



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Criminal Appeal 176 & 177 of 1998

GEOFFREY KARIUKI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 177 of 1998

NICHOLAS NGUGI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case no 3245 of 1997 of the Senior Resident Magistrate's Court at Mombasa – S Muketi)

JUDGMENT

The appellants Geoffrey Kariuki Ngatia and Nicholas Ngugi faced a charge of robbery with violence contrary to section 296(2) of the Penal Code. On the 3rd July, 1998 the Senior Resident Magistrate at Mombasa convicted them and consequent upon conviction, they were sentenced to death. Two others whom they were charged together with faced different charges of handling stolen property contrary to section 322(2) and preparation to commit a felony contrary to section 388(2)(4) of the Penal Code.

The summary of the evidence before the lower court was that on the 16.10.97 at around 1.00 p.m. Michael Awiti Bond (PW4) stopped a motor vehicle KAH 975M at his gate at Kiembeni estate and hooted for his wife to open. Before she could do so, he saw two people come towards him as if they were

passing by. They immediately drew pistols and pointed them at his head. They asked him to surrender everything while pulling him out of the vehicle. One of them took his watch while the other took his wallet. He says there was light from his gate lights and the moon. While one was trying to stop the car which took a while because of the alarm system the other was counting the Kshs 3,000/- they took from him. At this point he sneaked to the bus stage and started to shout for help. Security guards who were nearby could not help as the robbers shot twice in the air. He got some assistance and reported the matter to Bamburi Police Station.

On 21.10.97 CID urban received a report that some people were planning a robbery using a motor vehicle KAH 008Y Pickup at Changamwe Petrol station. IP Adiel Mate PW5 led an ambush and arrested the driver who was the 3rd accused in the lower court and two others. Through their investigations it turned out the driver was testing the motor vehicle with a view to buying the same. He later gave the police information which led to the arrest of the appellants. On checking the chassis and engine number, it was confirmed the motor vehicle was the same one robbed from PW4 but had fake registration numbers.

PW1, Hellen Chelegat Anyango a sister to 3rd accused confirmed in her evidence that the vehicle was to be sold to her brother. An identification parade was conducted on 28/10/97 by PW3, IP Gerald Shivanda in which the appellants were identified by PW4 in separate parades confirming they were satisfied with the manner the parades were conducted.

Both appellants filed amended grounds of appeal. At the hearing Geoffrey Kairuki Ngatia whom we shall refer to as 1st appellant raises 6 grounds while the 2nd has 5 grounds of appeal which may be summarized as touching on the issue of identification, arrest based on co-accused's statement and failure to take into account defence evidence. Since the grounds are common to both appellants we shall deal with them together.

Both Mr Magolo and the 2nd appellant dealt at length on the issue of identification as it formed the basis of the conviction. They say the circumstances surrounding the robbery were not conducive to a positive identification of the robbers by PW4. In his evidence PW4 described in sequence the events unfolding on the night of the robbery. As he stopped at his gate he hooted for his wife to open, two people approached the vehicle and pointed pistols to his head. They proceeded to open the door and he was pulled out. One took his wallet and the other his watch and while they concentrated on starting the vehicle and counting the money he managed to escape. He reported the robbery to Bamburi Police the same night. Nowhere in his evidence or that of PW2 PC Ndikira Habe who received his report at the Bamburi station is there mention of him having either said he could identify the robbers or even described them. Then twelve days later he was summoned to the Bamburi Police Station where he identified the appellants. Although the appellants have raised other issues like PW4 having been in the same room with the 2nd appellant and also having had a chance to speak to accused 3 in the original charge who identified 1st appellant.

Having outlined the sequence of events at the one of robbery, we need to satisfy ourselves that the conditions were conducive to a positive identification. At no time was the strength of lighting described by PW4. Nor did he describe the position at which he managed to see their faces or any significant identifying mark. He said the whole episode took about 15 minutes but no other evidence was called to corroborate this. Not even that of his wife.

The magistrate in arriving at a conviction did not warn herself of the dangers of convicting on the evidence of identification from a single witness. This point has been repeated in several decisions one of them being Charles O Moitanyi vs Republic (1986) 2 KAR75 in which Platt JA cited Abdalla bin Wendo vs R (1953) 20 EACA 166 which was followed in Roria vs Republic (1967) EA 583 thus:

“Subject to well-known 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 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.”

In this case the only other evidence connecting the appellants, with the motor vehicle is that they were identified by their co-accused as the robbers and were in the processing of selling it to him. This is evidence tending to show the identity of the offender but is in our opinion not enough to support a conviction. In the absence of any other evidence to support the correctness of an identification we are inclined to agree with the appellants. Senior State Counsel Mr Gumo supported the conviction and sentence on the grounds that the robber stood close to PW4.

We have no doubt that had the learned magistrate directed her mind to these issues she may well have reached a decision to the contrary. The upshot of all that we have said is that the appellants’ conviction was and is unsafe and ought not to stand. We accordingly allow the appeal, quash the conviction and set aside the sentence of death. The appellants are to be released from prison forthwith unless they are held for some other lawful cause.

Dated and delivered at Mombasa this 13th day of March 2000.

HON P.N. WAKI

JUDGE

HON. P. M. TUTUI

COMMISSIONER OF ASSIZE