



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL 234 OF 2009

BENSON MWAURA NJIRU 1ST APPELLANT
PETER MUGENDI MWANIKI 2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence by D.O. ONYANGO Senior Resident Magistrate at Runyenjes in Criminal Case No. 205 of 2008 on 21st December 2009)

J U D G M E N T

The two appellants BENSON MWAURA NJIRU hereinafter the 1st appellant and PETER MUGENDI MWANIKI hereinafter 2nd appellant were the first and second accused in the trial before the ; lower court respectively. They were jointly charged with three counts of robbery with violence contrary to Section 296(2) of the Penal Code. They are alleged to have robbed one Nahason Gitonga (PW1), one Elias Nyaga Njagi (PW2), and one Phelister Muthoni Nyaga (PW3). The offences were allegedly committed on the 10th of April 2008 at Ena Market, Kawanjara sub location, and the assailants were alleged to have committed the offence jointly with others not before the court, while armed with dangerous weapons, namely pangas, metal bars and axes.

After the learned trial Magistrate concluded the case he found both appellants guilty in the three offences charged, convicted them and sentenced each of them to death.

Both appellants were aggrieved by the convictions and the sentence and therefore filed these appeals. The appeals have been consolidated since they arose out of the same trial. The 1st appellant has raised 7 grounds of appeal in his amended petition of appeal. These are as follows:-

- 1. That the pundit Magistrate error in both law and fact while convicting him on reliance to the purported identification by recognition which was made under hectic prevailing circumstances nor either was it supported by PW1 or PW3 nor any description report to the police to confirm the same.**
- 2. That the pundit Magistrate erred in both law and fact while being impressed that he was positively picked at the identification parade conducted by PW4 which was in contravention of identification parade rules as spelt out in Cap. 46 of the Forces Standing Orders.**
- 3. That the pundit Magistrate erred in both law and fact while being impressed with my mode of arrest whilst the evidence by PW5 remained doubtful and questionable.**

4. That the pundit Magistrate erred in both law and fact while convicting me on charges that were not proved to meet the provisions of Sec. 77(2) of the Constitution of Kenya.

5. That the pundit Magistrate erred in both law and fact while rejecting my defense that was not challenged by the prosecution side as per law as joins in Sec. 212 of the CPC and confirmed by PW5 as it was wholly wanting.

6. That the pundit Magistrate erred in both law and fact while sentencing me to suffer death sentence which was harsh, degrading punishment and inhuman act which contravened Sec. 70(a), 71(i), and 74(i) of the Constitution (past) in that it was a deprivation of my life.

7. That the pundit Magistrate erred in both law and fact while convicting me without pointing out under which point of law he convicted me with which was a clear violation of Sec. 169(2) of the CPC.

The 2nd appellant also filed his amended grounds of appeal in which he raises 6 grounds as follows:-

1. That the learned trial Magistrate erred in law and in fact in relying on identification/recognition evidence by PW1, PW2 PW3 and whereas the same was not free from possibility of errors or mistake.

2. That the learned trial Magistrate erred in law and in fact in admitting the evidence of PW1 and PW5 I/O as safe and whereas the evidence was insufficient and incredible.

3. That the learned trial Magistrate erred in law and in fact in failing to consider that Cpl. Timbe and alleged sub chief were not summoned to clear doubt on the issue of recognition, identification by the prosecution witnesses and mode of arrest.

4. That the learned trial Magistrate erred in law and in fact in failing to take into account and failed to afford the appellant's defence adequate consideration.

5. That the learned trial Magistrate erred in law and in fact in not appreciating that the evidence was a frame up against the appellant.

6. That the learned trial Magistrate erred in law and in fact in not exercising the law of natural justice and especially in a grievous case as the one facing the appellant and or failed to appreciate that the natural thing a person would do when he had committed a serious crime as this one is to go underground.

The facts of the prosecution case are that the complainants in this case were neighbours who were living in a plot at Ena market. Each of them was in their houses at the time with PW2 and 3 in same house being husband and wife. They also claim that the light inside their house were on at the time of the attack and the source of light was electricity. PW1 said that his door was hit with a heavy object causing him to jump out of his bed. Two people entered inside the house and that he was able to see the one leading very clearly. He could not see the one behind him. He identified the man he saw as the 2nd appellant and said that he knew him before by his nick name Kariamira. PW1 said that he was robbed of money 8,000/= and his motorolla phone. He identified the 2nd appellant in an identification parade on 25th April, 2008.

PW2 said he was still awake because between midnight and 1 a.m. he was drawing water because there was heavy rain. At around 1 a.m. he heard screams at his neighbours house and he said he was unable to go out because his door was locked from outside. He decided to block his door with a sofa set. The door was broken and two men entered. He said he recognized the one who led the other as Benson the 1st appellant. PW2 said he recognized the 2nd man as the man who sells boiled eggs at Ena. He was able to identify both appellants in the identification parade which were carried out by PW4.

PW3 was the wife of PW2. She corroborated her husband's evidence. PW3 testified that the robbery took 10 and 20 minutes and the electricity lights were on and that she was not able to identify anyone claiming that she was new in the area.

PW4 was Inspector Muoki who conducted the identification parades in respect of both the appellants. He had five identifying witnesses for both parades. Two of them were not called as witnesses i.e. Grace Wanjia and John Munene. PW4 said that Nahason PW1, and Elias PW2 identified both appellants while Phelister PW3 was not able to identify anybody.

PW5 was the investigating officer. He visited the scene of the robbery at about 1.45 a.m. same night, and found that the robbers had fled. He received a first report from Elias PW2 who said that he saw and recognized somebody who was nick named Kiriamira. PW5 said that he escorted 6 victims who had been injured to Runyenjes Hospital. PW5 arrested the 1st appellant together with other suspects on the night of 14th and 15th April 2008. PW5 received the 2nd appellant from Cpl. Timbe on the 16th of April 2008. PW5 said he organized for the identification parades which were conducted by PW4. He also recorded statements from witnesses and collected P3 forms from doctors. PW5 testified that some of the victims of the incident were not willing to pursue the case with the police.

The last prosecution witness Dr. Njiru produced P3 forms filled after he examined PW2 and 3. He confirmed that the two had been injured during the incident.

Both appellants put forward an alibi as their defence. The 1st appellant said he was asleep in his house on the day of the alleged robbery. He said that one of the victims, PW2 was his cousin and that he had identified him in an identification parade. The 2nd appellant said that he sells miraa and boiled eggs for a living. He said PW1 was his cousin and he is the one who led police to his home on 16th April 2009, when he was arrested for this offence.

The appeals were opposed by the learned State Counsel Ms. Esther Macharia. The learned State Counsel submitted that both appellants were identified by PW1 and 2. Ms. Macharia urged that two complainants knew the appellants before and knew that the 2nd appellant sold boiled eggs at Ena market. The learned State Counsel urged that there was no evidence of bad blood between the complainants and the appellants.

Regarding the mandatory death sentence which was raised by the 1st appellant in ground 6 of his petition of appeal, Ms. Macharia submitted that the sentence was provided under Section 296(2) of the Penal Code and is therefore not unlawful. Regarding the 7th ground raised by the 1st appellant, the learned State Counsel urged that even though the trial magistrate did not record the law under which he convicted the appellants, the trial Magistrate indicated that they were convicted as charged in counts 1, 2 and 3. The learned State Counsel urged that the charges were before the court and it was clear under which law the appellants were charged and therefore convicted. The counsel urged that if the same was an error or mistake the same was curable under Section 382 of the Criminal Procedure Code.

We are a first Appellate Court We are guided by the Court of Appeal decision of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005**. It was stated as follows:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs. Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and

conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for that fact that the trial court has had the advantage of hearing and seeing the witnesses."

As expected of us as a first appellate court, we have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses, and have given the due allowance.

The appellants challenge their conviction on the basis of the evidence of identification which they claim could have been mistaken as the alleged assailants were outside when the complainants claim they saw them. The appellants contended that people resemble others. The other reason advanced why the evidence of identification ought not to have founded a conviction was the fact the trial magistrate gave undue weight to that evidence.

Ms Esther Macharia for the State opposed this appeal. The learned State Counsel urged that PW1 and 2 both positively identified the 2nd appellant whom they knew well as a person who sold boiled eggs in the market at Ena. Counsel urged that the 2nd appellant had admitted he sold boiled eggs at the said market. Counsel urged that both identified the 2nd appellant in ID parades and therefore confirming identification further.

Ms Macharia submitted that there was electricity lighting in the houses of PW1 and 2. Counsel urged that the conditions of lighting were conducive to positive identification. Ms Macharia urged that the 1st appellant was identified by PW2 who knew him before as Benson.

The appellants were convicted on the basis of the evidence of identification. The principles that should be had when considering the evidence of identification made in difficult circumstances were well out in the case of **Peter Kimaru Maina vs Republic Nyeri CA No. 11 of 2003** where the court held.

"Before the court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight R. vs. Eria Sebwato [1960] EA 174; Kiarie v. Republic [1984] KLR 739. Further, visual identification must be treated with greatest care and ordinarily a dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect in a properly conducted parade (Amolo v. Republic [1988-1993])"

Both of them said that they had electricity in their homes. That on the night of the incident, the electricity lights were on in their houses. We have carefully considered the evidence of identification by both eye witnesses, PW1 and 2. In the evidence of PW1 he said very clearly that when the robbers struck, he was able to see only one of the two men who robbed him. PW1 gave a justification for the inability to identify the second man as the fact the man who entered first covered his view of the second man. The man he said he saw and recognized was the 2nd appellant whom he knew by his nick name *Kiriamira*. PW1 was able to identify the 2nd appellant in an identification parade 15 days after the incident.

The prosecution has adduced the evidence of ID parades showing that PW1 identified the two appellants as those who attacked him on the night in question. Given PW1's evidence, we do not think that the identification of the 1st appellant by PW1 was credible and we so hold.

In regard to PW2 he said that he recognized the two men who attacked him and his wife on the material day. We did not however lose sight of the evidence of PW5. He said that he went to the scene soon after the attacks and even took victims, who numbered 6 to hospital. Among those he interviewed about the incident was PW2. PW5 said that PW2 told him that he had only been able to recognize one person who was nick named *Kiriamira*. PW2's report to PW5 was a first report to a person in authority at the first opportunity. In the case of **Terekali & Another –vs- Republic [1952] E.A.** it was held:

"Evidence of first report by the complaint to a person in authority is important as it often provides

a good test by which the truth and accuracy of sub-sequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.....”

We are guided by the case we have referred to. We think that this case is a good example of how embellishment can be can be gauged and avoided. PW1 was clear he saw and recognized only one of the assailants. PW2 on the other in his first report said he recognized only one person. both gave the name of the person they recognized as Kiriamira, and also identified him in ID parade. We accept the identification of PW2 as having been tested and found to be free of error or mistake. The conditions of identification were also good and the quality of light also good.

On the basis of our finding we rule that the conviction entered against the 1st appellant was not safe and cannot be sustained.

The 1st appellant had raised technical issues which we shall not consider since his appeal has succeeded.

We have warned ourselves regarding the evidence against the 2nd appellant and the danger of convicting on such evidence. Having done so we have come to the conclusion the evidence of identification against him was safe. We have therefore come to the conclusion that the appeal by the 2nd appellant has no merit. He was well known to the complainants before the attack. We are satisfied that he was properly identified as on of those who attacked and robbed the complainants. The offence he was charged with was established beyond any reasonable doubt and the ingredients of the charged sufficiently proved.

The 2nd appellant in his defence claimed that PW1 was his cousin. We have confirmed from the proceedings that no such allegation was put to PW1. All PW1 admitted was that he knew the 2nd appellant before. The allegation of an existing familial relationship between them was an afterthought.

Having carefully considered this appeal, we allow the 1st appellants appeal, quash the conviction and set aside the sentence. The 1st appellant should be set at liberty unless he is otherwise lawfully held. In regard to the 2nd appellant, we find his appeal without any merit and dismiss it accordingly. We uphold the conviction and confirm the sentence.

DATED AT EMBU THIS 27TH DAY OF JULY 2012.

LESIT, J.
JUDGE

H.I. ONG’UDI
JUDGE

READ, SIGNED AND DELIVERED,

In the presence of:-

.....for State

.....Appellant

.....Court Clerk