



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 14A of 2002

RICHARD JUMA MUSYOKI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH HCCRA 16 OF 2002

MUTUA MUTISO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

This is an appeal from the judgment in Machakos SPMCRC 834/01. The 1st appellant Richard Juma Musyoki was the 2nd accused in the lower court whereas Mutua Mutiso now the 2nd appellant (Cr. Appl.16/02) was the 1st accused.

In the lower court they were jointly charged in count I with offence of robbery with violence contrary to section 296(2) of the penal code. In Count II the 2nd appellant was charged alone with possession of cannabis sativa contrary to section 3(1) as read with section 2(a) of the narcotic drugs and psychotropic substances Act.

In the 3rd charge the 1st appellant was charged with attempted robbery contrary to section 297(2) of the penal code and in Count IV the 1st appellant faced a charge of possession of a firearm contrary to section 89(1) of the penal code. After hearing the case 1st appellant was acquitted on count I and IV but was convicted on count III and sentenced to death. The 2nd appellant was convicted of count I and acquitted of count II.

The appellants were dissatisfied with the convictions and sentences of death and preferred these appeals.

Before the appeal was heard the 1st appellant applied that Cr.C 250/01 in which he had been charged be produced in evidence. We considered the application and a perusal of the lower court record revealed that PW10 had been cross examined by the 1st appellant on the file but for some unknown reason the said file was never produced in evidence. it is now part of the record before us.

We have considered the petitions of appeal filed by both appellants and in brief the grounds can be summed up as follows:-

1. That the prosecution evidence was not sufficient to sustain a conviction.
2. The parade on which the appellants were purportedly identified was conducted unprocedurally.
3. That the appellants defences were never considered.

Briefly stated, the prosecution case before the lower court was that PW1 Administration Police Coporal Matheka was walking home on 25.12.2000. It was at night. He was attacked from behind, made to fall and was robbed of a ceska pistol which was loaded with 15 rounds of ammunition, a seiko watch and cash. Later he identified the 2nd appellant on a parade mounted by the police but did not identify the 1st appellant who was the 2nd accused.

In a different incident on 21.1.2001PW2 Richard Musyimi was in his hotel with some customers at about 8.00p.m. when they were attacked by 5 people who were armed with bows, arrows and rungs. The intruders ordered them to lie down but they resisted and a fight ensued. Some customers were injured. One of the robbers was injured. 2nd appellant was later arrested on 19.1.2001 in company of another who was released whereas 1st appellant was arrested on 22.1.2001 a day after the 2nd robbery while in his house and they were charged. The 2nd appellant in his defence said that he was shot by police while looking after cattle and he was then framed with possession of bhang. He denied involvement in the robbery. The 1st appellant was arrested in his house. He had an injury which he explained how he got it but was arrested and that it was about 5 days old.

Since the appellants were convicted of different counts which took place on different dates, we shall consider each appellants submissions and these of the state counsel separately.

The 1st appellant was convicted in count III. The relevant evidence in respect of this charge was that adduced by PW2, 3,4,5,8 and 7. PW2, 3, 4 and 5 were at PW2's hotel when the robbers struck. It was about 8.00p.m at night. There was a hurricane lamp in the hotel. None of the witnesses told court where exactly the said lamp was placed in relation to where the attack occurred. The witnesses told court that they engaged the robbers in a fight for a bout half an hour. Since they were fighting we believe the robbers had close contact with the witnesses to enable the witnesses to identify them.

PW2 said that he saw the faces of the robbers well and is able to identify them and he therefore purported to identify 1st appellant on a parade conducted by PW10. He did not specifically say how he managed to identify the 1st appellant nor did he state what role he played during the robbery. PW3 contradicted the evidence of PW2. He said that the robbers had masked faces. He struggled with the one who hit the robber with a pistol and pinned him in a corner where one of his colleagues hit him with a bench on the head. This must be the robber who was said to have been injured on the head.

PW4 on the other hand never mentioned the masks. He said he identified 1st appellant as the person they hit with a bench while cornered in corner where they later recovered a pistol. PW4 further said that he knew 1st appellant before as a friend to his cousin yet he never told police that he knew the robber who was injured nor did he name him to the police.

The magistrate in his judgement did not address this contradictory evidence by PW2, 3, 4 and 5. The issue is whether or not the robbers had masked their faces because if they had then the witnesses did not

see their faces unless the masks were removed. There is no evidence that was not done. There is doubt raised by this glaring contradiction in the evidence of the prosecution witnesses. Further though PW4 claims to have known 1st appellant he never named him to police. Similarly PW5 claimed to have known 2nd appellant as the owner of a shop but never mentioned his name to police. In the case of CHARLES OUMA VERSUS REPUBLIC CRI. APP. 222/02 THE Court of Appeal held that the witness should have given a description of the appellant to police in making his report. Likewise PW4 should have named the 1st appellant to the police since he knew him.

PW4 purportedly identified 1st appellant on a parade but that was not necessary as he knew 1st appellant before. This was what court of appeal observed in the case of OLUOCH VERSUS REPUBLIC CR. APP. 66/84. Only PW2 should have taken part in the parade. From the above observations, we find that there is doubt as to whether 1st appellant was properly identified by PW2, 3, 4 and 5 or he was just picked up on suspicion because he had an injury and had not sought treatment.

The 1st appellant was arrested on 22.1.2001 a day after the robbery at the hotel. He was found to have been injured. There was contradictory evidence as to whether he was treated or not. He was however noted that the wound was stitched save that he had no hospital records. The police never bothered to have him examined to find out how old the injuries were. The court cannot rely on the word of the witnesses that the wounds were fresh.

We had a chance to read the file CRC. 250/01 in which the 1st appellant had been charged alone. He claimed that the evidence adduced in that file was contradictory to that adduced in crc.834/01 which is subject of the appeal. PW10 conducted the parade. He testified as PW5 in Crc.250/01. He maintains that all these on the parade had injuries just like the 1st appellant had. 1st appellant led questions regarding injuries only to PW10 but not the other witnesses in both cases.

It is 1st appellants word against that of PW10 that the parade members looked like 1st appellant. 1st appellant had a chance to challenge the evidence of PW2, 3 and 4 regarding identification parade. The parade seems to have been conducted properly save for the observations made above that it was not necessary for PW4 and 5 to take part in the parade having known the 1st appellant before. We have also found above that despite the parade there are doubts whether the 1st appellant was properly identified and that doubt should have been resolved in his favour. Accordingly we quash the conviction in respect of count III sentence is set aside and the 1st appellant is set at liberty unless otherwise lawfully held.

Coming to the 2nd appellant, his conviction is in respect of count I. The relevant witnesses in respect of this charge are PW1, 6, 7 and 10. PW1 is a alone identifying witness. 2nd appellant was not arrested with any of the stolen items. PW1 did not state the exact time of night the robbery took place was but the fact that he claims there were street lights leads us to conclude that it was at night time. PW1 said he was held from behind, knocked down and somebody lay on him when his property was taken. He screamed for help but the watchmen who came was chased away. PW1 later purported to identify 2nd appellant on a parade conducted by PW10.

PW1 never told the court what the intensity of the light at the scene how far the electric post which was the source of the light that he used to identify the robbers was. PW1 told court that he was held from the back. He never told court from where the robbers approached and how he was able to see that they were 20 and were armed with the weapons he mentions.

He did not tell court how he fell on his back or to the front to enable him see who took his watch from his wrist. The court was not told how long the incident took. From what happened it must have been brief. It would have been an uphill task for the complainant to pick 2nd appellant from a group of 20 robbers. It is also interesting that on the parade complainant never noticed that the 2nd appellant was injured on the leg from bullet wounds because if he was bandaged the rest of the members on the parade should have been the same. The sum of our observation above is that there was doubt as whether PW1 properly

identified 2nd appellant as one of the robbers. In the case of OLE TOROKE VERSUS REPUBLIC CR. APP. 204/87, the Court of appeal held that it is not enough for a witness to merely state that there was light at the place where the robbery took place. There has to be evidence on the type of light, its intensity or the location of its source in relation to the point where the attack took place. It was further observed that it possible for one to believe that they have identified one when infact it is a mistake and the magistrate has to warn himself of the inherent danger of relying on a single identifying witness. In the case before the lower court the court did not take into account the factors considered above and the magistrate failed to warn himself of the dangers of relying on the evidence of PW1 as a single identifying witness. Further in the case of REPUBLIC VERSUS ERIA SEBWATO CR. APP. NO. 37/1960 the court held that where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction. The case before the lower court depended solely on identification. However our view is that the evidence is not watertight.

After the conviction the 2nd appellant stated that he was 18 years old. This was on 16.1.2002. The offence was allegedly committed in January, 2001. If indeed 2nd appellant was 18 years in 2002 he was under age at the time of commission of the offence. And if that be the case the provisions of section 25 (2) of the Penal Code should have been invoked. Once the 2nd appellant claimed to have been 18 years, the magistrate should have ordered for an age assessment.

All things taken into account the 2nd appellants conviction was usaf e and it is hereby quashed and sentence set aside. 2nd appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 22nd day of September, 2004.

Signed in the presence of:-

LESIIT J

JUDGE

WENDOH R.

JUDGE