



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 53 OF 2013

LAWRENCE MWANGI WAMUYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal against conviction and sentence in Nyeri CM.CR.C.No.350 of 2012 from
the judgment of the Hon.J.Wambilyanga (SRM) delivered on the 21/04/2013)**

JUDGMENT

FACTS

1. The appellant, **Lawrence Mwangi Wamuyu**, was charged with Robbery with Violence contrary to **Section 295 as read with Section 296(2)** of the **Penal Code**.
2. On the 24th March, 2012 the complainant **Japheth Muthui Nkanata** had booked a room at Spinners Bar and Restaurant in Nyeri town within Nyeri County when the appellant jointly with others not before the court while armed with dangerous weapons namely metal bars and knives entered the room and robbed him of cash in the sum of Kshs.17,800/- and his mobile phone Nokia 6370 valued at 5,400/- and used actual violence to him.
3. *The appellant was tried and was convicted and sentenced to the mandatory death sentence; being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal on the 1st day of August 2007 and the Supplementary Grounds of Appeal are as hereunder summarized:-*
 - (i) The provisions of Section 214 of the Criminal Procedure Code were not complied with thereby occasioning prejudice to the appellant.
 - (ii) The trial court erred in rejecting the complainant's application for the withdrawal of the complaint.
 - (iii) The complainant failed to give a description of the appellant when making the first report; the conditions for identification were not favourable;
 - (iv) The prosecution failed to prove its case beyond reasonable doubt; the conviction was based purely on circumstantial evidence;

4. At the hearing hereof the appellant was represented by Learned Counsel Ms Mwai and Ms Gicheha represented the State; both Counsel made oral presentations; hereunder are the parties respective rival submissions;

APPELLANTS' SUBMISSIONS

5. (i) The Complainant had requested the court that he be allowed to withdraw the case; which application the trial court wrongfully disallowed;

ii. Crucial witnesses were not called; **PW2** stated in her evidence that the appellant told her to transfer the money to another person who was not called as a witness;

iii. On identification; the incident occurred at night; that there was fluorescent tube lighting; the police were not given any description of the robbers by the complainant; the trial court did not make any inquiry on the intensity of light or location so that it could make a finding on whether the illumination was sufficient for positive identification of the appellant; Counsel submitted that the conditions and circumstances were not favourable for positive identification;

iv. The genesis of the case starts with **PW2** and she was the person who led to the arrest of the appellant; that she initially was the first suspect; was in fact **PW2** who was the first suspect then she turned state witness; her evidence ought to have been treated as suspect;

v. That there was contradictory evidence on the amount stolen; the complainant stated that he had Kshs.13,232/- in his phone and was forced to transfer Kshs.10,000/-; but the charge sheet states cash of Kshs.17,800/-; this was not possible as the appellant had less money in his phone; there were too many contradictions that ought to be resolved in favour of the appellant

vi. A new Charge Sheet was drawn but the trial court failed to comply with Section 214 of the Criminal Procedure Code; the trial court ought to have informed the appellant of his right to recall the witnesses to cross-examine them or to testify afresh; the provisions are mandatory and the failure was fatal to the prosecutions' case; that this was not a suitable case for retrial.

vii. Counsel urged the court to allow the appeal and that the appellant be set at liberty.

RESPONDENTS SUBMISSIONS

6. (i) Counsel made the following submissions in response to the submissions made by Counsel for the appellant; that the complainant stated that he was robbed at midnight and this was corroborated by **PW2** that this was the time the money was sent; and that the appellant called at this time to confirm whether the monies had been received; the appellant was identified by **PW2**; the Investigating Officer **PW3** obtained a print-out that led to the arrest of the appellant;

(ii) The substituted charge sheet was only the changing of the amounts involved; this did not invalidate the offence committed; did not go to the core of the main charge; that even though the prosecution witnesses were not called their evidence remains unchanged;

(iii) On Failure of the trial court to grant order for withdrawal of the case Counsel submitted that Section 204 clearly indicates that the trial court must be satisfied and 'may' allow the application; that robbery with violence is a felony and the trial had reasonable grounds to deny the application;

(v) All the ingredients of robbery were proved by the prosecution to the desired threshold; that there was more than one attacker and that the appellant was one of the attackers; that he was armed with a small knife and that force was used on the complainant to make him surrender his Mpesa PIN;

(vi) Counsel prayed that the appeal be dismissed and the trial court's findings be upheld.

REJOINDER

7. On Section 214 counsel relied on the authority listed as No.3 in the List of Authorities; the trial court was obligated to inform the accused of his rights and that the record must show this; that it is a requirement that must be strictly complied with; that failure to do so was fatal to the prosecution's case.

ISSUES FOR DETERMINATION

8. After taking into consideration the forgoing submissions made by the appellant and those of the Counsel for the State, this court has framed the following issues as set out hereunder for determination;

- i. Whether there was a procedural flaw in the proceedings;
- ii. Whether the appellant was positively identified;
- iii. Whether this is a suitable case to order for a retrial;
- iv. Whether the trial court exercised its discretion properly when it declined the application to withdraw the case;
- v. Whether the prosecution failed to call crucial witnesses
- vi. Whether the prosecution proved its case beyond reasonable doubt;

ANALYSIS

9. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA. 321.**

Whether there was a procedural flaw in the proceedings;

10. The first charge sheet did not include the amount that was stolen from the complainant; the appellant's contention is that after amendment of the particulars and substitution of the Charge Sheet the trial court did not comply with the provisions of Section 214 of the Criminal Procedure Code; the contention is that the proceedings were irregularly conducted making them flawed and that he was denied his right to a fair trial;

11. Looking at the record it is noted that on the 21/01/2013 the prosecution noticed that it had omitted to include on the Charge Sheet the sum stolen amounting to Kshs.17,800/- ; it then applied to substitute the charge and amend the particulars; the record reflects that the appellant did not oppose the application and it was allowed;

12. This court notes the omissions made by the trial court after allowing the amendment are notably that it failed in not recording that there had been compliance with Section 214; it also failed to take a plea afresh to the altered charge; and it failed to explain to the appellant his rights to recall the prosecution witnesses to either give their evidence afresh or for further cross-examination;

13. In the case that was referred to by Counsel for the appellant **Yongo vs R Criminal Appeal No.1 of 1993 referred** the Court of Appeal held that;

“It is a mandatory requirement that the court must comply with the conditions, but it shall record that it has complied. The trial magistrate failed in not recording whether there had been compliance with the proviso to Section 214 of the Criminal Procedure Code Cap 75.

The appellant should have been given the opportunity to further question the prosecution

witness and it could be said whether the failure to give him the opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to form a different view of the witness evidence”

14. In this instance the trial court allowed the amendment but failed to call upon the appellant to take a fresh plea; the trial court also failed to explain to the appellant his basic rights; but the most critical omission was failing to record that it had complied with the proviso to the Section; the amendment related to the amount of money stolen and it was important that he be notified of his rights for him to make a decision on whether to prepare a different kind of defence suitable to counter the new amendment;

15. This court is guided by the authority of **Yongo vs Rep supra** and finds that failure by the trial court to adhere to the procedure was prejudicial to the appellant;

16. This ground of appeal has merit and is allowed;

Whether to the appellant was positively identified;

17. The conviction of the appellant was based on identification which calls for careful scrutiny of the evidence; the complainant told the trial court that the incident occurred at night at around 11.59pm and that the incident took 20 minutes and that with the aid of electric fluorescent tube lighting he was able to see his attackers;

18. In the circumstances where the evidence is of identification and recognition the trial court for it to form a basis for conviction must carefully examine such evidence and satisfy itself that it is free from the possibility of error; the trial court is found to have addressed the issue of identification at the time of the incident but failed to address recognition vis-a-vis the mode of arrest of the appellant and the presence of the complainant thereat; as the appellant was also not known to the complainant before the incident; and the appellant was not arrested from information received from the complainant; therefore it was incumbent on the complainant to explain how he was able to recognize the appellant at the time of arrest.

19. The evidence of **PW3 PC Peter Orwa** was that the police traced **PW2** through Safaricom phone records and with the help of **PW2** arrested the appellant; the police invited the complainant to accompany them to the place where they had laid a trap to arrest the appellant; the complainant stated he was then able to recognize the appellant; this then makes the issue of identification unclear; the question then arises is whether the complainants evidence was that of identification or recognition; the trial court it is noted only addressed the issue of identification but failed to examine the evidence on recognition; whether the complainant gave a description of the appellant when he made the first report; and when the appellant was arrested in the presence of the complainant to explain how he recognized the appellant;

20. The identification by recognition was not addressed by the trial court in its judgment; this court finds that the identification was not free from the possibility of error as no identification parade was conducted to enable the complainant identify the appellant before the trial; the conviction based on identification is found to be unsafe.

Whether this is a suitable case to order for a retrial;

21. The conviction of the appellant was also based on the evidence of **PW2** who was initially a suspect and then turned up as a prosecution witness; her evidence was the only evidence that linked the appellant to the robbery; she told the court that the money was sent to her phone via the complainants phone; that shortly after she received the money the appellant called her and instructed her to send the money to one David Muriithi who was never called by the prosecution as a witness to substantiate the evidence of **PW2**; thus the evidence of **PW2** that provided the nexus was uncorroborated and must also be treated with caution as she was initially a suspect;

22. The trial court in its judgment confirms that appellants conviction was based on circumstantial evidence; it is trite law that for circumstantial evidence to be a basis for conviction it must be strong and

must irresistibly point to the appellant as being one of the robbers; there must be no other co-existing circumstances which destroy the inference of guilt; in the absence of the evidence of David Muriithi and the fact that the monies were transferred to this persons number other than the appellants creates other explainable co-existing factors and destroys the inference of guilt of the appellant; the doubt raised is that the robber could have been this David Muriithi and not the appellant;

23. Having re-evaluated the evidence produced before the trial court on identification and the circumstantial evidence this court is satisfied that the evidence is not sufficient to support a conviction; and thus finds that this is not a suitable case to order for a retrial;

24. This ground of appeal is found to have merit and is hereby allowed;

25. The above reasons are found to be sufficient to dispose of the appeal and this court will not belabor itself in commenting on the other grounds of appeal such as whether the prosecution failed to call crucial witnesses; whether the trial court exercised its discretion properly when it declined to grant orders to withdraw the case; and whether the prosecution proved its case beyond reasonable doubt.

FINDINGS

26. *For the forgoing reasons this court makes the following findings;*

i. This court finds that failure by the trial court to comply with Section 214 of the Criminal Procedure Code was prejudicial to the appellant;

ii. The identification was not free from the possibility of error; and that the conviction is found to be unsafe.

iii. This is not a suitable case to order for a re-trial.

DETERMINATION

27. The appeal is found to have merit and is hereby allowed.

28. The conviction is hereby quashed and sentence set aside.

29. The appellant be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly

Dated, Signed and Delivered at Nyeri this 9th February, 2017.

HON.A.MSHILA

JUDGE