



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

[CORAM: KOOME AND AZANGALALA, JJ]

CRIMINAL APPEAL NOS. 25 OF 2009 AND 26 OF 2009

(CONSOLIDATED)

BETWEEN

**MOSES MOSETI AND
STEPHEN**

NYONGESA.....APPELLANTS

AND

**REPUBLIC.....RESPOND
ENT**

*[Being an Appeal from the Judgment of the Principal Magistrate
{P.N. Gichohi} dated 16/04/2009 – in Kitale CMC.CRC. No. 2952 of 2005]*

JUDGMENT

Moseti alias **Patrick Ambetsa** (hereinafter “**the 1st appellant**”), **Stephen Nyongesa Makokha** alias **Steve** (hereinafter “**the 2nd appellant**”) and **James Njoroge Maina** (hereinafter “**the co-accused**”), were jointly charged with **Robbery with Violence Contrary to Section 296 (2) of the Penal Code (Cap. 63, Laws of Kenya)**. The allegation was that the appellants and their co-accused, jointly with others not before the Court and while armed with dangerous weapons namely an AK 47 rifle, serial number 15095513 and a browning pistol, on 5th June, 2005, in Kitale town in Trans Nzoia District within the Rift Valley Province, robbed **Bhikhu Ramji Shah** of cash in the sum of Kshs 1,423,235/=, two Nokia mobile

phones No. 7250 and No. 8210 all bearing a value of Kshs 1,443,235/= and immediately before or immediately after the time of such robbery threatened to use personal violence to the said **Bhikhu Ramji shah** (hereinafter “**the Complainant**”).

The prosecution called nine (9) witnesses and after hearing their evidence, the learned Principal Magistrate (**P.N. Gichohi**) found that the appellants had each a case to answer and put them on their defence. Their co-accused was however acquitted under section 210 of the Criminal Procedure Code. The 1st appellant gave a sworn statement but was not cross-examined. Before the cross-examination and before the 2nd appellant testified, in his defence, the two informed the court that they would continue with their case before the Magistrate who was to replace the trial magistrate. They therefore declined to take part in further proceedings before the trial magistrate. The learned Principal Magistrate had no choice but to conclude the trial without their further participation.

Upon analyzing the evidence of the prosecution witnesses and that of the 1st appellant, the learned Principal Magistrate found the appellants guilty as charged. They were accordingly convicted and each sentenced to death. Being dissatisfied with their convictions and sentences, each has appealed to this court against both conviction and sentence.

During the hearing of their appeals, which were consolidated, the appellants appeared in person and **Ms. Bartoo**, learned State Counsel, appeared for the Republic. The appellants wholly relied upon pre-written submissions to which **Ms. Bartoo** responded orally. After considering those submissions and their grounds of appeal, the following issues were raised:-

Identification, violation of their rights- to a fair hearing, and failure to consider their defences.

Ms. Bartoo supported the appellants’ conviction and sentences contending, in the main, that the appellants were convicted on sound evidence which included the testimonies of two police officers who were eye witnesses and a security officer, employed by the complainant who was also an eye witness to the robbery.

As a first appellate court, it is our duty to re-examine and re-evaluate the evidence upon which the appellants were convicted and reach our own independent conclusion, bearing in mind that we neither saw nor heard the witnesses testify and should give allowance for that. (**See Okeno –vrs Republic [1972] EA 32.**)

The prosecution’s case was briefly as follows: The complainant, **Bhikhu Ramji Shah** (P.W.1) was closing his shop at about 1.20 p.m. on 5th June 2005 when he heard noise and the cocking of guns. The invaders ordered everybody to lie down. The complainant complied after pressing the shop’s security alarm button. Shortly thereafter, he felt something like a gun pressed in his back and a demand for money. He gave them what he had. He also opened his safe for the thugs when they demanded more. Securicor personnel and police officers arrived at the scene after 10 minutes only to find the thugs gone. He could not identify any of the thugs but found that his Kshs 1.6 million had been stolen.

Andrew Jimmy Bhama (P.W.2) was the complainant’s manager and was at the material time closing the shop when a vehicle reversed towards the shop. A person ran from the vehicle to the shop and produced a pistol at the same time ordering him into the shop. The thug hit him at the knees and ordered him to lie down. A second thug went to where the complainant was. He too did not identify any of the thugs.

Hannah Nyailio Gachanga (P.W.3), a junior clerk of the complainant, confirmed that the cash sales upto Sunday, which was the date of the robbery, totaled Kshs. 1.6 million. She was however not on duty at the time of the robbery.

Polycarp Wekesa Wafula (P.W.4) was at the material time on guard duties at the complainant's shop. He was hit on the chest by one of the thugs. When he enquired why, the thug pointed a gun at him and ordered him to leave. He walked backwards for a distance and was then ordered not to move further. While in that position, he saw two thugs leave the shop with paper bags. They entered a motor vehicle which had reversed to the shop and drove off. In an identification parade held in August, he allegedly identified the 2nd appellant as the thug who had pointed a gun at him.

P.C. Moses Nyota (P.W.5) and **P.C. Joseph Mwaura** (P.W.6) claimed to have witnessed the robbery; their evidence in brief was that they were from the Municipal Market on the material date at about midday when they learnt that a robbery was in progress at the Complainant's shop. When the shop was identified to them, they saw a person standing outside it. He wore a maroon jacket, had long hair and beards. P.W.5 had a gun while P.W.6 was not armed. They took cover behind Lorries parked near the shop and waited. They then saw a reversing motor vehicle which stopped at the complainant's shop. According to P.W.5, the vehicle had two occupants in the driver's cabin. He allegedly identified the one in the co-driver's seat. He was dark and had no hair. After ten (10) minutes, a person left the complainant's shop carrying some baggage followed by the one who was at the door and they both entered the waiting vehicle which drove off away from them.

P.W.6 however testified that the said vehicle had initially only one occupant who was dark and slim and was at the driver's seat. He then saw a person he identified as the 2nd appellant emerge from the complaint's shop. The person was carrying a green paper bag and was followed by another. At the door of the shop, P.W.6 saw the person who was keeping guard whip out an AK 47 rifle. The trio then entered the waiting vehicle and drove off.

P.W.5 and P.W.6 allegedly identified the person who was guarding the complainant's shop as the 1st appellant. P.W.5 allegedly identified the second occupant of the motor vehicle as the 2nd appellant. The two police officers then ran to the police station and found that the robbery had been reported and then gave chase in a Toyota Land Cruiser but failed to trace the thugs and the vehicle they had used.

On 20th June, 2005, P.W.5 and P.W.6 allegedly identified the appellants at Kitale Police Station where they had been brought by their colleagues in the Flying Squad- Eldoret who included CPL **Ismael Ombati** (P.W.8).

P.W.8 told the trial court that on the said 20th June 2005, in the morning hours, while on patrol within Eldoret town, in the company of other police officers, he received information of suspected robbers in vehicle registration No. KAE 567 Q. They spotted the vehicle outside Salama Hotel in Eldoret and found three occupants therein. One suspect came out of the vehicle with a pistol and a magazine for an AK 47 rifle. There was an exchange of gun fire and the person escaped. The other occupants of the vehicle surrendered. A search of the vehicle produced an A.K. 47 rifle without its magazine, a browning pistol and one round of ammunition. The two suspects were taken to Eldoret Police Station where information was relayed that the said vehicle had been stolen in Kitale. The two suspects and the said items were handed over to Kitale CID officers. P.W.8 identified the suspects as the appellants.

P.C. Tazan Ndindi (P.W.9) assisted in the investigation of the robbery of the complainant. He recorded statements from witnesses and charged the appellants and their co-accused as already stated. He also produced the said exhibits at the trial.

In his sworn statement, the 1st appellant denied committing the robbery. He put forward an alibi defence alleging that on the material date, he was at his car-washing business at Sosian River in Eldoret with his colleagues and worked for the whole day. He was however arrested at Salama Hotel at 4.00 a.m. on 19th June, 2005 where he had gone for a cup of coffee after hours of watching football on T.V. He was then, on 20th June, 2005, taken to Kitale Police Station and later charged with many offences which included Kitale Criminal Case Number 2942 of 2005.

The appellant applied to rely on the said case and the learned Principal Magistrate ordered that the said file be looked for for certification of a document the 1st appellant wished to produce (DMF 1). Thereafter, the appellants declined to participate in the proceedings with the result that the 1st appellant was never cross-examined and the 2nd appellant made no statement in his defence.

On the above facts, the learned Principal Magistrate found that the offence of robbery with violence had been proved against both appellants as required in law and convicted them as already stated. In convicting the appellants, the learned Principal Magistrate found that P.W.4, had identified the 2nd appellant positively. In her own words:-

“ However, P.W.4 who was standing and keeping guard at the door of the said shop identified the 2nd accused and accused 2 hit him on the chest and he demanded to know from accused 2 why he had done it. The 2nd accused pointed a pistol at him and ordered him to move away. P.W. 4 moved backwards facing the 2nd accused.

He was able to mark his appearance. He told the court that he identified the 2nd accused during the parade. Even though the identification parade form was not produced in court, I am satisfied that the said witness P.W.4 identified the 2nd accused during the said robbery. The circumstances were conducive for proper identification”.

The learned Principal Magistrate further found that P.W.5 and P.W.6 also identified the appellants. In her own words:-

“They [P.W.5 and P.W.6] identified the 1st accused and the 2nd accused during the robbery -----

There was no reason or need for identification parade in respect of the said witnesses [P.W.5 and P.W.6] because they again saw accused 1 and 2 outside at the police station Kitale after they were brought by officers from flying squad Eldoret on 20/6/2005. The 1st accused wore exhibit 2 which he had worn during the robbery. I am satisfied that the two accused persons have not been mistaken for any other person ...”

We have re-analyzed, re-examined and re-evaluated the same testimony and appreciate that the robbery was indeed staged in the early afternoon – i.e in broad day-light and ordinarily identification would present no difficulties at all. However, a closer scrutiny of the evidence of P.W.4, P.W.5 and P.W.6, who were the eye witnesses, exposes serious conflict in their testimonies. P.W.4 purportedly identified the 2nd appellant. According to P.W.4, he (2nd appellant) was the thug who pointed a gun at him and ordered him to back off during the robbery. According to P.W.4, the thug had a pistol. He also allegedly identified the 2nd appellant at an identification parade. However, the identification parade form was never produced and the parade officer never testified. P.W.4’s identification of the 2nd appellant therefore remained dock identification which is generally worthless (see **Fredrick Ajode) –vrs- Republic [Cr. Appeal No. 87 of 2004] (UR).**

P.W.5 on his part allegedly identified the 2nd appellant as the thug who was at the time of the robbery in the co-driver’s seat in the vehicle which reversed to the complainant’s shop. He did not allege that the thug ever left the vehicle during the robbery. It is apparent that P.W.5 and P.W.4 did not therefore agree on the role the 2nd appellant played during the robbery. The 2nd appellant could not be in the vehicle and at the same time guard the subject shop.

P.W. 6 on his part allegedly identified the 2nd appellant as the thug who emerged from the complainant’s

shop carrying a green paper bag during the robbery. His testimony did not therefore agree with that of P.W.5 on what the 2nd appellant did during the robbery.

The conflict in the evidence of P.W.4, P.W.5 and P.W.6 on the identification of the 2nd appellant was not considered by the learned trial Magistrate. If she had subjected that evidence to the scrutiny we have subjected it, we have no doubt that she would have entertained doubt with regard to the identification of the 2nd appellant.

The 1st appellant was purportedly identified by P.W.5 and P.W.6 at the time of the robbery and at Kitale Police Station when he was taken to that station by Eldoret Flying Squad Police Officers. P.W.5 allegedly identified the 1st appellant as the thug who was guarding the complainant's shop. According to P.W.5, the thug was short and wore a maroon jacket. He also had long hair and beards. It is significant that P.W.5's testimony did not agree with that of P.W.4 regarding the thug who was guarding the complainant's shop. As already observed, according to P.W.4, the thug with the gun and who ordered him to back off was the 2nd appellant. According to him the thug had a small pistol.

P.W.6 on the other hand identified the 1st appellant as the thug who was guarding the complainant's shop. He saw him whip out an AK 47 rifle as the thugs made their escape. P.W.4, who was in close proximity with the thug, did not agree. He saw the thug guarding the shop carrying a small pistol. Whereas the testimonies of P.W.5 and P.W.6 was in consonance with each other with regard to the identification of the 1st appellant, there's remained dock identification. We do not think that much should turn on the finding of the 1st appellant with a maroon jacket. We say so because, as P.W.6 admitted in cross-examination, there was nothing special about the jacket. It was also significant that the robbery took about three minutes [see the cross-examination of (P.W.6)]. In three minutes, P.W.4 was ordered to back off as the thug at the shop verandah pointed a gun at him. Within the same three minutes, P.W.5 and P.W.6 moved from where they had first positioned themselves to take cover behind some Lorries at the scene. We doubt that during the entire three minutes, they trained their eyes on the thugs. It is apparent that the actual time taken to observe the robbers was less than the three minutes which in our view was not adequate to make a positive identification.

In the light of the above shortcomings, we are unable to agree with the learnt trial magistrate's findings on the identification of the appellants. In our view, the identification of the appellants as some of the robbers who robbed the complainant was not positive. This finding is enough to dispose of this appeal. However, the appellants also complained about denial of their rights to a fair hearing as they were not accorded an opportunity to defend themselves. We think that complaint has no merit. The record shows that the appellants themselves despite being accorded an opportunity to fully defend themselves declined to do so and the learned trial magistrate had no alternative but conclude the trial without them. There was therefore no failure of justice occasioned by the decision of the learned trial magistrate in so concluding the trial.

There is however one matter which we think the learned trial magistrate failed to observe. Before the appellants decided not to participate in the proceedings, the 1st appellant had applied to rely upon a document in Criminal file No. 2942 of 2005. The learned trial magistrate indeed made the following order:-

“ File NO. Cr. 2942/2005 to be looked for, for certification of DMF 1. Hearing on 26/09/2008.”

The 1st appellant also applied for witness summons to be served upon a Doctor. The learned trial magistrate duly ordered that summons be issued to a Clinical Officer **Peter Simiyu** to testify during further defence hearing. The record does not show that any of the two requests was complied with. In our view, the non-participation of the appellants in the subsequent proceedings did not absolve the learned trial Magistrate from ensuring that the 1st appellant's applications which she had allowed were pursued

before the trial was concluded. The document in Criminal case No. 2942/2005 should have been availed and considered. The record shows that the appellants had many cases facing them. We do not know whether the said document could have had a bearing on the fair trial of the appellants. If we had found that the appellants had been positively identified, we do not think their conviction would have been allowed to stand in view of the learned trial magistrate's failure to take into account the document she had herself allowed to be produced at the trial.

In the result, we find that the appellants were not properly convicted. Accordingly, we allow the appeal of each appellant, quash the conviction in respect of each of them and set aside the respective sentences. Each appellant shall be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT KITALE THIS 13TH DAY OF MAY 2011.

M. KOOME

JUDGE

F. AZANGALALA

JUDGE

Read in the presence of:-

M. KOOME

JUDGE