



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL 93 OF 2010

SOSPETER GITONGA 1ST APPELLANT

STEPHEN MUTEMBEI MUCHIRI.....2ND APPELLANT

DAVID MWENDA KIMATHI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Criminal Appeal against both conviction and sentence by P. Ngare SRM at Chuka SPM Criminal Case No. 236 of 2009 delivered on 29.4.2010)

J U D G M E N T

The Appellants Sospeter Gitonga hereinafter the 1st Appellants, Stephen Mutembei, the 2nd Appellant and David Mwenda the 2nd Appellant and David Mwenda, the 3rd Appellant were the 1st, 2nd and 4th accused in the trial before the lower court. They were jointly charged with another with one count of attempted robbery with violence contrary to section 297(2) of the Penal Code. They were convicted of the offence and sentenced to death. Being aggrieved by the conviction and sentence they filed their appeals which we have consolidated as they arise from the same trial.

The 1st Appellant relied on 11 grounds of appeal. However, the pertinent ones are six as follows:

1. **That the Pundit Magistrate erred in law and facts while convicting me on reliance to the purported visual identification as was alleged in my respect by PW3 of which the same was not supported by any first report to the police as pertaining to my descriptions to suit the same as it was wholly required to meet the circumstances of section 165 of the Evidence Act.**
2. **That the pundit Magistrate erred in law and facts in convicting me and failed to make a finding that the circumstances prevailed at the alleged scene of the attack were not free from the possibility of the error or mistake.**
3. **That the pundit Magistrate erred in law and fact in relying upon the evidence of an improperly and unfairly conducted identification parade contrary to section 6 of chapter 46, police identification parade regulations.**
4.

5. **That the pundit Magistrate erred in law and fact in convicting the appellant while my defence witnesses were not summoned in the court to give evidence, whose evidence would have been adverse to the defence, an act that was prejudicial and consequential to the conviction and sentence.**
6. **That the pundit Magistrate erred in law and fact in convicting me, and failed to make a finding that the arresting officers in my respect were not summoned in the court.**
7.
8. **That the pundit Magistrate erred in law and fact in rejecting my sworn defence without giving a cogent reason as required under section 212 PC.**

The second Appellant relied on amended grounds of appeal as follows:

1. **That the trial magistrate erred in law in convicting the appellant while my constitutional rights under Section 72(3)(b) of the then constitution and Section 49(1)(f)(i) and (ii) of the new Constitution were violated by the police when they arrested and detained me for fifty three(53) days in the station without taking me to the court.**
2. **That the trial magistrate erred in both law and facts while convicting me relying upon the purported visual and voice identification by recognition as alleged by PW3 of which was not supported by an immediate first report to the mentioned OCS Chuka and APs from PW3's camp as well as the scenes of Crime Officer (PW1) who visited the scene for photographing.**
3. **That the trial magistrate erred in law and facts while convicting me relying as well on the evidence of voice recognition while there was no identification parade in respect with my voice to test the authenticity of PW3's allegations.**
4. **That the trial magistrate erred in law and facts while convicting me without making a finding that the most vital mentioned witnesses were not summoned in the court whose evidences if they were called would have been in the favour of 1 the appellant. They include the OCS Chuka and APs from PW3's camp who visited the scene first. OCS Timau Police Station who ordered for my arrest among others.**
5. **That the learned trial magistrate erred in law by rejecting my duly sworn defence testimony, which defence was not shaken by the prosecution.**

The 3rd Appellant relied on amended grounds of appeal.

1. **That the trial magistrate erred in law in convicting me without making a finding that the charge sheet was defective in its contents. The names and dates of the particulars of the offence in the charge sheet differs with that of PW5 who testified as a complainant in the court.**
2. **That the trial magistrate erred in law and facts in convicting me without making a finding that the prosecution case was riddled with many conflicting statements.**
3. **That the trial magistrate erred in law and facts in convicting me upon the evidence of opinion and circumstantial while the factors to support the same were not satisfactorily disclosed in the trial.**
4. **That the trial magistrate erred in law in rejecting my duly sworn defence, which defence was duly supported by my defence witness and which defence was detailed and unshaken by the prosecution.**

The chief facts of the prosecution case are that the complainant PW3 Superintendent Michael Mutonyi Makayo was sleeping in his house on 10th February 2009 when at 3 am he was woken up by voices. His door was being banged severally. He woke up and walked to the sitting room and looked through the window. He said that he was the 2nd Appellant whom he had two days before the attack to do casual

work for him. There were nine others. PW.3 said they demanded for money and a mobile phone. It was at that point that he proceeded to his bed room, took a Ceska Pistol issued to him by the government and fired two shots in the air and one shot at the fleeing robbers. He called the OCS Chuka and his Administration Police Officers. They recovered a dead body within the area. The complainant eventually identified the 1st Appellant in an Identification Parade on 25th, fifteen days after the attack.

The Appellants all denied the charges. The 1st Appellant put forward an alibi as his defence that he was not in the area on the day in question and that he returned one day after the incident. He claimed the offence was a frame up. The 2nd Appellant admitted being engaged to repair houses at the hospital one of which was occupied by the complainant in this case. He denied any involvement in the offence and said he saw the dead man on the morning following the incident at the hospital grounds. He stated that he was in the crowd which thronged the scene and also heard the complainant explaining to the Police what had happened. He said that he was summoned nine days later by the OCS through the Area Chief and arrested for the offence.

The 3rd Appellant put forward an alibi as his defence. He stated that he was arrested 1 month after the incident as he celebrated with friends at a local bar. He said that he had bullet wounds on his body and claimed that they were inflicted on him in Isiolo Town during a cattle rustling incident.

The State was represented in this appeal by Mr. Motende, learned State Counsel. In his submissions he urged that the language of the court at the plea was not indicated and that the trial was therefore defective. He urged us to order a retrial as the evidence against the appellants was strong and sufficient to found a conviction. Counsel urged that the 3rd Appellant was positively identified in an Identification Parade. He urged that since the incident took place 3 years ago the Appellants would not suffer any prejudice if a retrial was ordered.

All 3 Appellants opposed an order of retrial arguing that they had suffered in custody during the pendency of the trial and would be prejudiced if a retrial were ordered.

We are a first appellate court. That being the case we have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation bearing in mind we neither saw nor heard any of the witnesses and giving the due allowance for same. We are guided by the court of Appeal case of **Okeno v. Republic 1972 EA 32** which held:

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and 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 Vrs. R. (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 finding and conclusion; 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 Peters Vrs Sunday Post [1958] E.A 424."

The particulars of the charge the appellants and another faced were as follows:

"On the 10th day of February 2009 at Chuka District Hospital staff quarters in Meru South District within Eastern Province, with others not before court, while armed with dangerous weapons namely crow bars, axes, pangas and rungas attempted to rob money and mobile phones from Michael Mutonyi Mokaya"

The evidence against the appellants was that of the complainant in respect of the 1st and 2nd Appellant. In respect of the 3rd Appellant the evidence against him is technical. Regarding the 1st Appellant it was the Complainant's evidence that he saw him in the crowd of 10 thugs who invaded him at his house on the material night. PW3 the complainant said that he later identified him in an identification parade 15

days later. Regarding the 2nd Appellant the Complainant's evidence was that he had employed him to do casual work for him 2 days before the attack and that he saw him hiding behind his accomplices just before he fired causing all of them to flee.

The 3rd Appellant was not identified by the complainant. He was however, arrested one month after the incident with bullet wounds. The Dr who examined him, Dr. Nyaga said that the 3rd Appellant had multiple fractures on the right forearm which could only have been caused by a bullet. The age of the injuries were within the period the incident took place.

The evidence of identification in this case was difficult since the incident took place at 3 am and therefore at night. The complainant described the lighting at the scene as from an electric bulb outside his house. He also said that he saw the two appellants the 1st and 2nd Appellants one and a half meters from him. He said that the 1st Appellant was the one who demanded money and a mobile phone from him. As for 2nd Appellant he said he saw him hiding behind others at the scene.

In the case of **PAUL ETOLE AND ANOTHER VRS REPUBLIC CA NO. 24 OF 2000 (UR)**, where 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 raises 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 court 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 weaknesses 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”.

We have closely examined the evidence of identification by the complainant. As against the 1st Appellant, the complainant did not know him before. We noted that in his evidence, the complainant stated only in passing that it was the 1st Appellant who demanded money from him. The complainant did not however give any details of the basis of identifying him. He did not for instance give any descriptions of the 1st appellant to the Police and neither did he give any in his evidence in court.

It is trite law that for a proper identification parade to be conducted the identifying witness must first give a description of the person he claims he was able to identify before the parade is held. That way there will be a basis of testing the evidence of identification to confirm whether there was any material basis upon which the parade was held in the first place and the person was identified.

In this case there was no evidence of descriptions having been given by the complainant. Considering the complainant was an Administration Police Officer who was well versed on issues of Identification Parades, we find the omission smacked more of the complainant's inability to describe the 1st Appellant before the parade was conducted. For that reason the Identification parade was of little probative value.

Regarding the 2nd Appellant it was the complainant's evidence that he was and recognized him in the crowd which attempted to rob him. The complainant testified that he informed the police officers who visited the scene that he had seen and recognized the 2nd Appellants. PW6, the DCIO Meru was one of the Police Officers who visited the scene of attempted robbery the same night. He told the court that the complainant informed him that he had seen and recognized the 2nd Appellant and that they even went to his house but could not find him. PW6 said that the 2nd Appellant was traced at Timau on 27th February, 17 days after the incident.

We have perused the evidence of PW3, the complainant; nowhere did the 2nd Appellant suggest to him that he was at the scene of the attempted robbery when Police Officers visited the scene after the attempt. The 2nd Appellant's statement that he was at the scene as the complainant explained to the police what had happened was therefore an afterthought. It cannot be reliable. The 2nd appellant did not put any question to PW6 suggesting he was at the scene of incident when he visited. We find that the 2nd Appellants statement that he was at the scene of incident during the scene visit by Investigating Officers does not in the circumstances shake the evidence adduced against him by the prosecution.

We find that the evidence before the court was clear that the complainant had hired the 2nd Appellant for 2 days before the attempted robbery. The complainant's knowledge of the 2nd Appellant's identity was therefore very fresh by the time of the attack. He saw him within one and a half meters from him under security lights. The complainant also named the 2nd Appellant the same night to PW6 and other officers as one of the attackers. The police even visited his house within the same hospital grounds and found him absent.

The 2nd Appellant did not explain his absence. Instead he said he was at the scene. That cannot be well founded as PW6, the investigating officer said he looked for the 2nd Appellant at that scene and did not get him.

We find that the circumstances of Identification of 2nd Appellant were safe. It was the evidence of recognition as the complainant already knew the 2nd Appellant. The search for the 2nd Appellant by the Police Officer on the same day of the attack adds an assurance to the complainant's evidence that he indeed saw and recognized the 2nd Appellant at the scene. The 2nd Appellant disappeared from the area and never returned until his arrest several kilometers and 17 days after the incident. We are persuaded that the conduct of the 2nd Appellant to disappear from the scene and to stay away even from his work was conduct of a person with a guilty record.

The evidence against the 3rd Appellant was that he had bullet wounds whose age corresponded the time of the incident in question where the complainant fired gun shots. We do not find this evidence strong because the complainant was clear he shot twice in the air and once at the fleeing thugs. One thug was found dead in the compound 30 meters from the complainant's house. There is no evidence to suggest anyone else was shot apart from the dead man since the complainant was clear he saw only one person walking in a zig zag manner after firing the gun shot. The convection of the 3rd appellant to the scene of attempted robbery was very remote in our view. Before we conclude we shall consider Mr. Motende's submission regarding the trial. Counsel submitted that the language used to read the charge to the Appellant was not stated and that therefore the plea was defective. We perused the proceedings and noted that the learned trial magistrate noted that the plea was taken in a language understood by the accused person. That language was however, not stated. We are of the view that the defect if any did not prejudice the appellants since they entered a plea of not guilty to the charge subsequently a full trial was held in a language they understood. It is clear from the record that the Appellant fully participated in the trial and were in no illusions as to the charges facing them. We find that the defect at the plea stage is unable under section 382 of the Criminal Procedure Code.

In conclusion we have carefully considered the Appellants appeal. We find that the appeal by the 1st and 3rd Appellants had merit. We consequently allow their appeals, quash the conviction and set aside their sentences. The Appellants No. 1 and 3 should be set at liberty unless they are otherwise lawfully held.

The Appeal by the 2nd Appellant has not merit and is dismissed. We have considered all the grounds raised by the 2nd Appellant in his appeal. We have not found any of them without exception of any merit. We find that there was overwhelming evidence adduced against him by the learned trial magistrate was safe and should stand. We accordingly uphold the conviction entered against him. In terms of section 389 of the Penal Code the 2nd Appellant shall not be liable to imprisonment for a term exceeding 7 years. The upshot is that the appeal on conviction is hereby dismissed, but the appeal on sentence is hereby

allowed to the extent that the 2nd Appellant serves a sentence of (7) seven years from date when he was convicted.

Those are our orders.

Right of appeal explained

DATED AT MERU THIS 10TH DAY OF OCTOBER, 2012.

LESIT, J
JUDGE.

J.A. MAKAU
JUDGE.