REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 389 & 388 OF 2010.

LAWRENCE MWAURA WANYOIKE.....1ST APPELLANT.

THOMAS MWANIKI WACHIRA.....2ND APPELLANT.

VERSUS

REPUBLIC .....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Makadara Cr. Case No.4392 of 2007 delivered by Hon. T. Ngugi, PM on 8th July, 2010).

JUDGMENT.

Background.

1. Lawrence Mwaura Wanyoike and Thomas Mwaniki Wachira, hereafter the 1st and 2nd Appellants respectively, were charged of committing the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 2nd October, 2007 at Ruai Stage 26 in Kayole Division within Nairobi Area, being armed with a dangerous and offensive weapon namely pistol robbed Mr. Erustus Mwangi Macharia of his cash Kshs. 5,000/-, one mobile phone make 1018, one pair of shoes, a wrist watch and personal documents all valued at Kshs. 25,630/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Erustus Mwangi Macharia.

2. The Appellants were arraigned in court and at the conclusion of their trial found guilty and sentenced to suffer death. They were dissatisfied with that court's decision and have lodged the present appeal against both the conviction and sentence. The 1st Appellant's amended grounds of appeal filed 14th November, 2018 were that; the initial report did not identify or describe him, the burden of proof was not discharged and his alibi defence was not considered. The 2nd Appellant's grounds of appeal were set out in an addendum to his written submissions filed on 14th November, 2018. They were that; the particulars of the charge sheet were at variance with the evidence adduced contrary to Section 214 of the Criminal Procedure Code, the PW1 did not include his name in the initial report thus failing to demonstrate his involvement in the robbery, the case was not proved beyond a reasonable doubt, his mode of arrest was doubtful, the investigations were shoddy, his conviction was based on mere suspicion, and his defence was not considered.

Submissions.

3. Both Appellants were in person while Ms. Nyauncho acted for the Respondent. The Appellants filed written submissions which they briefly highlighted while Ms. Nyauncho made oral submissions.

4. The 1st Appellant submitted that Section 200(3) of the Criminal Procedure Code was not complied with when Hon. Muriithi took over the matter. That they had the right to recall witnesses and they were not informed of this fact. Further, that the Appellants answer to the question whether to have the matter proceed or begin *de novo* was not set out on the record. Amongst the cases cited to buttress the submission were; **Morris Kinyalili Liema *v.* Republic[2012]eKLR, Stephen Waweru Nyambura *v.* Republic[2016] eKLR, and Cyrus Muriithi Kamau & another *v.* Republic[2007] eKLR.**

5. He argued that the identification evidence in the present case was not sufficient to found a conviction and questioned whether the evidence of recognition could be relied upon in the present case. He submitted that the conditions conducive for a positive identification were not existing. He relied, *inter alia*, on the cases of **Leboi Ole Toroke *v.* Republic(CoA Crim. App. No. 204 of 1987), Paul Etole & another *v.* Republic[2001] eKLR and Kennedy Maina *v.* Republic[2008] eKLR to support the submission.** It was the 1st Appellant's submission that his conviction was not safe and urged the court to uphold his appeal.

6. The 2nd Appellant submitted by stating that the initial report neither identified him nor gave his description. He also questioned the divergence between the initial report and the evidence adduced by the complainant specifically, why the initial report indicated that the perpetrators were three while the evidence of the complainant was that he was attacked by two people. He relied on **Thomas Oluoch Okumu *v.* Republic[2001] eKLR** to buttress this submission. It was his view that the particulars of the charge were at variance with the evidence. He was of the view that the identification evidence was insufficient to found a conviction.

7. He pointed to the failure by the complainant to indicate in his statements that he knew him, thus a pointer that his identification was not free from error, suggestibility or contamination. He added that he was allegedly identified by a single witness in difficult circumstances, hence a possibility of a mistaken identity was very high. He concluded by submitting that given that this was a case of identification by a single witness in difficult conditions chances of mistaken identity were high especially as no inquiry was made as to the foregoing conditions at the scene. He urged the court to allow the appeal.

8. Ms. Nyauncho submitted that PW1 recognized the Appellants as the perpetrators as he knew them well prior to the incident and that there was a full moon at the scene and lights from passing cars which assisted in the identification. That this was clear from the initial report in which the complainant informed the court he knew his assailants. Furthermore, the complainant identified them after they were arrested, eleven days later. This was corroborated by PW3 who took part in the arrest. With regards to the sentence passed by the trial court she submitted that the court should take cognizance of the fact that the Appellants were armed during the incident.

9. In reply, the 1st Appellant, submitted that nothing was recovered from him that linked to the offence. That additionally, PW1 failed to lead the police to his home which he claimed to know. He submitted that he was arrested going home and urged the court to consider the alibi defence.

10. The 2nd Appellant in response faulted the fact that PW1 did not indicate the presence of the moon in his statement. With regards to the light of vehicles passing by he submitted that it was doubtful how the complainant made out the number plate of a vehicle while being robbed. He submitted that he was arrested on the basis of blood on his clothes but it stained his clothes as he helped the police carry a body from an earlier robbery scene.

Evidence.

11. PW1, Erastus Mwangi Macharia was the complaint. On 2nd October, 2007 he was headed home when he met two men who asked him what he was carrying. The 1st Appellant pointed a gun at him and asked him to lie down and give up everything. He gave them his wallet which had Kshs. 5,000/-, an Ericsson 1018 mobile phone, 2 torches, personal documents and a pair of shoes. He was then tied up by the 2nd Appellant before the robbers left but he was able to get home where his wife untied him. He reported the matter to the police and even mentioned the names of the suspects. He was asked to look for the robbers and inform the police when he found them. When he informed the police they did not act. After about a week he was called and informed that some robbers had been arrested. He went and identified the 1st and 2nd Appellants as the robbers. He recalled that there was full moonlight on the night in question and also lights from passing vehicles which allowed him to identify them. In cross examination he stated that the 1st Appellant was a neighbor while he knew the 2nd Appellant as he had employed him to dig a latrine. Further, that his statement did not indicate that he could identify the Appellants. **PW2, Rosemary Jane Mwangi** wife of PW1 was informed on 2nd October, 2007 by the houseboy that her husband required her help. She went and found PW1 hands tied to his back with laces and helped to untie him.

12. **PW3, Sionge Makori,** the chairman of Community Policing at Ruai Stage 26 recalled that on 13th October, 2007 at around 11.00 pm they were at a wake when they heard gunshots and they went to find out what had occurred. They were informed someone had been shot by robbers and they decided to lay an ambush in a nearby bunker where they knew the robbers used to hide. They were able to arrest the Appellants. They suspected them of being robbers and they called PW1 who came and identified them as the men who had robbed him.

13. **PW4, Sgt. Patrick Mwatha** was informed by the members of public on 13th October, 2007 that they had arrested two robbers at Stage 26. PW1 informed him that the arrested persons were his robbers. He recalled seeing the 2nd Appellant earlier that evening as he had assisted him move a victim who had been shot earlier in the day. **PW5, PC Silas Masoe** he was the investigating officer. He recorded all the witnesses' statements and charged the Appellants on 19th October, 2007.

14. **DW1,** 1st Appellant denied he committed the offence. He stated that he was arrested on the road while coming from a construction site on 13th October, 2007. The mob who arrested him beat him up and accused him of robbing members of the public. He tried to explain himself but he was arrested and taken to Ruai Police Station before being charged in the present case. **DW2,** 2nd Appellant also said that he was going home on 13th October, 2007 at around 7.30 pm. He was at the shops near stage 26 when he was informed someone had been attacked by robbers and needed help. He proceeded to the scene and they found the man on the ground. The police soon arrived at the scene and one of the officers asked him to assist him get the injured man into the motor vehicle. He assisted the officers to take the man to Ruai Dispensary where he got first aid and he then went home. That on his way home he was stopped by some people who questioned him and then arrested him. That is when he was arrested and taken to Ruai Police Station after which he was charged.

Determination.

15. After evaluating the evidence on record and the submissions by the respective parties this court finds that the following issues arise for determination:

i. Whether Section 200(3) of the Criminal Procedure Code was complied with

ii. Whether the offence in question was proved beyond reasonable doubt.

Whether Section 200(3) of the Criminal Procedure Code was complied with.

16. Compliance with this provision is a mandatory obligation on a judge or magistrate succeeding another in a trial as was held by the Court of Appeal in **David Kimani Njuguna *v.* Republic[2015] eKLR,** to wit:

> ***"…the provisions of Section 200(3) are Mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or Magistrate complies with it out of a statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court renders the trial a nullity."***

17. The present trial was first heard by Hon. Muneeni who was tsucceeded by Hon. E. Muriithi, as he then was, who complied with the provision on 27th November, 2008 by informing the Appellants who then chose to have PW1 recalled. Hon. Muriithi, as he then was, heard the rest of the prosecution evidence and made a ruling that there was a case to answer. He was then succeeded by Hon. T. Ngugi. The proceedings of 1st October, 2009 were as follows:

> ***"'Mr. Memusi for accused persons: It's part heard by Honorable Muriithi. Its for hearing. Its proceeding under section 200 of CPC***
>
> ***Court***
>
> ***Trial magistrate away on official duties***
>
> ***Hearing adjourned for 1/2/09***
>
> ***Mention on 15/10/09"***

18. When the matter came up on 1st December, 2009 the court set the defence hearing for 31st December, 2009 but the matter was adjourned to 8th April, 2010 when the defence was finally heard. There was nothing on the record to indicate an explanation to the Appellants of their right under Section 200(3) of the Criminal Procedure or an attempt to comply with the same. The only indication was the Appellants' advocate assertion that the matter was would proceed under Section 200 which was not indicative of compliance with the provision. Therefore, the succeeding magistrate abdicated his duty under Section 200(3) of the Criminal Procedure Code rendering the case a nullity.

19. In the circumstances, this is a case ripe for a retrial. The Court of Appeal in **Makupe *v.* Republic[1989] eKLR**, considered circumstances that offered exceptions to the general order for a retrial and held that:

> ***"In general, a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant(or accused)."***

20. The court is therefore under a duty to first evaluate the evidence in the matter. In the present case, the first thing that jumped out from the evidence was the circumstances of the Appellants' arrest. The evidence adduced by PW1, PW3 and PW4 was that the Appellants were arrested by what could aptly be described, to quote the 2nd Appellant, as a vigilante group. PW3 who testified that he was leading the group said that they laid an ambush and were on their way home when they saw an approaching figure whom they arrested. They saw another man further behind whom they also arrested. He testified that they suspected the men of being robbers and interrogated them. In the course of the interrogation they noticed blood on the 2nd Appellant's clothes which led them to conclude that he took part in a robbery earlier that evening.

21. It is trite that suspicion cannot form the basis of a conviction as was ably held in **Faith Lucas *v.* Republic[2008] eKLR,** that:

> ***"…suspicion, however strong, cannot be used as evidence in a criminal case…"***

22. In the present case it is clear that the Appellants were arrested in the vicinity of a notoriously unsafe area and held as suspects. The presence of blood on the 2nd Appellant's clothes seemed to confirm their suspicions but the evidence of PW4 clearly explained the presence of blood on the Appellant's clothes as he testified that earlier that evening a man was injured around Stage 26 and the Appellant had assisted in the caring for the man including getting him into the police vehicle and transporting the man to the hospital. He testified that there was a lot of blood at the scene where this man was injured. This clearly explained the presence of blood on his clothes.

23. While PW1 testified that he could identify the assailants it is clear that he did not set out the 2nd Appellant's name in the initial report or in his consequent statement. The court then finds that the 2nd Appellant was tied to the offence on mere suspicion and a conviction could not lie against him. The appropriate order in the circumstances is therefore for the 2nd Appellant's freedom.

24. The 1st Appellant was arrested in the same circumstances as the 2nd Appellant. The initial report as set out in Occurrence Book entry 6 of 3rd October, 2007 indicated that the complainant identified one of the robbers as one Mwaura, the Appellant's second name. However, the court did note that the complainant deviated from the contents of his initial report in his evidence. While he had reported that he was attacked

by three men, namely; a Kamba, Mwaura and another man, in his evidence he testified that he was only attacked by two men. Further, the complainant testified that he recognized the 1st Appellant who was his neighbor and associated with the local shop but he did not lead the police to his residence. PW1 testified that when he informed the police that he had traced the robbers they could not assist him as they lacked a motor vehicle. Having not identified the residence of the Mwaura he knew, it begs to convince the court whether the culpable Mwaura is the Mwaura who was arrested. The doubt in my mind must be accorded to the benefit of the 1st Appellant. This lackadaisical attitude to the offence is also clear from the fact that the investigating officer was assigned the case on 14thOctober, 2007, more than 10 days after the initial report. The matters raised clearly raise doubts about the recognition of the 1st Appellant by the complainant which is exacerbated by the fact that PW1 did not indicate that he could identify the perpetrators of the offence in his consequent statement.

25. In view of the foregoing, it is my humble view that the appeal against the 1st Appellant too should succeed. He is entitled to an acquittal. The sum total being that I find that the conviction of both Appellants was unsafe. A retrial would not thus serve the interests of justice. I accordingly quash the conviction, set aside the death sentences and order that both Appellants be forthwith set free unless otherwise lawfully held.

DATED and **DELIVERED** this **4th** day of **March, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *1st Appellant in person.*
2. *2nd Appellant in person.*
3. *Miss Atina for the Respondent.*