REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 36 OF 2012

CONSOLIDATED WITH CR. APPEALS NOS.35, 37 & 38 OF 2012

DANIEL KAMAU KAMAU.....1ST APPELLANT

DAVID KINUTHIA KAMAU..... 2ND APPELLANT

DAVID MWANGI WAMUHU..... 3RD APPELLANT

SAMUEL MWAGO NGATIA ….....4TH APPELLANT

VERSUS

REPUBLIC OF KENYA ….....RESPONDENT

(Being an appeal arising from the conviction and sentence by Principal Magistrate, Naivasha, Hon. P.M. Mulwa in Criminal Case No. 152 of 2011)

JUDGMENT

INTRODUCTION

1. The appellants, Daniel Kamau Kamau, David Kinuthia Kamau, David Mwangi Wamuhu and Samuel Mwago Ngatia were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the charge are that on the 15th January 2011 at Bonga Connections Shop on Kilimanjaro building along Mbaria Kaniu Road in Naivasha within Nakuru County while armed with a US Army Colt Revolver Pistol, a panga and a knife, robbed Aidah Wamuhu Goko of Kshs. 30,000/= cash and two mobile phones all the total value of Kshs. 46,500/= and at or immediately before or immediately after the time of the said robbery threatened on use actual violence to the said Aidah Wamuhu Goko.

2. Judgment was delivered on 29th February, 2012 by Hon. P.M. Mulwa, Principle Magistrate. He found the appellants guilty of the main charge and sentenced each to suffer death as provided by the law.

3. The Appellants being aggrieved by the decision of the trial magistrate preferred this appeal. The appeals were consolidated on the 15th October, 2013. Each Appellant filed his respective Amended Grounds of Appeal which can be summarized as hereunder:

i. That the learned trial Magistrate erred in law and fact in relying on identification evidence of a

single witness whereas the identification was not free from possibility of errors;

ii. That the learned trial Magistrate erred in law and fact in shifting the burden of proof to the Appellants;

iii. That the learned trial Magistrate erred in law and fact in finding the prosecution proved its case beyond all reasonable doubt;

iv. That the learned trial magistrate erred in law and fact in failing to comply with the provisions of Section 150 of the Criminal Procedure Code;

v. That the learned trial Magistrate erred in law and fact by failing to comply with provision of Section 169 of the Criminal Procedure Code.

4. Briefly, the facts of the case before the lower court are that on 15th January 2011, Aidah Wamuhu Goko (PW1), was at her Mpesa Shop. At around 8.00 a.m. a man walked into the shop and sought to withdraw Kshs. 5,000/= from his Mpesa account. Before completing the transaction, a second man came into the shop and pointed a gun at PW1. He demanded money. He was accompanied by a 3rd man. It was then that the man who pretended to be a customer drew a panga from his waistline, moved over to the counter and took cash and two mobile phones. A fourth man who was keeping guard by the door and armed with a knife ordered that PW1 be locked up. He pushed her into a back room where she stayed for about 10 minutes. The four robbers then took off in a motor vehicle registration no. KAL 447E. PW1 reported the incident to the police and recorded her statement before P.C. Samson Omala (PW5) and PC James Ouma Makobi (PW6)

5. Samuel Mbata (PW3), the OCS for Gilgil Police Station, APC Stephen Gitonga (PW3) and PC Abdi whilst in the course of a different investigation spotted a motor vehicle fitting that description and flagged it to stop. PW3 conducted a search and recovered mobile phones, a revolver gun, 5 ammunitions and cash. He reported the arrest and was informed by police at the Divisional Headquarters that there had been a robbery reported at Naivasha town and the items recovered fitted a report made earlier that day. He thus handed over the four suspects and the items recovered to PW5 and PW6.

6. Patrick Kirimi (PW8) was the Investigating Officer assigned to the case. He contacted PW1 and informed her of the arrest and obtained a statement from her. Thereafter an identification parade was conducted by John Owouth (PW7) and PW1 was able to identify the Appellants by their dress and physical appearance.

7. The 1st Appellant, Daniel Kamau Kamau denied committing the robbery. In his defence, he stated that he was taking a bath at a near-by river when he was arrested by members of public. He was then escorted and joined with three other men who were in the custody of police officers.

8. The second Appellant, David Kinuthia Kamau, also denied committing the robbery. In his defence, he stated that he was traveling to Nakuru to visit his ailing child and boarded the saloon car registration number KAL 447E, when the driver changed course at Gilgil and stopped at a nearby forest. The driver and two other passengers shared some items and shortly after getting back on the road the vehicle was stopped by police officers. The appellant was arrested and charged with the current offence which he denied committing.

9. On 14th January, 2011, David Mwangi Wamuhu (3rd Appellant) was driving motor vehicle registration KAL 447E to Kinungi when he stopped at Fly Over area to change the rear tyre. He was accosted by three men who had a gun. They bound him and placed him in the boot of the car. The next morning, he was ordered to drive the vehicle. He was flagged down by police officers shortly thereafter and arrested. He denied being involved in the robbery.

10. The fourth Appellant, Samuel Mwagu Ngatia, a farmer in Kinagop boarded a Matatu to Naivasha, it however did not get him to his destination. He got a lift in a Saloon car registration number KAL 447E. A man in the rear seat whipped out a gun and demanded his money and mobile phone. At Gilgil area, the car was flagged down by police officers. He was arrested but denied committing the offence.

11. The appeal was canvassed before us on 15th October, 2013. The appellants relied on their respective written submissions whilst Learned Prosecuting Counsel for the State Mr. Gitonga, made oral submission.

12. In opposing the appeal, Mr. Gitonga submitted that PW1 was able to articulate the role played by each of the appellants during the robbery; That she was also able to identify the appellants by their physical appearance and or items of clothing at identification parades conducted on the same day. The learned Counsel further submitted that on arrest, two mobile phones belonging to PW1 and Kshs. 22,000/= were recovered from the appellants. Finally, counsel submitted the identification parade was properly conducted in accordance with the police standing orders.

ISSUES FOR DETERMINATION

13. After considering the submission by both parties, we do find the following issues for determination:

    a) Whether PW1 positively identified the appellants?

    b) Whether the Identification parade was properly conducted?

    c) Whether the prosecution proved its case beyond reasonable doubt?

ANALYSIS

14. This being the first appellate court we are duty bound to re-evaluate and re-assess the evidence on record and to arrive at our own independent conclusion. We make reference to the renowned case of Okeno vs R [1972] EA 32.
15. The first ground of appeal challenged the identification of the Appellants. According to the appellants, the identification parade was conducted in breach of chapter 46 of the Police Standing Orders. It was submitted by the 1st Appellant that he was the only one in the parade with dreadlocks and therefore easily picked by the complainant. Further, the appellants submitted that the complainant was startled, shocked and scared and therefore could not have positively identified each of the appellants.

16. Before evaluating the re-assessing the evidence, we need to mention the legal principles applicable in identification of accused persons. In Charles Maitanyi v Republic [1986] KLR 198, Nyarangi, Platt and Gachuhi JJA held as follows;

> **"Although it is trite law that a fact may be proved by a testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially if its known the conditions favoring a correct identification were difficult.**
>
> **When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description."**

17. In re-evaluating the evidence afresh, we carefully directed ourselves regarding the conditions prevailing at the time of identification and the circumstances under which PW1 identified the appellants in order to test those conditions for possibility of error.

18. An inquiry into the circumstances of identification the evidence revealed that the persons who robbed PW1 were strangers to her and that the encounter occurred in broad day-light at about 8.00a.m. The evidence shows that the attackers were PW1's first customers for the day and she was able to observe the appellants and describe in detail the different roles played by each appellant during the robbery.

19. In the initial report to the police, we note from the court record that PW1 had given the police a description of the 1st appellant. She had described him as a short, dark man with dreadlocks. She confirmed under cross-examination by the 2nd and 3rd appellants that a description of either of them was not captured in her initial report. As for the 4th appellant, **PW1** gave a description of the appellants clothing and was able to identify the 4th appellant at the identification parade as he was wearing the same sweater that he had worn during the commission of the robbery.

20. The guiding principles of an identification parade are set down in the case of **Simiyu and Anor** V. **Republic**, C.A. No.243 of 2005 (Unreported) where it was held that a description of the accused persons ought to have been made to the police prior to the Identification Parade.

21. The correctness of an identification parade relies on the fact that the persons to be arraigned must match a particular description. It is apparent from the record that no description of the 2nd and 3rd Appellants was given to the police prior to the identification parade that would be when the first report is made.

22. In the light of the above, the failure to capture the descriptions of the 2nd and 3rd in the initial report is an error on the part of the police. It then means that the identification that has to be resorted to is that of dock identification and it is trite law that this is the most unreliable form of identification. This then leaves us with no option but to find that the 2nd and 3rd appellants were not positively identified by PW1.

23. We therefore hereby allow this ground of appeal for the 2nd and 3rd appellant.
24. In respect to 1st and 4th appellants, we note that the robbery took place in broad daylight and we are satisfied that there was proximity during the duration of the robbery as the appellant's sought the services of **PW1** they had engaged her in conversation she was then able to observe them under favourable conditions. In the initial report to the police she was able to describe them by the clothing they had on and the hairstyle sported. In her testimony at the initial trial, she was also able to articulate their locations inside the shop, the respective roles played by each one of them during the robbery and the weapons carried.
25. Though she admitted to being scared, she did manage to observe and comprehend all that took place during the incident. There being no other person in the parade sporting a dreadlock hairstyle does not render the identification parade as fatally flawed. The officer conducting the parade gave a reasonable explanation that he made all efforts to ensure all the procedures were complied with. We therefore find that PW1 was able to positively identify the 1st and 4th appellants.
26. In any event, there is also other evidence on record that supports the correctness of the identification. The evidence on record shows that these two appellants were arrested on the same day of the robbery; they were found together inside the motor vehicle bearing the registration number KAL 447E.
27. PW3 APC Stephen Gitonga and PW4 CI Samuel Mbata both narrated in their evidence that upon arresting and searching the 1st appellant he was found with a revolver pistol. Both prosecution witnesses described him as sporting a dreadlock hairstyle and this corroborates the evidence of PW1 on the appellant's hair style and also corroborates her evidence that it was the 1st appellant who brandished a gun at her.
28. This evidence goes to support the correctness of identification of the 1st appellant.
29. PW3 and PW4 further narrated how the 1st appellant attempted to flee so as to avoid being arrested but was nevertheless apprehended by members of the public. This evidence on conduct is corroborated and lends credence to an inference of guilt on the part of the 1st appellant and which makes it difficult to accept the 1st appellant's line of defence.
30. The inventory drawn upon arrest showed that two mobile phones were recovered from the motor vehicle in which the appellants were found riding in. The complainant (PW1) positively identified both the phones and she stated that one phone was her personal mobile phone and the other phone as her work phone. The appellants both failed to give a reasonable explanation as to how they came into possession of the mobile phones.
31. We have considered the circumstantial evidence of the items recovered by the police it in the context of the rest of the evidence on record and found that it links and places the 1st and 4th

appellants at the scene of the robbery at the material time; that the stolen items were recovered within hours of the robbery and in possession of the appellants; the conduct of the 1st appellant in attempting to flee; that the appellants were both identified by PW1.

32. In light of this evidence we find that the prosecution proved its case beyond reasonable doubt as against the 1st and 4th appellants

FINDINGS

33. We are therefore satisfied and find that PW1 positively identified only the 1st and 4th appellants at the identification parades and we are also satisfied that the same were conducted fairly. As for the identification of the 2nd and 3rd appellants we find that it did not meet the desired threshold.
34. We find that the prosecution proved its case beyond reasonable doubt against the 1st and 4th appellants and that they were properly convicted and sentenced for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

CONCLUSION

35. The appeals of the 1st and 4th appellants are found to be lacking in merit in their entirety and are hereby disallowed and their convictions and sentences are hereby upheld.
36. As for the 2nd and 3rd appellants their appeals are found to be meritorious and are hereby allowed. Their convictions are hereby quashed and their respective sentences set aside. They are to be set at liberty unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 3rd day of February, 2014

A. MABEYA

JUDGE

A. MSHILA

JUDGE