



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAROK
CRIMINAL APPEAL NO 71 OF 2016

[Being from the original conviction and sentence in Criminal Case No. 1246 of 2012 in the Senior Principal Magistrate's Court at Narok, R. v. John Kamau Wangui]

JOHN KAMAU WANGUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence as follows. In count 1 he was convicted and sentenced to death in respect of robbery contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya. In count 2, he was convicted but was not sentenced in respect of being in possession of a firearm without a certificate contrary to section 4(1) as read with section 4 (3) of the Firearms Act (Cap 114) Laws of Kenya. In count 3 he was convicted but was not sentenced in respect of being in possession of ammunitions without a certificate contrary to section 4 as read with section 4 (3) of the Firearms Act. In Count 4, he was convicted but was not sentenced in respect of the offence of being in possession of 126 papers intended to resemble or used in making bank notes of Kshs.1,000 Kenyan currency. The sentences in counts 2, 3 and 4 were ordered held in abeyance pending the execution of the death sentence in count 2.

2. Additionally, the assault rifle was forfeited to the Inspector General of Police. The fake currency papers was forfeited to the Governor of Central Bank of Kenya for destruction.

3. The state has supported both the conviction and sentence.

4. The appellant was convicted on the single eye witness evidence of Elizabeth Mwangi (PW1), who is the complainant in the capital robbery charge. He was also convicted of being in possession of an assault rifle, ammunitions and 126 fake Kenya currency papers, based on the evidence of the police officers namely No.65400 P.C. Samuel Liu (PW2) No. 61187 P.C. Henry Kiboma (PW3), No. 92822 P.C. Virginia Mwangi (PW4), No. 231339 CIP Peter Muiruri (PW5), SSP Johnstone Mwongela (PW6) and No. 84046 P.C. Nicholas Njoroge (PW 7).

5. The appellant's defence is that he was framed up by the police. The appellant has raised 5 grounds in his amended petition of appeal to this court. I will consider ground 2 first. The appellant has faulted the trial court in finding that visual identification by PW1 was positive and that the police identification parade was conducted contrary to the police standing orders, Chapter 46 of those orders. In this regard the evidence of PW1 was that she closed her shop in Narok town at 7.30 p.m. and drove to her home. Her watchman opened the gate. She then came out of her motor vehicle to collect her handbag from the motor vehicle's seat. At that point in time, she heard someone who came and held her handbag. Another

person emerged and ordered her to sit down on the ground. She also testified that she was able to see her attackers due to the security lights that were on. Suddenly she saw a group of 15 persons, who entered her gate while armed with *rungus* and *pangas*. They then ordered her to open her house. Amongst her attackers she identified the appellant and 4th accused in the trial court, whom she saw well. The appellant ordered her to sit down. They assaulted her and took cash Kshs.97,000/= which was in her hand bag and thereafter that they left her compound. It was also her further evidence that she reported the matter to the police, who then arrested the appellant. After some time she attended a police identification parade in which she identified the appellant by touching him. The police identification parade was conducted by No. 231339 CIP Peter Muiruri, who produced the parade identification form as exhibit 9. According to exhibit 9 the appellant stood between parade members 2 and 3. The appellant was identified by being touched on the left hand shoulder. In answer to the question as to whether he was satisfied with the conduct of the parade, he replied that: “*I am satisfied.*” Thereafter he signed it.

6. Furthermore, the circumstances prevailing at the scene of crime favoured the identification of the appellant by the complainant (PW1). First, the security lights were on. Second, PW1 spent 20 minutes with this appellant and the 4th accused before the others entered that compound. Third, PW1 described what the appellant did at the scene of crime namely that it is this appellant and the 4th accused who attacked her first. Fourth, it is this appellant who entered the compound in company of PW1. This close proximity between the appellant and PW1 is another factor that favoured the visual identification of the appellant.

7. In the light of the foregoing circumstances, I find that the appellant was positively identified by the complainant (PW1). I further find there is no merit in the submissions of the appellant that PW1 did not give to the police any special features concerning him. And this explains why PW1 positively identified him at the police identification parade. I also find that PW1 did not see the appellant before the parade was held. This assertion by the appellant is an afterthought. That is why the appellant never raised this issue with PW1 when she was cross examined.

8. The appellant has also attacked the evidence of the conduct of the parade by PW5. He submitted that the parade was conducted after the media in particular Citizen TV had published the proceedings in court. The appellant did not raise this issue when PW5 testified in respect of the conduct of the parade. I reject this submission as lacking in merit for it is afterthought. I therefore find that the parade was held properly.

9. In ground 1, the appellant had faulted the trial court for convicting and sentencing him to death on an incurable defective charge, which he alleges is in contravention of article 50 (2)(b) of the 2010 Constitution of Kenya and sections 134 and 137 (a) and (i)(ii) and (iii) of the Criminal Procedure Code. In this regard, it is important to refer to the charge of robbery as filed. The section that is under which the appellant was charged is indicated as being robbery contrary to section 296 (2) of Penal Code [Cap.63] Laws of Kenya. In this regard I find that the charge should have been framed as being robbery with violence contrary to section 296 (2) as read with 295 of the Penal Code. However, I find that this is a curable defect. It did not prejudice the appellant in any way. The particulars of the offence alleged that on 14/9/2012 at Narok Township in the Narok North district within Rift Valley Province jointly with others not before the court while armed with dangerous weapons namely AK 47 rifle, a pistol, *pangas* and *rungus* robbed Elizabeth Wanja Mwangi of Ksh.97,000 and immediately before or immediately after the time of such robbery threatened to use actual violence on the said Elizabeth Wanja Mwangi. I find from these particulars that they support the offence charged and are sufficiently detailed to inform the appellant with the required details of the offence with which he was charged. The charge as filed complies with the provisions of article 50 (2) (b) of the 2010 Constitution of Kenya. I further find that the charge as filed, provided that appellant with the necessary particulars that enabled him to defend himself as required by section 134 of the Criminal Procedure Code. I further find that the charge as filed is in compliance with the provisions of section 137 (a)(i)(ii)(iii) of the Criminal Procedure Code. In the circumstances, this ground of appeal is without merit and I hereby dismiss it.

10. Finally in relation to ground 2, I find that the authorities cited by the appellant are distinguishable. The upshot of the foregoing is that this ground is lacking in merit and is hereby dismissed.

11. In ground 3, the appellant had faulted the trial court for convicting and sentencing him to death in relying on the evidence of possession of a firearm, which possession was not positively proved. In this regard, I find that No. 65400 P.C Samuel Liu acting on information of an informer went and entered the room occupied by the appellant. He was in company of 3 other police officers. They carried out a search in that single room. In the process of doing so, P.C Virginia Mwangi (PW4) lifted a sofa set and beneath that sofa set she found an AK 47 rifle which was loaded with 23 rounds of live ammunitions. The rifle was produced as exhibit 1. The 23 rounds of live ammunitions were put in evidence as exhibit 2. Thereafter the firearm and the rounds of ammunitions were forwarded to No. 230552 SSP Johnstone Musyoka Mwangela who is a ballistics examiner. He examined the firearms and the rounds of ammunitions and put in evidence his report as exhibit PM -19B. In his report, he confirmed that the exhibits which were forwarded to him were a firearm and ammunitions as defined under the Firearm Act (Cap 114) Laws of Kenya. In the circumstances, I find that this ground of appeal lacks merit and I hereby dismiss it.

12. In ground 4, the appellant has faulted the trial court for convicting him on a charge of possession of a firearm, which was not contained in the substituted charge sheet. In this regard, it is important to refer to the proceedings of the trial court of 3/10/2012 when the substituted charge sheet was admitted into hearing. The record shows that the appellant who was the 1st accused in that court together with the co-accused did not object into hearing the substituted charge sheet. In the substituted charge sheet which is dated 27/9/2012, the appellant is charged together with 4 other persons for being in possession of a firearm namely an AK 47 rifle without a firearm certificate in count 1. In count 2, the appellant along with 3 other accused persons was charged with being in possession of 23 rounds of ammunitions without a firearm certificate as shown on the 2nd page of the substituted charge sheet. Furthermore, on that date they pleaded not guilty to count 1 which charged the appellant along with the co-accused with capital robbery. They also pleaded not guilty to counts 2 and 3. It is only the appellant who is charged alone in count 4 with being in possession of 126 papers intended to resemble or used in making bank notes of Ksh.1000. It is therefore clear that the appellant was charged for being in possession of a firearm with a certificate in the substituted charge sheet to which he pleaded not guilty. In the circumstances, I find no merit in this ground of appeal which is hereby dismissed.

13. In ground 5, the appellant has faulted the trial court for dismissing his defence which was plausible and credible without proper reasons. The defence of the appellant was that the case against him was framed by the police. He made an unsworn statement. In the statement he stated that he left his house on 26/9/2012 and went to his place of work. While en-route, 2 persons stopped and greeted him who turned out to be police officers. They asked for the particulars of his residence including his name which he answered positively. Without giving any reasons they suddenly arrested him. Following his arrest, he was taken to an unknown house, where photographs were taken. He remained outside that house but the police entered into that house and returned with a gun and tried to force him to accept that it was his gun. He refused to do so. As a result, the police beat him up in an attempt to force him to admit the offence.

14. I have reassessed the prosecution evidence and that of the defence. I find that the trial court rightly believed the prosecution evidence in respect of the identification of the appellant as one of the 15 robbers who were at the scene of the robbery. This is clear from the evidence of Elizabeth Mwangi (PW1). Under cross examination, PW1 testified that she saw the appellant well at the scene of crime. She further testified that the appellant held her clothes at the chest and ordered her to sit down which she did. She also testified that the appellant again ordered her to open the door to her house. She went further to testify that the appellant was speaking Kikuyu which was also her language. Finally, she testified that:

“At the identification parade, I saw you and remembered your chocolate face. I asked you to speak Kikuyu. You did and I identified you. My compound is well lit. Lights are all over the compound. You and accused 4 were the first ones I met and were last to leave. Before the parade, I had seen you at the scene. I was shocked at first but as time passed by I composed myself as we talked.”

15. It is therefore clear that the appellant was positively identified as one of the robbers. The evidence which I have referred to is crystal clear on this point. In the circumstances, I find that the defence of the appellant was rightly considered and rejected. There is also credible evidence of No. 65400 P.C Samuel

Liu who in company of the deputy DCIO Muiruri No. 92822 PC Virginia Mwangi (PW4), P.C Kiban and PC Jesse that they recovered an AK 47 rifle from the one roomed house which was occupied by the appellant.

16. It is important to point out that the appellant in his submission to this court strongly urged the court to find that the police witnesses (PW2,3,4,5) were incredible. He submitted that they were being directed by an informer. It was also his submission that the evidence of the police officers was in need of corroboration. In the absence of corroboration he urged the court to find that there was no evidence to support the charge of being in possession of the firearms and 23 rounds of live ammunitions. I find this submission to be strange. There is no provision in the law of evidence that classifies the evidence of police witnesses as inherently incredible. There are no provisions in the law of evidence that the evidence of police witnesses must be corroborated by the evidence of independent witnesses for it to be relied upon by the court. In this regard, I find that even the evidence of accomplices can be acted upon without corroboration. And in terms of section 141 of the Evidence Act [Cap.80] Laws of Kenya an accomplice witness is deemed to be a competent witness against an accused person. The police witnesses are not accomplices. According to the law, any witness be it a police officer or a civilian witness is capable of proving any fact in issue if such a witness is credible. I find that this submission of the appellant is wholly lacking in merit and is hereby dismissed.

17. Furthermore, the appellant strongly submitted that the informer had to testify as regards his source of information in respect of the gun that was found in his one roomed house which he occupied. An informer in terms of the law of privilege enjoys a privilege from disclosure of his identity. This is clear from section 132 of the Evidence Act. That section provides as follows:

“No public officer shall be compelled to disclose communications made by any person to him in the course of his duty, when he considers that the public interest would suffer by the disclosure.”

If the identity of the informer is disclosed, informers may become the subject of retaliatory actions by those in respect of whom they have passed information to the police. In the instant appeal the 15 accomplices who have not been arrested may be tempted to take retaliatory actions against potential prosecution witnesses. No informer knowing that his identity would be disclosed would be willing to give information to the police. The net effect of this is that informers would stop giving information to the police. And this is likely to impact adversely on effective law enforcement. It is for this reason that the identity of the informers is not subject to disclosure. The leading authority in this regard is the English case of *Marks v. Beyfus (1890) 25 QBD 494*. In that case, it was held that the identity of the informer is not subject to disclosure. It was also held therein that the disclosure of the informer or the nature of the information may be disclosed if it is necessary or desirable in order to show the innocence of an accused person. In the instant appeal, the appellant submitted that the informer was a suspect and that is why he was not charged in court. And for that reason, the informer should have been called as a witness. His evidence would have been that of an accomplice. Assuming without deciding that this submission is correct, then the informer was an accomplice. It therefore follows from that submission that the evidence of the informer was not going to show that the appellant was innocent. That being the position the identity of the informer was not subject to disclosure. In terms of article 50 (2) (c) the disclosure of the identity of the informer would have been necessary if his evidence was going to assist in showing the innocence of the appellant which is not the position in the instant appeal. In the circumstances, I find no merit in this submission and is hereby refused.

18. Furthermore, the appellant submitted very vehemently that the landlord should have been called as a witness to confirm the evidence of the police witnesses (PW2, PW3, PW4 and PW5) that the rifle (gun) and the fake papers resembling Kenyan currency notes of Ksh.1000/= were recovered in that house. I have already found that the evidence of the police witnesses is not inherently incredible or suspect so as to require independent corroboration. There is no evidence to show that the landlord knew that the appellant was in possession of the rifle and fake currency papers that resembled Ksh.1000/=notes. I therefore find that this submission lacks merit and is hereby dismissed.

19. This is a 1st appeal. As a 1st appeal court I am required according to *Okeno v. R (1972) EA 32* to

reassess and make my own independent findings. I have reassessed the entire evidence and I find that the appellant was convicted on sound and overwhelming evidence. I therefore confirm his conviction.

20. As regards sentence, the appellant was sentenced to death in respect of count 1. The sentence in counts 2, 3 and 4 were held in abeyance pending the execution of the sentence in count 1. The death penalty imposed upon the appellant was a lawful sentence and I hereby confirm it.

21. The upshot of the foregoing is that the appellant's appeal is hereby dismissed in its entirety.

Judgement delivered in open court this 14th day of May, 2017 in the presence of Appellant and Mr. Mukofu for Respondent.

J. M. Bwonwonga

Judge

14/5/2017