REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 364 OF 2008

(Appeal from the judgment of Miss Karani, Senior Resident Magistrate, Makadara CMCR. no.10926 of 2004)

ARNOLD ODHIAMBO OGOLLA.....1ST APPELLANT

CALVIN JUMA KOMOGO.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The appellants were convicted by Makadara Chief Magistrate of the offence of **robbery** with **violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to suffer death in the manner authorized by the law. The main grounds of appeal are that identification was not positive; that the conviction was based on circumstantial evidence which was unreliable; that the charge was defective; that the evidence was full of contradictions in material particulars including the date of offence; that the preferred language of the appellant namely Kiswahli was not used his advantage; that the notebook used as an exhibit and relied on by the trial court was not subjected to a handwriting expert that the court did failed to fully record the defence of the first appellant and that the first appellant was not supplied with witness statements as required by the law and that the offence was not proved to the standards required.

The brief facts of the case are that on the 13th of May 2004 at Survey of Kenya Stage, Nairobi the complainant PW1 was walking home in the evening coming from his evening classes at KCA University. He met with two people including the appellant who attacked and robbed him of his personal items. The appellants were arrested and later jointly charged with the offence.

The evidence of PW1 is that when he met two men at the Kenya Survey Stage, he saw the first appellant carrying a gun which he pointed at him. The accomplice held PW1 on the neck from behind, He was then searched and his identity card, note book and cash Kshs.100/= removed from his pocket. PW1 released himself and escaped. He met with the 2nd appellant who tried to stop him from running away but PW1 managed to dodge him. He reported the matter at Dela Rue Police Post. PW1 went with police officers to the scene where the 2nd appellant was arrested and taken to Muthaiga police station.

PW2 is the officer who arrested the first appellant at the scene. He was stationed at Muthaiga Police station. He testified that he searched him on arrest and recovered a note book and an identity card. The complainant identified the recovered notebook and identity card as his stolen property. PW2 was accompanied by PW3 when he arrested the first appellant. While PW2 and PW3 were booking the first appellant at the station, the 2nd accused was brought under arrest by General Service Unit (GSU) officers who said they arrested him at the scene after he was pointed out to them by PW1.

The counsel for the first appellant Mr. Okao submitted that there were several contradictions. The date of the offence in the charge sheet was indicated as 13th May 2004 while PW1 gave the date as 13th May 2003. The magistrate in her judgment adopted the date given by PW1 in her judgments. We have perused the evidence as to the date of offence. It is correct that the date recorded by the court in the evidence of PW1 is 13th May 2003 which was also appears in the judgment. However, PW2 and PW3 who went to the scene gave the date of the offence as 13th May 2004. The accused in his defence gave 13th May 2004 as the date when he was arrested. This is the date on the charge sheet. The plea was taken on 20th May 2004 – which was seven (7) days after the incident and seven days after the appellant was arrested. The witnesses testified from the August 2004. From all these dates and events the correct date of the offence is therefore 13th May 2004 and not 13th May 2003. The error on the year 2003 instead of 2004 may have been occasioned by a mistake in recording the proceedings or by PW1 giving the wrong year. We agree with the defence that this is a discrepancy in the evidence. However, the same is not fatal to the prosecution's case. The rest of the court record confirms the correct date of offence.

It was said that in his evidence in chief, PW1 told the court that he was held by one of the men who attacked him from the back. When he was recalled for cross-examination, he said he was held from the front. He said in his evidence that he was robbed of a notebook, identity card and cash Kshs.100/=. During cross-examination, PW1 talked of a wallet which neither PW2 or PW3 mentioned. We take note that being held from the front and the back are two different things. However, the most important thing to establish is whether PW1 was attacked and by who. PW1 did not tell the court in his evidence in chief that he had a wallet until during cross-examination. The trial court did not deal with the issue of the belated wallet. The judgment focused on the items listed on the charge sheet. The name of the complainant in the charge sheet is Wesley Moronge Mogara. In PW1's evidence it appears as Wesley Murunge Magara. PW2 referred to the complainant as Wesley Mogaka. The complainant appeared in court in person to testify and confirmed that he is the one who was attacked at Survey of Kenya Stage on 13th May 2004 in the evening and reported the matter at Muthaiga Police station as a result of which the appellants were arrested. The discrepancies in his name which may have been errors in typing or recording evidence are not material. The record bears witness that the trial court dealt with the right person as the complainant.

We do not find the discrepancies regarding to the manner of attack, the issue of the wallet and the name of the complainant material to the prosecution's case. Neither do they affect the credibility of any of the witnesses.

The first appellant alleged that the magistrate did not record the answers of PW1 in cross-examination about the red jacket allegedly won by the appellant during the robbery. This is only the word of the appellant which cannot be verified. The record of the trial court does not show that the accused complained at any one time that the court failed to record some evidence. We take the record of the court as it is and will deal with it as such.

The record of the court is clear that the first appellant requested to be supplied with witness statements. On 28th April 2004, the appellant made his application after PW1 testified. He declined to cross-examine the witness and requested for witness statements. The court made the order that the court Executive Officer facilitates the photocopying charges. The next hearing date was on 19th April 2005 when PW2 testified. It was about seven (7) months later yet the order of the court had not been acted upon. When PW2 testified, the appellant said he had no questions in cross-examination. A month later on 4th May 2005, the appellant made his second application to be supplied with witness statements. The court made another order similar to that made on 28th August 2004. On 3rd March 2006 the court, on application by the prosecution made an order that PW1 be recalled for cross-examination.

On 15th February 2007, the first appellant made another application and an order was made by the court to supply the appellant with witness statements. This order was not complied with and neither did the court make any attempt to enforce it. PW1 was finally cross-examined on 10th July 2007 followed by PW3's evidence. The prosecution's case was later closed, defence case heard and judgment delivered. It is important to note that the case was all along handled by the same magistrate one Ms. Karani.

At the time the case was heard and concluded the relevant constitutional provisions as to a fair trial were contained in the repealed constitution which provided:

"Section 77(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

77(2) Every person who is charged with a criminal offence: (c) shall be given adequate time and facilities for the preparation of his defence. (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

The constitutional provisions established an elementary principle in criminal justice that a fair hearing, within a reasonable time, is ordinarily a judicial investigation, listening to the evidence and arguments, conducted impartially in accordance with the fundamental principles of criminal justice and the due process of the law. The accused must be afforded an opportunity to prepare his case fully aware of the evidence against him. This is a constitutional right that the court is obligated to guard during the trial to ensure that the trial is fair in accordance with the law and the laid down principles.

We rely on the case of **Juma and Others vs. Attorney General [2003] AHRLR 179 KeHC 2003** where Mbogholi, J and Kuloba, J in hearing an application for violation of rights for a fair trial said:

"Always remember that the purpose of criminal prosecution is not to obtain a conviction; it is to lay before the court what the court considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly."

The learned judges further clarified the position thus:

"There is an overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted; and the erosion of this right due to non-disclosure may lead to the conviction and the incarceration of an innocent person. Anything less than complete disclosure by the prosecution falls short of decency and fair play."

We totally associate ourselves with the dictum of the judges in the above case, that the accused has a constitutional right to be supplied with all the evidence including copies of exhibits and reports to be used by the prosecution before the trial commences. The **Constitution** of **Kenya 2010** provides for the right to a fair trial.

At **Article 50(2)(j)**

2. **Every accused person has the right to a fair trial, which includes the right -**

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

We find that the trial magistrate in this case had a duty to ensure that the appellant was accorded a fair trial by facilitating the process of availing witness statements to the appellants. Failure to do so was an abdication of the court's legal duty. We find that the appellants in this case cannot be said to have had a fair trial. It does not matter whether an accused person requests for the statements or not. It is his constitutional right to be supplied with all necessary materials for preparation of his case.

An accused person requires to know in advance the case which will be made against him if he is to be accorded a fair opportunity to answer to the allegations made by the prosecution. It results to breach of the fundamental rights of the accused person should he be denied a fair hearing. This breach calls for nullification of the entire proceedings and perhaps an order for retrial.

A retrial order is not automatic in the circumstances. The court before making such an order must ensure that it will serve the interests of justice and that it will not occasion a miscarriage of justice.

The appellants were charged on 20th May 2004 and the matter finally disposed of on 28th July 2008. The trial took four (4) years while the appellants were remanded in prison. The offence of robbery with violence was not bailable before the enactment of the new constitution which is the relevant period herein. This appeal was lodged in October 2008. It has taken five (5) years to be heard. The trial and the appeal periods add up to a total of nine (9) years. In the event that this case was to be sent for re-trial, it may take another two (2) years to be heard and determined. The prosecution is also likely to face difficulties in tracing witnesses almost ten (10) years down the line.

In the case of **John Mwangi Chege vs. Republic [2004] eKLR** it was held:

"that ***a retrial will be ordered only when the original trial was illegal or defective …..... and not because of the insufficiency of evidence for the purpose of enabling the prosecution to fill in the gaps …..but where the interests of justice require it."***

It is our considered opinion, that an order for retrial will not serve the interests of justice but may surely subject the appellants to further hardship and suffering awaiting disposal of criminal trial. In the circumstances, we are of the view that the cardinal principle of expeditious justice will be violated should this matter go for retrial.

The issue of identification was faulted by the appellants who argued that there was no positive identification. PW2 and PW3 told the court that they received complaints from two young men that there were people who were robbing others at Kenya Survey Stage and immediately proceeded to the place with a colleague. The first appellant was arrested in possession of two items belonging to the complainant.

In convicting the first appellant, the court relied on the doctrine of recent possession as opposed to identification. There is only an indication in the judgment that the complainant identified the first appellant but no details of whether this identification was positive or not. The circumstances in which the first appellant was arrested by PW2 on the road and taken to the police station where no identification parade was held cannot be said to be reliable evidence. It is at the police station where PW1 saw the appellant and identified him as one of the persons who robbed him. It was not said that there was any light which aided the complainant to see the appellant. If there was any light at the scene, the intensity of such light ought to have been given. We find that there was no positive identification on the part of the first appellant.

However, the appellant was arrested a short while after the incident within the Survey of Kenya premises by PW2 and PW3 in possession of the identity card and the notebook of the complainant which the complainant identified as his property. At the time of arrest PW2 and PW3 were not aware that PW1 had been robbed since he had not reached the police station. PW2 was acting in response to a report by some two youths who told him that there were people robbing others at Survey of Kenya Stage. The first appellant did not give any explanation in his defence on how he came into possession of the items in question. The burden of proof shifts to an accused person once possession has been established. In the case of **Court of Appeal Criminal no.108 of 2003 Matu vs. Republic 2004 (1) KLR**, it was observed:

> **"That the appellant had been in possession of goods stolen from the complainant kiosk and he would not offer any acceptable explanation on how he had come by that property. The inevitable conclusion, therefore was that the appellant had participated on the robbery (sic)..... I find the evidence of PW3 as credible and absolutely worthy of believing."**

The principles to be followed in recent possession were laid down in the case of **Arum vs. Republic Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005** where it was held that the doctrine of recent possession is applicable where the court is satified that the prosecution have proved the following:

a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was stolen from the complainant;

d. **that the property was recently stolen from the complainant.**

The court in that case upheld the conviction of the appellant based on recent possession as opposed to identification by the complainant. In the case of **George Otieno Dida alias Stevo & Another vs. Republic**, the appellants were found in possession of the stolen property about four (4) hours after the robbery. There was no identification by the complainant of his assailants. The Court of Appeal upheld the conviction based on recent possession on grounds that it was founded on sound legal principles.

The trial magistrate in convicting the first appellant said:

> ***"This recovery negates the need for an identification parade as the first accused not being known to the complainant had absolutely no explanation even in his defence as to how he came to be in possession of the complainant's stolen items."***

In the circumstances, we agree with the reasoning of the magistrate that recent possession of the complainant's items was established in respect of the first appellant. In the absence of any explanation as to possession, we find that the magistrate was correct in applying the doctrine of recent possession.

The State conceded to the appeal of the second appellant on ground that there was no evidence of identification. The second appellant said in his defence that he works as a causal labourer. At the material time, he met three police officers who arrested him, searched him and found Kshs.4000/= cash in his pocket which was his hard-earned dues. They returned the money to him and took him to the police station where he was charged with the offence. The complainant did not connect the second appellant with the offence. He only said that after he was attacked, he ran away and met the second accused who tried to stop him. Since PW1 was scared and traumatized, he ran away across the road. PW1 said he watched the 2nd appellant from across the road before he led the GSU officers to arrest him. This was after PW1 had gone to Muthaiga Police station to report that he returned to the scene. The source of light which enabled PW1 to identify the accused at night was not given. It was also important to give the intensity of the light and the distance involved which are core to identification of a suspect. The magistrate in her judgment did not consider the issue of the light in any way which aided the complainant into seeing the second appellant. Nothing belonging to PW1 was recovered from the 2nd appellant. In the **High court Criminal Case No. 63 of 2002 Nairobi Kura Charo Ndombo vs Republic** it was held: ***"though it was said that the appellant was viewed by aid of moonlight, the trial court was not given its intensity, duration and the state of lighting. The upshot is that the appellant was not positively identified an the complainant may well have been mistaken as to who he saw during that fateful night."***

We agree with the State counsel that there is no sufficient evidence to connect the second appellant with the offence and that there was no positive identification. The conviction of the 2nd appellant was unsafe.

In conclusion, we have considered all the issues discussed in this judgment and make the following orders:

(a) That the proceedings and judgment are hereby declared null and void for want of compliance with the constitutional provisions as to fair trial;

c. That the appellants are hereby set at liberty unless otherwise lawfully held.

F. N. MUCHEMI **G. ODUNGA**

JUDGE **JUDGE**

Judgment dated and delivered on the **29th** day of **November 2013** in the presence of the appellants and the State counsel Mr. Barasa for Mrs. Mwaniki and Mr. Okao for 1st appellant.

F. N. MUCHEMI

JUDGE