



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CRIMINAL APPEAL NO. 168 OF 2017

JOSEPH MUEMA RAMCHE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 1023 of 2012 in the Principal Magistrate's Court, Naivasha, (E Kimilu – PM)

JUDGMENT

Background

1. The appellant Joseph Muema Ramche was indicted and convicted with one count of robbery with violence contrary to **section 295** of the **Penal Code** as read with **section 296(2)**. The particulars of the offence were on the 24th day of March 2012, along Naivasha- Nakuru road in Nakuru County, jointly with others not before the court while armed with dangerous weapons namely pistol and chemicals robbed Julius Nzioka Kimote registration number KBN 235Q Toyota NZE white in colour value the Kshs 950,000/= the property of Stephen Gikaru Waweru, one mobile phone make Nokia 2630 valued at Kshs 4,000/= and cash Kshs 4,000/= the property of Julius Nzioka Kimote, and during the time of such robbery used actual violence to the said Julius Nzioka Kimote.

2. At the hearing the prosecution had called six witnesses, whilst the appellant gave unsworn testimony and did not call any witnesses.

3. Dissatisfied with the judgment of the lower court, the appellant through his counsel Mr Waiganjo appealed on the following grounds contained in his supplementary petition of appeal:

“1. That the learned trial magistrate erred in law and fact by not addressing himself properly and adequately on the issue of proper and positive identification and more particularly failed to warn himself of the danger of conviction relying solely on evidence of a single identifying witness.

2. That the learned trial magistrate erred in law and in fact in relying on uncorroborated, inconsistent and contradictory evidence by prosecution witnesses

3. That the learned how magistrate erred in law and in fact in failing to consider the most crucial witnesses were never called and also most crucial documents or exhibits were never produced in court as evidence in this case

4. That the learner trial magistrate erred in law and fact by mainly relying on hearsay evidence in convicting the appellant merely on suspicion

5. That the learned trial magistrate erred in law and in fact by failing to consider that this was a poorly investigated case and in convicting the accused against the weight of the evidence adduced

6. That the learned trial magistrate erred in law and in fact in shifting the burden of proof upon the appellant whereas onus of proof on his lies of the prosecution and same cannot be shifted to the accused person”

7. The appellant filed written submissions and relied on a list of twenty authorities some of which I will refer to herein. Mr Koima for the state, opposing the appeal, made oral submissions at the hearing.

8. The issues for determination are as follows:

- a. Identification
- b. Failure to call relevant witnesses
- c. Failure to avail corroborating evidence
- d. Whether the offence was proved beyond reasonable doubt: contradictions and inconsistencies
- e. Conviction on circumstantial evidence and on suspicion

9. This is a first appeal. To that extent, this court is obliged to subject the evidence as a whole to a fresh and exhaustive examination, to weigh conflicting evidence, to our own conclusions and to come to our own decision on the evidence. In so doing, this court must bear in mind the comparative disadvantage of the fact that that it has not had the advantage, which the learned trial court below had, of hearing and seeing the witnesses testify.

10. The facts of the case are as follows: The complainant, PW1 Julius Nzioka Kiote, was a taxi driver operating vehicle registration number KBN 235Q a white Toyota NZE at Prestige along Ngong road. On 24 March 2012 at about 3.00pm he received a call on his mobile number 0726657751 from a mobile number 0751320542. The caller wanted to be taken to Naivasha from Adams Arcade to pick his sick mother and bring her back to Kenyatta National Hospital in Nairobi. They negotiated the costs, and agreed on Kshs 3,000/= shillings plus fuel. He met the customer, who entered the car and sat in the co-driver's seat. At about 4.30 pm they drove off to Naivasha arriving at 6:30 pm at Silver Hotel.

11. The customer then went to call his mother while PW1 waited in the vehicle. After 30 minutes the customer returned, saying his mother was not ready and he went off again. He returned about 20 minutes later with three other men, all strangers to PW1. He knew none of the three men, but one of them asked him if he knew him, to which he replied in the negative.

12. Shortly thereafter, one of the men grabbed him by his collar and ordered him into the back seat, and took over the driver's seat. The customer entered and sat in the co-driver's seat, while the other two men entered into the back. They shoved the complainant onto the floor of the back seat and stepped on him. It was already getting dark and the headlights were on. One of the men asked PW1 whether he preferred to be killed or to swallow one medicine. He opted for the medicine and they raised his head and put a plastic soda bottle with some liquid into his mouth, forcing him to drink all the liquid. With his head raised he could see that the vehicle was headed towards Nakuru. After drinking all the content of the bottle he lost consciousness.

13. PW1 regained consciousness at around 1.30am and found himself in a forest, feeling drunk. His Nokia phone and shs 4,000/= were missing, as was his car. When he felt steady enough, he walked until he came to a tarmac road, and at around 3.00am he noticed a market, went and spoke to a watchman, who told him he was at Rafiki Centre Menengai. The watchman let PW1 use his mobile phone and he called his employer PW2, Stephen Gikaru Waweru, who he informed about what had transpired. The following morning he went to report at Menengai Police station, and identified the customer as a medium sized man who walked with a limping gait.

14. PW1 went back to Nairobi whilst investigations went on. A week later, whilst at a car wash in Kibera, he met a taxi driver who told him he was preparing to go to Naivasha to pick a sick woman and bring her to Kenyatta hospital. Recalling his own experience, he questioned further and discovered that this erstwhile customer's telephone number was 0751 320542 – the same number that PW1 had been called by, and he had given to his employer. He asked his colleague how his customer looked like and he described him as light complexioned and with a limp. PW1 urged his colleague to report to the police. Whilst they were still together, the colleague received a telephone call from the said number, asking him to pick the caller at Uthiru. Police arranged for the arrest of the caller.

15. After the caller had been arrested jointly with two other ladies, PW1 was called by his employer to go and identify the suspect at Kilimani Police station. At the station he positively identified the man as the one who had hired him to go to Naivasha. In court, he identified the appellant as the suspect.

16. PW2 was the operator of Step-ride Tours and Cabs and the employer of PW1. He repeated the story told him by PW1 and confirmed that PW1 had given him the mobile telephone number of the customer who had called PW1. He recorded it as 0751 320 542. He also reported to the insurance company, and told his friends. Within five days he received a call from a taxi driver called Philip Waireri (PW4) who told him that he had got a car hire customer who wanted to go to Naivasha to pick a sick mother. PW4 called the customer in the hearing of PW2 and confirmed readiness for the trip the same evening. PW4 showed him the telephone number and it was the same number he had recorded from PW1.

17. He went to the police station at Kilimani and asked PW4 to accompany him. When the caller called PW4 at around 4.00pm they were at the police station and arranged for the police to follow them to the Uthiru pick-up point. Thereafter the caller was arrested.

18. PW4, Ernest Philip Waireri was a taxi driver at Adams Arcade. He testified that on 20/3/2012 at about 10.00am a gentleman approached him to hire his taxi to Naivasha to pick a sick patient from Naivasha to Kenyatta Hospital. He was to fuel the vehicle and would pay 3,000/=. He also testified that he reported the incident together with PW1. On 26/3/2012, the customer told him to prepare for the trip to Naivasha.

19. On 27/3/2012 whilst at a car wash PW4 at 10.00 am he told a fellow taxi driver about his intended trip. One of the taxi driver was PW1, who recounted his own Naivasha experience. They looked at the customer's telephone number and it turned out to be the same number that PW1 had been called on when he undertook his trip. PW1 urged him to report to the police.

20. Later the same day the customer asked PW4 to meet at Uthiru for the trip. At around 4pm, the customer called and told him he had sent his sister to meet him at Dagoretti Corner. Now wary of the customer, he went together with other taxi drivers and reported at Kilimani Police station. After hearing his story, the police agreed to follow PW4 as they drove to Dagoretti and finally arrested the accused with two other ladies.

21. PW3 Corporal Evens Karanja of CID Kilimani was at his desk when PW4 called the station and reported that he was a taxi driver at Adams Arcade; that on 20/3/2012 he called him with a view to hiring him to pick a patient in Naivasha on 21/3/2012; that his vehicle number was KBM 127N and that they had agreed on a price of 3,500/=; and that he would call him again when he was ready. The caller left him with his phone number 0751320542. The customer did not call him the following day, but on 26/3/2012 the customer told him he had picked the patient and taken him to a house in Naivasha where they would pick him from.

22. According to PW3 the taxi driver received a call on 27/3/2012 from the customer to pick his sister at Dagoretti Corner at 4,00pm. The police followed the taxi, which picked a lady at Dagoretti, and proceeded to Uthiru where it picked the customer and another lady. The police then intercepted the suspects. After a quick search, they found on the accused a phone with sim card number 0751320542 for Yu mobile. PW3 called the mobile number and the phone rang. They thus arrested the suspects and drove to the police station.

23. PW5 Sgt Samuel Kimani, testified that he was at Kilimani Police station when he received the report from PW4 about the caller who wanted a taxi to Naivasha. He recounted the evidence of PW4, and told PW4 to continue with his plans to pick up the customer for the trip to Naivasha. PW5 was in the vehicle that trailed PW4 to Dagoretti and Uthiru. At Uthiru, after a lady and man entered PW4's taxi, the police intercepted the taxi and arrested the passengers.

24. As PW5 had taken the telephone number – 0751320542 – of the caller, they recovered a Nokia phone from the appellant which had a sim card bearing the same number. The suspects were then booked in at Kilimani and later transferred to Naivasha Police station.

25. PW6 Corporal Boniface Mwangi was the investigating officer at Naivasha Police station. He testified that he was in the office on 25/3/2012 with one Corporal Mwangi, when PW1 came having been referred from Menengai Police station. PW1 reported the incident and recounted his ordeal. On 27/3/2012 they received a call from PW2, who told them a suspect had been arrested and was at Kilimani Police station. The complainant had already identified the accused. PW6 and Cpl Mwangi went to Kilimani to pick up the appellant from Kilimani on 28/3/2012.

26. I now deal with each of the issues in the appeal.

Identification and evidence of single witness

27. On this ground, the appellant submitted that the learned magistrate failed to address the issue of positive identification and on the danger of relying on a single witness. Further, PW1 stated that the alleged robber was of light complexion and had a limping gait, yet admitted that during the proceedings the appellant was not limping and had gained weight. The prosecution should have arranged for an identification parade since the appellant was arrested some days after the robbery. It was also submitted that PW1 never gave a description of the appellant at the time of reporting the incident to the police and only gave a description in court; that the description was general and did not fit the physical appearance of the appellant; and that no exhibits were recovered from the appellant.

28. The pertinent issue in this appeal turns on the sufficiency or otherwise of evidence of the single identifying witness. It is clear from the record that the only eye witness to the robbery was PW1 as he was the driver of the taxi and carried the appellant on the ill-fated trip to Naivasha. PW1 testified that he gave a description of the appellant at Menengai Police Station where he reported. He was then sent to Naivasha police station where he reported as well. This evidence was confirmed by PW6.

29. The issue of conviction on the evidence of a single witness is one that has been the subject of numerous appeals over time. It is well settled that evidence of a single witness is in fact sufficient to found a conviction.

30. The Court of Appeal for Eastern Africa in **Abdalla Wendo v Republic [1953] 20 E.A.C.A 166** held that:

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

31. In **Roria v Republic [1967] EA 573** the Court of Appeal for East Africa also held that:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

32. The issue of identification was also discussed at length in the case of **Charles Amboko Anemba & Another v Republic [2015] eKLR** where the court relied on the following cases to reach its determination: **R v Turnbull & Others (1976) 3 ALL ER 549**, the decision of which has been generally accepted and widely used in our judicial system. There the court considered the factors that ought to be considered when the only evidence turns on identification by a single witness and stated:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

33. In addition the Court of Appeal case of **Wamunga v Republic (1989) KLR 426** was relied on in which it was stated as follows:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

34. PW1's evidence was that he picked his customer in his taxi at about 4.00 pm and carried him to Naivasha. The customer, who turned into an assailant, sat in the co-driver's seat. They were on the road from Nairobi to Naivasha 4.30 pm to about 6.30 pm. He had opportunity to talk to his customer and see him. At Naivasha, his assailant left the vehicle, went into the hotel and returned to the car. The customer spoke to PW1 and told him his patient was not ready, and went back. After about twenty minutes the customer came back with three other strangers.

35. It is clear that PW1 had ample time to fully recognise his customer during those first hand interactions and the moments spent together during the daytime. The trial court found that PW1 described the attacker to the police at Naivasha. He described his light complexion and limping gait. He shared his encounter with other taxi drivers in Nairobi. The trial court found that PW1 had also identified the appellant at Kilimani Police station, and in court. The trial court stated:

“It is the finding of this court identification of the accused by PW1 was free from error since they had travelled from 4.00pm from Nairobi to Naivasha there was no suspicion of danger. PW1 recognised the accused upon arrest at Kilimani Police station. It was therefore not necessary for an identification parade to be conducted in Naivasha.....

...PW1 Having positively identified accused person as his customer who had hired him to Naivasha, his evidence was further corroborated by mobile number used to communicate...”

36. I am satisfied with the trial magistrate's finding and see nothing to impugn concerning the evidence of evidence of identification of the appellant .

Failure to call relevant witnesses and evidence

37. The appellant complains that the prosecution failed to call crucial witnesses and produce essential documents and or exhibits. The missing witnesses include the two ladies who were arrested with the appellant and their statements taken, the good Samaritan who helped the complainant when he emerged from the forest, and the other taxi drivers apart from PW4.

38. The appellant submits that these witnesses who were not called were crucial witnesses and would have enlightened the court on the events, yet no explanation was given why they never testified. Regarding PW1's mobile phone, it is the appellant's submission that no receipt was ever produced and also the log book read a different name from the purported owner and no explanation was given as to the discrepancy regarding ownership. Further, the appellants submits that PW1 claimed he was drugged before he was robbed and he attended hospital and was discharged but no medical treatment notes or any proof whatsoever was tendered.

39. The appellant cited **Daniel Kimani & 2 Others v R [2008]eKLR** in which **Bukenya v Uganda [1972]EA 549** was cited where the Court of Appeal of East Africa held:

“i)

ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;

iii) the court has a right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;

iii) 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 case.”

40. In the present case, the question is whether the persons not called as witnesses would have aided the just disposition of the case. **Section 143** of the **Evidence Act** provides:

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

41. The appellant complains that a host of witnesses not called, such as the two ladies with whom he was arrested, the good Samaritan who the complainant met after emerging from the forest, should have been called. As already seen, the witnesses availed proved the key elements

of the crime with which the appellant was charged. Additional witnesses, though they might fill more evidential transcripts would have added little to the just determination of the case as none of them were in any event direct witnesses.

42. In **Julius Kalewa Mutunga v Republic - Criminal Appeal No. 31 of 2005**, the Court of Appela held as follows:

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

43. On this issue, therefore, I see no basis for impugning the trial court’s determination.

Conviction on circumstantial evidence and suspicion, failure to avail corroborating evidence and proof beyond reasonable doubt

44. The appellant’s assertion here was that the conviction was essentially baseless and unwarranted in light of the paucity and unverifiability of evidence.

45. The offence of robbery with violence is provided for in **section 296** of the **Penal Code**. The ingredients of that offence were clearly set out by the Court of Appeal in the case of **Oluoch v Republic [1985] KLR** where it was held:

“Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person”

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.”

46. Were any of these ingredients proved in the present case? PW1 testified that he was robbed by 4 men. They included the appellant who led him into the trap, and then brought the appellant’s three collaborators onto the scene. One of the men held him by the collar of his shirt and ordered him to the back seat of the vehicle and tied him there, where two of them stepped on him. He was ordered to ingest some juice like drink at gun point. They threatened to kill him if he didn’t take the drink. He agreed to drink. Shortly thereafter, he lost consciousness. When he regained consciousness, he found he had been robbed of his phone, money and vehicle. All three ingredients of the offence of robbery with violence have fully been met in this case.

47. The appellant also submitted that the case was poorly investigated and that there is no way that PW1 could have remembered the appellant’s mobile number bearing in mind that this was his first time too communicate with him. In addition, that PW1 had alleged that he had lost his phone and could not access the appellant’s number through his phone. Lastly that the investigating officer never made any effort to verify the information given relating to mobile phone communications as regarding the numbers given by mobile phone number providers.

48. In the case of **Stephen Nguhi Mulili v Republic (2014) eKLR** the court cited the case of **Miller v Ministry of pensions (1974)**, where the court held as follows concerning the degree of proof:

“...the degree is settled. It need not reach, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt, the law would fail to protect the community if it admitted fruitful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

49. As for the impugned circumstantial evidence, the Court of Appeal has stated:

“But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR APP. NO 32 OF 1990 this Court tabulated the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).

50. Having considered the evidence of all the prosecution witnesses on record, the evidence appears to me to flow with consistency and hardly any contradictions. The first calls of the customer to the complainant on a specific telephone number; the story he made up about going to pick a patient in Naivasha to bring to Nairobi; the repeated story told to PW4 about going to Naivasha; the use of the same telephone number; his consequent arrest and identification. The evidence and the story told by the prosecution witnesses definitely appears probable and reasonable. The prosecution's case was strong and unshaken.

51. From the proceedings however, I do note a slight contradiction on the appellant's phone number, where there is a discrepancy on one digit. No issue has been made of it, and it appears to me to be a typographical error. Nevertheless, the narration of events and how they occurred at the time was not shaken. I found the prosecution's evidence overall to be weighty and believable. The direct evidence of PW1 was sufficient, but alongside the circumstantial evidence, it shows the inescapable conclusion that the robbery was committed by the appellant.

52. The appellant gave unsworn testimony in his defence. This is permitted and lawful under the CPC. After all the defendant is not required to prove his innocence. It is for the prosecution to prove his guilt.

53. In relation to the value of unsworn evidence, it was held the case of **May v. Republic, C.A. Cr Appeal No. 24 of 1979 (1981) KLR 129** as follows :

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”

54. Clearly, unsworn evidence is merely persuasive. The accused's evidence, though untested by cross examination, did not shake the strength of the prosecution case or persuade the court otherwise. The trial magistrate stated clearly that she had considered the accused's evidence and she concluded that the accused was properly recognized and therefore there was no need of an identification parade and that the identification had been free from error. On that basis she concluded that appellant was guilty. Having re-considered the evidence I come to the same conclusion

Disposition

55. As shown in the foregoing, and having considered all the appellant's grounds of appeal, and also having carefully reviewed all the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

56. Accordingly, the appeal fails and is hereby dismissed.

57. Orders accordingly.

Dated and Delivered at Naivasha this 1st Day of April, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Waiganjo for the Appellant
2. Koima for the State
3. Appellant - present
4. Court Clerk - Quinter Ogutu