



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 249 OF 2009

(From original conviction and sentence of the Chief Magistrate's court at Makadara in Criminal Case No, 6827 of 2006 – K. Muneeni)

GULAM HUSSEIN AMOKE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT OF THE COURT

G. OMIRERA – State Counsel

BETTY RASHID – for the appellant

The charge

1. Gulam Hussein Amoke (the appellant) was charged with 4 counts of robbery with violence contrary to section 296(2) of the penal Code. The particulars of the offence were that on the 26th February 2006 at Buru Buru Phase III Nairobi within the Nairobi area with others not before court while armed with a dangerous weapon namely a pistol robbed JANE WAMBUI MBOGO a television set make Sony wega 14'' colour and a sanitary towel, DVD deck all valued at kshs.19, 000/-, at this same place and time the appellant also robbed NAHASHON THIONGO MBOGO cash 2,500/-, two pairs of long trousers all valued at kshs.4, 000/-. On this same day, the appellant together with others not before court also robbed PETER KIMANI MBOGO a mobile phone make Nokia 8310 valued at kshs.8,000/=, he robbed SAMUEL ODHIAMBO JUSTUS a mobile phone make Nokia 6310, a wallet an cash kshs.1,600/= all valued at kshs.10,800/=. At the time of these robberies, the appellant at or immediately before of immediately after the time of such robberies threatened to use actual violence to Jane Wambui Mbogo, Nahashon Thiongo Mbogo, Peter Kimani Mbogo and Samuel Odhiambo Justus. The appellant pleaded not guilty to the charges. After a full trial, the appellant was found guilty as charged. He was sentence to death as the mandatory penalty provided by the law. Being aggrieved by the conviction and sentence, the appellant filed an appeal against his conviction and sentence.
 - a. *The appellant has raised ten (10) ground of appeal in his petition of appeal on the basis that the learned trial magistrate erred in law and in fact by;*
 - b. *Failing to appreciate or take into consideration the appellants defence;*
 - c. *Failing to convict the appellant on the requisite standard of proof of beyond reasonable doubt;*
 - d. *Convicting the appellant on the basis of identification parade that was conducted unprocedural, unlawfully and illegally; convicting the appellant upon recognition evidence where it was not proven beyond reasonable doubt that the appellant was not a stranger to his identifiers;*

- e. *Basing the conviction upon the identification evidence which evidence was neither reliable, satisfactory nor cogent and relying on the evidence relating to the appellants mode of arrest so as to place the appellant at the scene of the alleged crime;*
 - f. *Failing to put a difference between recognition and identification evidence; and*
 - g. *Failing to accord the appellant a fair hearing and thus convicted the appellant against the weight and evidence available and metered out a harsh and excessive sentence.*
2. At the hearing of the appeal, the appellant, with the leave of the court presented written submissions in support of the appeal and also made oral presentations and urged this court to find the appeal has merit and allow the same. On his part, Mr. Omirera, learned State Counsel opposed the appeal and urged the court to uphold the conviction of the appellant as passed by the trial magistrate. We will consider the augments made before us after briefly setting out the facts of this case.
 3. On 26th February 2006, Jane Wambui Nyambura (PW1) was in her house in Buru Buru Phase III. She was in the company of her children and relatives when at 2.00pm. They had left the door open. The appellant entered armed with a gun and told PW1 and her children to lie down and give out their phones if they did not want to die. Two more thugs joined the appellant. The appellant asked for money and placed the gun on PW1 chest. She had no money and so he turned on Nahashon Thiongo (PW4) and then to Peter Kimani Thiongo (PW2) and continued to demand for money. One of the other thugs took the TV set. These were the sons of PW1, but they too had no money. Just then, a neighbour Samuel Odhiambo Justus (PW3) walked in. he had been calling out PW2 to sell some eggs to him. The thugs duped him into the trap. All in the house were told to lie under the bed. PW1 went out and saw the appellant fleeing; he fired into the air to wade off a crowd that was following him. The robbers took TV, DVD, phone and cash. As the robbers were being chased, they dropped the DVD.
 4. After one year, PW3 saw the appellant at a hotel in Donholm and reported to the police through a call using the hotline numbers. The appellant was arrested. PW1 picked out the appellant from the identification parade on the basis that she had spoken to the appellant for 20 minutes at the time of robbery. PW2 also identified the appellant as he was also in the house during the robbery. PW3 saw the appellant in a hotel in Jericho; he called the police who arrested the appellant while in the company of two other people. When the appellant was searched, he was found in possession of PW3 wallet in scribed the word 'Jesus' and his name 'Sam' and he recognised the appellant since he was facing him during the attack and he was present for 10 minutes.
 5. PC Munayo was among the officers who arrested the appellant on 12/12/06 at Jericho market upon being called by PW3, he had to fire in the air and when he arrested the appellant, a wallet was recovered on him that belonged to PW2. IP Mugo conducted the identification parade and PW1 and PW2 and PW3 were able to identify the appellant and this was corroborated by PW4.
 6. PC Cosmas Munyao (PW5) from Buru Buru police station on 12/12/06 was in the company of PC Mulundu and PC Otang, a complainant called them while on Patrol with information that a suspect had been seen. They found Samuel and Mamba at Jericho market who directed them to where the thugs were. The thugs started moving away, the officers fired in the air and arrested three of them and took them to Buru Buru police station. Samuel said the phone found on the appellant had his name 'Sammy' and produced as exhibit1. Only the appellant was identified. IP Ephalant Mugo (PW6) the DCIO Buru Buru on 14/12/12 at 1.30pm. Was requested by PC Otanga to conduct the identification parade in one cell. He placed the witnesses in room 40, he followed all the motions and rules of an identification parade and PW3 was able to identify the appellant.
 7. When the appellant was put on his defence, he denied being involved in the robbery and stated that he was a tout on route 23 Outerging and on 12/12/06 he was on half day and was in the company of another tout. He went to work in Jericho market when he was confronted by the police who fired in the air forcing them to lie down. He was charged when the others were released.

Submissions

8. In submissions, Mrs Rashid for the appellant stated that the appellant was charged with 4 counts of robbery with violence contrary to section 296(2) of the Penal Code and that this court should

evaluate all the evidence as held in the case of **Gabriel Njoroge versus Republic [1982-88] iKAR 1134**. Identification by PW1 and PW3 was faulted in that it contravened section 46 of the Police Standing orders and hence unlawful. PW3 had called the police when he saw the appellant, he was then taken for an identification parade hence serving no purpose as he had already led the police to arrest the appellant. There was no purpose in calling PW3 to an identification parade as he was already exposed to the appellant and the identification became a nullity. PW1 had also been exposed to the appellant before calling the police to arrest him and hence there was no purpose in conducting the identification parade. That for the trial magistrate to use such evidence of identification was an error and the use of PW2 and PW4 evidence which relied on dock identification was wrong as held in the *Gabriel Njoroge case*. When the complaints reported the robbery at Buru Buru police station, they never gave a description of the thugs who attacked them and their statements were not made after the arrest of the appellant, the police did not take a description of the appellant to ascertain the accuracy of the people they were looking for. In **Walter A. Analo versus Republic [1991] 2 KAR 254** the court held;

... Visual identification must be treated with the greatest care and ordinary dock identification alone should not be accepted unless the witness had in advance given description of the assailants and identified the suspect in a properly conducted identification parade. That was not the case in this matter.

9. That in this case, the appellant was arrested a year after the robbery and the witnesses could have lost their memory to enable them to recognise any of the people who attacked them. Mrs. Rashid further submitted that the 1st charge was defective. The complainant is stated to be JANE WAMBUI MBOGO whereas in evidence PW1 was JANE WAMBUI NYAMBURA and there was no explanation on the variations making the charge defective as held in **Yongo versus Republic**. Also, that the 1st report made to the police by PW3 did not indicate that a wallet stolen had initials 'SAM' and only stated so during his evidence in court. PW3 did not give this evidence when his memory was still fresh and thus raises doubts that what he stated in court was true. The recovery of the wallet was not recorded in the OB and hence makes the evidences of PW3 weak as held in **Bukenya versus Republic [1972] EA 549** and the provisions of section 150 of the CPC.
10. The learned State Counsel opposed the appeal and asked the court to confirm the conviction and sentence of the trial court as the complainants were robbed in broad day light and managed to identify their attackers. PW1 was present and PW2, PW3 and PW4 corroborated her evidence. There was evidence of recognition when PW3 said that he knew the appellant and was able to identify the appellant in the parade. That not all details of a report are recorded on the OB and the wallet subject of question was produced in evidence and identified by PW3 as his stolen wallet. The name of a complainant is a curable defect under section 382 of the CPC and thus the court should reject the appeal.

Determination of the issues

11. We have carefully considered this appeal, re-evaluated the evidence adduced before the lower court and formed our own conclusions bearing in mind that we neither saw nor heard the witnesses and gave due allowance for the same as mandated of us as the first appellate court in line with the Court of Appeal decision in **Okeno versus Republic [1972] EA 32**.
12. On whether the charge is defective we note with regard to the 1st count, the charge was specific that the complainant in this respect was JANE WAMBUI MBOGO who was robbed on 26th February 2006. In evidence the complainant with regard to the 1st count the witness who gave evidence was JANE WAMBUI NYAMBURA, PW1. We have scrutinised this evidence with a view of looking at the substance of the charge and without application of technicalities, the charge as drawn, must in its form and substance bring out all the sufficient ingredients of the offence and what the court has to consider if whether the appellant has been prejudiced. PW1 in her evidence stated that she was robbed of a TV, DVD and a sanitary towel. She was recalled to produce further evidence with regard to her ownership of the TV and had a Kenya Broadcasting Corporation

- (KBC) permit in this regard. This document is in the name of Jane Wambui Mbogo and the receipt MFI-3 was in the name of Jane Wambui Mbogo.
13. This evidence, even with a view to avoid technicalities does not support the substance of the charge. When it became clear to the investigating officer that they were dealing with a different person with regard to the person who made a complaint with them on 26th February 2006, this should have raised concern and they should have sought to have an amendment to the charge. Even when PW1 was recalled to give evidence with regard to the TV permit, this should have made the prosecution note this error and difference between the two persons, the one who made a complaint on 26th February 2006 and the person who gave evidence in court. This we find is a fatal mistake herein that cannot be cured with the application of section 382 of the CPC. To sustain a conviction in this regard would be a miscarriage of justice to the appellant as there cannot be one person with two different names without an explanation and in this case JANE WMBUI MBOGO cannot be found to be the same as JANE WAMBUI NYAMBURA. We will disregard the evidence of PW1 as being prejudicial to the appellant and immaterial in this case.
14. There are other complaints herein whose evidence we must evaluate.
15. The main ground in this appeal we find to be that of recognition and identification. The trial court relied on the evidence of the complainant, PW3 in that he did not only identify the appellant but recognised him being a person he had recognised well during the robbery since he was with the appellant together with the other assailants for over ten minutes and it was in broad daylight. When he saw the appellant a year later in a hotel in Donholm, he recognised him and called the police who responded and arrested him at Jericho Market. The learned trial magistrate was sketchy on how the evidence of identification was dealt with. We agree with the submission of Mrs. Rashid that evidence of identification must be watertight - See *RORIA V. R. [1967] E.A.* 583. There is nevertheless some measure of reassurance when the case rests on recognition as stated in *ANJONONI & OTHERS V. THE REPUBLIC [1980] KLR 59*, thus:-

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.

16. Further, in the case of **Republic versus Turnbull [1976] 3**

ALL ER 549 held;

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

17. Applying the principle then in *Anjononi & Others* case as well as the *Turnbull case*, it is clear that the evidence of recognition should be equally be treated with caution. PW3 identified the appellant, he however did not give a description of him immediately after the attack and report to the police or even after he saw him later after several months. PW3 said he saw and recognised the appellant on 26th February 2006 as he was with him in the house of PW1 for over 10 minutes. It was in broad day light. His wallet was stolen and this wallet had his name 'Sam' inscribed on it and he had highlighted the name 'Jesus' on it. Several months later on 12th December 2006 when PW3 saw the appellant in a hotel in Donholm, he identified him and called the police. When the appellant was arrested, a wallet was found on him with a name 'Sam' and was produced as exhibit 1. However, the trial magistrate, does not analyse the evidence before the court in this respect, the wallet was not examined to ascertain if indeed this was the same wallet with the inscribed name 'Sam' and the highlighted name 'Jesus'. Noting the difficulty in the reliance of the evidence of recognition and the time that had lapsed, it was important for the trial court to examine closely all the evidence before it before finding a conviction in this regard. This is so as the initial report of a

witness is always most reliable as the mind is still fresh after the incident and memory sharp. This was so held in **Terekali & Another versus Republic [1952] EA.**

18.The evidence of PW3 was that the robbery took place at about 8:00 p.m. hence in broad daylight. The appellant was not known to PW3 prior to that day. This makes the evidence of identification, by a single witness, subject to the possibility of error as it was long after the robbery that PW3 said recognition the appellant. Further to this assessment, PW3 saw the appellant in a hotel in Donholm and called the police. However PW5 arrested the appellant at Jericho Market. Was this the same person that PW3 had identified or a mistake? In evidence, PW3 stated;

... We reported to the police. After months I went to a restaurant in Donholm. I saw the accused and other men. I called the police hot line. Accused was arrested. He had my wallet by the time of his arrest. Accused was arrested at the gate of the mavel they were three. The accused was identified. The others were released. This is the wallet mf1 it has my name 'Sam' I highlighted the word 'Jesus' on the wallet... I identified him by the physical features. We were in the house with him for ten minutes. Accused was fording all this time. In the room there were four men... [Emphasis added on words not clear].

19.On this arrest of the appellant, the arresting officer PW5 stated;

... A compliant called to say he had seen one of the robbers. We found Samuel and Mamba at Jericho market. He told us where the thugs were. They started moving away. We fired into the air we arrested three of them. We took them to Buru Buru police station. Samuel said the wallet had his name 'Sammy', I produce the wallet exhibit1. The others were not identified, only accused one.

20.There are simply too many contradictions that create doubt that should have been exercised to the benefit of the appellant. We have considered a retrial or not bearing in mind that such an order does not mean that the appellant was not properly found guilty but the same absurdities that faced the trial court on recognition and identification of the appellant and the fatal defect with regard to the 1st charge may as well lead to a miscarriage of justice and thus prejudicial to the appellant. The appellant should therefore be set free unless he is otherwise lawfully held.

Dated at Nairobi this 20th Day of November, 2013.

M. Mbaru

J. Rika

Judge

Judge

In the presence of

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