



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NOS.13 &14 OF 2017

OMAR NACHE UCHE.....1ST APPELLANT

ABDIRAHMAN DAWA DARO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence BY Hon. B.M. OMBEWA

Principal Magistrate in Criminal Case No.156 of 2017

of Principal Magistrate's Court at Marsabit)

JUDGMENT

The appellants were charged and convicted of two counts of the offence of robbery with violence Contrary to section 296(2) of the Penal Code. The particulars of the offence are that the appellants on the 18th day of March, 2017 near Marsabit PCEA church in Marsabit township, Marsabit central sub-county within Marsabit county, jointly with others not before court while armed with dangerous weapons namely pistols, robbed No.83461 Inspector **SAMUEL MUTURI** of his mobile phone make Tecno C-8 imei number 352386073914654, an orange mobile phone make kabambe imei not known, cash Ksh.500/=, card holder containing certificate of appointment, bearing number 83461, Mount Kenya University card, National identity card number 235782, NHIF card all valued at Ksh.15,000/= and immediately after the time of such robbery threatened to use actual violence to the said No.83461 Inspector **SAMUEL MUTURI** In the second count, the particulars of the offence were that the appellants, on 18th of March 2017 near Marsabit PCEA church in Marsabit township, Marsabit central sub-county within Marsabit county, jointly with others not before court while armed with dangerous weapons namely pistols robbed **PURITY NYAGUTHI MWANGI** of her mobile phone make Tecno Y2 valued at Ksh.6000/= and immediately after the time of such robbery threatened to use actual violence to the said PURITY NYAGUTHI.

The trial Court sentenced the appellants to suffer death. The grounds of appeal for the first appellant are:-

- 1. That the trial magistrate erred in both law and fact by failing to observe that the evidence adduced by the witnesses was uncorroborated and contradicting.***
- 2. That the trial magistrate erred in both law and fact when he acted on unproved allegations to convict the Appellant herein.***
- 3. That the trial magistrate erred in both law and fact that no identification parade was done by PW1.***
- 4. That the trial magistrate erred in both law and fact that no report was made by PW2.***
- 5. That the trial magistrate erred in both law and fact that there was no description in the first report.***
- 6. That the trial magistrate erred in both law and fact that the accused persons were unknown to each other.***
- 7. That the appellant's defence was rejected without giving any cogent reason.***
- 8. That, Article 50(2) of the constitution stipulates that every accused person has the right to a fair trial which includes the right.***

a) To be presumed innocent until the contrary is proved

b) To be informed of the charge with sufficient detail to assure it.

c) To have adequate time and facilities to prepare a defence, in view of the above I lack all the rights to a fair trial.

9. That the learned trial magistrate erred in both law and fact by not informing the accused person that it was his right to choose and be represented by an advocate and to be informed of his right promptly and this substantial injustice resulted hence contravening Article 50(2)(g)(h) of the Constitution of Kenya.

Miss Thibaru, appeared for the 1st appellant, Omar Nache Uche. Counsel submit that PW1 testified that he did not identify the appellant by any special Mark. PW1 further testified that the person they arrested and later released was tall and of medium body and was arrested for looking suspicious. The attack lasted for five (5) minutes. He later changed the evidence and stated that he identified the appellant because of the brown jacket he was wearing. Counsel maintains that PW1 was a dishonest witness.

PW2 testified that she was robbed by a short man. Whereas PW1 testified that the appellant's face was not covered, PW2 stated that he had a cap. There was no positive identification. Counsel relies on the case of **FRANCIS KARIUKI NJIRU & 7 OTHERS –V- REPUBLIC[2001] eKLR** where the Court stated as follows:

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive or free from the possibility of error. The surrounding circumstances must be consideredAmong the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the Police at the earliest opportunity or at all.”

It is submitted that the prosecution evidence was insufficient and does not support the charge of robbery with violence.

The second appellant was represented by Mr. NYAWEYA Advocate. The grounds of appeal for the 2nd appellant, Abdirahman Dawa Daro as per the amended Petition of appeal are that:-

- 1. The learned Magistrate erred in law and fact by not allowing the 2nd accused to take a plea after allowing consolidation of the charges.***
- 2. The learned Magistrate erred in law and fact by presiding and proceeding on irregular proceedings.***
- 3. The learned Magistrate erred in law and fact by failing to note that the trial as it went on it caused the appellant prejudice.***
- 4. The learned Magistrate erred in law and fact to convict the 2nd accused in failing to note that the case was full of contradictions and inconsistencies Contrary to Section 163 of the Evidence Act.***
- 5. The trial Magistrate erred in law and fact by not noting that the charge sheet didn't indicate the time the offence was committed.***
- 6. The learned Magistrate erred in law and fact to convict 2nd accused by failing to consider and warn itself that the case was founded on the evidence of a single witness.***
- 7. The learned erred in law and fact by convicting the accused despite of the failure by the complainants to hand in the 1st report of the assailant who is alleged to have committed the offence in the 1st report to the Police, making the evidence of recognition doubtful.***
- 8. The learned magistrate erred in law and fact by not noting that the 1st report, the statements to the police and the testimony in court were inconsistent and contraction to the extent that they lacked credibility.***
- 9. The learned Magistrate erred in law and fact by failing to examine the evidence of identification, and recognition to the required standard.***
- 10. The learned Magistrate errand in law and fact by not finding that the complaint in 2nd count didn't make a report to the Police of the offence.***

Mr. Nyawewa appeared for the 2nd appellant. It is submitted that the proceedings were prejudicial, illegal and a nullity. On 15.4.2017 the prosecution applied to have the evidence of PW2 and PW4 in Criminal case No.155 of 2017 be adopted in Criminal case No.156 of 2017 without the two suits being consolidated. The appellant was not given an opportunity to cross examine the witnesses. This makes the proceedings to lack credibility in some parts. Counsel further submit that the prosecution evidence is full of inconsistencies and contradictions. It is not clear how many people robbed the complainants. PW1 didn't see where the gun was being cocked and this is a clear manifestation that there was no sufficient light at the scene of crime to clearly see a person ahead of him. PW2 did not see the person cocking the gun.

Mr. Nyawewa further submit that the trial Court did not warn itself on the danger of convicting on a single identifying witness. The conditions were not favourable for positive identification. The evidence of PW1 and PW2 is contradictory and casts doubt which should benefit the appellant. PW1 did not mention the 2nd appellant when he made the first report. Further, the appellant denied that he took Police officers to Kiwanja Ndege where the gun was recovered. The arresting officer and the officers who recovered the gun did not testify.

It is further submitted that the judgement acknowledge that parties recorded a consent witnesses who testified in Criminal case No.155 of 2017 be adopted as evidence for the appellant's case. These include P.C. Geoffrey Maina Gitari (PW2), Charles Mwangi (PW3), PC Peter Kipruto Nyaga (PW4), PC Geoffrey Sitoshe (PW6) and Inspector Samuel Barongo (PW10). Charles Mwangi, Samuel Barongo and Geoffrey Sitoshe did not testify. Further, no identification parade was conducted. The parade officer did not testify.

Counsel relies on the case of **REPUBLIC –V- JEREMIAH K HASSAN, Msa criminal case No.8 of 2011** where Justice M. Odera observed as follows:-

As a court I am quite mindful of the fact that great care must be taken in relying on the identification by a single witness. In the case of MAITIANI –VS- REPUBLIC [1987] KLR 198 the Court of appeal held as follows:

“Although it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the great care the evidence of a single witness respecting identification especially when it is known that the condition favouring a correct identification were difficult.”

The state opposed the appeal. Mr. Mwangangi submit that the evidence of PW2, PW3, PW4 , PW6 and PW10 in criminal case number 155 of 2017 was adopted in the case the subject of this appeal. Counsel maintain that the application was made because the witnesses played the same role in both files and the statements they had recorded in both files were the same in all respect. The evidence adduced in criminal case number 155 of 2017 would not have differed when it came to criminal case number 156 of 2017. The appellants conceded to the application. No prejudice was suffered. According to Counsel, Section 34 of the Evidence Act allows this procedure.

Counsel further contend that the appellants were positively identified. There was light from street light at the scene which illuminated the area. The complainants were able to see the clothes worn by the appellants as well as the number of the robbers. There is no contradiction in the evidence of PW1 and PW2. The evidence on identification was that of two witnesses as opposed to the appellants' allegation that it was that of a single witness.

Mr. Mwangangi further submit that a pistol was recovered. Photographs were taken at the scene of recovery of the pistol. The arresting officer testified. The evidence on how the pistol was recovered is consistent. There was no miscarriage of justice. The prosecution proved its case beyond reasonable doubt. The appellants had a right to engage advocates of their own choice. At one time an advocate appeared for the first appellant.

This is a first appeal and the Court is required to re-evaluate and assess the evidence afresh and draw its own conclusion. **PW1 Inspector SAMUEL MUTURI** was the complainant in the first count. He was stationed at the Police County headquarters in Marsabit. On 18.3.2017 he arrived from Isiolo at about 9.00pm. He was walking towards the Police lines. He met PW2 on the way and they walked together. While walking three people walked very fast and approached them. One had a gun. They were forced to sit down. Since he is the one in charge of the armory, he noted the gun was a real pistol. There was light and he was able to see the one holding the gun. He was slightly tall and had a brown wooded jamper. His face was not covered. Another robber had a long cream overall which had some writings.

It is PW1's evidence that he was robbed of his Techno C8 phone, a Techno Kabambe phone, his National and job identity cards and student ID card for Mount Kenya University. The robbers then left. On 20.3.2017 at 7.00pm they got information that some people had been robbed and the robbers had a gun. They went to town and found one Peron had been arrested. He had the same jamper as the one he was wearing on 18.3.2017. He is the first appellant. He was arrested with a red motor cycle. Later the appellant informed them that he was willing to surrender the phone but the other items were thrown in a toilet. They were led to a barber's shop in Marsabit where his phone was recovered. The second appellant was arrested by the OCS and was wearing the same dust coat he was wearing when PW1 was robbed. It is PW1's further evidence that where he was robbed there was sufficient light. He indicated in his statement that he was able to identify the robbers. The second appellant was nearer to him at the scene of the robbery than the other robbers.

PW2 PURITY MWANGI was walking towards the hospital. She was with PW1. They were accosted by three robbers and were made to sit down. PW1 sat on the road. She was made to kneel down. The 1st appellant pointed a gun at her. The second appellant took her phone. Techno Y2 and also took phones from PW1. The second appellant was wearing a blue jeans and cream dust coat. The first appellant had a jamper, cap and blue jeans. On 26.3.2017 she attended an identification parade and identified one of the appellants. According to her, the robbery took about five minutes and there was security lights. Her phone was not recovered.

PW3 SAMUEL AGALA operates his brother's studio and barber shop in Marsabit. He knows the appellants. On 20.3.2017 the first appellant took to him a Techno C8 phone for charging at about 9.00a.m. He did not go for it. He left the phone with his brother, Oshe (PW4). The following day Police went to his business premises and asked for the Techo C8 phone. PW4 went there and removed the phone from a drawer. They charge phones at their place. He could identify the phone as it had a cracked guard screen. He also issued the 1st appellant with a receipt.

PW4 OSHE BANGE SOSO is a brother to PW3. On 25.3.2017 they had about seven phones charging. The owners collected six phones. He put the remaining one in a drawer. Police officers went to the premises and asked for the phone. He gave the phone to the Police officers. He was arrested and recorded his statement with the Police.

PW5 PC MACDONALD MAKAMU was stationed at Marsabit Police station. He investigated the case. PW1 and PW2 reported the robberies on 18.3.2017. On 20.3.2017 there was another robbery near KCB bank and the victims confirmed that the robbers had a pistol. A

complainant had bought a scarf that was stolen during the robbery. She went back to the seller and informed her. The seller had seen someone wearing the scarf in town. Police were informed. They went to town and the 1st appellant was arrested with the scarf. He had a motor cycle and wanted to escape. The first appellant mentioned the second appellant. The 1st appellant disclosed where he had kept the phone belonging to PW1. The second appellant was arrested. He led Police officers to Kiwanja Ndege area in a miraa farm where a pistol EKOL model was recovered wrapped in a piece of clothe and black polythene paper. An Identification Parade was conducted. PW1 and PW2 recognized the same clothes the appellants were wearing during the robbery. The 1st appellant had taken the phone for charging. PW1 and PW2 had reported that they had been robbed at a place where there was light.

The 1st appellant, **OMAR NACHE UCHE** gave sworn evidence. On 20.3.2017 he went to his place of work at stage 44. His sister called to inform him that her scarf had fallen on dirty water. The sister operates in a hotel and he was requested to take to her another scarf. He went home and took to her another scarf. When he went back to his place of work Police officers in civilian arrested him. He was arrested alone. He had rolled the scarf on his head. He does not know the 2nd appellant.

The second appellant **ABDIRAHAMAN DAWA DARO** gave sworn evidence. On 21.3.2017 he was arrested by Police officer in the evening. He denied that he was arrested with the gun. He does not know where the gun was recovered from. He does not know the first appellant.

The appeals raises the following issues:

- (a) Whether PW1 and PW2 were violently robbed of their properties on 18.3.2017.
- (b) Whether it is the appellants who robbed the complainants.
- (c) Whether the appellants were positively identified.
- (d) Whether the trial court erred by allowing the evidence adduced in Criminal case number 155 of 2017 to be part of the evidence in Criminal Case Number 156 of 2017.
- (e) Whether the prosecution proved its case beyond reasonable doubt.

PW1 and PW2 testified that on the 18th of March, 2017 at about 9.00pm they were walking together when they were accosted by three people. One had a gun. PW1 was made to sit on the road while PW2 knelt on the road. The two lost their items. Both lost their mobile phones. The prosecution evidence does prove that PW1 and PW2 were robbed of their properties on 18.3.2017 at about 9.00pm. The matter was reported at the Marsabit Police station.

The other two issue are more or less inter related. In their respective defences the appellants denied committing the offence. The appellants were not arrested on the material day. According to PW5, there was another robbery on 20.3.2017. This was about two days after the robbery involving PW1 and PW2. The appellants were arrested on 20.3.2017. The arrest was in relation to a robbery which had occurred near Kenya Commercial Bank. The scene of this robbery is less than 500 metres from where PW1 and PW2 were robbed. PW1 went to town when the second robbery occurred and found the 1st appellant had been arrested. He recognized that when he was robbed on 18.3.2017, the robber was wearing similar clothes as those worn by the 1st appellant on 18.3.2018. PW1 testified that the 1st appellant was wearing the same jamper as the one he was wearing on 18.3.2018. The 1st appellant was arrested because he was found with a scarf that had been stolen in a robbery. His defence is that the scarf belonged to his sister who was not called to testify in the case before the lower court.

According to PW5, it is the first appellant who mentioned the 2nd appellant. The second appellant was present when the first appellant was arrested. A pistol was later recovered. Counsels for both appellants contend that the circumstances were not conducive for positive identification. Further, the identification was by a single witness. The evidence of PW1 and PW2 is that there was street light where they were robbed.

The evidence on identification is part of the prosecution evidence. PW2 testified that he attended an identification parade and picked the 2nd appellant. That aspect of evidence is not complete. The parade officer did not testify. There is the contention in relation to the evidence in criminal case number 155 of 2017 which was imported to this case. I will deal with that issue separately.

PW1 was robbed of his phone on 18.3.2018. PW3 testified that on 20.3.2017 the 1st appellant took to him a mobile phone for charging at about 9.00am. He did not collect the phone. PW4 testified that they had about seven phones for charging. The Techno C8 phone was not collected. Police officers went there on 25.3.2017 and collected the phones. It is the evidence of PW1 that it is the first appellant who took them to where the phone was charging. PW1 identified the phone as his.

In his sworn defence, the first appellant testified that the scarf he was found with belonged to his sister who operates a hotel in town. He was arrested at stage 44 but was not told the reason for his arrest. He does not know the 2nd appellant. His sister is called Habiba Nache alias Habiba Hussein.

The second appellant's sworn evidence is that he was arrested by the police as he had gone to buy cigarettes. Nothing was recovered from him. He does not know where the gun was recovered.

Given the evidence on record, I do find that it is the appellants who robbed PW1 and PW2 on 18.3.2018. the two appellant's were arrested on 20.3.2018. The prosecution evidence proves that it is the first appellant who took PW1's phone for charging at PW3's shop. The phone

had been recently robbed from PW1 on 18.3.2017. The doctrine of recent possession applies to the circumstances of this case. No explanation was given as to how the 1st appellant came into possession of PW1's phone. The arrest of PW2 led to the recovery of a pistol that was produced in court. Counsel for the 2nd appellant contends that the 2nd appellant denied that the recovery of the pistol was done in his presence and that no inventory was produced in relation to the recovery. The 2nd appellant was charged in count III in criminal case number 155 of 2017 with being in possession of a firearm without a certificate Contrary to Section 4(2)(3(b) of the Firearms Act Cap 114 Laws of Kenya. The prosecution's evidence is that the pistol was recovered from a miraa farm and it is the 2nd appellant who led them to that farm. I do find that both appellants as were involved in the robbery which occurred on 18.3.2017 involving PW1 and PW2.

There is the issue relating to evidence adduced in Criminal Case number 155 of 2017. The record of the trial Court of 23.8.2017 is as follows:-

23.8.2017

Before Hon. B.M. Ombewa – PM (Mr.)

Prosecutor – Mr. Mwangangi for state

Court Assistant – Mr. Oche

Accused – Present

Interpretation – English/Kiswahili

Prosecution – I would like to apply to have the evidence of PC Peter Kipruto Nyaga (PW4) in Cr. Case 155 of 2017 to be adopted herein. He only recorded a statement once which statement is applicable in these two files.

Accused - I am agreeable to having the entire evidence of Peter Kipruto Nyaga apply and be adopted herein.

Accused 2: I agree to have the evidence of Peter Nyaga in Cr. case 155 of 2017 be adopted herein.

Court: The evidence of Peter Nyaga (PW4) in Criminal case 155 of 2017 be and is hereby adopted in this case.

Prosecutor: I seek adjournment to 29.8.2017 to avail more witnesses.

Accused 1: No objection

Accused 2: No objection

Court: Application for adjournment is granted. Further hearing 29.8.17. RIC.

In its judgement at page 45, the trial court states as follows:-

The parties also recorded consent to have the evidence of PC Geoffrey Maina Gitau (PW2), Charles Mwangi (PW3), PC Peter Kipruto Nyaga (PW4), PC Geoffrey Sitoshe (PW6) and IP Samuel Barongo (PW10) in Cr. Case No.155/17 adopted herein. This is because these officers recorded one statement each in respect of their rules in this matter and Cr. No.155 of 2017.

The accused persons were thereafter placed on their defence. The 1st accused gave sworn evidence and called 01 witness namely Habiba Hussein (DW1). The 2nd accused gave sworn evidence and called no witness.

Counsel for the 2nd appellant maintain that there was no consent on the evidence of PW2, PW3, PW6 and PW10. The only consent involved PW4. I have read the evidence of PW4 in criminal case number 155 of 2010.

Section 34 of the Evidence Act states as follows:

(1) Evidence given by witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of proving the fact which it states, in the following circumstances:-

(a) Where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable:

And where, in the case of subsequent proceedings-

(b) The proceedings is between the same parties or their representative in interest and

(c) The adverse party in the first proceeding had the right and opportunity to cross-examine and

(d) The questions in issue were substantially the same in the first as in the second proceedings.

(2) For the purposes of the section:-

(a) The expression “*judicial proceedings*” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath, and

(b) A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

Criminal case number 155 of 2017 involved the two appellants who were charged with two counts of robbery with violence, one count of being in possession of a firearm without a certificate and being in possession of suspected stolen property. I do agree with counsel for the second appellant that the consent only involved PW4 in criminal case number 155 of 2017. There was no comment on the other named witnesses. Section 34 of the Evidence Act permits the importation of evidence in previous proceedings to on-going proceedings.

The evidence of P.C Peter Kipruto Nyaga(PW4) in Criminal case No.155 of 2017) mainly relates to how the 1st appellant was arrested at stage 44, Marsabit. The witness also testified on how the appellants resisted arrest and that the 1st appellant gave a pistol to the 2nd appellant who ran away from the scene. The evidence of PW2, PW3, PW6 and PW10 in the other case cannot be imported to this case since there was no consent for it to be adopted as part of the evidence. The pistol was subsequently recovered after the second appellant was arrested. That evidence was adduced in the presence of the two appellants who cross examined the witness. That evidence has to be analyzed together with the other evidence. The first appellant’s evidence is that he was arrested at stage 44. The second appellant was not arrested at that pace. However, it is clear that the two appellants know each other contrary to their evidence that they do not. I am aware that the trial magistrate in criminal case number 155 of 2017 recused himself and the case was transferred to the Moyale court. It is not clear whether the Moyale Court started the case de novo or continued from where it had reached.

I am satisfied that the prosecution proved its case beyond reasonable doubt. The conviction is not based on the evidence that was adduced in criminal case number 155 of 2017. The evidence of the five witnesses who testified in this case sufficiently proved the case beyond reasonable doubt. The appellants’ contention of inconsistencies in the prosecution evidence is misplaced. PW1 and PW2 were robbed of their phones. The first appellant took PW1’s phone to PW3 for charging two days after the phone was robbed from PW1. Even without the evidence on identification and that of PC Peter Nyaga, the rest of the evidence proves that it is the appellants who robbed PW1 and PW2. The absence of an inventory on the recovery of the pistol does not mean that there was no recovery of the pistol. PW5 testified that a pistol was recovered and it is the second appellant who took them to where it was recovered. In the end, I do find that the prosecution proved its case to the required standard.

The Supreme Court in the case of **FRANCIS MURUATETU & ANOTHER –V- REPUBLIC, Constitution Petitions No.15 and 16 of 2017** held that the mandatory nature of the death sentence as

provided under section 205 of the Penal Code is unconstitutional. Section 205 provides for the death sentence in murder cases. The holding of the Supreme Court can be extended to other capital offences.

From the circumstances of the case, I do find that the death sentence is not proportionate to the offence. What was robbed from PW1 and PW2 are two phones and some personal properties. However, the two appellants have to be severely punished as there are signs that they were becoming permanent robbers. They were armed with a pistol and plied their crime in Marsabit town. They do not deserve any leniency.

The upshot is that the appeals lack merit and are hereby dismissed.

I do set aside the death sentence imposed on each appellant and replace it with fifteen (15) years imprisonment. The appeals on conviction are hereby disallowed. The appellants shall serve fifteen (15) years imprisonment from the date of conviction.

Dated, Signed and Delivered at Marsabit this 11th day of October 2018

S. CHITEMBWE

JUDGE