



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.132 OF 2017

(From PM's Court at Sirisia Criminal 1123 of 2016 by: Hon. L. Kiniale (SRM))

MAURICE AMULIESE MUTAMBI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Maurice Amuliese Mutambi was charged with four offences before the PM's Court at Sirisia. The charges are as follows:

Count I:

Robbery with violence Contrary to Section 296(2) of the Penal Code:

Particulars:

*On the 19th day of October, 2016 at Namutokholo Village, Namwela Division, Bungoma West Sub-County within Bungoma County jointly with others not before the Court while armed with dangerous weapon namely a pistol robbed **Tecla Chelimo Sambu** Kshs.300,000/= (Three Hundred Thousand Shillings Only) and at the time of the robbery threatened to use actual violence against the said **Tecla Chelimo Sambu**.*

Count II:

Robbery with violence Contrary to Section 296(2) of the Penal Code

Particulars:

*On the 19th day of October, 2016 at Namutokholo Village, Namwela Division, Bungoma West Sub-County within Bungoma County, jointly with others not before the court, while armed with dangerous weapon namely a pistol robbed **S/Sgt. Barasa Mango'oli** two mobile phones make Nokia and Tecno, a wrist watch, Certificate of Appointment, Kshs.200/= and firearm movement register all valued at Kshs.16,489/= (Sixteen Thousand, Four Hundred and Eighty-Nine Shillings Only) and at the time of the robbery used actual violence against the said **S/Sgt. Barasa Mang'oli**.*

Count III:

Impersonation of a Police Officer Contrary to Section 101(1)(a) of the National Police Service Act 2011.

Particulars:

On the 19th day of October, 2016 at Namutokholo Village, Namwela Division, Bungoma West Sub-County within Bungoma County, jointly with others not before the Court, without authority from the Inspector General of Police, presented yourself to Tecla Chelimo Sambu as a police officer.

Count IV:

Impersonation of a police officer Contrary to Section 101(1)(a) of the National Police Service Act 2011.

Particulars:

On the 19th day of October, 2016 at Namutokholo Village, Namwela Division, Bungoma West Sub-County within Bungoma County, jointly with others not before the Court without authority from the Inspector General of Police, presented yourself to S/Sgt. Barasa Mango'oli as police officer.

The appellant was convicted on the four counts and was sentenced to death on Count I while the sentence on the other three counts were left in abeyance.

The appellant is dissatisfied with both the conviction and sentence, which provoked the filing of this appeal. The grounds of appeal are found in the petition of appeal filed in court on 29/12/2017 and supplementary grounds filed in court on 12/9/2018. They are as follows:

- (1) That the court erred in admitting evidence of exhibits as they were not entered in an inventory;***
- (2) That there was no description of the appellants to the police or in the O.B. or statements;***
- (3) That the identification parade was not conducted in accordance with the provisions of the Police Force Standing Orders;***
- (4) That the identification of the appellant was not watertight;***
- (5) That the appellant was not accorded his right to fair hearing;***
- (6) That the court did not consider the appellant's defence;***
- (7) That the trial magistrate failed to evaluate the evidence in accordance with Section 169 of the Criminal Procedure Code;***
- (8) That the court erred by relying on circumstantial evidence which did not meet the threshold of beyond reasonable doubt.***

The appellant filed written submissions in which he urged that before the parade was conducted, the witnesses should have given a description of the suspect beforehand which they did not do. The appellant relied on the decision in Ajode v Republic (2004) 2 KLR 81. The appellant also submitted that the parade was not done at the police station which was contrary to Police Standing Orders; that the witnesses i.e. PW1 admitted to having been shown the exhibits before the hearing and were hence influenced.

The appellant also submitted that his fundamental rights under Article 50(2)(c)(g)(h) and (j) were

breached; that he was not given witnesses statements and the evidence that the prosecution were to rely on; that the reasons for dismissing the defence were not plausible and the trial court failed to comply with Section 169 of the Criminal Procedure Code.

The appeal was opposed and Ms. Njeru, learned counsel for the State submitted that when PW4, who conducted the parade testified, the appellant never raised any objection on the conduct of the parade and if the identification parade had been copied from the Mumias case, the appellant should have raised the issue; that the appellant was served with all witness statements and exhibits for both the Mumias and Bungoma cases.

As to the evidence adduced, counsel submitted that the evidence of PW1 and 2 tallies in all material particulars; that PW1 was travelling on a motor cycle with a female passenger (PW2), when they were blocked by motor vehicle KBA 765H Toyota, people came out and claimed to be police officers and demanded to know why they had no helmets; that PW1 was handcuffed, assaulted and they demanded money. PW1 was injured and was robbed of 2 phones and Kshs.200/=; that PW2 corroborated PW1's testimony. She too was robbed of Kshs.300,000/=; that PW1 and 2's evidence was further corroborated by PW3; that PW5 arrested the appellant when the vehicle he was travelling in was stopped and other occupants ran off except him and the appellant was found with a pair of handcuffs, certificate of appointment of a police officer, driving licenses of the appellant; that PW1 and 2 later identified the appellant on an identification parade; that the offence was committed in broad daylight and the appellant was properly identified; that the defence did not dislodge the prosecution case and should be dismissed.

In a rejoinder, the appellant urged that the witnesses never gave a description of the robbers; that he was never given some witness statements; that the witnesses never stated which role each attacker played; that he was never booked at police station with the exhibits produced in court. The appellant further stated that motor vehicle KBA 765H was not reported to have been involved in the robbery.

This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court afresh, analyze it and arrive at its own conclusions. See *Kiilu v Republic [2005] KLR 174* however the court has to bear in mind and give allowance for the fact that it did not see or hear the witnesses.

The prosecution called a total of 7 witnesses in support of its case whereas the appellant testified on oath and did not call any other witness.

PW1 Snr. Sgt. Barasa Mangoli was sent to deliver a firearm at Bungoma from Cheptais Police Post on 19/10/2016. On his way back to Cheptais, after he was dropped at Chwele, he boarded a motor cycle together with a lady (PW2) but on the way, they were overtaken by a motor vehicle KBA 765H, Toyota Isis, which blocked their motor cycle; five people got out of the vehicle and demanded to know why they did not have helmets and reflector jackets; that the people claimed to be police officers. PW1 asked for their identification and one of them showed him an identification card of Chief Inspector of Police – CIP named Maurice A. Mutambi; that the person wore a blue shirt and black trouser; that the said Maurice had a pistol – ceska in make and threatened him with death and bundled him into the car. The lady with PW1 had already been shoved in the vehicle and they took her Kshs.300,000/= while his 2 phones and cash Kshs.200/= was taken. He got confused due to injuries he received and was later bundled out of the vehicle. He managed to get to Bungoma Police Station where he made a report. He was later admitted in hospital due to injuries he sustained. Later, the DCI Mumias informed him that some people had been arrested and he attended an identification parade where he identified the appellant as one of the robbers. PW1 admitted that he did not give a description of the assailants when he made his first report to the police.

PW2 Tecla Chelimo recalled that on 19/10/2016, she went to withdraw Kshs.300,000/= from KCB Bungoma, boarded a motor cycle to Chwele which also carried a police officer. On their way, a vehicle which had been following them overtook and blocked them; that five people came out, demanded to know why they were not wearing helmets; that PW1 introduced himself as a police officer but the people said they were his seniors; they handcuffed him and one showed his work identification; that one had a pistol, one with a rifle and another with a sharp wire. They were put in the vehicle and her face was

covered but she could hear them torturing PW1 as he screamed and they threatened to kill him. They later dropped off PW1, demanded money from her, took her Kshs.300,000/= and phone but left the handbag. She was abandoned in a sugar plantation; she was assisted by 2 ladies, reported to the chief Bumula and then Bungoma police station. She was later called by DCI Bungoma to proceed to Mumias where she identified the appellant on the parade as the person who had a pistol and police appointment certificate.

PW3 Fred Namasaka a motor cycle rider confirmed that he was carrying PW1 and 2 on his motor cycle when a vehicle blocked them. The occupants of the vehicle claimed to be police officers and purported to arrest PW1 and he resisted; that the people had police identification. He was slapped and left to leave.

PW4 IP. Hagga Oduor recalled that on 22/10/2016 he conducted a parade in respect of a suspect – the appellant; he arranged the parade and the appellant was identified by PW1 and 2.

PW5 APC Moses Kiplegei of Isongo Administration Police Post in Mumias was on duty on 21/10/2016 when the area chief reported of having seen a suspicious vehicle. They saw the vehicle stopped about 50 – 100 metres away and people standing near it but they dispersed and ran on seeing the officers. They managed to arrest one person, the appellant and on being searched, had a pair of handcuffs in his pocket and a certificate of appointment from Kenya Police of rank of Inspector, 2 driving licenses, one for the appellant and one for another person; that they found a man in the said motor vehicle who claimed to have been abducted from Webuye and robbed of Kshs.85,000/=; that the vehicle KBA 765H white in colour was later towed to the police station.

Cpl. Aden Mohammed (PW6) of Bungoma West was assigned to investigate a robbery case which occurred on 19/10/2016 along Chwele – Cheptais Road. He interviewed PW1 and 2 on 21/10/2016. He got information that a suspect had been arrested in Mumias where PW1 and 2 were asked to attend identification parades. PW6 did a search and found that the vehicle was registered in the name of David Maina Njogu who informed him that it was hired by one Maurice Mutambi, the appellant and gave him a copy of the agreement.

PW7 Elias Adoka, a Clinical Officer at Bungoma Hospital examined PW1. He said PW1 complained of pains in the left ear, chest and back and bruises on the wrist joint which had been handcuffed. He had been admitted in hospital between 23/10/2016 and 25/10/2016. He assessed PW1's injuries as harm.

The appellant (DW1) testified that he deals in timber and was at his home in Kakamega; that on 21/11/2016, he had a case in Mumias Court whereby the police had taken his driving license and identity card; that he went to court on 22/11/2016 and his documents were recovered and when there, he was arrested by a police officer from Sirisia and he was charged for an offence he had no knowledge of.

I have now reviewed all the evidence that was tendered before the trial court, the submissions of both the appellant and the State. The appellant faced several charges, the main one being robbery with violence contrary to Section 296(2) of the Penal Code. The ingredients that must exist to prove an offence of robbery with violence were considered 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 weapon or instrument; or

(b) The offender is in the company with one or more persons or person; or

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

It means that the proof of any of the above ingredients is sufficient to establish an offence under Section 296(2) of the Penal Code.

In this case, PW1, 2 and 3 have clearly told the court that the vehicle that blocked their motor cycle had five occupants. That satisfies the 2nd ingredient.

PW1 told the court that he was roughed up, handcuffed and assaulted. PW2 corroborated PW1's evidence that when in the car, she could hear PW2 screaming as he was tortured. There is evidence that PW1 was even admitted in hospital at Lugulu Hospital and the examination by PW7 confirmed the injuries. That satisfies the 3rd ingredient that violence was vested on PW2.

PW1 and 2 both told the court that the robbers were armed. PW1 saw a pistol. PW2 said there was a pistol and rifle. PW3 does not seem to have seen anything. PW1 referred to seeing something like a radio-call, whatever that means. There is ample evidence that the robbers were armed with dangerous weapons.

The only question is whether the appellant was one of the robbers. The offence was committed in broad daylight. Although PW1 to 3 did not specifically say what time it was, PW2 said that after the whole ordeal, she arrived at Bungoma police station to report about 6.00 pm.

PW1 and 2 came face to face with the robbers. PW1 had an argument with them as he tried to identify himself and PW1 – 3 all saw one of the robbers produce a police identification certificate. The evidence of PW1 to 3 is consistent in all material particulars as to what transpired at the scene of robbery. PW2 specifically told the court that she had time to observe the robbers before she was taken to the car and it is there that her face was covered. Although the court was not told the approximate time that the robbery took place, but from a narration of the events, it was daytime and it was possible for a person facing another to see them properly. PW1 said the appellant wore a light blue shirt and black trouser while PW2 confirmed that indeed he had a light blue shirt.

I am satisfied that PW1 and 2 were in a position to positively identify the robbers. The appellant complained that the witnesses did not give his description to the police before the parade was conducted and hence the purported identification was worthless. On the validity or otherwise of an identification parade, the Court of Appeal in ***John Mwangi Kamau v Republic KLR*** stated as follows:

*“The identification parades are meant to test the correctness of a witness’ identification of a suspect. See this court’s decision in ***John Kamau Wametu v Republic CRA.68 & 69/2008***. In this case, Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that PW1, Cpl. John Makumi in producing the Occurrence Book, testified that the incident was recorded as O.B. No.45 of 24/6/2003; the assailants’ were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In ***Gabriel K. Njoroge v Republic (1982 – 1988) I KAR 1134***; this court observed:*

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

Flowing from the above decision, ideally, a witness ought to give the description of the assailant for purposes of the police mounting an identification parade. In this case, neither PW1 nor 2 gave the description of the robbers to the police. PW2 however told the court that he told police that if she met the robbers, she could identify them but it seems that was not recorded in the first report.

The court was faced with a similar scenario in ***Nathan Kamau Mugure v Republic CRA.63/08*** and the court expressed itself thus:

“As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of

the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.

I have read the evidence of PW4 who conducted the identification parade. He generally stated that after preparing the parade forms, he conducted the parade. PW4 should have adhered to the provisions of the Standing Order 6(iv) as to the conduct of parades. There is no evidence that the appellant was informed of the purpose of the parade, or that he could have an advocate or friend witness the parade and whether he objected to it or not. The only objection we see is at the end when the appellant refused to sign the parade form. I doubt that the parade was properly conducted and in my view, it is not of any evidential worth to the identification of the appellant.

The above notwithstanding, I find that the offence having been committed during broad daylight, and the fact that PW1 had some argument with the robbers before they handcuffed and purported to arrest him, he was in a position to identify them. PW2, on the other hand, told the court that she had told police that she could identify the robbers if she saw them again.

The appellant was arrested by PW5 after a tip off from a chief. PW5 searched him and found him with handcuffs. P.Ex.11 and a police identification card for Inspector of Police bearing the appellant's names, a driving license in the appellant's names P.Exh.No.12. The recovery of the police identification card and handcuffs goes to corroborate PW1, 2 and 3's evidence that the robber identified himself as an Inspector of Police and had handcuffs which were used to handcuff PW1. Although PW1 and 2 are said not to have known the registration number of the vehicle, PW1 and 2 described it as a white Toyota Vehicle which the appellant was found with as per photographs P.Ex.14.

The investigating officer (PW6) found that the said vehicle which was registered in the name of David Maina Njogu had been hired out to the appellant under hire agreement dated 17/10/2016 – which bears identity card number of the appellant 0965451, which was also recovered from the appellant. The appellant's defence never dislodged PW4's evidence regarding his arrest and what was recovered in his possession. The defence did not also dislodge the findings of PW6 that it is the appellant who had hired the said vehicle and was found with it and was the same vehicle he used in robbing PW1 and 2.

Even though the identification parade evidence was worthless, I find that the arrest of the appellant with the handcuffs, the police identity card and the vehicle placed him at the scene of the robbery on 19/10/2016. The robbery was committed in broad daylight. The appellant was arrested on 21/10/2017 only 2 days after PW1 and 2 were robbed. I find that the robbery was so fresh in the minds of PW1 and 2 and that goes to buttress their testimonies that the appellant is the robber who identified himself as an inspector of police and showed them his identification card.

I agree with the findings of the trial court that the appellant was one of the robbers.

PW1 and 2 told the court that they were robbed of their properties. PW1 reported the loss of his phones as evidenced by his application to block the Sim Cards P.Ex.7. Pw2 had just withdrawn Kshs.300,000/=

from the bank. A certified Bank Statement to that effect was produced in evidence (P.Ex.9).

I am satisfied that the charge of robbery with violence was proved to the required standard.

There is overwhelming evidence from PW1, 2 and 3 that the appellant presented himself to the three as a police officer. He produced a police identification card to that effect. He had handcuffs and purported to arrest PW1 and 2. He was in company of others who were not arrested. He was later arrested with the police identification card and handcuffs two days later.

The appellant complained that the court breached his fundamental rights under Article 50(2)(c)(g) and (h) of the Constitution. Article 50(2)(c) guarantees the right to have adequate time and facilities to prepare a defence. The appellant did not tell the court how that right was breached. On 31/5/2017 after several adjournments, when the case came up for hearing, the appellant said that he was ready to proceed even without his advocate and the case proceeded.

Article 50(2)(g) guarantees the right to choose and be represented by an advocate and be informed of this right promptly. The appellant had an advocate, a Mr. Wamalwa on record. As noted above, he chose to proceed without him. The appellant did not expound on how the right was breached.

Article 50(2)(h) guarantees the right to counsel by the State. This right would not have been breached when the appellant had already got counsel.

Article 50(2)(j) guarantees the right to be informed in advance of the evidence the prosecution intends to rely on. When the appellant was arraigned in court on 23/11/2016, the court directed that he be supplied with witness statements. On 6/2/2017, Mr. Wamalwa asked for witness statements and on 15/3/2017 he intimated that he was ready to proceed. It means that he had been supplied with witness statements.

Lastly, the appellant complained that his defence was not considered. However, that is not the correct position, the same was considered and dismissed as an afterthought. The defence was a bare denial as the appellant only talked of his going to Mumias court and the arrest. He did not give a reasonable explanation which is all that was required of him.

I reject the defence as a sham and unbelievable in light of the evidence on record. As to whether the judgment of the trial court complied with Section 169 of the Criminal Procedure Code, I am satisfied that it did.

In the end, I find that the appeal is not merited. I affirm the conviction and sentence. The appeal is hereby dismissed.

Signed and Dated at NYAHURURU this 8th day of May, 2019.

.....

R.P.V. Wendoh

JUDGE

Delivered by S. Riechi (J) at BUNGOMA this 20th day of May, 2019.

PRESENT:

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present