



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 8 OF 2014

SHUKURI MOHAMED..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 261 of 2012 of the Chief Magistrate's Court at Malindi – Nathan Shiundu, Ag. SPM)

JUDGEMENT

1. The Appellant, Shukuri Mohamed, appeals to this court against his conviction and sentence for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 14th April, 2012 at Simba Dishes in Malindi Town within Kilifi County, the Appellant, jointly with others not before court, while armed with an offensive weapon to wit an AK47 rifle robbed Said Mohamed Njoroge of Kshs. 96,000 and two mobile phones valued at Kshs. 14,000 and at, or immediately before, or immediately after such robbery threatened to use actual to the said Said Mohamed Njoroge and shot dead Hassan Karisa Njongoro.
2. Through his amended grounds of appeal the Appellant faults the trial court for failing to consider that the death sentence imposed on him was excessive; failing to consider that there were contradictions in the amount of money stolen; failing to consider the contradictions in the serial number of the rifle as per the evidence adduced and as captured in the occurrence book; failing to consider that the identification parade was not conducted in compliance with the Police Standing Orders; failing to consider that no names or descriptions of the suspects were given to the police and recorded in the occurrence book; failing to consider that no post-mortem report was produced; and failing to consider the defence case.
3. The Appellant commenced his case by submitting that the death sentence was contrary to the Bill of Rights as per the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. He stated that the trial court upon receiving his mitigation imposed the death sentence stating that the same was mandatory and thus denying itself an opportunity to consider his mitigation and impose an appropriate sentence. In his view, this makes the sentence excessive.
4. The Appellant urged that under Article 27 of the Constitution he had the right to equal treatment before the law; that Article 50(2)(p) of the Constitution entitled him to benefit from the lesser severe sentence if the law had changed; and, that this court, as per Article 165(3)(a) of the Constitution, having unlimited jurisdiction can review the death sentence imposed on him taking into account the period spent in remand as was decided in the **Muruatetu** case.
5. On the ground that the evidence on the identity of the rifle was contradictory, the Appellant submitted that PW8 Corporal Fred Esembe, the investigating officer, had testified that the serial number of the rifle was 2112455 whereas the first report as captured in the occurrence book as entry number 2/15/4/2012 indicated that according to the police officers who arrested him the serial number of the rifle was 12455. According to the Appellant, the investigating officer in his evidence mentioned the type and make of the rifle hence the rifle referred to by the officer was never recovered from him. Further, that PW9 Chief Inspector Alex Muindi, the ballistics examiner, was given a gun serial number 2112455 for testing, making it a different gun from the one recorded in the occurrence book. It is the Appellant's case that the gun serial number 12455 was never taken to the ballistics examiner for analysis and neither was the same produced as an exhibit. Further, that he was never charged for being in illegal possession of rifle No. 12455. In his view, there was failure to connect the weapon to the alleged offence. He concluded on this issue by stating that the trial court had made a finding that the firearms examiner had confirmed that the gun and ammunition used were different from what was in the occurrence book.
6. Turning to another ground of appeal, the Appellant submitted that there were sharp contradictions as to the amount allegedly stolen during the alleged robbery. He stated that when PW1 Said Mohamed Njoroge, the cashier was cross-examined he stated that he had not calculated the day's sales prior to the incident hence he could not account for the sum of Kshs. 96,000 reflected in the charge sheet. It was the Appellant's case that the sum reflected in the charge sheet contradicted the entry in O.B. No. 86/14/4/2012 which indicated Kshs. 70,000 was stolen but which was also contradicted by the entry in O.B. No. 2/15/4/2012 in which the arresting officers stated the stolen amount was

Kshs. 80,000. He urged that the charge sheet was therefore defective. His view is that a conviction can only be based on evidence and not theories and relies on the finding in **Okethi Okale v Republic [1965] E.A. 555** in support of this statement.

7. On the identification parade, the Appellant pointed out that PW6 Chief Inspector Daniel Ndomi, who conducted the identification parade, admitted that the witnesses had seen the Appellant before the identification parade was conducted thus rendering the identification parade of no value as Section 5(iv)(c) of the Police Standing Orders requires that the witnesses should not see a suspect before the parade. The Appellant further submitted that PW2 Marjan Mohammed had stated that he coincidentally saw him at the police station and pointed him out meaning that he admitted seeing him before the identification parade was held.

8. Further, that the identification parade did not have persons of similar features as admitted by PW1 and the identification parade did not therefore meet the requirements of the standing orders. According to the Appellant none of the members of the parade were of Somali extraction like him thus making him easily identifiable. He relied on the Court of Appeal decision in **Fredrick Ajode v Republic, CA Criminal Appeal No. 87 of 2004** where it was held that dock identification is worthless unless preceded by a properly conducted parade and that the witness ought to be asked to give a description of the suspect before the parade.

9. The Appellant further submitted on the post-mortem report stating that it was not produced in evidence so as to link the alleged death to the offence. In addition, the Appellant asserted that the name of the deceased is indicated as Hassan Biladi but PW5 Allan Makokha stated that he prepared a post-mortem report for one Hassan Karisa. According to the Appellant, the police had requested a post-mortem report to be carried out on the body of a different person from the one indicated in the charge sheet.

10. On identification, the Appellant submitted that his description was not given in the statement recorded from PW1 by the police. Further, that PW2 indicated that there was a blackout which would have made identification impossible. Further, that though PW1, PW2, PW3 Hassan Mohammed Simba and PW4 Abdi Komoro allegedly recognized him as their attacker they failed to give his description to the police implying they were not sure of their attacker. He relied on the decisions in **Kabogo s/o Wagunyu 23(1) KLR 50** and **Simiyu & another v Republic [2005] 1 KLR 92** and urged that the identification was dock identification which is worthless.

11. The Appellant contended that the trial court failed to appraise the evidence so as to connect him to the offence. He further pointed out that his defence was not considered, though he had raised the defence of *alibi*. He therefore urged this court to allow his appeal.

12. In short, it was submitted for the Respondent that the evidence directly pointed to the Appellant; that he did not offer any explanation about the gun he was apprehended with; that there was sufficient light to identify him at the restaurant; that he was picked in an identification parade; and that he was found with the weapon that was used to kill Hassan Karisa. The Respondent therefore urged that the conviction should be confirmed.

13. This being a first appeal, the duty of this court is to look at the evidence afresh in order to arrive at its own independent decision bearing in mind that, unlike the trial court, it did not have an opportunity of seeing and hearing the witnesses testify in order to gauge their demeanour. In determining the appeal, this court is also guided by the principle that a finding of fact by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles.

14. What was the evidence adduced? PW1 told the court that on 14th April, 2012 at about 9.30 p.m. he was at his place of work at Simba Hotel in Malindi when three people arrived at the hotel on motorbike. His colleagues Marijan and Swaleh were present and there were other workers in the kitchen. One of the three people pointed a big gun at him and he was able to see him clearly as the lights were on. The other intruder then pushed him down, opened the drawer and took Kshs. 96,000. The man also took his two Nokia mobile phones and ran out to board the motorbike followed by the gun bearer. It was then that one of the cleaners by the name Hassan came out with a huge cooking stick and hit the gun bearer on his head and hand causing him to fall off the motorbike. Hassan made a further attempt to hit the gun bearer but was shot and the assailant ran into an alley. According to PW1, a group of people then pursued the escaping gunman and they later received information that the police had apprehended the man. PW1 stated that he was held hostage for a while but he could remember the Appellant, who was the gun bearer, though that was his first time to see him. He testified that Hassan died as a result of the gunshot wounds.

15. During cross-examination PW1 told the court he gave the Appellant's description to the police but this was not captured in his statement. He further stated that he was not given the description of the Appellant prior to the identification parade but he nevertheless picked him out of the parade.

16. Re-examined, PW1 told the court that he had not counted the day's collections before the robbery took place.

17. PW2 had just eaten at the restaurant and was waiting for a hand napkin at the counter when the command to lie down was issued. He checked and saw a gun pointed at the cashier. He could clearly see as the lights were on. As he lay down he heard one of the assailants order the cashier to hand over money. As the intruders left, PW2 saw a motorbike outside and one of the workers by the name Hassan hit one of the intruders with a cooking stick. PW2 stated that when he went to the police station to record a statement he coincidentally met the Appellant, who was the gun bearer, being escorted by the police. He identified the Appellant in court. It was his testimony that he took Hassan to hospital after he succumbed to the injuries sustained in the attack. He was present when post-mortem was performed on the body of the deceased.

18. PW3 Hassan Mohamed Simba, the owner of the establishment, was in the kitchen when he heard the order to lie down being issued. According to PW3, he had counted the money that was with the cashier and it came to Kshs. 96,000. PW3 peeped through the service window and saw a gun pointed at the cashier. He identified the gun. He stated that there was light and he could see. He heard the cashier being ordered to hand over the money and after a short while he heard gunshots and on running out to check what had happened he found his worker Hassan had been shot. Together with PW2 they took Hassan to hospital where he succumbed to the bullet injuries.

19. PW4, a watchman at the establishment, was in the kitchen when he heard a commotion and people being ordered to lie down. Peeping

through the door he saw somebody point a gun at the cashier. After the incident there was a power outage. He confirmed that Hassan died of the gunshot wounds. He identified the Appellant in the dock. In response to questions put to him during cross-examination he stated that he looked at the Appellant for a few minutes and that he described to the police how the Appellant was dressed.

20. PW5 performed post-mortem on the body of the deceased and concluded that the cause of death was severe haemorrhage due to gunshot wounds. He produced the post-mortem report as an exhibit.

21. PW6 told the court how he conducted an identification parade in which a witness picked out the Appellant.

22. PW7 Police Constable Fredrick Otieno told the court that on the material day he heard a gunshot sound from the direction of the town and in the company of his deceased colleague he proceeded to check on the incident. They were told that a robber was hiding in the bush nearby. They checked and found a person bleeding and having an AK47 rifle. They arrested him. He carried out safety operation on the firearm and found it had eight bullets. They took the man to the police station. Later they heard that a robbery had taken place at Simba Dishes and somebody had been shot in the process. He identified the Appellant in court as the person they had arrested. He also identified the firearm recovered from him.

23. PW8 the investigating officer established that a robbery had taken place at the said establishment culminating in the death of a person during the robbery. He stated that the suspect was identified at the parade. He produced a gun serial number 2112455, eight rounds of ammunition and a ballistics report as exhibits. He testified that the expended cartridges recovered from the scene were fired from the rifle he had produced.

24. PW9 stated that he tested the gun serial number 2112455 and found it in a serviceable condition. He found that the spent cartridges forwarded to him for examination had been fired from the rifle. He produced his report as exhibit.

25. In his defence, the Appellant stated that on the material day at about 5.30 p.m. he received a call from somebody that she had goats from Tana River to sell. He bought a goat and sold it. As he was going home he met a vehicle with three occupants who assaulted him and took him to the police station. He stated that no identification parade was held and he was surprised when a gun was produced as an exhibit in court.

26. In the case at hand, the question is whether the Appellant was sufficiently identified to warrant a conviction for the offence of robbery with violence. It is noted that apart from the evidence of PW1, the evidence of the other witnesses was that of dock identification.

27. In deciding whether an accused person was sufficiently identified by a witness, the court will always ask itself the questions that were asked in the English case of **Regina v Turnbull [1976] 3 WLR 445** as follows:

“Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by the witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

28. PW1's testimony was that he faced the Appellant as he pointed the gun at him. He described to the police how he was dressed. There was sufficient light. The fact of sufficiency of light was confirmed by PW2, PW3 and PW4. Even though PW4 talked of power outage, he stated that this occurred after the robbers had exited the scene.

29. As for the identification parade conducted by PW6, he explained that the people in the parade were of similar complexion and height. He also said that some of the people in the parade were Somalis. The Appellant was asked to select the position he wanted to take in the parade and the witness identified him by touching him.

30. A perusal of the identification parade form that was produced by PW6 shows that PW1 Said Mohamed was the witness for that parade. Apart from the Appellant, three members of the parade had Somali names. This confirms that the Appellant was not the only person of Somali extraction in the parade as he claims in this appeal. The identification parade was therefore properly conducted and there is no support to the Appellant's case that the parade breached the Police Standing Orders.

31. PW2 did not participate in any identification parade but he told the court he saw the Appellant at the police station when he went to record a statement and he identified him as the robber with the firearm.

32. In **John Mwangi Kamau v Republic [2014] eKLR** the Court of Appeal held that:

“15. 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 –vs- Republic – Criminal Appeal No. 68& 69 of 2008*. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In *Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134*, this Court observed:-

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

33. In the case at hand an identification parade was conducted and PW1 picked out the Appellant. It is noted that during the identification parade one Godana Halake represented the Appellant. I would therefore say that the identification parade was properly and fairly conducted as was stressed by the Court of Appeal in **John Mwangi Kamau** (supra) when it stated that:

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In *Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008* this Court faced with a similar situation expressed itself as follows:-

“As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in *GABRIEL’s* case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness ‘SHOULD’ be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

34. The Appellant has also urged that as a description of him was not given to the police prior to the parade it rendered his identification in the parade of less evidential value. It is however noted that the witnesses told the court that they described the robber to the police. Indeed the identification parade was conducted a few days after the robbery and it cannot be said that the memory of PW1 had faded. It is unfortunate that three of the four witnesses present during the robbery were not asked to identify the Appellant in parades. The case of PW2 can be understood as he saw the Appellant at the police station and an identification parade could not have made any sense in his case. However, it is not clear why PW3 and PW4 were not asked to identify the Appellant in identification parades.

35. The Appellant raised an issue about the identification of the gun that was produced as an exhibit. The issue of the differing serial numbers is a new issue being taken up by the Appellant at this stage. Even so, it is clear that the gun the Appellant was found with is the one that was brought to court. PW7 who arrested the Appellant with the firearm identified the firearm in court. PW1, PW2, PW3 and PW4 all stated that the firearm used during the robbery was the one in court. Indeed the serial number recorded in the occurrence book, as stated by the Appellant, was 12455 and the serial number for the rifle produced in the trial was 2112455. It is clear that the only number missing from the occurrence book were the first two numbers being 21 otherwise the other numbers being 12455 all matched. The ballistics examiner confirmed that the spent cartridges collected at the scene were fired from rifle serial number 2112455. His evidence therefore confirmed that the rifle used during the robbery is the one found with the Appellant and booked at the police station by PW7.

36. The Appellant was found hiding and bleeding. This connects with the evidence that the deceased Hassan had walloped him with a cooking stick forcing him to abandon the motorbike and dash into an alley. He was therefore the bearer of the firearm that was used during the robbery.

37. The Appellant submitted that there was contradiction as to the name of the person who died in the robbery. PW5 testified that he conducted post-mortem on the body of Hassan Karisa. Although the police when requesting for post-mortem referred to the body of Hassan Bidali, the place filled by the doctor shows the body upon which post-mortem was performed was that of Hassan Karisa. PW2 and PW3 are named as the persons who identified the body for purposes of post mortem. This tallies with their evidence that they witnessed post-mortem on the body of Hassan. There is therefore no merit in the Appellant’s claim that post-mortem was performed on the body of a person different from the Hassan Karisa killed during the robbery.

38. The issue of the exact amount stolen during the robbery does not make much difference. The evidence points to the fact that money was stolen during the robbery. Two mobile phones were also stolen from PW1. Force was used to steal and in the process somebody was killed. The ingredients of the charge of robbery with violence were therefore proved by the prosecution.

39. Upon perusal of the evidence adduced, I agree with the trial court that the Appellant was one of the robbers who robbed PW1 in PW3’s hotel. In light of the evidence that was adduced by the prosecution, the defence that was advanced by the Appellant collapsed in its entirety. The conviction was proper and the appeal on conviction is dismissed for want of merit.

40. As for the sentence, I agree with the Appellant that post the **Muruatetu** case (supra), the sentence of death is no longer mandatory where an accused person is convicted for robbery with violence contrary to Section 296(2) of the Penal Code.

41. In his mitigation before the trial court, the Appellant indicated that he was a young man who was asthmatic and had contracted TB and had ulcers. It is noted that a life was lost during the robbery. Though the facts show that the Appellant only used his firearm after he was

attacked by the deceased Hassan Karisa, the fact remains that the Appellant turned violent and shot and killed the deceased.

42. Though in the circumstances of this case I would not impose the sentence of death on the Appellant, I find it necessary to impose a long custodial sentence so as to keep the Appellant away from society. His greed led to the unnecessary loss of life and severe punishment is called for. I set aside the sentence of death passed upon the Appellant and substitute it with thirty (30) years imprisonment.

Dated, signed and delivered at Malindi this 6th day of December, 2018.

W. KORIR

JUDGE OF THE HIGH COURT