



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.26 OF 2019

(As consolidated with Criminal Appeals No.11 of 2019 and 64 of 2019)

(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalang'o (SRM) delivered on 19th October 2018 in Makadara Criminal Case No.1826 of 2016)

MICHAEL ODUOR ODONGO.....1ST APPELLANT

KENNEDY ONYANGO OCHIENG.....2ND APPELLANT

STEPHEN OCHIENG AWILLY.....3RD APPELLANT

GEORGE RWEYE MAMU.....4TH APPELLANT

MORRIS BARITUNGA OMUSULA.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants were jointly charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 10th July 2016 at Lucky Summer Easter, Ruaraka in Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely knives, robbed Phares Makisa of his mobile phone make Samsung and Kshs.4,000/- and at the time of such robbery used actual violence to the said Phares Makisa (hereinafter referred to as the complainant). When they were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were all found guilty as charged. They were each sentenced to serve twenty (20) years imprisonment. They were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging the said conviction and sentence.

In their respective petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of evidence of identification that was made in difficult circumstances that could not sustain a conviction. They were aggrieved that they were convicted by the trial court yet the evidence adduced against them was insufficient to sustain their conviction. They took issue with the fact that they were convicted on the basis of conflicting and scanty evidence that did not point to their guilt. They pointed out that their respective plausible defences were not taken into account before the trial court reached the impugned decision. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the custodial sentences that were imposed on them.

During the hearing of the appeal (the appeals were consolidated and heard together as one since they emanated from a single trial), each Appellant presented to court written submission in support of his appeal. In essence, the Appellants argued that their conviction on the basis of the evidence of identification which was allegedly made at night, in circumstances that did not favour positive identification, could not be sustained. The Appellants relied on various decided cases which points to the fact that for the trial court to convict on the basis of the evidence of identification made in difficult circumstances, such evidence must be watertight and free from the possibility of error or mistaken identity in order to sustain a conviction. In the premises therefore, the Appellants urged the court to allow their respective appeals.

Ms. Kimaru for the State opposed the appeal. She submitted that the evidence of identification that was adduced by the prosecution witnesses established to the required standard of proof that indeed the Appellants were identified during the course of the robbery by the complainant and his friend. There was sufficient light which enabled the prosecution witnesses to identify their assailants. Further, the Appellants were apprehended by members of the public shortly after the robbery incident. A report was made to the police. Upon being searched, a kitchen

knife was recovered from the 3rd Appellant. Learned prosecutor asserted that the complainant and his friend sufficiently described the physical features of their assailants which fitted with the physical description of the Appellants. An identification parade was conducted where the complainant and his friend confirmed their initial identification of the Appellants. Unfortunately, the police officer who conducted the identification parade did not testify before court. The identification parade forms were not produced into evidence. Learned prosecutor submitted that this failure should not distract the court from reaching a finding that indeed the Appellants had been properly identified. In the premises therefore, she urged the court to dismiss the Appellants' respective appeals and confirm their conviction and sentences.

The facts of this appeal, according to the prosecution witnesses, briefly is as follows: The complainant in this case, who testified as PW1 told the court that on 10th July 2016 at around 11.00 p.m. he paid a visit to his friend PW2 Elly Wandege, a resident of Lucky Summer Estate. He was at PW2's house up to about midnight when he left for his home. He was escorted part of the way by PW2. Shortly after leaving PW2's house, they found a motor vehicle stuck on the road. The driver of the motor vehicle was known to the complainant. They decided to assist the driver push the motor vehicle from where it had gotten stuck. After a short while, a group of about eight young men came to the scene. Under the guise of assisting them push the vehicle, one of them pickpocketed the complainant. When the complainant confronted the person who had pickpocketed him, the other members of the group jumped at him and assaulted him. The complainant told the court that he was beaten both with fists and with a stone. He was robbed of his mobile Samsung phone and Kshs.4,000/-. When PW2 attempted to come to the rescue of the complainant, he was threatened with a knife. After they had robbed the complainant, the group left the scene. The complainant told the court by that time he was unconscious. PW2 took the complainant to the nearby Neema Hospital where they were referred to St. Francis Hospital for further treatment. The complainant regained his consciousness at about 6.00 a.m.

During the robbery incident, the complainant and PW2 told the court that they were able to identify their assailants. They both stated that there were street lights at the scene. They testified that one of their assailants wore dreadlocks. Another was wearing a red T-shirt while another was wearing a white T-shirt. Another was wearing a brown jumper while another was said to be tall and slim. PW4, John Odhiambo Odima was at the material time of the robbery having a drink at Sengeti Bar. This establishment is within Lucky Summer Estate. He left the bar at around 11.00 p.m. He got information that the complainant had been attacked. On the following day, he met the complainant who gave him the description of his assailants. He told the court that he knew the persons that the complainant was describing. With the assistance of the police, he caused the Appellants to be arrested.

The Appellants were arrested by the police officer including PW5 Cpl Farutious Daniel who was then based at Ruaraka Police Station. He told the court that on 10th July 2016 at around 1.00 a.m., while on patrol at Lucky Summer Estate, they were drawn to a commotion near Sengeti Bar. They were informed that a businessman (the complainant) had been robbed. Members of the public had apprehended the robbery suspects. They wanted to lynch them. One of them had a kitchen knife. They rescued the suspects and took them to the police station. These suspects are the Appellants in this appeal. The case was investigated by Cpl. Kosgei Pius of Ruaraka Police Station. He told the court that after concluding his investigations, including arranging for a police identification parade to be conducted, where the Appellants were positively identified by the complainant, he came to the conclusion that a case had been made for the Appellants to be charged with the offence that they were convicted. The complainant was seen by PW3 Dr. Joseph Maundu of the Nairobi Police Surgery. He was seen a day after the robbery incident. The doctor noted that he had a cut wound on his right eyebrow, had a swell around the right eye, had a loose upper incisor tooth, had a swollen upper lip and a cut wound on the right side of the head. He was of the opinion that the injury had been inflicted by a blunt object. He assessed the degree of injury to be harm. The kitchen knife recovered during the robbery and the P3 form were both produced as prosecution's exhibits.

When the Appellants were put on their respective defences, they denied committing the offence. They each gave a defence explaining the circumstances of their arrest. They told the court that they were arrested on the material night while they were on their way home from their usual pace of work. In essence, they were saying that they were victims of mistaken identity. They did not rob nor did they assault the complainant. They were not at the scene of crime and were only confronted by members of public and falsely accused of being the robbers after the robbery incident had occurred.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1987] eKLR** stated this on the duty of the first Appellate court:

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”

In the present appeal, the issue for determination is whether the prosecution established the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** brought against the Appellants to the required standard of proof beyond any reasonable doubt.

In the present appeals, it was clear to the court that the Appellants were convicted solely on the basis of the evidence of identification made in circumstances that can only be described as difficult. There are several decisions of the Court of Appeal that guide the trial court while considering such evidence of identification. In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**, the Court held thus:

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“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”.

For the court to convict solely on the evidence of identification, it must be satisfied that the complainant indeed identified the Appellants. In that regard, the court must consider whether there was sufficient light which would have enabled the complainant to be positive that he had identified the Appellants. His position at the scene of crime *vis-a-vis* that of the Appellants in relation to the light must be taken into account. The time that the robbery took place must also be considered. If it is a short time, say 5 minutes, it may well be impossible for the complainant to positively identify his assailants. The hectic circumstances and the state of mind of the identifying witness must also be taken into consideration. An important aspect when considering such evidence of identification is the description given to the police of the assailants in the first report made to the police. Such description would later be important if an identification parade is held to confirm the identification of the perpetrators of the crime.

In the present appeal, this court is not convinced that the complainant and his friend positively identified the Appellants as being the persons who robbed them during the material night. After the robbery incident, the complainant told the court that he became unconscious. PW2, the other identifying witness, took the complainant to hospital. They did not make a report of the robbery to the police until after the Appellants had been apprehended. PW5, was on the material night on patrol at Lucky Summer Estate. He was with other police officers. He responded to a commotion outside Sengeti Bar where the Appellants had been apprehended by members of the public. The police were told that the Appellants had robbed the complainant. None of the members of the public who apprehended the Appellants were called to testify in court. It was not clear from the prosecution's evidence the basis upon which the members of public apprehended the Appellants and accused them of being members of the gang that robbed the complainant.

It was clear from the evidence that the Appellants' arrest was unrelated to any complaint that may have been lodged by the complainant. This court formed the opinion that the description the complainant gave before court of his alleged assailants was made after seeing the Appellants at the police station after their arrest. It was clear from the evidence adduced that the complainant and PW2 did not give the description of their assailants when they went to make the first report to the police before being exposed to the Appellants. Further, it was clear from the complainant and PW2's testimony that the Appellants were not known to them prior to the robbery incident. The fact that the evidence of the police identification parade that was conducted was not adduced into evidence makes the evidence of identification by the complainant and PW2 even more tenuous. This court is not convinced that the circumstances in which the robbery took place was conducive for positive identification.

This court therefore holds that the evidence of identification adduced by the prosecution witnesses was not sufficient to sustain the conviction of the Appellants. Since no other evidence was adduced to corroborate the evidence of identification (the robbed items were not recovered), this court is of the view that the defence adduced by the Appellants that they were victims of mistaken identity may well be the correct position.

In the premises therefore, this court allows the Appellants' respective appeals. Their respective convictions are quashed. The custodial sentences that were imposed on them by the trial court are set aside. They are ordered released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH MAY 2020

L. KIMARU

JUDGE