REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 58 OF 2018 and 59 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.1843 of 2016 by Hon. S.N. Mwangi – S.R.M.)

JAMELECK KARANJA KAMAU.....1ST APPELLANT

MARK WAMBUGU KAMAU.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellants ***Jamleck Karanja Kamau and Mark Wambugu Kamau (1st and 2nd)*** were convicted by the ***Hon. S.N. Mwangi SRM*** for the offence of Robbery with Violence contrary to ***Section 295*** as read with ***Section 296 (2) of the Penal Code.***

The particulars of the charge are that on 03/03/2016 at about 1500 hours at SDA Church Junction Area, Mairo – Inya Trading Centre in Nyandarua County, jointly with others not before court, robbed one ***Samuel Mugo Kiragu*** of motor vehicle Reg. No. KCB 759X Toyota Probox worth Kshs.850,000/- and before the said time of robbery caused actual bodily harm to the said ***Samuel Mugo Kiragu.***

Upon conviction the appellants were sentenced to death. Dissatisfied with the judgment, each appellant filed an appeal against both the conviction and the sentence i.e. Cr.A.58/2018 and 59/2018. The appeals were consolidated to proceed as Cr.A.58/2018

The supplementary grounds of appeal for both appellants can be summoned up as follows;

1. ***That the court erred by not warning itself of the dangers of relying on the evidence of one identifying witness;***

2. ***That the court erred by relying on hearsay, contradictory evidence and discrepancies in the evidence;***

3. ***That the court relied on a defective charge which was duplex;***

4. ***That no forensic evidence was adduced.***

5. ***That the court failed to consider the appellant's defences;***

6. ***That the conviction went against the weight of the evidence.***

The appellants filed written submissions;

The appellants pray that the convictions be quashed and sentence be set aside.

The appeals were opposed.

This is a first appeal and it is the duty of this court to re – examine all the evidence tendered before the trial court afresh, analyze it and make its own findings and determinations. The court has to make due allowance due to the fact it neither saw nor heard the witnesses testifying. However, the trial court had that opportunity and is better placed to assess the demeanor of the witnesses.

The prosecution called a total of six witnesses in support of their case. This case was first heard by ***Hon. Momanyi SRM*** but he later recused himself. ***Hon. Mwangi*** took over. The appellants had no objection to the new Magistrate taking over but applied to recall PW1 which was

done.

The complainant ***Samuel Mugo Kiragu (PW1)*** is a taxi driver of motor vehicle KCB 759X Probox. The vehicle belongs to his brother PW2 ***Simon Mwangi Kiragu***. PW1 recalled that on 03/03/2016, somebody whom he knew called him and requested PW1 to take a patient to Kijabe the next day at 3.00am. He was called at 3.00am and he met with the person near Equity Bank Nyahururu and they proceeded to pick his sick brother at Mairo – Inya; that while at Manguo, the person called somebody on phone and instructed him to stand at the gate. They took the Shamata route, and stopped at Fulani where two people were waiting to be picked and that one had a leso (khanga) and was held by the other. The one with the leso was helped to get into the back seat of the car. The person he had picked first got out and asked him to surrender the keys or be killed. He moved to the co-driver's seat and when he tried to escape, he was stabbed; when the car refused to start, he was stabbed and hit again and threatened with death. The car was driven towards Shamata. The person with the leso asked what they would do with him because he knew them and one said they kill him or remove his eyes and he was stabbed near the eye. One held his neck and it is then he escaped leaving his shirt behind. He screamed for help, people came as the car fled back towards Mairo – Inya. A green motor cycle was found in a nearby farm. Police came and took him to hospital. He was injured on the head, buttocks, the head and back.

Later on 04/08/2016, he was called to attend a parade where he identified Jamleck – 1st appellant, that he used to work on a motor cycle and that he used to see Jamleck in town and that when at the back of the car the robbers called each other by name. PW1 also identified the 2nd appellant who used to be a motor cyclist in Nyahururu Town.

PW1 said that the one who hired him was never arrested. PW1 said that he also managed to see the robbers when they opened the doors to the car and the lights in the car came on and their faces were not covered.

PW2, PW1's brother confirmed that on 03/03/2016 about 1.00am, PW1 asked for his phone because his wasn't working and he had a client who would call using his line. PW2 is the owner of the vehicle of KCB 759X which was registered in his wife's name. He later learnt that PW1 had been robbed of the vehicle which was later found at the Mairo – Inya Police Station. According to PW2, PW1 told him that he knew one of the robbers, Wambugu who pretended to be a patient.

Agnes Ndiragu (PW3) a clinical officer examined PW1 and produced the P3 form. She saw a cut on the back, head, right finger and legs.

PW4 PC Edward Esanya a scenes of crime officer produced in evidence photographs of motor vehicle KCB 759X Probox and motor cycle KCP51 0170552 on 07/03/2016 at Mairo – Inya Police Station.

IP Dominic Cheboi (PW5) of Karuri Police Station was requested to conduct an identification parade where the first appellant was identified by the complainant.

PW6 Cpl David Omondi took over this case as investigating officer on 21/07/2017. Through intelligence and information, he went in search of the 1st appellant and arrested him at his home in Leshau Pondo and he organized for an identification parade where the 1st appellant was identified by PW1. He also received information on the whereabouts of the 2nd appellant whom he arrested at Manguo where PW1 identified him as Jamleck's brother. In cross examination, PW6 admitted that PW1 had not given the names of the assailants and did not give a description of them.

When called upon to defend himself, the first appellant in his sworn evidence denied knowing anything about the charge he faced. He only made reference to 31/07/2016, how he did his normal chores and retired to bed with his family at 10.30pm only to be woken up at 2.00am by his uncle and on opening, found police officers who arrested him and charged him.

The 2nd appellant in his sworn statement denied the charge he faces. He recalled that on 10/07/2016, a police officer had asked him for his brother's number; that on 1/08/2016 he came from Nairobi and next day he went to court, met two police officers who harassed and arrested him and took him to Nyahururu Police Station where he found 1st appellant, his father, 2 uncles and cousin Jamleck Karanja Wanjiru. On 3rd he was charged for conspiracy and then taken the Police Station, PC Odak threatened to frame him because he had refused to reveal his phone number.

In their submissions, it was argued that it was important for the court to examine carefully the evidence of visual identification by one witness as it can bring about a miscarriage of justice. They relied on the decision in ***Cleophas Otieno Wamunga vs Republic Kisumu Cr.A. 20/1989;*** that the court must warn itself of the dangers of relying on such evidence. It was argued that PW1 did not identify the appellants and never gave their names or description to police that the OB report produced in court did not contain the names of the attackers save that they were three.

It was also the appellant's contention that the charge is defective due to duplication of the charge in that the charge should indicate whether the appellants were three or were armed or they used violence on the complainant. They relied on the case of ***Joseph Njuguna Mwaura & Others vs Republic Cr.A. 5/2008 (2013) eKLR.***

The 1st appellant faulted the manner in which the identification parade was conducted. He relied on the case of ***Cr.A 117/2005 David Muita Wanja & Others vs Republic (2007) eKLR*** where the court emphasized the need for the police officers who conduct parades to conform to the Police Standing Orders; that it was not clear whether PW1 had told police that he could identify the robbers if he saw them again.

Lastly, it was the appellant's submission that the prosecution evidence was not sufficient to prove the charge due to the contradictions between PW1 and 6's evidence.

Ms. Rugut, counsel for the State, opposed the appeal arguing that the appellants were identified by way of recognition because PW1 used to see them working as motor cycle riders which work he also used to do; that PW1 recorded in his statement that he knew those who attacked

him. Counsel further submitted that the 1st appellant was identified on the police identification parade and he was satisfied with it; that PW1 heard the robbers call each other by name and saw them when the car doors would be opened and lights inside vehicle would go on.

As regards the sentence, counsel urged the court to deal with the appellants in accordance with ***Muruatetu case SC Pet 15 & 16/2015*** which abolished the mandatory death sentence.

I have now considered the grounds of appeal and the oral submissions. The appellants faced a charge of Robbery with Violence. To prove that offence, the prosecution has to establish beyond reasonable doubt the ingredients which were clearly set out by the Court of Appeal in ***Oluoch vs Republic (1985) KLR,*** where the court held;

> ***"Robbery with violence is committed in any of the following circumstances;***
>
> ***a) The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***b) The offender is in company with one or more person or persons; or***
>
> ***c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."***

The use of the work 'OR' in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under ***Section 296 (2) of the Penal Code.***

PW1 told the court that the robbers were three and that he was injured during the robbery. He did not allude to what the robbers were armed with but he was found to have, suffered three cut wounds on the scalp, cut wound on mid spine, cut wound on the mid finger, cut wound on left thigh. The robbers must have been armed with some dangerous weapon with which they inflicted the said injuries on PW1. Though only one of the elements needed to be proved, all the three were present. An offence of Robbery with Violence was committed.

Whether there was duplicity of charges:

The rule against duplicity stems from the provisions of ***Section 134 of the Criminal Procedure Code***. It provides;

> ***"Section 134 every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

Duplicity is a term of art and a duplex charge is one which charges more than one offence in the same count. In ***Pope vs Republic (1966) EA 138,*** Sir Allistair Forbes V.P stated that ***"It is well established that a count which charges two offences is bad for duplicity and that a conviction made under it cannot stand – Cherere s/o Gukuli vs Republic (1955) 22 EACA 478."***

In ***Cherere son of Gukuli vs Republic (supra)*** the court stated as follows;

> ***"Where two or more offences are charged to the alternative in one count, the charge is bad for duplicity contravening Section 135 (2) of the Criminal Procedure Code. The defect is not merely formal but substantial. Where an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged and if he is convicted, he does not know exactly of what he had been convicted."***

When addressing a similar situation as in the instant case, in ***Joseph Njuguna Mwaura & 2 Others vs Republic (2013) eKLR*** a five bench of the Court of Appeal held as follows;

> ***"The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code which provides that 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 to property in order to steal. It would not be correct to prove a charge for the offence of robbery with violence under Section 295 and 296 (2) as this usually amount to a duplex charge."***

In ***Amos vs DPP (1988) RTR 198DC,*** the court held that the rule against duplicity is to ensure certainty in charges. The court said uncertainty is the ***"vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain."***

The English case in Ministry of Agriculture and Fisheries and ***Ford vs Munn (1978) Ltd (1990) CR LR 268 DC*** put it even more succinctly when it said ***"that the question of duplicity is one of fact and degree and that the purpose of the duplex rule is to enable the accused to know the case he is to meet."***

In the instant case, the charge indicates that the charge was under ***Section 295 and 296 (2) of the Penal Code.*** The particulars of the charge were of view as follows;

> ***"On 3rd day of March, 2016 at around 1500 hrs at SDA Church Junction area Mairo – Inya Trading Centre within Nyandarua***

County jointly with others not before court robbed off one Samuel Mugo Kiragu motor vehicle Reg. No. KCB 759X Toyota Probox white in colour valued at Kshs.850,000/- and before the time of such robbery caused actual bodily harm to the said Samuel Mugo Kiragu."

It is clear the particulars relate to an offence of robbery with violence. The evidence that was tendered too relates to charge of robbery with violence. The appellants cross examined the witnesses and never raised that issue. I appreciate the fact that they represented themselves. However, they have not demonstrated in which manner they were prejudiced by the inclusion of ***Section 295 of the Penal Code*** in charge. In ***Paul Katana Njuguna vs Republic (2016) eKLR,*** the court said;

"In the matter before us, we are unable to detect any prejudice which the Appellant suffered. The record shows that the Appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case he has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

Flowing from the above decision it is my view that no prejudice was suffered by the appellants due to the duplex charges. This is because the appellants cross examined the witnesses at length and there was no evidence that the appellants did not understand the offence which they faced. It was one of Robbery with Violence. They did not suffer any prejudice.

The next issue I must address, is whether the 1st appellant was identified at the identification parade. The purpose of an identification parade was explained in ***Samuel Kilonzo Musau vs Republic (2014) eKLR*** as follows;

"The purpose of an identification parade, as explained in Kinyanjui & 2 Others vs Republic (1989 KLR 60) is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion. It is precisely for that reason that courts have insisted that the identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification. The Police Identification Standing Orders under the National Police Service Act regulate parade procedures. The said procedures were restated in R.U. Mwango s/o Manaa (1936) 3 EACA and Ssantale vs Uganda (1968) EALR 365."

The first irregularity I note in the conduct of the parade is that PW5 did not inform the 1st appellant what his rights were, that he may have an advocate or a friend present at the parade. In the form, PW5 marked that the requirement for a friend or Advocate was not applicable (N/A) yet it was the appellant's right. Secondly, PW5 never told PW1 that he may or may not find the suspect on the parade. Having failed to do so, it implies that the suspect must on the parade. It means that the witness's attention may have been directed at those on the parade which is not fair.

In cross examination by the 1st appellant, PW5 said that the 1st appellant had been charged and positively identified by the complainant by the time the parade was conducted. However, I note from the parade form that the parade was conducted on 03/08/2016 and thereafter, the appellant was arraigned in court on 05/08/2018. All in all, the parade did not accord with the Police Standing Orders was not fair and was not of any evidential value.

It is trite that a fact may be proved by the testimony of one witness unless a particular statute provides otherwise, see ***Section 143 of the Evidence Act.*** However, great caution has to be taken in matters of identification, where it is shown that the conditions favouring correct identification were difficult. See ***Marube & Another vs Republic (1986) 356.*** In ***Abdalla bin Wendo & Another vs Republic (1953) 20 EACA 166,*** it was held;

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the 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."

See also ***Cr.A. 335/2008 Wamonye vs Republic (Nyeri).***

The appellants have faulted the prosecution evidence on identification of the appellants. In his testimony PW1 told the trial court that he saw the two appellants and they also called each other by the names of Jamelek and Wambugu and that they are people he knew before. He said that he told the police that he was attacked by three people whom he knew. When PW1's statement was shown to him, he admitted that he did not know the 1st appellant's name but only knew his face. Similarly, though PW1 had said that he knew the 2nd appellant as a fellow 'boda boda' rider there before, he never mentioned it in his statement. Later, when PW1 was recalled, he then added that he saw the appellants using the lights in the car when the doors were opened. He stated ***"I reported to the police immediately after, on the same day. I told the police their names and described them."***

However during cross examination of the investigating officer PW6, he was referred to the first report made to the police. PW6 denied that PW1 ever gave the names of the robbers to the police and that is why the police took too long to arrest the appellants. PW6 said ***"The complainant never gave us the people's names in the first report.....He didn't give me your description."***

If PW1 heard the appellants call each other by name and knew them there before, I have no idea why their description was not captured in the first report or in his statement. I find that PW1 did not give a description of the robbers nor did he know their names. The contradictions in PW1's evidence casts doubts on his creditworthiness and hence I find him an unreliable witness.

PW6 said that he used his intelligence to arrest the appellants about five months after the robbery. I am persuaded to believe that there was a delay in the arrest because the complaint did not know the robbers. PW6 should have shed light on how he came to learn that it is the appellants who were the robbers. Otherwise, I find that the identification of the appellants was not full proof. In such a serious case with serious consequences, the evidence must be of high quality, credible and watertight.

In the case of ***Ndung'u Kimanyi vs Republic (1979) KLR 282 (283)*** the Court of Appeal stated;

> ***"We lay down the minimum standard as follows; the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which make it unsafe to accept his evidence."***

See ***Elizabeth Gitiri Gachanja & 7 Others vs Republic (2011) eKLR.***

PW1 said told the court he knew the person who called him on phone and hired him to take a sick person to hospital at Kijabe. PW1 never disclosed the said person's name. If PW1 was called on phone, there has been no evidence tendered from the prosecution as to who he was and why he could not be traced through his data on phone by the cybercrime personnel.

In the end I find that the evidence on identification of the appellants was wanting and there are many doubts as to whether the appellants were involved in the robbery. The standard of proof in a criminal case is beyond any reasonable doubt. This case does not meet that threshold. I find the convictions to be unsafe and are hereby quashed. The sentence is set aside and the appellants are set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at *NYAHURURU* this *12th* day of *May*, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mwangangi – State Counsel

Soi – Court Assistant

Appellants present