



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 59 OF 2009

ANTONY NDWIGA KAUMBUTHU.....APPELLANT

VERSUS

REPUBLICPROSECUTOR

From original conviction and sentence in Cr. case No. 2645 of 2005 at the Chief Principal Magistrate's Court at EMBU

J U D G M E N T

The appellant was charged before the Embu Chief Magistrate's court vide Criminal case No.2645 of 2005 for the following offences;

COUNT 1

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

The particulars as stated in the charge sheet were as follows;

ANTONY NDWIGA KAUMBUTHU: On the 1st day of September 2005 at Kathageri market, Kyeni North location in Embu District within Eastern Province jointly with others not before Court while armed with dangerous weapons namely piston, panga and a knife robbed EDWARD KARIUKI NDWIGA of cash Kshs.30,000/=, a mobile phone make Sumsang valued at Kshs.7,500/= and a motor vehicle registration number KAJ 309Y make Subaru Leone valued at Kshs.250,000/= all valued at Kshs.287,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said EDWARD KARIUKI NDWIGA.

COUNT 2

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

Particulars as stated in the charge sheet were as follows;

ANTONY NDWIGA KAUMBUTHU: On the 1st day of September 2005 at Ngoire village, Kigumo sub-location, Kyeni South location in Embu District within Eastern Province, jointly with others not before court while armed with dangerous weapons namely a pistol, panga and a knife robbed PHINEAS MBURIA GATUMO of cash Ksh. 1,200/= and a mobile phone make

Sagem all valued at Kshs.1,750/= and at or immediately before or immediately after the time of such robbery threatened to beat the said PHINEAS MBURIA GATUMO.

COUNT 3

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

Particulars as stated in the charge sheet were as follows;

ANTONY NDWIGA KAUMBUTHU: On the 1st day of September 2005 at Ngoire village, Kigumo sub-location, Kyeni South location in Embu District within Eastern Province, jointly with others not before court while armed with dangerous weapons namely a pistol, panga and a knife robbed CYRUS MUGENDI NJUE of cash ksh. 25,200/= and at or immediately before or immediately after the time of such robbery threatened to beat the said CYRUS MUGENDI NJUE.

COUNT FOUR

REFUSING TO PERMIT FINGERPRINTS TO BE TAKEN CONTRARY TO SECTION 21(3) OF THE POLICE ACT CAP.84 OF LAWS OF KENYA

Particulars as stated in the charge sheet were as follows;

ANTONY NDWIGA KIAMBUTHU: On the 26th day of September 2005 at Runyenjes police station in Embu District within Eastern Province while having been arrested and charged with the offence of robbery with violence, refused to permit his fingerprints to be taken for record and identification purposes.

After a full hearing the appellant was found guilty, convicted and sentenced to death on counts 1,2 and 3. He was sentenced to six months imprisonment on count 4.

The appellant being dissatisfied with the Judgment has appealed against both conviction and sentence citing three main grounds through his amended grounds namely;

1. That the learned trial magistrate erred in law and facts and misdirected himself by relying on the purported identification evidence by P.W.7, P.W.2 and P.W.1 in that they identified their attacker without first of all considering as to the following;

- b) None of them gave out the descriptive evidence as to the identity of their attacker upon reporting the incident and in their subsequent statements recorded to police.*
- c) P.W. 1 had described his attacker as chocolate in appearance whereas the appellant is black in complexion.*
- d) The three witnesses testimony as to the identity of their attacker was under the influence of police.*
- e) Prosecution totally failed to establish the solid time taken under unimpeded observation by the three witnesses.*
- f) Identification parade conducted in the instant matter was unacceptable as the same was in contravention to the forces standing orders chapter 46 rule 6 (iv) letters "a", "c", "d" and "k".*
- g) The circumstances obtaining at Locus Quo was unfavourable to a positive identification.*

2. That the learned trial magistrate erred in both law and facts and misdirected himself in failing to note

and acknowledge that prosecution totally failed to establish the link of my arrest hence the entire case was fabricated and not proved beyond any reasonable doubt as the law requires.

3. That the learned trial magistrate erred in law and fact in failing to give my sworn evidence due consideration which was enough to displace the prosecution evidence.

When the appellant appeared before us for hearing he elected to dispose of his appeal vide written submissions which we have carefully read. He has submitted that the identification of him by P.W.1, P.W.2 and P.W.7 was faulty. The witnesses did not know him and they said the attacker was wearing a blue cap. The witnesses must have been fearful and frightened. He submits that the witnesses did not give any description of the attackers to the police. He disputes that he is chocolate in complexion. Lastly he submitted that the witnesses may have seen him before they picked him at the parade. At page 60 P.W.2 says;

“you kept changing attire and positions during the parade. The police officer allowed you to change clothes and even positions”.

In brief the appellant has attacked the evidence on identification especially on the manner the parade was conducted.

The State through the learned State Counsel M/s Macharia opposed the appeal. She stated that the evidence against the appellant was overwhelming. P.W.1 identified him, at the identification parade, P.W.2 identified him as the person who robbed P.W.1 and drove away in his father's vehicle. There was light from a hurricane lamp on the table. P.W.3 and P.W.7 also identified the appellant.

This being a first appeal this court has a duty to re-examine and re-evaluate the evidence that was adduced in the lower court to arrive at its own independent decision. It also has to bear in mind that it did not see the witnesses. In this case we are guided by the cases of;

1. KIILU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 174

2. BORU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 649

In the court below the prosecution called seven (7) witnesses. P.W.2 the complainant in count 2 is a driver employed by Moses Ndwiga. On 1/9/2005 at 8.00pm he was outside their office at Kathageri near Runyenjes when two people walked to where he was. One had a cap on. He was with the turnboy. The two visitors asked them to go

to the office. In the office were P.W.3 and P.W.7. They went to the office and once there the two strangers told them to lie down and produce money and mobile phones. One person had a pistol while the other had a panga. P.W.2 was robbed of shs.1,200/= and a sagem mobile phone. There was light from a pressure lamp and he observed these people well and realized they were not people he knew. He was able to identify the appellant at the station on an identification parade.

P.W.3 gave similar evidence to that of P.W.2 and said they took away shs.300/= from him. They drove away in a motor vehicle KAJ 309Y belonging to P.W.7's father. The person who searched him was not arrested. P.W.7 who was with P.W.2 and P.W.3 and who is the complainant in count 3 told the court that he was in the office when P.W.2 and P.W.3 were pushed there by two people one of whom wore a cap and was holding a pistol. The one behind had a grey hat and was armed with a long knife. The room was well lit by a pressure lamp on the table. The man with the grey cap and pistol took his money (shs.30,000/=), his samsung phone No.100 valued at shs.7,500/=. The motor vehicle keys for KAJ 309Y were on the ignition. He observed the people well and was with them for 15 minutes. He was able to identify the man with the blue cap and pistol who was the appellant. He also identified him on the identification parade. After they left he took another motor vehicle and went to report.

P.W.1 the complainant in Count 3 was in his shop on 1/9/2005 at 8.30pm when he heard a motor vehicle

outside. He went to find out what the person wanted. A person alighted from the motor vehicle and held his hand back to the shop, and demanded for money. The person had a pistol. He took from him shs.25,200/= from his pocket and other money from the counter. As he led him out he saw a person flashing a torch. He pushed him and went for the person with the torch and shot him. The person later died. The incident took 3 minutes. He was able to observe the attacker well with the help of the light from the hurricane lamp. The person he saw was the appellant. The motor vehicle KAJ 309Y was recovered abandoned along Karurumo Kavangua road. The suspects were later arrested on 19/9/2005. P.W.5 was the identification parade officer. He testified that the appellant was identified by P.W.1, P.W.2 and P.W.7 in a well conducted identification parade.

The appellant had in his defence told the court that the charges were fabricated. On 18/9/2005 he closed his shop late at 10.30pm when he was arrested by police alongside other 4 people. He was placed in cells and three days later he was called by the OCS who asked him for shs.3000/= and he told him he did not have it. On 26/9/2005 he was taken to an identification parade. He challenged the identification parade.

From the evidence that was adduced it is clear that P.W.1, P.W.2 and P.W.7 were robbed of money and mobile phones. The motor vehicle KAJ 309Y was used for escape and the escapees went with it to rob P.W.1.

The only issue for determination is the issue of identification. There is no dispute about the following facts;

- a) That the incident occurred at night
- b) None of the robbers were known to the complainants prior to the incident.

The court is enjoined to assess the prevailing conditions at the time of the robbery to satisfy itself that the identification was free from error.

In the case of **CHARLES MAITANYI -VS- REPUBLIC [1986] 2 KAR 75**, the The Court of Appeal held that after inquiring into the conditions for a favourable identity the court should further inquire and confirm if the complainant was able to give some description or identification of the assailants to those who came to her and or to the police.

The 1st Robbery was the one that occurred at the office of P.W.7's father. P.W.2 and P.W.3 were pushed to the office by a man wearing a cap and was holding a pistol. P.W.7 was in that office. P.W.2 and P.W.7 were able to identify this person but P.W.3 was not able to. The three witnesses say the office was well lit by a pressure lamp. The office was small. The incident took about 8-15 minutes. The victims had been ordered to lie down as the culprits frisked them for money and mobile phones. Though P.W.2 and P.W.7 in these circumstances say they were able to identify the man with the cap they do not demonstrate how they did that as they lay down. P.W.1 stated that he was with this attacker for three minutes. The attacker had a cap and pistol. He held his shirt collar to the shop and there from. He then pushed him down when he saw somebody flashing a torch. A record time of three minutes is not sufficient time in the circumstances to identify anyone wearing a cap, pointing a pistol and the same time holding you by the shirt collar! At P.W.1's shop was a watchman who saw all this but was never called as a witness. Coming back to P.W.2 in cross-examination at page 59 lines 18 - P.W.2 states;

“The members of the parade were many and mixed – black brown complexion, others had caps on. You kept changing attire and positions during the parade. The parade officer allowed you to change clothes and even positions. I did not see you before the parade.”

We are wondering at what point P.W.2 was seeing the appellant changing attire and even positions at the parade if he did not see him prior to the parade. He could not have been changing attire and positions when the witness was already at the parade for the purpose of identification.

The identification by P.W. 2 at the parade can not be left to stand as it is clear P.W.2 saw the appellant

prior to the parade. It has also been shown that the members of the parade were not as close to the size, height, complexion of the appellant. Secondly some even wore caps and others didn't.

From the evidence herein it's clear that the witnesses never gave any description of the culprits to the police prior to their arrest. It's not in the reports and in the statements. Before the police conduct any identification parade there must be a basis for it. The witness ought to have given some description of the person/persons he saw, and intends to identify at a parade at one point in time..

In the case of ***SIMIYU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 192*** the Court of Appeal held as follows;

1. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person/persons to whom the description was given.

2. In this case no description was given hence no basis for the identification parade.

The above exposition has well tackled the first two grounds of the appeal. It is clear that the learned trial magistrate did not critically analyse the circumstances/conditions in order to be satisfied that they favoured a positive identification. The appellant was arrested on 19/9/2005 allegedly through information by an informer. There was no recovery and neither did any of the complainant's lead to his arrest. The offence had occurred on 1/9/2005. So he was arrested 18 days after the offence. The appellant in his defence denied any participation in that robbery. It was upon the prosecution to link him to the said robbery.

After carefully analysing the evidence we have come to the conclusion that the identification of the appellant by the prosecution witnesses P.W.1, P.W.2 and P.W.7 was not free from error. And he ought to have been given the benefit of it. The upshot of this is that the appeal is allowed. The conviction on the 1st, 2nd and 3rd counts are quashed. The sentences on the said counts are set aside. The appellant had indeed refused to have his finger prints taken and he only did comply after the court issued an order. The conviction and sentence on count 4 are upheld. He has however served that sentence. The appellant shall therefore be released unless otherwise lawfully held under a separate warrant.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

**LESIT J.
J U D G E**

**H.I. ONG'UDI
J U D G E**