REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 184 OF 2009

BENARD MUGENDI MUTHONI……..…….....……..APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 135 of 2008 at the Senior Principal Magistrate's Court at Runyenjes

JUDGMENT

Bernard Mugendi Muthoni Appellant herein was charged with two others for the offence of robbery with violence contrary to section 296(2) Penal Code.

The particulars as per the charge sheet were as follows:-

BENARD MUGENDI MUTHONI: On the 1st day of December, 2004 at Embu town, Embu Municipality Location in Embu District within Eastern province, jointly with another not before court, armed with dangerous weapons namely toy pistol and knives robbedFRANCIS MUNYI KIURA one motor vehicle registration Number KRD 265 Toyota saloon valued at ksh. 150,000/- and one cassette valued at ksh. 100/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Francis Munyi Kiura.

The matter proceeded to full hearing and the Appellant convicted and sentenced to death. He was aggrieved by the judgment and has appealed against the judgment and sentence raising the following grounds:-

1. That the learned trial magistrate erred in both point of law and fact by convicting him relying on a defective charge sheet.

2. That the learned trial magistrate erred in both point of law and fact by failing to consider that the prosecution violated his right section 72(3b).

3. That the learned trial magistrate erred in both point of law and fact pointing reliance on evidence adduced and there was no exhibit or a weapon was recovered in the Appellant's possession.

4. That the learned trial magistrate erred in both point of law and fact by convicting the Appellant and failing to consider that there was no report or description given about the Appellant.

5. That the learned trial magistrate erred in both point of law and fact by putting reliance on evidence adduced by PWI, PW5, up to P.W. 11 which was full of contradictions.

6. That the learned magistrate erred in both point of law and facts by relying on confession that was surrounded with a lot of doubts.

7. That the learned trial magistrate erred in both point of law and facts by failing to consider there were two officers who investigated this case, which created a lot of doubts making it to be a mere frame up.

8. ***That the learned trial magistrate in both point of law and fact by rejecting the Appellant's defence without sufficient.***

When the appeal came for hearing the Appellant presented written submissions. He has submitted that he was convicted for an offence he was not charged with as his name does not appear in the said charge sheet.

He challenged the identification of the radio cassette and cassettes by PWI. He was also not found in possession of those items. It was the assistant chief who had them.

He further submits that the evidence on the weapons and the particulars in the charge sheet are at variance. He therefore asked to be released.

The state through M/s Macharia the learned State Counsel opposed the appeal saying the Appellant was properly identified by several witnesses. She further submitted that the exhibits were recovered from the Appellant and were well identified. And that the discrepancy in the charge sheet could be cured under section 382 CPC.

This being a 1st appeal this court is enjoined to re-evaluate and re-consider afresh the evidence that was adduced in the court below to arrive at its own conclusion. We are also alive to the fact that unlike the lower court we never saw nor heard the witnesses Ref:

1. OKENO -V- REPUBLIC [1972] EA 32

2. SIMIYU & ANOTHER -V- REPUBLIC [2005] I KLR 192

The original record Embu Chief Magistrate\'s case No. 3706/04 was initially heard by M/s Lucy Gitari Senior Principal Magistrate. The people charged were three viz:

1st accused – Bernard Mugendi Muthoni

2nd accused – Mannases Mwaniki Njagi

3rd accused – Misheck Kimani Mwangi

The 3rd accused escaped from prison before the matter was concluded.

However the case against the 1st and 2nd accused proceeded and was concluded. And on 22/02/2008 a judgment written by M/s Gitari - Senior Principal Magistrate was read by Mr. Riechi Chief Magistrate. In the said judgment the 1st accused was found guilty and convicted of the offence of robbery with violence under section 215 Criminal Procedure Code.

The 2nd accused was acquitted under section 215 Criminal Procedure Code. And on 13/03/2005 the Chief Magistrate Mr. Riechi made an order directing the matter to be heard in Runyenje's SRM's court. The reason was that the Embu court was busy. We have also noted from the Chief Magistrate's remarks on 22/02/2008 that the judgment was only against the 2nd accused. This was a misdirection because the judgment by M/s Gitari is clear. It's on this basis of this misdirection that Mr. D.A. Onyango

SRM directed that the matter starts de novo. Mr. Onyango then heard the case against the 1st accused afresh and convicted him. In essence there are 2 judgments in this file.

This is against the law. If there was any problem with the judgment of M/s Gitari it is only the High Court which could have set it aside and ordered for a retrial. This was not done.

It is against the law for one to be convicted/acquitted twice over the same offence. Section 138 of the Penal Code provides;

" A person who has been tried by a court of competent jurisdiction, for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside shall not be liable to be tried again on the same facts for the same offence".

In this case M/s Gitari SPM heard the case and did a judgment. The same has not been reversed or set aside. We therefore find that Mr.D.A. Onyango could not again try the Appellant herein for the same offence. We quash the conviction by Mr. D.A. Onyango SRM dated 16/09/2009. The death sentence is also set aside.

The original record pertaining to this case is just one and we propose to deal with the judgment by M/s Gitari which is in this file. The evidence before her was that PWI who was the driver of motor vehicle registration No. KRD 265 was approached by 2 men on 01/12/2004 8:00am who wanted to be dropped at Kimangaru within Embu. He was paid Ksh. 300/=. On the way one of the customers placed something like a pistol on his neck. He was ordered to stop. The customers took his 600/= and placed him in the boot of his car which they tied with a rope. He remained with his phone and was able to send texts to his employer and a colleague. The motor vehicle developed a mechanical problem and the same was abandoned after a few items e.g. radio and cassettes, battery had been removed. He was later rescued. PWI did not know the customers prior to this incident. When the Appellant was arrested and brought PWI was able to identify him as one of the said customers. A cassette was removed from his pocket which he identified as his. It had a yellow tape which he had fixed (EXB2). He identified a radio and battery of the vehicle (EXB 3a & b), and a bag (EXB4) which the Appellant had been carrying. PW4 a police officer received the bag (EXB4). He said he received them from the assistant chief and a cousin of the Appellant. He stated that the Appellant led them to where they recovered a toy pistol from a banana plantation. PW5 who had allegedly seen the Appellant did not attend any identification parade to identify him. PW6 is the cousin in whose house the Appellant had allegedly left a bag with a few items. The witness said he saw the Appellant enter his house. He was some distance away.

P.W.7 was the mechanic who was called from Runyenjes to attend to the motor vehicle belonging to PW2. The driver was one Kim who was with another called Kinyua and both of them were not before the Court. The assistant chief was given a description of a wanted man by the OCS. He immediately knew it was the Appellant. They then arrested him from a hotel.

The OCS Runyenjes (PW9) acted on information he had received and the Appellant\'s name featured in the information he received.

We do note from the record that the evidence of PW9 was taken in the absence of the Appellant who had walked out of the court for two reasons:-

1. An application to allow him legal representative and the matter to start a fresh was denied.

2. *Application to recall witnesses was also denied.*

He did not therefore make any defence. Nonetheless a judgment was delivered as he had participated in the rest of the proceedings.

The issue for determination here is the identification of the Appellant and of the recovered items.

PWI did not participate in any identification parade of the Appellant as he had seen him upon his arrest. He had been brought to where PWI was and he had a cassette in his trouser pocket.

PW5 was a civilian witness who said he had seen two people in the grounded motor vehicle. He was able to identify the Appellant in the dock only as he said he had not been invited to any identification parade.

Dock identification not preceded by a proper identification parade is worthless. This was the holding in ***AJODE VERSUS REPUBLIC [2004] 2 KLR 81.***

This witness did not state anywhere that he had known the Appellant prior to this incident.

The evidence of PW6 (a cousin of the Appellant) is very interesting. He says he was not in his house but was in the shamba when Appellant came there and left a bag. He apparently saw him from far but did not ask him what he was upto. Later when he went to Ena market and heard of Appellant's arrest he came to the house and took the bag to the assistant chief.

PW8 appeared to have such detailed information about the car jackers. He did not however support this evidence with any other independent evidence.

The mechanic (PW7) who had apparently come to the vehicle to repair it did not identify the Appellant. He too was not called for any identification parade. The persons whose names he remembered were not in court when he testified. The assistant chief just acted on the information given to him by PWI and PW8. He did not give any independent evidence.

The items identified by PWI were the radio, cassette and a car battery. These are very common items which require proper identification. PWI said he had put some yellow tape on the cassette. He had not given any description of this cassette to the police. The Appellant plus a cassette were brought to him and he simply said ***"This is one of the two men and this is my cassette".*** The car battery were not properly identified.

The practice of taking suspects to witnesses for them to confirm if they are the culprits ruins an otherwise good case. We have noted that the way the witnesses and identification of the suspects were handled diluted the otherwise good evidence they had.

Our overall evaluation of this evidence is that the prosecution did not prove its case beyond reasonable doubt. Secondly the conduct of the Appellant before the learned trial Magistrate was not the least to say respectful, and he is admonished for this.

The upshot is that we allow the appeal, the conviction is quashed. There was no sentence that was meted out to the Appellant upon this conviction. We therefore have nothing to set aside.

The Appellant to be set free unless otherwise lawfully held under separate warrant.

Orders accordingly.

DATED AND DELIVERED AT EMBU THIS 21ST DAY OF SEPTEMBER 2012.

LESIIT J. **H.I. ONG'UDI**

JUDGE **JUDGE**