in law and fact when she failed to consider the fact that PHINEHAS ERIC MUNENE testified that he was about 10 metres and responded to the alarm, he did not see any of the suspect and that there was no light on that night.

The 3rd Appellant raised the following four (4) grounds of appeal;

1. That learned trial Magistrate erred in law and fact by convicting the 3rd Appellant using a charge sheet which was defective.

2. That learned trial Magistrate erred in law and facts when she convinced the 3rd Appellant relying on the alleged confession ignoring the fact that the confession was unconstitutional.

3. That the constitutional rights were violated whereby the 3rd Appellant was kept in police custody for more than 14 days which is unconstitutional whereby he stayed for 17 days.

4. **The learned trial Magistrate erred in law and facts by failing to consider the contradictions surrounding the Prosecution witness.**

The 4th Appellant raised the following eight (8) grounds of appeal;

1) The 4th Appellant pleaded not guilty before the trial Magistrate.

2) That learned trial Magistrate erred in law and facts when she failed to consider the fact that the 4th Appellant's constitutional rights were seriously violated when he was held in police custody for more than 20 days before he was taken before a Court of law for plea.

3) That the learned trial Magistrate erred in law and facts when she convicted the 4th Appellant on allegations that accused number 2 caused his arrest failing to consider the fact that no exhibit or any evidence was recovered from him.

4) That the learned trial Magistrate erred in law and facts when she convicted the 4th Appellant relying on evidence which was inconsisted and uncorroborated.

5) That the learned trial Magistrate erred in law and facts when she failed to consider the fat that the 4th Appellant was not mentioned in the alleged confession by Accused 3.

6) That the learned trial Magistrate erred in law and facts when she convicted the 4th Appellant relying on the identification by PW1 failing to consider the fact that her evidence was contradicted by the brother of the deceased PHINEAS ERICK MUNENE who testified that he could not identify anyone.

7) That the learned trial Magistrate erred in law and facts when he failed to consider the fact that the 4th Appellant was in remand awaiting trial for more than a year before his case was consolidated with accused 1 and 3.

8) That the learned trial Magistrate erred in law and facts when she failed to consider the fact that the light used by PW1 was not enough to see my position.

Though the 1st Appellant filed a petition of appeal and indicated that the grounds were overleaf the record does not bear them.

This being a first appeal the Court has a duty to reconsider and re-evaluate the evidence adduced and arrive at its own conclusion. The Court should not lose sight of the fact that it neither saw nor heard the witnesses. We are guided by the case of ***MWANGI -V- REPUBLIC [2004]2 KLR 28*** where the Court of Appeal held;

1. 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.

2. The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.

3. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's evidence and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witness.

4. ***The manner in which the Appellants' appeal was dealt with by the first Appellate Court fell short of its duty in re-evaluating the evidence. It is not enough for a first appellate Court to merely state that it has analysed the evidence adduced. That analysis of evidence must be seen to have been undertaken than simply stated.***

The case of the Prosecution was that on 2/12/2004 at 10pm PW1 and her late husband went to sleep. They were with their children in the home. Later PW1 heard somebody call a Njue and Mzee. She woke up her husband who responded. He was asked to surrender cash. He told them he had no money. The window panes of their permanent house were shattered, petrol splashed therein and a matchbox lit. The house was engulfed in fire. PW1's late husband went to the rear door which was the kitchen door. She followed and saw somebody standing by the door with a small axe as her husband fell down. She was held and thrown over her husband. They rose up and returned to the house where the children were. PW1 traced her son Kennedy and went to look for the others but got confused in the process. She later found herself in hospital. She and her son had inhaled smoke. She was able to identify 1st, 2nd and 4th Appellants. She lost her husband and her two sons (Eric Muchangi and Lincolin Keru) also died. PW1 stated that besides the shs.2000/= which her deceased husband threw to the attackers, nothing was stolen. At the identification parade she identified 2nd and 4th Appellants. PW8 a son to PW1 told the Court that he identified the 2nd Appellant at the scene. The doctor who did the Post Mortem on the bodies of the three deceased found the cause of death to be as follows;

1. **<u>ERICK MUCHANGI GACHAMBA</u>**

Pulmonary cario-arrest due to chemical burns and fire

2. **JOSEPH MUNYI**

Pulmonary cardio-arrest due to chemical burns

3. **LINCOLIN KERU**

Pulmonary arrest due to chemical pains and soot and heat from fire. (EXB.4-6)

The Government analyst (PW10) examined ash/debris and an empty plastic container. The ashes were from PW1's sitting room, corridor and kitchen. He was to examine and see if he could trace any inflammable substance in them. His finding was that he found traces of petrol in form of liquid in the ash from the kitchen, corridor and sitting room. There was traces of petrol from the empty jerrican (EXB 7). PW1 a Senior Resident Magistrate then produced a Statement under inquiry recorded from 3rd Appellant. PW12 arrested 2nd and 4th Appellants. PW13 C.I. Benjamin Gitonga who investigated gave a history of how he had investigated this case alongside other cases of Robbery with Violence and had 1st and 3rd Appellants arrested.

PW14 conducted an identification parade in respect of the 1st Appellant. He was identified by PW1 (EXB.3). All the Appellants gave sworn defences denying the charges. The 1st Appellant stated that his machine got damaged on 2/12/2004 as he worked in Kinoro. He was repairing it on 13/12/2004. His brother complained against him to the police in 2005 and he was taken before C.I. Gitonga. PW1 found him with C.I. Gitonga and later picked him at an identification parade. The 2nd Appellant sells tyres in Chuka. He was arrested in Embu as he looked for accommodation. Later at the CID he met a lady and a young person. They both identified him at an identification parade. He was at logger heads with C.I. Gitonga. The 3rd Appellant also blamed C.I. Gitonga for his woes. He stated that he dealt in cannabis and his protector was C.I. Gitonga whom he used to pay protection fee of shs.4000/=. He denied signing any confessionary statement. The 4th Appellant stated that he was arrested after delivering milk at Gatunduri. DW5 testified in support of the 4th Appellant.

When the appeal came for hearing the four (4) Appellants presented us with written submissions and also made some oral remarks. The learned State Counsel Mr. Miiri conceded to the appeal on the grounds that the identification parade was faulty.

Secondly that the 3rd Appellant was charged on the basis of a confession taken by PW11 in the absence of any other witness which is contrary to the Law. And the said confession was not read out in Court for the other co-accused to hear and respond.

We have as is required of us re-evaluated the evidence afresh and also considered the submissions by both the Appellants and the learned State Counsel.

The Appellants were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The person who is said to have been robbed was PW1. PW1 herself at page 114 lines 2-3 stated;

Nothing was stolen from the scene but ksh.2000/= which my husband threw out before the house was set on fire".

It is therefore clear that PW1 was not robbed of anything. Even what she stated about the deceased throwing out money is neither here nor there. Its not clear at what point any money was thrown out. In a change of robbery with violence we have two (2) main ingredients i.e. theft and violence and/or a threat to violence. When theft is missing it ceased to be Robbery.

The evidence on record confirms that PW1's house was set on fire using petrol which is a highly inflamable liquid. The exhibits taken from the scene and examined by PW10 confirms that.

The evidence also confirms that three persons namely a male adult and two children who were in

the said house died as a result of chemical burns, soot and heat from the burning house.

The 1st Appellant's grounds were not reflected in the records. However since the appeals arise from the same Judgment we are doing re-evaluation of the whole record and he will be covered. The issue we are dealing with is the issue of identification, which will resolve all the issues raised in the grounds. A reading of the Judgment shows that the learned trial Magistrate heavily relied on the statement under inquiry (EXB9) produced by PW11 plus the evidence of identification by PW1 & PW8. The gist of this Statement is that the 3rd Appellant was not only implicating himself but he also implicated his co-accused who are the present Appellants number one (1), two (2) and four (4). The process of receiving this statement was wanting.

Section 25A of the Evidence Act provides thus;

1. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

2. ***The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.***

This statement was not taken in the presence of a witness of the 3rd Appellant's choice. And in the absence of such compliance the statement is inadmissible. Secondly this long detailed statement which was implicating other accused persons was not read out loudly in open Court to enable the other accused persons cross-examine the maker of this statement. The record shows that the 1st, 2nd and 4th Appellants had no question for PW11. We are sure if the statement had been read in Court the Appellants would have properly cross-examined PW11. And for these two reasons we find that the statement (EXB 9) ought not to have been admitted. The only other evidence left is that of identification. In the case of ***KIARIE -V- REPUBLIC [1984] KLR 739*** the Court of Appeal held thus;

"Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction".

Where the conditions favouring a correct identification are difficult the Court must test such evidence with the greatest care before relying on it to convict.

PW1 told the Court that she relied on moonlight and the light from the fire to identify 1st, 2nd and 4th Appellants.

PW8 has also stated that he was able to see and identify the 2nd Appellant by the help of moonlight and light from torches held by those outside.

It is clear that PW1 and PW8 did not give any description whatsoever to the police prior to their participating in the identification parades. In the case of ***AJODE -VS- REPUBLIC [2004]2 KLR 81*** where the Court of Appeal held thus;

"***It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade".***

In her own evidence at page 113 lines 8-11, PW1 states;

"I wasn't able to identify any person at the scene of crime. But in my mind I could see them well. I did identify three (3) persons at the scene. I did identify 1st accused (identified), 2nd accused (identified),

and the 4th accused (identified)".

This is a contradictory statement by PW1. The truth of the matter is that PW1 got confused considering what was happening and no one can blame her for that. The conditions were not favourable for a positive identification.

PW1 and PW8 talk of moonlight, torches and light from the fire. They were inside the house. PW4 a brother inlaw to PW1 who stays 50M from them heard bangs on PW1's house and went there. He heard people ordering him to open the door. He says at page 132 line 15-16;

"It was dark and so could not see anybody but I concluded that they were thieves from the mode of their talk".

Even in cross-examination he maintained that it was a dark night so he could not see anybody. The evidence of PW1 and PW8 is therefore contradicted by the evidence of PW4 as concerns the source of light. PW4 stated that it was a dark night and there were no torches. PW8 appears to be the only one who saw torches that night. These contradictions go to the root of the basis of the identification of the attackers by the witnesses that night.

We are therefore satisfied that the conditions were not favourable for a positive identification.

The learned State Counsel had submitted that the witnesses had not touched but pointed at the suspects contrary to regulation 6(4)(1) of the Force Standing Orders. Though PW1 in her evidence had stated that she identified the suspects on the parade by pointing. The evidence of PW3 who conducted the parade said she identified them by touching. The parade forms produced EXB2 and 3 also attest to that. That would to our minds not be a good ground for vitiating the identification parade.

Otherwise for the many reasons stated above we find that the evidence adduced did not place the Appellants at the *locus quo*. The State does not support the conviction and correctly so. The result is that the appeal is allowed, the convictions quashed and the sentence of death set aside.

All the Appellants shall be set free unless otherwise held under lawful separate warrants.

SIGNED AND DATED THIS 17TH DAY OF MAY 2013 AT EMBU.

LESIIT J.
J U D G E

H.I. ONG'UDI
J U D G E

Delivered in open Court in the presence of;

…..... for State
Appellants

Njue – C/c