



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 34 OF 2017

JAMES MAINA NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Senior Resident Magistrate Hon. J.N. Nthuku at Nakuru on the 22nd day of March 2017 in Criminal Case Number 4239 of 2012)

This Ruling/ Judgment is being delivered via Zoom Video conferencing/Email pursuant to several directives by the Honourable Chief Justice, the Chief Registrar of the High Court, and Administrative Directions of the Presiding Judge, Nakuru High Court issued on the first day of April of 2020 all relating to operations of courts during this Covid-19 pandemic.

JUDGMENT.

1. The appellant James Maina Ndungu was charged and convicted for the offence of **Robbery with Violence Contrary to Section 296 (2)â3**
2. **of the Penal Code.** The particulars of the offence are that on the 3/12/2012 at Rongai area, Nakuru County, with others not before the court, while armed with dangerous weapons namely AK 47 Riffle robbed peter Kosgei, two mobile phones make Nokia X2 valued at Kshs.10,000/= Motor Vehicle Registration No. KBN 932X and unknown amount of money, and at or immediately before or immediately after the time of such robbery killed the said Peter Kosgei.
3. On the 22/3/2017 , the court convicted and sentenced him to death as provided under **Section 296 (2) of the Penal Code.**
4. This appeal is against the said conviction and sentence, on two main grounds; lack of proper identification of the assailant and failure to provide documents that the prosecution relied upon to the appellant before and during the hearing of the case.
5. The appellant is represented by Maragia Advocate who filed written submissions to urge the appeal, while Ms. Odero Learned State Counsel represented the state. She tendered oral arguments. During the hearing before the trial court, the appellant was unrepresented, and the prosecution called ten witnesses. In his defence, the appellant gave sworn evidence and called no witness.
6. This is the first appellate court. It is my duty to re-evaluate and re consider the evidence adduced during the trial, and subject it to a fresh examination and make my own conclusions, but upon application of principles, that I must make appropriate allowance for the fact that I never saw or heard the witnesses testify and that I must consider the evidence in its totality – **Okeno Vs. Republic (1973) EA 32, Pandya Vs. Republic (1957 EA 336.**
7. The prosecution Evidence against the grounds of Appeal.

Failure to provide the appellant with Documents relied upon by the prosecution during the trial.

The record of proceedings show that the appellant requested to be supplied several times.

On the 9/1/2013 the trial court directed that a copy of the charge sheet, the OB and identification parade form be supplied to the appellant at his cost. He was then in custody and actin in person.

8. The prosecution case started on the 17/4/2014 when the appellant told the court that he was ready for the hearing, in person. On the 23/7/2014, the appellant requested to be given the 1st investigation report but the court declined stating that

“the accused has had enough time to ask for the 1st report but he chose to wait till the witnesses are in court to ask for it. Hearing to proceed forthwith”.

This was after PW1 had testified.

9. Earlier on the 23/1/2014 the prosecutor told the court that he did not have the police file, and has sought adjournment. It is the police file that contains and holds all documents and exhibits.

PW2 testified without the appellant's having the 1st report but nevertheless the appellant cross examined the witness basically on the matter of identification. PW3, PW4 and PW5 testified but the appellant did not cross examine them.

10. On the 9/10/2014 after PW8 testified, the appellant reminded the trial court that he had not been given the 1st report, despite having paid for it. The record shows no comment or order by the trial magistrate over the appellant's request. The case proceeded with PW9 and PW10 being police officers testifying.

PW9 testified that the 1st report was the OB NO. 3/4/12/12 that stated the report of the robbery, the scene of crime and what transpired. It stated that the appellants name was not in that 1st report.

11. Once again on the 19/2/2015 and on the 26/3/2015 the appellant requested for the said 1st report. It appears that the trial court made an order for the 1st report to be supplied to the appellant. The report was not supplied because on the 25/6/2015, the appellant made a further request to which the prosecution responded that it supplied the investigation diary that contains the said 1st report.

12. The 1st, 2nd prosecution witness were recalled and cross examined by the appellant; but PW8 was not recalled for reasons not given by the trial magistrate.

The appellant submits that failure to supply the appellant with the documents vitiated the entire trial, and more so that PW8 was not recalled for cross examination yet he testified before the appellant was given the said documents.

13. The trial court failed to recall PW8 for cross examination by the appellant despite a request by the appellant. PW8 was Patrick Ruto testified to have recognized the appellant as the esculent whom he had alleged to have met the night before, and the person who had killed Peter during the robbery. The above witness was a material witness in the matter of identification. The appellant did not have this benefit of his statement, though he proceeded to cross examine him.

14. In her judgment, the trial magistrate, relied heavily on PW8'S evidence of identification of the robbers stating

“PW8 even says when he saw the accused the following morning he asked if “aren't you the person I gave a cigarette last night?”.

It was incumbent upon the trial magistrate to consider the nature of evidence adduced by PW8, and allow him to be recalled for cross examination when his statement was provided to the appellant. This evidence of identification is one of the grounds of appeal. Clearly the trial magistrate misdirected and misapprehended the evidence and thus erred in law and fact by her failure to direct and order the prosecution to procure PW8 for re-examination by the appellant without any reasons given.

15. **Article 50(2) of the Constitution** requires that:

(2) every accused person has a right to a fair trial which includes the right –

(c) to have adequate time and facilities to prepare a defence

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence,

(k) to adduce and challenge evidence

16. In the case **Peter Njenga Njuguna Vs. Republic (2018) e KLR, Ngugi J** rendered that

“----- our jurisprudence is uniformly consistent on this question: it fatally viciates a trial to fail to supply an accused person with witness statements and other documents relied on by the prosecution so that he can prepare for his defence. This is now explicitly required by the Constitution at Article 50(2) © and (j). At a minimum, this right includes the right to receive a copy of the charge sheet-----”

17. As I have stated above (paragraph 4) the appellant was unrepresented at the time hearing started; but had the benefit of legal representation at the preliminary stages. None of the advocates then on record complained of not having been supplied with the charge sheet and the other documents. What is evidently clear is that when the hearing started on the 17/4/2014, the appellant had no documents with him, and despite request, none were supplied to him and prosecution witnesses testified without the appellants benefit of the documents. This is demonstrated by the trial court's recalling of PW1 and PW2 for cross examination after the appellant received the documents, at the tail end of the trial. The trial court's conduct by her failure to enquire and confirm that documents were provided to the accused stand

wanting.

18. It is an accused right as provided under Article 50 to be accorded a fair trial. The sole purpose of furnishing to an accused person with the documents the prosecution intends to rely on during the trial is to enable him to prepare his defense and challenge the prosecution evidence in cross-examination.

19. In this appeal, the appellant cross examined the prosecution witnesses without the advantage of the documents as stated by the **Court of Appeal in Thomas Patrick Gilbert Cholmendely Vs. Republic and Joseph Ndungu Kagiri Vs. Republic (2016) e KLR.**

20. The right to fair trial is not limited under Article 24 of the Constitution as the Cardinal principle in Criminal Justice is that an accused person is presumed innocent until proven guilty.

To that end, I find and hold that the prosecution's failure to provide the appellant with the documents the prosecution used during the trial before commencement of the trial to enable him prepare his defence and cross examination of the witnesses was an illegal and a serious breach of the principles of fair trial, and therefore a violation of his constitutional rights to a fair trial.

21. **In Republic Vs. Ward (16) Court of Appeal in England** the court unanimously rendered that

“-----furthermore, the prosecution were under a duty which continued during the pre-trial period and through the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case-----”

22. **Matter of Identification.**

Evidence of identification of the appellant as one of the robbers was adduced by PW2 Ashley Zuleka the deceased's wife, and PW8 as stated earlier.

In the first instance, the record of proceedings does not state that the appellant admitted having participated in the robbery as captured by the trial magistrate in her judgment pages 51-52. That without a doubt is a misapprehension of the evidence adduced by the prosecution and the appellant in his defence.

PW2's testimony is that during the robbery, there was a bulb light inside the house, and a security light outside the house. It was her evidence that she identified the man who ordered her to open the bedroom; that he wore a black cap. She did not give any description of the man, save to state that he looked drunk and confused.

23. In his sworn defence, the appellant testified on how he was given a lift and drugged and only recovered the following day, the 4/12/2012 about 5:00a.m. when he was disoriented with foam from his mouth and found people surrounding him, interrogating him of his identity, after which they went, together with him to report at the police station.

Later, on the 6/12/2012, the police placed him in an identification parade where PW2 pointed at him as the assailant who robbed her on the 3/12/2012. He was later charged with the offence.

24. In the judgment, the trial magistrate agreed with PW8'S evidence that the appellant looked drunk, confused and unaware of his surroundings on the 4/12/2012 when he was found in the victim's compound. The only reason the trial magistrate had to pin down the appellant was not because he was positively identified by PW2 and PW8, but that he had a gap between the teeth both upper and lower jaws, pointing at him at the dock. It was her evidence that it was a gang of seven people.

25. She further stated that she identified the appellant in an identification parade by stating that she saw the appellant the night before the parade so she could identify him. It was her evidence that out of the seven robbers, she only could identify the appellant.

26. The events that took place prior to the shooting of the victim and robbery in PW2'S house are not, in my opinion, adequate for positive identification of the appellant as one of the robbers. PW2 testified that when the robber followed her into her bedroom, she switched off the light. In that case, how did she identify him yet she had switched off the light? She did not give adequate scenario as to how and at what point she could see the robber, to discover gaps in his upper and lower teeth.

27. The trial court further made a finding of fact that there was no doubt that the accused was drunk, whether he did it voluntarily or he was drugged before being led to commit the offence as it's an issue to be determined after examination of **Section 13 (1) (2) of the Penal Code.**

28. From the above findings, the trial court came to a further finding that the appellant was drunk but not to the level of not knowing what he was doing and therefore rejected his defence.

29. I have keenly considered PW8's evidence, the witness who testified to have met the appellant and gave him a cigarette about 11:00pm of the fateful night.

30. PW3 Stephen Njoroge, who accompanied PW8 to the victim's house to answer screams, about 12 midnight gave a different story. His evidence was that it was PW8 who borrowed a cigarette from a man they met on the road while going to PW's house. It was his further evidence that it was dark and did not recognize the man, that he was traced towards the wheat farm; and that he did not know him, yet the following morning, PW3 says he found him there.

31. The obvious question is if PW3 did not recognize him, how then could he testify to have found him t PW2's house the following day?

32. Evidence of Visual Identification in Criminal Cases can bring miscarriage of Justice and it is of vital importance that such evidence is examined carefully to minimize the danger – *Wambugu Vs. Republic* (1989) KLR 424, when it was held

“-----whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convincing the defendant in reliance of the correctness of the identification”

33. Further, it is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade – *Ajode Vs. Republic* (2004) e KLR.

In addition, the **Court of Appeal in Maitanyi Vs. Republic (1986) KLR 198 pronounced that**

“ There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainants did or to the police----- if a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description”

34. PW8 and PW3 visited the victim's house immediately after the robbery. PW2 at that point did not give to them any description of the robbers, leave alone the appellant, if indeed what she testified is credible. She only did so after seeing the man allegedly found drugged and unaware of his surroundings, and foaming from his mouth, the following morning in the village. Without any supporting evidence PW2 believed that the said man was one of the robbers. From the description she gave it can only be deduced that, she saw the man's gaps in his upper and lower teeth on the next day, not during the robber.

35. No wonder that during the hearing of this appeal, the prosecution counsel conceded that the identification parade was not properly conducted, as the appellant had been seen by the complainant a day after the robbery and was without any difficulty able to pick him up from the parade.

36. The appellant gave a very spirited defence, and explained the circumstances from which he was found in the victim's village the day after the robbery. It is unfortunate that the trial magistrate failed to given a thorough analysis of the defence against the prosecution evidence. How was it, or could it be possible that the appellant, if indeed he was one of the robbers, could commandeer PW2 and other house occupants using a gun/pistol at about 9:30pm, and about 11:00p.m he was still hanging out within the vicinity drunk and/or dragged and in the morning about 6:00a.m. was within the complainants homestead and/or village drugged with foam from his mouth, confused and unaware of his whereabouts? The whole prosecution evidence casts a lot of doubt as to whether the appellant was among the robbers who robbed the complainant's house, and unfortunately killed the owner, Peter Kosgei. Had the trial magistrate 36. I agree with the trial magistrate's findings that the robber who attacked PW2 came after her when she started screaming after seeing her husband lying unconscious bleeding and ordered her to open the door lest he shoots her, which she concluded, how's that the accused's person's state of mind was able to realise that PW2'S screams were dangerous and would attract neighbours so he went back to silence her. However, the question that begs' an answer is whether that robber was the appellant.

37. Having carefully analysed and re-evaluated the entire evidence, I come to the unenviable conclusion that the appellant was not the robber who terrorized PW2, as no positive identification was achieved during and or immediately after the robbery incident.

As stated in the case **Woolmington Vs. Republic DPP (1935) UKHLI, and cited with approval by the Court of Appeal in Jali Kazungu Gona Vs. Republic (2017) e KLR.**

“-----If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner----- the prosecution has not made out the case and the prisoner is entitled to an acquittal”.

Ultimately I am convinced that the evidence of identification was contradictory and not properly tested and analysed by the trial court.

38. The upshot is that the appeal succeeds on the two main groups stated above.

For the foregoing, the appellant's conviction is quashed, and the sentence set aside.

39. The appellant is therefore released forthwith unless otherwise lawfully held.

Delivered, signed and dated electronically, at Nairobi this 7th day of May, 2020.

J.N. MULWA,

JUDGE.