



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & M'INOTI, J.J.A.) CRIMINAL APPEAL NO. 4 OF 2015

BETWEEN

JOSEPH MWATHI NYANJUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mwongo and Achode, JJ.) dated 18th December 2013 in

H.C.C.R.A. No. 49 of 2013)

JUDGMENT OF THE COURT

On 28th February 2013, the *Senior Principal Magistrate's Court at Kiambu* convicted *the appellant, Joseph Mwathi Nyanjui*, and sentenced him to death for the offence of robbery with violence contrary to *section 296(2)* of the *Penal Code. Mwongo and Achode, JJ.* dismissed his first appeal to the High Court on 18th December 2013, prompting the appellant to lodge this second appeal in the Court of Appeal.

The concurrent findings of the trial and the first appellate court were that *Tabitha Muthoni Kingori (PW1), Beatrice Njambi Mukuria (PW2)*, and *Juliet Wanjiku*, who did not testify in the appellant's trial, were all members of *Guthairira Women Group*, a duly registered welfare association with the *Department of Social Services, Ministry of Gender, Sports, Culture and Social Services. Anne Wangui Kinuthia (PW3)* was the chairlady of the Group, which had managed to raise from its members a sum of *Kshs 184,720* for their welfare. On 13th April 2011 they met at PW3's house at *Farmers? Village, Limuru* and decided that three of them, namely PW1, PW2 and Juliet Wanjiku would proceed to *Kenya Commercial Bank, Limuru*, and bank their money. PW2 carried Kshs 128,700; PW1 Kshs 36,300 and Juliet Wanjiku Kshs 20,420.

On the way to the bank, at about 3.30 pm, the appellant accosted PW2, who was carrying her money in a bag, and demanded that she surrenders it to him. He was armed with a pistol, which he held against her. PW2 surrendered the money to the appellant who attempted to flee from the scene. The three ladies' however screamed and attracted members of the public who chased the appellant, arrested, and assaulted him. Before he was arrested, the appellant threw the bag into a bush from where it was shortly recovered. Juliet, who was suspected of involvement in arranging the robbery disappeared with the money she had and had not been apprehended at the time of trial. The appellant was subsequently re-arrested by the police and charged with the offence of robbery with violence and an alternative charge of handling stolen goods contrary to *section 322 (2)* of the Penal Code. The recovered money was given to PW3 who shortly

thereafter banked it in the account of Guthairira Women Group. No pistol was recovered.

The evidence of **PW4, Corporal Anthony Mburu**, was that on the material day and time, he was on duty at Kirathimo Administration Police Camp when he heard members of the public shouting at a distance of about 100 meters. He proceeded to the scene where he found members of the public beating the appellant for allegedly stealing money from PW2. He rescued the appellant, re-arrested him and handed the recovered money back to PW2. He took the appellant to Tigoni Police Station where he was charged as aforesaid.

When he was put on his defence, the appellant gave a sworn defence but did not call any witness. The substance of his defence was that he was a hawker in Limuru and that on the material day at about 3.30 pm he was on his way home to replenish his stock. Near **Kirathimo Administration Police Camp**, he heard members of the public shouting “*thieves, thieves*”, and as a Good Samaritan, he went to find out what was happening. He saw a man and three women running away, with members of the public in hot pursuit. The man threw a bag similar to the one that was produced in court as an exhibit, into the bushes and the appellant went to fetch it, intending to give it back to the owner. However members of the public, who he thought were confused, turned against him and beat him up, accusing him of being the thief. He was taken to Kirathimo Administration Police Camp and later to **Tigoni Police Station** without any explanation why he was arrested. The police demanded from him a bribe of Kshs 20,000 and when he was unable to raise the same, he was charged in court. He denied having committed the offence or being in possession of a pistol.

Urging his second appeal before us, the appellant’s learned counsel, **Mr. Wandugi** relied on a supplementary memorandum of appeal filed on 30th September 2014. The first ground of appeal, which he abandoned midstream, was that the appellant’s first appeal in the High Court was a nullity because it was heard by Mwongo, J and Achode, J. at a time when Mwongo J. was serving in the Commercial Department of the High Court. When we drew his attention to the fact that the judgment of the Supreme Court in **Republic v. Karisa Chengo & 2 Others, SC Pet. No. 5 of 2015** was concerned with the validity of criminal appeals in which judges of the Environment and Land Court and the Employment and Labour Relations Court sat, and not judges of different divisions within the High Court, the appellant abandoned the argument.

Next he contended that PW1 and PW2 were contradictory and unreliable witnesses whose evidence was unsafe. Relying on **Ndungu Kimani v. Republic [1979] KLR 282**, the appellant submitted that PW2 was not a straightforward witness and there was suspicion about her trustworthiness because her evidence was inconsistent as to whether she fell down when accosted by the appellant or whether she screamed. It was also submitted that PW2 purported to have obtained the appellant’s name from the appellant himself, which was not probable. It was therefore contended that if the two courts below had properly analyzed and evaluated the evidence, they would have picked out the contradictions. The appellant emphasized too that the pistol in question was never recovered.

The appellant submitted further that PW2 did not have a proper opportunity to see the appellant because the incident lasted only a short time of about 5 minutes while the witness was in shock. In his view, because the identification of the appellant was under difficult circumstance, it was necessary for PW1 and PW2 to describe the appellant to the police, which they failed to do. The appellant also faulted the two courts below for failing to warn themselves of the danger of relying on the evidence of identification by the two witnesses and contended further that in the absence of an identification parade, the appellant’s identification was mere dock identification, which on the authority of **Gabriel Kamau Njoroge v. Republic (1982-88) 1 KLR 1134**, is worthless.

The next issue taken up by the appellant was the contention that his trial was null and void because there was a change of the trial magistrate without complying with section 200(3) of the Criminal Procedure Code. Relying on **Bob Ayub v. Republic Cr. App. No. 106 of 2009** and **Eric Omndi alias Gor v. Republic, Cr App. No. 15 of 2007**, it was submitted that the trial was a nullity and the appeal must succeed on that ground alone.

Lastly the appellant submitted that his trial was a nullity on the additional ground that the trial court directed the parties to file written submissions whilst such a practice is not known or provided for under the Criminal Procedure Code. He relied on the decisions of this Court in **Robert Fanali Akhuya v. Republic, Cr App. No. 42 of 2000** and **Henry Odhiambo Otieno v. Republic [2006] eKLR. Mr. Maitanyi**, learned Senior Assistant Director of Public Prosecutions opposed the appeal submitting that the identification of the appellant was safe and reliable because it was by PW1 and PW2 who were both at the scene. He added that the offence was committed at 3.30 pm in a public place in broad daylight when visibility was good. He also discounted the possibility of mistaken identity in the arrest of the appellant, arguing that PW1 and PW2 did not lose sight of him as he fled from the scene of the robbery until his arrest by members of the public. He was also seen throwing the bag that contained the money in the bush and that in his defence the appellant had placed himself at the scene. In his view the evidence of PW1 and PW2 was consistent and cogent. He added that in the circumstances of the case, there was no need for an identification parade.

As regards compliance with section 200(3) of the Criminal Procedure Code, the respondent submitted that it was the appellant's advocate who requested the trial court to proceed from where the earlier magistrate had left, that the appellant effectively participated in the rest of the trial, that he never applied for recall of any witness and that he had not suffered any prejudice that could not be cured by section 382 of the Criminal Procedure Code.

Lastly the respondent submitted that the two courts below properly evaluated the evidence and the appellant's defence and that there was no substance in the complaint regarding the written submissions because the appellant did not suffer any prejudice.

This being a second appeal, by dint of section 361 of the Criminal Procedure Act, our remit is to consider only issues of law. As regards findings of fact, we are required to pay homage to the concurrent findings of the two courts below, unless it is demonstrated that those courts considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, they were plainly wrong. (See **Karani v. Republic [2010] 1 KLR 73**). We are satisfied that the issues that the appellant has raised in this appeal are issues of law.

On the appellant's identification, we agree with the respondent that it was not by a single witness. It is true that as regards identification, particularly by a single witness under difficult circumstances, the court is required to proceed with utmost circumspection and to warn itself of the dangers of convicting an accused person on the evidence of a single identifying witness, because people are known to make mistakes in identifying persons that they are familiar with. (See **Maitanyi v. Republic (1986) KLR 198** and **Wamunga v. Republic [1989] KLR 424**). However, in this case the identification was by two witnesses and the offence was committed at 3.30 pm in broad daylight in a public place. The trial court and the first appellate court took these circumstances into account in assuring themselves that the appellant's identification was safe. The appellant was arrested as he was fleeing from the scene of the robbery. In his own defence, the appellant placed himself squarely at the scene and gave a version of events that closely agreed with the evidence of PW1 and PW2, including the attempt to dispose of the money in the bag by throwing it in the bush and the appellant's claim of trying to retrieve the money to hand over to PW2. The evidence of PW 4 on how the appellant was arrested by members of the public agrees substantially with that of PW1 and PW2. In the circumstances of this case, we are satisfied that there was no possibility of mistaken identity and the appellant's claim that he was merely prosecuted because of refusal to bribe the police with Kshs 20,000/- is clearly an afterthought.

Having carefully considered the evidence on record and the concurrent findings of the two courts below, we do not find basis for interfering with their conclusions. We particularly do not find any contradictions of the nature that would make the case presented by the prosecution unbelievable. As was stated in **Kimeu v. Republic [2002] 1 KAR 757**, it is not every conflict or contradiction in evidence, even of a minor nature, that vitiates a trial. To lead to such an eventuality, the contradictions involved must be of such a nature as to create doubt in the mind of the court regarding the guilt of the accused. (See also **Njuki & 4 Others v. Republic, [2002] 1 KLR 771**).

The next issue is whether the appellant's trial was a nullity by reason of failure by the trial court to comply with section 200(3) of the Criminal procedure Code. That section provides as follows:

„200. (1)...

(2)...

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

The record shows that the trial of the appellant started before **Murage, SPM** who took the evidence of four prosecution witnesses. Thereafter the learned magistrate was transferred and on 2nd April 2012, the appellant's advocate is recorded informing the court that the hearing could proceed from where the previous magistrate had left. Accordingly the trial was taken over by **Oduor, SPM** who heard the last prosecution witness, PW5, and the appellant's defence and wrote the judgment.

From the record, we are satisfied that the appellant was fully aware of his right to have all the witnesses recalled when the trial was taken over by Odour SPM and that he consciously and deliberately elected, through his advocate, to proceed with the trial without recall of any witnesses who had already testified. As this Court stated in **Joseph Gichuki Njoroge v. Republic, Cr App No 523 of 2010**:

“This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.”

(See also **Ndegwa v. Republic [1985] KLR 535**; **Nyabuto & Another v Republic [2009] KLR 409**; and **Joshua Ntonja Mailanyi v. Republic [2011] eKLR**).

In this appeal, other than the appellant electing to proceed from where the previous magistrate had left without recalling any witness, the first magistrate had heard all the prosecution witnesses except the investigating officer, PW5, who was duly cross-examined by the appellant's advocate after he testified. We are satisfied that the appellant suffered no prejudice in this case.

Turning to the last question on written submissions, the record shows that when the prosecution concluded its case on 22nd June 2012, the learned Magistrate set the 7th August 2012 for taking submissions on whether a case to answer had been made out. The learned magistrate did not direct the parties to file written submission. On the contrary it was the appellant who applied to file written submissions on 15th August 2012 and confirmed to the Court on 31st August 2012 that he had filed his submissions. The prosecutor elected not to make any submissions, oral or written. Upon conclusion of the hearing of the defence case on 27th November 2012, the court set the 10th of December 2012 for hearing the final submissions. Once more the court did not direct the parties to file written submissions and it was the appellant who elected, on his own volition, to present his submissions in written form. In **Chrispine Kent Otieno v. Republic [2017] eKLR** this Court rejected a ground of appeal that challenged the validity of a trial on account of relying on written submissions filed at the request of the appellant. (See also **Dickson Mwaura Mbogo v. Republic [2016] eKLR** and **Otieno Kopyo Gerald v. Republic [2010]**

eKLR).

Ultimately we have come to the conclusion that this appeal has no merit.

We accordingly dismiss the same in its entirety. It is so ordered.

Dated and delivered at Nairobi this 2nd day of February, 2018

R. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

K.M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR