



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 100 OF 2016**

**DANIEL GICHUI NDEGWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**(Being an appeal from the original conviction and sentence in Criminal case Number 743 of 2013 in the Chief Magistrate's court at Mombasa – Hon. D. N. Ogoti (CM))**

**JUDGMENT**

1. The appellant herein **DANIEL GACHUI NDEGWA**, was jointly charged together with 3 others with 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 were that on 20<sup>th</sup> March 2013 at Railway Station area in Ganjoni Location in Mombasa District of the Coast province jointly robbed **EUGENE ARIKA MUMIA** of one laptop, computer make H.P compact valued at kshs. 56,000/- and immediately before or immediately after the time of such robbery wounded the said **EUGENE ARIKA MUMIA**. The appellant pleaded not guilty to the charges and a trial was conducted in which the prosecution called a total of 4 witnesses as follows:
2. PW1, the complainant, testified that on the material day at about 4.40am, he was on his way to his work when he was attacked by a group of 5 men who robbed him of his laptop, head phones, flash disk, pen, crew driver set and key. He stated that no sooner had the robbers left the scene than police officers on patrol passed by and that he informed them of the robbery. He further testified that out of the 5 robbers, he was only able to identify the appellant at an identification parade.
3. PW2 CIP PIUS MBURI testified that he was on the material day at about 7am at Central Police Station where he was allocated a robbery case to investigate and that suspects had already been arrested by one CPL Wekesa and PC Liben. He issued the complainant with a p3 form and conducted an identification parade with the assistance of IP Zeben as the in charge. He stated that the complainant identified the assailants who were then charged with the offence. He produced a panga (P exhibit 1).
4. Pw3 Dr. Said Mohammed produced the P3 form which showed that the complainant had a cut wound on the head and that the probable type of weapon used was a blunt object.
5. PW4, PC George Morara testified that he was on 20<sup>th</sup> March 2013 at about 5.30 am on patrol with his colleagues P.C. Liben and P.C. Egesha when the complainant stopped their vehicle and informed them that he had been attacked and robbed a laptop, and that in the process of the robbery, one of the robbers assaulted him with a panga. He claimed that the complainant then showed them the attackers who were sitting in one of the corners in the park but that when the alleged robbers noticed that the police were around the vicinity, they took to their heels thereby forcing the police to shoot in the air. He added that 4 of the suspects surrendered and were arrested while one of them, who had what looked like a laptop, escaped. He further testified that one of the 4 suspects had a blood stained panga at the time of the arrest which panga he recovered and produced as an exhibit.
6. At the close of the prosecution's case, all the accused persons were placed on their defence, but I will, for the purposes of this appeal only consider the unsworn testimony of the appellant herein as he was the only one convicted at the close of the trial.
7. In his said unsworn testimony, the appellant denied any involvement in the robbery and only narrated the circumstances and manner in which he was arrested on the morning in question while he was allegedly on his way to work after which he was charged with the offence of robbery with violence.
8. As I have already stated in judgment, out of the 4 accused persons, only the appellant was convicted and sentenced to suffer death thereby triggering the instant appeal in which he faulted the trial court for failing to note that the prosecution's case was not proved to the required standards and that circumstances under which the complainant was allegedly robbed were not conducive for positive identification.

9. He further stated that the prosecution's case did not meet the threshold of proof that is expected in a criminal case and that the alleged identification parade was neither here nor there considering that neither the parade officer nor the arresting officer testified to confirm the manner in which the exercise was undertaken.

10. The appellant and counsel for the state filed written submissions on the appeal which I have carefully perused and considered. As the first appellate court, this court is under a duty to re-consider and reanalyze the evidence tendered before the lower court afresh with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. *See Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

### **Analysis and determination**

11. I have considered the instant appeal and the rival submissions made by the appellant and the counsel for the state. The issues for determination are –

**a. Whether the offence of robbery with violence was committed; and**

**b. Whether the appellant was properly identified as having taken part in the alleged robbery with violence, if proved.**

12. The key ingredients of the offence of robbery with violence are the evidence of theft, the number of attackers, appellant being armed with a dangerous weapon and the beating of the complainant. The above ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

#### **“296. Punishment of robbery**

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any ***dangerous or offensive weapon or instrument***, or is ***in company with one or more other person or persons***, or if, at or immediately before or immediately after the time of the robbery, ***he wounds, beats, strikes or uses any other personal violence to any person***, he shall be sentenced to death.”

13. In the instant case, the prosecution relied on the claim that the appellant was in the company of 4 other persons and were in possession of dangerous/offensive weapon, namely; a panga, which they used to injure the complainant at the time of the robbery. The Court of Appeal in the case of *Odhiambo & Another v Republic* (Omolo, Githinji & Deverell JJA) (2005) 2 KLR 176 explained the ingredients of the offence of robbery with violence as follows:

**“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc. the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”**

14. In the present case the complainant testified that the attackers were about five and were armed with a panga which was allegedly used in injuring him. He further stated that he was robbed of his laptop computer and other items during the said attack. PW3 Dr. Said Mohammed testified that the complainant had a cut wound on the head. On account of the assault and the theft, I find that the offence of robbery with violence was proved, even if the prosecution was not able to prove that the attackers were two or more. The big question that this court needs to consider in this appeal however, is whether it was proved, beyond reasonable doubt, that the appellant was involved in the said robbery. The answer to the above question requires the determination of the issue of the identification of the appellant as the complainant's assailant. In doing so, the circumstances under which the alleged identification was done must be considered.

15. In this case, the incident allegedly occurred at night, at about 4.40am, when it was obviously still dark. The appellant claimed that there was light from the street lights near the scene of the robbery. I however find that neither the intensity of the light, nor its distance from the scene of the incident was described so as to enable this court gauge whether the lighting was sufficient to enable the complainant positively identify his attackers. It is noteworthy that there was no evidence that the recognition was based on voice or any other means. I therefore find that the circumstances of this case did not afford favourable conditions for the positive and accurate identification of the appellant given that the alleged robbers were complete strangers to the victim and were armed with dangerous weapons which must have caused fear and panic to the victim.

16. In his testimony during the trial, the complainant described the appellant as the shorter of the 2 suspects. It however worthy to note that the trial magistrate doubted this piece of evidence when he noted as follows during the cross examination of the complainant by the appellant:

**“You were the shorter of the 2 that I saw (NB accused 4 is noted to be almost the same height as accused1) you had watery eyes.”**

17. From the above extract of the complainant's testimony, it is clear that even the trial court was not convinced of the complainant's description of the appellant. In this regard, I find that the doubt created on the said description ought to have been construed in favour of the appellant.

18. As was observed by the Court of Appeal in Karanja & Another Vs Republic (2004) 2 KLR 140,

**“The law as regards identification under difficult conditions is now well settled. In the case of *Cleophas Otieno Wamunga vs Republic* Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows:-**

**“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of *R vs Turnbull [1976]3 All ER 549 at page 552 where he said:-***

**‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’”**

19. In the case of Kiilu & another v Republic, (2005) 1 KLR 174, the Court of Appeal (Tunoi, Waki & Onyango Otieno JJA) reiterated the position as follows:

**“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this 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. 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 probability of error.”**

20. I did not find any other evidence linking the appellant to offence of robbery. I am, accordingly, not convinced that the identification of the appellants by the complainant, in the circumstances of this case, was free from possibility of error.

21. The prosecution further alleged that a blood stained panga which was supposedly used in the attack was recovered from one of the suspects. The alleged panga was produced in court as an exhibit. I however note that no DNA analysis was done on the said panga so as to establish, firstly; if indeed it was stained by human blood and secondly, if the blood was that of the complainant. It is therefore my finding that the said panga did not add much value to the prosecution’s case.

22. Moreover, there was also the issue of failing to tender the evidence of the arresting officer and the identification parade officer so as to confirm the circumstances of the arrest and the alleged identification which, to my mind, were critical in proving the prosecution’s case. In the case of Bukenya & Others –vs- 1972 EA 349, it was held that:

**“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

23. In my humble view, it was incumbent upon the prosecution, to tender the identification parade forms and the evidence of the said IP Zeven in order to support this claim. This was not done and no explanation was offered to explain such failure. My take is that the only logical conclusion that one can arrive at is that either the said identification parade did not take place or its outcome was different from what was alleged before the court.

24. It is an accepted legal principle that whenever the case against the suspect depends wholly or substantially on the correctness of one or more identifications of the suspect, caution is required in convicting such a person and an identification parade is called for in order to remove any doubt as to the identity of the suspect. While it may not be mandatory to conduct an identification parade, the Court of Appeal has underscored the utility of identification parades in order to minimize the danger of mistaken identity. In James Tinoga Omwenga v Republic Criminal Appeal No. 143 of 2011, the Court of Appeal observed that:

**The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.**

25. In the instant case, PW2 and PW4 testified that in order to test the identity of the suspects, an identification parade was mounted by one Inspector Zeven where the appellant was identified by the complainant. The identification parade forms were however not produced by the said officer. The appellant contended that failure to call the call the maker of the identification parade forms was fatal to the case. The Court of Appeal held as follows in Achieng v Republic [1981] KLR 175:

**“[W]here an identification parade was held, the officer who conducted it must be questioned about it. Where such an officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as the finding of goods in possession of the appellant.”**

26. Courts have emphasized that without an identification parade they must examine and test, with greatest care, the evidence presented before convicting an accused. In **Muiruri and 2 Others v Republic [2002] KLR 274** it was held that:

**“We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken.”**

27. The question that arises is whether the testimony of PW1, who was the sole identifying witness, was sufficient to support a conviction. As I have already found in this judgment, the circumstances under which the appellant was allegedly identified during the alleged robbery did not favour positive identification. The trial court noted that the complainant’s identification of the appellant was doubtful. I therefore find that the failure, by the prosecution, to tender the identification parade forms as evidence before the trial court further weakened the prosecution’s case.

28. Having found that the identification of the appellant was not done in a satisfactory manner among other findings, I further find that the instant appeal is merited and I allow it with the result that the conviction of the appellants is hereby quashed and the sentence set aside. I direct that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and signed at Nairobi this 11<sup>th</sup> day of March 2019**

**W. A. OKWANY**

**JUDGE**

**Dated, signed and delivered in open court at Mombasa this 8<sup>th</sup> day of April 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

**Appellant present**

**Ms Marindah for the Director of Public Prosecution**

**Mr Oliver Musundi – Court Assistant**