



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 188 OF 2005

JULIUS MUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Nakuru C.M.CR.C.NO.2754/04

by Hon. T. M. Wekulo, Senior Resident Magistrate)

JUDGMENT

The appellant, Julius Mumba, was charged with five counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge facing the appellant (similar on all counts only differing as regards the identities of the victims and the nature and value of their stolen properties) were that on the 11th day of November, 2004, at Jirani Farm in Njoro within Nakuru District of the Rift Valley Province, the appellant, jointly with others not before court and while armed with dangerous weapons, namely pistols and pangas, robbed Peter Kinuthia, Elizabeth Kinuthia, Peter Bukhala, Susy Bukhala and Wycliffe Andulu of their various properties and cash and threatened to use actual violence on the said persons in the course of robberies committed against them. The charge sheet states that the first complainant, Peter Kinuthia Mbugua (P.W.1) was robbed of a motor vehicle registration No.KAJ 905G make Nissan Datsun Pick Up, a mobile phone make Nokia 2300, a wrist watch, Kshs.4700/= in cash all valued at Kshs.1,020,200/=. The second complainant Elizabeth Kinuthia (P.W.2) was robbed of a mobile phone make Motorola T190, 20 Safaricom Scratch cards Kshs.3000/= in cash all valued at Kshs.15,500/=. The third complainant Wycliffe Andulu (who, as appears elsewhere in this judgment, did not testify) was robbed of Kshs.82/=. Unfortunately the record does not contain any particulars as regards the robbery committed against Peter Bukhala (P.W.3) and Susy Bukhala (P.W.5) which robberies were presumably recorded under count 3 and 4. The respective parts of the charge sheet were missing from the record of appeal submitted before us.

Having denied the charge on all counts, the appellant was tried before the Hon. T. M. Wekulo, Senior Resident Magistrate, Nakuru and was convicted on all counts. He was sentenced to suffer death.

Being dissatisfied with the conviction and sentence the appellant filed this appeal citing 7 grounds of appeal as follows:

1. That he was not positively identified as having been among the persons alleged to have robbed

the complainants.

- 2. That the parade at which he was identified as a suspect was irregular and the manner in which it was conducted prejudicial.**
- 3. That nothing was recovered from him to warrant a finding that he was properly implicated in the commission of the offence.**
- 4. That the prosecution's case was not proved beyond doubt.**
- 5. That his defence, which he considers to have carried more weight than the prosecution's evidence, was not properly considered.**

The appellant filed written submissions and made no oral representation at the hearing of the appeal. The State made no submissions at all, the learned State Counsel Mr. Njogu having come to court unprepared.

In his written submissions, the appellant stated that the circumstances under which he is said to have been identified by the various prosecution witnesses were difficult and not conducive for positive identification. He faulted the identification parade at which he was identified as having irregularly conducted in contravention of the relevant Rules under the Police Act (Chapter 46 of the Laws of Kenya).

The appellant submitted further that Prosecution witnesses 1, 2 and 3 contradicted themselves as to his identity and that none of them gave any description of their attackers when they first reported the robbery to the police. He states that the arresting officer was not called to testify in order to explain the reasons for the appellant's arrest and to establish the basis of suspicion as set out in the celebrated decision of **ABDALLAH BIN WENDO VS. REPUBLIC [1953] EACA 66 and RORIA VS. REPUBLIC [1967 E.A. 583** where the court held that the evidence of an informer ought to be properly tested for it to be relied upon as a basis of arrest, arraignment and eventual conviction of an accused person.

The appellant has submitted further that according to P.W.4 P.C. Hilary Kimutai, the investigating officer, the appellant was charged following investigations into a case where some suspects had been arrested, in the course of selling a phone, a day after the robbery incidents herein. The appellant is of the conviction that the failure to call the arresting officer and the witness to the alleged sale (referred to in P.W.4's testimony) punctured a hole in the prosecution's case.

He also pointed out discrepancies in the testimonies of P.W.4, P.W.1 and P.W.6 as regards the identification parade whereby P.W.1 testified that the appellant was the only person with a missing tooth, whereas P.W.4 said there were three people with missing teeth and P.W.6 testified that there were five people with missing teeth but that only three of the persons paraded resembled the appellant *with the missing tooth being "one of the marks."*

The appellant cited the authority of **RAMKRISHAN DENKRA PANDYA VS. REPUBLIC [1957] E.A.C.A. 102** in support of his submission that contradictory evidence must never be relied upon when convicting an accused person.. He asks us to find that the offence was not proved beyond doubt and that, whereas he had set up a sound defence of alibi, the same was disregarded without any reasons being given for so doing.

We have, as is required of us, being the first appellate court, evaluated and analyzed the entire record of the trial court and have arrived at our own independent conclusions. In the process, we have also carefully considered the judgment of the learned trial magistrate in light of the evidence adduced by the various prosecution witnesses as well as the defence evidence.

It is clear from the judgment of the trial court that the appellant was convicted on all counts on the basis of the evidence of P.W.1, Peter Kinuthjia Mbugua and his wife, Elizabeth Wanjiru Kinuthia, P.W.2. This was notwithstanding the fact that complainants in the 2nd and 3rd counts, Peter Buhala

(P.W.3) and Susy Buhala (P.W.5) testified (under cross-examination by the appellant) that they did not see him among the persons who attacked and robbed them in their own house in the presence of P.W.1 and P.W.2 who were their neighbours.

In their testimony, P.W.1 and P.W.2 gave similar accounts of the robbery incident. They testified that, on the night of 11.11.2004 at about 7.30p.m. they were confronted by armed men as they closed their family business which was managed by P.W.2.

As the two prepared to enter their motor vehicle, registration No.KAJ 905G (a Nissan Pickup), one of the thugs held a gun to P.W.1's neck and ordered him to open the car door. Other thugs stood next to P.W.2 on the passenger side. P.W.1 was ordered to open the passenger door, which he did. Two thugs entered the driver's cabin with P.W.2 sandwiched between them. P.W.1 was forced to the back of the pick up where he sat with the pistol wielding thug and another. One of the two thugs in the front took over the driving and drove the vehicle towards P.W.1 and P.W.2's home in Elburgon where they claimed P.W.1 had some Kshs.300,000/= which they wanted surrendered to them. Along the way, the group caught up with another vehicle as its occupants waited for the gate to their home to be opened. The thugs got hold of the driver of that other vehicle and ordered him to ask his wife to open the gate. Once the gate was opened the thugs forced their victims into the homestead and into the house which they ransacked, over a period, before locking all their victims inside one room and leaving.

In his testimony, P.W.1 stated that he identified the appellant as one of the assailants because of a gap he had in his teeth. He testified that he had seen him clearly as the person who ordered him to open the car door for P.W.2, aided by the electric light which shone at the shop where P.W.1 and his wife were accosted. Similarly, P.W.2 testified that she saw the appellant clearly when she and her husband were accosted outside their shop and that the appellant sat beside her as the vehicle was driven towards Elburgon. She claimed that the appellant and another thug entered P.W.3's house after P.W.2 and P.W.1 had been forced inside and ordered to join several other people whom they found lying down.

Although in his testimony P.W.1 stated that he and his wife were forced into P.W.3's house by the thugs, he did not specify who among the thugs did what, after stating, (at one point) that, after the thugs accosted P.W.3 at his gate, P.W.1 was left with one person while (his) wife (P.W.2) was left with another. Throughout his account of the events which took place at P.W.3's house, P.W.1 referred to the assailants as **"they"** and did not say whether the four who carjacked him and P.W.2 outside their shop entered P.W.3's house. P.W.2 stated that she saw the appellant and one other robber inside P.W.3's house. At no time did P.W.1 testify that the appellant entered P.W.3's house. Neither did he say how many thugs entered the house. His evidence of identification is limited to the time when thugs appeared outside his shop. He said of the parade that:

"suspects were in an enclosed place.....I was able to identify the accused (appellant). I called him, greeted him, I saw the gap in his mouth. I had seen it earlier."

When cross-examined by the appellant, P.W.1 testified as follows:

".....I saw your face and recognized you.....only one with a gap in the mouth.....without one tooth. Your complexion was also unique. Your appearance was different from others in addition to other things..... I had your image on my mind.....I recorded my statement and said the person did not have one tooth."

P.W.2 talked of two robbers entering P.W.3's house and demanding money. Under cross-examination by the appellant, she testified that she did not know why the appellant was arrested and that she did not lead to his arrest, having told the police that she had been attacked by people she did not know.

P.W.3 testified that he saw two robbers enter his house and that he could identify the one who got him out of his car at his gate, if he saw him but that no such person was in court and P.W.3 did not know the appellant at all. His wife, who testified as P.W.5, told the trial court that she too saw two men with P.W.3 when he called her to open the door to their house and that these two entered the house, demanded money

and ordered everyone to lie down before proceeding to search the bedroom, steal her mobile and other items and thereafter before leaving in the family's motor vehicle registration No. KAM 437J. The witness testified that it was the same two persons who brought in P.W.1 and P.W.2 inside the house, and ordered them to join those who were lying down. She testified, however, that none of the two was before court. When cross-examined by the appellant, P.W.5 testified that she did not know him and had not seen him among the robbers.

According to P.W.4 and P.W.6, Inspector James Karanja (the parade officer), the appellant was identified by P.W.1, P.W.2 and one Wycliffe Andoni (Andulu?) (who, as appearing in the learned trial magistrate's Ruling of 3rd November, 2005 appears to be the complainant in count 5 but who did not testify, leading the court to acquit the appellant of the charge on that count). P.W.6 testified that P.W.5 attended the identification parade but did not identify the appellant. It appears, from the evidence, that her husband, P.W.3, did not attend the identification parade. The 7th and final prosecution witness, Inspector Sambu Wafula, only produced photographs of P.W.1's and P.W.3's motor vehicles. Under cross-examination by the appellant, he told the trial court that he did not know who was involved in the robbery.

Despite the glaring discrepancies in the identification evidence, wherein only P.W.2 testified as having seen the appellant at P.W.3 and 5's house and in the absence of any independent evidence to corroborate her testimony as required under law, the learned trial magistrate was quick to find as follows:

“It is very clear that P.W.1 and P.W.2 saw him (the appellant) very well outside the shop where there was sufficient light. This was further strengthened by the evidence of P.W.2 with whom accused sat in the front of the motor vehicle - and held a conversation while in the house of P.W.3 – P.W.2 was able to see the accused very well in the light of the house – thus saw the gap in his teeth – P.W.1 and P.W.2 were able to identify the accused having seen him in sufficient light severally”

It is not clear from P.W.2's testimony that it was the appellant that she conversed with at P.W.3's house. Her testimony only was that:

“Accused and (an)other entered the house. One came and asked for my handbag he began to check inside. Accused was near a table. There was electricity light. He began to pour the things he had taken out of my handbag. I got up – opened the handbag because the other accused was saying there was no money there. He took the 3000/-. He gave me back my bag.....They stayed for about 30 minutes. Then took us one by one and locked us up in a bedroom..... We heard them leave.....”

Considering our observations that P.W.1 only testified to having seen the appellant outside his shop and at no other time before the parade, the learned trial magistrate's finding that P.W.1 had seen the appellant severally ***“in sufficient light”*** was not supported by the evidence adduced before him. The learned trial magistrate failed to note that, although P.W.1 testified that he had reported to the police that one of the attackers had a missing tooth, none of the police officers who testified adduced such evidence. P.W.2 testified that soon after the carjacking she closed her eyes ***“to talk to God”*** and only looked up when the car had passed the way to her house. At P.W.3's house she was ordered to lie down together with others, including P.W.1 and P.W.3 and P.W.5 whose testimony was to the effect that they had not seen the appellant at the scene. In our view P.W.2's evidence alone stands out as that of a single identification witness and which, in the absence of any corroboration renders the conviction quite unsafe.

In his unsworn statement of defence, the appellant testified that he was arrested in a police swoop on 12th November, 2004 while at work. He had secured a maize loader's job on the day of the robbery and had been at Molo until 8.00p.m. on the said date. (The robbery was between 7.30p.m. and 8.00p.m.). On 13th November, 2004 he was paraded for identification where one person asked the ***“suspects”*** to open their mouths and one touched his shoulders. Three people identified him but the appellant contends that the reason for their doing so was that he was the only person at the parade with a missing tooth. He objected to the parade.

The learned trial magistrate took note of the appellant's objection to the parade in the following words:

“Accused raised issue with the police that it was his gap – the teeth that set him apart from the others at the identification parade”

Without making any finding on the issue of the appellant’s objection, and ignoring his defence of alibi, the learned trial magistrate proceeded, however, to find the appellant guilty and to convict him purely on the basis of the prosecution’s evidence as it stood. Despite the learned trial magistrate having acquitted the appellant on count 5, no reference is made to that acquittal in the final judgment which (as worded) suggests that the appellant was convicted on all counts. We do not consider this to be proper.

As earlier stated in this judgment, the appellant has asked us to consider the flaws in the identification parade which he considers to have been conducted in violation of the relevant parade rules and in a manner prejudicial to him. In this regard, we find Rules (d) and (h) relevant.

Under Rule (d) of the Parade Rules, the police are required to parade at least 8 persons as far as possible of similar age, height, general appearance and class of life as the suspect/accused. We note that the parade form exhibited at the trial stated that 8 suspects were paraded. However the prosecution witnesses contradicted themselves as to whether there were eight or more persons paraded. Furthermore they gave conflicting testimonies as regards the appearance of those persons. Under cross-examination by the appellant P.W.1 testified that:

“..parade had 9 persons. You were the only one who had a gap in the mouth – without one tooth. The tooth was one of the marks. Your complexion was also unique.....Your appearance was different from other.....”

P.W. 3 and 5 on the other hand testified that there were three people at the parade with missing teeth, while P.W.6 said there were six.

Rule (h) of the Parade Rules provides that if a witness (at a parade) desires to see accused/suspect walk, hear him speak, see him with his hat on or off this should be done but in this event the whole parade should be asked to do likewise. From the evidence of P.W.1 it appears that only the appellant was made to speak. P.W.1 testified that:

“.....when I went in I was able to identify the accused. I called him, I greeted him, I saw the gap in his month. I had seen it earlier.”

Clearly from the above, the parade rules were flouted to the extent shown above. We accept the appellant’s contention that he was indeed prejudiced in the manner in which the parade was arranged and conducted. For that reason we are persuaded to find that the appellant was not accorded a fair trial as required under the Constitution, the Criminal Procedure Code and Rules of Natural Justice.

In view of the above and having found that the evidence as to identification was inconsistent, contradictory and quite inadequate, we are of the considered opinion that the appellant’s conviction was unsafe and cannot be sustained. We allow the appeal, quash the conviction and set aside the death sentence. We order and direct that the appellant be set free forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at NAKURU this 21st day of May, 2009.

M. KOOME

M. G. MUGO

JUDGE

JUDGE