



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 229 of 2006

(From Original Conviction and Sentence in Criminal Case No. 620 of 2004 of the Chief Magistrate's Court at Nairobi – W.A Juma SPM)

JACKSON NGUI KISAA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

JACKSON NGUI KISAA, the appellant, was jointly charged with one JACKSON MWANGANGI KITI before the subordinate court with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of count 1 were that on 24th October 2003 at Kajiado Township in Kajiado District within Rift Valley Province jointly with others not before the court while armed with dangerous weapons namely AK 47 rifle they robbed DAVID LOKERU NKINYI of Kshs.154,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said DAVID LOKERU NKINYI. The particulars of count 2, on the other hand, were that on the same 24th October 2003 at Kajiado Township in Kajiado district within Rift Valley Province jointly with others not before court while armed with dangerous weapon namely AK 47 rifle they robbed PETER SETEI NTUNDURA of Kshs.129,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence, to the said PETER SETEI NTUNDURA.

After a full trial, the co-accused was acquitted. However, the learned trial magistrate found the appellant, who was the 1st accused in the subordinate court, guilty on both counts, convicted him and sentenced him to suffer death as provided for by law. The appellant, being dissatisfied with the decision of the learned trial magistrate, has appealed to this court. In addition to his petition of appeal, the appellant tendered written submissions and also addressed the court at the hearing of his appeal.

In his submissions in court, the appellant submitted that the arresting officer testified that he recovered nothing from him. Though the arresting officer testified that he arrested the appellant who was actually on fire, having been burnt with a tyre by members of the public, a shirt was produced in court as an exhibit. It was the appellant's contention that, if the shirt that was produced was indeed the shirt which he was wearing when arrested, it would have had been burnt, or at least partly burnt. He also challenged the identification parade, which he contended was conducted after he came out of hospital and was still wearing hospital clothes and a sheet. The identification parade, he contended, was therefore not proper or satisfactory. In addition, the appellant submitted that PW1 and PW2 did not give any description of the robbers in the first report to the police and in their first statements. He contended that the two witnesses stated that they could only identify the driver of the vehicle. Therefore, his identification as one of the

robbers was not positive and without the possibility of error. The appellant also contended that one SIMON MBUGUA was not called by the prosecution to testify with regard to an alleged previous similar case against the appellant. He contended that he called, at the trial, the prison officer from Kamiti prison who produced documents showing that he had no previous case. The appellant also argued that, there was no proof that witnesses saw the alleged gun. PW1 merely stated that he saw something like a pistol, while PW2 stated that he did not see any weapon. In his view, the two witnesses neither saw a weapon nor did they identify the robbers.

Lastly, the appellant submitted that the language used in court by PW5 in his testimony was not indicated contrary to the legal requirements under section 198 of the Criminal Procedure Code. In his view, he was implicated in the crime because he had a disagreement with the DCIO Kajiado and Mr. Mbugua who did not testify.

Learned State Counsel, Ms Gateru, opposed the appeal and supported both the conviction and sentence. It was counsel's contention that the prosecution had proved its case to the standards required in criminal cases. Counsel contended that all the ingredients of the offence of robbery with violence had been proved. The respective complainants in both counts had testified that the people who robbed them were more than one, and that one of the robbers was armed with a gun.

On the identification, it was counsel's contention that the appellant was positively identified as one of the robbers. That identification was done by PW1 and PW2, both of whom saw the appellant clearly as the offence occurred in broad daylight at about 10.00 a.m. Though the appellant was not known to PW1 and PW2 before, an identification parade was conducted and both witnesses identified the appellant. It was counsel's contention that the identification parade was conducted properly in accordance with the law.

With regard to contradictions, counsel contended that any apparent contradictions were minor and did not go to the root of the case. Though PW2 did not make any mention of the robbery weapon, that was not fatal to the conviction.

On the defence of the appellant, counsel contended that the appellant's defence was considered by the learned trial magistrate and found to have no merits. Counsel asked us to dismiss the appeal.

In a short response, the appellant submitted that he was the only person in the identification parade who had burns and cuts. He contended that PW1, PW2 and PW7 said that they did not see anybody with any injury in the parade. On the issue of the weapon, he submitted that both PW1 and PW2 were shocked during the time of the alleged offence, and could not see or identify any of the attackers.

In brief the facts are as follows. PW1 DAVID LOKERU NKINYI and PW2 PETER SETEI NTUNDURA are both teachers in Kajiado. They applied for bank loans at Kenya Commercial Bank Kajiado branch. On 24.10.2003, in the morning, they went to the bank branch to enquire on their loans. An employee at the bank AGNES W. GICHOHI (PW3) assisted them and informed them that their loans were ready and credited to their accounts. The loan of PW1 was Kshs.200,000/=. The loan for PW2 was Kshs.130,000/=. PW1 withdrew Kshs.150,000/= and had Kshs.14,000/= from the sale of a cow. He gave Kshs.10,000/= as a loan to PW3. PW2 withdrew from the bank Kshs.129,000/=. PW1 and PW2 then proceeded to a hotel nearby and took some tea. They then left to go to board a train about one kilometer away.

On the way, a car with 4 occupants overtook them and stopped. A man seated in the front passenger seat called PW1 by name and informed him that they were anti fraud police officers and ordered PW1 to get into the vehicle and go to the DC's office. PW1 asked PW2 to get into the car also. They both got into the car. Immediately thereafter, the car was ignited. Though initially the car was driven towards Namanga DC's office, it did not branch to the DC's office, and it was driven on. One of the robbers engaged PW1 and PW2 in a talk, while another used abusive and threatening language on PW2. The vehicle was driven into the forest and stopped near a place called Kumba. One of the occupants of the car, who was not charged in the subordinate court, pointed a pistol at the neck of PW1 and removed all

the money he had and gave it to another person, whom PW1 says was the appellant. Another man removed the money of PW2 and threw it to the appellant. PW2 was taken a distance away with a pistol pointed at him and told to lie down face downwards. PW1 who was handcuffed was taken further on in the vehicle and also ordered out of the vehicle with a pistol pointed at him and told to close his eyes. The vehicle left.

Each of the two victims (PW1 and PW2) managed to get to Kajiado police station separately and reported the incident. The money which was robbed from PW1 was the subject of count 1, while the money which was robbed from PW2 was the subject of count 2. The appellant was arrested on 26.2.2004 at Kitengela outside Pinto Bar by PW4 a police officer PETER NANGURO, where some members of the public were trying to burn the appellant with a tyre because he was alleged to have robbed one MWANGI by pretending that he was a policeman. An identification parade was later conducted by PW6 CIP RICHARD KINUTHIA on 4.3.2004 at Isinya police station. The appellant was said to have been identified by both PW1 and PW2 by touching. The appellant remarked that he was not satisfied with the parade. He was later charged with the two offences.

In his defence, the appellant gave sworn testimony. It was his defence that he was a retired army corporal, and at the time of arrest, he worked for Park Trucks Security Services. On 24.10.03 he was on duty and also took his sick father to Kijabe Mission Hospital. On 26.2.2004 he reported for work at 11.30 a.m. and proceeded to Kitengela, arriving there at about 12.00 noon to meet Peter Mwangi who had sold him a piece of land. When Peter Mwangi arrived at the place where the land was located, he incited his workers telling them that the appellant was a thief. They beat him up and burnt him with a tyre, but a woman who owned the next plot called the police who came and took him to Isinya police station. He was later taken to a parade. He was also taken to hospital and a photograph of him was taken and published on Taifa Leo newspaper on 11.3.2004. He stated that he had a land dispute with PETER MWANGI, but was framed with a robbery charge. He contended that, if it was true that he had committed the robbery PETER MWANGI should have been called to testify. He also did not know where the prosecution got the shirt which they produced in court as an exhibit.

This being a first appeal, we are duty bound to re-evaluate the evidence on record afresh and come to our own conclusions and inferences taking into account that we neither saw nor heard the witnesses testify to determine their demeanour, and give allowance for that – see OKENO – vs – REPUBLIC [1972] EA 32.

The conviction of the appellant was predicted on the evidence of identification. Indeed, the identification of the appellant was visual identification by two witnesses PW1 and PW2, the complainants in count 1 and count 2 respectively. The incident occurred during broad daylight at about 10.30 a.m. The two complainants, did not know the four occupants of the car in which they were persuaded to board and were later robbed in a forest. The two complainants that is PW1 and PW2, later in an identification parade, identified the appellant by touching. The learned trial magistrate stated thus in the judgment regarding the identification of the appellant –

“The case has nothing to do with the Athi River case, there is no reason why the two complainants would have been engaged to have first accused (the appellant herein) punished (*sic*) the alleged robbery happened at day time they were together for sometime and they had an opportunity to recognize the accused. The parade followed and the two witnesses pointed him out, I am satisfied that the complainants did not have an opportunity to see the accused person prior to appearing on parade. I believe the evidence of the police officers who handled the case. The accused did not challenge the witnesses that he appeared on parade in a hospital bed sheet or clothes, I believe that the first accused was sufficiently connected to the offence. I do not believe the defence put by the first accused about his other case or has other problem (*sic*) with the other complainant”.

Indeed, the incident occurred during broad daylight. Both PW1 and Pw2 reported the robbery to the Kajiado police station just a few minutes after the incident. There is no evidence however, that they gave any description of the robbers or a description of the clothes that the robbers wore. The appellant was not arrested because of any description given by any of the complainants, but because he was alleged to have

committed a different robbery at Kitengela and was in the process of being burnt alive with a tyre. This was the evidence of PW4, the arresting officer. PW1 and PW2 gave a description of the appellant at the trial but not before the appellant was arrested, and also not before the identification parade was conducted. There is also evidence on record that the appellant informed the identification parade officer that he was not satisfied with the conduct of the parade.

In our view, in every case where there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.

As we have observed above, no description of the appellant appears to have been given by any of the complainants to the police, when they reported the robbery. The appellant's arrest was because of a totally different allegation, which only happened to be similar to the offences herein. The robbery occurred on the 24/10/2003 while the arrest of the appellant was on 26/2/2004, more than 4 months afterwards. The fact that no description was given of the robbers by the complainants before arrest of the appellant, in the circumstances of this case, diminished the evidence value of the visual identification of the appellant.

The appellant was identified by touching by PW1 and PW2 at an identification parade conducted on 4/3/2004. Both PW1 and PW2 appear to have identified the appellant because of a blue shirt which he wore at the time of the parade. We observe no one else in the parade wore a blue shirt. The rules pertaining to identification parades dictate *"that the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself, or herself"* - MWANGO s/o MANAA – vs – R (1936) 3 EACA 29. Clearly, if the identifying description was based on a blue shirt, the other members of the parade should have similarly been wearing blue shirts. This was not done, thus greatly diminishing the evidential value of the parade. Significantly, the fact that the PW1 and PW2 had to identify the appellant because he wore a blue shirt shows that they could not remember his physical appearance. In addition, there is evidence from the identification parade officer, that the investigating officer was present during the parade. The presence of the investigating officer during the parade can easily be construed as creating the possibility of interference by the investigating officer with the conduct of the parade to the prejudice of the appellant. We find that conduct of the identification parade was not proper. That also diminishes the evidential value of the identification of the appellant.

In addition, we observe that the learned trial magistrate did not warn herself of the danger of convicting the appellant on the evidence of visual identification, before convicting him. In PAUL ETOLE & ANOTHER – vs – REPUBLIC Criminal Appeal No. 24 of 2000 (unreported) the Court of Appeal stated –

"The appeal of second appellant raises problems relating to evidence of visual identification. Such evidence can bring about a miscarriage of justice. But such miscarriage 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 identifications 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".

In our view, had the learned trial magistrate warned herself of the need for caution before convicting on the basis of the evidence of visual identification, and considered the circumstances under which each of the two identifying witnesses identified the appellant, she would not have arrived at the conclusion that the identification of the appellant was positive and free from any possibility of error. In our view, the evidence of identification of the appellant herein was not without the possibility of error. It is not safe to base a conviction on the evidence of identification on record. We will allow the appeal on that ground.

The appellant has claimed that a key witness, a MR. MBUGUA, who complained against him resulting in his arrest, was not called. Indeed, MR. MBUGUA was not called to testify. However, there is no denial by the prosecution that the appellant was arrested at Kitengela because of a different

complaint. In our view, the failure of the prosecution to call that witness did not weaken the prosecution case. There is no allegation that MBUGUA knew anything about the robberies, the subject of this case. We cannot draw an adverse inference on the prosecution case because of their failure to call that witness. That ground of appeal is dismissed.

The appellant also claims that his defence of alibi was not considered. We find no basis for that contention. The learned trial magistrate did consider the appellant's defence and disbelieved the same. We therefore dismiss that ground appeal.

Lastly, the learned trial magistrate sentenced the appellant to suffer death on both counts. That was an error since a death sentence cannot be executed twice. The learned magistrate should have suspended the sentence on count 2.

Consequently, and for the above reasons, we allow the appeal, quash the convictions and set aside the sentences imposed by the learned trial magistrate. We order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated and Delivered at Nairobi this 20th September 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

In the presence of –

Appellant in person

Ms Gateru for the State

Tabitha/Eric – Court Clerks