



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
CRIMINAL APPEAL NO. 434 OF 2013

PATRICK NZIOKA KAMALA

APPELLANT

v

REPUBLIC

RESPONDENT

(Appeal from conviction and sentence by M. W. Mutuku, Principal Magistrate in Thika Chief Magistrate's Court Criminal Case No. 777 of 2011 on 14 February 2013)

JUDGMENT

1. Patrick Nzioka Kamala (Appellant) and two others were charged with four counts of robbery with violence contrary to section 296(2) of the Penal Code before the Chief Magistrate's Courts in Thika on 14th February 2011.
2. Accused 2 and 3 in the lower court were acquitted because they were not favourably identified by the witnesses and also because of contradictions in the testimony and the identification parade forms. The Appellant was convicted and sentenced to death.
3. Being dissatisfied with the conviction and sentence the Appellant filed a Petition of Appeal and Grounds of Appeal on 8th March 2013. 7 grounds of appeal were set out in the grounds of appeal though there are 5 main grounds.
4. Before the hearing of the appeal the appellant filed an Amended Memorandum of Appeal which now listed 4 grounds of appeal though a perusal of the grounds show 3 substantive grounds. We will discuss the grounds seriatim.

Identification

5. Grounds 2 and 3 of the Amended Memorandum of Appeal challenged the identification of the Appellant.
6. According to the Appellant the circumstances were not favourable for a positive identification and that the identification parade was conducted in breach of chapter 46 of the Police Force Standing Orders. It was submitted that because PW 1 Boniface Musyoki (complainant in count iv) was startled, shocked and scared, he could not have positively or reliably identified the Appellant. He further submitted that the description PW1 gave was just dock identification because no description was given when a first report was made to the police.
7. The Appellant further submitted that he disputed the identification parade process immediately because it was not fairly conducted.
8. Before evaluating and reassessing the evidence we need to mention that the law reports are replete with the legal principles applicable in identification of accused persons.
 - a. One recent authority where identification was discussed is *Anthony Muchai Kibuika v R* (2013) eKLR delivered by the Court of Appeal on 11th October 2013. The principles

applicable as we can glean from the decision are that one always needs to approach the issue of visual identification with great care and caution [reference to decision in *Waithaka Chege v R* (1979) EA 271] and that *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 a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given* [making reference to decision in *Simiyu & Another v R* (2005) 1 KLR 192].

9. According to the trial Court, the Appellant was positively identified by PW 1, PW 2 Fr. Patrick Mutisya (complainant in count I), PW 3 Fr. Benard Mutua (complainant in count III) and PW 4 Vincent Muema Kamba (complainant in count II). We examine and evaluate what these witnesses had to state regarding the identification of the Appellant.
10. PW 1 was a cook at Kithimani Catholic Church where the robbery took place. He stated that at about 6.00 pm he heard dogs barking and went out to check and as soon as he opened the door four men pushed him back inside the house. The one ahead of the four men was short, black and clean shaven and had a panga. He was led to the room where the other witnesses were.
11. Later at an identification parade he was able to identify the short dark fellow who accosted him at the door as accused 1 because they met face to face as the witness walked backwards into the house a metre apart and he saw him well. The security lights were on during the robbery.
12. PW 1 stated that he informed the police when making his statement on 10th February 2011 that he would be able to identify the attackers and that the statement was made before the identification parade was held. He even testified that the Appellant was wearing a dark coloured jacket though he had not known him before.
13. PW 2, a father at the Catholic Church where the robbery took place testified that he heard dogs barking at about 7.30 pm and sent PW 1 out to check but soon thereafter he came back into the house with some four men who had pangas. One of the men who confronted him with a panga was short and dark and whom he identified as accused 1 (Appellant). He stated that he was able to identify the Appellant because he came close to him and he saw him well. The lights in the house were on. He was able to identify the Appellant in the identification parade. PW 2 did not give a description of the Appellant to the police in his statement.
14. PW 3 was the Assistant priest at Kithimani Catholic Church. He heard dogs barking and asked PW 1 to go and check. Shortly, PW 1 came back walking backwards with two other men. One man was short and dark and had a knife and took his phone. He was the first one to walk into the room. Later, he was called to an identification parade and he identified accused 1 (Appellant) and accused 2 because he was able to see them well. He is not the one who called the police though he stated he informed the police one of the attackers was a short dark man.
15. PW 4 stated he was at the church on the robbery day and that at about 7.30 pm about four to six men got into the house and one short and dark man demanded for his phone and when he stated his phone was in the bedroom, the attacker led him there holding his hands. The witness was later called to an identification parade and he was able to identify the Appellant because there was light and he had been with him for two to three minutes in the bedroom.
16. In cross examination the witness stated he was unable to identify any of the attackers because they were made to lie down. The witness denied being given a description by the police before the identification parade.
17. PW 5 Chief Inspector George Njoroge Macharia conducted the identification parades. According to exhibit VII(b), Identification parade form, the Appellant expressed his dissatisfaction by the way the identification process was conducted. His dissatisfaction was on the ground that the identifying witnesses had seen him being removed from the cells.
18. During cross examination the Appellant confronted the witness on the identification process. The witness stated that the Appellant did not meet any of the identifying witnesses.
19. Appellant put to PW 2 the question whether he had been shown to him before the identification parade and PW 2 denied. PW 2 admitted also in cross examination that he had not given a description of the Appellant to the police in his statement.
20. The testimonies of PW 3 and PW 4 were not clear on whether they gave any prior descriptions of the attackers to the police. This is confirmed by the testimony of the Arresting/Investigating Officer, PW 7 Sgt. Charles Barasa.
21. Considering that it is not clear from the record that a description of the Appellant was given to the

police prior to the identification parade and the guiding principle outlined in the case of *Simiyu & Another v R*, it is our considered view that this ground of appeal should succeed.

Incompetent witnesses

22. Another ground of appeal was that the evidence of incompetent witness was admitted and that the witness was allowed to produce exhibits. The witness in question was PW 6 Benjamin Maingi, the Clinical Officer who attended to the victims of the robbery and filed the P3 forms.

23. In our view this ground has no merit. PW 6 was a competent witness to testify and produce medical evidence as a qualified Clinical officer serving in a government institution.

Rejection of Appellants defence and section 169 of the Criminal Procedure Code

24. The last ground of appeal by the Appellant was to the effect that his defence was not considered.

25. The Appellant gave an unsworn statement and submitted that his defence was strong and outweighed the prosecution case. The trial court dismissed his defence as a mere denial.

26. In the face of our conclusion in regard to the ground of appeal on identification it is not necessary to make any determination on this ground.

Conclusion and Orders

27. In the circumstances we allow the appeal and reverse the conviction and sentence and order that the Appellant be released forthwith unless otherwise lawfully held.

Delivered, dated and signed in open court in Muranga on this 27th day of November 2013.

A. Mbogholi Msagha

Judge

Radido Stephen

Judge

Appearances

Appellant in person

Mr. Okeyo/Ms. Maraga State Counsels for Republic