



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NOS. 48, 49, 50 AND 51 OF 2014

RODGERS AMUKE OCHEBO alias AMOIT.....1ST APPELLANT

HARUN HAMISI JITA.....2ND APPELLANT

SAID AYUB KIBWANA3RD APPELLANT

HASHIM MOHAMED.....4TH APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal case Number 663 of 2010 in the Principal Magistrate's court at Mombasa Hon. I. Ruguru (SRM))

JUDGMENT

1. The appellants herein were jointly charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on 17th February, 2010 at about 2.00am at Vijiweni area in Likoni Location of Mombasa district within Coast Province jointly with others not before court while armed with dangerous weapon namely pangas, iron rods and arrow bars, robbed Maurice Juma Wanyonyi of cash kshs 30,000/- and at or immediately before or after the time of such robbery used personal violence to Maurice Juma Wanyonyi.
2. All the appellants pleaded not guilty to the charge and a trial was conducted in which the prosecution presented the evidence of a total of 7 witnesses.
3. A summary of the prosecution's case was that PW1, the complainant herein, was on 17th February 2010 asleep in his house together with his wife (PW2) and 6 children when at about 2pm, armed robbers invaded their home, broke into his house and robbed them of Kshs. 30,000. PW1 managed to get out of the house where he met neighbors had responded to their distress calls and they informed him that they had seen the robbers running towards Vijiweni.
4. PW1 testified that he was able to identify the appellants through their appearances and that he was injured in the attack when one of the robbers hit him on the head with a metal rod after which he lost consciousness thereby leading to his hospitalization. He testified that was able to identify the 2nd and 3rd appellant in an identification parade but did not know the 4th appellant. He added that he knew the 1st appellant prior to the attack as he (1st appellant) was his former employee and that he recognized him during the attack, through his voice.
5. PW2, the complainant's wife, corroborated the complainant's testimony and stated that on the material night, she heard a loud bang on her door before the robbers stormed into their bedroom where they demanded to be given money and that she gave them kshs 30,000 after which they left. She added that she was not able to identify any of the robbers but confirmed that the 1st appellant was their former employee.
6. PW3, Patrick Wanyonyi Matunda, the complainant's father, testified that he was on the material night in his house when he heard screams and noises from complainant's home which was 100 meters away from his house. He stated that he left his house in the company of his son Benard Wanamboye (PW4) and a neighbor one Abraham to go to the complaint's rescue but that as they got close to the where the screams were emanating from, he saw a group of over 5 people running towards them thereby forcing them to retreat but added that he was able to see and identify the 2nd appellant because he was ahead of the group. He testified that after a short while they proceeded to the complainant's home where they found that he had been injured and they took him to the hospital.
7. PW4 Benard Wanamboye Wanyonyi was the younger brother to PW1 and the son of PW3. His testimony was that upon hearing a commotion emanating from the direction of the complainant's house, he accompanied PW2 to the complainant's home where the robbers

flashed torches on them. He stated that he was able to identify all the 4 appellants as the robbers on the night in question. He later attended identification where he identified all the 4 appellants as the robbers on the night in question.

8. PW5 was Dr. L. Ngone. He filled the p3 form in respect to the complainant injuries which he produced as an exhibit during the trial. He confirmed that PW1 sustained injuries in the attach which he classified as harm.

9. PW6 was the investigating officer while PW7 CI John Mwangi Kiilu conducted the identification parade.

10. When placed on their defence, the 4 appellants gave sworn testimonies in which they denied any involvement in the robbery and instead, explained the circumstances under which they were arrested as they went about their daily activities the day after the night in question.

11. After considering the evidence of the prosecution witnesses and the appellants, the trial court found that the prosecution has established its case beyond reasonable doubt whereupon the appellants were convicted and sentenced to suffer death thereby precipitating the instant appeal. The appellants filed separate petitions of appeal whose grounds were however similar. The appeals were later consolidated and heard together. In the said appeal, the appellants faulted the trial court for failing to note that the prosecution's case was not proved beyond reasonable doubt and further, for failing to consider their sworn testimonies. The appellants also took issue with the manner in which the identification parade was conducted and maintained that they were not properly identified as the perpetrators of the crime for which they had been charged.

12. At the hearing of the appeal, each of the appellants relied on their written submissions.

1st appellant's submissions

13. The 1st appellant submitted that the charge of robbery with violence was fatally defective and far-fetched as no evidence was adduced in to court to show that the appellants robbed the complainant of any money. It was the 1st appellant's case that the prosecution did not adduce any evidence of theft of money from PW1. The appellant argued that the trial court's findings were based on pure speculation.

14. He further argued that in the circumstances of the case and considering that nothing was stolen from PW1, if the court found that he was indeed attacked on the night in question, then the only offence that they could have been charged with is assault.

15. He also submitted that the source and quality of the light used to identify the appellants on the night in question was not disclosed thereby making the alleged identification of the appellants unreliable as there could be a case of mistaken identity. The 1st appellant argued that the prosecution did not discharge its burden of proof. For this argument the 1st appellant cited the decision in the case of **Sekitoleko Vs Uganda [1967] EA CA 531** wherein it was held that:

“As a general rule of law the burden is on the prosecution of proving the guilt of prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else.”

2nd appellant's submissions

16. The 2nd appellant submitted that the trial court shifted the burden of proof to the appellants and that the element of theft was not proved. He further submitted that conditions as at the time of the alleged robbery were not suitable for the positive identification of the suspects/appellants and that the alleged identification was therefore not free from the possibility of error. It was the 2nd appellant's case that the identification parade was not conducted in the proper manner in line with the provisions of the Police Force Standing Orders.

3rd appellant's submissions

17. The 3rd appellant submitted that the prosecution's case was riddled with numerous contradictions and inconsistencies and could not therefore sustain a conviction. He also submitted that his alleged identification both at the scene of the crime and during the identification parade was shaky and could not be relied upon to support a conviction. **4th appellants submissions**

18. The 4th appellant reiterated 1st appellant's submissions and argued that the charge was fatally defective and that there was a possibility that he was a victim of mistaken identity. He also contested the manner in which the identification parade was conducted as he claimed that the witnesses had been the members of the parade in previous parades.

19. He argued that since only one witness (PW4) claimed that he identified him on the night in question the trial court ought to have treated the evidence of PW4 with extreme caution. For this argument the 4th appellant relied on the decision in **Odhiambo vs Republic [2002]1 KLR 24** where at page 247 the court held:

“The court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification – where evidence of identification vests on a single witness and the circumstances of identification are known to be difficult (as here is) what is needed is other evidence either direct or circumstantial pointing to the guilt of the accused which the court may reasonably conclude that identification is accurate and free from the possibility from an error.”

20. The 4th appellant further submitted that he was arrested merely because, he was, at the time of the arrest taking breakfast in the company

of the 3rd appellant.

Respondent's submissions

21. In the response to the appellant's submissions, Mr. Alekha, learned counsel for the state submitted that the prosecution's case was proved by 7 witnesses 4 of whom were at the scene of the crime on the material night and witnessed the unfolding events first hand.

22. He further submitted that PW1, PW2, PW3 and PW4 knew the 1st appellant prior to the robbery incident and that they were therefore able to positively identify him through his voice and appearance. He added that there was light at the scene of the crime that enabled the witnesses to see the attackers. It was the respondents case that the appellants were positively identified, both at the scene and at the identification parade

Analysis and determination

23. I have carefully examined the evidence contained in the entire record of appeal and the submissions by the appellants and counsel for the state together with the authorities that they cited.

24. As is the norm is every first appeal, the duty of this court is to re examine, re-analyze and re-evaluate the evidence presented before the trial court afresh with a view of making its own independent findings while bearing in mind the fact that it did not have the benefit of seeing or hearing the witnesses testify. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

25. The issues for determination in this matter 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.

26. The 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."*

27. In the case of **Odhiambo & Another v Republic** 2005) 2 KLR 176 the Court of Appeal 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."

28. In the present case the prosecution witnesses testified that the attackers were many and were armed with various weapons namely; sticks, pangas and iron rods which they allegedly used in injuring the complainant. It was also not in dispute that PW1 was injured in the incident. PW5 Dr. Ngone testified that facial injuries that were caused by a blunt object. On account of the beating, the offence of robbery with violence would be proved, even if the prosecution were not able to prove that the attackers were two or more, if the prosecution proved theft to the required standard. The big question that this court needs to consider in this appeal however, is whether it was proved, beyond reasonable doubt, that firstly; the complainant was robbed and secondly, if the appellants were involved in the said robbery. The answer to the above question requires the determination of the issue of the identification of the appellants as the complainant's assailants.

29. On theft, PW2, the complainant's wife testified as follows:

"I then saw people coming into the bedroom with torches and they told me to remove money lest they could also kill me. I removed kshs 30,000/- and gave them. They then left and shortly thereafter I heard people making noise outside. I struggled as

my energy was out and I went outside and saw my husband had been cut severally.”

30. PW2 was subjected to cross examination and she maintained that the robbers threatened to kill her if she did not give them the money that they had demanded. I am therefore satisfied that theft was proved to the required standards.

31. Turning to the issue of identification of the appellants as the perpetrators of the crime in question, the court is required to consider the circumstances under which the identification took place. In this case, the incident allegedly took place in the dead of the night at about 2am. It was obviously dark at the time and even though the witnesses claimed that the robbers had torches and that there was security light from a neighbor's home, the intensity of the light and the distance between the neighbours home to the scene of the incident was not stated.

32. PW1 testified as follows on the circumstances of identification:

“One then said “Ndiye huyu Ndiye anaituita sisi wakora” as I stood in the mid, I identified the voice of the person who had said I was the one. One of them said that I should be finished. They had torches which they were using and I struggled to avoid the same so that it could light the faces of the persons. I managed to get to see three of them and recognized their faces. From the voice of the one who said “Ndiye huyu” I recognized he was one of my former employee- Rodgers Amuge. I recognized two other faces. Accused 1 identified. I identified accused 2 and 3 from their appearance. Both identified. I was hit with a metal rod on the head and I lost consciousness.”

33. The other 2 witnesses who also allegedly identified the appellants during the attack were PW3, the complainant's father and PW4 the complainant's brother. PW3 testified as follows:

“When we neared we passed near security lights in a neighbor's house and when the people saw us, they came running towards us while carrying sticks, panga and metal bar. They were over 5 people. We ran away back. From the people who ran towards us I was able to see and identify the 2nd accused. 2nd accused identified. I was able to see and register his appearance in my memory. He was ahead and that is why.”

34. PW4, on the other hand testified as follows:

“ I came out very fast and ran there and when I was about to reach torches were lit on me and I heard a voice saying “huyu ni ndugu yake” I ran back and hid and went to my father's house and found he had also woken up. I told them what had happened. I told them the people were armed with pangas and metals. At first instance, I saw and recognized Rodgers from about 20 meters. I knew 1st accused voice as we had worked together in my brothers business of selling cakes. He had a stick and metal rod we went back and we were able to hide and I saw and recognized them by their facial appearance the 2nd, 3rd and 4th accused persons. I was not able to see which particular weapon each was carrying.”

35. From the above extracts of the testimonies of PW3 and PW4 I note that even though they claim to have recognized /identified the appellants, they did not state how they were able to make such identification considering that it was dark at the time. As I have already stated in this judgment, no description of the intensity of the lighting or its distance from the scene of the incident was made so as to enable this court gauge if, in the circumstances at the scene, the witnesses could have been able to positively identify the appellants.

36. In respect to the complainant's alleged identification of the 1st appellant, it was suggested that identification was on the basis of both voice and recognition. The complainant also stated that he lost consciousness upon being hit on the head by the robbers who were shining their torches on him. He further stated that he was able to recognize the 1st appellant's voice as he (the 1st appellant) was his former employee. I am however not satisfied that in the circumstances under which the robbery is reported to have been committed, the complainant could have been able to positively identify any of the robbers not to mention the 1st appellant. I say so because, the complainant testified that some of his neighbors responded to their distress call and for that reason, it is clear that other than the attackers there were other good Samaritans, including PW2 and PW3 milling within the complainant's home. I am therefore not convinced that in the ensuing confusion, coupled with the fact that the complainant claimed that he lost consciousness upon being hit on the head, he could have been in a position to single out the voice of the 1st appellant among the many people in his home.

37. As was observed by the Court of Appeal in Karanja & another V Republic (2004) 2 KLR 140, 147

“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.’

38. In the latter 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.”

39. I did not find any other evidence linking the appellants to offence of robbery. I am, accordingly, not convinced that the identification of the appellants by the complainant, PW3 and PW4, in the circumstances of this case, was free from possibility of error. That the complainant testified that he was under attack by a group of thugs that hit him and left him unconscious. I am not satisfied that he could recognize any of his alleged assailants without the possibility of error. PW1 did not state the basis of his recognition of the 2nd and 3rd appellant either by way of long association or dealings that could have enabled him to recognize them as opposed to the 1st appellant whom he alleged was his former employee. Furthermore, it was not clear how long the 1st appellant had worked for the complainant or how long it had been since he ceased working for him so as to enable the court determine if the circumstances were such that PW1 and PW3 could still recognize him through his voice.

40. Having regard to the principles expressed in the above cited authorities and considering that the incident allegedly took place in the night when it was dark, and that the intensity of the sources of light was described, I am of the view that the circumstances of this case, did not afford favourable circumstances for the positive and accurate identification of the appellants.

41. In a nutshell, I find that the prosecution’s case was not proved to the required standards. Consequently, I find that the instant appeal is merited and I allow it, with the result that the conviction is hereby quashed and sentence set aside. The appellant may be set at liberty forthwith unless they are otherwise lawfully held.

Dated and signed in Nairobi this 11th day of March 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 8th 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