REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 162 & 163 of 2008

MICHAEL NTHAMBURI MUGAMBI…………..........…1ST APPELLANT

DAVID KIMATHI MUTUA ……………………......……….2ND APPELLANT

VERSUS

REPUBLIC ……………………………………………………RESPONDENT

J U D G M E N T

The appellants Michael Thamburi Mugambi hereinafter 1st appellant and David Kimathi Mutua, the 2nd appellant , were in the trial court 1st and 2nd accused. They were jointly charged with one count of robbery with violence contrary to Section (2) of the Penal Code. They were convicted of the offence and sentence to death. Being aggrieved by the conviction and sentence they filed their appeals which we have consolidated as they arise from the same trial.

The 1st appellant relied on 5 grounds of appeal being as follows:-

1. That the learned trial Magistrate erred in both law and facts in failing to note that the recognition and/or identification of the 1st appellant was not free from possibility of error.

2. That the learned trial Magistrate erred in law and facts in failing to observe that the prosecution failed to avail vital witnesses mentioned in the trial case for just decision to be reached.

3. That learned trial magistrate erred in both law and facts in failing to observe that the prosecution witnesses tendered contradictory and conflicting testimonies.

4. That the learned trial Magistrate erred in law and facts in not giving I the appellant sufficient time to avail defence witnesses.

5. That the learned trial Magistrate erred in law and facts in dismissing and disregarding the preferred sworn defence without giving any cogent reasons.

6. That the grounds herein has been drafted in absence of certified copy of the trial proceeding I pray to be served with the same to enhance me draft further form of supplementary grounds of appeal.

The 2nd appellant similarly relied on 5 grounds of appeal being as follows:-

1. That the learned trial Magistrate erred in law and fact in failing to note that the prosecution

failed to avail vital witnesses for a just decision to be reached.

2. That the learned trial Magistrate erred in law and facts in failing to find that the alleged identification and or recognition were not cogent.

3. That the learned trial Magistrate erred in law and fact in failing to observe that the prosecution witnesses gave contradictory and conflicting testimonies.

4. That the learned trial Magistrate erred in law in failing to observe that the trial suffered some procedural irregularities.

5. That the learned trial Magistrate erred in law and in fact in dismissing and disregarding the sworn testimonies of I the appellant and of DW1 without giving any cogent reasons for the same.

6. That the grounds of herein have been drafted in absence of certified copy of the trial proceedings. I pray to be served with the same to enable me draft further firm supplementary grounds of appeal.

The Chief facts of the prosecution case are that the complainant PW1 Geoffrey Kinoti Murithi was on 25th November, 2008 at his home in Gitie with PW2 Mary Kinoti, his wife and PW3 Ndereba Kinoti, his son when at 9.00 p.m they switched the television set off so as to pray. That as PW2 was intending to take her sick child to the hospital the following morning, she decided to clean the baby clothes for the use the following morning. That after washing the baby clothes she went outside to place them on the drying line. PW1 was by then washing his feet in a basin. That suddenly PW2 retreated back to the house screaming as she had noted two men outside one armed with a rifle and the other with a sharp panga. She had been able to see the two using moonlight. The two men pursued PW2 into the house. There was a tin lamp in the house. That PW1, PW2 and PW3 recognized the two men using the tin lamp light, which was placed on coffee table. PW1, PW2 and PW3 recognized the two men as Nthamburi, 1st appellant and Kimathi, the 2nd appellant. The 1st appellant had a riffle while 2nd appellant had a sharp panga. The 1st appellant ordered PW1 to give out the money he had. 2nd appellant picked Kshs.1700/- which was on the cupboard. They also took cell phones, a Nokia 2310 belonging to PW1 and Motorola C-113 belonging to PW2, a torch and Chloride Exide battery for solar. The appellants took about 15 minutes in the house. The appellants then left with PW2. The 2nd appellant retreated to the house and poured the water PW1 was using to wash his feet on PW1. That after the appellants had left with PW2, PW1 proceeded to his neighbour's home one Nyagah and requested to be assisted with his phone. He then called Mujwa police post and talked to PW4 to whom he reported the incident. PW1 also called the neighbours for help in pursuing the robbers and PW2.

The appellants claimed to PW2 they were new in the area and wanted her to assist them to get to Chaaria. PW2 pleaded with appellants to be released as she had a sick child but the appellants declined insisting that she had to accompany them to where they were going. They proceeded upto Gitie market. PW2 was then told she could leave. PW2 was then led by 1st appellant to where there was a booster whereby she was left free as 1st appellant went back.

PW2 headed home and met PW1 and other neighbours who were seeking for her. PW2 told PW1 and her neighbours she had not been hurt. PW1 asked her whether she had known the suspects and she said she knew Nthamburi and Kimathi. PW4 and his colleagues visited the scene of crime. He found the complainant and his family members who told him he was invaded by people who he recognized and knew their voices. He told them the robbers were David Kimathi and Michael Nthamburi. PW4 was shown appellants home but he did not find them at their homes. That PW4 arrested the appellants on 2nd December, 2008 from their houses but did not recover anything. The appellants were then charged with the offence of robbery with violence.

The appellants denied the charges. 1st appellant stated that he met pW4 and complainant on 28/11/2008 at Gitie shopping Centre who called him and told him there was someone who had claimed that 1st appellant

owed him money. He was asked to go to Mujwa police post for the person to be called. That family members of Kinoti also went to the police post. That after questioning family members the 1st appellant was released. 1st appellant was told to sell maize and take to them Kshs.24,000/. The 1st appellant did not sell the maize as he was told the officer was out to make money from him. That on 2/12/2008 the Officers went to 1st appellant's home in company of Kimathi. He was asked to give Kshs.8,000/- so as to be released. 1st appellant said he had no money, consequently he was arrested and locked together with Kimathi at Mujwa police post. The 1st appellant was then taken to Kariene police station and charged with the offence.

The 2nd appellant in his defence testified that between May-August, 2008 his quarry at Nthamene gathered water and he stopped quarrying. That PW4 asked 2nd appellant to accompany him to check on his stones. That 2nd appellant went there and met Geoffrey Kinoti, complainant, in this case, with two other workers. 2nd appellant was asked whether he could work for complainant. They agreed at Kshs.7/ per foot. 2nd appellant after working for complainant for a month, he got a quarry at Kiambogo about 7 kilometers away. Complainant asked 2nd appellant to allow him to work at the quarry jointly but the 2nd appellant declined as the quarry was not enough for 2 persons. On 27/1/2011 the 2nd appellant met the complainant at Gitie market area and who told him that he had learnt of the area when he had leased was big and he had refused to accommodate him and the complainant told him that he would know that complainant works for police force. The 2nd appellant told complainant that he had no fear as he owed him nothing. That on 2nd December, 2008 at 3.00 a.m. the 2nd appellant was arrested. Search was carried out and complainant took 2nd appellant's mountain bicycle. That complainant and PW4 led 2nd appellant to home of 1st appellant. PW4 awoke 1st appellant and asked for Kshs.8000/- which he did not have. That both appellants were taken to Mujwa police post. That parents for both appellants came to find out why appellants were arrested and both parents were chased away. The 2nd appellant and the 1st appellant were then taken to Kariene Police Station and charged with this offence. The 2nd appellant called DW2 who testified that he witnessed 2nd appellant arrest on 2/12/2008 at 3.00 a.m. by PW4 who was accompanied by PW1. PW1 told DW2 that they were after PW1's money as he had worked with Kimathi in a quarry.

During the hearing of the appeals the appellants opted to produce written submissions to support their appeal. The appellant's appeals have identical grounds of appeal. The appellants' grounds are that they were not sufficiently identified as the conditions were not conducive to positive identification. They also contended that the prosecution failed to avail vital witnesses and that the prosecution case was full of contradictions. That the trial court failed to avail appellants sufficient time to avail their witnesses. The appellants also faulted the trial court for dismissing and disregarding the preferred sworn defence without giving cogent reasons.

The State was represented by Mr. Musau, learned State Counsel. In his submission he averred that the appellant's appeals lacked merits. He urged that the circumstances at the time of commission of the offence were favourable for identification. That though the incident took place at night there was evidence of PW1, PW2 and PW3. That there was lantern lamp in the house and moonlight which enabled the witnesses to identify the appellants being people they knew. PW1 knew 1st appellant since childhood and had known 2nd appellant for a period of not less than 6 months as they had worked together in a quarry. That 2nd appellant was a frequent visitor of PW1's house. That the two appellants stayed under observation by the witnesses for a period of 15 minutes. On failure to call witnesses the State Counsel submitted that they were not at the scene and failure to call them did not prejudice the appellants in anyway. He urged in law there is no particular number of witnesses required to give evidence or a fact. He urged the prosecution evidence was not contradictory and if any he submitted they did not go to the root cause of this case. He further urged that appellants were given opportunity to defend themselves and call witnesses and closed their case without applying for adjournment.

We are first appellate court. That being the case we have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation bearing in mind we neither saw nor heard any of the witnesses and giving the allowance for the same. We are guided by the Court of Appeal in the case of

Okeno – V- Republic(1972) EA.32 which held:-

"An appellant on first appeal is entitled to expect the evidence as a **whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **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 the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The particulars of the charge with which the appellant were charged with were as follows:-

"On the 25th day of November, day of November, 2008 at Gacha village, Gitie Sub location, Kiija location in Meru Central District within Eastern Province jointly while armed with dangerous weapons namely rifle and pangas robbed GEOFREY KINOTI of cash 1,700/- two mobile phones make Nokia 2310 and Motorola C113, one chloride Exide battery, and a torch all valued at Kshs.14,750/- and at or immediately before or immediately after the time of such robbery threatened to shoot the said Geoffrey Kinoti."

The evidence against the appellants was that of the complainant, PW2 and PW3. PW1's evidence is that he saw the two appellants when they entered into his house following his wife, PW2. That 1st appellant had a panga. PW1 testified that he knew both appellants since childhood as they had grown up together. That there was a tin lamp in the house and he was able to see the appellants. That they pointed a gun at him and told his wife to shut up. 1st appellant asked him to give out money. That 2nd appellant took the money. That the appellants were in the house for 15 minutes. That the appellants left with PW2, PW1's wife, and PW1 went to Nyaga's home for assistant. PW2 testified that when she went out to put child baby shawl on drying line she saw two men and got and got scared and rushed back in the house. That they pursued her into the house. That they entered the house and picked 2 mobile phones on table, torch. That PW2 had seen the two men using moonlight. That inside their house their was tin lamp. That PW2 knew the assailants and named them as Nthamburi and Kimathi. The 2nd appellant had a gun which was a long gun. That 1st appellant picked the phones. That assailants had woolen hats which they lowered to the area slightly above the eyes. The 2nd appellant asked PW1 for money. Pw1 picked money and gave it to 1st appellant. PW2 testified she saw 1st appellant pour water on PW1 and put off the lamp.

PW3 testified that PW2 rushed back into the house from outside screaming and sat on a chair and covered herself with the baby shawl. That he looked at the entrance and saw two men. One had a long gun and the other a panga. That there was a tin lamp on the table and was able to see the man and he recognized them as Nthamburi and Kimathi. That 2nd appellant was working for them before in a quarry. That PW1 gave them Kshs.1700/- on being asked for money. Appellants were told to pick it at the cupboard. Appellants took battery-M.V Battery torch and phones. The appellants remained in the home for 15 minutes. They put off the tin lamp as they were out with PW2.

The conviction of the appellants was based on evidence of recognition by PW1, PW2 and PW3. It is important when assessing the evidence of identifying witnesses to examine the conditions of lighting at the time the identification or recognition is made in order to satisfy that the conditions prevailing at the time of identification or recognition is made in order to satisfy that the conditions prevailed at the time of identification or recognition the conditions, were conducive for positive identification of the culprits. What one has to look for in such evidence was set out by the Court of Appeal in several cases:-

Cleophas Otieno Wamunga – V- Republic(1989) KLR 424, the Court of Appeal stated as follows:-

'The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is

of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ in the well-known case of R. VS.Turnbull 1976(3) ALL E.R. 549 at pg.549 at page 552 where he said:-

"Recognition may be more reliable that identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.:"

Further in the case of **Paul Etale & Another – V- Republic C.A No.24 of 2000** Pg. 2 & 3 Court of Appeal held:-

"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

We have carefully examined the evidence of the complainant(PW1), PW2 and PW3 and the basis upon which they claimed they saw and recognized the appellants. Our first observation is that the complainant, PW2 and PW3 did not in their evidence mention the intensity of the tin lamp which enabled them to recognize their assailants. The witnesses did not state the size of the room and where they were in relation to the tin lamp.

The complainant testified that the assailants remained in the house for 15 minutes yet they did not describe how the assailants were dressed. They did not give description of their assailants. PW2 said there was moonlight yet no other witness mentioned of there being moonlight nor was its intensity stated. The position of the moonlight and its brightness was not disclosed. In his consideration of the prosecution evidence the learned magistrate observed:-

" The main issue for determination by the court is whether the accused were positively recognized by the witnesses during the alleged robbery. There is no dispute that the incident took place at night. The source of light available was a tin lamp. The three eye witnesses, who are PW1, PW2 and PW3, stated firmly that they knew the accused persons well before then. They were from the said village, Gacha and the 2nd accused had even worked with PW1 in the quarry for months, during which period he regularly visited PW1's house. The three witnesses even could recognize the accused voices."

We are not satisfied that the learned trial Magistrate carefully evaluated the complainant's evidence in regard to the conditions of light and what it is that enabled the complainant to make the recognition of their attackers. The mere facts that there was moonlight and that the complainant had tin lamp is not sufficient. It was important for the complainant, PW2 and PW3 to describe the intensity of the moonlight and tin lamp which they said enabled them to recognize the assailants. It is not enough for the complainant to say they saw so and so and heard or recognized their voices. PW1 as it turns out asked PW2 whether she had known the assailants as he did not want to disclose them to her first. PW2 said she had known the assailants as Nthamburi and Kimathi. She gave only one name of each of the assailants.

We do not see any logical explanation why PW1 would ask PW2, his dear wife, if she had known the

assailants if he knew them. We are not convinced that PW1 had recognized the assailants before he talked to his wife. If PW1 had known the assailants he would have been eager and excited to give their names to his wife and one Mr. Nyaga who assisted him with a phone and even he would have informed the neighbours who came to his aid immediately. PW2 as it turns out gave only one single name of each of the attackers. We believe in Meru area where the appellants come from there are many Nthamburi's and Kimathi's. It can safely be said the name given could be of any Nthamburi or Kimathi in Meru and need not be the appellants herein.

We have also noted that PW1, PW2 and PW3 testified that the assailants had put on woolen hats covering their faces upto the near eyes. No description was given as to how the complainant, PW2 and PW3 could recognize the assailants as the appellants in such circumstances.

The complainant, PW2 and PW3 testified that they even recognized the voices of the assailants yet there was no attempt by the prosecution to have the appellants subjected to voice identification and confirm that the voices the complainant, PW2 and PW3 heard were those of the appellants nor did the complainant, PW2 and PW3 state toe the Police the words which appellants uttered and which made them know the assailants voices were of the appellant. The complainant, PW2 and PW3 did not give peculiar manner in which the appellant's spoke and which would certainly enable complainant and his witnesses associate the voices they claim to have heard with the appellants.

We find that the evidence of complainant, PW2 and PW3 was shaky, devoid of details and did not bring out the circumstances of identification that would enable the court to find that appellants were correctly identified or recognized. The conditions we find were not conducive for positive identification or recognition of the appellants.

The prosecution witnesses tendered contradictory evidence before the trial court. PW1 was contradicted in material facts by PW2 and Pw3. PW1 in his evidence testified that 1st appellant asked for money from him and that 2nd appellant searched for money which was in the table room and that his house had 3 rooms whereas PW2 testified 2nd appellant is the one who asked for money from PW1 and PW1 picked the money and gave it to 1st appellant. PW2 testified their house has 4 rooms as opposed to 3 mentioned by PW1. PW2 testified that 2nd appellant struck them with a panga whereas no other witness mentioned the same. PW2 testified she saw 1st appellant pour water on PW1 and put off the lamp whereas PW1 testified that the 2nd appellant retreated to the house to the name and poured water on him. He did not mention the lamp being put off. Pw3 testified the assailants asked for money from PW1 and were told to pick it from the cupboard and that when appellants were going out they put off the tinlamp. PW3 did not mention of any water being poured on PW1. PW3 testified that the assailants did not beat them.

We find the evidence of the prosecution witnesses to be riddled with contradictions. The prosecution witnesses if they were at the scene of the crime at the same time they should not have given contradicting statements as to what had happened.

They should not have contradicted one another on the role played at the time of robbery by each of the appellant who they claimed to have known before.

Our conclusion is that there was not sufficient light to enable the prosecution witnesses see what was happening as they were shaken and shocked to have been able to follow the events. We do therefore find the prosecution evidence to be contradictory, inconsistent and doubtful.

We are not satisfied that the learned trial Magistrate carefully evaluated the complainant's evidence and that of the prosecution witnesses. We find the evidence of the prosecution witnesses was shaky and contradictory.

The learned trial Magistrate in dismissing the appellant's defence stated as follows:-

"The prosecution case can't be a charade as the accused alleged in their defence."

It is trite law that in criminal cases the accused are presumed innocent and the burden of proof do not shift at any one time for the accused to prove their innocence. The trial court in criminal cases is required to evaluate and analyze the accused persons defence and give cogent reasons for disregarding or dismissing the defence. It is not enough for court to only state the defence cases are a sham. The court is required to give reasons for rejecting the evidence. We find in this case the trial court was in error in failing to evaluate and analyze the defence cases. It was wrong to say the defence was sham and leave it at that point. The appellants in their defence raised issues to the effect that they were being framed by PW1 and PW4 who were their business competitors and former employers. The appellant raised the issue of conspiracy between PW1 who was a manager to PW4, Investigating officer's quarry business and PW4. There was an allegation of grudge due to business rivalry and an attempt to extort money from 1st appellant. The trial court in its judgment did not consider the possibility of grudge. In our considered view, that grudge cannot be ruled out against the appellants.

The appellants ground that vital witnesses were not availed we find that all witnesses who were at the scene of the crime were called and failure to call those who did not witness the incident did not prejudice the appellants in anyway. We find the failure to call other witnesses did not attract adverse inference. The appellants did not state which vital witnesses were not often called or not called.

We also find that the appellants were given sufficient opportunity to defend themselves. The appellants gave evidence and called the available witnesses and at no time did they seek to produce any witness and were denied.

Having come to the conclusion we have of this case, we find that the prosecution failed to prove the charge of robbery with violence against the appellants to the required standard of proof beyond any reasonable doubt. In the circumstances we find that these appeals have merit and should be allowed.

Accordingly we allow the appellants appeals, quash the conviction and set aside the sentence. We order that the appellants should be set at liberty forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT MERU THIS 8TH DAY OF NOVEMBER, 2012.

MUGA APONDI
JUDGE

J. MAKAU
JUDGE

Delivered in open court in presence of:

1. appellants in person – present

2. Mr…………………………….for State

MUGA APONDI
JUDGE

J. MAKAU
JUDGE

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