REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 72 OF 2018

PATRICK NZIOKI NDETI alias CAPTAIN.....1ST APPELLANT

(Consolidated with HCCRA 69, 70 & 71 of 2018 respectively as follows)

PATRICK MWENDWA MUSILI *alias* **AVAI.....2ND APPELLANT**

PETER KURIA NDEGWA *alias* **MATO.....3RD APPELLANT**

JULIUS WAWERU MUCIRA *alias* **MANDEVU.....4TH APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 219 of 2018 by Hon. J.N Mwaniki (SPM) at the Senior Principal Magistrate's Court in Makueni delivered on 3rd December, 2018)

JUDGEMENT

Introduction:

1. The appellants were charged with the offence of **Robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code**. The particulars of the offence were that on the 9th day of April 2018 at Kathonzweni Market within Kathonzweni sub-County in Makueni County, with others not before Court while armed with dangerous weapons namely a wheel spanner and police handcuffs robbed JOHNBOSCO MUTUKU KIMUYU kshs 430,000/= and during the time of such robbery threatened to shoot and used actual violence to the said **Johnbosco Mutuku Kimuyu**.

2. After a full trial, the learned trial magistrate convicted and sentenced them to thirty (30) years imprisonment.

The Appeal:

3. Aggrieved by that decision, the appellants filed separate appeals which were consolidated on 10/06/2019. The 1st appellant raised 6 grounds of appeal and contended that the learned trial magistrate erred in law and fact by;

a) Finding that the appellant was properly and positively identified by the prosecution witnesses notwithstanding that the prevailing conditions at the scene of crime were not favorable for positive identification.

b) Failing to appreciate that the identification parade did not pass the test of judges rule.

c) Failing to appreciate that evidence of identification was wanting in so far as the identifying witnesses had not given prior description of the appellant before the parade.

d) Drawing inferences from evidence which did not flow logically and reasonably.

e) Relying on document examiner report which was wrongly admitted in evidence.

f) Convicting the appellant in a duplex charge.

4. The 2nd and 4th appellants raised similar amended grounds of appeal and contended that the learned trial magistrate erred in law and fact by;

a) Failing to find that the charge sheet was defective ab initio for duplicity and non-conformity with the evidence on record.

b) Failing to find that there was no adverse positive first report against him and that the identification parade was not conducted as per the force standing orders.

c) Failing to find that the explicit inconsistencies and contradictions on record went to the root of the prosecution's case hence the burden of proof was not discharged.

d) Failing to find that essential witnesses needed to corroborate the prosecution's case were not called hence violating Article 50(2) and (j) of the Constitution.

e) Failing to find that his mode of arrest and identification were greatly unjustified by evidence hence a violation of the rules of natural justice.

f) Basing the conviction and sentence on a faulty judgment which did not observe the provisions of section 169 of the Criminal Procedure Code.

g) Failing to give regard to the defense case which reasonably exonerated the appellants from any wrong doing.

h) Meting a sentence that was harsh and excessive in the circumstances of the case.

5. The 3rd appellant raised 6 grounds of appeal as follows;

a) That the learned magistrate erred in law in failing to inform the appellant of his right to cross-examine his co-accused persons contrary to the provisions of section 208 (3) of the Criminal Procedure Code.

b) 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 favorable for positive identification.

c) That the identification parade was dubious because the complainant had already seen the appellant beforehand and was therefore valueless.

d) That the trial Court had erroneously relied upon accomplice evidence

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 by failing to note that the burden and standard of proof by the prosecution was not discharged hence making the guilty verdict unsafe.

6. The appellants canvassed the appeals through written submissions which they highlighted on 11/07/2019 and the learned prosecution Counsel Mr. Morara responded orally.

THE SUBMISSIONS

1st Appellant's Submissions:

7. The 1st appellant submits that he was not properly identified by PW1 and that PW1's first statement vide OB/NO23/9/4/2018 did not contain the description of the persons who attacked him. That the learned trial magistrate was not careful to instruct himself that the witness had never seen the attackers before. He contends that the identification parade should have been preceded by description of the suspect.

8. He submits that the incident was reported at midday yet the exhibits were recovered at 11.30hrs by PC Mungat who was never called to testify. That the prosecution did not give reasons as to why the witness was not called to testify. He also submits that PW6 had no authority to produce the examination report on behalf of Martin Kitayi as it was contrary to section 77 of the evidence Act. He contends that the expert report of the document examiner could only be tendered in evidence by a skilled expert. He submits that failure to call the expert denied him the opportunity to test the expert's opinion by way of cross examination.

9. He submits that the charge was duplex because sections 295 and 296 of the Penal Code provide for different scenarios and lumping them together could create confusion in the mind of the accused person as he is not likely to know the exact offence facing him.

2nd and 4th Appellants' Submissions:

10. The appellants submit that the charge sheet is defective for failing to conform with the evidence adduced. That according to the narrative, the appellants threatened to shoot the victim but no evidence was lead to show the existence of a pistol. They contend that by so doing, the prosecutions intention was to paint a picture of aggravated robbery so that the appellants could be over punished.

11. They submit that charging the appellants under section 295 as read with section 296(2) of the Penal Code made the charge sheet bad for duplicity. They cite *inter alia* the case of ***Kasyoka vs Republic (2003) eKLR*** where it was held that;

> ***"Where a charge is duplex and the accused person goes through the trial, the fairness of the process is fundamentally compromised as it is not clear as to what the exact charge is and as a result, he may not be able to prepare a defence."***

12. They also relied on the case of ***Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR*** where the Court of Appeal ruled as follows:

> ***"The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."***

13. On identification, they submit that there must be positive identification which must rhyme with the first report. They contend that the witnesses did not describe them to the police in their first report. They also submit that evidence of identification must be water tight to justify a conviction.

14. On the issue of contradictions, they submit that there was a contradiction as to where the complainant's first report was recorded. Was it at Makueni Hospital as per PW1 or the police station as per PW5? He also submits that there was a contradiction as to when the identification parade (ID) was conducted. That according to PW5, the ID parade for 1st and 3rd appellant was conducted on 09/04/2018 but according to PW1, he was called for an ID parade on 28/04/2018. He also submits that the particulars of the motor vehicle used to abduct the victim were doubtful.

15. They submit that David Mburu Munji who had allegedly hired the impugned motor vehicle was an essential witness who the prosecution failed to call. That failure to call the witness means that there was a gap in the prosecution case which should be resolved in favour of the appellant.

16. With regard to their mode of arrest, they contend that no inventory was prepared in relation to the alleged stolen items belonging to the PW1 and that the one PW6 alleges to have prepared is not counter signed by the suspects to acknowledge recovery. They also submit that nothing was recovered from them as per PW6's testimony and as such, their arrest was unjustified.

17. As for non-compliance with section 169 of the Criminal Procedure Code (CPC), they submit that the trial Court did not identify the law relating to the issues in its judgment, did not provide reasons for conviction and did not specify the offence and section under which he was convicted.

18. They also submit that their defences were not considered and that the onus remained with the prosecution to disprove their defence.

19. With regard to the sentence, they submit that in the absence of any explicit aggravating circumstances, the sentence of 30 years was excessive.

3rd Appellant's Submissions:

20. The 3rd appellant submits that there was no compliance with section 208 of the CPC as he was not informed of his right to cross examine the his co-accused. He cites *inter alia* the case of ***Godhana vs Republic (1991) KLR 417*** where it was held that;

> ***"The appellant had not been given the opportunity to cross examine his co-accused and other prosecution witnesses. On appeal, the Court of Appeal held this to be a fatal misdirection."***

21. On identification, he submits that the circumstances obtaining during the robbery were such that the witnesses who purported to identify him could not have been in a position to do so. He cites the Canadian case of ***R vs Hanemaayer, 2008 ONCA 580*** where the Court of Appeal of Ontario stated that;

> ***"She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses…"***

22. He submits that his arrest was based on information from his co-accused *(1st appellant)* hence the accomplice evidence required corroboration.

23. He also submits that, while it is not disputed that PW1 was approached by some people in broad daylight with the claim that they were police officers, there was nothing peculiar about those people except that they indeed looked like policemen. He contends that a witness who had not given the descriptions of assailant(s) is not supposed to proceed to identify anyone from an identification parade.

24. He submits that his alibi defence was not considered and contends that the burden of proving an alibi does not lie on the accused person.

The Respondent's Submissions:

25. Mr. Morara for the state opposed the appeals and submitted that the parade rules were not deviated from, that descriptive factors were used and that the complainant interacted with the attackers. That it was daytime and lighting was sufficient. He also submits that there was interaction between the suspects and boda boda rider.

26. He submitted that the registration number of the motor vehicle was KCM 733J which number was also on the side mirror and that the other number plates were for purposes of concealing identity.

27. With regard to the report of the document examiner, he submitted that section 77 of the evidence Act allows expert opinion to be produced in the absence of the maker.

28. On the issue of where the first report was made, he submitted that it was made before the complainant went to hospital and that he (complainant) was confusing the first report and recording of statement.

29. On the issue of the sentence, he submitted that 30 years was sufficient as the appellants have other cases in other Courts. He gave the example of Criminal Case No. 224/2018 in Mwingi Law Courts.

Duty of the First Appellate Court:

30. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

31. Having looked at the record of appeal, the evidence on record and the rival submissions, it is my considered view that the following issues arise for determination;

a) *Whether the appellants were positively identified.*

b) *Whether the charge sheet was defective.*

c) *Whether there was non–compliance with sections 208(3) and 169 of the CPC.*

d) *Whether the prosecution's case was proved beyond reasonable doubt.*

Identification:

32. The question of identification featured prominently in the appeals. **PW5** was **Inspector Wesley Langat**, the officer who conducted the identification parades. The learned trial magistrate had the following to say with regard to the evidence of PW5;

> ***"When asked to describe the accused persons, the officer (PW5) described them in regard to their physical appearance and showed none who resembled the other. He however and shockingly so went ahead to state that he used the same people in the parade to identify the first and third accused persons in one parade and the same people in the parade to identify second and fourth accused persons in the other. That was the height of incompetence on his part. He exhibited no professionalism in his work and made a mockery of the exercise. He was an embarrassment to himself and investigation. The identification parade he did served no useful purpose. It cannot be said that the accused persons were properly identified. Using same people to identify 'A' first and 'B' later is tantamount to asking the identifying witness in regard to the second parade where 'B' appears to pick the new entrant. Other than the issue of parade, there are witnesses who said they did on the material day interact with the accused persons."***

33. Having looked at the evidence of PW5, it is clear that he behaved exactly as described by the learned trial magistrate. Despite stating that he was conversant with the ID parade rules, he did the exact opposite and I am inclined to join the learned trial magistrate in reprimanding the officer for unprofessionalism.

34. The appellants belabored the issue of ID parades in their submissions yet it is crystal clear from the above extract that the learned trial magistrate did not base his finding on the ID parade results. On the contrary, he appreciated that the parade was shoddy and did not comply with the force standing orders.

35. **PW3** was **Peter Mutinda Nyaa**, the boda boda rider who testified that he interacted with the 1st and 3rd appellant on 09/04/2018 *(material day).* He testified that on the material day, he was hired by two men to ferry them to Itangine. They went to Ocal petrol station and fueled Kshs 200/= which was paid by one of the men. They arrived at Itangine but there was no vehicle waiting for them. The men kept telling him to move until he got to a place where he declined. He was later told that he had ferried criminals.

36. He said that he talked a lot with the men, one was a kamba and the other was a kikuyu. He spoke with the kamba and the other one spoke kikuyu on his phone and had brown teeth. He left them at Munyu area and was later told by boda operators that he had carried criminals who robbed someone at Kathonzweni.

37. **PW1** the complainant described how he was abducted at Kathonzweni by four men who stole Ksh 430,000/= which he had withdrawn from KCB bank and how he struggled with them in the white fielder car before being thrown out near Kaiti river. He said that the 1st and 2nd appellants were at the back seat, that the 3rd appellant was the one who gave the wheel spanner to 2nd appellant to hit him and that the 4th appellant was the driver. That the 2nd appellant was the one who ransacked his pockets and the 1st appellant showed him his *(complainant's)* picture on his *(1st appellant's)* phone.

38. **PW6, Sergeant Patrick Bwire** testified on how they recovered a white Toyota fielder, KCJ 642R which had been abandoned at Makueni Kako dry weather road. That they recovered a black bag from the motor vehicle which contained clothes, toiletries, a novel *'Doing his time'*, registration number plates KCM 733J and KCL 590B *(both front and rear).* He said that it was accused 5 *(acquitted)* who gave him the phone No. 0717-843190 which he established was registered in the 1st appellant's name. That it was the 1st appellant who led to the arrest of the 3rd appellant. That the 2nd and 4th appellants were later arrested at Kawangware and Mwiki respectively.

39. Further, he testified that after arresting the 1st appellant, he learnt that his name was Patrick Nzioki Ndeti, the same name which appeared in the novel recovered from the motor vehicle. He produced the exhibits which included an inventory of the recovered items, the number plates, motor vehicle search reports, car track report and the novel. The prosecution Counsel applied to have the document examiners report produced by PW6 and there was no objection from the 1st appellant.

40. The evidence shows that before being bundled into the motor vehicle, the complainant spent about two minutes with the assailants and later on while giving evidence in Court, he described what each of them did and did not mix up their roles even on cross examination. He even described their sitting positions in the motor vehicle and it is not in dispute that the attack happened in broad daylight. In my view, despite the frightening situation which he later found himself in, there was an initial interaction with the assailants where the complainant was able to observe the attackers.

41. As for PW3, it is clear that he was not aware of the robbery when he carried the two men and was therefore in a position to observe them soberly. On being cross examined by the 1st appellant, PW3 responded as follows; *"I had not known about the robbery when I carried you"*. From this response, the question must have been; 'Were you aware of the robbery when you carried me?" Accordingly, I take this as an acknowledgement from the 1st appellant that he was indeed carried by PW3 on the material day.

42. Further, the evidence shows that it was the 1st appellant who led to the 3rd appellant who was described as having brown teeth by PW3. The fact of the brown teeth was also observed by the learned trial magistrate. I am thus convinced that PW3 was a credible witness and that he indeed ferried the 1st and 3rd appellant on the material day.

43. The 1st appellant was further connected to the crime by the novel in the getaway motor vehicle which had his name. According to the forensic document examiner's report *(exh 14c)* the handwriting in the novel and specimen handwriting *(of the 1st appellant)* were made by the same author. The report was dated and signed by Martin Kitayi and also contained his qualifications. It was produced by PW6 without any objection from the 1st appellant and he cannot now turn around and claim that the report was wrongly admitted in evidence. Further and as rightly submitted by Mr. Morara section 77 of the Evidence Act allows production of expert opinion without calling the maker.

44. From the foregoing and having looked at the totality of the evidence on record, I do agree with the learned trial magistrate that the involvement of the appellants in the crime was proved beyond reasonable doubt.

Whether the charge was defective:

45. The appellants raised the issue of duplicity. They were charged with robbery with violence contrary to section 295 as read with section 296 (2) of the penal code. Duplicity occurs where one count contains more than one offence. Section 295 describes the offence of robbery and section 296(2) describes the offence and sentence. Courts have continually held that a charge of robbery with violence under section 296(2) alone should be sufficient as the section is self-contained. I therefore agree with the appellants that indeed the charge was duplex.

46. The question which this Court has to consider at this juncture is whether the duplicity caused any prejudice to the appellants. The issue of duplicity was discussed in ***Cherere S/O Gakuli vs R (1955) 622 EACA*** where the court held as follows

> ***"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity."***

47. The decision in ***Cherere S/O Gakuli (Supra)*** was cited with approval by the Court of Appeal in ***Paul Katana vs R [2016] eKLR*** by stating that;

> ***"In the matter before us, we are unable to detect any prejudice which the Appellant suffered."***

48. For robbery to qualify as a violent one, the offender must;

> ***a) Be armed with a dangerous or offensive weapon.***
>
> ***b) Be in the company of one or more persons.***
>
> ***c) Immediately before or after the time of robbery, wound, beat, strike or use any other personal violence on the victim.***

49. From the particulars of the offence as well as the evidence of the witnesses, the prosecution's case was that the assailants who were several in number, stole money from the complainant, were armed with dangerous weapons and actually injured the complainant.

50. From the record, the appellants participated in the trial fully and cross examined the witnesses in a manner showing that they understood the charge facing them. Upon being placed on their defence, they all confirmed that they were aware of the charge against them. Accordingly, it is my considered view that the appellants did not suffer any prejudice. In any case, section 382 of the Criminal Procedure Code frowns upon interference with a finding of a Court of competent jurisdiction on account of an error, omission or irregularity which does not occasion a failure of justice. The section provides as follows;

> ***"Subject to the provisions hereinabove contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summon, warrants, charge, proclamation, order, judgment or other proceedings before or during the trial or in any enquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings....."***

Whether there was non –compliance with sections 208(3) and 169 of the CPC:

51. Section 208 of the Penal Code provides as follows;

"Procedure on plea of not guilty

> ***1) If the accused person does not admit the truth of the charge, the Court shall proceed to hear the complainant and is witnesses and other evidence (if any).***
>
> ***2) The accused person or his advocate may put questions to each witness produced against him.***
>
> ***3) If the accused person does not employ an advocate, the Court shall at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."***

52. Contrary to the 3rd appellant's submissions, the requirement in section 208(3) of the CPC is for an accused person to cross-examine the prosecution witnesses. From the record, it is evident that he cross examined all the prosecution witnesses or remained silent where he didn't have questions. None of his co-accused persons testified against him hence negating the need to cross examine them. Accordingly, the complaint by the 3rd appellant is misplaced.

53. As for section 169 of the CPC, the requirement is that a judgment should contain the points for determination, the decision thereon and reasons for the decision. It should also be dated and signed by the presiding officer in open Court at the time of pronouncing it. In case of conviction, it should specify the offence for which the accused is convicted, the section of the law under which he is convicted and the punishment given.

54. Having scrutinized the judgment, it is crystal clear that the same is compliant with section 169 of the CPC.

Whether the prosecution proved its case beyond reasonable doubt:

55. PW1 testified that on the material day, he had withdrawn Kshs 430,000/= from KCB bank in Wote, Makueni and was later accosted by four men at Kathonzweni who robbed him of the. He said that the money bag he threw away was picked by the 4th appellant. The prosecution produced withdrawal slips from KCB showing that indeed the complainant had withdrawn that amount of money from the bank.

56. The prosecution also established that the complainant was injured in the ordeal by producing his P3 form and treatment summary. They also availed Dr. Loiposha (PW2) who confirmed that he attended to the complainant on the material day and that he had bruises on the head, injury on the right eye, blunt injury on the back and bruises on both hands. He assessed the degree of injury as grievous.

57. The prosecution also produced a wheel spanner and blood stained handcuffs which were the offensive weapons used to inflict injuries on the complainant. The same were recovered from the white Toyota fielder which had been disguised as KCJ 642R. The prosecution produced a car track report showing that the vehicle was in Wote, Makueni on the material day.

58. Having earlier established that the appellants were positively identified, it is clear that all the ingredients of the offence of robbery with violence were proved beyond reasonable doubt.

59. As for the sentence, it is on record that the appellants have similar cases in different Courts within the country. The appellants inflicted serious injuries on the complainant and it was the doctor's evidence that the injury on the right eye could lead to blindness. Throwing someone out of a moving motor vehicle is the height of cruelty. There are aggravating circumstances in this case which make the sentence of 30 years look like child's play.

Conclusion:

60. In sum the court finds that, the appeal has no merit and makes the following orders:

i. The appeal is dismissed.

ii. The Conviction is upheld and sentence is confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE