



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL APPEAL 538 OF 2009

BENSON MWANGI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of K. Muneeni PM in Criminal Case No. 2096 of 2008 delivered on 17th November 2009 in the Chief Magistrate's Court at Kiambu)

JUDGMENT

The Appellant was charged with 6 offences of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the first offence were that on the 3rd day of October, 2008 along Nairobi-Nakuru Highway in Kiambu West District within Central Province, jointly with others not before court and being armed with dangerous or offensive weapons namely knives robbed Ag. Inspector Moris Njue of a Ceska Pistol Serial Number F3888 with 15 rounds of ammunitions, cash Kshs.6,550/=, two mobile phones a motorolla V3 and Nokia 1200 all valued at Kshs.46,000/=, and immediately before or immediately after the time of such robbery used violence to the said Moris Njue.

The particulars of the second offence were that on the third day of October 2008 along Nairobi-Nakuru Highway in Kiambu-West District within Central Province jointly with others not before court and being armed with dangerous or offensive weapons namely knives robbed Elijah Mbugua Kahara a Bus registration number KAZ 912 V belonging to Eldoret Express Company, and immediately before or immediately after the time of robbery used actual violence to the said Elijah Mbugua Kahara.

The particulars of the third offence were that on the third day of October 2008 along Nairobi-Nakuru Highway in Kiambu-West District within Central Province jointly with others not before court and being armed with dangerous or offensive weapons namely knives robbed Rahab Njeri Nganga a sum of Kshs.6,000/=, and immediately before or immediately after the time of such robbery used actual violence to the said Rahab Njeri Nganga.

The fourth offence's particulars were that on the 3rd day of October 2008 along Nairobi-Nakuru Highway in Kiambu-West District within Central Province jointly with others not before court and being armed with dangerous or offensive weapons namely knives robbed Jason Wachira Gichobi a Nokia 1200 phone valued at Kshs.2,800/= and cash Kshs.8,000/= all valued at Kshs.10,800/=, and immediately before or immediately after the time of such robbery used actual violence to the said Jason Wachira Gichobi.

The particulars of the fifth offence were that on the third day of October 2008 along Nairobi-Nakuru Highway in Kiambu-West District within Central Province jointly with others not before court and being armed with dangerous or offensive weapons namely knives robbed Peris Wanjiku Githura a Nokia Phone

2300 valued at Kshs.3,800/= and cash Kshs.28,000/= all valued at Kshs.31,000/=, and immediately after the time of robbery used actual violence to the said Peris Wanjiku Gathura.

Lastly, the particulars of the sixth offence were that on the 3rd day of October 2008 along Nairobi-Nakuru Highway in Kiambu-West District within Central Province jointly with others not before court being armed with dangerous or offensive weapons namely knives robbed Symon Irungu Mwangi cash Kshs.3,200/= and immediately before or immediately after the time of robbery used actual violence to the said Symon Irungu Mwangi.

The Appellant were arraigned in the trial court on 12th December 2007 and he pleaded not guilty to all the charges against him. He was tried, convicted of all of the offences of robbery with violence and sentenced to death for each of the offences. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. His first main ground of appeal were that there was no proper evidence of identification, and that the magistrate erred in law and facts in convicting the Appellant while relying on identification evidence given by a single witness whereas the circumstances of identification were not reliable, and by admitting the evidence as to the identification parade which was irregularly conducted. The second main ground of appeal is that the magistrate relied on insufficient and unreliable evidence to convict the Appellant and failed to consider the Appellant's defence.

Mr. Karuri for the State conceded the Appeal on the ground that the magistrate convicted the Appellant on the identification of a single witness, PW1. Mr. Karuri submitted that the robbery occurred at night aboard an Eldoret Express bus and there were no lights in the bus. Further, that PW1 relied on a flashlight to identify the Appellant and did not give a description of the Appellant. Mr Karuri further submitted that the identification was conducted by PW6 two months after the robbery, and the Appellant was the only parade member with a scar above the left eye and stood out. Mr Karuri submitted that the conviction was therefore not safe.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called seven witnesses. PW1 was Ag. IP Moris Njue, who was based at Kitale Police Station and who testified that on 2/10/2008 he was travelling from Kitale to Nairobi aboard an Eldoret Express Bus, and that upon reaching Uplands a group of people started shouting in the bus. One of them held him by the neck asking him for money and another held a knife, and they robbed him of Kshs 6,500/= his phones a v3 motorolla and Nokia 1200. Further that they took his pistol and used it to command the other passengers out of the bus. The passengers were then abandoned in the bushes, and the bus driver found his way to the main road and drove to Lari Police Station where they reported the robbery. PW1 testified that even though the bus lights were off, he was able to identify the Appellant through a flashlight held by another robber. He also later identified the Appellant in an identification parade.

Similar evidence was given by PW2, Peris Wanjiku Gachura who was a passenger in the same bus, and who was robbed her nokia 2300 phone and Kshs 28,000/=; PW3 Rahab Njeri Nganga , a conductor in the said bus who was robbed of Kshs 6,000/=, PW4, Elijah Mbugua Kahara, the driver of the bus and PW5, Ibrahim Mutua Makoro a conductor of the bus who was robbed of Ksh 4,000/= and a motorolla. Of the said witnesses PW4 and PW5 testified that they identified one of the robbers, but that he was not in court.

PW6 was Inspector Jane Otieno the deputy OCS Tigoni Police Station, who conducted the identification parade. She testified that she called members of the parade who were similar to the Appellant, and that PW1 identified the Appellant by touching him on the shoulder and by the scar on his left eye. PW7 was C.I Simin Kirui who was in charge of the Flying Squad in Tigoni. He testified that he was informed by an informer that the Appellant was one of those involved in the carjacking of the Eldoret Express bus. Further, that on 29/11/2008 he was informed that the Appellant had been seen at Mai Mahiu and they arrested him at a lodging in the town. PW7 testified that he was sure that the Appellant was one of the robbers and knew him before the robbery incident.

After the close of the prosecution case and submissions by the Appellant's counsel, the trial magistrate found that the Appellant had a case to answer on the first four offences, and he was acquitted under section 210 of the Criminal Procedure Code of the fifth and sixth offences as the complainants did not

testify.

The Appellant gave sworn evidence and did not call any witnesses. He stated that he runs a butchery in Nakuru and stays in Nyeri, and that on 28/11/2008 he left Nyeri in the morning and went to buy goats at Mai Mahiu. Further, that at 5.00pm someone knocked at his door asking for Kabunda, a known robber. He denied that he was the robber, and was arrested and taken to Tigoni and charged with the offences. He denied carjacking the bus.

We have carefully reviewed the evidence and considered the arguments made by the Appellant and the State. The issues for determination in this appeal are whether there was a positive identification of the Appellant and whether there was sufficient evidence to convict the Appellant of the offence of robbery with violence.

On the issue of the positive identification, we are in agreement with the Appellant's submissions in this respect. In the present appeal the robbery took place at night, the lights in the bus were off and PW 1 stated that he was able to see the Appellant from a flashlight held by another robber. It is not stated if the flashlight was shorn on the Appellant's face, and for how long. The PW1 stated that at the time he was being held by the neck by the Appellant. The identification was therefore made in difficult circumstances and there is a possibility that an error could have been made in the identification of the Appellant.

We are in this respect guided by the principle of law that there is danger in convicting an accused person on the basis of the evidence of a single identifying witness made in difficult circumstances. This was explained in **Maitanyi –Vs- Republic [1986] KLR 198 at 200** as follows:

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

In addition, the corroborating evidence provided by the prosecution was that of the identification parade. We are in this respect reminded of the procedure for conducting an identification parade as laid out in case of **R V. Mwangi s/o Manaa (1936) 3 EACA 39** and **Ssentale v Uganda (1968) E.A.L.R 365**, particularly the requirement that the accused person is placed among at least eight people as far as possible of similar age, height and general appearance.

In the present appeal, PW6 on cross-examination admitted that the Appellant was the only member of the identification parade who had a scar on his face, and that it was difficult to get ten members with scars. We also note in this regard from the cross-examination of PW7, that PW1 in his initial statement did not give this description of a scar on the face of the Appellant to the police, and only did so in a further statement. It is thus our finding that the identification parade was irregular to the extent that the 1st Appellant was the only person with a scar on his face placed in the identification parade, and it was thereby easy to draw attention to him. The conviction of the Appellant on the basis of the evidence of a single witness in difficult circumstances, and of an irregular identification parade made his conviction was therefore unsafe.

On the second issue for determination as to whether the ingredients of a charge of robbery with violence were proved, we note from the evidence that save for the identification evidence no other evidence was brought by the prosecution to prove the ingredients of the charges against the Appellant, or to place him

at the scene of the robbery. It is thus our finding that the prosecution did not prove beyond reasonable doubt that the Appellant committed the offence of robbery with violence.

We accordingly quash the conviction of the Appellant for four charges of robbery with violence contrary to Section 296(2) of the Penal Code, and set aside the sentences imposed upon him for these convictions. We also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE