REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 32 OF 2017

JOSEPH MEMIA MBURU.....APPELLANT

-VERSUS-

REPUBLIC............................RESPONDENT

(Being an appeal against original conviction and sentence in Nakuru Criminal Case Number 2681 of 2013 by J. N. Nthuku (Senior Resident Magistrate) on the 22nd day of March, 2017)

J U D G M E N T

1. On 22nd March, 2017, the appellant herein Joseph Memia Mburu was convicted and sentenced to death for the offence of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code.**

2. He, together with three others had been charged that on 26th July 2013 at Zaburi Shopping Centre Nakuru County jointly with others not before court robbed Peter Ndung'u Muturi of a motor vehicle registration number KBK 630Y Mitsubishi Lorry, two (2) mobile phones, Nokia Xi, a National Identity, Driving Licence, Equity and Co-op Bank ATM cards all valued Kshs. 7,006,300/=. That at the time they were armed with a dangerous weapon, a pistol, and at, immediately before or immediately after the said robbery, threatened to use actual violence against the complainant.

3. The appellant was aggrieved and he filed petition of appeal on 10th November 2017 on the following grounds;

1. The trial magistrate erred in law and fact in convicting and sentencing the appellant yet no proper identification was established.

2. The trial magistrate erred in law and in fact by failing to make a finding that the identification parade was flawed.

3. The trial magistrate failed in law to evaluate the evidence adduced in court by the witnesses and make a finding that it was contradictory.

4. The trial magistrate failed to make a finding that the arrest to the appellant was disputed.

5. The trial magistrate erred in law and in fact by failing to consider the defence of alibi.

6. The trial magistrate convicted and sentenced the appellant on suspicion.

7. The trial magistrate erred in law and in fact by failing to come to a finding that the appellant was innocent and committed no offence.

8. The trial magistrate was biased and erred in law by refusing to grant the appellant a right to a fair trial.

9. The trial magistrate without any justification refused to consider the defence tendered by the appellant.

And Supplementary Grounds on 23rd March 2018.

1. THAT the learned trial Judge erred in law and fact in convicting the Appellant while relying on the contradicting evidence of the prosecution witnesses.

2. THAT the learned trial Judge erred in law and fact in convicting the Appellant and yet there was no eye witness and no proper identification of the Appellant.

3. THAT the learned trial Judge erred in law and fact in relying in the insufficient evidence of the prosecution and further that identification was not properly done.

4. THAT the learned trial magistrate erred in law and fact in overlooking the fact that the evidence relied on was not watertight to justify a conviction.

5. THAT the learned trial magistrate erred in law and fact in sentencing the appellant to life imprisonment which was excessive.

6. THAT the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant.

7. THAT the learned trial magistrate erred in law and fact in failing to consider the strong defence and submission by the Appellant.

His counsel filed written submissions on 9th May 2019 in which they set out eight (8) issues for determination.

1.Whether the learned trial magistrate erred in law and facts in convicting the appellant relying on the contradicting evidence of the prosecution witnesses.

2. That the learned trial magistrate erred in law and fact in convicting the appellant yet there was no eye witness and no proper identification of the appellant.

3. That the learned trial magistrate erred in law and facts by overlooking the fact that the evidence relied on was not watertight to justify the conviction.

4. That the learned trial magistrate erred in law and fact in sentencing the appellant to life imprisonment which was excessive.

5. Whether the learned trial magistrate erred in law and fact in sentencing the appellant to life imprisonment which was excessive.

6. Whether the learned trial magistrate erred in law and facts by shifting the burden of proof to the appellant.

7. Whether the learned trial magistrate erred in law and facts by failing to consider the strong defence and submissions by the appellant.

8. That the learned trial magistrate erred in both law and facts in misconstruing the circumstances of the arrest of the appellant in connecting him with the purported robbery committed on 26th July 2013 to one Peter Ndung'u Muturi, the appellant did not have nexus to this felony.

4. Mr. Mong'eri argued the appeal for the appellant. He submitted that the appellant's contention was identification was not proper. Hence the appellant essentially collapsed his Grounds of Appeal to;

- Identification
- Failure of prosecution to prove ownership of motor vehicle
- Defective charge sheet.

5. The appellant challenged the prosecutions submissions contention of Ms. Chelang'at that the witnesses had seen the appellant in the morning before the robbery as the driver of the 'Saloon car" in which one of the other accused persons had posed. It was argued for the appellant that no description of the appellant was given to the police to warrant his arrest, and the alleged identification parade, and in any event, the identification parade officer who conducted the identification parade in respect of the appellant never testified.

6. It was argued that the charge sheet was defective for not setting out the individual values of the alleged stolen items. The state contended that the charge sheet was not defective.

7. It was also argued that the prosecution produced no evidence to prove ownership of the alleged stolen items.

8. The case for the prosecution was set out by seven (7) prosecution witnesses. The scene was set by PW6, No. 234908 IP Richard Rasiene. He testified that on 26th July 2013 he was on patrol duties with his two (2) colleagues when they met boda boda operators who told them that there was a lorry driver who told them that he and his conductor were robbed of a lorry at Kiamunyi, and that the driver had left on another boda boda to where the conductor was lying unconscious at Mbaruk. He and his colleagues proceeded to Mbaruk area where they found the driver and the conductor, who looked drunk. The two told them they had been drugged by known people and robbed of motor vehicle registration number KBK 630Y. He and his colleagues escorted them to the police station where the OCPD directed him to book them in the cells because he did not believe their story.

9. He confirmed that he did state in his statement that the two told him they could identify the robbers if they saw them. He also confirmed that the 1st report as booked in OB 19/26/7/2013 DID not indicate that the 2 stated they could identify their attackers, neither did the incident

report booked by the CID officer Mburugu on 2nd August 2013. The two (2) did not report that they could identify their attackers. He confirmed that the two appeared dizzy but were conscious, that something was not right with them but he did not take them to hospital. On cross examination he said that the driver of the lorry was conscious and met the boda boda riders on his way to the police station.

10. The investigating officer PW7 No. 75828 PC Joseph Mburugu was handed over the case on 1st August 2013. After arresting the first accused and placing her in cells, he learnt that she was receiving threats on phone. He testified;

> "I got information from CIU and Safaricom on the callers and they led me to the 2nd accused (the appellant) and the 3rd accused (deceased) as the ones threatening the 1st accused.
>
> It is the 1st accused who gave me the numbers threatening her on phone and those are the numbers I gave to CIU. On 3/8/2013 the 2nd accused(appellant) and the deceased were traced while travelling from Eldoret to Nakuru and operation lounged at Eveready and all vehicles stopped. <u>Since we already had the names of the persons we were looking for everybody stopped was asked for their identification cards and that's when the 2nd accused(appellant) and the deceased were arrested." (emphasis mine) …</u>The complainant and turn boy identified the 2nd and 3rd accused and the 4th accused was charged jointly with the others with this offence."

He later caused the appellant to be charged with this offence. On cross examination he said;

> "I don't know the relationship between 1st and 2nd accused. The complainant didn't talk to 2nd accused. So he couldn't identify his accent. The 2nd accused was driving the saloon car according to the complainant. The driver identified the 2nd accused at the point of hiring the motor vehicle. The complainant was assisted by motor bike operators to Mwariki Police Station. I can see Rasiene said he met the complainant and boda boda operators."

11. It is with this evidence in the backdrop that I will look at the rest of the evidence.

According to PW1 he and PW1 were hired to move a certain lady (1st accused) from Pius Muiru Area to Salgaa on 26th July 2013. They met this lady while she was inside a saloon car which they alleged was driven by the appellant. That was at 10.00 a.m. It is not clear what time the offence was committed but the PW1 and PW2 testified that upon being hired they were directed to place in Zaburi, where they found saloon car in front. PW1 gave the driver of the saloon full lights but what followed was an attack, by people who came from inside the car who beat them up and bundled them into the saloon car, drove around with them and dumped them. PW1's testimony was that he identified the appellant's facial looks and described him to the police. However on further cross examination he retracted this and said he did not give any description to the police, but registered their faces in his mind, physical appearance and accent. He also said he lost consciousness and came to at Mwariki Police Station, clearly contradicting PW6 who testified that he was conscious, and was able to leave the scene for the police station.

12. Be that as it may, it is clear from the evidence of PW6 and PW7 that no description of the attackers was given to the police, and neither was there any record either at the initial report or before the arrest of the appellant that the complainant on any witness would be able to identify the attackers if he saw them. The investigating officer also testified that he had names of the suspects, and that is how he identified the appellant, through his identity card. However, he produced no evidence at all to demonstrate how he came to know the full names of the suspect he was looking for, to be the appellant herein.

13. The testimony of PW3 the turn boy throws a spanner in the prosecution's case with regard to identification. He claimed that he clearly saw the second accused, the appellant herein twice, and the second time, that it was the appellant who hit him and threw him out of the lorry. His evidence contradicts that of PW1 in this respect. PW1's testimony was that at the robbery it is the appellant who drove the saloon car, that the conductor PW3 was pulled out of the lorry and beaten up by another man, the investigation officer PW7 testified that the person who attacked PW3 was the person who had presented himself as the brother of the lady who was moving house, the same person who directed them right into the trap.

14. Clearly at this point, it is already clear that there were several persons who did different things, which were attributed to the appellant, in addition PW3 testified that he heard people calling the appellant "Simon". According to the I.O this was not the appellant's name as it was not told to the police. He testified that the appellant drove the motor vehicle, at the same time gave him an alcoholic beverage to drink. Yet in PW7's testimony there was nothing about the appellant driving the motor vehicle from the scene of the robbery. PW3 confirmed he did not know how the appellant was arrested, but identified him in an identification parade. He testified that he recognized the appellant while at the same time saying that he was drugged and passed out for hours and contrary to the evidence of PW6 he said he regained consciousness before PW1, the driver.

15. Again, clearly from PW3's testimony he did not give the police any evidence on which they could arrest the appellant. According to PW7 the appellant was arrested upon information obtained by the "CIU", yet no one from this "CIU" testified, and he did not produce that evidence in court.

16. PW1 testified that he was able to register the physical appearance, facial appearance accents of the appellant, nowhere in the evidence of identification did he mention this in **<u>Maitanyi v Republic</u> [1986] eKLR** the court stated';

> i. 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 complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.

17. The identification parade evidence was therefor of no probative value. It was submitted that since the police officer who did the identification parade did not come to court despite the summons issued to him or avail himself to court during trial therefore, it was proof that the identification parade was wrongly done and the appellant was identified wrongly for a crime that he did not commit. The steps to be followed in an ID parade were set out in in **Ajode v R [2004] 2 KLR 81, ASIKE MAKHANDIA J, W. OUKO J & K M'INOTI** held that

> **"before an identification parade is held, a witness should be asked to give the description of the person sought to be identified. Ideally, that advance description of the person ought to be in writing and the same, together with parade forms availed to the trial court so that it can be compared with the description given of the accused. This was not the case here. That notwithstanding, PW2 claimed to have picked out the appellant on the basis of his swollen mouth. It is this evidence which was adopted and relied on by the trial court and confirmed by the first appellate court to found a conviction. However, there is no evidence that PW2 had seen the appellant with the swollen mouth during the incident." In any event, Rule 6 (iv) (d) of the Force Standing Orders requires that: -**
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> > **"….. the accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance, and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent…"**

18. In this case just like in **GEORGE MEREBA MACHOGU & 2 OTHERS V REPUBLIC [2017]**, the ID parade forms were not produced and the prosecution closed its case without producing them. In this case the court held, and I agree, with respect to the appellant herein;

> **"It is my finding that the trial magistrate misapprehended the purpose and import of an identification parade when she held that the appellants were positively identified by the complainant despite her finding that the identification parade forms were not produced in court, in which case the trial court had no way of determining if the identification parade was properly conducted or not. One then wonders how the trial court arrived at the conclusion that the appellants were positively identified in absence of the relevant document of proof."**

19. Taking into consideration the circumstances of this case it falls squarely into the holding in **FRANCIS KARIUKI NJIRU & 7 OTHERS V REPULIC [2001] R.S.C OMOLO J, E.O. O'KUBASU J & S. E. O BOSIRE J** where it was held;

> **"The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. V. Turnbull [1976] 63 Cr. App. R. 132). Among the other factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."**

20. In this case there was none at all. I am satisfied that there was insufficient evidence to prove identification.

21. Regarding the other issues, the record will show that no documents were produced to show that the motor vehicle actually existed, even the other stolen items e.g. phones. It was alleged there was mobile phone communication between the appellant's phone and that of 1st accused but no such evidence was produced.

22. The evidence of identity is crucial in any criminal matter as the risk of incarcerating an innocent person is very high when that is in issue. In this case, I am persuaded, after reevaluation the evidence, that there was insufficient and contradictory evidence when it came to the identity of the appellant as one of the robbers. To that end I find that the appeal has merit. The same is allowed. The conviction is quashed, the sentence set aside and the appellant set free unless otherwise legally held.

Dated and signed and delivered at Nakuru this 13th July, 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Court Assistant Joseph

Mr. Mong'eri for appellant

Ms. Wambui for state

Appellant present