



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.157, 158, 159 & 160 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. M. Muya – CM delivered on 13th June 2012 in Makadara CM. CR. Case No.4034 of 2010)

JOSEPH KARIUKI MWANGI.....1ST APPELLANT

FRANCIS NDUNGU MUNGAI.....2ND APPELLANT

KEVIN IRUNGU MUHIA.....3RD APPELLANT

PETER NJOROGE NDUNGU.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Francis Ndungu Mungai hereinafter referred to as the 1st Appellant, Kevin Irungu Muhia hereinafter referred to as the 2nd Appellant, Peter Njoroge Ndungu hereinafter referred to as the 3rd Appellant and Joseph Kariuki Mungai hereinafter referred to as the 4th Appellant were charged with another (who was acquitted by the trial court) as the 5th, 4th, 3rd and 1st accused respectively in the trial before the lower court. Their appeals have been consolidated as they arise from the same trial. The appellants were facing two counts of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the first count were that on 14th day of October 2010 at Kayole Estate within Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous or offensive weapon namely an AK 47 rifle robbed Robert Thuo Mwangi of motor vehicle registration number KAP 190Y Toyota Corolla black in colour valued at Kshs.400,000/= and at or immediately before or immediately after the time of such robbery threatened to shoot the said Robert Thuo Mwangi. The particulars of the second count were that on the same day and in the same place, the Appellants, jointly with others not before court while armed with dangerous or offensive weapon namely an AK47 rifle robbed John Njuguna Njoroge of cash Kshs.500 and at or immediately before or immediately after the time of such robbery threatened to shoot the said John Njuguna Njoroge. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to both charges. After full trial, the learned trial magistrate found the Appellants guilty of both counts and sentenced them to life imprisonment. The Appellants were aggrieved by their conviction and sentence and have duly filed their

respective appeals to this court.

In their petitions of appeal, the Appellants raised similar grounds of appeal. The Appellants were aggrieved that the trial magistrate erred in law and in fact in holding that they were properly identified by the prosecution's witnesses. According to the Appellants, their identification by prosecution witnesses had not been sufficiently established. The Appellants were also concerned that their defence had not been considered when the trial magistrate reached the decision to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them.

At the hearing of the appeal, the 1st, 2nd, 3rd and 4th Appellants presented to the court written submission in support of their respective appeals. This court further heard oral submission made by Mr. Wandugi on behalf of the 2nd, 3rd and 4th Appellants and Ms. Rashid for the 1st Appellant. A response to the submission was made by Ms. Aluda on behalf of the state. She presented to the court written submission opposing the appeals and further made oral submission during the hearing of the appeal.

Mr. Wandugi submitted that having regard to the evidence adduced during trial, the 2nd, 3rd and 4th Appellants' conviction was not safe. He submitted that there was a variance between the averment in the charge sheet and the evidence adduced by the prosecution witnesses during trial. In particular, learned counsel for the 2nd, 3rd and 4th Appellants submitted that while the charge sheet talked of the Appellants being armed with an AK 47 rifle, the evidence of PW1 was that the Appellants were armed with a pistol. Mr. Wandugi submitted that the crucial issue of identification of the Appellants in this case was not proved beyond any reasonable doubt. He laid emphasis on the witnesses' lack of description of the Appellants to the police after the robbery. He contended that this omission raises reasonable doubt concerning the reliability of the witnesses' identification. He submitted that PW2 did not have opportunity for a reliable identification since he was said to have been covered in the face during the incident. He further submitted the failure of the prosecution to produce the identification parade forms as exhibits during trial also raised doubt as to the reliability of the witnesses' identification. To this end, learned counsel for the 2nd, 3rd and 4th Appellants relied on the case of **Republic –versus- Eria Sebwato [1960] E.A 174, Augustino Njoroge Ritho alias Chabah & Another –versus- Republic Criminal Appeal No. 99 of 1986 (Nairobi)** and **Ndungu Kimanyi –versus- The Republic [1979] KLR 282**. He urged the court to allow the 2nd, 3rd and 4th Appellants appeal.

On her part Ms. Rashid, learned counsel for the 1st Appellant submitted that prosecution's case against the 1st Appellant was not proved to the required standard of proof. She submitted that the 1st Appellant was neither identified by PW1 nor PW2 as being one of the assailants during the incident, neither was he found to be in possession of the stolen items. She therefore urged the court to quash the 3rd Appellant's conviction by the trial court and acquit him.

In response, Ms. Aluda opposed the Appellants' appeal. She made oral submission to the effect that the prosecution had established its case on the charges brought against the Appellants to the required standard of proof. She submitted that the Appellants were properly identified by the prosecution witnesses. Ms. Aluda submitted that the complainants were able to identify their assailants as the offence was committed in broad daylight. She further submitted that the identification parade was properly conducted. She submitted that the doctrine of recent possession was applied to the 3rd Appellant as it was proved that he had been found in possession of the stolen vehicle's car ignition key. In support of her submission, Ms. Aluda relied on the cases of **Athuman Hamisi Mwaviadzo & Another –vs- Republic [2014] eKLR** and **Samson Nyandika Orwerewe –vs- Republic [2014] eKLR**. She urged the court to dismiss the appeal and confirm the trial court's conviction and sentence.

The facts of the case as presented by the prosecution are as follows. At the material time PW1 Robert Thuo Mwangi was a driver of a taxi motor vehicle, Toyota Corolla registration number KAP 190Y which plied the Kayole-Kanisani route within Nairobi. The vehicle was owned by PW3 Benson Mwangi Maina. PW1 testified that on 14th October 2010 at about 12.30 p.m, he was approached by young man and a lady

who told him that they had customers who needed his services. PW1 drove them to a nearby church where he was to pick some customers. According to PW1, he stopped the vehicle near the church and the young man and the lady alighted. He testified that three men then entered the vehicle. He saw they had pistols with them. The said men then ordered PW1 to drive to a place called Prime Rose. At Prime Rose, they picked a fourth man who was with an old man. The fourth man forced the old man into the vehicle before he also got inside. PW1 was then ordered to drive away. They stopped at Maili Saba for one of the men to purchase some cigarettes. It was at this point that PW1 managed to escape. He went to report the incident to Kayole Police Station. PW1 was able to identify his assailants as he was at close proximity with them. However, it emerged in evidence that PW1 did not give the description of his assailants in the first report that was made to the police. PW1 also informed PW3 of the incident.

On his part PW2 John Njuguna Njoroge was at his place of business in Kayole on the day in question. He recalled that he received a phone call from an unknown number. He also recalled that he saw a vehicle with tinted windows parked outside his shop. He testified that a man emerged from the vehicle and approached him and asked him whether he remembered him. He testified that suddenly, he was surrounded by men armed with pistols and AK 47 rifles. They frog matched him into the vehicle. One of the men pushed him inside the vehicle. Before he got inside the vehicle, he threw his car's ignition key to PW4 who was also at the shop. PW4 confirmed that PW2 was driven away in motor vehicle registration number KAP 190Y, Toyota Corolla, grey in colour. PW4 testified that one of the men wore a long, dark coat while another wore a camouflage jungle trouser. The evidence of PW2 was that while inside the vehicle his assailants covered his face. They also took money from his pockets. He testified they stopped somewhere to purchase cigarettes before he was taken to a house where he found about twelve other men. He was beaten up and ordered to produce Kshs. 500,000. They called his wife and demanded a ransom of Kshs.1,000,000/-. When his wife told them she did not have money they handcuffed him and left him under the watch of a man armed with an AK47 rifle. PW2 was able to identify the 1st, 2nd and 3rd Appellants as his assailants. He testified that they were members of the mungiki sect who used to come to his place of business to ask for money ostensibly to provide security. He did not however give their description to the police when he first made his report.

PW10 PC Ronald Chemosit was in the office together with PW12 SGT Patrick Okwara when PW1 reported the incident at Kayole Police Station. PW1 also reported that the thugs had also abducted a man at Prime Rose. They proceeded with PW1 to Maili Saba where he had left his car. On the way, they met three men whom they stopped. One of the men however escaped. PW1 identified two remaining men as his assailants amongst them the 4th Appellant. The two were arrested and taken to Mowlem Police Station. PW12 testified that the 4th Appellant asked to make a phone call to the 2nd and 3rd Appellants who upon their arrival at the police station were arrested. When they were searched, the 3rd Appellant was found with the ignition key for motor vehicle registration number KAP 190Y (**PEXH 10**). Upon interrogation, they disclosed that the vehicle had been abandoned at a nearby quarry. They inquired about the abducted man and were informed that they would be led to where he had been locked up. The vehicle was recovered by PW 10 and was taken to the police station.

The 2nd, 3rd and 4th Appellants were further interrogated on the AK 47 rifle and they disclosed that it was with the man manning the abducted man. They sought reinforcement from Mowlem Police Station and proceeded to where the said man had been locked up. The 2nd, 3rd and 4th Appellants led them to a building where they found other people inside. They inquired from the people whether they had seen the man but they all said that they had not seen him. PW12 testified that they were ambushed by a hail of bullets fired from inside the house through the door and windows and they took cover. He testified that a man came out of the house firing gun shots and he managed to escape over the wall fence. PW2 also came out of the house with his hands handcuffed. They unlocked his handcuffs (**PEXH 7**). Inside the room, they recovered a jungle pullover (**PEXH 8**) and a jungle trouser (**PEXH 2**). PW6 CPL Eustus Waweru testified that upon further interrogation the 3rd Appellant identified the 1st Appellant as part of the group. He testified that the 3rd Appellant led PW6 to the 1st Appellant's house in Kayole where he was arrested.

Several identification parades were carried out by PW5 IP Lilian Chepchirchir, PW7 CI John Wainaina,

PW8 CI John Kamati and PW9 IP Daniel. PW1 and PW2 were called to attend the identification parades. In the identification parade conducted by PW5, PW1 was not able to identify the 2nd Appellant. On his part, PW2 was able to identify the 4th Appellant. The report was produced as **PEXH 3**. In the identification parade conducted by PW7, PW1 was not able to identify the 3rd Appellant while PW2 identified him. The report was produced as **PEXH 4**. In the identification parade conducted by PW8, both PW1 and PW2 identified the 4th Appellant. The report was produced as **PEXH 5**. In the identification parade conducted by PW 9, both PW1 and PW2 identified the 1st Appellant. The report was produced into evidence as **PEXH 6**. It was on the basis of this evidence of identification that the prosecution secured the conviction of the Appellants.

PW12 was assigned to investigate the case. After concluding his investigations, he formed the opinion that a case had been made for the Appellants to be charged with the disclosed offences. When they were put on their defence, the Appellants denied participating in the robbery. They stated that they were framed with the offences. In essence, the Appellants testified that they were innocent.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (**see Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellants of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was clear from the evidence that the prosecution relied on is the evidence of identification and by the application of the doctrine of recent possession to secure the conviction of the Appellants. The crucial evidence regarding identification was that of PW1 Robert Thuo Mwangi and PW2 John Njuguna Njoroge. PW1 testified how on 14th October 2010 at about 12.30 p.m. he was hired by a man and a woman. PW1 operated motor vehicle registration No.KAP 190Y Toyota Corolla as a taxi. He narrated how he was ordered to drive from a place where three men armed with pistols entered the motor vehicle. He was directed to drive the motor vehicle to a place in Kayole called Prime Rose. At this place, PW1 saw the Appellants enter a business premise before dragging PW2 into the motor vehicle. All this time, PW1 interacted with the four men at close quarters. The men wore no disguises. They ordered PW1 to drive the motor vehicle towards the direction of a trading centre known as Maili Saba. At the centre, one of the men ordered PW1 to stop the vehicle so that he could purchase cigarettes. It was at this point that PW1 managed to escape. He reported the incident to the police. Meanwhile, after being abducted from his place of business, PW2 was taken to a house where he found about twelve other men. He was handcuffed and then beaten. He was told to produce the sum of Kshs.500,000/-. They used his phone to call his wife demanding a ransom of Kshs.1 million to be paid to them. During the entire period, PW2's assailants did not wear any disguises. PW2 was later in the day rescued by the police after a fierce shootout between the police and the thugs.

PW1 and PW2 testified that during their period of interaction with their assailants they were able to positively identify them. PW1 and PW2 gave a verbal description of the assailants to the police. However, this description was not recorded in the first report that PW1 made to the police. The Appellants were arrested on the same day. They were positively identified by PW1 and PW2 as the persons who respectively abducted them and robbed them. Their identification of the Appellants was confirmed in a police identification parade which was later conducted by the police. If there was any doubt that indeed the Appellants had been identified as the persons who committed the robbery of the motor vehicle, that doubt was removed by the testimony of PW2 who testified that he knew the Appellants prior to the robbery incident. He testified that the Appellants were members of a criminal gang known as Mungiki who had on several occasions attempted to extort money from him while at his place of business under the pretext that they would offer him security. PW2 did not succumb to the extortion. The identification of the Appellants by PW2 was therefore that of recognition and not merely the identification of a stranger.

The Court of Appeal in **Anjononi –Vs- Republic [1980] KLR 54 at P.60** held thus:

“Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other.”

In the present appeal, the robbery incident took place during day time. The Appellants interacted with PW1 and PW2 at close quarters. The Appellants had interacted with PW2 prior to his abduction and robbery. As stated earlier in this judgment, the Appellants wore no disguises. PW2 recognized them as being members of a gang which had been attempting to extort money from him. PW2’s identification of the Appellants as the persons who abducted and robbed him cannot therefore be doubted. As regards PW1’s identification of the Appellants, this court holds that the identification having been made in broad daylight, and the Appellants having been arrested on the same day of the robbery, the trial court’s finding that PW1 had properly identified the Appellants cannot be faulted. In any event, PW1 confirmed his identification of the Appellants in the identification parade which was later convened by the police. Having re-evaluated the evidence adduced in regard to how the police identification parade was conducted, we hold that the same was conducted in accordance with the established rules.

As regard the 3rd Appellant, upon his arrest, he was found in possession of ignition keys of motor vehicle registration No. KAP 190Y which had been robbed from PW1. These ignition keys connect the 3rd Appellant to the robbery. He was found in possession of the ignition keys a few hours after the motor vehicle had been robbed from PW1 and later abandoned. The doctrine of recent possession applies in his case. This court presumes that he was among the gang that robbed PW1 of the motor vehicle and later abducted and robbed PW2. The presumption that he was a member of the gang was not displaced by any evidence that the 3rd Appellant adduced in his defence. There is no other feasible explanation of how the 3rd Appellant came into possession of the ignition keys of the robbed motor vehicle other than that he was a member of the gang that robbed the driver of the same. Further, upon their arrest, it was the Appellants who led the police to the place where the robbed motor vehicle, which had been abandoned, was recovered. The Appellants had the special knowledge of the whereabouts of the motor vehicle. They were therefore found in constructive possession of the motor vehicle. The doctrine of recent possession applied in their case too.

As regard whether the charges brought against the Appellants were defective in that the charge sheet refers to the Appellants being found in possession of an AK47 rifle instead of pistols, we hold that the evidence adduced by the prosecution witnesses established to the required standard of proof that the Appellants were armed with both pistols and an AK47 rifle during the course of committing the crime. Both pistols and the AK47 rifle fit description of **“dangerous or offensive weapon”** which is one of the ingredients to establish the charge of robbery with violence contrary to **Section 296(2) of the Penal Code**. Nothing turns on this ground of appeal. We have carefully considered the evidence that the Appellants adduced in their defence. We are not persuaded that the said evidence dents the otherwise strong culpatory evidence adduced by the prosecution witnesses that connects the Appellants to the crime.

The upshot of the above reasons is that the appeals lodged by the Appellants challenging their conviction and sentence by the trial magistrate’s court lacks merit and is hereby dismissed. The conviction and sentence is confirmed. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF MARCH 2016

L. KIMARU

JUDGE

G.W. NGENYE-MACHARIA

JUDGE