



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 157 & 163 OF 2015

PETER GIKONYO KIMANI.....1ST APPELLANT

JOSEPH LOVE KAZI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Juma SPM delivered on 9th September 2015 in Kibera CM CR. Case No. 1580 & 1605 of 2012)

JUDGMENT

The Appellants, Peter Gikonyo Kimani and Joseph Love Kazi, were charged alongside others in Count I with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 16th March 2012 at Ongata Rongai within Kajiado County, the Appellants, being armed with a dangerous weapon, namely a pistol, robbed Hillary Kiprotich Sigei of his car a Toyota Carina Registration Number KBE 078H, a laptop make Gateway, two external hard drives, a wrist watch, a coat, a pair of brown open leather shoes, a Transnational Bank ATM card, a Kenyan national identity card, elector's card, a wallet and business cards all items valued at Ksh.858,000/- plus cash Ksh.4,500/- and at the time of such robbery wounded the said Hillary Kiprotich Sigei.

The Appellants were charged alongside others in Count II with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 16th March 2012 at Ongata Rongai within Kajiado County, the Appellants being armed with a dangerous weapon, namely pistol, robbed Joyce Chepngetich of two mobile phones makes Ideos and Nokia 1280, one text book titled Environmental Economics, one kikoi, a pair of ladies sandals, Transnational Bank ATM cards, one fresh shine air cleaner, one purse, a voter's card and business cards all items valued at Ksh.22,900/- plus cash Ksh.4,000/- and at the time of such robbery wounded the said Joyce Chepngetich.

The 1st Appellant was charged in Count III with the offence of being in possession of a firearm without a firearm certificate contrary to Section 4(1) as read with Section 4(3) of the Firearm Act. The particulars of the offence were that on 22nd March 2012 at Mayor Road Area in Ongata Rongai within Kajiado County, the 1st Appellant was found in possession of a Taurus 38 special pistol Serial Number XG180 without a firearm certificate. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, 1st Appellant was convicted as charged in Count III. He was sentenced to serve seven (7) years imprisonment. The 2nd Appellant was convicted as charged on both Counts I and II and sentenced to death. The Appellants were aggrieved by their convictions and sentences and have each filed a separate appeal to this court.

In his petition of appeal, the 1st Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the firearm was not recovered in his possession but from a sewerage pit and in his absence. He faulted the trial court for failing to acknowledge that the firearm was not dusted for fingerprints. He asserted that the trial court convicted him based on uncorroborated evidence of the arresting officer. He was of the view that trial magistrate shifted the burden of proof from the prosecution to the defence. He took issue with his conviction stating that the prosecution failed to establish the case against him to the required standard of proof beyond any reasonable doubt.

In his petition of appeal, the 2nd Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the prosecution's evidence of identification was not reliable and sufficient to sustain a conviction. He took issue with his conviction stating that crucial prosecution witnesses and exhibits were not availed before the trial court. He faulted the trial court for convicting him based on contradictory and inconsistent evidence by the prosecution witnesses. He was of the view that the trial court shifted the burden of proof from the prosecution to the defence. He was aggrieved with his conviction stating that the complainant failed to appear before court when he was recalled as a witness. He faulted the trial magistrate for failing to comply with Section 169 of the Criminal Procedure Code when writing the

judgment. In the premises, the 2nd Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions from the 1st Appellant and Ms. Sigei for the State. The 2nd Appellant filed written submissions in support of his appeal. He urged the court to allow his appeal. The 1st Appellant submitted that police officers did not recover the pistol from his possession. He asserted that he was convicted based on the evidence of the arresting officer, yet he was not given a chance to cross examine him. He averred that the prosecution witnesses gave contradictory and inconsistent evidence with regard to the serial number of the pistol that was allegedly recovered from him. He pointed out that none of the stolen items were recovered from his possession. He stated that the investigating officer was unable to describe his house. She failed to inform the court the exact place the pistol was recovered from. He submitted that the pistol was not dusted for fingerprints. In the premises, he urged this court to allow his appeal.

Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the prosecution established its case against the Appellants to the required standard of proof beyond any reasonable doubt. She stated that the evidence of PW1 and PW6 implicated the Appellants in the robberies. She averred that the firearm was recovered from the 1st Appellant's possession. He had hidden the firearm in a sewer. He did not have a firearm certificate. She asserted that PW1 and PW6 positively identified the 2nd Appellant during the identification parades. She submitted that Dr. Kamau's evidence indicated that the complainants were injured during the robbery. She was of the view that the sentences given by the trial court were proper in the circumstances. She therefore urged this court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: PW1, Hillary Sigei told the court that he was driving home on 16th March 2012 at about 10.00 p.m. He was accompanied by his wife, Joyce Chepngetich (PW6). He was driving motor vehicle Registration Number KBE 078H. When they got to Cape Joy Academy, they saw an oncoming vehicle. It was a Toyota Probox. He drove his car to the side of the road so as to give way to oncoming vehicle. The said vehicle however rammed into his car. He alighted from the vehicle to assess the damage the accident caused to his car. Two men suddenly emerged from the Probox. They had a gun. They told them that they were thieves. PW1 and PW6 were ordered to move to the rear passenger seat of their vehicle. They were ordered to lie down. One of the men sat with them at the rear passenger seat. The other moved to the driver's seat and started driving the car.

The robbers left the Toyota Probox at the scene of crime. The robbers tied their hands and legs together. After driving for some time, PW1 and PW6 were abandoned at a field. The robbers drove away in their vehicle which contained several of their valuable items. They managed to untie themselves. They walked and came across a Korean School. The guards at the said school assisted them to get to Ongata Rongai Police Station. They reported the robbery incident. They afterwards went to hospital for medical treatment. Two days later, PW1 got a call from the police station informing him that his vehicle had been recovered. Other stolen items were also recovered from a house in Ngong. He identified the recovered items at the police station. He attended an identification parade at the police station where he was able to identify both Appellants as the robbers. He told the court that he was able to identify the assailants since they switched on the vehicle light inside the car as they drove them around. They switched on the light to show them the pistol and warned them that it was a real gun. PW1 stated that the 1st Appellant sat with them at the rear passenger seat. The 2nd Appellant was the driver. He had the gun.

PW6, Joyce Chepngetich corroborated the events of the material night as narrated by PW1. She added that there was a kiosk about 1 or 2 metres away from the scene of the robbery which had a security light. She was therefore able to identify the assailants. She added that the assailants switched on the lights inside the vehicle to show them a gun. She attended an identification parade where she identified the 2nd Appellant and DW3 as the two men who robbed them.

Cpl. Hassan Aritei (PW8) arrested two of the Appellant's co-accused (DW1 and DW2). Items stolen from the complainants were recovered at DW2's house. After interrogation, DW2 implicated DW3 and the 2nd Appellant in the robberies. PW9, IP Luke Kiptoo, together with other police officers managed to arrest DW3 and the 2nd Appellant with the help of DW2. PW9 also managed to arrest the 1st Appellant after DW3 implicated him in the robbery. The 1st Appellant led them to a sewer where he had hidden the firearm. They were able to recover a Taurus Revolver firearm Serial Number XG18019. PW7, CIP Alex Chirchir, examined the firearm Serial Number XG18019 that was allegedly recovered from the 1st Appellant. He confirmed that the same was a Taurus Revolver firearm and a firearm within the meaning ascribed to the term in the Firearm Act.

PW2, IP Francis Njue conducted the 2nd Appellant's identification parade on 24th March 2012. He stated that the 2nd Appellant was identified by PW1 and PW6. He produced the identification parade forms into evidence. PW5, Dr. Zephaniah Kamau, the Police Surgeon examined the complainants on 20th March 2012. He told the court that PW1 had injuries on the left side of his chin and right hip area. He also complained of pain on his right leg. PW6 had bruises on the left wrist and outer right arm. PW5 stated that the witnesses had earlier been treated at St. Mary's Hospital.

This case was investigated by PW10 Cpl. Beatrice Ndunda. She interrogated the complainants. They informed her that on the night of 16th March 2012, they were driving home when an oncoming vehicle hit their vehicle. The men in the oncoming vehicle hijacked them. They afterwards dumped them in a field and made away with their vehicle as well as other valuables. PW1 told her that one of the men had a similar body physique to his. The other assailant was short with a brown complexion. PW1's vehicle was recovered on 19th March 2016 outside Camp David Bar in Matasia, Ngong. She visited the scene with PW1 who identified the motor vehicle as his. PW8 also gave her items that he had recovered from DW2's house. PW1 identified the recovered items as some of the items stolen from them by the assailants. DW2 led to the arrest of DW3 and the 2nd Appellant, who in turn led to the arrest of the 1st Appellant. Identification parades were conducted. She thereafter charged the Appellants alongside the three other suspects with the present offences.

The 1st Appellant was put on his defence. He testified that on 22nd March 2012, he was having breakfast with his daughter at his house. Police officers came to his house and arrested him. He was taken to Karen Police Station. He was transferred to Ongata Rongai Police Station the following day. He was charged with the present offences. He stated that he did not participate in any police identification parade. He testified that he was not arrested in possession of any firearm. Nothing was recovered from him when he was arrested. The Appellant denied taking part in the robbery as narrated by the complainants.

When the 2nd Appellant was put on his defence, he stated that on 22nd March 2012, he went to work. Four policemen came to his place of work. They arrested him and took him to Ongata Rongai Police Station. He was later arraigned in court and charged with the present. He denied the charges against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the Appellants' guilt on the charges preferred against them to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal.

The 1st Appellant was convicted of the offence of being in possession of a firearm without a firearm certificate contrary to Section 4(1) as read with Section 4(3) of the Firearm Act. PW9 testified that he interrogated DW3 who implicated the 1st Appellant in the robberies. DW3 informed him that the 1st Appellant had a gun. They proceeded to the 1st Appellant's house. DW3 called the 1st Appellant on his mobile phone and asked him to come out of his house. PW9 with the help of other police officers arrested the 1st Appellant when he emerged from his house. PW9 told the court that after they arrested the 1st Appellant, he took them to a sewer where he had hidden the gun. They recovered the said gun.

This court notes that the arresting officer (PW9) was stepped down before the 1st Appellant had a chance to cross-examine him. He was stepped down so that the OB report from Ngong Police Station could be availed in court at the request of DW3. The trial court failed to ensure that PW9 was recalled for cross-examination by the 1st and 2nd Appellants. The testimony of PW9 was uncorroborated. None of the officers who were with him when he arrested the 1st Appellant and the recovery of the gun were availed in court to give evidence. DW3 in his defence statement did not implicate the 1st Appellant. He stated that he met the 1st Appellant in court for the first time. The 1st Appellant in his defence denied being arrested in possession of a firearm. The investigating officer (PW10) gave evidence that was inconsistent with that of PW9. During cross-examination, PW10 stated that the gun was recovered from the 1st Appellant's house by the arresting officer. PW10 told the court that the firearm was not dusted for finger prints after it was recovered.

The 1st Appellant was convicted by the trial court based on the evidence of PW9 which was uncorroborated. The 1st Appellant was not given a chance to test this evidence by cross-examining the witness. The evidence of PW9 was inconsistent with the evidence of PW10 as to where the firearm was recovered. The 1st Appellant denied that he was arrested in possession of a firearm. In the premises, this court is of the view that reasonable doubt was created as to whether the 1st Appellant was arrested in possession of the said pistol. The prosecution failed to prove to the required standard of proof beyond any reasonable doubt that the 1st Appellant was found in possession of the firearm. His conviction on the charge in Count III is subsequently quashed and his sentence set aside.

The 2nd Appellant was convicted in both counts of robbery with violence. It was evident from the facts of the case that the prosecution relied on direct evidence of identification to secure the conviction of the 2nd Appellant. Evidence led by the prosecution was that PW1 and PW6 identified the 2nd Appellant as one of the men who robbed them after police identification parades were conducted. This court has a duty to examine thoroughly the evidence on identification before confirming a conviction based on the same. In the case of Wamunga vs Republic [1989] eKLR 426, the Court of Appeal stated as under:-

“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.”

Similarly, in the case of R v Turnbull [1976] 3 All ER 551 Lord Widgery CJ observed as follows:

“the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.

The robbery in the present appeal took place at night at about 10.00 p.m. PW1 and PW6 were driving home when they were accosted by the robbers. The robbers were in a motor vehicle make Toyota Probox. The assailants' vehicle collided with the complainants' car. PW1 alighted from the vehicle to assess the damage caused to his car by the accident. It was then that two men came from the Toyota Probox. One of the men had a gun. They ordered the complainants to move to the rear passenger seat and lie down. PW6 stated that there was a kiosk about one or two meters away from the scene of the robbery. The kiosk had security lights on which she used to identify the assailants as they accosted PW1. Both complainants told the court that the assailants switched on the lights inside the vehicle. The assailants wanted them to see the gun and warned them that it was real. The complainants stated that the light inside the vehicle enabled them to identify the assailants. PW1 stated that the 1st Appellant sat with them at the rear passenger seat while the 2nd Appellant was the one who drove the vehicle. He stated that the 2nd Appellant had the gun.

This court is not convinced that the complainants positively identified their assailants. The circumstances favouring a positive identification to be made were difficult in the present appeal. The robbery took place at night. The robbers had a gun. They shoved the complainants to the rear passenger seat and ordered them to lie down in the car as they drove around. It was not clear from the complainant's testimony how long they were inside the motor vehicle with the 2nd Appellant before they were dumped. The complainants clearly did not have enough time to memorize the physical appearances of the assailants. The complainants were later abandoned at a field which did not have any source of light. PW6 during cross-examination stated that she could not recall which one of the assailants was driving and who was at the rear passenger seat. The complainants were attacked by two men. PW1 identified the 1st and 2nd Appellants as the assailants. On the other hand

PW6 identified DW3 and the 2nd Appellant as the men who robbed them. Their testimonies were inconsistent and contradictory as regard the evidence of identification.

This court also notes that the complainants did not give a description of their assailants in the first report made to the police. If they indeed identified the assailants, they ought to have been in a position to give their description in the first report made to the police (See **Maitanyi vs Republic [1986] eKLR**). The 2nd Appellant's identification parade was therefore conducted in the absence of prior description made to the police by the complainants. The court further notes that the 2nd Appellant's identification parade was conducted after he had been arraigned before the trial court. The 2nd Appellant was arraigned in the trial court on 23rd March 2012. PW2's evidence as well as the identification parade form produced in evidence indicated that the 2nd Appellant's identification parade was conducted on 24th March 2012. Laid down procedures in the **Police Force Standing Orders** require that a witness ought not to see the accused person before an identification parade is conducted. The fact that the identification parade was conducted after the 2nd Appellant was arraigned in court meant that the 2nd Appellant was exposed to the witnesses before they identified him in the parade.

In the case of **David Mwita Wanja & 2 Others vs. Republic [2007] eKLR**, the Court of Appeal stated thus:

*“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. (See **R vs. Mwangi s/o Manaa [1936] 3 EACA 29**).”*

The 2nd Appellant's identification parade was not conducted according to the guidelines provided in the **Police Force Standing Orders**. The evidence of identification by PW1 and PW6 was therefore not reliable. His conviction based on this evidence of identification was unsafe. *In the circumstances of this case, this court is of the view that it cannot sustain the conviction of the 2nd Appellant on the basis of the evidence of identification adduced by the complainants. Reasonable doubt has been raised regarding the evidence of identification.*

There was no other evidence that was adduced to directly connect the 2nd Appellant to the robbery. None of the robbed items were recovered in his possession. Indeed, some of the robbed items were recovered in the Appellant's co-accused possession. He was however acquitted by the trial court. The 2nd Appellant in his defence denied being involved in the robbery. The 2nd Appellant may well be a victim of mistaken identity. No other evidence was given before this court connecting the 2nd Appellant to the robbery. None of the stolen items were recovered from his possession when he was arrested. From the foregoing, the evidence of identification, taken into totality is not watertight and free of error to support the conviction of the Appellant.

In the premises therefore, this court finds merit in the appeal lodged by the Appellants. Their respective Appeals are hereby allowed. Their convictions are quashed. The Appellants are acquitted. The Appellants are set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2019

L. KIMARU

JUDGE