REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 80 AND 81 OF 2015 (CONSOLIDATED)

BETWEEN

KEVIN LUMBASO SHAMALA.....1st APPELLANT

TYSON LUMBASO SHAMALA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against convictions and sentences of death for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code in a judgment delivered by Hon.J. Ong'ondo, Senior Resident Magistrate, on 10th July 2015 in Kakamega Criminal Case No. 2322 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background and Brief Facts

1. This appeal stems from the judgment of the learned trial magistrate aforementioned which was filed by the appellants on 20th July 2015 seeking that their sentences be set aside and convictions quashed on the following grounds as set out in their respective petitions of appeal *inter alia* **THAT**:

a) I did not plead guilty to the above appended charge.

b) The sentence meted was very harsh and excessive in the circumstances.

c) The learned trial magistrate erred in law and facts in convicting me on the evidence which did not prove the charges.

d) The evidence produced before court by witnesses was fabricated.

e) The learned trial magistrate erred in law and facts in relying on hearsay evidence to convict me.

f) The learned trial magistrate erred in law and facts to consider the truth that I was not arrested with anything.

g) The trial magistrate erred in law and facts by failing to consider the fact that the evidence that the prosecution intended to use was not availed to me during the trial thereby breaching my constitutional rights to a fair trial.

h) The trial court did not consider my mitigation

2. The Appellants were charged with the offence of ***robbery with violence, contrary to Section 296(2) of the Penal Code***. The particulars were that the appellants, jointly on the night of the 31st day of October 2013, at Bukolwe area, Muranda location, Shiswa sub-location, in Kakamega East District within Kakamega County, while armed with dangerous weapons namely a panga and a slasher robbed Emmanuel Munala off his mobile phone make Nokia 1200 valued at Kshs. 3,500/- and immediately before the time of such robbery chopped off the hand of the said Emmanuel Munala.

3. At the conclusion of the trial, the learned trial magistrate convicted the appellants on the charge of ***robbery with violence contrary to section 296(2) of the Penal Code*** and sentenced them to death as by law provided.

4. This is the first appellate court and as such it is guided by the principles set out in the case of ***David Njuguna Wairimu V – Republic [2010] eKLR*** where the court of appeal stated:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

5. The Court of Appeal for Eastern Africa similarly held in ***Okeno vs. Republic [1972] EA 32*** that :

> ***"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."***

Issues for Determination

a) Whether the appellants' rights under Article 50(2) (j) of the Constitution of Kenya were violated.

b) Whether the appellants were in the company of one or more persons.

c) Whether the appellants were armed with pangas and sticks.

d) Whether the appellants chopped off the hand of the complainant/PW1.

e) Whether the appellants were positively and properly identified.

a) Whether the appellants' rights under Article 50(2)(j) of the Constitution of Kenya were violated

6. It was the appellants' submissions that their rights to a fair trial were violated in that the evidence the respondent intended to use for the trial were given to them a day before the hearing date which made the whole trial unfair for them. The appellants further submitted that it was prudent for the respondent to have supplied them with the evidence at least 14 days in advance prior to the hearing date.

7. The respondent submitted that even though the trial magistrate ruled against the 1st appellant who stated during the trial that he was not ready to proceed, the same was an isolated incident and does not constitute an unfair hearing. The respondent added that in any case, the 1st appellant did not state why he was not ready to proceed and that the learned trial magistrate exercised proper discretion in ordering that the hearing therein proceeded.

8. ***Article 50(2) (b) (j) of the Kenyan Constitution*** provides as follows:

> ***"50.Fair hearing***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

9. ***Article 25 (c) of the Constitution of Kenya*** provides that:

> ***25.Fundamental Rights and freedoms that may not be limited***

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

……

(c) the right to a fair trial;

……"

(see Supreme Court of Kenya cases: ***Christopher Odhiambo Karan v David Ouma Ochieng & 2 others [2018] eKLR; Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others, Sc. Pet. 18 of 2014, [2014] eKLR)***

10. In the case of ***Leonard Maina Mwangi v Director of Public Prosecutions & 2 others [2017] eKLR, Lesiit J*** cites the Supreme Court of India in the case of ***Zahira Habibullah Sheikh & another vs State of Gujarat & Others AIR 2006 SC 1367*** where the said court stated:

"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical or comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and presence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

11. In the case of ***Joseph Ndungu Kagiri v Republic [2016] eKLR, Mativo J*** held that:

"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society."

12. Mativo J went on to refer to the case of ***Thomas Patrick Gilbert Cholmondeley Vs. Republic,*** *(*decided before the promulgation of the 2010 constitution) the Court of Appeal stated categorically that:-

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)."

Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence…….

"I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial ……."

(Also see the Court of Appeal in ***Simon Ndichu Kahoro v Republic NRB CA Criminal Appeal No. 69 of 2015 [2016]eKLR; D.K Kemei J*** in ***Domenic Kariuki v Republic [2018] eKLR*** and***; D.S. Majanja J in Julius Rotich v Republic [2019] eKLR.***

13. From the record, the appellants asked for statements on 2nd December 2013 to which the trial court ordered that the same do issue to the appellants at their own cost. On 16th December 2013, the 2nd appellant asked for statements and stated that he did not have money for photocopies. On 19th December 2013, the respondent stated that he had three witnesses to which the 1st appellant stated that he was not ready to proceed. The record indicates that the first respondent's witness testified immediately after the 1st appellant's statement that he was not ready to proceed and the record indicates that the trial court did not consider his protest. On 13th February 2014, the 2nd appellant told the trial court that he was unable to cross-examine properly as he had not received statements and the trial court ordered for a further cross-examination of PW1,PW2 and PW3. On 30th April 2014, the 2nd appellant stated that he had not cross-examined the witnesses after he got the statements.

14. From the record, it is clear that the appellants were never supplied with the evidence the respondent intended to rely upon before the trial commenced. The statements were however supplied after PW1, PW2 and PW3 had testified. The appellants then made an application to recall the witnesses who had already testified for cross examination. The witnesses, and in particular, PW1, were recalled and cross examined by the appellants. This court is aware of the Court of Appeal decision in ***Simon Githaka Malombe versus Republic – Nyeri Court of Appeal – Criminal Appeal number 314 jof 2010 [2015]eKLR*** in which the court held that ***"the denial of witness statements in the present case reduced the trial to a farcical sham."***

15. In the instant case, I find that the fact that the witnesses who had testified were recalled for cross examination by the appellants after they (appellants) were supplied with statements, ameliorated the earlier prejudice. I therefore do not think that the failure to supply the appellants with witness statements before commencement of the hearing breached their rights to a fair trial under ***article 50 of the Constitution, 2010.***

b) <u>Whether the appellants were in the company of one or more persons</u>

16. One of the ingredients necessary to prove the offence of robbery with violence is that the offender must be in the company of one or more persons. (See the Court of Appeal in ***Oluoch –Vs – Republic [1985] KLR 549***; and also in ***Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR).***

17. The complainant, **Emmanuel Munala Odipo**, testified as PW1 and stated that he was confronted by the appellants who he recognized by their appearance. **Zakaria Resang Odipo,** who testified as PW2 stated that he was informed by PW1 that the appellants had attacked him. **Thomas Muchogo** testified as PW4 and stated that on the material day, he heard a scream and on getting to the scene, he found PW1 bleeding from the right hand. PW4 stated that he was informed by PW1 that he had been attacked by two boys. The clan elder, **Elkaba Lianda** testified as PW5 and stated that he got information from the area assistant chief that some youth had injured a person in Kakamega. **Patrick Mambili**, a senior Clinical Officer testified as PW6 and stated that PW1 informed him that he was cut by two people. **PC Shariff Mohammed** testified as PW7 and stated that PW1 informed him that he was attacked by the appellants.

18. From the evidence, it is clear that the attack on PW1 was committed by two people, and that during the attack, PW1 was injured.

c) <u>Whether the appellants were armed with pangas and sticks</u>

19. Another ingredient necessary to satisfy the offence of robbery with violence is the fact of the offenders being armed with any dangerous and or offensive weapon or instrument. PW1 testified that the appellants had a panga and sticks about one foot long. PW1 identified the panga at the trial court which was produced by PW7 who stated that it was the panga used in the commission of the offence (*Pexhibit 3*). While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, the definition of dangerous or offensive weapon, includes at one extreme a stone or stick and the other extreme a firearm ***(Joseph Kaberia Kahinga & 11 others v Attorney General (supra)*** refers. A panga is one such dangerous weapon that does not need defining and I find that the respondent was able to satisfy this ingredient that PW1's attackers were armed with dangerous and offensive weapon.

<u>d) Whether the appellants chopped off the hand of the complainant/PW1</u>

20. Another ingredient necessary to prove the offence of robbery with violence is the fact that the offenders "***At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence"*** (*See the Court of Appeal in* ***Oluoch –Vs – Republic case(supra)***

21. PW1 testified that after he told the 1st appellant the time on his phone, the 1st appellant demanded his phone and thereafter aimed and swung the panga on PW1's head but it landed on his left hand virtually severing it off at the wrist. This was corroborated by PW6 who produced the discharge summary form and medical P3 (*Pexhibit 2* and *Pexhibit 1* respectively) which indicated that PW1's hand was amputated after being hit by a sharp object.

22. Based on the evidence above, I find that the respondent proved beyond reasonable doubt the ingredients of the offence of robbery with violence by proving that the attackers of PW1 used actual violence on him immediately after robbing him. And as held in the ***Oluoch versus Republic case (supra)*** the respondent needed to prove only any one of these ingredients.

<u>e) Whether the appellants were positively and properly identified</u>

23. Identification is a crucial ingredient necessary to satisfy the offence of robbery with violence. The ultimate question in all criminal proceedings is whether the person(s) brought before the trial court actually committed the offence(s) with which they are charged.

24. PW1 stated that he was robbed at around 4.00 pm by the appellants whom he identified when they confronted and attacked him. PW1 added that it was rainy on the material day. On cross-examination, PW1 stated that he did not know the appellants before the day he was attacked but he was able to identify them as it was daytime. PW5 stated that the appellants were well known to him due to their notoriety as criminals and that he was given the appellants' names after being informed of the attack by the area Assistant Chief and that he(PW5) helped in tracking and arresting of the appellants. This begs the question: How did PW5 know that it was the appellants who attacked PW1 being that it was not PW1 who informed PW5 of the attack and there was no one else present when PW1 was being attacked? It would appear that PW5 relied on hearsay evidence from the area assistant chief who did not testify in the trial court. PW7 stated that PW1 gave him the names and descriptions of his attackers. This begs another question: How did PW1 know the names of the appellants and yet he testified that he did not know the appellants prior to the incident? PW7 added that the appellants were well known criminals and that they had committed another robbery on the material day though there was no evidence to back this claim.

25. The Court of Appeal, in the case of ***Jali Kazungu Gona v Republic [2017] eKLR*** held that:

"In Wamunga vs. Republic [1989] KLR 424 this Court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -

"Evidence of visual identification in criminal cases can bring about 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 mere identification of the accused which he alleges 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".

(See Court of Appeal in Maitanyi vs. Republic [1986] KLR 198.

……

"To begin with BP was clear that she did not know the appellant prior to the incident hence, it was crucial for the veracity of her identification of the appellant to be tested through an identification parade. For the reason that identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu & another vs. Republic [2010] eKLR. Unfortunately, her identification of the appellant at the trial as submitted by the appellant amounted to dock identification. In that regard, we reiterate the findings in the decision of this Court in Ajode vs. Republic [2004] eKLR which expressed that:-

"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."

26. In the instant case, I find and hold that the identification of the appellants as the persons who attacked PW1 and maimed him by cutting off his left hand at the wrist was in doubt. That identification evidence was shaky and not sufficient to pin the two appellants to the scene of crime. They may have done it, but the fact that no identification parade was conducted to test PW1's assertion that he truly identified the two appellants as his attackers pocked an irredeemable hole in the prosecution case; and all that remained was dock identification of the appellants. Such identification has been held to be of little probative value unless it is preceded by a properly conducted identification parade. It thus follows that had the evidence of identification been properly and thoroughly tested and analyzed by the trial court, I doubt whether the court could have come to the conclusion that the appellants had been identified by PW1. Further, had the investigating officer been more vigilant and requested for an identification parade, there is no way PW1's suffering would have gone unpunished. The investigating officer only did his basic duty and no more.

27. As the Court of Appeal held in the case of ***Jali Kazungu Gona v Republic case* (supra),** the onus is always on the prosecution to prove its case against the accused person to a standard beyond reasonable doubt. **Lord Sankey** expressed that fundamental principle many years ago in his famous speech in ***Woolmington vs. DPP [1935] UKHL 1*** where he said:-

"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

(See the Court of Appeal in ***Joan Chebichii Sawe – V- Republic Crim. App. No. 2 of 2002)***

Conclusion

28. The upshot of the foregoing is that because there was no proper and clear identification of the appellants as PW1's assailants, this appeal is merited on both conviction and sentence. Accordingly I allow the appeal, quash the conviction and set aside the sentence of death imposed upon each of the appellants. Unless any of them is otherwise lawfully held, they are to be released from prison custody forthwith.

29. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019

WILLIAM M. MUSYOKA

JUDGE