REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 96 OF 2012

ALEXANDER SYENGO MBUVI .....1ST APPELLANT

BEN KITEME MBUVI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 83 OF 2010 IN THE PRINCIPAL MAGISTRATE'S COURT AT MWINGI – H.M. NYABERI (PM) ON 27TH SEPTEMBER, 2012)

JUDGEMENT

The appeal before us arose from Mwingi Senior Resident Magistrate's Court Criminal Case No. 83 of 2010. In that case, through a consolidated charge read in court on 3rd May, 2010 Ben Kiteme Mbuvi, Sammy Muthui Musee and Alexander Syengo Mbuvi being the 1st to 3rd accused persons were charged with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence stated that on 11th January, 2010 at Nguni Market, Nguni Location in Mwingi District of the Eastern Province, the accused persons jointly with others not before court, being armed with a dangerous weapon namely a pistol robbed Fredrick Mavuti Katuku cash ksh.360,000/=, one mobile phone make Nokia, 3 packets of batteries and Safaricom airtime cards all valued at Kshs.386, 700/= and at the time of such robbery used actual violence to the said Fredrick Mavuti Katuku.

Alexander Syengo Mbuvi was faced with a second count of escape from lawful custody contrary to Section 123 of the Penal Code. The particulars of this count stated that on 22nd January, 2010 at Kiambe village, Mwingi District within Eastern Province, the accused person being a suspect in a case of robbery with violence and while in the lawful custody of No.60665 Police Constable Christopher Kwambai escaped from such lawful custody.

At the conclusion of the trial, the learned trial magistrate (H.M. Nyaberi, Principal Magistrate) found Ben Kiteme Mbuvi (the 1st accused person) and Alexander Syengo Mbuvi (the 3rd accused person) guilty of robbery with violence contrary to Section 296(2) of the Penal Code. He convicted them and imposed the sentence of death on each one of them.

In his judgment delivered on 21st September, 2012 the learned trial magistrate stated that: **"count II stand in abeyance against the 3rd accused."** We will deal with this statement later in this judgement.

Ben Kiteme Mbuvi and Alexander Syengo Mbuvi were dissatisfied with both the conviction and sentence

and they filed appeals in this court. Ben Kitema Mbuvi filed Garissa High Court Criminal Appeal No. 97 of 2012 and Alexander Syengo Mbuvi filed Garissa High Court Criminal Appeal No. 96 of 2012. By an order issued by this Court (S.N. Mutuku, J) on 30th September, 2013 the two appeals were consolidated under Criminal Appeal No. 96 of 2012 with Alexandar Syengo Mbuvi being the 1st Appellant and Ben Kiteme Mbuvi being the 2nd Appellant.

The 1st Appellant's grounds of appeal, as contained in the document filed in court on 2nd October, 2013 are:-

a. **THAT, the pundit trial magistrate erred both in law and fact when he relied on the evidence of purported visual identification yet, failed to find that the same wasn't free from error as the prevailing circumstance could not favour a positive identification.**
b. **THAT, the learned magistrate erred both in law and fact when he accepted the evidence of the identification by a single witness, yet failed to warn himself on the dangers of convicting on a single testimony.**
c. **THAT, the learned trial magistrate erred both in law and fact when he relied on the evidence of recovery of MFI-1 yet failed to find that the same wasn't affirmatively proved.**
d. **THAT, the learned trial magistrate erred both in law and fact when he failed to find that the evidence adduced was incredible and could not support a safe conviction.**
e. **THAT, the learned trial magistrate erred both in law and fact when he convicted, failing to find that very crucial witnesses did not testify during the trial.**
f. **THAT, the learned trial magistrate erred both in law and fact when he convicted, failing to find that the alibi defence raised wasn't rebutted under Section 212 of the CPC Cap 75 Laws of Kenya.**

The 2nd Appellant's grounds of appeal are found in the petition of appeal filed on 8th October, 2013. They are as follows:-

a. **THAT, the learned trial magistrate erred in Law and fact by overlooking the fact that identification at the scene of crime was not satisfactory.**
b. **THAT, the learned trial magistrate erred in law and fact by not observing that the identification parade process was flawed.**
c. **THAT, the learned trial magistrate erred in law by convicting the appellant on inconsistent evidence.**
d. **THAT, the learned trial magistrate erred in law by dismissing the sworn defence of the appellant.**

Mr. Mailanyi for the state opposed the appeal. He submitted that the complainant who testified as PW1 clearly narrated how he identified his attackers and there is no doubt about the identification of the appellants. He submitted that a mobile phone was indeed recovered from the 1st Appellant. Mr. Mailanyi further submitted that the evidence of the prosecution witnesses was consistent and the appellants were rightly convicted by the trial court. He told the court that the trial magistrate considered the defence of the appellants and rejected it.

This being the first appeal, we have a duty to look at the evidence afresh, evaluate it and reach out own conclusion. In doing so we are guided by the fact that we did not see or hear witnesses testify- see **OGETO v REPUBLIC [2004] 2KLR 14.**

The complainant who testified as PW1 told the court that he is a businessman and on 11th January, 2010 he was in the house behind his shop at Nguni trading centre. At about 7.00 p.m. he was in the sitting room when a man carrying a firearm entered the house and pointed the gun at him demanding money. He then beckoned others and two men entered the house. The man who had a gun picked his wife's Nokia mobile phone which was on the table. The complainant told the intruders that the money was in the shop.

At the shop the complainant removed kshs 160,000/= which was in a black polythene bag and gave it to one of the other two men as directed by the man with the gun. He was told the money was too little. He then removed a green polythene bag which had kshs.200,000/= and handed it over to the same person. The man with the gun then asked for airtime scratch cards and he was given airtime cards worth kshs.10,000/=. They also took a Sony Radio, three dry cells and bread which they stashed in a green polythene bag. The man with the gun then removed the complaint's Nokia mobile phone and cash kshs.200/=. He was then told to lie on his stomach failing downwards and the men left.

As to the identification of the intruders, the complainant stated that:-

"The whole incident took about 30 minutes. The room was lighted by a bulb. The room is about 10 x 20 ft painted cream white. There was light in the shop.....

I had been seeing the man who was holding the gun at Nuu market. I had seen him once. The one who was taking money I had been seeing him at Kyumbe market. I had also seen him twice there. I had never seen the third person. The person who was holding the gun is the 3rd accused whereas the 1st accused is the one who was receiving the money.....I don't know the 2nd accused."

The complainant told the court that about a week later police officers from Ukasi told him to accompany them as they were going to arrest some suspects. They went to a place called Kyumbe in the company of a chief called Ndunu Kituo. He was left in the police motor vehicle. Police officers came back having arrested the 1st Appellant. He was found with the mobile phone belonging to his wife. The 1st Appellant was left in the custody of two police officers. They went and arrested the 2nd Appellant. When they came back they found the 1st Appellant had escaped. They took the 2nd Appellant to Nguni Police Post.

The complainant told the court that he was later informed by the OCS Ukasi Police Station that kshs.11,000/= and clothes had been recovered from the house of the 1st Appellant.

During cross-examination the complainant testified that he participated in an identification parade in which he identified the 1st Appellant by a scar on his right hand. He stated that when the 1st Appellant was arrested at Kyumbe he did not see him because it was at night.

PW3 Felistus Mueni Mavuti, the wife of the complainant, narrated how the robbery took place. She told the court that she informed the police that she could identify two of the robbers if she saw them. She informed the court that two weeks later the OCS Ukasi Police Station took three phones to her shop and asked her if she could identify any of the phones. She identified her mobile phone which had been stolen during the robbery. On 27th January, 2010 she picked the 2nd Appellant from an identification parade.

PW4 Police Constable Christopher Kwambai testified that he was in the company of the OCS and other police officers when they proceeded to Wigemi Location to arrest suspects who had stolen at Nguni Market. They went and arrested the 1st Appellant from his house at Wigeni shopping centre. They recovered a Sonytech radio and two mobile phones. The 1st Appellant was handcuffed and he was left guarding him in the police vehicle. The 1st Appellant complained of stomach problem and in the process of releasing him to answer to the call of nature he escaped. They then proceeded to the house of the 2nd Appellant and the complainant identified him as one of the suspects and he was arrested. On the way to the police station they passed Nguni market where PW3 identified a phone that had been recovered. PW4 told the court that the 1st Appellant was rearrested from his house on 20th April, 2010.

PW7 Chief Inspector Andiema Cyrus told the court that on 27th January, 2010 he presided over an identification parade in which PW3 identified the 2nd Appellant. He also told the court that on 27th April, 2010 he presided over an identification parade in which the complainant identified the 1st Appellant. At the same parade, the wife of the complainant (PW3) failed to identify the 1st Appellant. When cross-examined, PW7 testified that the complainant did not tell him that he could identify the 1st Appellant by a

special mark.

From the evidence of the complainant and PW3 we have no doubt that the offence of robbery with violence was committed on the night of 11th January, 2010. The appellants did not dispute this fact.

The only question to be answered is whether sufficient evidence was adduced to connect the two appellants or any one of them with the said crime.

We will start by reviewing the circumstances surrounding the arrest of the appellants and their subsequent identification in identification parades before proceeding to consider whether the appellants were identified at the scene of crime.

There is contradiction as to what exactly happened on 21st October, 2011 when the 1st Appellant was allegedly arrested from his house and later escaped. We have already reproduced at length the evidence of Constable Kwambai (PW4) as to what happened on that night.

PW8 Chief Inspector David Waweru who was the OCS Ukasi Police Station and PW9 Police Constable John Njuguna told the court that they were among the people who went to arrest the appellants on the material night.

PW8 told the court that on 21st January, 2010 at about 10.00 p.m. he received information about the 1st Appellant. He led police officers to the home of the 1st Appellant at Kamutiuni village, Wingemi Location in Nuu Division. They searched the house of the 1st Appellant and recovered one Nokia mobile phone from his bedroom. The mobile phone was identified by the complainant. The complainant also identified the clothes the 1st Appellant was wearing during the robbery. He identified a jacket, a shirt and a trouser. The 1st Appellant was arrested and left with PW4. PW8 proceeded to the house of the 2nd Appellant with another team of police officers. The 2nd Appellant was arrested and he was identified by the complainant. When they went back to the vehicle, they found the 1st Appellant had escaped. During cross examination PW8 stated that:-

"In the house of 3rd accused, it had solar but it was not working. There was a charger. The 3rd accused was charging. I don't know whether his wife's phone was there. There were three phones on the charger. I together with the complainant and police officers entered into the house of 3rd accused. The complainant saw him. We stayed in his house for about 20 minutes....."

The evidence of PW8 clearly reveals that the complainant saw the 1st Appellant on the night of 21st January, 2010. This clearly contradicts the evidence of the complainant and PW4 who told the court that the complainant did not get the opportunity to see the 1st Appellant on that night. PW8 was also asked if he was aware that the chief who led them to the house of the 1st Appellant had a land dispute with the 1st Appellant. We must note at this stage that the chief was never called to testify. The evidence of PW1 and PW8 gives the impression that they only visited the home of the 1st Appellant once and that is when they made the recoveries.

The evidence of PW9 is totally different. PW9 told the court that on 22nd January, 2010 they proceeded to the home of the 1st Appellant with a view to apprehending him since he had disappeared. They searched for him using sniffer dogs but they did not find him. On 25th January, 2010 at around 2.00 a.m. they again went back to the home of the suspect and found his wife. The witness stated that:-

"We did not find the suspect. On the cloth string CIP Waweru identified the clothes the suspect was wearing while escaping. The clothes were a shirt, I long trouser and half jacket."

PW9 told the court that a (Sonny-tech) radio and cash Kshs.12,000/= were recovered. The evidence of PW9 therefore show that the recoveries were not made at the same time. On cross-examination, PW9

testified that the other exhibits were recovered by PW8.

The evidence of the prosecution witnesses is not clear as to under what circumstances the mobile phone that was later identified by PW3 was recovered. It is not clear whether the same was indeed recovered from the 1st Appellant leave alone his house.

On the identification parade conducted on 27th April, 2010 in which the complainant was said to have identified the 1st Appellant we find the same to be of no evidential value. The complainant had already seen the 1st Appellant and there is no way he could have missed him in an identification parade.

As for the 2nd Appellant, we note that nothing was recovered from him at the time of his arrest.

As regards the identification parade conducted for the 2nd Appellant, PW3 stated:-

"On 27.1.2010 at about 11.00 a.m. I was summoned to Mwingi Police Station for an ID parade. I found people lined up in a parade. They were about 7-8. I went along the parade and identified one of the suspects by touching his hand. The suspect identified is the 1st accused. He was the one who was standing in front of me and there was security light on and it was bright. It was my first time to have seen him at our plot."

We find the alleged identification of the 2nd Appellant by PW3 quite questionable. It is noted that PW4 had informed the court that they had passed the shop of PW3 to show her the mobile phone they had recovered. The 2nd Appellant was with them. Chances are that she saw him on that day and the identification parade would not have served any purpose.

Even more intriguing is the further statement recorded by PW3 on 27th April, 2010 after attending the 1st Appellant's identification parade and failing to identify him. The statement is brief and in it PW3 states that:-

"I do wish to state that I did not identify the suspect as during the robbery there came a group of 4 men who found me cooking outside our room. Three of them went straight into the house while the fourth one was left guarding me. The one who was guarding me has never been arrested and if arrested I can easily identify him as I stayed with him for about 30 minutes they used in our compound while my husband was with the suspect and the other two."

This further statement clearly shows that on 27th April, 2010 PW3 knew that the only robber that she had identified at the scene had not been arrested. How then could she have identified the 2nd Appellant in an identification parade held on 27th January, 2010? We find that the identification of the 2nd Appellant by PW3 was not proper. That leaves us with the identification at the scene of crime.

We have already stated that there is no evidence on record to show that PW3 identified any of the robbers at the scene of crime. The only remaining evidence which seems to connect the appellants with the crime is that of the complainant. The complainant told the court that he used security light to identify the appellants. He told the court that he had seen the appellants once or twice before the material night in local markets. He did not explain what had made him take keen interest in the appellants when he saw them. Only evidence of properly conducted identification parades could have boosted the evidence of PW1. The cloths the complainant claimed the 1st Appellant was wearing at the time of robbery were recovered in unclear circumstances. One witness claimed that those were the clothes the 1st Appellant was allegedly wearing on the night of 21st January, 2010 when he escaped after being arrested by the police. We cannot tell whether the clothes were recovered because he was wearing them when he allegedly escaped from police custody or because the complainant identified them as the clothes he was wearing during the robbery.

We do not think that we can confidently say that the appellants were among the people who robbed the complainant of his property. The trial magistrate apart from restating the evidence of the appellants in the judgment did not state what his finding on that evidence was. He ought to have made a finding on the evidence of the appellants. We will in the circumstances of this case allow the appeal.

Before we make the final orders, we note that the learned trial magistrate indicated in his judgment that count 2 was to stand in abeyance. He therefore did not make any finding on the evidence tendered in respect of count 2. This was not the proper thing to do. What is normally put in abeyance, once a person is convicted and sentenced to death for robbery with violence, is the sentence for other counts for which he has been convicted. The judgment should therefore contain the decision on each and every count facing the accused person. A retrial may have been necessary for count 2 but we find that the 1st Appellant has been in custody for over three years and it would be unfair and not in the interests of justice to order a retrial.

As already stated, we have allowed this appeal. The appellants are therefore set free unless otherwise lawfully held.

We make orders accordingly.

Signed and dated this 22nd November 2013

S. N. MUTUKU, W. KORIR,

JUDGE JUDGE

Dated and delivered this 29th November 2013

S. N. MUTUKU,

JUDGE