



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 23 OF 2017

1. OWEN NDUNG’U NDUTA.....1ST APPELLANT

2. CHARLES MWANGI WANJIRU.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. E. Michieka – SPM Kikuyu

dated and delivered on the 23rd day of September 2015 in the original Kikuyu

Senior Principal Magistrate’s Court Criminal Case No. 03 of 2014}

JUDGEMENT

The appellants were convicted and sentenced to death for the offence of Robbery with violence contrary to Section 295 as read with 296 (2) of the Penal Code.

The particulars of the charge were that on 2nd February 2014 at Baraniki village in Kiambu County within Central region with others not before court being armed with dangerous weapons namely machetes, pangas and rungs they robbed John Mwangi Ngendo of Kshs. 4,500/=.

The appellants filed separate appeals against the conviction and sentence but as those appeals arise from the same judgement they were consolidated. Their petitions of appeal raise district grounds and so I shall reproduce them sequentially. For the 1st appellant the grounds are: -

“1. **THAT** there was a fatal failure to accord a fair hearing to the Appellant contrary to Article 50(2) (c) and (j) of the New Constitution of Kenya which is applicable to the case.

2. **THAT**, the learned Magistrate erred in law in holding that the Appellant was properly identified while basing the conviction on uncorroborated evidence of a single identifying witness.

3. **THAT**, the learned trial Magistrate erred in law when he held that the Appellant was properly identified by the Prosecution witnesses whereas there was no mention or description of the Appellant in the first report, and the prevailing circumstances were not favourable for positive identification.

4. **THAT**, the lower Court erred in accepting the Appellant was properly identified whereas there was no evidence by the Prosecution to demonstrate that indeed any Identification Parade was conducted for purposes of identifying the Appellant.

5. **THAT**, the learned Magistrate failed to note that the Appellant's conviction was based on "mere suspicion."

6. That the Magistrate erred by failing to give the Appellant the benefit of doubt considering the flaws in the investigations and the generality of the circumstances of the case.

7. **THAT**, the trial Magistrate erred in law by failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law, thus

the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice.”

For the 2nd appellant he avers that: -

“(a) THAT there was variance between the particulars of the charge and the evidence adduced, in breach of the provisions of Section 214 (1) of the Criminal Procedure Code.

(b) THAT, the learned trial Magistrate erred in both law and fact by failing to inform the Appellant of his right to cross-examine his co-accused persons in contravention of Section 208 (3) of the Criminal Procedure Code.

(c) THAT, the learned trial Magistrate had overlooked the 1st report made by the Complainant at the Police Station which report had not identified the Appellant nor given his descriptions.

(d) THAT, the learned trial magistrate erred in both law and fact by failing to find that the Prosecution did not prove to the required standards that the prevailing conditions at the time were conducive for positive identification/recognition of the Appellant.

(e) THAT, the testimonies tendered to establish the Appellant’s mode of arrest was riddled with doubts and was not enough to sustain a conviction.

(f) THAT, the learned trial Magistrate erred in law and fact by failing to note that Pw4 (the Investigating Officer) did not do any investigations, and that if he did, the same were shoddy.

(g) THAT, the learned trial magistrate erred in law by rejecting the Appellant’s defence without assigning any good reason for so doing thereby contravening the provisions of Section 169 of the CPC.”

The appeal is vehemently opposed. The appellants canvassed the appeal through written submissions while Counsel for the respondent submitted orally.

The duty of the first appellate court was summarized by the Court of Appeal in **Ngui v Republic [1984] KLR 729** as follows: -

“2. The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions.”

I have also borne in mind that I did not see or hear the witnesses who gave evidence (see **Okeno v Republic [1972] EA 32**).

The evidence in the court below was that on the material day at about 3.30pm the complainant (Pw1) who was at Baraniki was headed to Dagoretti when he met the 1st appellant who was in the company of four other men. They asked him for a match and when he said he did not have any they frisked him and the 1st accused took Kshs. 4,500/= from his hind pocket. Pw2, was passing by when he saw the appellants and their accomplices frisking the complainant and fearing the same fate would befall him he fled and made a report at Gichungu Police Post. He went back to the scene with police officers but by then the attackers had fled. Both Pw1 and Pw2 testified that during the occurrence the 1st appellant was armed with a panga and the 2nd appellant an axe. The complainant stated that as he was being frisked the 2nd appellant just stood there watching. After the assailants took his money and fled he reported the matter to the police and like Pw2 told them that he knew the assailants as he used to see them in the neighbourhood. The next day he led officers attached to Gichungu AP Post among them PC Paul Ondieki (Pw3) to the scene and identified the two appellants to them. The appellants were arrested and taken to Kikuyu Police Station where they were charged with this offence. Nothing was recovered.

Both appellants testified on oath. The 1st appellant stated that he was a resident of Baraniki and worked at the quarry as a masonry casual. He confirmed that he was arrested by two police officers on 3rd February 2014 at noon. He stated that he was taken to the police station and told he had assaulted someone. The officers asked him for a bribe but he did not have money so they said they would fix him. He maintained he was innocent and did not know why he was in court. He further testified that the complainant too threatened to fix him over some money he (appellant) owed him.

The 2nd appellant also testified that he worked at Baraniki quarry as a casual. He stated that he knew the complainant and confirmed that they were arrested on 3rd February 2014 at about noon by two administration police officers who took them to the police post for allegedly robbing a man. He contended that while at the police post the complainant went there and told them he would fix them for refusing to repay his money. He, the appellant, denied committing the offence and stated he was surprised when they were charged.

Sections 295 & 296 (2) of the Penal Code under which the appellants were charged states: -

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296 (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

From that definition the offence of Robbery with violence is committed if any of the following circumstances are proved: -

“(a) That the offender is armed with any dangerous and offensive weapon or instrument; or

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

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person – See *Oluoch v Republic [1985] KLR*, *Mohamed Ali v Republic [2013] eKLR*, *Daniel Muthomi M’Arimi v Republic [2013] eKLR*.

Having evaluated the evidence in the court below myself I am satisfied that the charge against the appellants was proved beyond reasonable doubt. The offence was committed on a road at about 3.30pm hence in broad daylight. Both the complainant (Pw1) and Pw2 (the passer-by) testified that they knew the appellants as they used to see them and indeed both appellants confirmed they knew the complainant. Their allegations albeit not true that he **“framed/fixe**d them because they owed him money confirms this was a person who knew them and who they knew very well. Moreover, the 2nd appellant expressly stated that he knew the complainant. This was therefore not just evidence of visual identification but recognition. That does not however remove the need to be cautious when relying on such evidence. In the case of *Osiwa v Republic [1989] KLR 469* the Court of Appeal held: -

“1. Where the only evidence against an accused is, as here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of the identification are favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

In *Mwenda v Republic [1989] KLR 464* the same court held: -

“..... Recognition might be more reliable than identification of a stranger but even then the court should remind itself that mistakes in recognition of close relatives and friends have been made sometimes.....”

In this case I am satisfied that as the offence occurred in broad daylight and on a road, the circumstances were favourable to a positive recognition of the appellants and there was no possibility of a mistaken identity. Moreover, this was not evidence of a single witness because Pw2 who was a mere passer-by and who happened on the scene also recognized the appellants. That he did so was corroborated by Pw3, an AP officer at Gichungu AP Post who confirmed that Pw2 reported the incident and even took them to the scene but there was no one as the attackers had fled. Pw2 was an independent witness as he did not know the complainant and the appellants themselves did not allege that he had any reason to lie against them. I am satisfied that he was a reliable and trustworthy witness.

The 1st appellant complained that because the 1st report or OB through which the matter was reported was not produced then his right to a fair hearing under **Article 50 (2) (j) of the Constitution** was violated. On his part the 2nd appellant contended that the report was overlooked and that in any event the same had not identified him or given his description. In this very appeal the appellants made several applications for production of the OB. It is however instructive that on 25th June 2018 when they appeared before Meoli J, they withdrew that application. Their subsequent persistence for production or supply of the OB must therefore be considered as mischievous. Be that as it may the relevance of a first report or OB, as appellants usually refer to it, is to confirm that the witnesses told the police that they knew the assailants and that they gave the police their description. This is to so as to further confirm to the court that identification of the accused is positive and free from error and that there is no material discrepancy between the description given to the police and the evidence given in court – **(see the oft quoted case of Republic v Turnbull and others [1976] ALL ER 549)**. It is my finding that the omission to produce the report in this case whether here or in the court below was cured by evidence that the complainant took the officers to the scene of the robbery and identified the two appellants to them, a fact which they conceded. To me that was as good as the complainant stating he knew the assailants and giving a description of the appellants to the police in his first report. I am not therefore persuaded that failure to produce the OB was fatal to the prosecution’s case or that it violated their right to a fair trial.

Both appellants also faulted the trial Magistrate for not informing them of their right to cross examine each other as provided in **Section 208 (3) of the Criminal Procedure Code**. The 1st appellant submitted that this omission was fatal to the prosecution’s case. He relied on the case of *Simon Githaka Malombe v Republic [2015] eKLR*. However, in the instant case none of the appellants implicated the other and the omission to bring this right to their attention and for them to cross examine each other did not prejudice them in any manner. That ground of appeal therefore also fails.

As for the complaint that the charge sheet was fatal for not indicating that **“at or immediately before or after the time of the robbery the attackers used actual violence against the complainant”**, I have already set out the elements of robbery with violence and also cited authority to the effect that it is sufficient if any one of those elements is proved. In this case more than two elements were proved, namely **that the appellants were in company with more than one or more other person(s) and that they were armed**. The fact that violence was not mentioned in the charge sheet is therefore not fatal. Moreover, even were the charge defective the same would be curable under **Section 382 of the Criminal Procedure Code** as there was no prejudice to the appellants. Moreover, the complainant’s evidence was that the assailants frisked him and he did not allege that they wounded, beat, struck or used any other violence against him. I am satisfied that the charge against them was proved beyond reasonable doubt and that the **appeal against conviction has no merit**.

The appellants did not make any specific submissions regarding the sentence only urging this court to find merit in their appeal and to quash

the conviction and set aside the sentence. From the record it is clear that the only reason they were sentenced to death is that the sentence was mandatory and the trial Magistrate did not have any discretion such sentences have since the Supreme Court decision declaring them unconstitutional in **Francis Muruatetu & Another v Republic [2017] eKLR** been shirked by the courts and convicted persons who have applied to the courts have had them set aside and substituted with a term of imprisonment. The appellants too are entitled to equal benefit of the law and accordingly this court having considered the circumstances of the offence and their plea of remorse, has **set aside the sentence of death and substituted thereof a term of imprisonment for fifteen (15) years from the date they were sentenced by the court below**. The appeal is otherwise dismissed. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE