



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 259 “B” OF 2011

MPAYO LENTIRANGOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal from original conviction and sentence in the Senior Resident Magistrate's court at Maralal
in criminal case No. 292 of 2009 dated 7th March 2011 by Hon. A.K Ithuku Senior Resident
Magistrate)**

JUDGMENT

1. The Appellant Mpayo Lentirangoi jointly with another person not involved in this appeal were charged with four counts of robbery with violence contrary to section 296 (2) of the Penal Code. They were charged with a fifth count of possession of a firearm contrary to section 89 (1) of the Penal Code, a sixth count being in possession of ammunition without a firearm certificate contrary to section 26 (1) as read together with Section 26 (2) of the Firearms Act Cap 114 Laws of Kenya and an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code.
2. The appellant was convicted on counts 1, 11 and 111 of robbery with violence and sentenced to death.
3. He was also convicted on counts V and V1 and the sentences held in abeyance.
4. The 2nd Accused was acquitted of all charges against him.
5. The appellant being dissatisfied with the decision of the learned Magistrate preferred this appeal and put forward the following grounds in his petition:

AMENDED GROUNDS OF APPEAL

1. That the trial court erred in law and fact by failing to find that the purported identification was unsatisfactory, doubtful, could not support a conviction and the Appellant was a victim of mistaken identity
2. That the trial Magistrate erred in law in convicting the Appellant on the basis of an identification parade that was not properly conducted
3. That the trial Magistrate erred in failing to consider the Appellant's defence

FACTS

6. The complainant (PW1) Boniface Owino was traveling from Siaya to Maralal in his motor vehicle registration number KAJ 802 on 9/11/2009. He was with PW2 Samson Langi, PW4 Tobias Ochieng Ouma and Francis Maina. On reaching Lemisigiyo between 5.00 and 5.30 pm they were stopped by two men who were carrying guns, ordered to get out of the vehicle and lie down.

7. One of the Robbers was wearing a hood and PW1 was not able to observe him. He described the other robber whose face was not covered as being of a light complexion with a gap between his front teeth. PW2 and PW4 corroborated the testimony of PW1. They both stated that they were able to see the Appellant during the robbery. PW2 described him as light skinned, without a beard and PW4 identified him by the gap between his front teeth. They were however unable to identify the 2nd man as he was wearing a black mask during the robbery.

8. Several items were stolen from the complainants including money, wallets and mobile phones.

9. After being robbed, they were ordered to return to their vehicle. They drove to Kisima Police Station but were referred to Maralal Police Station where they recorded their statements.

10. On 7/12/2009, the 3 were summoned to Maralal Police Station in order to identify suspects who had been arrested and stolen items recovered. The witnesses did not see the Appellant before the parade was conducted as they were in the OCS' office while the Appellant was in the cells. The parade was conducted behind the office of the OCPD.

11. PW6 Chief Inspector Charles Marangu conducted the parade. He testified that he selected 8 people who were of same height and build as the Appellant for the parade and explained to the Appellant that he had the right to chose where he wished to stand.

12. The Appellant opted to stand between the 2nd and 3rd witnesses. PW1 was the first witness. He requested that the members of the parade be asked to say "Jambo" and they did so in turns. He was able to identify the appellant by his voice and the description stated herein above.

13. Thereafter the Appellant chose to stand between the 3rd and 4th members of the parade. PW2 was also able to identify him by the description given to the police.

14. PW4 identified the Appellant by his voice when all the members of the parade said the phrase "*kadi ya mama yako*" and by the description he had also given the police.

15. None of the witnesses were able to positively identify the 2nd accused as among the robbers.

16. PW3 Katuka Lesuuda testified that on 28/11/2009 at around 7.00 pm he was in Nkutoto near Lemisigiyo when he received information that there were 2 armed men who were stopping vehicles near the culvert. He called Letubar Lesuuda and several other people and they went to the shamba where one of the men had fled and surrounded it. They pursued the man, fire was exchanged and they convinced him to surrender. They arrested him and on searching him, recovered a rifle carbine S/No.12050509, 7 rounds of ammunition and six mobile phones.

PW5 Tumbal Lesuuda was with PW3 during the pursuit and confirmed PW3's testimony.

17. When placed on his defence, the Appellant gave an unsworn statement. He told the court that on 28/11/2009 he had gone to the market to purchase goats. However, darkness set in before reaching home and he spent the night at a neighbour's Manyatta. The following day, PW3 came accompanied by seven other people and accused him of stealing the goat he was found with. He was arrested and taken to PW3's home whom he had a grudge with for the reason that the Appellant's father, a former chief, had accused PW3 of theft.

18. He was later taken to Maralal Police Station and placed in custody for one week after which he participated in a parade where he was identified by strangers. The Appellant objected to the parade on the grounds that he was the only one who was wearing a *shuka* and had red ochre on his head. He denied the charges against him.

19. The Appellant put in written submissions in support of his appeal and relied on them during the hearing of the Appeal. The Prosecuting Counsel for the State made oral submissions.

ISSUES FOR DETERMINATION

20. Upon consideration of the submissions made by both the appellant and Counsel for the state, we find the following issues for determination:

1. whether the Appellant was properly identified
2. whether the identification parade was properly conducted
3. Was the appellant's defence considered.

ANALYSIS

21. We are alive to the requirement that a court sitting on first appeal is under a duty to examine and evaluate afresh all the evidence adduced at the lower court with a view to arriving at its own independent conclusions whether or not to uphold the judgment of the lower court. In doing so, the court is alert to the fact that it did not have the advantage of seeing the witnesses testify as to form an opinion on their demeanor. We are guided by the case of **Okeno v Republic** (1972) E.A 32

22. The first issue relates to identification. The offence was committed in the evening, between 5.00-5.30 pm, so that the question of lighting conditions at the scene cannot possibly arise.

23. The complainants were also able to observe the Appellant at close quarters and they all testified that they were able to see the man who first appeared on the right side of the road, pointed a gun at them and ordered them to get out of the vehicle. This is the same person who demanded money and other valuables from them and they were able to observe his face.

24. After re-evaluating the evidence, we find that there is no inconsistency or contradictions in the evidence of PW1, PW2 and PW3. The trial court which had the opportunity to observe their demeanor as they testified, found them to be convincing and being the Appellate court, we cannot find otherwise. We therefore find and hold that the offence of Robbery with violence was committed and the first ground of appeal therefore fails.

25. The next issue relates to the identification parade.

The Appellant herein argued that the parade was not conducted in accordance with the law and in particular that he was the only one wearing a *shuka* and had red ochre on his head. According to him, this singled him out and that is the reason why he was picked out by the witnesses.

26. We do not agree with this submission. The witnesses were not influenced by the mode of dress or colour of hair of the Appellant. They testified that they identified the Appellant by his complexion and the gap in his teeth. PW1 and 4 were also able to identify his voice.

27. We are satisfied that the identification parade was carried out in accordance with the Force Standing Orders.

28. In addition, the Appellant did not offer any defence on the allegation that he was amongst the persons who robbed PW1, 2 and 3 on the night of 9/11/2009.

29. The last issue is whether the Trial Magistrate considered the Appellant's defence. In his defence, he told the court that on the 28/11/2009, he spent the night at a neighbour's Manyatta after coming from the market late and that is where he was arrested by PW3 and 7 other men. He alluded to the fact that PW3 was the main architect of the charges against him which were fabricated because he had a grudge against him. We have considered the Appellant's sentiments and defence. The Appellant did not offer any evidence to support his alibi defence. In addition, PW3's testimony was supported by PW5 who did not know the Appellant prior to the arrest and against whom there was no allegation of ill will.

30. The trial court did not make any finding in relation to count 4 where the Appellant together with his co-accused had been charged of robbing Lawrence Njeru Muindi on 9th November, 2009 and threatening to use violence against the said person. No evidence was submitted in support of this count. The person alleged to have been robbed did not testify. We therefore acquit the Appellant of this count.

31. On counts V and VI, the Appellant was charged with being in possession of a firearm without reasonable cause and ammunition without a firearm certificate. When the Appellant was arrested on 28/11/2009 the police recovered a rifle and rounds of ammunition which as per the ballistic Report, were found to be live ammunition under the Firearms Act Chapter 114. The Appellant did not produce any certificate or permit allowing him to be in possession of the said items.

32. We concur with the Trial Magistrate who found and entertained no doubt that the Appellant was found in possession of a firearm and ammunition.

FINDINGS

33. The trial Magistrate reached a correct finding that the appellant was positively identified by way of recognition. We find the convictions on counts 1,11 and 111 on the basis of identification to be safe and uphold the conviction.

34. The trial Magistrate did not make any findings on count 1V. We acquit the Appellant of this charge.

35. The conviction on counts V and V1 are upheld.

36. We sentence the Appellant to death on the 1st count and leave the sentences on the other counts in abeyance.

CONCLUSION

1. On counts 1,11,111, V, V1 the appeal has no merit and it is accordingly dismissed.

2. The appellant is acquitted on count 1V

It is so ordered.

Dated, signed, and Delivered at Nakuru this 10th day of December 2013.

R.V.P WENDOH

JUDGE

L.N WAITHAKA

JUDGE

PRESENT

Mpayo Lentirangoi: Appellant

Mr Marete for the State

Emmanuel Maelo: Court Assistant.

R.P.V WENDOH

JUDGE

L N WAITHAKA

JUDGE