IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 60 OF 2019

BETWEEN

ANTHONY KIGURO WAINAINA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence dated 29th November 2018 in Criminal Case No. 5212 of 2013 at the Thika Magistrates Court before Hon. C. A. Otieno-Omondi, PM)

JUDGMENT

1. The appellant, **ANTONY KIGURO WAINAINA** together with his co-accused faced a single charge of robbery contrary to **section 296(1)** of the ***Penal Code (Chapter 63 of the laws of Kenya)*** whose particulars were as follows:

> ***ANTONY KIGURO WAINAINA*** and **JSK** on 22nd September 2013 along Eastern By-Pass at Kibendera area in Kiambu County, jointly with others not before the court robbed off **ROSE JEPKOSKEI CHEPSEBA** of one motor vehicle make Nissan X-Trail engine number NT – 051630 and chassis number NT30-058163, two mobile phones make NOKIA N7 and NOKIA E63, one tablet make GUANGZHOU, assorted clothes and cash Kshs. 55,000/- all valued at Kshs. 1, 675,000/=, the property of **ROSE JEPKOSKEI CHEPSEBA** and at the time of such robbery threatened to use actual violence to the said **ROSE JEPKOSKEI CHEPSEBA**.

2. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see ***Okeno v Republic*** **[1972] EA 32**, ***Kiilu and Another v Republic*** **[2005] 1 KLR 174**).

3. The prosecution marshalled 5 witnesses. Rose Chepseba (PW 1) and Daniel Njuguna (PW 2) testified that on 21st September 2013 they were driving from Mombasa to Nairobi. PW 2 had been engaged to drive PW 1's unregistered Nissan X-trail. When they reached Mtito-Andei, they decided to take a break. As they were having tea, two people approached them. PW 1 did not know them and they spoke to PW 1 in Kikuyu. When they reached City Cabanas, Nairobi at about 4. 00am, she saw the two people, the appellant and the other person whom she had seen at Mtito-Andei. The driver and the 2 men agreed with PW 2 to proceed to Ruai to view a plot. The two men drove ahead while two entered the Nissan X-trail and pushed PW 2 out of the vehicle. One of the assailants drove off with the car leaving her behind. PW 1 recalled the assailants took her Nokia E63, Nokia Lumia, Tablet, Identification cards, about Kshs. 50,000/- in cash, ATM card and her purse. She walked to the highway and met a family who lent her a phone with which she called PW 2 and went to report the matter at Ruiru Police Station. She also reported the matter at Nairobi Central Police Station. In the meantime, PW 1 had been told by JSK that he knew where the vehicle was. A police officer called JSK in her presence and she heard him tell the officer that he could produce the vehicle if he was sent Kshs. 100,000/- which PW 2 owed him. PW 2 sent JSK Kshs. 100,000/- by MPESA but he did not produce the vehicle. He was later arrested. While PW 1 was at the police station, the appellant was arrested when he came to the police station, PW 1 identified him as one of the assailants.

4. PW 2 confirmed that he had been engaged by PW 1 to drive the Nissan X-trail to Malaba. He confirmed that they stopped at Mtito-Andei where he met JSK's son, BG, who was with another man. They talked about some land that was being sold by his father in law. BG told him that they could meet at City Cabanas in Nairobi and proceed to view the land. BG and the other man drove ahead of them. They met there at about 6.00am and drove towards Ruai. BG stopped and asked if he could drive the Nissan X-trail. At that time the other vehicle went ahead and blocked the Nissan X-trail. PW 2 recalled that he was pushed out. He left with his phone and proceeded to Ruiru Police Station. Before he reached there, PW 1 called him and told him the vehicle had been stolen.

5. PW 2 further testified that while at Ruiru Police Station, he was called by JSK who told him that his son, BG, had stolen Nissan X-trail.

When he travelled to Nairobi, he was arrested by Police Officers from Nairobi Central Police Station. PW 2 further testified that JSK demanded Kshs. 95,000/- so that he could ask BG to deliver the stolen vehicle. JSK was arrested. According to PW 2, JSK called BG to bring his phone to the police station but he did not. The appellant came to the Police Station instead and was arrested.

6. Gideon Kibet Kigen, PW 3, testified that he had engaged PW 1 to import the Nissan X-trail on behalf of his brother who was working in South Sudan. He arranged to receive the vehicle at Malaba on 21st September 2013 so that he could drive it to South Sudan but he was informed by PW 1 that it had been stolen.

7. PC Duncan Odhiambo, PW 4, testified that on 22nd September 2013 at about 5.00pm, PW 1 reported at Ruiru Police Station that she had been robbed of the Nissan X-trail. In the course of investigations, he was informed by police officers from Central Police Station that they had arrested PW 2 as he was suspected of being an accomplice as he knew the father of one of the suspects, JSK. JSK had told the police that he knew that his son, BG, knew where the vehicle was but demanded to be given money to give information leading to recovery of the vehicle. PW 2 mobilised his friends who paid the Kshs. 100,000/- demanded by JSK but he failed to produce his son and the vehicle. The police then arrested JSK.

8. PC Patrick Kithure, PW 5, was working at Nairobi Central Police Station. He testified that PW 1 reported that she had been robbed of the Nissan X-trail on 27th September 2013. They met PW 2 who told them that JSK was demanding Kshs. 100,000/- which he was owed and which he should pay so that his son, BG, could produce the vehicle. He arrested PW 2 and on 28th September 2013, he called JSK who stated that PW 2 had paid him Kshs. 100,000/-. Since the vehicle had not been produced, they arrested JSK. As they were going to the police station, JSK called the appellant to the police station. When the appellant reported to the police station, PW 1 identified him as the person who assaulted her.

9. When put on his defence, the appellant denied the offence. He stated that he was not at the scene of the robbery and that he did not know PW 1. He recalled that he went to Nairobi Central Police Station as PW 2 had called him to collect some documents for registration and some money which he owed him. When he went to the police station, he met PW 2 and a lady he did not know. He also told the court that he did not know, JSK's son, BG and was not dealing in land.

10. Based on the aforesaid evidence, the trial magistrate was satisfied that the prosecution had proved its case and more so that the appellant had been identified as one of the assailants who robbed the Nissan X-trail. The appellant's case as set out in petition of appeal and supplementary petition of appeal dated 9th September 2019, written and oral submissions by his counsel is that the appellant was not identified at the scene and that the trial magistrate held that it was not fatal to the prosecution case that an identification parade was not held. Counsel contended that there was contradictory evidence and the appellant's defence of alibi was disregarded. Counsel for the respondent submitted that the prosecution proved the elements of the robbery with violence and that the appellant was properly identified by PW 1 in the circumstances.

11. The appellant and his co-accused were charged with the offence of robbery which is defined under **section 295** of the ***Penal Code*** as follows:

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

12. The offence comprises two elements; First, the act of stealing and second, the use of or threat to use actual violence to any person or property immediately before or immediately after stealing intending to obtain or retain the stolen item or prevent or overcome resistance to the stealing. In this case, I find that the prosecution proved the two elements. PW 1, who was the special owner of the Nissan X-trial confirmed that the vehicle had been stolen. That vehicle according to the evidence was never recovered. Her purse, mobile phone and other assorted items were stolen from her. She was also threatened with violence when the vehicle was stolen and one of the assailants, hit and kicked her.

13. The issue of identification has been the subject of various decisions of our court. The Court of Appeal has given guidance on how evidence of a visual identification should be approached in a plethora of authorities (see ***Abdalla Bin Wendo & Another v R*** **[1953] 20 EACA 166**, ***Anjononi & Others v Republic*** **[1980] KLR 59**) and ***Francis Kariuki Njiru & 7 others v Republic*** **NRB CA Cr. Appeal No. 6 of 2001 [2001] eKLR**). In ***Wamunga v Republic*** **[1989] KLR 424** the Court of Appeal observed that:

> **[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.**

14. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic*** **[1986] KLR 198** and ***R v Turnbull*** **[1967] 3 ALL ER 549)**. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic*** **[1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic*** **[1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

15. In assessing the evidence of identification, the court ought to take into account the fact that a witness who identified an appellant would be able to give the police a description of the assailant (see ***Simiyu and Another v Republic*** **[2005] 1 KLR 192)**. It is on the basis of this description that an identification parade was conducted to test the veracity and correctness of witness description of a suspect. If an ID parade is not done in such circumstance, the identification amounts to a dock identification. I*n* ***James Tinega Omwenga v Republic*** **NKU CA Criminal Appeal No. 143 of 2011[2014] eKLR**, *the Court of Appeal expressed the view that:*

> The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.

16. This is not to say that an identification parade must be conducted in every instance or that a conviction cannot ensue if an identification parade is not conducted. On this issue, I would do no better that quote the Court of Appeal in ***Nathan Kamau Mugwe v Republic*** **NRB CA CRA No. 63 of 2008[2009] eKLR considering an earlier decision stated as follows:**

> ***Even in*** **Gabriel Kamau Njoroge v Republic (1982 – 1988) 1 KAR 1134, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness "SHOULD" be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.**

17. And finally, in the case quoted by the trial magistrate, the court was of the view that an identification parade is but one of the means of testing the evidence of visual identification. In ***Bernard Mutuku Munyao and Another v Republic*** **NBI CA Criminal Appeal No. 222 of 2004 [2008] eKLR** the Court of Appeal held as follows:

> It follows therefore that there was no error in law or in principle made by the two courts in relying on the evidence of the two complainants in this case despite the absence of an identification parade. Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in **R v Turnbull [1976] 63 Cr. App. R. 132**. The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One may think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification. Fortunately, that evidence does not stand alone as there was further circumstantial evidence which, on its own, could sustain the conviction. We reject the first ground of appeal.

18. The first line of inquiry is whether the circumstances of identification at Mtito Andei and City Cabana were favourable for positive identification to the extent that if the witnesses were able to see the appellants at the first point of contact, they would be able to recognise them at the second meeting. It is not in dispute that the appellant was a stranger to PW 1, at any rate before the robbery, and was identified by her when he came to Nairobi Central Police Station. PW 1 had testified that she had seen the appellant on the night of 21st September 2013 at 10.00pm at Mtito Andei when he was one of the two people that approached them as she was taking tea with PW 2. PW 2 also stated that the appellant was not known to him previously and when cross-examined, he told the court that the appellant was not at the scene in Mtito Andei and that he saw the appellant for the first time at Ruai and he is the one who pushed him out of the vehicle as he sat in the rear seat. He stated that the appellant was wearing glasses, a hat and brown jacket.

19. When they reached City Cabannas, PW 1 saw the appellant and it is him and another man who entered the vehicle and drove off at Ruai. During cross-examination, she stated that the appellant was seated at the back and he was wearing jeans, a t-shirt and coat. She recalled he is the one who slapped and kicked her and she was able to look at him when he ordered her to lie on her abdomen. She admitted during cross-examination that she did not give the police at Ruiru or Central Police Station a description of any of the assailants. When cross-examined, PW 2 stated that the appellant came from the vehicle that was driving behind them and stated that he owned a garage and that BG called him and told him that he would bring some documents to him. He also stated that it is JSK who called his son BG, to call the appellant to avail the vehicle.

20. The prosecution did not lead evidence as to the nature of lighting at Mtito Andei when she first saw the appellant. Of course it is possible that she observed him well as they were in close proximity. This is however, negated by the testimony of PW 2 who was adamant that he did not see the appellant at Mtito Andei and only saw him in Nairobi. The testimony of PW 1 and PW 2 is also divergent. PW 1 stated that she saw the appellant at City Cabanas but PW 2 did not see him. Again, it is clear that this was early in the morning but evidence was not led as to how dark it was or how close they were to the assailants?

21. The third place where PW 1 and PW 2 met the assailants is at Ruai. Once again the evidence of PW 1 and PW 2 is divergent in the description given by them as to the manner of dressing. While it is possible that witnesses may perceive colours differently, certain items of clothing such as a hat and spectacles would stand out. PW 1 did not mention that the appellant had a hat or that he was wearing spectacles while PW 2 stated that he had a hat and was wearing spectacles. Finally, it is clear from the totality of the evidence that neither PW 1 or PW 2 told the police officers, that they could identity any of the assailants.

22. The authorities I have cited are clear that when prosecution relies on identification of a suspect, it must weigh all the evidence to be sure that the identification was positive and free from error. All the issues I have raised go to the quality of the evidence produced by the prosecution to implicate the appellant. Once PW 1 was identified by the appellant when he came into the police station, it was no possible to carry out an identification parade. Despite this, it was still possible to conduct an identification parade to enable PW 2 identify the appellant as one of the assailants as he stated he clearly saw him at City Cabbanas.

23. Having considered the evidence and entirety of the record as required by the first appellate court, I cannot help but feel that there was more than meets the eye in this case that the police failed to investigate and in particular tie the loose ends between the key players including PW 2 and the alleged relationship with the appellant. Nothing was said of BG who appeared to be the mastermind and was clearly identified by both PW 1 and PW 2. The contradictions in the evidence of PW 1 and PW 2 could not be reconciled. The conviction is my view unsafe.

24. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 16th day of JANUARY 2020.

R. N. SITATI

JUDGE

Mr Kirubi instructed by Kirubi, Mwangi Ben and Company Advocates for the appellant.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.