



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 101 of 2010

ROBERT KARIUKI WACHURI.....1ST APPELLANT

TIMOTHY GACHICHIO THIGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Narok criminal case No.718 of 2007 by W.N. Njage Senior Principal Magistrate dated 19th March, 2010).

JUDGMENT

The appellants, Robert Kariuki Wachuri (hereinafter called the first appellant), and Timothy Gachichio Thiga (hereinafter called the second appellant), were jointly charged with two counts of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. They also faced two counts of the offence of being in possession of a firearm without a firearm certificate contrary to **Section 4(1)** as read with **Section 4(3)** of the **Firearm Act Cap 114** laws of Kenya.

Upon being satisfied that the evidence presented before it proved the charges beyond reasonable doubt the trial court convicted the appellants of the offences in the main counts and sentenced them to suffer death in each of the two counts of robbery with violence and to serve ten years imprisonment in respect of each of the two counts of being in possession of firearms.

Aggrieved by the conviction and sentence, the Appellants have filed appeals to this court on grounds that can be summarized as follows:-

1. That the conviction was against the weight of the evidence;
2. That the sentence was unlawful;
3. That the trial court did not consider their defence; and
4. That the trial court violated their rights by failing to comply with the mandatory provisions of Section 200 of the Criminal Procedure Code before taking over the trial of the case from its predecessor.

The appellants contended that the trial magistrate erred in law by failing to seek the view of the appellants before proceeding with the case from where her predecessor had reached and by allowing the prosecution to recall one of its witnesses; that the exhibits (firearms) were improperly handled and that the prosecution evidence did not identify the second appellant as the person who threw money to the members of the public; that the appellants' defence was not adequately considered; and that the appellants

were not given the chance to cross-examine each other. They submitted that the identification was vitiated by the fact that the appellants were exposed to the witnesses before the parade was conducted and by the fact that the officer who conducted it was not called to testify.

Learned counsel for the respondent while conceding that the trial court did not comply with section 200 of the Criminal Procedure Code submitted that that failure did not prejudice the appellants. He further submitted that there was sufficient evidence to support the conviction. For instance he argued that the offence occurred in broad day light and in the full view of the victims who had sufficient time with the assailants and were able to identify them; that the police officers saw the appellants at close range and were able to describe what they were carrying and what they did; that the P.W5 AND P.W.6 chased and caught up with the first appellant immediately after the commission of the offence and that the first appellant led the police to the other suspects, the second appellant included. He conceded that the sentence was irregular as it prescribed two death sentences.

This being a first appeal, it is our duty to re-evaluate the evidence presented before the trial court in order to arrive at our own independent conclusion but bearing in mind that we did not hear or see the witnesses testify.

Six prosecution witnesses testified in the case in the lower court to the effect that P.W.1 (the complainant in count one) was in his business premises, on the material day, when at about 3.00pm he was accosted by some armed men who ordered him to lie down. He defied the order and instead walked to the back of the shop and took stones to attack them. When he returned to the shop he found that the robbers had gone but his workers were still lying down. During the encounter he saw two of the men very well. These were the one who ordered him to lie down and the one who was taking money from the safe. When he attended an identification parade conducted by the police after they arrested some suspects, he identified the first and the second appellants as the men who accosted him. P.W.2, Hassan Lemeria Ole Ngweta, an employee of P.W.1, a victim of the robbery also attended the identification parade and positively identified the first appellant as the person who pointed a gun at him and ordered him to lie down.

P.W.3, Kennedy Momanyi Mose, who is the complainant in count two of the offence of robbery with violence, had motor vehicle registration KAQ 166K Marino Toyota, a taxi, at 3.00pm when a customer hired him. The customer wanted to be taken to Narok Teacher's College to pick someone. On the way he saw three men whom the customer said were the people he wanted to pick at Narok. After he turned and pulled up to pick them one of them got into the car and sat at the back. The other one came where he was, faced him and raised his untucked shirt and asked him what he could see. He then drew a pistol that was stuck on his waist, pointed it on his head and ordered him to quickly jump to the back of the vehicle. He complied and joined their colleague who opened a bag and showed him a long gun before searching his shirt's pocket and taking his wallet that contained about Kshs. 1000/=, his driving licence, bank card and identification card. The men took a sweater at the back of the car and blindfolded him. They also covered him with a blanket before they drove off fast. They later abandoned the car after making several stops. The police noticed him at the back of the car and rescued him before they pursued the men. When the police called him to assist in identification of some suspects they had arrested, he positively identified the first appellant as the first who had hired him and the second appellant as the person he sat with at the back of the hijacked car and who showed him the long gun.

P.W.5, CIP Churchil Owili and his colleague CIP Josphat Murage were on patrol on the material day and time when they saw five men alight from motor vehicle registration KAQ 166K Toyota Corolla that had pulled up about six metres from where they were. One of the men was carrying a small box while the other was carrying a black bag. As they suspected the car to have been stolen, they inspected the car and found a man covered in a blanket. After rescuing the man they pursued the suspects and when they caught up with them they ordered them to stop but the men defied the order, drew a firearm and started firing at them. After engaging the robbers in a shoot out for about five minutes, the robbers managed to escape in motor vehicle KAW 871P, Toyota Corolla white in colour. The police officers pursued them to a place called Siyapei where they abandoned the get a way car after it got a puncture and ran into the bushes. After failing to get the robbers they walked to the main road where a good samaritan informed

them that a man had come from the bushes and boarded motor vehicle registration No. KAS 146G Nissan Matatu. They immediately pursued the matatu and caught up with it at a place called Mongare Trading Centre. Upon searching the matatu they arrested the first appellant who was seated at the front. They booked him and took him to Narok police Station. The following day, the officers contacted P.W.1 and P.W.2 both of whom positively identified the first appellant as one of the robbers. From the get a way car they recovered a car hire contract which showed that it had been hired for use in Narok, Nanyuki and Nairobi from 23rd June to 25th June 2007. The hirer was indicated as James Nganga while the driver was indicated as the first appellant. With the help of the first appellant, the police managed to arrest the other suspects, including the second appellant. One of the suspects, James Ngugi, alias Fredrick Gichane, led the police to recover a loaded AK 47 rifle with which he tried to shoot the officers, who instead gunned him down. In the course of his investigations P.W.6 searched the second appellant and recovered a bus ticket that showed that the second appellant had travelled from Narok to Nairobi on the material day. He also contacted the manager of the car hire company who gave him the photographs of both the hirer (James Ngugi) and the first appellant.

In his defence the first appellant denied having committed the offence. He stated that on the material day he had been sent by his boss, James Ngugi to deliver some curios to a customer at Sekenani in Maasai Mara; that after dropping the curios he drove towards Nairobi. He arrived at Narok at around 3 pm and went to a petrol station to refuel his car. While at the petrol station he was hijacked by two men armed with a gun who dropped him after driving for about 10 minutes and drove away. After reporting the incident to his employer, he boarded a matatu headed for Nairobi. On the way the matatu was stopped by police and after volunteering information about the theft of the car he was driving the police took everything that he had and took him to Narok police station insisting that he was involved in the robbery. The following day he was taken to the CID office where he saw four men some of whom later on identified him in an identification parade that the police conducted. He took the police to his employer, James Ngugi, who was arrested and later shot dead. He denied either having taken the police to the second appellant or having known him before.

The second appellant also denied involvement in the robbery. He stated that on the material day he was at Nairobi driving his brother's pick up; that on 26th June, 2007 at about 6.00 am while at his house at Githurai Nairobi his wife, Rebecca Wangari, who had gone out to buy milk, returned to the house accompanied by police officers who searched the house but did not find anything. The officers, nevertheless, arrested him, his wife, his brothers and some other neighbours and took them to Pangani Police Station before they transferred them to Narok police station where he was interrogated about a gun and robbery. He was placed in an identification parade and one of the men he had earlier seen at the CID office identified him as one of the robbers.

This was the evidence upon which the trial court found the two counts of robbery with violence and of possession of firearm proved beyond reasonable doubt and convicted the appellants.

It is common ground that the appellants in these appeals were not known to their accusers before. Their trial therefore turned on the question of identification. Two identification parades were conducted after police arrested people they suspected to have been involved in the offences. The eye witnesses also insisted that they had sufficient time and opportunity to identify their attackers. Whenever the case against a suspect depends wholly or substantially on the correctness of one or more identifications of the suspect, special need for caution before convicting in reliance on the correctness of the identification is necessary. See *Mwenda V. Republic* (1989) KLR 464. An identification parade is conducted to remove any doubt as to the identification of a suspect. In this case the parade officer was not called.

The Court of Appeal in ***Achieng V. Republic*** (1981) KLR 175 held that:-

“Where an identification parade was held, the officer who conducted it must be questioned about it. Where such officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as finding of goods in the possession of the appellant.”

(Emphasis ours)

The failure to call the parade officer, in our view rendered those identifications valueless. However, in the circumstances of this case, we are of the considered view that the witnesses were able to identify their attackers. For instance both P.W.2 and P.W.3 had considerable time with their attackers. Their description of the events and their attackers leaves no doubt that they were indeed able to identify their attackers. They described the incident as follows:-

“P.W.2:I saw the two men who confronted me very well. I noted their physical appearance. I can't see the one who had the short gun in court. The one who had the long gun is the first accused at the dock. The incident took about 20 minutes. I stared at first accused for about 5 minutes...I told police I could identify two of the assailants if I saw them again.”

For his part, P.W.3 testified as follows:

“I saw well the person who hired my vehicle. It was during the day. I saw him well..... I have described one person as stout and brown who was 5.9 feet. He was wearing a white T-shirt and a maroon jumber..... The person who I have described is the person who hired the vehicle at Qahira..... I did not pick the person at the parade. The person I described is however before court. He is the first at the dock..... The first parade had many suspects who were wearing caps. I was not aware I had the right to ask suspects to remove the caps or jacket.”

We are satisfied that the trial court directed itself properly in considering the witnesses' evidence of visual identification. It for instance, considered the circumstances in which the offence was committed and the time the witnesses had to identify their assailants. See Mwaura V. Republic (1987) KLR, where the Court of Appeal held:-

“ In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of the time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.

The two robberies occurred at about 3.00pm in broad day light. The victims had ample time with their assailants. The complainant in count one, for instance, defied the orders of the robbers and instead walked through the shop to pick stones to attack them. His salesman, P.W.2, saw them from the time they stormed the shop until they fled in a green car that was waiting outside. He was able to consistently describe the events of the day. Thus:-

“I remember on 24/6/2007 at about 3pm. I was at the shop working. I had about 3 customers. They ordered for goods of about 2440/=. The customer was a woman and she gave me 3000/= suddenly the woman was ordered to lie down on the ground. A man had entered to where I was and was pointing a gun on me in front, on my head. It was a long gun. Another man pointed a short gun at me at the side...He then kicked me to the ground and stepped on my head while on the ground..... The one who had a short gun went where the safe is located. He pulled out the moneys drawer and then came close to where I was. He removed some soaps from a carton and with the empty soap carton he returned to where the money was and put the money in the carton. I was peeping at him though pretending to have closed my eyes. After that the man called on the other and told him to leave.”

In respect of count two of the offence of robbery, the complainant, P.W.3, gave a detailed account of his treatment by the robbers. He sat with his customer (the first appellant) on the driver's seat before he was ordered to move to the back. He also had ample time with the person he sat with at the back (the second appellant). We are, therefore, not surprised that he was able to give to the police in his statement the description of the appellant.

As regards the other two counts of being in possession of firearms without a certificate, we find that the evidence did not meet the threshold set in the case of Smith V. Republic (1981) in which the Court of Appeal held:

“A trial court ought always to insist on the details of identification in case of accidental mistake. It would have helped if the complainant had produced at least the firearm's number and description, if not its certificate.”

Even though there was evidence that the appellants were armed with firearms, from the evidence it was not possible to identify the firearms they had to certify the particulars of the charge. The chain of possession of the firearms was blurred.

Regarding sentencing, the trial court went against the practice and directions given in numerous cases regarding death sentence where a person is charged with two or more capital offences and non-capital offence. For instance in **Boru & another V. Republic** where the Court of Appeal observed:-

“Where an accused person is charged with a capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and to leave the others in abeyance, including any sentence of imprisonment.”

For the foregoing reasons, we affirm the conviction in respect of the two counts of robbery with violence but quash the conviction on the two counts of being in possession of firearm. We also set aside the death sentence in respect of count 2 which will be held in abeyance and confirm the death sentence in respect of count one.

Dated, Signed and Delivered at Nakuru this 12th day of October, 2012.

W. OUKO

H. A. OMONDI

JUDGE

JUDGE