REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 55 & 54 of 2012

LAWRENCE MURIITHI NARMAN....….....1ST APPELLANT

PETERSON MUGENDI NJUKI..... 2ND APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 1536 of 2006 at the Chief Magistrate's Court Embu by L.K. Mutai – Principal Magistrate on 29th July 2008

JUDGMENT

LAWRENCE MURIITHI MARMAN & **PETERSON MUGENDI NJUKI** hereinafter referred to as the 1st and 2nd Appellant were charged with the offence of Robbery with Violence contrary to section 296(2) Penal Code. The particulars as stated in the charge sheet were as follows;

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

1. **LAWRENCE MURIITH NORMAN 2. PETER MUGENDI NJUKI: On the 21st day of July 2006 at Kathageri market, Kiangungi sub-location, Kyeni North location, in Embu District within Eastern Province jointly with others not before Court while armed with dangerous weapons namely axe, pangas and a sword robbed JIM NJAGI NJERU of six dozens of batteries, twelve bundles of cigarette, one mobile phone make Motorolla C115 and cash money all valued at ks.62,500/= and at or immediately before or immediately after the time of such robbery threatened to wound the said JIM NJAGI NJERU.**

The matter proceeded to full hearing and both Appellants were convicted and sentenced to death. Their co-accused were acquitted.

And being aggrieved by the Judgment they have appealed against both conviction and sentence. The 1st Appellant raised the following seven (7) grounds of appeal;

1. That the learned trial Magistrate erred in law and fact to convict the 1st Appellant without putting due consideration that he pleaded not guilty to the charge.

2. That learned trial Magistrate erred in law and fact in placing reliance on evidence adduced by PW2 that he identified me through the light of torch and the same was not conducive.

3. That the learned trial Magistrate erred in both points of law and fact in relying on recognition

evidence adduced by PW2, PW3 and PW4 which was surrounded by doubts.

4. That the learned trial Magistrate erred in law and fact when he put into consideration the identification parade which was irrelevant lacking description. Secondly the 1st Appellant was confined in the same police cells for more that four (4) days and the parade officer PW8 was the O.C.S. of the station and he had time to show the complainant the accused which is contrary to parade standing orders.

5. That the learned trial Magistrate erred in law and fact in convicting the 1st Appellant putting reliance on evidence adduced by PW7 which was uncorrobarated by the evidence of PW2.

6. That the learned trial Magistrate erred in law and fact by failing to consider that no exhibits or weapons were recovered in the 1st Appellant's possession that could reinforce the investigations by prosecution.

7. That the learned trial Magistrate erred in law and fact by rejecting the 1st Appellant's defence without sufficient reasons.

The 2nd Appellant also raised the following seven (7) grounds of appeal;

1. That learned trial Magistrate erred in law and fact when did not consider that the 2nd Appellant pleaded not guilty to the charge.

2. That learned trial Magistrate erred in law and fact in by failing to consider that nothing like exhibits or weapons were recovered in the 2nd Appellant's possession that could support the investigations by the Prosecution.

3. That learned trial Magistrate erred in law and fact in putting reliance on recognition evidence adduced by PW4 which was surrounded by doubts.

4. That the learned trial Magistrate erred in both points of law and fact in putting consideration to the identification parade which was irrelevant and the parade officer (PW7) was the OCS of the same station and he had time to show the complainant the 2nd Appellant which was contrary to parade standing orders.

5. That the learned trial Magistrate erred in both points of law and fact in placing reliance on torch lights which was not conducive for identification as partitioned by the evidence adduced.

6. That the learned trial Magistrate erred in law and fact when he relied on the evidence of the statements of PW4 which he had made in police station which were of fabrication and afterthought whereby the statement of the police station and those at the Court differed.

7. That the learned trial Magistrate erred in law and fact by rejecting the 1st Appellant's defence without sufficient reasons.

This Court as a first appeal Court has the duty to reconsider and reevaluate the evidence adduced and come to its own conclusions. We are also bearing in mind that we did not see or hear the witnesses. This is what the Court of Appeal had to say about the duty of a 1st appeal Court in the case of ***MWANGI -V- REPUBLIC [2004]2 KLR 28;***

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.***

We therefore move to consider the evidence adduced. The facts of the case are that on 21/7/2006 at 1.30am PW1 and his wife PW2 were asleep in their shop when they were attacked. He gave his wife shs.30,000/= for the robbers as he hid under the counter. The door was broken and they entered. They were given the money and left with PW2 with motor vehicle keys. They wanted her to drive the motor vehicle for them but she told them she did not know how to drive. She was beaten by them. She was however able to identify them using the light from the torches they were flashing. She recognised one out of the four (4) people who entered their house. She was finally hit on the left side of the head and left for dead. She staggered to her house and was taken to the hospital alongside their watchman (PW4). They were treated and discharged. They found several items stolen from their shop as shown in the charge sheet. PW1 reported the incident to Runyenjes police station. Later PW2 was called to identification parades where she identified the Appellants and five (5) others. Besides PW2 there is PW3 and PW4 who identified the Appellants, who they said they had known prior to this incident. PW5 and PW6 who are police officers effected the arrests of the Appellants and others. Dr. S. Maina PW7 produced a P3 form (EXB 6) confirming that PW2 had been injured.

PW8 a Chief Inspector conducted the identification parades and his witnesses were PW2 and PW4. They both identified the Appellants.

In his unsworn defence the 1st Appellant stated that prior to his arrest on 26/7/2006 he used to sell traditional liqour. And every two weeks he would give the OCS shs.1000/=. He was arrested for not complying with this arrangement. And that the witnesses (PW2 and PW3) saw him in the office of the OCS before they picked him on the parade. The 2nd Appellant gave similar evidence.

When the appeal came for hearing before us the 1st Appellant presented us with written submissions. The 2nd Appellant did the same. He further submitted that PW4's statement (DEXB2) did not have any names contrary to what PW4 stated in his evidence.

M/s Ing'ahizu the learned State Counsel conceded to the appeal on the following grounds;

1. Inconsistency in the evidence of identification. PW2 identified all suspects at the identification parade.

2. The witnesses gave no description or names of the robbers. There was therefore no basis for an identification parade.

3. The P3 form showed that PW2 was assaulted by unknown persons.

The two appeals were consolidated as they arise from one Judgment. As is expected of us as a first appellate Court we have analysed the above evidence and considered all the submissions by the Appellants and the learned State Counsel.

On the 1st issue as to whether an offence of robbery with violence was committed we do find that there was proof of theft. In law the proof of any of the elements in the section 296(2) Penal Code is sufficient to establish the said offence if theft is established. In the present case we find also that the attackers were more than one, they were armed and they used violence on their victims.

The next issue to confront is whether the Appellants were among the robbers. We propose to consolidate all the grounds as they are all geared towards the issues of identification and the weight of the evidence.

There is no dispute that this incident occurred at 1.30am when PW1 and PW2 were asleep. Their watchman PW4 claimed to have identified Runji, Muriithi and Mugendi who he said were the 1st and 2nd Appellants. This was with the help of electricity lights. In cross-examination he said he knew these people very well, and even gave their names to the police. This cannot be true because had he given the names there could have been no need for the many identification parades he participated in. PW3 also stated that he identified the 1st Appellant who he knew very well, as they used to drink together. Inspite of all this he never gave any names to anyone not even the police.

PW2 said she recognised the 1st Appellant who used to be their customer. She did not know his name though. There is no evidence that she gave this information to the police. She also claimed to have identified some of the attackers and so attended several identification parades. PW9 also said she identified 2nd Appellant whom she knew as Kitene. She did not give this information to the police. This is what the learned trial Magistrate stated in his Judgment at page 87 lines 12-20

"The conditions of recognition were in my view favourable particularly the light from the electricity and the torches accused had. I therefore find that Accused 1 Lawrence Muriithi Narman was positively recognized as being one of the robbers at the home of the complainant. Since the witness had known them before, the value of the identification parade in respect of accused was of minimal significance. As for Accused 2 Peterson Mugendi Njuki was recognized by PW4 Njuki Mikunyani. He has known him before as his home is about ½ km from the house of complainant PW4. PW2 Lena was also able to recognize him when the torch was flashed at him after the robbery before she was hit. She was able to remember his appearance and picked him at the identification parade. I am satisfied that the recognition of Accused 2 by PW4 Njuki Mikanyuni and PW2 Lena was under favourable conditions and free from error".

In cases of recognition there ought to be the mention of names and/or descriptions before such evidence can be relied on. In the case of ***SIMIYU & ANOTHER -VS- REPUBLIC [2005]1 KLR 192*** the Court of Appeal held thus;

1. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave description and purport to identify the accused, and then by the person or persons to whom the description was given.

2. ***The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.***

Our finding is that the failure by PW2, PW3, PW4, PW5 and PW9 to give the names of the attackers to the police or other people clearly shows they did not know them. Secondly there must be a basis for an identification parade. PW2 and PW4 were called to attend identification parades by PW8.

In the case of ***AJODE -VS- REPUBLIC [2004]2 KLR 81*** the Court of Appeal heal 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".

It is no where here indicated that any such descriptions as required were given by these witnesses.

PW3 and PW9 testified identifying the Appellants as having been among those who attacked them. None of them attended a properly conducted identification parade. Relying on the cases of ***KIARIE -V- REPUBLIC [1984] KLR 739 and AJODE -V- REPUBLIC [2004]2 KLR*** we find that the identification by PW3 and PW9 was generally worthless and the Court ought not have placed any reliance on it as it was not preceded by any properly conducted identification parade. It was a pure dock identification.

PW2 also told the Court that they had been attacked by four (4) people and she recognized one and was able to identify some of the others. However when she attended the several identification parades she identified seven (7) persons who were charged alongside the Appellants but were acquitted. One is left to wonder if the identification was the basis of the conviction then why were the five other accused acquitted and the Appellants convicted.

Secondly this evidence of PW2 of having been attacked by four (4) people and going to identification parades and picking seven (7) people as the ones she saw at their home is incredible. Once a witness's evidence is found to be incredible it can't be relied on by the Court. In the case of ***KIILU & ANOTHER [2005]1 KLR (Supra)*** it was held;

"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

We find all the identifying witnesses to be unreliable and their evidence to be unacceptable. The evidence of identification was unreliable and should never have formed the basis of a conviction. The State did not support the conviction and sentence which was a correct decision to make.

The result is that the appeal is allowed, the convictions quashed and the sentence of death set aside. The Appellants to be set free unless otherwise held under separate lawful 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