



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KARANJA & KANTAL, JJA]

CRIMINAL APPEAL NO. 1 OF 2016

BETWEEN

GEORGE MUNUHE WASHORI.....1ST APPELLANT

GEOFFREY KIMANI NJERI 2ND APPELLANT

SUSAN NJERI.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit & Kimaru, JJ) dated 4th June, 2015 In

HCCRA NO. 258, 259 & 260 OF 2012)

JUDGMENT OF THE COURT

This is a second appeal from the conviction and sentence meted out to the appellants, **George Munuhe Washori, Geoffrey Kimani Njeru** and **Susan Njeri**, by the Senior Principal Magistrate sitting at Makadara, Nairobi. The appellants were charged on two (2) counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. Particulars on count 1 were that the three appellants (with another who was acquitted at the trial) on 9th January, 2010 along Kangundo road in Nairobi jointly with others not before the court while armed with dangerous, offensive weapons namely, pistol robbed **Margaret Wairimu Chege** of cash Kshs 42,000/= and other items and that immediately before or immediately after the time of such robbery, they used actual violence to the said person.

Particulars on count 2 were that on 8th February, 2010, along the same road while similarly armed, they robbed **Rose Mugoh** of cash Kshs 32,000/= and before or after such robbery they used actual violence against the said person. Nine (9) prosecution witnesses were called; the appellants upon being put on their defence gave unsworn statements and in a Judgment delivered on 10th October, 2012, the appellants were convicted on both counts and were sentenced to death on both counts, sentence on count 2 being put in abeyance on account of sentence on count 1. A first appeal to the High Court (**Lesiit and Kimaru, JJ**) failed in a Judgment delivered on 4th June, 2015 and the appellants being dissatisfied with those findings filed this appeal.

The 1st appellant, **George Munuhe Washori** in what is titled “Memorandum Grounds of Appeal” filed on 22nd June, 2015 sets out 5 grounds of appeal where the High Court is faulted for not re-evaluating the evidence; that the High Court failed to find that the case was not proved to the required standard; that some witnesses were not called and this led to the prosecution’s case not being proved; that the High Court did not comply with section 169 of the Criminal Procedure Code and, finally, that the High Court failed to find that the 1st appellants’ Constitutional rights under Article 50 (2) of the Constitution had been contravened.

The 2nd appellant, **Geoffrey Kimani Njeri** in “Supplementary Grounds of Appeal” complains that the High Court failed to find that identification of him was not positive; that his defence was not considered; that the High Court erred in shifting the burden of proof to him contrary to law; that the case was not proved to the required standard; that in admissible evidence was admitted; that some witnesses were not called by the prosecution and like the 1st appellant, that the provisions of Section 169 of the Criminal Procedure Code were flouted.

The 3rd appellant, **Susan Njeri**, in a “Supplementary Memorandum of Appeal” raises issues of whether there was proper identification and

questions the conduct of the identification parades; that the High Court erred in relying on dock identification; that the High Court did not re-evaluate the evidence as required in law and finally, that the High Court erred in not finding that the case was not proved as required in law.

Section 361 Criminal Procedure Code mandates us in a second appeal like this one to consider issues of law only but not matters of fact which have been tried by the trial court and re-evaluated by the High Court on first appeal. We should respect findings of the two courts below unless, we find on the whole that findings arrived at by the two courts below are not supported by the evidence or were reached on the basis which a reasonable tribunal properly exercising its mind would not make – see, for a judicial pronouncement of the mandate of the court in a second appeal the case of **Stephen M’Irungu vs. Republic [1982 -88] KLR 360**, where the following passage appears:

“ Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

We shall visit the facts of the case purely for purposes of examining whether the trial court and the first appellate court properly carried out their mandate as seen above and as was held in the oft-cited case of **Okeno v. Republic [1972] 1 EA 32**

The 9th January, 2010 was an unpleasant day for **Margaret Wairimu Chege (P.W.1) (Wairimu)**. After visiting her friend at Komarock estate, she was escorted to the bus stage on Kangundo road when at 5.45 p.m., a motor vehicle registration number **KAR 229W** stopped near where she was standing awaiting transport by public means. In the vehicle were 2 men and 2 women and the driver asked her for directions and also offered her a lift. She was hesitant on the offer of a lift and was walking away when the man in the rear seat alighted and forcefully put her in the vehicle where after the motor vehicle was driven at high speed. The person who forced her into the car produced a gun and hit her on the neck using his fist and forced her to the floor of the car where she was covered with a jacket so that she would not see the occupants of the car or know her surroundings. She was threatened and intimidated and forced to give telephone numbers of relatives and friends who were made to send money to the abductors and she was forced to give PIN numbers of her bank account. She was eventually thrown into a bush from which she escaped to **Ngemwa Police Base** where she made a report and was eventually rescued by her husband.

On visiting her bank, Wairimu noted that various withdrawals of cash had been made. She obtained documents from her bank to show this. On 15th February, 2010, she visited **Kayole Police Station** where she participated in identification parades where she picked the appellants as the persons who had abducted and robbed her on the fateful day.

The same fate was to befall **Rose Mugo (P.W.2) (Mugo)** on 8th February, 2010 who was at a bus stage at about 10 a.m. when the same motor vehicle with 2 men and 2 women occupants stopped and offered her a lift. She innocently accepted the offer of a lift but immediately upon boarding the car, she felt uncomfortable as the occupants avoided eye-contact with her. She was soon hit on the head, beaten and a jacket was placed on her head so that she could not see. She was then threatened and told that money had been paid for her to be killed. Her mobile phone was used by the robbers to call various people who were forced to send money to the robbers and she was eventually left in **Mwiki** area from where she made a report to **Mwiki Police Station**. Money was withdrawn from her bank account after her bank documents and other items were stolen from her. On 11th February, 2010, she attended identification parades at **Kayole Police Station** where she was able to pick the 3 appellants as some of the people who had robbed her. She related her ordeal to various people including **Peter Ndungu Nganga (P.W.3) (Nganga)** who reported the hijack to **Dandora Police Station** and **Kayole Police Station**. Nganga after some days saw the said motor vehicle and assisted in having the occupants arrested by police.

No. 83958 P.C. Ronald Chemosit (the Investigating Officer) was the investigating officer in the case and on 11th February, 2010, collected the appellants and the said car from Ruai Police Station and took them to Kayole Police Station. He produced documents including statements from Safaricom and bank statements as exhibits in the case.

No. 67423 P.C. Timothy Aremi was one of the police officers who arrested the appellants on 11th February, 2010. The appellants had no weapons when they were arrested.

No. 231472 C.I. Peter Ochieng upon request conducted an identification parade of the 3rd appellant. **Wairimu** asked members of the parade to speak certain words in the Kikuyu language and upon those words being spoken, she picked the 3rd appellant as one of the people who had robbed her

Jairus Waiyaki Munyua (P.W.7) (Munyua) was the owner of the motor vehicle **KAT 229 W**. He hired out the same to the 1st appellant on 22nd December, 2009 and when the car was not returned, he reported the matter to the police and he later found his car at Kayole Police Station.

No. 230823 C.I. John Wainaina, Deputy DCIO, Kayole Police Station conducted an identification parade on 15th February, 2010 when Wairimu picked the 1st appellant as one of the people who had robbed her. In cross-examination he said:

“...This is the original identification form. At part E, there is no indication how the suspect was identified. In the original copy, it does not indicate where the suspect was standing. There is no indication as to how the suspect was identified. On the remarks, there is nothing in the original remarks of the suspect and the signature of the suspect is missing”.

He further testified that the parade form had many places left blank and that different pen writings appeared on the original form and a copy.

The last prosecution witness, **No. 45937 Tom Ndolo** produced photographs of the motor vehicle as part of the evidence and that closed the prosecution case.

Put on their defences, the 1st appellant stated that he was a mechanic at **Ruai Shopping Centre** and that in the morning of 11th February, 2010, he was at his place of work when the 2nd appellant approached him telling him that his car had broken down. He accompanied the 2nd appellant to where the broken down car was and, upon arrival, he found 2 ladies (the 3rd appellant and the other who was acquitted at appeared for the 2nd the trial) and that he repaired the car. They then drove towards Ruai Shopping Centre but en route, they were stopped by police and arrested. He denied committing the offences.

The 2nd appellant stated that on 21st February, 2010, he requested his friend **Munyua** (P.W.7) to lend him a car as he was to visit a sick friend in **Kangundo**. He visited Kangundo and on the way back, he was stopped by 2 ladies including the 3rd appellant who asked him for a lift. He obliged but the car broke down along the way and he went for the 1st appellant who repaired the car and, later, on as they were driving to Ruai, they were stopped by police and arrested for an offence he knew nothing about.

The 3rd appellant's testimony was more or less a rendition of what the 1st and 2nd appellants had stated about a broken car, its repair by the 1st appellant and arrest by police.

The trial court evaluated the case by the prosecution and the defences offered by the appellants and convicted them as we have shown and the first appeal to the High Court failed.

When the appeal came up for hearing before us on 29th November, 2018, **Mr. Wandugi Karathe**, learned counsel appeared for the 1st appellant; **Miss Kaimugul** appellant while **Mr. Robert Amutallah** appeared for the 3rd appellant. **Miss Maina**, learned Senior Principal Prosecution Counsel, appeared for the respondent.

Mr. Wandugi submitted that the High Court had failed to make findings on the defence offered by the appellant which, according to him, it was legally enjoined to make. Counsel further submitted that the 1st appellant's fair trial rights had been violated as he was not asked whether he wanted to recall witnesses when the trial magistrate was replaced by another and was not asked to comment when the charge sheet was amended. Further, that evidence of identification was inadequate and the High Court should have so found particularly in the case where victims of the robberies had not given a description of the robbers. Finally, that we should re-look at propriety of death sentence imposed on the 1st appellant.

Miss Kaimugul, learned counsel for the 2nd appellant had filed written submissions on 29th November, 2018 and entirely relied on the same. It is submitted that the High Court had found that the evidence of **Wairimu** and **Mugo** (P.W. 1 & P.W.2) could not sustain a conviction and the fact that the 2nd appellant had been found in the subject motor vehicle could not offer corroborative evidence. It is further submitted that the owner of the subject motor vehicle had not testified that the 2nd appellant was in possession of the motor vehicle on 9th January, 2010, having hired it on 28th December, 2009. The High Court is also faulted for developing theories on how the robberies took place which theories are not supported by the evidence.

The case of **Gabriel Kamau Njoroge v. Republic [1982-88] 1 KAR 1135** is cited for the proposition that dock identification is generally worthless when it is not supported by a properly conducted identification parade and where there has not been a description of a suspect by the complainant.

Mr. Amutallah, for the 3rd appellant, submitted that the High Court was wrong to uphold conviction when it had found that evidence of Wairimu and Mugo could not, on its own, sustain a conviction.

Miss Maina, for the State, opposed the appeal by the 1st and 3rd appellant but conceded to the appeal by the 2nd appellant. Counsel submitted that the provisions of Section 200 Criminal Procedure Code had been complied with in full as the rights donated by that Section to an accused person had been explained to the appellants who opted that the incoming magistrate proceed with the case from the previous magistrate. Counsel supported the conduct of identification parades submitting that they were properly conducted. On concession of the appeal for the 2nd appellant, it was **Miss Maina's** submission that without an identification parade and the same having been conducted a month after the first robbery, conviction of the 2nd appellant was not safe.

We have considered the record and the submissions made by counsel on both sides and are mindful of our mandate in a second appeal as we have already stated above.

An important legal issue raised by the appellants relates to whether they were properly identified by the prosecution witnesses in the case before the trial court. Also raised as an issue is whether the High Court, on first appeal, properly carried out its mandate of retrying the case as it was legally required to do.

On the issue of identification, the trial magistrate held that:

“The complainants in this case stated they were able to see the robbers well. They were robbed during the day and were with the robbers for a long time. They were under difficult situations as they say the robbers were armed and they issued death threats. This, however, in view of this court would not negate the fact that the robbers were sitting in a small car with the complainants and the complainants were able to see them well. There was conversation between them as the robbers were asked for P.I.N (Personal Identification Numbers) and talked to the people whose contacts they found in the phones of the complainants. The court has accorded the necessary care in testing the evidence of identification”

The trial court considered and held that the prosecution case relied totally on whether the appellants had been properly identified as the robbers who had hijacked and robbed **Wairimu** and **Mugo**. The High Court on first appeal found that the prosecution had conducted a wrong

identification parade in respect of count 2 in that Force Standing Orders had not been complied with. That court however found that evidence on count 1 was adequate to sustain the conviction.

On the issue of identification, the High Court held that the evidence in that respect was that of a single identifying witness and that there was need to carefully scrutinize that evidence in order to tell whether it was positive and free from error or mistake. In its own words:

***“We have analyzed and evaluated afresh the evidence of P.W.1. While it is true that P.W. 1 spent about five hours with the assailants between 6 pm and 10 p.m., the circumstances of identification were partly difficult because while 6 p.m was still during the day, from 7 p.m onwards, it had definitely become dark. P.W.1’s initial contact with the assailants, was not that brief. From the description, the assailants first approached her, the driver in particular, seeking to know the directions to the bypass. He even had time to offer her a lift which she accepted.*”**

The moment P.W. 1 entered the vehicle, she was harassed, beaten, threatened and eventually she was sat on. By the time she left the company of the four assailants, it was already night and she must have been traumatized. There was however a prolonged period of time that P.W. 1 had with the assailants. P.W.1 described in detail what each of these people did and the roles played....”.

In evidence before the trial court, **Wairimu** stated that she did not give a physical description of her attackers when she reported the matter to police and there was even some confusion in her evidence with what was recorded in her statement where the colour of the motor vehicle driven by the assailants was recorded as white while she testified that its colour was grey.

In order to enter a conviction in a criminal trial where the evidence relied on is on identification, the trial court must deal with that evidence with utmost care to ensure that there is no possibility of error or mistaken identity on the part of the identifying witness. A useful discussion on this issue of identification appears in the oft-cited case of **Roriavs. Republic [1967] EA583** where it was observed that evidence of identification must be scrutinized carefully and with extreme caution and that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine cases out of ten - if there are as many as ten- it is in a question of identity.”

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances, it is safe to act on such identification. In Abdala bin Wendo and Another vs. Republic (1) this Court reversed the finding of the trial Judge on a question of identification and said this (20 E.A.C.A. at p. 168):

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring 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 possibility of error”

In the well-known English case of **R. vs Turnbull & Others [1976] 3 All ER 549**, the Court of Appeal of England, Criminal Division, warned of specific weaknesses which had appeared in the evidence of identification. It was held on the issue of identification:

“ ... If the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger...”

This Court in the case of **Wamunga vs. Republic [1989] KLR 424**, while dealing with the issue of identification of a suspect held that:

“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction ...”

The High Court on first appeal, held that **Wairimu** had time to see the people who had abducted her and that:

“... The quality of identification considering the circumstances under which the assailants were identified was strained. This is due to the violence visited upon P.W. 1. As such, we are of the view that there was need for other evidence implicating the appellants with this offence”.

The High Court found that other evidence through the identification parades where the appellants were identified and the fact that they were found in the motor vehicle belonging to **Munyua (P.W.7)**. **Chief Inspector Peter Ochieng (P.W.6)** testified that he conducted an identification parade where **Wairimu** identified the appellants after requiring members of the parade to speak certain words in the Kikuyu

language. The High Court analyzed that part of the evidence and found that:

“... P.W.1 did not know the assailants before and therefore the familiarity test cannot be applied to this case, moreover, the words were too few to aid in a positive identification. Voice identification does not apply to this case ...”

The High Court found that the police had broken every rule on the conduct of identification parades and this led to the allowing of the appeal in respect of count2.

On the issue of the motor vehicle belonging to **Munyua** (P.W.7), it is not clear on the record whether the 2nd appellant had hired the motor vehicle on 9th January, 2010 (when the first robbery took place). The agreement produced as part of the evidence showed that the 2nd appellant took the car on 11th December, 2009 to return it on 22nd December, 2009. **Munyua** did not testify that the 2nd appellant had the car on 8th February, 2010 when the 2nd robbery took place.

There were many grey areas in the prosecution case and had the High Court properly analyzed the evidence, it should have allowed the appeal. Circumstances for positive identification were difficult where the robbers ensured that victims (**Wairimu and Mugo**) did not look at their faces. Violence was visited upon the victims who were not allowed to see their surroundings as they were forced to the floor of the car and their heads covered so that they could not see. Identification parades were conducted contrary to Force Standing Orders and as correctly held by the High Court on first appeal, they were worthless. The prosecution did not create a flawless chain on when **Munyua's** car was hired and when it was to be returned and, worse still, the not unreasonable defences offered by the appellants were not properly evaluated and considered.

The conviction of the appellants was not safe in the circumstances and we find merit in this appeal which we hereby allow by quashing the convictions and setting aside the sentence. The appellants shall be set free forthwith unless otherwise lawfully held.

DATED & Delivered at Nairobi this 8th day of March, 2019.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR