



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 237 OF 2009
PATRICK HANDI MUKAMI Alias ALEX MBUGUA KAMAU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 1475 of 2008 in the Chief Magistrate's

Court at Kiambu – Mrs. G. W. Macharia (SRM) on 28th May 2009)

JUDGMENT

1. **Patrick Handi Mukami, alias Alex Mbugua Kamau** the appellant herein, filed an appeal following his conviction by Mrs. G. W. Macharia, the Senior Resident Magistrate at Kiambu law courts (as she then was), in one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. The appellant had faced one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in which the chief particulars were that on the 8th day of July 2008 at Limuru township in Kiambu District within Central Province, jointly with others not before court while armed with a dangerous weapon, namely pistol robbed Joseph Mwangi of cash Kshs.100,000 and at or immediately before or immediately after the time of such robbery caused the death of the said Joseph Mwangi.
3. Upon conviction the appellant was sentenced to death as by law prescribe, whereupon he filed an appeal against both conviction and sentence, advancing grounds that the trial court did not observe **Section 77(2), (3b)** and **Section 77(1), (2), (b), (c), (e), (f)** of the old constitution, and **Section 198** of the **Criminal Procedure Code**. He also attacked the weight of the evidence and in particular that of identification. He further contended that the charge sheet was defective and that he was not given a chance to defend himself.
4. On his behalf learned counsel M/s. Rashid argued that the evidence did not indicate how bright, or in what position the gas lamp said to have illuminated the scene of the robbery was, and that the parade was not conducted properly and was therefore irregular. M/s. Rashid also submitted that the duration of observation was so short that there could not have been positive identification.
5. On identification M/s. Rashid cited the cases of **Wang'ombe v Republic [1976-80] 1KLR** and **Joel Saiyanga Ole Mwaniki & Ano. v Republic Cr. App no. 229/2003** (unreported). She argued that the

assailant and the deceased struggled for one minute, when the gas lamp had been switched of, and that in those circumstances **PW1** and **PW2** could not have identified the assailant positively. M/s Rashid also contended that if **PW3** who came face to face with the thugs in the shop did not identify any of them because of fright, it was not possible that **PW1** and **PW2** who were cleaning the verandah outside identified them.

6. It was also contended for the appellant that, a description of the robbers was not given to the police at the time of making the report, and that the trial court shifted the burden of proof to the appellant. M/s. Rashid further urged that the trial court went on to put forth theories upon which it then convicted the appellant.

7. The state opposed the appeal through learned counsel M/s. Wang'ele, who submitted that the issues raised by the appellant on appeal were mere assumptions and an afterthought and were not a true reflection of the record. She urged the court to reassess the evidence and find that the trial court made a proper finding. On the ground of identification, M/s. Wang'ele contended that the issue of light had been raised, and that **PW1** and **PW2** stated that the appellant came in first as a customer and took one minute to shop. That the lights in the shop and the adjacent shop were all on, there was no interference and the witnesses were therefore able to see and identify the appellant and to give a description to the police later.

8. We have anxiously re-evaluated the evidence on record bearing in mind that a duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised in the appeal. - See **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR**. In doing so we reminded ourselves that we did not have the advantage of seeing the witnesses as they testified.

9. PW1 and PW2 who were the eye witnesses were considered to have been honest witnesses, by the learned trial magistrate, but we were circumspect in the consideration of the evidence in view of the fact that errors of identification may occur even where witnesses are honest. We addressed ourselves to the cases of **Wang'ombe v Republic [1976-80] 1KLR** and **Joel Saiyanga Ole Mwaniki & Ano. v Republic Cr. App no. 229/2003** (unreported) to which we were referred by M/s. Rashid. We agree that as was stated in the case of **Kamau v Republic [1975] E.A. pg 139**: **“The most honest of witnesses can be mistaken when it comes to identification.”**

10. Pursuant to the concerns on the need to ensure that no person is convicted of an offence on the basis of the untested evidence of visual identification by a witness, the Kenya Court of Appeal set out certain guidelines to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified.

11. Those guidelines may be found in the case of **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424**, as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C. J. in the well-known case of Republic vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

12. Having so guided ourselves, we re-examined the evidence on record. **PW4**, Sgt Mbithi testified that while responding to a report that a bus had been carjacked on 5th August 2013 he and his colleague came upon the appellant running from the direction where gunshots were coming from. **PW9** PC Ngumi, the Investigating Officer, testified that at the time of taking over the case for investigation of the robbery herein, he found the appellant in the cells, having already been arrested in connection with the carjacking of the bus on 5th August 2008. Further, that he charged the appellant because he fitted the description given by **PW1** and **PW2**.

13. We scrutinized the evidence of two eye witnesses afresh to ascertain whether or not there could have been the possibility of error in the identification of the appellant in the case before us. **PW1** Wilson Lipuko Mutsore and **PW2** Samuel Mungai Karanja testified that on 8th July 2008 at about 7 p.m. they were cleaning a shop verandah in Limuru. The employer and his wife were inside the shop, and that a customer came to the verandah to buy some goods through the service window. The customer left and the witnesses also moved away to buy Mutura (unprocessed sausage), some 6 (six) metres away.

14. Ten minutes later as they stood waiting for their mutura they were attracted by a scuffle at the veranda of the shop where they worked. Both testified that when they looked up they saw the customer whom they had seen ten minutes earlier buying stuff from the shop. Only now he was holding the shop owner who was on the verandah and pushing him to enter the shop.

15. They started to approach them to intervene but just then they heard the sound of a gun shot from their shop. They fled in different directions and when they emerged 5 minutes later, they found the employer fallen some six metres away from the door of the shop. He had a gunshot wound to the head. They rushed him to Tigoni hospital and onto Aga Khan Hospital where he died as he was being attended to.

16. **PW3** the wife to the deceased testified that three men came into the shop and demanded for cash, one of them had a pistol. She showed them the cash box in which there was Kshs.100,000/=, and they took it. She pleaded with them not to harm her husband but at that moment she heard a gunshot outside her shop. When the robbers left she found her husband fallen outside on the ground. He was bleeding from the head. He died a short while later in hospital.

17. The appellant contended that he was not given a chance to defend himself but the handwritten manuscript shows that he not only defended himself, he also submitted at the close of the case. In his sworn testimony he gave an alibi defence stating that on 8th July 2008 he went to Nyambari Market where he bought vegetables and sent them to Mombasa. At 7.00 p.m. he returned home. His further defence was that on 5th August 2008 at about 8.30 p.m. he was on his way home from buying vegetables at Nyambari when he came across police officers who arrested him and after interrogations told him that he was a suspect in a case where a bus was carjacked. He denied any involvement in this robbery.

18. **PW5**, Dr. Simiyu who performed the post-mortem upon the remains of the shop owner on 15th July 2008, noted that he had sustained a gunshot wound on the ceiling of the head measuring 0.5 cm, and also had an exit wound at the back of the head measuring 1 cm. Internally he had a fracture of the skull with massive haemorrhage. In her opinion the deceased died as a result of that gunshot wound and the ensuing haemorrhage.

19. **PW1**, **PW2** and **PW3** testified that their verandah was well lit by a gas lamp in their shop and electric lighting on the verandah of the neighbouring shops. **PW1** described the customer he saw buying goods from the shop as being of brown complexion, short in stature and stout in build. He wore a white sweater and black trouser. **PW2** called him short, fat and brown. He was the same man they saw ten minutes later struggling with their employer. At that moment they were able to observe him because they did not know their shop was under attack.

20. **PW3** testified that both **PW1** and **PW2** reported to her immediately after the attack that they had recognised one of the thugs and that he had a few minutes earlier, purchased some items from the shop. **PW3** herself did not identify any of the assailants.

21. On the identification parade which M/s. Rashid contended was flawed, we made reference to the case of **SENTALE VS. UGANDA 1968 EA 365**, which stated that the identification parade therein had been held in a manner contrary to the rule approved by the Court of Appeal in **REPUBLIC V MWANGO S/O MANAA (1936) EACA 29**. The latter case set out 13 Parade Rules as provided in the Kenya Police Standing Order No. 15/26 and approved by the then Chief Justice as hereunder:

- 1. That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.*
- 2. That the officer in charge of the case, although he may be present, does not carry out the identification.*
- 3. That the witnesses do not see the accused before the parade.*
- 4. That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*
- 5. That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.*
- 6. Care to be exercised that the witnesses are not allowed to communicate with each other after they been to the parade.*
- 7. Exclude every person who has no business there.*
- 8. Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.*
- 9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.*
- 10. See that the witness touches the person he identifies.*
- 11. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.*
- 12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say "Pick out somebody", or influence him in any way whatsoever.*
- 13. Act with scrupulous fairness, otherwise the value of the identification, as evidence will depreciate considerably.*

22. We made an inquiry of the evidence, to establish whether the parade as conducted by **PW7** passed the litmus paper test in the cases of **Sentale** and **Mwango** (supra). **PW7** the Parade Officer narrated to the court in detail how he went about conducting the parade. He testified that the parade had eight members of almost similar size and complexion as the appellant. That the parade members were sourced from the police cells and from members of the public who had visited the police station. He also stated that he gave the appellant the opportunity to choose where to stand in the line-up and whether or not to have his attorney present.

23. He testified further that there were two witnesses who participated in the parade and that he informed each of them that the suspect in his case may or may not be on the parade. At the end of the parade the first identifying witness was escorted to the office to avoid contact with the remaining witness. That before the parade those witnesses were held in an office at Kiambu Police Station and would not have

been able to see the members of the parade where the identification parade was being conducted in an enclosure at the station.

24. Indeed the identification parade came one month after the robbery, but in the evidence of these two witnesses and that of **PW7** the two witnesses had no difficulty picking the appellant from the parade. They identified the appellant by touching him. The appellant signed the parade forms to say he was satisfied with the manner in which the parade was conducted and **PW7** produced them in evidence.

25. In his grounds of appeal the appellant stated that the charge sheet was defective. M/s. Rashid did not submit on this ground none the less we considered it. Both the charge sheet and the evidence tendered before us showed that during the robbery the offender was armed with a dangerous and offensive weapon to wit a pistol, he was also in company with other persons, and they did fatally wound a person. The particulars of the charge sheet were therefore proved and the ingredients of **Section 296(2)** of the **Penal Code** were satisfied in all three aspects, even though satisfaction of any one of the aspects would have sufficed.

26. Upon careful consideration of the circumstances of this case, we are satisfied that the provisions of **Section 77(1)** and **(2)** of the repealed **Constitution** and **Section 198** of the **Criminal Procedure Code** were observed and that the appellant was afforded a fair hearing. The learned trial Magistrate properly convicted the appellant based on sound evidence, and we confirm the conviction and sentence imposed him.

The appeal is dismissed.

SIGNED DATED and **DELIVERED** in open court this **28th** day of **August 2013**.

F. A. OCHIENG

L. A. ACHODE

JUDGE

JUDGE