



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.158, 159 & 160 OF 2017

CHARLES KIMANI MURAYA.....1ST APPELLANT

PAUL IRUNGU MWANGI.....2ND APPELLANT

JOSEPH MBURU WAMBUI.....3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. S. Jalang'o SRM delivered on 13th October 2017 in Makadara CM CR. Case No. 3406 of 2014)

JUDGMENT

The 1st Appellant, Charles Kimani Muraya, the 2nd Appellant, Joseph Mburu Wambui and the 3rd Appellant Paul Irungu Mwangi were jointly charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 27th September 2013 at Allsops Bus Terminus in Nairobi County, the Appellants, jointly with another not before court, while armed with a dangerous weapon namely a revolver robbed Mark Nderitu of a mobile phone make LG P504, Equity Bank ATM card and cash Ksh.320,000/- all valued at Ksh.355,000/- and the time of such robbery threatened to use actual violence to the said Mark Nderitu. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged and sentenced to death. The Appellants were aggrieved by their convictions and sentences. They have each filed a separate appeal to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They took issue with their convictions stating that the prosecution had not proved their case to the required standard of proof beyond any reasonable doubt. They faulted the trial court for relying on the prosecution's evidence which was unreliable, inconsistent and full of contradictions. They were aggrieved that the trial court based their conviction on the evidence of the identification parades which were conducted in total disregard to the guidelines provided in the Police Force Standing Orders. The Appellants were further aggrieved that the trial magistrate improperly admitted into evidence photographs of the alleged stolen motor vehicle. They faulted the trial magistrate for failing to consider their defence in arriving at its decision. They urged the court to review their sentences following the recent Supreme Court decision in in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR.

The three separate appeals were consolidated and heard together as one for the purpose of this appeal. During the hearing of the appeal, the Appellants presented to court written submission in support of their respective appeals. They urged this court to allow their respective appeals. Ms. Sigei for the State opposed the appeals. She submitted that the complainant narrated in detail how the assailants robbed him. He had just withdrawn money at Equity Bank in Allsops when three men accosted him. They handcuffed him, shoved him in a car and drove along Thika Road. They robbed him of the cash and his ATM card. They afterwards dropped him at Ridgeways. A boda boda rider followed the assailants' vehicle and managed to get its registration number. The vehicle was registered under the name of George Gatheru. George Gatheru had hired the said vehicle to the 1st Appellant. Learned State Counsel averred that the complainant properly identified the Appellants during identification parades conducted by PW3. She asserted that the complainant gave a description of the assailants to the police. She was of the view that the Appellants' convictions were safe. Learned State Counsel submitted that the discrepancy with respect to the amount of money that was stolen from the complainant was curable under Section 382 of the Criminal Procedure Code. She urged this court to uphold the trial court's sentence since the Appellants were armed with a firearm. In the premises therefore, she urged this court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: Mark Nderitu, PW1, was in Buruburu on 27th September 2013. It was at about 10.00 a.m. He went to Equity Bank Ltd, Kariobangi Branch and withdrew Ksh.120,000/-. He afterwards boarded a matatu to Allsops and alighted near GSU Headquarters. As he was crossing the road, a motor vehicle make Toyota NZE stopped where he was. Three men

alighted from the said vehicle. One of the men was armed with a gun, the second man had a police radio while the third was carrying a pair of handcuffs. The men claimed that he was a thief. They purported to arrest him, handcuffed him and forced him into their vehicle. They drove off towards Thika Road. They robbed him of his mobile phone, ATM card and cash Ksh.320,000/-. They afterwards dropped him at Ridgeways. He managed to get the registration number of the motor vehicle. He stated that it was a grey Toyota NZE KBS 247G. PW1 met a motorcycle rider. He informed him what had transpired. The motorcycle rider followed the assailants' vehicle and confirmed the registration number. The complainant later found out that the assailants withdrew Ksh.20,000/- from his account using the stolen ATM card. He reported the robbery at Muthaiga Police Station.

PW2, George Gatheru, was the registered owner of the motor vehicle registration No.KBS 247G that was used by the assailants in the robbery. He runs a car hire business. He stated that the 1st Appellant hired the said vehicle on 24th September 2013. He wanted to hire the vehicle for two days. He however returned the vehicle to PW2 after five days, on 28th September 2013. Three months later, his vehicle was intercepted by the police. The police informed him that the vehicle was used during a robbery incident on 27th September 2013. He gave the police the car hire agreement as well as identification documents of the 1st Appellant who had hired the vehicle on the said date. He told the court that he had known the 1st Appellant for approximately a year prior to the robbery incident. The 1st Appellant was his neighbour.

PW3, Inspector Nzioka Mwendwa conducted the Appellants' respective identification parades on 27th August 2014. He told the court that he conducted the same in accordance with the guidelines provided for in the Police Force Standing Orders. He stated that the complainant positively identified the three Appellants. He produced their respective identification parade forms into evidence. He testified that the 2nd Appellant complained that the witness who identified him had seen him prior to the identification parade. This case was investigated by I.P Alphonse Kimengwa (PW4) based at Muthaiga Police Station. He testified that the complainant reported a robbery at the police station on 27th September 2013. The complainant informed him that he was robbed of his phone, cash and ATM card. He stated that the assailants were four men. They used a motor vehicle Toyota NZE registration No.KBS 247G. He recorded the complainant's statement and circulated the registration number of the said vehicle to his colleagues. He handed over the file to PC Sowen since he was to attend a training course at the Police College in Kiganjo.

While at training, PC Sowen informed him that they had intercepted the motor vehicle that was used by the assailants in the robbery. The occupants of the motor vehicle had been arrested. The complainant was requested to go to the police station to attend an identification parade. However the complainant was not able to identify any of the persons who were arrested when the vehicle was intercepted. A search was done to establish the owner of the motor vehicle. The registered owner was PW2. PW2 informed them that on the material date when the robbery occurred, he had hired out the vehicle to the 1st Appellant. PW2 gave the police the car hire agreement as well as copies of the 1st Appellant's national identification card and driving licence. PW2 showed them where the 1st Appellant resided since they were neighbours. When they went to the 1st Appellant's house, they found his wife who informed them that the 1st Appellant had travelled. PW4 got a tip off from an informer that the Appellants had relocated to Eldoret. He discovered that the Appellants had been arrested in Eldoret and had been charged with another offence of robbery with violence in Eldoret CM's Court CR. Case No.5070 of 2013.

PW4 requested for a production order for the suspects to be availed at Muthaiga Police Station for purposes of investigations. He interrogated the suspects and came to the conclusion that they were among the people who robbed the complainant. The complainant was not available to attend an identification parade on that day since he had been transferred to Garissa. The Appellants were arraigned in court on 14th August 2014 and later escorted back to Eldoret. The complainant came back from Garissa on 27th August 2014. He participated in identification parades where he positively identified the three Appellants as the assailants who robbed him. PW4 produced in evidence the complainant's bank statements, motor vehicle search for Toyota NZE KBS 247G, car hire agreement, and copies of the 1st Appellant's identification documents.

When the 1st Appellant was put on his defence, he stated that on 13th August 2014 he was in remand at Eldoret Main Prison. The officer in-charge of the prison informed him that he was being transferred to Nairobi. He was taken to Industrial Area Police Station. On 15th August 2014, he was arraigned in court in Nairobi and charged alongside two others with the offence of robbery with violence. He was informed that he was a suspect in a robbery that occurred on 27th September 2014. The 1st Appellant admitted that he hired motor vehicle registration No.KBS 247G on 24th September 2013 from PW2 for two days. He stated that he returned the said vehicle on 26th September 2013 at 8.20 p.m. as per the agreement. He told the court that he did not have the said vehicle on 27th September 2014 when the robbery occurred. He testified that the identification card and driving licence produced in evidence by the prosecution were not the same documents he used to hire the vehicle. He denied taking part in the robbery as narrated by the complainant.

In his unsworn statement, the 2nd Appellant stated that he resides in Eldoret. He used to sell second hand clothes for a living. On 27th November 2013, he was in Matunda Area in Eldoret. He saw two vehicles involved in a chase. He heard gunshots. He ran to a nearby house. Police officers arrested him. They alleged that he was one of the occupants of the vehicle involved in the chase. He was later arraigned before a court in Eldoret. On 14th August 2014, he was transferred to Industrial Area Police Station. On 15th August 2014, he was arraigned before a court in Nairobi and charged with the present offences. On 26th August 2014, he was transferred back to Nairobi and participated in an identification parade. He stated that the complainant who identified him at the parade was in court when he was arraigned on 15th August 2014.

The 3rd Appellant was put on his defence. He gave an unsworn statement. He stated that he resides in Murang'a. He told the court that he travelled to Eldoret on 27th November 2013. He boarded a bus travelling to Matunda Area. He was going to pick luggage from Mama Otiso's shop. He however found that her shop was closed. He decided to go to her house. As he was walking to her house, he saw two vehicles that were involved in a car chase. He heard gunshots. He lay down on the ground. Police officers arrested him. He was not told the reason for his arrest. He was arraigned before a court in Eldoret on the next day on 28th November 2013. On 14th August 2014, he was transferred to a prison in Nairobi. He was arraigned in court the following day. On 26th August 2014, he participated in an identification parade at Muthaiga Police Station. He told the court that the witness who identified him at the identification parade was present in court during his arraignment. 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 charge of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification and circumstantial evidence to secure the conviction of the Appellants. It is trite that evidence of a single identifying witness must be examined carefully to ensure that it is watertight before a conviction can be founded on it. In the case of Kiilu & Another vs. Republic [2005] eKLR the Court of Appeal stated thus:

“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.”

This Court has a duty to weigh the evidence of PW1 who was the only identifying witness with greatest care and to satisfy itself that in all circumstances, it is safe to convict on such evidence. It has warned itself of the dangers of relying on the evidence of a single witness to secure a conviction. PW1 stated that the robbery occurred at about 11.00 a.m. He testified that he was able to identify the assailants since he spent about 30 minutes with them in the car during the robbery before they dumped him at Ridgeways. This court however notes that the complainant failed to give a description of the assailants in the first report that he made to the police. It's the prosecution's case that the complainant identified the Appellants during the respective identification parades conducted on 27th August 2014. The Appellants' identification parades were conducted in the absence of a prior description of the assailants by the complainant. The Appellants claimed that they had already been exposed to the witness before the identification parade was conducted. The Appellants were arraigned in court on 14th August 2014. They told the court that the complainant was present in court during their arraignment.

PW3 who conducted the identification parades for the three Appellants stated that during the parade, the 2nd Appellant complained that the witness who identified him was in court when he was arraigned. According to the Police Force Standing Orders, an accused person ought not to be seen by a witness before an identification parade is conducted. The Appellants' identification parades were therefore conducted in contravention of the said orders if the allegations made by the Appellants are true. 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).”

In the premises, the evidence of identification by PW1, who was the only identifying witness was not reliable since no description of the assailants was made in the first report that was made to the police. This court holds that it is highly unlikely that the complainant could have retained in his memory the description of the assailants. Further, it was peculiar that the prosecution relied on the evidence of the identification parades when a decision had already been made to charge the Appellants prior to the conduct of the identification parades. *How sure was the prosecution that the complainants would identify the Appellants in the identification parades?* That evidence is incredible and by itself it cannot support a conviction.

The prosecution adduced other circumstantial evidence against the 1st Appellant. The complainant stated that the assailants used motor vehicle Toyota NZE registration number KBS 247G during the robbery. The registered owner of the motor vehicle was PW2. PW2 told the court that the 1st Appellant hired the said vehicle from him on 24th September 2014. He hired the vehicle for two days and was required to return it by 26th September 2014. The 1st Appellant however returned the vehicle after five (5) days on 28th September 2014. PW2 availed in court the car hire agreement between himself and the 1st Appellant. He also availed the identification documents used by the 1st Appellant to hire the vehicle. The said agreement (*Prosecution Exhibit No.6*) indicated that the 1st Appellant hired the vehicle from 24th September 2013 to 26th September 2013. There was a two day extension of the contract. The 1st Appellant was required to return the vehicle on 28th September 2013. The said agreement coupled with the evidence of PW2 that the 1st Appellant returned the vehicle on 28th September 2013, proved that the 1st Appellant was in possession of the vehicle used in the robbery on the material day of 27th September 2013. Therefore, the 1st Appellant's claim that he returned the vehicle on 26th September 2013 does not hold water.

PW2 produced into evidence other car hire contracts entered between himself and the Appellant where he had extended the said contracts. Extension of time of the contract was therefore not unusual. The 1st Appellant was known to PW2. They lived in the same neighborhood. This court is convinced that the 1st Appellant was in possession of the vehicle on the material day of the robbery.

This evidence against the 1st Appellant was circumstantial. In Sawe vs. Republic [2003] eKLR the Court of Appeal stated thus:-

“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on.”

In the present appeal, the surrounding circumstances taken as a whole formed unbroken chain of events that proved the 1st Appellant was in possession of the vehicle from the time he hired the same from PW2 up until when he returned the vehicle on 28th September 2013. He was therefore in possession of the vehicle that was used to rob the complainant on the material day of the robbery, that is, 27th September 2018. This evidence was incompatible with the 1st Appellant's innocence and incapable of any other explanation other than he was one of the men who were involved in the robbery of the complainant. In the premises therefore, the 1st Appellant's conviction by the trial court was sound. All the ingredients of the offence of robbery with violence were established by the prosecution. The assailants were more than one. They were also armed with a gun. They threatened to harm the complainant by use of violence after which they robbed him of cash, his ATM Card and mobile phone.

No other evidence was adduced before the trial court connecting the 2nd and 3rd Appellants to the robbery. None of the stolen items were recovered in their possession. The 2nd and 3rd Appellants in their defence denied being involved in the robbery. As stated earlier in this judgement, the evidence of identification on its own, taken into totality is not watertight and free of error as to support the conviction of the 2nd and 3rd Appellants. This court therefore finds merit in the appeals lodged by the 2nd and 3rd Appellants. The 2nd and 3rd Appellants' appeals are hereby allowed. The trial court's convictions of both the 2nd and 3rd Appellants are hereby quashed. Their sentences are set aside. The 2nd and 3rd Appellants are set at liberty forthwith and ordered released from prison unless otherwise lawfully held.

As regards the 1st Appellant's sentence, following the recent decision by the Supreme Court in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, the court has discretion of re-sentencing the Appellant on the basis of severity of the offence now that the mandatory death sentence has been declared unconstitutional. In the present appeal, the Appellant was sentenced to death by the trial court. This court has considered the Appellant's mitigation. It has also considered the time spent by the 1st Appellant in custody before and after his conviction. The evidence adduced by the prosecution established that the Appellant and his gang robbed the complainant at gun point. They however did not injure the complainant. In the premises, this court sets aside the death sentence meted out by the trial court. The same is substituted by a sentence of this court sentencing the 1st Appellant to serve ten (10) years imprisonment with effect from 13th October 2017 when he was convicted by the trial court. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE