



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 32 OF 2008

(Consolidated with Criminal Appeal No. 57 of 2014)

R.V.P. WENDOH AND J.A.MAKAU JJ

ASHFORD MWITI NJOKA... 1ST APPELLANT

MOSES MURIITHI MBAKA ALIAS MURURU 2ND APPELLANT

- V E R S U S -

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case no. 1197 of 2007 of the Principle Magistrate's Court at Chuka – P.N. Gesora –. S.R.M.)

JUDGEMENT

1. The Appellants ASHFORD MWITI NJOKA and MOSES MURIITHI MBAKA were the first and second accused respectively before the lower court. They were charged with another with an offence of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code** and the other was also charged with alternative charge of **Handling Stolen Goods contrary to Section 322 (2) of the Penal Code**. The particulars of the main Count were that the appellants and another, on the night of 25th and 26th of September 2007 at Chuka Township in Meru South District of the Eastern Province, jointly with others not before court armed with ringtons robbed MARTIN MUIA of cash Kshs. 3,200/- and immediately before the time of such robbery wounded the said MARTIN MUIA. The particulars of the alternative charge related to the 3rd accused and the particulars of the charge were that on the night of 26th September 2007 at Chuka Township in Meru South District of the Eastern Province, otherwise than in the course of stealing assisted in the disposal of Kshs. 3,200/- unlawfully obtained or believing it to be stolen property.

2. The 1st and the 2nd appellants were convicted on the main Count and each sentenced to death. The 3rd accused was acquitted on the main Count but convicted on the alternative charge of handling stolen goods and sentenced to serve three (3) years imprisonment and thereafter to be under police supervision for a period of 5 years under Section 344 of the Criminal Procedure Code. Being aggrieved by the conviction and sentence the appellants filed these appeals which we have consolidated having originated from the same trial.

3. That each of the appellants challenged the conviction on the basis that the conditions were

not favourable for positive identification and or recognition; that the trial court erred in law and fact in basing the conviction upon the evidence of a single witness; that the trial court erred in failing to consider their defence; that the evidence was insufficient and that the identification parade was not properly conducted.

4. This is first appeal from conviction and sentence. We are therefore the first appellate court and are guided by the principles enunciated in the case of **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duty of the first appellate court in the following terms:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peter v. Sunday Post, [1958] EA 424.)”

5. The 1st Appellant and the 2nd Appellant appeared in person. Each of the appellant relied on his written submission and had nothing else to add. The main bone of contention in the first appellant’s appeal is that the Learned Trial Magistrate erred in relying on contradictory evidence of PW1 and PW2 and referred to the case of **DankeraiRamkishamPandyavs R E.A.C.A. [1957] Page 336** where it was held:-

“Where the evidence is contradicted or is inconsistent it would not be lied upon”

6. The 1st appellant further relied on the case of **Daxwell –vs Uganda[1978]** where it was held:-

“A conviction cannot stand in the evidence of a witness who had a fleeting glance of the suspect.”

7. The 1st appellant submitted further that the evidence of PW2 was not corroborated and was unreliable. He submitted as such there was need of other evidence referring us to the case of **Charles Olinda Maitanzivs Rep. Cr. App. No. 6 of 1986** where the High Court at Nairobi held:-

“There must be any other evidence to test with the greatest care the evidence of a single witness.”

8. On visual identification the 1st appellant referred us to the case of **Abdullah Bin Wendo – vs- Rex 20 E.A.E.A 166** and on evidence of single witness referred us to the case of **Richard Magana vs Republic App. NP. 44 of 2001 [At Nyeri]** at **page 5** where it was held that:-

“It is trite law the evidence of identification in unfavourable circumstances especially when it is the evidence of a single identification witness at night should be tested with the greatest care and must be absolutely water tight before it can be the basis of conviction.”

9. The 1st appellant as regards his defence referred us to the case of **Stephen Mungai Macharia –vs Republic No. 1/94 C.A.** where it was held:-

“An accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused person remains on the prosecution throughout the

trial”

10. The 2nd appellant in his written appeal submitted that his fundamental rights and freedoms were abused as stipulated under Section 72 (3) (b) of the old Constitution stating that he was arrested on 11th October 2007 and was not taken to court till on 30th November 2007. He submitted that he was illegally detained by police for fifty (50) days and as such the trial was illegal. He cited the case **of Ndede v Republic [1991] KLR 567, AlabanusMwasiaMutua v Republic C/Appela No. 120 Of 2004** at Nairobi amongst others. On the prosecution witness evidence he submitted that their evidence was contradictory, inconsistent and uncorroborated and the trial court was in error in relying on the same. The 2nd appellant referred to the same authorities referred to us by first appellant in support of his proposition that contradictory or inconsistent evidence should not be relied upon. The rest of the 2nd appellant's submissions we note are similar to those of the 1st appellant and we need not reproduce the same. The 2nd appellant further submitted that if PW2 had known him and had recognized him he should have given his full name but not the name of “Mururu”. He referred us to the case of **Kiarie v Republic [1984]. KLR 739** where the court stated:-

“Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. The need for extra care is not reduced even when the evidence is that of recognition for there may be cases when even people who know each other may very well still make mistakes.”

11. Mr. Moses Mungai learned state counsel represented the State. He submitted that the state opposed both appeals submitting that the ingredients of robbery with violence were established as there was violence, involving more than one person and property was stolen from the complainant. He submitted that the identifying witness was PW2 and he did explain how he was able to identify the suspects at night; that he knew the appellants before and gave their names, urging that the evidence of PW2 was consistent. He gave the distance from which the complainant was able to identify and recognize the appellants. Counsel further submitted that at the time of the robbery the circumstances were favourable for positive identification of the suspects. Mr. Mungai submitted there was overwhelming evidence from the Investigating Officer and that of identification parade which was conducted promptly after commission of the offence. He submitted the trial court warned itself of reliance on evidence of a single identifying witness and the conviction and sentence were proper after evaluation and/or analysis of the evidence.

12. The facts of the prosecution case are that PW1 Martin Matheka Muia was on 25th September 2007, at about midnight walking home from a club called Club 700 when at about 10 metres from the club one person appeared and held him by the neck and others appeared thereafter totaling to three (3); they robbed PW1 of his wallet which had money, national identity card and Bank Card. The wallet had 3000/- and the assailants also took Ksh. 200/- as they were attacking him using a wooden plank; after they had pulled him down. PW1 screamed for help and guard (PW2) from nearby building came to his aid. PW1 was not able to see the person who held him first but he was able to see the other two with the aid of electricity light from Good Hope Bar next to 700 Club. PW1 sustained injuries and was bleeding from the mouth and his left hand had been wounded. He informed PW2 of his injuries and left to go and sleep; that the following day PW1 woke up late and proceeded to their branch at Chogoria where he was relieving the manager. He took pain killers as he was to open the bank. On arrival at Chogoria his branch manager called him and told him that his wallet, identify card, voter card and bank card had been recovered and taken to him and he therefore enquired whether PW1 was safe. PW1 later returned, identified his items and reported to the police. He was then referred to the hospital where he was treated and a P3 form filled, which he identified as MFI-1, wallet MFI 2(a), Employers card MF2(b); identity card Exhibit (c). He testified that the people who attacked him were all male. He testified that he did not know the accused persons. On being cross-examined by the 1st appellant PW1 testified PW2 saw the 1st appellant and identified him; that PW2 recorded a statement with police and he is the one who took PW1's items; which he identified before court. He testified further he did not

recognize his attackers but the guard (PW2) saw the 2nd appellant.

13. PW2 Albert Murara Ngaruni testified that he is a guard at Good Hope Bar, Chuka; that on the night of 25th and 26th September 2007 at about midnight, he was at the corridor when he heard screams. He opened the door and at a distance of 20 metres he saw a man on the ground being beaten by three (3) men. He rushed to the scene holding his panga up and the three (3) on seeing PW2 ran away. PW2 testified he was able to see the men clearly and recognized one of them who he knew by his nickname of "Mururu". He testified that PW1 was robbed of his wallet and money. He testified that there was sufficient electricity light from Good Hope Bar; London Bar and adjacent butchery; that many people gathered at the site. He noted the victim had been injured and he decided to go back to his workstation 30 minutes later; that while at his workstation PW2 heard commotions outside his workstation of people arguing about the money. PW2 heard one call the other "Mururu". He saw there were two (2) ladies and three (3) men. PW2 was able to recognize Mwiti; Mururu, a lady called Karendi and Kanyua and another boy; the five (5) divided the money amongst themselves; dropped the wallet and other documents and left after 20 minutes. PW2 proceeded there and collected the documents and the following morning he took the items to KCB; Chuka. He told one clerk at KCB Chuka what had transpired. He further stated the items are the ones before the court. PW2 testified that he saw the first appellant on the day of the robbery; the 2nd appellant who he referred to by the name "Mururu" his nickname. He further stated the 2nd appellant being from his area, he knows him very well. PW2 testified he attended an identification parade at Chuka Police Station where he was able to identify the appellants by touching them referring to identification parade MF1 -3.

14. On cross-examination of PW2 by the 1st appellant he testified that he saw the 1st appellant and others at the scene as there was sufficient light; that after 30 minutes he saw them and heard one of them calling the name "Mwiti" when they were distributing the money and he was able to identify them very well and he also told the manager of KCB. He was able to recognize the appellants who he knew there before. On being cross-examined by the 2nd appellant he stated that he had known him since childhood and even gave the 2nd appellants' parents names as "M'buba and Harriet." He stated the appellant's nickname is "Mururu" which he is called by everyone in their area. He admitted he never made any report to police station as he left that matter to PW1 but he offered to give a statement to the police. He stated that he recognized the 2nd appellant as he was leaving the scene with the help of electric light from said Hope Bar and that the 2nd appellant was the last to leave the scene. He added there was light from the butchery that was adjacent and the incident occurred on the road 5 metres from the butcher. PW2 testified he recovered PW1's property and took it to his workplace. He testified that in the identification parade he identified the 2nd appellant.

15. PW3 Albanas Musembi No. 54332, recalled that on 26th September 2007 at 4.45 p.m. while at CID office Meru South District, PW1 reported that he had been attacked on previous night and robbed Ksh. 3,200/-, National Identification Card, Visitor Card, ATM and Business Card. He stated he did not know the robbers. He had injuries and PW3 referred him to the hospital; that the following day PW3 visited the scene with help of PW1. He made inquiry and with PC Busolo arrested the 1st appellant. The 2nd appellant had been named as a suspect but PW3 was unable to arrest him but when another robbery was committed in Chuka, PC Kijara arrested the 2nd appellant and PW3 managed to charge him alongside the 1st appellant and another. PW3 testified that the personal effects of PW1 were recovered by PW2 who handed them over to Manager, KCB Chuka and later PW3 got them. PW3 met the guard PW2 who named the appellants as the assailants. PW2 identified the appellants at an identification parade organized later by Inspector Sang. PW3 testified that at the scene where PW1 was attacked there was security light. PW3 produced the recovered exhibits before court as exhibits 2 (a) (b),(c) and (d) and shirt as Exhibit 4. PW3 on being cross-examined by the 1st appellant stated that he was investigating officer and he is the one who arrested the 1st appellant after he was identified by the witness. On cross-examination by the 2nd appellant he stated that when he commenced investigations he was given

the name of the 2nd appellant as “Mururu” being his nickname. He stated that he had sufficient evidence from the statement he had recorded to connect appellants with the offence.

16. PW4 No. 57497 Jackson Sang testified that on 1st October 2007, he conducted an identification parade as per the Force Standing Orders Cap. 46 Laws of Kenya that after carrying on the preliminaries and complying with the provisions of the Force Standing Orders, PW2 identified the first appellant by touching him and the appellant was satisfied with the conduct of the parade and signed the form. PW4 had not known the 1st appellant before. He produced the identification parade form as exhibit 3. PW4 stated that he came to know that the 2nd appellant was known to PW2 when he was about to conduct identification parade for the 2nd appellant and another and noted that in the identification parade form. He produced identification parade for the 2nd appellant as exhibit 5 and for another who is not a party in this appeal as exhibit 6. On Cross-examination by the 1st appellant PW4 testified that he placed people in the parade that nearly resembled the 1st appellant and PW2 was able to identify the 1st appellant. On cross-examination by the 2nd appellant, PW4 testified that PW1 identified the 2nd appellant when he told PW4 that he knew PW2 very well.

17. PW5 Margery Gatwiri a Registered Clinical Officer attached at Meru South District Hospital testified that PW1 reported to the hospital on 26th September with a history of having been assaulted and robbed on the night of 25th and 26th September 2007. On examination he had bruises to the left shoulder, left knee. That after treatment the degree of injury was assessed as harm. PW5 produced P3form as exhibit 1.

18. The 1st appellant gave unsworn defence and called no witness. He testified that on 23rd September 2007 he was summoned by his uncle to his home. He travelled home and was sleeping when police went to his home and arrested him. He was taken to police station and later charged with the offence.

19. The 2nd appellant gave unsworn defence and called no witnesses. The 2nd appellant's defence is that he is a potter within Chuka Town and that he recalled on 10th November 2007 he woke up as usual and went to his place of work at the market; that at noon he was paid his money and he went to the pub and had a beer. He later went to the bus stage and on the road he met with police officers who arrested him and took him to police station and later charged him with this offence. He denied having participated in the robbery.

20. The conviction of the appellants was based on evidence of a single recognizing/identifying witness. It is very important when assessing the evidence of a single identifying witness to examine conditions of lighting at the time of identification is made in order to satisfy oneself that favourable conditions prevailed at the time of identification of the culprits. What one has to look for in such evidence has been set out by the Court of Appeal in several cases. In the case of **Cleophas Otieno Wamunga v Republic 1989 KLB424** the court addressed itself as follows:-

“The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. In the well-known case of R. Vs Turnbull 1976 (3) All E.A. 549 at Pg.552 where he said “Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21. In the case of Paul Etole and another vs Republic CA No. 24 of 2000 Pg 2 & 3 the court stated as follows:-

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second Appellant raised problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the courts should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

22. Further in the case of Kiilu & Another v Republic [2005] I KR 174 the Court of Appeal on evidence of a single identifying witness addressed itself as follows:-

“1. Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

23. In the case Simiyu & Another v Republic [2005] 1 KLR 192 the Court of Appeal held:-

“2. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.”

24. Yet again in the case of Abdala bin Wendo and Another v Republic [1953] 20 EACA 166 the Court of Appeal stated as follow:-

“1. There was a need for testing with the greatest care the evidence of a single witness respecting identification,

especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances what is needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a judge or jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility or error.”

25. We have closely examined the evidence of PW2 and the basis upon which he claims he saw and recognized and/or identified the appellants. Our first observation is that PW2 heard screams, opened the door and at a distance of 20 metres saw a man on the ground being beaten by three men; that there was sufficient electric light from Good Hope Bar, London Bar and adjacent butcheries. PW2's evidence on source of electricity was corroborated by PW1 who testified there was electric lighting from Good Hope Bar next to 700 Club. PW2 rushed to the scene holding up a panga and the assailants on seeing him ran away. He was able to see them clearly and

recognized one of them whom he gave his name as “Mururu” which is his nickname. PW2 returned to his workstation but after a while heard some commotion outside his workstation. He saw threemen and two ladies arguing about the money. He heard one calling the other “Mwiti”. He recognized “Mwiti”, “Mururu” “Karendi” and “Kanyua” and another boy. He was able to see them divide the money and dropped the wallet and the documents and thereafter left after 20 minutes. He collected the personal effects of PW1 and took them the following morning to KCB, Chuka. The 2nd appellant was known to PW2 as he hails from PW2’s area. PW3 the Investigating Officer testified that PW2 gave him the names of 1st and the 2nd appellants as some of the assailants to PW1. We note that PW2 gave the names of the 1st and the 2nd appellants to police and that during identification parade he told PW4 that he had known the 2nd appellant before. We note PW2 was able to identify the appellants in the identification parade.

26. We have very carefully considered the evidence of PW2 and have considered that the trial court warned itself of the danger of relying on evidence of a single identifying witness before conviction. We subjected the evidence of PW2 to scrutiny and have tested the evidence with the greatest care in respect of identification of the appellants, and especially when it is known that the offence took place at night where conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether circumstantial or direct, pointing to guilt of the accused. We note immediately after the robbery the appellants and three others were heard and seen by PW2 near his workstation where there was sufficient light calling the name “Mwiti”. PW2 was able to recognize “Mwiti”, “Mururu”, “Karendi” “Kanyua” and another boy sharing the money which had immediately been stolen from PW1 and dropping the wallet and documents. They left after 20 minutes. We are satisfied that the appellants were under observation of PW2 for a reasonable time of not less than 20 minutes. We therefore find that the needed other evidence pointing to the guilt of the appellants was that immediately after the robbery the appellants and others were seen by PW2 sharing PW1’s money which had been stolen from him and dropping the wallet and documents under the watchful eye of PW2 who had earlier on witnessed PW1 being robbed by the appellants and another.

27. We are therefore satisfied that though PW2 was the only single identifying witness, his testimony can safely be accepted as free from the possibility of error and we are satisfied that the learned trial magistrate correctly accepted PW2’s evidence as free from error. We do not agree with the appellants’ submissions that the evidence of PW1 and PW2 were contradictory and inconsistent and should not be relied upon. PW1’s evidence is clear and though he was attacked at a place which was well light with electricity he was not able to identify the assailants. PW2 gave detailed evidence on what transpired and the role he played. He was able to recognize and/or identify the assailants with aid of sufficient electric light and he even identified the appellants at the identification parade. We have carefully evaluated and analyzed the evidence of PW1 and PW2 and we do not find any material contradictions or inconsistencies. We find that the trial court acted correctly by relying on the evidence of PW1, PW2, PW3, PW4 and PW5. PW2 we note had sufficient time to observe the assailants at the time of the attack and thereafter at the time of sharing of the loot. We find and hold by all standards the observation of assailants by PW2 cannot be termed as fleeting glance of the suspects.

28. The 2nd appellant in his appeal submitted that his fundamental rights and freedoms were abused and he was illegally detained for fifty (50) days by police and as such his trial was illegal citing the case of **Ndede v Republic [1991] KLR 567**. We have considered the appellant’s ground of appeal on the alleged breach of his fundamental rights and whereas his claim may be justified it is in our view that the claim should be addressed before a Constitutional Court but not before a criminal court; That if the appellant was detained for more than 14 days, the period allowed by the then repealed Constitution he can file a suit before a Constitutional Court for compensation for having been held beyond 14 days allowed by the then repealed Constitution but such detention in our view does not make his trial illegal. We therefore find that the trial of the appellant herein for an offence of robbery with violence was lawful notwithstanding that the detention

Was beyond the period that was by then allowed by the now repealed constitution. The conviction and sentence before the trial court was lawful upon our evaluation of the whole evidence that was adduced before the trial court.

29. We now turn to the appellants' defence in which the appellants submitted that the learned trial magistrate was in error in rejecting their unsworn defence. We have carefully evaluated the appellants' defence and our first observation is that the defence of the first appellant is that he was arrested on 23rd September, 2007 before the commission of the offence. He did not raise that defence of alibi through cross-examination of any of the prosecution witnesses. The 2nd appellant defence is that he was arrested on 11th October, 2007. He did not say anything about the date of the alleged robbery. We have perused the learned trial magistrate's judgment and have observed that the appellant's defence was considered and the court noted that the appellants were silent on their whereabouts on the night of robbery and instead dwelt on the dates of their arrest.

In view of the above we are satisfied that the learned trial magistrate Correctly rejected the appellant's unsworn defence after he had given reasons for doing so.

30. We have no doubt in our minds that the appellants were members of the gang of robbers which robbed the complainant and actually participated in the robbery that took place at the material night. We are of the considered opinion that the conviction is safe and well deserved. The upshot is that we hereby dismiss both appeals since the same have no merits at all. We hereby uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF OCTOBER, 2015.

R.V.P. WENDOH

J.A. MAKAU

JUDGE

JUDGE

1.10.2015

1.10.2015