REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 194 of 2005

LABAN NYAGA NJUE..... 1ST APPELLANT

FRANKLINE MUTEMBEI MUTEGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of L.W. GITARI Senior Principal Magistrate Embu in Criminal Case No. 3537 of 2002 on 1/12/2005)

J U D G M E N T

The appellants LABAN NYAGA NJUE, hereinafter the 1st appellant and FRANKLINE MUTEMBEI MUTEGI, the 2nd appellant were the 1st and 3rd accused before the lower court. They had been charged with PETER MBAABU Alias UAVIU the 2nd accused in lower court, who served sentence and abandoned his appeal. They were also charged with MICHAEL MBAABU MUTEGI who was the 4th accused in lower court and who was acquitted. The appellants were charged in count 1 with Robbery with Violence contrary to Section 296(2) of the Penal Code.

In count 2 the appellants faced a charge of Being in Possession of a Firearm without a Firearms certificate contrary to Section 4(2) of the Firearms Act. In count 3 the appellants faced the offence of Consorting with Persons armed with a Firearm contrary to Section 89(2) of the Penal Code.

The 1st appellant was convicted in count 2 and sentenced to serve 15 years imprisonment. He was acquitted of count 1 and 3. The 2nd appellant was convicted in count 1 and sentenced to death and in count 3 was sentenced to serve 5 years imprisonment. He was acquitted of count 2. Being aggrieved by the convictions and sentences imposed against them, they filed their respective appeals. We have consolidated them having arisen from the same trial in the lower court.

The 1st appellant raised five grounds of appeal. However in court he stated that he was not challenging the conviction but only the sentence. He urged the court to find that his sentence was too long and to reduce it.

The 2nd appellant has raised nine grounds of appeal as follows:-

1. ***The learned trial magistrate erred in both law and fact for basing her conviction on a single evidence.***
2. ***The learned trial magistrate erred in both law and fact for misdirecting herself that the source of light used to view the attackers and circumstances were reliable.***

3. ***The learned trial magistrate erred in both law and fact for not warning herself before conviction that PW1 did not make any report to police concerning the assailants when the incident was reported.***
4. ***The learned trial magistrate erred in both law and fact for not warning herself before conviction that prosecution did not call essential witnesses especially those who tipped his arrest and those who were at the scene to clear doubts of his arrest.***
5. ***The learned trial magistrate failed to warn herself that the investigating officer was of a rank of constable contrary to Laws of Kenya regarding capital offence.***
6. ***The learned trial magistrate failed to warn herself before conviction that identification parade was unfairly conducted contrary to chapter 46(d) of force standing orders on parade.***
7. ***The learned trial magistrate erred in both law and fact for basing her conviction on a contradicted evidence of PW1 and PW2 and entire prosecution witnesses.***
8. ***The learned trial magistrate failed to warn herself that prosecution failed to avail/forward the informer who tipped his arrest to clear doubts of his arrest.***
9. ***The learned trial magistrate erred in both law and fact for not warning herself that identification of assailant should not be accepted unless the witnesses had in advance given descriptions of assailants and pick him/her in a well conducted identification parade.***

The facts of the prosecution case are that the complainant, PW1 was driving a motor vehicle KAP 120J on 15th October 2002 at 3 a.m. along Kirimari Petrol Station looking for passengers to travel to Nairobi. He was stopped by 3 people. He stopped. He was then removed from the vehicle under gunpoint. 2 of them drove away. The gunmen also left. The complainant took another vehicle whose keys he had parked at the petrol station. He followed his motor vehicle and on seeing it, blocked its path. The vehicle was driven into an electric pole and the two robbers abandoned it and fled. The complainant testified he was able to identify the two men by lights from the head lamp of the vehicle he was driving. He identified the two in court as the 1st and 2nd appellants.

PW3 conducted an identification parade where the complainant identified the 2nd accused in the case and the 2nd appellant as the two he had identified in the case. The other evidence was given by PW7. He was PC Makau. His evidence was that on 6th October 2002 he joined his colleagues in pursuit of robbers who were committing a robbery at Gikuuri, in Runyenjes areas. By the time they mobilized themselves, the robbers had fled the area and were being pursued by the OCS Runyenjes police station and his officers. PW7 testified that they caught up with the vehicle in which the suspects were travelling. They pursued it and in the process that vehicle veered off the road and entered a ditch. All those in the vehicle escaped except the 2nd appellant whom PW7 arrested inside the vehicle as he held onto a gun EXB.7. PW7 pursued others using sniffer dogs and managed to arrest the 2nd accused. The 2nd accused was convicted in count 3 and sentenced to 5 years imprisonment which he served.

The 1st appellant denied the charge. Since he is not challenging his conviction we see no need to go into it. He gave no mitigations before sentence by choice. The 2nd appellant's defence was that he was arrested on 27th September 2002 at a stage in Embu where he had just arrived from Nairobi after receiving new of the father's death.

We have carefully considered the appellants appeal and have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation and have drawn our own conclusions bearing in mind we neither saw nor heard any of the witnesses. We are guided by the Court of Appeal case of OKENO VS REPUBLIC [1972] EA 32 where the court held;

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; 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 has had the

advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

The appellants were unrepresented. We have considered their submissions both the filed written submissions and their address in court. The state was represented by Mr. Wanyonyi. The learned state counsel opposed the appeal by both appellants. We have considered the submissions by counsel.

The main ground of appeal raised by the 2nd appellant was to do with identification touching first on the first count of robbery with violence charge. The 2nd appellant argued that the evidence of identification was full of contradictions, inconsistencies and was uncorroborated. Mr. Wanyonyi on the other hand argued that the evidence of identification was safe because PW1 had seen the 1st and 2nd appellants clearly by the light from his vehicle and had later identified them in an identification parade.

The complainant's evidence is not contested. PW1 said that when he blocked his vehicle, which robbers had taken from him, the robbers hit an electric pole and that they abandoned it and fled. PW1 claims he saw the two people who came out of his vehicle by means of head lamps of the vehicle he was driving.

The learned trial magistrate was expected to carefully scrutinize the evidence of PW1 of identification while bearing in mind the conditions and circumstances under which it was made. This was clearly stated in the case of **MAITANYI VS REPUBLIC [1986] KLR 198** where the Court of Appeal held:

1. ***Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.***

2. ***When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.***

3. ***The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.***

4. ***Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support the conviction.***

The learned trial magistrate, while considering PW1's evidence of identification observed as follows

The only issue for determination on the first count is whether the accused persons are the one who jointly with others not before court robbed the complainant.

Evidence adduced by the complainant is that after he was robbed he followed the robbers with another vehicle. He overtook the vehicle which was robbed and blocked it. The vehicle hit an electricity post and two gangsters came out confused. PW1 said he could see the two with the help of the headlights of the vehicle he was driving. He decided not to hit the men who were at the gate of the church as he could have killed them or damaged the vehicle extensively. PW1 identified the 1st and 3rd accused as he had flashed them with headlights of the vehicle and he had seen them very well. PW1 is the only witness who said he had identified the 1st and 3rd accused from an identification parade."
The evidence adduced by PW1 was that he was able to identify the two people and he identified the 1st and 2nd appellants in court as the two who drove away in his vehicle. PW1 admitted that he was called to an identification parade and the he identified the same two people to PW3 who conducted it.

PW3 was the parade officer and he produced the parade forms as PEXB.4 and 5. He testified that the complainant (PW1) had identified the 2nd accused in the case and the 2nd appellant as the two who drove away in his stolen vehicle and whom he could identify.

The learned trial magistrate faced with the conflicting identification by the complainant PW1 observed

"PW1 testified that he told the police that he could identify the thugs if he sees them. According to PW1 he was able to identify the suspects when he flashed them with the headlights of the motor vehicle. I find that the lights of a motor vehicle give enough light which make the identification with such light possible and positive. It is under such circumstances that PW1 said he was able to identify the 3rd accused. I find that it was possible for the PW1 to identify the 3rd accused in the circumstances."

The evidence of identification was by a single witness, PW1. He was convinced that he had seen his assailants as they abandoned the vehicle they had stolen from him.

The learned trial magistrate accepted the identification of the 2nd appellant but rejected that made of 1st appellant in court and 2nd appellant at the identification parade. We find that was an error because the 2nd appellant was identified or purportedly so under the same lighting conditions as did the other two. PW1 should have been identifying two people. He ended up identifying three. We find that the complainant was mistaken in the identification of all the accused persons because having made a mistake in respect of one, there is no guarantee he was not also making a mistake in the identification of the other. What was required was other evidence implicating the 2nd appellant.

PW1 was the sole identifying witness in respect of count 1. We have searched through the entire evidence. His evidence was not corroborated by any other evidence. There was no other evidence, whether direct, circumstantial or documentary implicating the 2nd appellant with this offence. In the circumstances we find that the conviction entered against the 2nd appellant in count 1 was not safe and ought not to be allowed to stand.

In regard to count 3 the 2nd appellant was arrested within Dallas slums by PW4 Sgt. Ikunyua, one day after the arrest of the 1st appellant and 2nd accused in connection to the offences of possession of Firearm and consorting with persons armed with firearms. The only evidence against him, according to the learned trial magistrate is PW7's evidence that they (police) were looking for him in connection with the robbery at Runyenjes committed the day before his arrest. There is no other evidence connecting him with the third count except the fact he had the identity card of the 1st appellant on him at the time of his arrest.

Section 89(2) of the Penal Code under which the 2nd the 2nd appellant was convicted for this offence stipulates:

Any person who consorts with, or is found in the company of, another person who, in contravention of subsection (1), is carrying or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, in circumstances which raise a reasonable presumption that he intends to act or has recently acted with such other person in a manner or for a purpose prejudicial to public order, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

The prosecution case was that the 2nd appellant was arrested one day after the 1st appellant. They were therefore not in the same company at the time of 2nd appellant's arrest. The prosecution is therefore not relying on direct evidence but on circumstantial evidence. The only cogent circumstantial evidence the prosecution advanced was the fact the 2nd appellant had in his possession the identity card of the 1st appellant. Is mere possession of the identity card sufficient proof that the 1st and 2nd appellant consorted with each other? In ***SAWE VS REPUBLIC [2003] KLR 354*** the court of Appeal had the following to say concerning circumstantial evidence.

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. **Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

3. **The burden of proving facts which justify the drawing of this inference from the facts to the**

exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. **...**

5. **...**

6. **...**

7. **Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

We know that the 2nd appellant did not give any explanation of his possession of 1st appellant's identity card. The test however is whether the possession of the identity card was not capable of an innocent explanation. In other words is mere possession of the identity card proof that the 2nd appellant was consorting with the 1st appellant in relation to the possession of the firearm for which the 1st appellant was convicted? Consorting means agreeing to work together.

The charge of consorting with a person in possession of a firearm would mean, in the context of this case, that the 1st and the 2nd appellants were working in cohorts in the possession, control and use of the firearm. The 2nd appellant was arrested long after the 1st appellant. Apart from PW7's evidence that they were looking for the 2nd appellant, no evidence was adduced before the court to show that the two had any agreement or understanding in regard to the firearm.

We find that the possession of the 1st appellant's identity card by the 2nd appellant was capable of an innocent explanation. We find that the identity card was a very remote nexus to use as proof that the 1st and 2nd appellant consorted over the firearm. We find that the conviction entered against the 2nd appellant for this offence was unsafe and should not be allowed to stand.

In the result we allow the 2nd appellant's appeal against both conviction and sentence in counts 1 and 3. we accordingly quash the convictions in both counts and set aside the sentences in both. The 2nd appellant would be set at liberty unless he is otherwise lawfully withheld.

The 1st appellant challenges the sentence of 15 years imprisonment against him for count 2 of possession of a firearm. A person convicted for an offence under section 4(2) of the Firearms Act is liable to imprisonment for a period not less than seven but not more than fifteen years. The sentence is provided under Section 3(2)(a) of the Firearms Act. The 1st appellant was given the maximum sentence for this offence.

We considered that the 1st appellant gave no mitigation before his sentence, by choice. We considered the sentence was passed on 1st December 2005. He has served 7 ½ years of that sentence.

We see from the record that the 1st appellant was in custody pending trial since December 2002. We feel that the period he has been in custody in total in relation to this case, being 10 ½ years is sufficient for the 1st appellant to have learnt his lesson.

In the result we set aside the sentence of 15 years imprisonment passed against the 1st appellant and in substitution thereof reduce the sentence to the period already served.

Those are our orders.

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

LESIIT J.
JUDGE

H.I. ONG'UDI
JUDGE

Delivered in open Court in the presence of:-
MR. MIIRI.....for State
Both Appellants
Njue CC

H.I. ONG'UDI

JUDGE
21/5/2013