REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 200 of 2008

JOSEPH WANGATHI KAMAU.....1ST APPELLANT

DANIEL MULI MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.4473 of 2005 of the Chief Magistrate's Court

at Makadara by Mrs. Usiu – Senior Resident Magistrate)

JUDGMENT

The appellants, **JOSEPH WANGATHI KAMAU and DANIEL MULI MWANGI** were convicted for the offence of Robbery with violence **contrary to Section 296 (2) of the Penal Code**. The facts, as set out in the charge sheet, were that the appellants together with their co-accused and another person who was not before the court, while armed with a dangerous weapon namely a pistol, robbed MARY WAIRIMU KABIRI **(PW 1)** of cash KShs.1,915/- and a 1.5 litres of Highland pineapple juice all valued at KShs.2,025. The assailants are said to have threatened to use actual violence on **PW 1** at the time of the robbery.

After conviction, the appellants were sentenced to suffer death as by law provided.

In their appeal, the two appellants have made extensive submissions, which can be summarized as follows;

(1) The conviction was founded on the evidence of a single identifying witness, yet the trial court failed to warn itself of the danger of relying on such evidence alone, as a foundation for conviction.

(2) In any event, the complainant did not describe the assailants to either the members of the public or to the police officers who then pursued them, and arrested, (amongst others), the appellants.

(3) The prosecution failed to prove that the money which was recovered from the 1st appellant or the juice which was recovered from the 2nd appellant belonged to the complainant (PW 1). The money and the juice had no distinctive marks, which would show that they belonged to the complainant.

(4) Essential witnesses did not testify. In particular, the persons who chased after the appellants and then arrested them, should have explained how they knew who they were to run after, said the appellants.

(5) As the police officers who arrested the appellants had simply been on patrol, the appellants asserted that they had no basis for linking the appellants to the offence as the complainant had not talked to the officers before they arrested the appellants.

(6) The police officers took the appellants to the complainant immediately after arrest. According to the appellants, it is only because of that fact that the complainant said that the persons who were under arrest were the ones who had robbed her.

(7) The evidence was contradictory and uncorroborated. In particular, the appellants pointed out that PW 1 never testified that her assailants had a gun, yet the charge sheet mentioned a pistol. Secondly, whereas PW 2 said that the one with the pistol was not arrested, PW 3 said that the accused were arrested with a pistol.

(8) The trial was described as unfair because the appellants were denied the witness statements before the prosecution witnesses testified. The appellants said that they did request severally for witness statements, but the same were not made available to them.

Secondly, they were also denied the opportunity to further cross-examine PW 1, even when they had applied to have her recalled.

(9) The defences are said to have been rejected unfairly, as the trial court gave no cogent reasons for the said rejection. As a result, the trial court is said to have convicted the appellants on the basis of insufficient evidence, which was contradictory and un-corroborated.

In answer to the appeal, Ms Mwanza, learned state counsel, submitted that the convictions were sound. It was her contention that because the offence was committed in broad daylight, the appellants were identified positively.

The appellants are said to have first pretended to be customers at "Urban Supermarket" in Mathare area, wherein **PW 1** worked.

When **PW 1** showed them the range of fruit juices, from which they could make a choice, they suddenly demanded that **PW 1** should open the cash register.

After taking the money and one container of juice, the intruders left. **PW 1** then screamed, attracting the attention of members of the public. The said members of the public chased after the intruders and arrested them.

Meanwhile, the police on patrol also heard the commotion, and joined in the pursuit.

When the intruders were arrested, the police recovered cash and the juice from the appellants.

We are obliged, being the first appellate court, to re-evaluate the evidence on record, and to draw therefrom our own conclusions. That is the exercise we have undertaken, whilst bearing in mind the fact that, unlike the learned trial magistrate, we did not have the benefit of observing the witnesses when they were testifying.

PW 1 testified that the 2nd appellant arrived at Urban Supermarket at about 3.00p.m, in the company of one other young man. **PW 1** got up from where she had been basking (outside the supermarket), and went to serve the two young men.

The men inquired about juices, and **PW 1** showed them where they could make a choice. The 2nd appellant picked a "Highland" pineapple juice, of 1.5 litres. He then asked **PW 1** for the price. When **PW 1** told him the price, she noticed some other 3 men walk into the supermarket.

The 1st appellant was one of the 3 men. He joined the 2nd appellant and the other man who had entered together with the 2nd appellant.

Soon, the men pointed a pistol at **PW 1**, and ordered her to open the cash register. During cross-examination, **PW 1** said that it was the 1st appellant who pointed the gun at her.

PW 1 also said that she "recognized" the appellants well.

PW 2 was a police officer who was on patrol duties along Juja Raod, on the material day.

He testified that they got a report about a robbery at a supermarket along Juja Road. As the officers continued to patrol, they met 4 men, who started to run away when they saw the officers.

The police officers chased the 4 men, and members of the public helped the police. When the police arrested three (3) of the men, they recovered KShs.1,915/- from one, and a 1.5litre container of pineapple juice from the second person.

According to **PW 2** the juice which they recovered had no label.

After arresting the 3 men, the police continued walking along. In the process, **PW 2** appeared, and she identified the arrested men as the ones who had robbed her.

PW 3 was another police officer. He was the Investigating Officer. His role begun on the day after the appellants were arrested.

When **PW 3** recorded the statement of **PW 1**, the complainant told him that she was attacked by:

"accused who were arrested with a pistol and (who) stole from her."

Later, when the 1st appellant was put to his defence, he said that he was arrested on 3rd June 2005, when he was on his way from his place of work. He was on his way home, when he met a big group of people. They attacked and beat him up. Thereafter, the police arrived and took him away.

As the police were leading him away, they met a woman who said that he was one of the people who had robbed her.

The first appellant denied being one of the robbers. He said that the money which was recovered from him was his money, which he had worked for on that day.

On his part, the 2nd appellant said that he was a barber. He was arrested on 30th June 2005 because he failed to produce his Identity Card to the police. He was later charged alongside people whom he did not know.

Having re-evaluated the evidence on record together with the record of the proceedings, we note that the plea was taken on 4th July, 2005.

On 22nd December 2005, the accused persons sought an adjournment because they had not yet been provided with witness statements.

When adjourning the case, the learned trial magistrate ordered that witness statements be made available to the accused persons, at their own cost. The court then fixed the trial to start on 10th March, 2006.

Ultimately, the trial started on 18th July 2006. After **PW 1** testified, the case was adjourned, at the request of the prosecution.

On 17th November 2006 the accused persons renewed their applications for witness statements. Once again, the court ordered that each accused person be supplied with witness statements.

The trial resumed on 14th December 2006, when **PW 2** testified.

The appellants told **PW 2** that they had no questions to ask him in cross-examination; but they renewed the request for witness statements.

On 22nd June 2007, the appellants applied to the court to have **PW 1** re-called.

In her ruling, the learned trial magistrate held that although the court had ordered that witness statements be supplied to the accused persons from as early as December 2005, the accused did not thereafter expressly state that they were not ready to proceed with the trial.

Therefore, the court held that the application for the recall of **PW 1** was simply a tactic intended to frustrate the witnesses. The application was rejected.

On 11th March 2008 **PW 3** testified, and then the prosecution closed its case.

First, it is clear that when **PW 1** was being robbed, she was all alone in the supermarket. Therefore, if she did identify the robbers, she was a single identifying witness.

In the well-known authority of **ABDULLA BIN WENDO & ANOTHER Vs REG (1953) 20 EACA 166** it was held as follows;

"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 the 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."

Commenting on that holding, the Court of Appeal had the following to say in the case of **MAITANYI Vs REPUBLIC [1986] KLR** 198 at page 201;

"It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight."

After the court ascertains the circumstances in which the single witness identified the accused, the court is

expected to inquire into the question of whether or not the witness gave some description of the accused. The need for that second line of inquiry is that when an accused has made a strong impression on the witness, it should be easy for the witness to describe the feature(s) which made him readily identify the accused.

In this case the robbery took place in broad daylight. Therefore, there was real possibility that the complainant did identify the appellants positively.

However, the alleged identification was not put to the test immediately because the appellants were arrested shortly after they left the scene of crime.

The complainant did not have any opportunity to offer the description of the robbers to anybody before the appellants were arrested together with one other man.

The arrest of the appellants had no nexus with the alleged identification by the complainant.

Indeed, at the time when the appellants were arrested, the complainant was still inside the supermarket where she had been robbed.

It is not clear who exactly arrested the appellants. **PW 2** testified that he was with PC Collins when they arrested the appellants.

The reason why they arrested them was that the appellants together with two other men started running after they had spotted the police officers who were on patrol. That would imply that before the four (4) men saw the two (2) police officers, they were not running.

The 2nd appellant was said to have been drinking juice when the police officers first found them.

By that time, **PW 2** had received information about the robbery at the supermarket. However, he did not disclose to the trial court about where he got the said information from. Therefore, it is not known if the person who provided the information gave any description of the robbers.

At any rate, because the appellants only started running away after seeing the two (2) police officers who were on patrol, that implies that before that, the appellants were not running. In effect, nobody was pursuing them until after they started running away from the police officers.

That means that those who then assisted the police to arrest the appellants did so only because the appellants were running. Those people did not testify, and therefore there is no evidence at all why they ran after the appellants.

PW 3 said that he was told by **PW 1**, (the complainant) that one of the persons who were arrested had a pistol at the time of his arrest. Yet **PW 2**, who was involved in the arrest said that the police did not manage to arrest the person who had a pistol.

In effect, the evidence of the Investigating Officer was at variance with that tendered by the arresting officer.

We now revert to the fairness of the trial process. The appellants asked for but did not get the witness statements.

The learned trial magistrate had directed the appellants to pay for the copies of the witness statements.

There is no indication from the record as to why the statements were not provided. It may well be that the appellants failed to remit payment for making copies.

The appellants have not suggested that the prosecution refused to provide them with witness statements,

even after the appellants had paid for the same. Therefore, the failure to obtain copies of witness statements cannot, of itself, be said to have led to an unfair trial, in the circumstances prevailing.

As regards the description of the money or the juice which was stolen, we find that it is not always necessary that the serial numbers on the bank notes be provided by the prosecution. To suggest that a conviction can only result when the prosecution provides the court with the serial numbers of money stolen from a complainant would result in an absurdity.

Many times money is stolen unexpectedly. For instance when money is received by a shopkeeper, and is then stolen from him; the shopkeeper cannot be expected to have noted down the serial numbers of the currency notes.

Even when a person is paid his salary either in cash or at a bank, he cannot be expected to make a record of the serial numbers of the currency notes.

When a suspect is arrested in the absence of the complainant or of the eye-witness, the best practice is for the police to conduct an identification parade. Such a parade would enable the witness to prove that he had identified the suspect.

In this case, the police say that the complainant bumped into them whilst they were walking with the persons they had just arrested. If that is what happened, then the police cannot be blamed for failing to conduct an identification parade.

We must nonetheless emphasise that when a suspect is arrested by the police, the said police should not go with the suspect, to the complainant, if the arrest was effected in the absence of the complainant. If the suspect is exposed to the complainant, the police will have lost the opportunity to verify whether or not, the complainant had positively identified the suspect.

In conclusion, having re-evaluated all the evidence on record we find that the evidence on record was not a safe foundation for the conviction of the appellants. We therefore find it unsafe to uphold the convictions.

The appeal is allowed; the convictions quashed and the sentences set aside. We order that the appellants be set at liberty forthwith unless they are or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 11th day of June, 2012.

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FRED A. OCHIENG **L.A. ACHODE**

JUDGE **JUDGE**