



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 47 & 48 OF 2012

(APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE BY HON. R. K. ONDIEK-PM IN CRIMINAL CASE NO. 190 OF 2011 AT KILIFI ON 7TH MAY 2012)

ALLAN CHIVATSI KENNEDY.....1ST APPELLANT

MICHAEL MALANGA MUYE.....2ND APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

1. These two appeals were consolidated. The Appellants were charged in the lower court with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars of the offence are that on 2nd July 2010, between Mtwapa Township in Kilifi and Utange area of Mombasa, the Appellants jointly and being armed with dangerous weapons, namely, a rope, robbed Mercella Gathoni of her motor vehicle registration number KBK 523K Toyota station wagon valued at Kshs.730,000 and at or immediately before or immediately after the time of such robbery strangled the said Marcella Gathoni.
3. The facts of this case are that on 2nd July, 2010, at about 9:45 PM, PW1 was at Kenol petrol station fueling her motor vehicle. Suddenly, two men requested for a lift. She acceded to the request and while driving towards Bamburi, one of the men threw a rope around her neck and attempted to strangle her. PW1 obeyed the instructions that the men gave her and drove off the tarmacked road to a secluded area.
4. The man seated behind her engaged PW1 in small talk while strangling her. One member of the public rescued PW1 who had been abandoned by her assailants. PW1 was treated at Mtwapa medical clinic before being referred to Coast General Hospital for specialised treatment.
5. It was the evidence of PW1 that she recognised the accused persons because of the electrical lights at the Petrol station. According to her, it is the 1st Appellant who strangled her while engaging her in a conversation. The 2nd Appellant sat next to her.
6. In cross-examination, PW1 stated that she gave the police the description of the Appellants when she reported the incident although she never participated in an identification parade when the Appellants were arrested on account of a different offence.
7. According to the evidence of PW3 who a colleague of PW 1, PW1 asked him to hand over to her the vehicle that he (PW3) was driving. Before he handed over the vehicle, he saw PW1 talking to two young men at the petrol station. He was woken up at 12 AM and informed that PW1 had been robbed. He found PW1 at the police station with a blood stained t-shirt and took her to hospital.

- PW 3 identified the Appellants in the dock as the men who were talking to PW1 when she handed the vehicle to her at a petrol station. PW3 further stated that he identified the Appellants at the police station when they were arrested over a different incident. In re-examination, PW3 stated that when the 1st Appellant was arrested, he was taken to Kenol Petrol Station where he positively identified him.
8. Corporal Dancan Mokaya, PW5, was instructed to interview Michael Olodolpo who had been arrested for stealing motor vehicle registration number KBK 532K, the same car that had been robbed from PW1
 9. According to PW5, PW1 had given the police the description of the Appellants. It was his evidence that he did not conduct any parade and that he did not know the Appellants before the day he interviewed them. All he knew was that one of the people who robbed the complainant was tall while the other one was short.
 10. Police constable Ngatia, PW 6, informed the trial court that on 28th August 2010, they arrested the 1st Appellant who had robbed and killed Bernard Masha Tunje. The late Bernard Masha Tunje had been robbed of his motor vehicle registration number KBG 954A Nissan Wineroad. When they arrested the 1st Appellant, they recovered from his wallet a yellow nylon string. After the arrest, and while at Kenol petrol station at Mtwapa, PW 1 was called and she identified the 1st Appellant as the person who had robbed and stolen the motor vehicle she was driving on 2nd July 2010. The 1st Appellant then disclosed the names of his accomplices. On the same day of the arrest at night, they went to the 2nd Appellant's house and forced entry into the house. They arrested the 2nd Appellant and recovered a yellow nylon string and a motor cycle indicator. The yellow strings that were recovered from the Appellants were produced as exhibits number 7 and 8.
 11. The Appellants gave unsworn testimony. According to the evidence of the Appellants, they were arrested on 28th August 2010. The Appellants denied the charges that were leveled against them.
 12. The learned Magistrate found that the prosecution had established the ingredients of the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. The Magistrate was convinced that while at Kenol petrol station on the day that PW 1 was robbed, PW1 and PW3 were alert and seized of their senses. The two witnesses saw and appreciated the physique of the Appellants.
 13. The learned Magistrate further found as a fact that the yellow string that was recovered from the 1st Appellant is the one that was used to strangle the complainant and was a weapon usually used by the 1st Appellant and his accomplices. The Magistrate held that the prosecution had proved its case beyond reasonable doubt and convicted the Appellants. The Magistrate sentenced the Appellants to suffer death.
 14. The Appellants advocate adopted the Appellants' home-made submissions. The Appellants submitted that at the time of their arrest, the complainant was not present and only identified the 1st Appellant when the police called her at Kenol petrol station. There was no identification parade and consequently his conviction was unlawful.
 15. The state counsel submitted that the Appellant were identified by PW1 and PW3 who had ample time to see them at the petrol station before PW1 agreed to give them a lift. According to counsel, the complainant gave the police the description of the two appellants when she went to report the robbery. The description that the complainant gave to the police was that one of the Appellants was short while the other one was tall. In the circumstances, it was submitted, that the evidence before the lower court was sufficient to warrant the conviction and sentence that was imposed by the court.
 16. The duty of the first Appellant court is to re-evaluate the evidence, assess it and make its own conclusion **(see Okeno Vs R (1972) EA 322)**.
 17. From the evidence on record, PW1 was called at the police station after the Appellants were arrested. This was one month after the offence was committed. PW1 stated that the 1st Appellant was shown to her at the Kenol petrol station and at the police station by the police and she identified him. PW1 did not state at what particular point he identified the 2nd Appellant after he was arrested. The arresting officer, PW6, stated that after arresting the 1st Appellant, and while at Kenol petrol station, the complainant, PW 1, emerged and identified the 1st Appellant.
 18. It is true that PW1 had ample time and there was adequate light at the petrol station to enable her

- see the assailants' faces and physique. Indeed, they engaged her in a conversation before she gave them a lift and while driving towards Bamburi. It would therefore have been easy for the complainant to identify her assailants, which she did when the 1st Appellant was arrested two months after she was robbed.
19. However, no explanation was given by the arresting police officer why he did not conduct an identification parade when he arrested the Appellants on 28th August 2010. The identification parade was necessary in the circumstances of this case in view of the fact that the 1st Appellant was arrested in connection to a different incident of robbery and murder. The arrest was not made pursuant to the robbery the subject of this case.
20. In our view, it was unprocedural for the arresting officer to call the complainant at Kenol petrol station and show to her the 1st Appellant. As was held in the case of **Sangura Mbae Vs Rep, Criminal Appeal NO. 32 of 2004**, it would have been very easy for the complainant to say that she had seen the 1st Appellant during the robbery because the police took him to the complainant after the arrest.
21. The 2nd Appellant was arrested on the basis of information that the 1st Appellant gave to the police. He was not identified at all by PW1. The failure to conduct an identification parade, in our view, was fatal to the prosecution case in view of the fact that the prosecution case wholly relied on the identification of the Appellants by PW 1, and considering that the Appellants were not known to PW1 until the day she gave them a lift. As was held in the case of **Kamau Vs R (1975) EA, 139**, **“the most honest of witnesses can be mistaken when it comes to identification”**. An identification parade should have been conducted in this case.
22. In the circumstances, and for the reasons we have given above, we find the conviction and sentence of the Appellants by the learned Magistrate to be unsafe. We therefore quash the conviction of the Appellants and set aside the death sentence. The Appellants will be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Malindi this 7th day of **March**, 2014

C.W.MEOLI

JUDGE

O. A. ANGOTE

JUDGE