



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 59 & 60 OF 2007

PETER NJOROGE KIRIKA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.60 OF 2007

PAUL MAINA MWANGI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal from the Original Conviction and Sentence by the Chief Magistrate's Court Nairobi (Hon. Mr. T.O. Okello, SRM in Criminal Case No.686 of 2005)

JUDGMENT

These appeals were consolidated arising out of one trial Criminal Appeal No.59 of 2007 was filed by Peter Njoroge Kirika and Criminal No. 60/2007 was filed by Paul Maina Mwangi. By the time appeals came for hearing information was received that Paul Maina Mwangi had died at Kenyatta Naitonal Hospital when receiving treatment.

His appeal therefore abated under section 360 Criminal Procedure Code.

Peter Njoroge Kirika with others was charged with several offences but was convicted only on one charge under section 296 (2) of the penal code namely robbery with violence. He was tried and convicted and sentenced to death. The appellant was represented by Mbugua Mureithi and Co. Advocates who filed an amended petition of appeal filed on 28/5/2008.

The grounds of appeal are stated as follows:

1. That the trial magistrate erred in basing the conviction of the appellant on the evidence of document identification.
2. The conviction was based on a single identification witness without warning himself sufficiently of the danger of relying on such evidence.
3. The learned Magistrate based appellant conviction on insufficient and contradictory evidence of evidence that lacked credibility.
4. The learned Magistrate failed to appreciate the prejudicial circumstances that mitigated against fairness of an independent parade that the appellant justifiable and lawfully declined to participate in.
5. The leaned Magistrate failed to give due consideration to the appellant's defence and making adverse and prejudicial comments on the appellant defence.

The first witness testified that he owned a motor vehicle which he used for hire in Nairobi. His vehicle was Suzuki Escudo. He charged Shs. 5000/- per day. He met the hirer who wanted to take the vehicle the following day. He got a driver who turned up the following day and took the vehicle. On following day (Saturday) the driver did not return the vehicle and on Sunday morning he received a call from the driver telling him the vehicle had been stolen and he was reporting the matter to Thika police. The witness never recovered the vehicle again. This witness does not mention the appellant in his evidence.

The second witness Samuel Gichingiri Matu was the driver who was given the vehicle to drive customers to a wedding the following day. The following day the driver picked the customer and they headed for Blue Post Hotel Thika where they picked two persons. After driving for 10 Km and fuelling the vehicle the driver was told to stop and one of the men at the back removed a pistol and told the driver to move to the back. The one at the back had a gun and some 5 tablets. He told the driver to take the tablets or be shot. He took the tablets. After 3 minutes he became unconscious at around 10.00 a.m. In the evening he found himself at Kihumbuini near a coffee farm. Then people came to him, they gave him water and they gave him a place to sleep the whole night. They then gave him fare and he went to Thika Police station to report. 1st accused and 2nd accused are the ones he had found at Thika. (Paul Maina deceased) and Peter Njoroge. The second accused gave the driver the drugs. He had seen them for a while from the hotel.

On 4/4/2005 he was called to central police station. He was told by the police that the two had refused to be identified. The witness was cross examined by first accused (deceased) and the second accused (Appellant deceased) he said he saw the pistol when the person came to his door. He was scared. He was given tablets when he moved to the back seat. He told the police the description of robbers. The witness saw the second appellant at central police station being passed about. He was at CID office when appellant was being removed. This witness testified seeing the appellant when he was being transferred and pointed out 'he is one of them'.

PW3 was Elijah Muthuri Kituro gave evidence and stated how a Mr. Kibuja paid 14000/- for 2 Rav 4 or Suzuki with drivers (Kibuja is the accused 3 who was acquitted) Appellant was talking to accused 3. Then appellant and accused 3 were arrested. Accused 2 was in Pajero and they went to Central police Station the appellant was cross examined by Appellant who said he saw him near K.I.C.C entrance. He saw the person who had bald head. Accused was clean shaven a cap was recovered from his house was identified by the driver of the Pajero that he was putting on during the robbery.

PW4 was a police officer who went to cells to call the accused person for identification parade. Each one of them refused.

PW5 was arresting officer. He took Appellant who led them to (deceased) to arrest them. They used an informer.

PW6 was a police officer who with other police officer received a report of vehicle theft. At the scene the persons were escaping and they were arrested and taken to the central police station. They took Appellant to where they searched his house but found nothing. However in that place they recovered a copy of bond from Makadara Law Court and other exhibits.

The appellant Peter Njoroge Kirika gave unsworn statement that he was travelling to City Court when he met his friend John Mbugua accused 3. They met police officers, who told them to lie down and they were put in a civilian vehicle they were searched. One of the officers took his cap and said it was the one he had on robbery. They were taken to Central Police Station. Then he was asked about the vehicle and he replied he did not know about a vehicle. He was taken in a white Toyota and taken to Makuyu Police Station on 24/3/2005 moved to Kabati Police Station and later to Thika Police Station where he met (accused 1 deceased)

At Nairobi Central Police Station they were called by Wanjohi who informed them of an identification parade if they would attend but they refused on the grounds they had been taken round and thought the witnesses saw them. He had said he attended a parade on 4/4/2005 when he was not picked and refused to attend another one.

In the judgment the trial Magistrate found that it was daylight and PW2 was with the robbers for a while in the car the robbers were not masked and he identified the Appellant as one of the people he met at Blue Post Hotel and that it was the Appellant who gave him drugs which caused unconsciousness. The Trial Magistrate further found that without identification parade he was left with dock identification. His view was that dock identification was proper and positive. And he found the prosecution had proved case beyond any reasonable doubt. He proceeded to convict the Appellant for the offence of robbery with evidence. The Appellants were acquitted on all other charges.

The Appellant complains that his conviction was based on dock identification. In the Court of Appeal **Njoroge –vs- Republic** it was held that dock identification is worthless and a court should not rely on such identification unless it has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and then a fair identification parade should be arranged.

Regarding visual identification by a single witnesses there is the well known case of **Abdalla Bin Wendo and another –vs- Republic (1953) 20 EACA** where it was stated that evidence of a single witness needs to be tested with greatest care before a conviction when it is based on it so as to eliminate the possibility of an error or mistake.

In this case then identification was visual in daylight but in difficult circumstances. It was of a single witness.

In the circumstances of this case we are of the view that the conviction was not right. The 1st appellant's complaint was correct. The same is quashed and sentence set aside. We order that the Appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 28th day of May 2012

J. N. KHAMINWA

M. WARSAME

JUDGE

JUDGE