



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO 88 OF 2014 AS CONSOLIDATED WITH
CRIMINAL APPEAL NO 93 OF 2014

MAURICE ODUOR ODUOL1ST APPELLANT

MAXWELL OTIENO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. P.O. Ooko Ag. PM in Criminal Case No. 1005 of 2012 delivered on 30th January 2014 in the Principal Magistrate's Court at Mavoko)

JUDGMENT

The 1st and 2nd Appellants were jointly charged with the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code a. The particulars of the offence are that on the 18th December 2012 at Sabaki area in Athi River District in Machakos County, jointly with others not before the Court, while armed with dangerous weapons namely a pistol and knives, they robbed Charles Thurubi Mwangi of a motor vehicle registration number KBA 431P, Toyota Premio, valued at 650,000/=; cash of 6050; Nokia 200 valued at Kshs 6,000/=, wallet and ATM cards of Co-operative Bank, KCB and Equity Bank; all valued at 662,050/=, and that at the time of the time of such robbery used actual violence to the said Charles Thurubi Mwangi.

The Appellants pleaded not guilty to the charge in the trial court on 21st December 2012. They were tried, convicted of robbery with violence and each sentenced to death.

The 1st and 2nd Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal against the conviction and sentence. The appeals of the 1st and 2nd Appellant were consolidated to be heard and determined together at the hearing held on 13th July 2015. The 1st Appellant's grounds of appeal are in his Petition of Appeal filed in Court on 7th April 2014 as further amended by Amended Grounds of Appeal availed to the Court dated 13th July 2016 as follows:

1. THAT the learned trial magistrate erred in holding that the appellant was in possession of the allegedly stolen motor vehicle in the absence of evidence proving that the appellant had knowledge of the existence of a stolen motor vehicle.

2. THAT the identification parade was dubious because the complainant had already seen the appellant beforehand and was therefore valueless.

3. THAT the learned trial magistrate erred in law and fact in failing to find that the conviction was unwarranted since it was based on hearsay evidence.

4. THAT the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant in breach of the provisions of Section 107 of the Evidence Act.

5. THAT the learned trial magistrate erred in law and fact in admitting final written submissions in breach of the provisions of Section 213 of the Criminal Procedure Code.

6. THAT the learned trial magistrate erred in law and fact in failing to inform the appellant of his right to cross-examine his co-accused person thereby contravening Section 208(3) of the CPC.

7. THAT the lower court failed to consider the appellant's defence of alibi and failed to advance any cogent reasons for not believing the alibi which on the totality of evidence raises a reasonable doubt.

The 2nd Appellant's grounds are in the Petition of Appeal he filed in Court on on 7th April 2014 and are as follows:

1. THAT, the learned trial Magistrate erred in law by failing to observe that PW I evidence

2. was impeachable thus contrary to section 163(1) (c) of the Evidence Act.

3. THAT, the learned trial Magistrate erred in Jaw and facts by failing to observe that PW1 was an accomplish witness.

4. THAT, the learned trial Magistrate erred in law and facts by acting on contradictory and inconsistent evidence.

5. THAT, the learned trial Magistrate erred in law and facts by failing to analyze the entire trial record and observe that the irregularities contained therein were not curable under section 382 of the P.C.

6. THAT, the learned trial Magistrate erred in law and facts by failing to give his sworn defense adequate consideration , and further failed to enact Sec. 169(1) of the CPC while disowning his defense.

The 1st Appellant was unrepresented during the hearing of the appeal, while the 2nd Appellant was represented by Waithira & Mwangi Advocates. The 1st Appellant relied on two sets of written submissions he availed to the Court dated 13th July 2016 and 22nd November 2016, and the learned counsel for the 2nd Appellant filed written submissions in Court dated 28th July 2016.

The 1st Appellant in his submissions argued that there was no description of PW1 in the first report of the robbery as is required for an identification parade and cited the decisions in **Terekali and Another vs Republic (1952) EA** and **James Tinega Omwenga vs Republic, Nakuru Criminal Appeal No 59 of 2011** in this respect. On the application of the doctrine of recent possession, the 1st Appellant alleged that the driver of the motor vehicle alleged to have been stolen was PW1 who escaped from the scene to save himself from culpability.

Further, that the case against the 1st Appellant was based on circumstantial evidence and instances of the said evidence were given. It was further submitted that the prosecution did not call the witnesses alleged to have seen the Appellants hire the motor vehicle that was stolen, and produced photographic evidence without the photographer and certificate contrary to the provisions of section 77 and 78 of the Evidence Act. In addition, that the trial Court admitted written final submissions contrary to section 213 and 310 of

the Criminal Procedure Code, and also contravened section 208(3) of the Criminal Procedure Code when it failed to inform the 1st Appellant of his right to cross-examine his co-accused person.

The 1st Appellant also submitted that the trial magistrate failed to note that the charge as framed was duplex as it incorporated both sections 295 and 296(2) of the Penal Code, and reliance was placed on the Court of Appeal decision in **Joseph Njuguna Mwaura , Peter Njoroge Kamau and Patrick Murigi Kibia vs Republic, Criminal Appeal No. 5 of 2008**. Lastly, the credibility of PW5 and PW6 was also questioned, as their testimony showed they could not have been in employment of, and on duty at Mawasco on 18th December 2012 as they alleged.

The 2nd Appellant on his part submitted that the trial magistrate relied on contradictory and inconsistent evidence, including the fact that PW5 and PW6 testified that when they rescued PW1 he was badly injured an bleedings, yet he was able to go the scene of the accident, and no treatment or medical record were produced as evidence of his injuries. Further, that the defence of the 2nd Appellant was not given due weight as the prosecution never proved that there was another person other than PW1 driving the motor vehicle alleged to have been stolen and as claimed by the Appellants, and as the rope that tied PW1 was not produced in evidence. Lastly, It was submitted that conviction of the Appellants was against the weight of the evidence, as there was no proof that the Appellants were robbers as none of the stolen items were found in the car in which the Appellants had an accident; the time of the accident was stated to be 2 am, yet PW1 testified that he picked up the Appellants at 10.30 pm; the knife found in the car was never analysed for fingerprints or blood to link it to the Appellants and victim; PW5 and PW6 testified that they were both transferred to Mombasa after the accident; and that the identification of the Appellants was done after they had been arraigned in Court, and when they had injuries having been in hospital.

Ms Mogoi Lillian, the learned prosecution counsel opposed the appeal and filed written submissions dated 20th November 2016. It was conceded therein that the charge as framed was duplex as it referred to section 295 and section 296(2) of the Penal Code, however that the Appellants were aware that they were facing a charge of robbery with violence and there was overwhelming evidence to prove the charge adduced by PW1. On identification, it was argued that the Appellants did not dispute that they hired PW1, and PW1 could not have seen the Appellants before the identification parade as he was 50 metres away from where the parade was conducted.

On the ground raised of contradictory and inconsistent evidence, the prosecution submitted that other than the evidence of PW3 as to when the motor vehicle was hired and where PW1 was abandoned, the evidence of PW1 who was the complainant and the other witnesses was consistent and corroborated.

My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called ten witnesses. PW1 was Charles Thurubi Mwangi, the complainant, who stated that he was a taxi driver and narrated the events of the night of 18th December 2012 after he picked up 3 men as passengers, who later robbed him of the taxi he was driving and other items and stabbed him, and two of whom he later identified as the 1st and 2nd Appellants. He also testified that he was later that night told that the said taxi had been involved in an accident, and he went to the scene of the accident.

PW2 was Maureen Maitha , a clinical officer at Athi River Health Center and who filled the P3 from brought to her by PW1 and who relied on the complainant's history as to how he received the injuries. PW3 was Josiah Njoroge, the owner of the taxi being driven by PW1 and who testified as to the report he received of the robbery and accident involving his motor vehicle.

The Appellants were found at an accident involving the stolen motor vehicle by PW4 who was Cpl.

Micheal Mboya, who also testified that the injured Appellants were inside the said motor vehicle, and that he recovered a knife from the accident motor vehicle the next day after he was informed it had been stolen. PW7 (Cpl. Gilbert Kilonu Musila) also testified that he was called to go to the scene of the accident, and found the Appellants inside the motor vehicle at the scene. Chief Inspector Charles Opondo (PW8) testified as to the report he received of the accident from PW4.

PW5 (Christopher Mutinda Wahome) and PW6 (Mutinda Saulo) testified that they were guarding Mavwasco company premises in Athi River on the night of 18th December 2012, when PW1 whose hands and legs were tied with a rope came to their gate calling for assistance, and that they untied him and directed him to seek treatment. Chief Inspector Francis Wachira (PW9) testified as to the conduct of the identification parade on 21st December 2012, in which the Appellants were identified by PW1. The last prosecution witness was Cpl Jackson Mbiti (PW10), who was the investigating officer, and who testified as to his investigations and arrest and charging of the Appellants.

The trial court found that both Appellants had a case to answer and put them on their defence. The 1st Appellant gave unsworn evidence, while the 2nd Appellant gave sworn testimony, and they did not call any witnesses. Both the 1st and 2nd Appellants stated that on 18th December 2012 they did hire the complainant at Kitengela to take them to their homes in Mlolongo in his taxi, but that on the way he used the wrong lane of the road and was involved in an accident. He then fled the scene of the accident leaving them injured in the taxi.

I have considered the arguments made by the Appellants and the Prosecution, as well as the evidence before the trial court. I find that there are four issues for determination raised in this appeal. The first is whether the charge against the 1st and 2nd Appellants was defective; and if the Appellants are found to have been properly charged, the rest of the issues that the court will need to consider are secondly, whether there was a positive identification of the 1st and 2nd Appellants; thirdly, whether there was sufficient, consistent and credible evidence to convict the 1st and 2nd Appellants for the offences of robbery with violence; and lastly, whether there was non-compliance with section 169 of the Criminal Procedure Code.

On the first issue, the Prosecution conceded that the 1st and 2nd Appellants were charged under a duplex charge. The rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.

Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction. Therefore contrary to the Prosecution's submissions, it was paramount for the Appellants and the Court to be sure if the charge was one of robbery or robbery with violence as the two offences have different ingredients and therefore attract different defences. The submission that the trial Court and Appellants proceeded on the basis of a charge robbery with violence does not rule out the fact that the charge also contained the offence of simple robbery which was not interrogated.

I am also minded that the law on the framing of charges requires clarity in the charge sheet as stated in various provisions. Section 134 of the Criminal Procedure Code provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

Section 135 of the said Code in addition provides as follows:

“(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.”

I am in addition guided by the decision of a five-judge bench of the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] e KLR (Criminal Appeal No 5 of 2008)** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in **Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)** and **Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008)**, stated as follows:

“Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

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.”

I am persuaded by this explanation by the Court of Appeal, particularly as *section 296(1) of the Penal Code provides that a person who commits the felony of simple robbery is liable to imprisonment for fourteen years. I am also of the view that this is not a defect that is curable under section 382 of the Criminal Procedure Code, as there are two offences disclosed by the charge namely simple robbery and robbery with violence, which offences attract different penalties under the law. It is also my opinion that there was prejudice caused to the Appellants in this regard as it would not have been clear what offence or sentence was applicable to them.*

It is my considered opinion that this ground of appeal alone is sufficient to dispose of this appeal, and it is not prudent in the circumstances to consider the remaining issues which would go into the merits of the findings of the trial court, given that I have found that the proceedings were based on a defective charge.

The only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it

will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

In Mwangi v Republic [1983] KLR 522 the Court of Appeal also held thus:

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

I am convinced that this is not a proper case for retrial. I have in this regard noted the inconsistencies in the evidence of PW5 and PW6 who both testified on 27th June 2013, and who were the witnesses who corroborated PW1's evidence as regards the robbery. They testified that they were employed in Mombasa at the time of the hearing, where they had worked for six and three years respectively. It was therefore not clear how they could have been guarding Mavwasco company in Athi River on the night of 18th December 2012. There was also no independent medical evidence adduced of the injuries suffered by PW1, as PW2 testified she relied on the account given by PW1 to fill the P3 form.

In addition, no weapons and other items alleged to have been stolen were recovered from the Appellants, and no evidence was called to link them to the knife recovered from the motor vehicle alleged to have been stolen. Lastly, the persons alleged to have informed PW1 of the accident involving the said motor vehicle were not called to confirm this allegation, and PW1's evidence in this regard was hearsay. There were thus substantial gaps in the evidence brought during the trial as regards the alleged robbery with violence and the Appellant's involvement in the same. A retrial is therefore inappropriate in the circumstances as it may serve the purpose of addressing the gaps in the prosecution case.

Arising from the foregoing reasons, I allow the 1st and 2nd Appellants' appeals and quash the conviction of the 1st and 2nd Appellants for the offences of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. I also set aside the sentences of death imposed upon the 1st and 2nd Appellants for these convictions, and order that the Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 16TH DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE