



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL 173, 171 & 174 OF 2009

PETERSON MUGENDI NJUKI.....1ST APPELLANT

LAWRENCE MURIITHI NARMAN.....2ND APPELLANT

AYUB NJUE NDERI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 78 of 2008 at the Senior Resident Magistrate's Court at Runyenjes

JUDGMENT

PETERSON MUGENDI NJUKI, LAWRENCE MURIITHI NARMAN and AYUB NJUE NDERI herein after referred to as 1st, 2nd and 3rd Appellants were jointly charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code.

The particulars as stated in the charge sheet were as follows:-

PETERSON MUGENDI NJUKI, LAWRENCE MURIITHI NARMAN AND AYUB NJUE NDERI:
On the 26th day of July 2006 at Kathari village Kathari S/location, Kyeni North location in Embu District within Eastern Province jointly with others not before court while armed with dangerous weapons namely iron bar, pangas, axes and clubs robbed ERASMUS IRETI NYAGA of wrist watch make casio valued at ksh. 1500/=, mobile phone make motolla C 113 valued at Ksh. 3,000/= all valued at Ksh. 4,500/= and at or immediately before or immediately after the time of such robbery beat the said ERASMUS IRETI NYAGA.

The matter proceeded to full hearing and they were all convicted and sentenced to death.

They were aggrieved by the judgment and have appealed against both conviction and sentence raising the following common grounds:-

- 1. That the learned trial magistrate erred in law and fact in relying on identification recognition evidence by P.W.1 and P.W.2 and whereas was not free from errors or mistake.***
- 2. That the learned trial magistrate erred in law and fact in disregarding and or failed to give reason why he disregarded the P.W.3 evidence in that, he never saw or recognized the Appellants during the***

said attack and this occasioned a miscarriage of justice.

3. That the learned trial magistrate erred in law and fact in accepting the P.W.I and P.W.2 evidence of recognition and whereas no names or nick names given in initial report – neither description thus doubtful.

4. That the learned trial magistrate erred in law and fact in convicting the Appellants on contradictory evidence by P.W.I and P.W.2 thus violating section 163(I) of Evidence Act CAP 80.

5. That the learned trial magistrate erred in law and fact in not appreciating that the evidence was frame up against the Appellants.

6. That the learned trial magistrate erred in law and fact in failing to consider that the parade conducted by P.W.3 was not safe, since the parade rules under CAP 436 Forces Standing Orders were flouted, and violated.

7. That the learned trial magistrate misdirected himself in law of natural justice in not exercising the same, and especially in a grievous case as the one facing the Appellants, and or failed to consider that the natural thing a person can do when he had committed a serious crime and this one where he is well known is to go underground.

8. That the learned trial magistrate erred in law and fact in failing to consider the Appellants defence and or failed to give the Appellants defence serious consideration.

9. That the learned trial magistrate erred in law and fact in failing to summon vital witnesses (members of public to clear doubt on the mode of arrest and the said identification/recognition thus violating section 150 of Civil Procedure code.

When the appeal came for hearing all the Appellants presented written submissions. They argued that there were material contradictions in the evidence of P.W.I and P.W.2 especially about what the attackers were armed with. They also challenge the manner of identification when no names or descriptions were given by the witnesses.

The Appellants were neighbors to P.W.I and P.W.2 and so there was no need for an identification parade.

They are also questioning the manner the identification parade was conducted.

M/s Macharia the learned State Counsel opposed the appeals saying the three Appellants were positively identified in different parades. They had ample time to see the attackers. They had torches and at one time P.W.I was forced to drive them to Kathangari where his shop is. The 2nd Appellant sat with him in the front seat while the 1st and 3rd Appellants sat behind with his wife. Whenever the door was opened there was light. The Appellants pushed them when the motor vehicle skidded and the witnesses saw them well. A panga and rungu were recovered from 3rd Appellant after his arrest.

Since this is a 1st appeal it is our duty to reconsider and reevaluate the evidence adduced in the Court below and arrive at our own decision.

We are guided by the cases of:-

1. OKENO VERSUS REPUBLIC [1972] EA 32

2. NJOROGE VERSUS REPUBLIC

We are also alive to the fact that we did not see nor hear the witnesses.

The prosecution case is that P.W.I and P.W.2 are husband and wife. P.W.I operates a shop at Kathangeri trading centre. On 26/07/2006 they were asleep in his house when they heard two bangs on their door and 3 men entered their bedroom carrying torches. They demanded for money. P.W.1's hands were tied at the back, socks stashed into his mouth and the mouth tied. The house was searched but no money was found. They took a Motorola phone C113 and a wrist watch. They still demanded for money. They used powerful torches to search the house. They would flash torches on each other enabling him to see them. P.W.I was taken to the boot of his car. P.W.2 and their house girl were also taken to the car so as to take them to their shop for money. They were forced to remove P.W.I from the boot in order for him to drive the car. He drove and parked the motor vehicle near the shop and was left with one man guarding the motor vehicle as P.W.2 went to the shop with 2 men to get the money. P.W.1 got a chance to escape and same to the house girl.

Reports were made. The attackers panicked and disappeared when they heard P.W.I drive off. The 2 Appellants were finally arrested and P.W.I and P.W.2 identified them at separate identification parades.

P.W.5 was one of the arresting officers while P.W.6 was the investigating officer. P.W.3 conducted the identification parade and stated that he conducted parades in respect of the 3 Appellants. P.W.I identified the 3rd Appellant while P.W.2 identified 1st, 2nd and 3rd Appellants. The 1st parade where the 1st Appellant appeared had only 7 members. The rest had 8 members.

The 1st Appellant gave an unsworn statement. He was arrested by the OCS Runyenjes because he had not paid him the monthly protection fee of Ksh. 1000/= for selling liquor. Upon his arrest the OCS demanded for Ksh. He denied the charges. The 2nd Appellant also gave an unsworn statement of defence denying the charges. He also claimed to have been paying the OCS Ksh. 1000/= weekly. He had failed to do so hence his arrest. He was seen by P.W.I and P.W.4 in the OCS's office when the OCS demanded for Ksh. 30,000/=. The charge sheet did not have his nickname "RIJI".

The 3rd Appellant also unsworn denied the charges. He said he cut a mango tree at his home when he was called by the sub area, who inquired about him having a permit. A month later he was arrested from his house. Upon search the officers took a panga and charcoal. He knew he had been arrested for cutting the tree.

He was called to the report office Runyenjes when he found the lady and man he had seen on 27/07/2006. They asked why he had not been released. On the date of the parade he again saw this lady he had seen. She identified him just in that office. The statements of P.W.I and P.W.2 were produced together with the OB No. 4 of 24/07/06.

The 1st issue to determine is whether an offence called Robbery with Violence was committed or not.

From the evidence of P.W.I and P.W.2 they were attacked by more than one person. And the attackers were armed with axes, knives and rungun. They took from them the items mentioned in the charge sheet. They took P.W.I through a lot of torture and even threatened to kill him. We do found that the commission of Robbery with Violence was committed.

The next issue for determination is whether the 3 Appellants or any one of them was involved in the said robbery.

We propose to combine all the grounds of appeal as they raise issues mainly on identification and identification parades and contradictions in the evidence.

The star witnesses in this matter are P.W.I, P.W.2 and P.W.3.

P.W.I and P.W.2 explained that they were able with the help of the light form powerful torches to identify the attackers. In particular P.W.I mentioned the names of Gitare and Ronji which are alias names. This he

said was 1st and 2nd Appellant. He did not attend any identification parade in respect of the two suspects. He was able to pick the 3rd accused. On the parade P.W.2 picked 1st, 2nd and 3rd Appellants on the identification parades. Besides the light from the torches the two witnesses indicated that when P.W.I was removed from the boot the motor vehicle lights were on as the doors were open. Secondly when the motor vehicle skidded the attackers came out to push the motor vehicle in reverse. The lights of the vehicle enabled them to see them well, as they pushed the motor vehicle. P.W.I said he sat with the 2nd Appellant in the front part of the vehicle. He had sufficient time to see all of them. Same goes for P.W.2.

The statements by P.W.I and P.W.2 were produced as exhibits herein. We have read them and the witnesses (P.W.1 & P.W.2) gave detailed accounts of their experiences that night. Even the names of Gitare and Ronji are given. P.W.I identified the said Gitare and Ronji.

In a case which depends on visual identification at night the Court must be careful in assessing the circumstances surrounding identification. P.W.I and P.W.2 have well explained how they were able to identify the Appellant.

We are satisfied that the witnesses were with the attackers for sufficient time to enable them identify them. The attackers took their sweet time with the victims. PWI knew the 1st and 2nd Appellants well and that why he did not go to the identification parade to identify them.

A few mistakes we have noted in the identification parades which we must deal with are as follows:-

1. Under the Police Standing Orders 56 (iv) (d) during an identification parade the suspect is placed among at least 8 members of the parade. In the case of Peterson Mugendi {1st Appellant} there were only 7 parade members. The least number is 8. This now is therefore below the required member and is unacceptable.

We therefore find the identification of the 1st Appellant by P.W.2 to have been vitiated by that. And that being the case the evidence left against 1st Appellant is that of P.W.I.

2. These 3 parades were done within a span of one hour. i.e. 2:15pm – 3:15pm.

We have noted that Patrick Gitonga, Erick Gitonga, Joseph Njeru, Kennedy Njagi Njiru, Robert Kariuki, Joseph Kariuki and Peter Njeru Mugo, participated in the 3 identification parades. This made it very easy for the witnesses to identify the new faces especially P.W.2 who appeared in all the 3 parades. It was a walk over for her especially in identifying Lawrence Muriithi and Ayub Njue i.e. 2nd and 3rd Appellants.

Can this evidence of the identification parades especially the ones where P.W.2 was picking on the appellants?

The investigating officer did not deem it prudent to call the house girl to P.W.1 and P.W.2. She is the one who reported this incident to Runyenjes Police Station.

We are therefore left with the evidence of P.W.I only. And that being the case we have to address our minds to the evidence of a single identifying witness. The law is clear that a fact may be proved by the evidence of a single witness. It is necessary to lest the evidence of a single witness respecting identification with the greatest care, especially when the conditions favoring a correct identification were difficult. Ref:-

- 1. ABDALLA BIN WENDO VERSUS REPUBLIC [1953] 20 EACA 166**
- 2. RORIA VERSUS REPUBLIC [1967] EA 583**
- 3. MAITANYI VERSUS REPUBLIC [1986] 2 KAR 75**

The Appellants have submitted that P.W.I and P.W.2 gave different descriptions of what each of them had. They say the particulars in the charge sheet did not tally with evidence adduced. The charge sheet indicates that weapons the attackers had as **iron bar, panga, axes and clubs**.

P.W.I said the man he sat with at the front had a knife same to the one at the back. Elsewhere at page 20 line 29 he states **“During all this time I saw the thugs had axes, rungas and knives”**

PW2 said during the robbery the 3rd Appellant had an axe while the 1st Appellant had a knife page 23 line 33.

We note that there is a bit of contradiction on what weapons the attackers had and what each one of them did.

We have also noted that when P.W.I and P.W.2 left the house with the attackers it does not clearly come out what each of the attackers was doing. By this time according to the evidence the 2 witnesses had identified the attackers.

At page 20 lines 15-18 PWI states this:-

“Those who left the motor vehicle were the wife and the 3 men. I was in the motor vehicle with the house maid. One man remained standing next to the motor vehicle while 2 men accompanied my wife to the shop. The man remaining next to the motor vehicle was standing next to the motor vehicle just besides the driver’s seat where I was.”

This paragraph by P.W.I gives the impression that P.W.I had not identified these attackers. And at page 23 lines 6-20 PW2 states:-

“I was asked to get out in the company of the man who was talking to me in my house to the shop. I went with the thug to the shop – I opened the shop and he entered in. After a minute I heard the motor vehicle moving away. The man who had accompanied me to the shop panicked and started running away.”

This reference to man/men does not give the impression that the suspects had been identified by P.W.1 and P.W.2.

An honest witness may still be mistaken and that’s why we are taking all precautions just to ensure that the identification by the P.W.I was free from error.

P.W.4 a watchman at the Kathageri shop of P.W.I stated that he was there at the shop. He saw P.W.2 walk into the shop with a man whom he never identified. In cross-examination by 1st and 2nd Appellants he said he knew them very well for a long time but he never saw them. He did not know the 3rd Appellant. P.W.I had stated that where he had parked the motor vehicle there were electricity lights on. So what prevented him from seeing them and recognizing them?

The Appellants gave evidence denying the charges against them. Their evidence was a denial and an explanation as to why they were framed up. In spite of their defence which had nothing to do with the date of offence herein the prosecution had the duty to prove their case beyond reasonable doubt. We find that the evidence of identification by P.W.I was not watertight. The Appellants will benefit from the doubt created in our minds.

The upshot is that the appeal is allowed. The conviction is quashed and the sentence of death set aside.

Appellants to be released unless otherwise lawfully held under a separate warrant.

DATED AT EMBU THIS 21ST DAY OF SEPTEMBER 2012

LESIIT J.

JUDGE

H.I. ONG'UDI

JUDGE