



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 132'A' & 132'B' OF 2005

[From Original Conviction and Sentence in Criminal Case No.58 of 2000 of the Chief Magistrate's Court at Nakuru – S. MUKETI - S.R.M]

SIMON GITHU MBUGUA 1st APPELLANT

MUHORO THUITA 2nd APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The appellants, **Simon Githu Mbugua** and **Muhoro Thuita**, the 1st and 2nd appellants respectively were charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** before the Chief Magistrate Court in Nakuru.

The particulars of the offence as stated in the charge sheet were that on the 4th day of January, 2000 at Tipis Trading Centre of Mau Narok within Nakuru District of Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pistols and homemade gun, robbed of a driver **Mr. Paul Okoth Ochieng** of a motor vehicle registration number KZH 077 Isuzu lorry cash Kshs.300,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Paul Okoth Ochieng**.

The appellants pleaded not guilty to the charge and after a full trial, they were found guilty and sentenced

to the mandatory death sentence as by the law provided. The appellants being dissatisfied with the conviction and sentence, appealed to this court and in their petition of appeal, they have raised several grounds of appeal. The grounds of appeal by both appellants are similar. During the hearing of the appeal, both appeals were consolidated as they arise from the same conviction. We will endeavour to summarize the grounds of appeal as the issues raised in the ten grounds contained in the petition seem repetitive and contain matters of evidence.

The appellants challenged the decision of the trial court on account that the evidence of identification was unsatisfactory as the circumstances described by the prosecution's witness show that it was difficult for the witnesses to identify the attackers. The appellants also questioned the admission of the evidence of the identification parade which was conducted irregularly.

Further, the appellants contended that there was no evidence against them to sustain a conviction as they were merely framed up. Moreover, there was no evidence by an investigating officer, and the lorry which was allegedly robbed from the complainants was not produced as an exhibit.

In addition, the appellants faulted the trial court for placing heavy reliance on the evidence by the prosecution witnesses and for ignoring the defence evidence. Finally, there were contradictions in the prosecution's case and the conflicting evidence raised certain doubts which ought to have been resolved in favour of the appellants.

This appeal was opposed by the State, the learned Senior State Counsel **Mr. Koech** supported both the conviction and sentence and urged this court to uphold the decision of the trial court. He submitted that the appellants were positively identified by **Paul Ochieng Okoth (PW 1)** and **Joseph Maina (PW 4)** both of whom were the victims of robbery. Furthermore the appellants were arrested a short while after the robbery as they were accosted by the police while driving the lorry they had robbed from the complainants. The appellants were chased by the police who arrested them immediately. We shall revert to these submissions made by the State, later in this judgment first we wish to set out briefly the case which was before the trial court that led to the conviction and sentence of the appellants.

On the 4th day of January 2006, **Paul Ochieng Okoth** (hereinafter referred to as **PW 1** and **Joseph Maina (PW 4)** being driver and salesman respectively set out to distribute beer in Mau Narok while driving vehicle registration number KZH 077. After distributing beer, they set out on their journey for Nakuru and at a place known as Mwisho wa Lami, they saw a white Toyota Saloon car which was ahead of them. This car was being driven in a zigzag manner. The lorry was also moving slowly, that it when two people appeared and ordered **PW 1** to stop the lorry. **PW 1** did not stop and one of the persons jumped onto the driver's side and ordered him to stop. This attacker was armed with a gun. Both **PW 1** and **PW 4** were ordered to lie down and to remove all the money. The attackers were three and another one was armed with a sword, **PW 1** told the court that they were beaten and his assistant surrendered the money to the attackers. Both **PW 1** and **PW 4** were ordered to get out of the lorry and they ran towards the wheat plantation where they sought help from a farm manager of the farm.

Meanwhile, the police from Mau Narok police station were alerted of a saloon car which was spotted at Mwisho wa Lami and its number plates had been changed from KAD 574V to KAD 674V. Being suspicious, **P.C Samuel Muigai (PW 2)** and **P.C Daniel Siele (PW 3)** decided to go after that vehicle and on the way, they met with the vehicle KAE 674V being driven towards Mwisho wa Lami. Behind this vehicle there was a lorry, immediately the occupants of the saloon car spotted **PW 2** and **PW 3**, they started firing gunshots at them, they exchanged fire, meanwhile, the occupants of the saloon car and the lorry started running away on foot. The lorry was left in motion and on reverse. **PW 2** and **PW 3** chased then occupants of the lorry and they saw the 1st appellant drop a homemade gun and the 2nd appellant a sword. They arrested them and escorted them to the Mau Narok police station.

At the same time, **PW 1** and **PW 4** who were seeking help from the wheat farm heard the gun shots and when they came to the scene, they found the lorry had overturned. They reported the matter at Mau Narok Police station. **PW 1** told the court that he was able to identify the 1st appellant as the one who was holding the gun and the 2nd appellant as the one who was holding a sword. The third gangster was

shot dead.

Put on their defence, both appellants gave unsworn statements and denied any involvement with the robbery. The 1st appellant in his defence said that he was in the business of dealing with timber and on the material day he was looking for transport to go to Mwisho wa Lami. He could not find transport and he decided to walk. That is when he saw four people running towards him, he heard gun shots and he was immediately arrested by the police and charged with the offence of robbery with violence.

The 2nd appellant similarly said he was going about his business when he was arrested.

In analysing the evidence before the trial court, the learned trial magistrate identified the issues for determination and made the following finding:

“The issue that need to be determined is whether the accused were identified, the circumstances of the arrest, if any doubt was cast on the prosecution, whether the prosecution had proved their case beyond reasonable doubt.

The witnesses alleged that they had identified the suspects - the circumstances they describe however, that they had guns pointed at them, and they were ordered to lie down, these are tough conditions under which to positively identify a person.

However the accused were arrested right at the scene after a shoot out with the police. They were found with weapons. The accused’s defence that they were just walking and were innocent passerby cannot be true given that they were arrested after a shoot out.

*All the ingredients of this offence were proved, there was violence, money was robbed and the assailants were several. It is on the basis of the foregoing that court finds the accused guilty as charged that is of **robbery with violence** contrary to **Section 296 (2) of the Penal Code.**”*

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial court and arrive at its own independent determination on whether to uphold the conviction of the appellants.

In so doing, this court should bear in mind that it neither saw nor heard the witnesses as they testified and give due regard to that (See case of **Njoroge Vs Republic [1987] K.L.R 19**).

We have re-evaluated the evidence that was adduced before the trial court. The issue for determination is whether the prosecution proved its case to the required standard of proof beyond reasonable doubt. The prosecution mainly relied on the evidence of the two complainants who were victims of robbery and the two police officers who arrested the appellants after an exchange of gun shots.

It is also noteworthy that the trial court sufficiently warned itself of the dangers of relying on the evidence of identification by **PW 1** and **PW 4** by appreciating the circumstances of such identification were difficult. Thus the trial court relied on other evidence such as the arrest of the appellants after a chase at the scene of shooting and the recovery of the weapons from the appellants.

We have also taken into careful consideration the submissions by **Mr. Koech** who urged the court to consider that the arrest was effected immediately after a shoot out. He submitted that even if no identification parade was conducted, the identification by the complainants was safe as it was done immediately after the arrest when the complainants went to report the matter at Mau Narok Police station. They found the appellants being interrogated by the police.

As regards the evidence of identification of the appellants by the four prosecution witnesses, although this robbery took place in broad day light and the arrest was effected immediately after the robbery, the

appellants were not only convicted on the evidence of identification. The trial court relied on other evidence to arrive at its conclusion. We agree with the trial court and also the submissions by the appellants that whenever a case of accused person depends wholly or substantively on the correct identification of one or more of the accused person which the defence alleges to be mistaken, the trial court should take caution before convicting in reliance on the correctness of the identification (See the case of **Ngoya Vs Republic [1985] KLR 309**).

The issue of identification should be re-evaluated further for reasons that the appellants contends that the dock identification was not satisfactory. It is clear from the evidence of the witnesses especially **PW 1** and **PW 4** that they had come into contact with the appellants and in our opinion an identification parade would not have been necessary. During cross-examination, **PW 1** said that he saw the accused persons for the second time at Mau Narok police station when they were being interrogated and he saw the same people during an identification parade. (However the evidence of the identification parade was not adduced).

Similarly, **PW 4** said in his evidence under cross-examination that he saw the appellants when they were arrested.

As it was held in the case of **Ajode Vs Republic [2004] KLR 81**

“Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.”

The Court of Appeal further quoted the decision of **Githinji Vs Republic [1970] E.A. 231** a High Court decision comprising of ***Mwendwa CJ*** (as he then was) and ***Simpson J*** (as he then was)

“Once a witness knows who the suspect is, an identification parade is valueless.”

For the foregoing reasons, we are satisfied that the learned trial magistrate properly cautioned herself regarding the evidence on identification. Due to the circumstances of this case where the complainants came into contact with the appellants on the same day at the police station, it was not necessary to conduct an identification parade.

We find that the trial court properly established that the appellants were arrested immediately after the robbery, there were exchanges of gun shots with the police, who pursued the appellants and arrested them with the robbery weapons. We have also considered the defence offered by the appellants and we are in agreement with the trial court that the defence did not shake the otherwise strong prosecution’s case.

As regards the argument that there was inconsistency in the prosecution’s evidence, we find no material variance and the minor discrepancy did not affect the weight of the prosecution’s case.

We are satisfied that the prosecution proved its case against the appellants beyond reasonable doubt and the appellants were properly convicted. We uphold the conviction and sentence imposed on the appellants.

Judgment read and delivered this 14th February 2007.

M. KOOME

JUDGE

L. KIMARU

JUDGE