REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeall 154 &155 of 2005

(From original conviction and sentence in Criminal Case No. 2023 of 2003 of the Chief Magistrate's Court at Nakuru – S. MUKETI (MRS), PM)

JAMES TUMAI EPUR…….1ST APPELLANT

JOHN LOCHUM LOPARIO……..……..……2ND APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

JUDGMENT OF THE COURT

The appellants were charged with several counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and other minor offences. They were however convicted in three of counts; the same being counts 2, 4 and 8 as stated in the charge sheet. In count 2, it was alleged that on the night of 4th July 2004 at Bahati area in Nakuru District of the Rift Valley Province, the appellants jointly and while armed with dangerous weapons namely an AK47 assault rifle and a panga, robbed Japheth Mwenda of cash Kshs.800/- and at or immediately before or immediately after the time of such robbery threatened to shoot and cut Japheth Mwenda. In count 4, the particulars were that on the 4th day of July 2001 at Bahati area in Nakuru District of the Rift Valley Province the appellants jointly, and armed with dangerous weapons namely an AK47 rifle and a panga robbed Tabitha Wanjiru Ngige of cash Kshs.7,000/- and at or immediately before or immediately after the said robbery used or threatened to use actual violence to the said Tabitha Wanjiru Ngige. In count 8 the particulars were that on the aforesaid date and the same place, the appellants jointly and while armed with dangerous weapons namely an AK47 rifle and a panga robbed Moses Njoroge of unknown amount of money and at or immediately before or immediately after the time of such robbery shot dead the said Moses Njoroge.

After a full trial the appellants were found guilty and convicted in the aforesaid counts and sentenced to death. They were aggrieved by the said conviction and sentence and each preferred an appeal to this court against both the conviction and sentence. The grounds of appeal by the two appellants were more or less the same and at the beginning of the hearing of the appeals the two appeals were, with consent of the appellants, consolidated and heard together as one. The grounds of appeal can be summarised as follows:-

1. That the learned trial magistrate erred in law and in fact in convicting the appellants on identification evidence without considering that the circumstances were unfavourable for positive identification.

2. That the learned trial magistrate erred in law and fact by failing to comply with **Section 200** of the **Criminal Procedure Code** when she took over the hearing of the trial from the previous magistrate.

3. That the learned trial magistrate erred in law and in fact in failing to take into consideration the defences that were advanced by the appellants.

The facts of the case briefly stated were as follows:-

On 4th July 2001, at Bahati area in Nakuru, from about 6.50 p.m. to about 1.00 a.m. there was a spate of robberies which were said to have been undertaken by two people who were armed with an AK47 rifle and a panga. PW1, Japheth Mwenda Ikiugu, testified that on the aforesaid date at about 6.50 p.m. he arrived at his home at Mile Tisa within Bahati area. He went to a pit latrine within his home compound. While he was inside the latrine, he heard some footsteps behind the pit latrine. His dogs began to bark. As he was coming out of the latrine, the door was forcefully opened. He saw two men. One of them was armed with a gun and was wearing an overcoat. The other was armed with a sword. The gun was pressed against his stomach. The two men demanded money from PW1. PW1 said that it was not very dark and so he could see his assailants fairly well. PW1 gave them Kshs.500/-. PW1 told the court that the man who was armed with the gun was taller than the one who was armed with a panga. He made dock identification of the two appellants. The robbers demanded that PW1 gives them more money and PW1 told the robbers that he had Kshs.200/- or Kshs.300/- in the house and the two appellants accompanied him into the house. As they were approaching the house, PW1's wife put on the security lights which were bright and PW1 was able to see his assailants well. However, the first appellant pulled PW1 into an area which was dark but PW1's wife ran out screaming and put on other lights. The first appellant chased PW1's wife to the main gate. She jumped over the gate.

PW1 was in the house with the second appellant in full view aided by electric lights. When the first appellant returned to the house he picked a stick and broke the security lights. The first appellant saw a Seiko 5 wrist watch which PW1 was wearing and demanded the same. PW1 obliged and gave out the watch to the first appellant. PW1 took from the house Kshs.300/- and gave it to the second appellant. The appellants walked out of the house together with PW1. They locked PW1 inside the pit latrine and left. PW1 remained in the pit latrine for sometime until members of the public went and opened the latrine and let him out.

After about 20 minutes, PW1 heard screams from a neighbouring home. PW1 decided to rush to that home and he found the wife of a neighbour known as Njuguna had been attacked and had been slashed all over her body and was bleeding profusely. PW1 and other members of the public rushed her to a hospital. Later on he recorded a statement with the police. PW1 said that he stayed with the appellants for about 20 minutes and testified that he was able to see their faces clearly by the bright electricity lights which were both outside and inside the house. PW1 did not participate in any identification parade.

The wife of PW1, **Zipporah Mwenda, PW2**, corroborated the evidence of PW1 in all material aspects. However, she testified that she was not able to recognise any of the robbers during the course of the robbery.

PW3, Peris Wangari testified that on 4th July 2001, at about 8.00 p.m., she was in her house with her family members when she heard gun fire in their neighbourhood. Suddenly, a certain woman came to their home and reported that her husband had been shot dead. PW3 and her family members put off the lights and remained inside the house. After sometime they decided to go out to find out what had happened. As they were walking to their neighbour's home they saw two men, one of them armed with a gun and the other one with a panga. The only source of light at the time was moon light.

The robbers ordered PW3 to accompany them and on their way they met a neighbour known as Moses Njoroge. The robbers demanded money from him but Moses Njoroge said that he had no money. He started running away and PW1 testified that she saw the second accused shoot him. He fell down and within a short while he was dead.

The evidence of PW1, PW2 and part of the evidence of PW3 was recorded before Mr. N. O. Ateya, Senior Principal Magistrate. The learned trial magistrate, on application by the appellants, disqualified himself from any further conduct of the hearing as the appellants claimed that the hearing was taking too long before that court. Although the trial magistrate was not to blame for that alleged delay, he chose not to continue hearing the case. The hearing was assigned to Mrs S. Muketi, then Senior Resident Magistrate and she asked the appellants whether they were willing that she continues with the case from where Mr. Ateya, Senior Principal Magistrate, had reached. The appellants said that they had no objection. However, the record does not show whether the trial magistrate complied with the mandatory provisions of **Section 200(3)** of the Criminal Procedure Code which provides that:-

"***Where a succeeding magistrate commences the hearing of proceedings and part of the evidence had been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right."***

PW3 further told the court that she was forced to accompany the appellants as they went to different houses within Bahati area and was with them up to about 1.00 a.m. In one of those houses the appellants demanded that they be given tea which was made for them as they watched television. After the arrest of the appellants, PW3 identified them in an identification parade.

Tabitha Wanjiru Ngigi, PW4, testified that on 4th July 2001, at about 7.30 p.m., she heard somebody screaming near her house. After a short while, her house was broken into and two men walked in, one had a gun and the other one had a panga. They demanded money from her. She gave them Kshs.700/-. The appellants demanded more money but she told them that she did not have any. The appellants demanded for her car but it was not there. She told them that it was with her driver. The appellants insisted that they go and look for the driver. As they were walking about, the robbers kept on harassing other people and stealing from them. They reached a certain home where there was a vehicle which was parked in the compound. They went in and demanded for the same. PW4 was with the appellants up to about 1.00 a.m. She said that she was able to see their faces because there was moon light. She did not attend any identification parade.

Inspector Bonaventure Bikei, PW6 testified that he conducted an identification parade on 22nd November 2001 in which the second appellant was identified by PW3.

Inspector Kamenjo, PW7, conducted an identification parade on 20th August 2001, and the first appellant was identified by PW3.

The arresting officer and the investigating officer did not testify and no reason was given for that serious omission.

In his unsworn defence, the first appellant testified that he was a livestock dealer at Rumuruti. On 2nd July 2001, he was asked by some people to assist them in tracing their goats which had been stolen. They followed some foot prints of the suspected thieves up to an area known as Ndumachu. They were accompanied by an administration police and anti-stock theft police officer. They continued with the search up to 5th July 2001, when they returned home. On 19th August 2001, he went to repair his bicycle. He was accosted by flying squad police officers and arrested together with other people. They were taken to Rumuruti police station and later to Nyahururu police station. The appellant was eventually taken to Bahati police station and later Central Police station, Nakuru where an identification parade was conducted. He said that he did not understand what was happening all along. On 4th September 2001, he was surprised when he was taken to court together with another person whom he did not know and charged with the offence of robbery with violence.

The second appellant also gave an unsworn defence. He testified that on 30th October 2001, he was arrested by two police officers and taken to his house. The house was searched but nothing incriminating was found therein. He was asked to produce a gun but told the police that he had no gun. He was taken to Subukia police station and was later charged with robbery with violence. He denied any knowledge of

the alleged robbery.

This being a first appeal, this court is mandated to re-consider and to re-evaluate the evidence tendered before the trial court and arrive at its own independent decision as to whether to uphold the conviction of the appellants by the trial court or not. In doing so, the court has to bear in mind that it neither saw nor heard the witnesses as they testified and therefore cannot make any determination regarding the demeanour of the witnesses, see ***NJOROGE V REPUBLIC*** ***[1987] KLR 19.***

The first issue for determination in this appeal relates to identification of the appellants by the prosecution witnesses. PW1 testified that he was attacked at about 6.50 p.m. when it was just beginning to get dark. He saw his assailants when he was coming out of a latrine. Later he was able to see them more clearly when his wife put on the security lights outside the house. He also saw them when they went inside his house where electricity lights were on. He was with them for about 20 minutes. However, no reason was given as to why PW1 was not called by the police to attend an identification parade. The robbery took place on 4th July 2001, and PW1 made a dock identification of the appellants on 19th November 2002, about 17 months after he allegedly saw them. PW1 did not state what exactly made him identify the appellants after such a long time. When he made his report to the police he did not describe the assailants at all.

It was therefore doubtful whether he could remember the faces of his assailants after a period of nearly 17 months from the date when he last saw them. It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it had been preceded by a properly conducted identification parade, see ***FREDRICK AJODE VS REPUBLIC*** ***Criminal Appeal No. 87 of 2004 at Kisumu (unreported)***. PW2 said that she did not identify any of the robbers. PW3 testified that the only source of light on the material night was moon light. She did not explain how bright the moon light was. Although she was with the appellants for a considerable period of time, in the absence of sufficient light, it is doubtful whether she saw her assailants properly. The same can be said of PW4.

The identification parade in respect of the first appellant was conducted on 20th August 2001, and in respect of the second appellant the identification parade was conducted on 22nd November 2001. This was some considerable period after PW3 was attacked. The witness was not asked by the police to describe the robbers before the identification parade was conducted. PW3 said that she spent a considerable period of time with her assailants and therefore was able to recognise their faces. In a case where a witness testifies that he recognised his attacker, the first report of the witness to the police regarding the description of the attacker is important as it enables a court to determine the accuracy of the purported identification by the witness.

In ***ABDULA BIN WENDO VS REPUBLIC*** ***(1953) 20 EACA 166,*** the Court of Appal stated as follows:-

"Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

Applying the above principles, we are not satisfied that the evidence of PW3 was sufficient to warrant a conviction of the appellants, considering the circumstances that prevailed on the material night. In our view, the circumstances were not favourable for s positive identification. In ***JAMES TIOKOI KOITOI VS REPUBLIC*** ***Criminal Appeal No. 138 of 2003 at Nyeri (unreported),*** the Court of Appeal held that:-

"***Evidence of a single identification witness at night must be tested with the greatest care and must be water tight to justify a conviction."***

We agree with the appellants that there was insufficient identification evidence as would have made their conviction safe.

The provisions of **Section 200(3)** of the **Criminal Procedure Code** are mandatory. When Mrs Muketi, the then Senior Resident Magistrate, took over the conduct of the case from Mr. Ateya, Senior Principal Magistrate, she should have expressly advised the appellants of their right to demand that PW1 and PW2 be re-summoned and re-heard by her. That should have been recorded in the proceedings. It was not enough to ask the appellants whether they had any objection to her continuing with the case from where her predecessor left. The evidence and demeanour of those two witnesses was very important. The appellants were therefore prejudiced by the trial court's breach of the aforesaid provisions of the law.

The trial court was not told how the appellants were arrested and the circumstances that led to their arrest. The arresting officer and the investigating officer did not testify before the trial court and no reason was given for that serious omission. The appellants were facing serious charges and the trial court should have been given a detailed account of how the appellants were arrested and what caused the police to believe that the appellants were connected with the charges which they faced. In the absence of the arresting officer and the investigating officer, that kind of evidence was not adduced before the trial court. We must express our dissatisfaction with the manner in which the police investigated and conducted their investigations into the spate of robberies that led to the death of at least two people. In the absence of evidence from the two key prosecution witnesses, the trial court was not able to determine whether there was any truth in the defences that were advanced by the appellants. The trial court should have insisted that the two police officers be summoned to attend court and testify accordingly. Without their evidence, the prosecution case was incomplete and lacked a firm base upon which conviction of the appellants could stand.

For the reasons as stated above, we are satisfied that the appellants' appeals ought to be allowed. We therefore quash the convictions and set aside the death sentences that were pronounced by the trial court against the appellants. The appellants should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellants and Miss Opati for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE