



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 36 OF 2016

GILBERT IMBUSI CHEMOSO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 730 of 2013 delivered by Hon. Hannah Ndungu (CM) on 17th January, 2015)

JUDGMENT

Background

The appellant was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296** of the Penal Code. The particulars of the charge were that on 25th June, 2012 at around 1.50 p.m. along Bandari Road, Industrial Area in Nairobi within Nairobi County, jointly with others not before court while armed with pistols and AK 47, robbed Crispin Otieno Odongo of cash, Ksh. 90,000, his cell phone make Techno valued at Ksh. 3,500 all valued at Ksh. 93,500 and or immediately before or immediately after the time of such robbery used actual violence to the said Crispin Otieno Odongo. He also faced an additional charge of failing to permit fingerprints to be taken contrary to **Section 55(5)** as read with **Section 12(a)** of the National Police Service Act, 2011. At the conclusion of the trial, the appellant was convicted on the first account, and sentenced to suffer death. He was acquitted of the second charge.

The appellant set out ten grounds of appeal in the Amended Petition of Appeal which I have consolidated as follows: that the charge was duplex since the appellant was charged under Section 295 as read with Section 296(2) of the Penal Code; that the trial court failed to consider the appellant's defence; that the identification was not safe since no prior identification had been given by the complainant and further that the identification parade was not done in accordance with the law; that the trial court relied on extraneous evidence thereby arriving at wrong conclusions; that the prosecution evidence was contradictory and insufficient to sustain the elements of the offence of robbery with violence and finally that the trial court failed to comply with Section 200(3) of the Criminal Procedure Code.

Submissions.

Both parties relied on written submissions to argue this appeal. The appellant was represented M. K. Chebii, & Co. Advocates while learned State Counsel, Ms. Sigei appeared for the Respondent.

On behalf of the Appellant, it was submitted that the charge was duplex since it was brought under two provisions of the law; namely Sections 295 and 296 of the Penal Code. Accordingly, it was upon the court to determine whether in the result the appellant was entitled to an automatic acquittal or a retrial. Counsel for the appellant argued that based on the evidence on record, the case did not qualify for a retrial. The case of ***Mary Waithera Kamuiru & 3 Others v Republic Criminal Appeal No. 27 of 2013*** was cited in support.

It was also argued that the proceedings were defective for non-compliance with **Section 200(3)** of the Criminal Procedure Code. This is because the appellant was not informed of his right under this provision when a new magistrate took over the case. Consequently, it was submitted, the proceedings were a nullity for violation of the Appellant's right to a fair hearing and he ought to be acquitted. The court was also faulted for failing to analyze the evidence presented properly. It was argued in this respect, that the court erred in finding that the appellant committed the offence while at the same time finding that the appellant was at his place of work, thereby failing to distinguish between the scene where the offence was allegedly committed and the place where the appellant was stationed.

It was further submitted that the trial court failed to consider the appellant's defence of alibi without any reason. In this regard, it was pointed out that the defence witnesses as well as some of the prosecution witnesses confirmed that at the time of the alleged robbery, the appellant was guarding at the Credit Bank Industrial Area. This evidence, it was further submitted, was not controverted, which finding was confirmed by the trial court in its judgment. The trial court nevertheless went ahead to convict the appellant on the assumption that he had the opportunity to leave his work station and commit the offence, and get back to his duty station. Citing the case of ***Republic v Johnson [1961] All ER 969***, the appellant advanced the view that upon raising the defence of alibi, it was upon the prosecution to disprove it by providing the relevant footage to show that the appellant left his station to commit the offence and that he was actually at the scene.

The trial court was further faulted for relying on identification by a single witness when conditions for identification were not favourable. It was observed that PW2 did not describe any of the assailants when he reported to the police. He maintained that from the prevailing circumstances, the appellant could not have been in a position to identify the surrounding and his assailants, noting that he also failed to correctly describe the make of the car used by the assailants. The case of ***Mohammed Ellibite Hibaya & Another v Republic Criminal Appeal No. 2 of 1996 (unreported)*** was cited.

It was also submitted that the court arrived at erroneous conclusions in finding that Credit Bank was situated along Bandari Road and that the complainant had seen the appellant guarding the said bank, yet were that the case, the police would have been quick to arrest the appellant who was always on duty at the bank. The case of ***Wamunga v Republic Criminal Appeal No. 20 of 1989*** was cited. The appellant also pointed out that his place of work was not at Bandari Road where the complainant allegedly saw him and that there was a high risk of mistaken identity since the complainant was looking out for a uniformed police officer. The cases of ***Gayle [1992] 2 Cr. App. R. 130*** and ***Abdalla Bin Wendo & Another v Republic (1953) 20 EACA*** were cited. Furthermore, the identification was made under difficult circumstances given that it was the first time the complainant saw the assailant, and further that the attackers had appeared to be swift and ruthless. The cases of ***James Tinega Omwega v Republic Criminal Appeal No. 59 of 2011*** and ***Maitanyi v Republic [1986] KLR 198*** were cited in support.

It was the appellant's submission that the identification parade did not conform to Chapter 46 of the Force Standing Orders for the reason that the investigating officer took part in it, that the parade officer was the Deputy OCS and the relieving officer where the appellant worked who was ideally not supposed to conduct the parade. Further, there was no name indicated in the parade forms when they were supplied to appellant. The name was inserted later, an indication that the parade officer was biased. The appellant also noted that there was a possibility that the parade officer influenced the complainant given that there was pressure from the media after the police had initially failed to act on the complaint. In oral submissions in court, it was added that the parade officer did not testify and neither were the parade forms produced.

The appellant further submitted that the prosecution evidence was contradictory, observing that PW2's testimony that he had left Barclays Bank at Enterprise Road and entered Bandari Road where he was attacked was contradicted by PW5 who stated that PW2 had explained that he was attacked while entering Barclays Bank along Enterprise Road. The appellant added that besides the contradictions on the scene of crime, the bank withdrawal slip did not bear the appellant's name nor was it stamped. Further, PW2 contradicted himself about the number of people in the car and described the car as a Toyota Premio while the investigating officer stated it was a Toyota Fielder. The appellant further observed that while the appellant and his co-accused were identified under the same circumstances, his co-accused was acquitted on the ground that he was not sufficiently described before the arrest, yet, the appellant was not equally described and therefore ought to have been acquitted. He supported this view with the cases of ***Peter Ngige Weru v Republic Criminal Appeal No. 51 of 2000*** (unreported) and ***Fatehalli v Republic (1972) EA 158***. The court was urged to allow the appeal.

The appeal was opposed. In its written submissions, the Respondent began by conceding on the ground of defective proceedings. The respondent submitted that the evidence of single witness was properly relied on as the offence was committed during broad daylight. Recalling the prosecution evidence, the respondent added that an identification parade had been conducted in accordance with the rules where PW2 identified the appellant, citing features of the assailant. It was further submitted that PW5's presence did not occasion injustice so long as he did not conduct the parade.

The respondent also submitted that the appellant's defence of alibi was considered. On identification, it was submitted that the complainant spotted one of the attackers guarding the Credit Bank within Bandari Road. Further, it was also revealed that the appellant had been issued with an AK 47 firearm and that handcuffs had been found in his house.

On the ground of duplex charges, the respondent submitted that the charge was properly drafted citing, ***Paul Katana Njuguna v Republic Criminal Appeal No. 37 of 2015***. The respondent added that Section 295 was a mere definition while Section 296(2) created the offence of robbery with violence, thus, the offence of robbery had to be first demonstrated before proceeding to demonstrate the ingredients of the offence of robbery with violence. Furthermore, any defect in the charges was curable under Section 382 of the Criminal Procedure Code.

While conceding that the proceedings were defective for non-compliance with Section 200(3) of the Criminal Procedure Code, the respondent added that the circumstances of each case ought to be examined to determine if they would warrant a retrial or an acquittal, urging that the remedy in this case was to order for a retrial. Responding to the ground of discrepancy in the evidence, the respondent submitted that PW2's testimony was that he was attacked at Bandari Road as he joined Butere Road where Credit Bank was situated which fitted the description given to the police. The allegation of double standards by the trial court was also denied, with the respondent citing the evidence which the court found sufficient to convict the appellant. The respondent maintained that the evidence presented was corroborated, reliable, consistent and cogent, and urged the court to order a retrial.

Determination.

Having considered the evidence before the trial court and arguments by both parties, I firstly deal with matters of law raised by the appellant as follows:

Whether the charge was bad for duplicity

It is the appellant's view that the charge was duplex as it was brought under two provisions of the law; namely, Sections 295 and 296 of the Penal Code which provide for different offences. The position has been long set down on what constitutes the elements of the offence of robbery with violence. In the case of ***Simon Materu Munialu V Republic Criminal Appeal 302 of 2005, [2007] eKLR***, the Court of Appeal reasoned thus:

'...the ingredients that the appellant and for that matter any suspect before the court on a charge

of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.

Further in the case of *Joseph Njuguna Mwaura & 2 Others v Republic Criminal Appeal No. 5 of 2008 [2013] eKLR*, the Court stated that:

‘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.’

Considering the above, it is true that the charge of the offence of robbery with violence contrary to **Section 295** as read with **Section 296** of the Penal Code is defective for duplicity. The question is whether such defect occasions any prejudice or injustice to the Appellant. My humble view is that the mere fact the charge was drafted under the two provisions of the law did not prejudice the Appellant as he knew, from the commencement of the trial, the charge he was facing, that of robbery with violence. This is also the offence to which he pleaded and defended himself against. A retrial cannot therefore be ordered only on this ground.

Whether the trial court failed to comply with section 200(3) of the Criminal Procedure Code.

On non-compliance with Section 200(3) of the Criminal Procedure Code, I would wish to restate the provision as under;

‘Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.’

It is not disputed that the trial was conducted by two magistrates. Initially, the case was presided over by Hon. Kiarie wa Kiarie (as he then was). Following his appointment as a judge of the High Court, Hon. Hannah Ndungu took over the matter. During the mention of the case following this changeover, the succeeding magistrate directed that the proceedings be typed and supplied to the defence to enable them consider Section 200(3) options. However, when the matter next came up for hearing, it proceeded without the court giving the appellant an opportunity to hear the appellant on Section 200(3).

Undoubtedly, this was a violation of the law since the succeeding magistrate did not inform the appellant of his right, in order for him to respond accordingly. This is a mandatory requirement, which must be directed to an accused person. The question for determination, therefore, is whether this failure vitiates the trial. It has been held severally that failure to inform the accused person of this right goes to the root of a fair trial. As the Court of Appeal stated in *Samwel Ngare Kayaa & another v Republic Criminal Appeal No. 5 of 2011 [2014] eKLR*:

‘The appellant therefore had a right in raising the issue of non-compliance with section 200(3) of the Criminal Procedure Code. Failure to comply with the mandatory provisions above meant that the subsequent proceedings were a nullity and we so

hold.”

I am of a similar view that the non-compliance with Section 200 renders the entire proceedings a nullity. This would then necessitate a retrial.

The principles guiding the court in determining whether or not to order a retrial are long-settled. In determining whether to order a retrial, the court should be guided by the interests of justice, determinable by the circumstances applicable in each case. In so doing, the court may consider factors which have been cited in various decisions. As held in the case of ***Muiruri v Republic (2003) KLR 522:***

“Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or the court’s”

In order to determine whether or not a retrial should be ordered in this appeal, it is crucial to appreciate the evidence presented before the trial court. I shall reevaluate the same as mandated by law to so do. The prosecution relied on the evidence of five (5) prosecution witnesses. The main piece of evidence comes from the testimony of **PW2**, the complainant. He testified that he was accosted as he was joining Bandari Road from Butere Road. He stated that a police officer in uniform sprang on him and he was then pushed into the vehicle. The appellant had been issued with an AK 47 rifle on the material day by **PW1, No. 49906 Cpl. Godfrey Hinga** in order to attend to guarding duties, which he returned on the same day in good order. PW1 testified in cross-examination that he did not receive any complaint of the appellant’s desertion from the bank where he was stationed. A register was also exhibited in court showing the times the appellant reported and left the bank.

PW2 stated that he was first approached by a vehicle when he was walking along Butere Road. The co-driver was the one who addressed him, and he was ordered to get into the vehicle. PW2 insisted on being shown a job identification card by the people who said they were police officers. According to PW2, the identification cards did not appear to be genuine. They let him go and he proceeded. As PW2 joined Bandari Road, the vehicle suddenly stopped behind him and a person dressed in police uniform got out and pushed him into the vehicle. PW2 was robbed and later let out of the vehicle. PW2 stated that he went to report to the Industrial Area police and requested to be accompanied by a police officer to Butere Road as he could recognize the person by appearance. He was referred to the CID headquarters where he was told to report the following day. PW2 stated that the following day, he went to the scene and saw the person who robbed him. However, the police refused to accompany him and PW2 went to the press. He also stated that he did not lead the police to his arrest and further that he was later called and identified the appellant at an identification parade. PW2 stated that the appellant was the person who forced him into the vehicle, handcuffed him and took his money. He described the 2nd accused as the co-driver. PW2 stated in cross-examination that he described to the police the people who robbed him, adding in re-examination that he described the appearance of the appellant in his report. He also stated that he identified the appellant since he had pimples on the face and that his lower lip was red, which description he admitted was not in his statement. Even though PW2 stated that the appellant was identified in an identification parade, no evidence was given in respect of this parade. PW3, No 62469 IP Yasmin Khan carried out the identification parade in respect of the 2nd accused.

I observe a variation of the accounts given in the testimony of PW5, No. 71023 Sgt. John Shegu, the investigating officer in this case. PW5 stated that the complainant informed him that he was robbed while entering Barclays Bank along Enterprise Road by four armed robbers one of whom was in police uniform. PW5 added another piece of evidence, when he stated that the complainant was certain that the robbers were police officers since he had seen one of them guarding Credit Bank along Bandari Road. This information was not given by the complainant in his testimony. PW5 summoned all the police officers for a parade where the appellant was identified. He also stated that the register of attendance from Credit Bank showed that the appellant was on duty on the material day.

The evidence against the appellant in this case mainly turns on the aspect of identification. It is not disputed that the robbery took place during the day. The complainant described how he was attacked by persons who were in a vehicle, a saloon car. With respect to the appellant, the complainant maintained that it was the appellant who forced him into the vehicle and took the money from him. It is not in doubt that there was considerable time and opportunity for the complainant to identify his assailants. The appellant stated in his evidence that he informed the police that he could identify the suspect. He stated that he went back to the scene and saw the appellant but that the police declined to act on this report. He resorted to involve the media. Eventually, the appellant was arrested. However, it was notable that the complainant did not lead the police to his arrest.

From the evidence before court, it is not clear what description the police relied on to effect the arrest. PW5 indicated that the complainant informed him that he had seen one of the attackers guarding the Credit Bank. Yet no such reference was made by the complainant. PW5 relied on this information to summon all officers who were on guarding duties in the area on the material date. An identification parade followed thereafter where the appellant was identified. It is also notable that no evidence of the said parade was produced, neither did the officer who conducted the parade testify. PW3's evidence only related to the 2nd accused. I find that this was a material omission given that there is no clarity as to the description given by the complainant to the police and the information eventually relied on to arrest the appellant.

The complainant indicated that he identified the appellant from his facial features, pimples and red lips. It was not shown that he had given a prior description, and he only indicated that he could identify the person by appearance. Furthermore, the evidence shows that PW2 stated that he saw one of the attackers when he went back to the scene. According to his testimony, he had been robbed after he had withdrawn money from the bank along Enterprise Road. PW2 had then left and joined Butere Road where he was first stopped by the occupants of the vehicle. Shortly thereafter, he joined Bandari Road, when he was accosted by the same people and forced into the vehicle. The appellant indicated that he was on guarding duties at Credit Bank along Butere Road. It was not shown that PW2 spotted the appellant at the bank since he stated that he spotted the suspect when he went back to the scene. I find this evidence insufficient to persuade the court that the identification was sound and free from error.

The appellant maintained in his defence that he was stationed at the bank the whole day. He gave a sworn testimony and called two witnesses in support of his defence. The two witnesses testified that the appellant was at the bank at all material times. An accused does not assume duty to prove the case against him by advancing an alibi defence. As stated in the case of *Kiarie v. Republic* (1984) KLR 739:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

It was upon the prosecution to counter this defence of alibi. This was not done and the court simply concluded that the appellant has an opportunity to leave his work station and commit the offence. This finding was based on a mere presumption. The prosecution had opportune time to confirm the whereabouts at the material time since PW5 had the register from the bank which showed that the appellant had been stationed there the whole day. No additional efforts were made to clarify if the appellant had left his station as the prosecution alleged.

The sum total of the above is that the evidence against the appellant is not sufficient to hold a conviction. In light of my earlier findings, this case does not qualify for a retrial. This appeal therefore, succeeds. The conviction is quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and SIGNED this 13th day of March, 2017.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;

1. Appellant present in person
2. M/s Sigei for the Respondent.