



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 35 OF 2015

BETWEEN

JOHN MWANGI WACHIRA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and order of the High Court of Kenya at Nairobi

delivered by; Muchemi & Odunga JJ., on the 11th day of December 2013

in

HIGH COURT CRIMINAL APPEAL NO 642 OF 2010)

JUDGEMENT OF THE COURT

1. This is an appeal from the judgment of Muchemi & Odunga JJ., dated the 11th December 2013. John Mwangi Wachira (appellant) in this appeal was charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code before the Senior Principal Magistrate's Court at Limuru. The particulars of the charge were that on the 7th day of March 2009, at about midnight, within Uplands Trading Centre in Kiambu County, jointly with others not before court and while armed with dangerous weapon namely metal bar, *panga* and *rungus*, robbed Paul Mwaniki Wamiti of Ksh 2,800/=, ATM card and NHIF cards and immediately before or after the said robbery, used violence on the said victim of robbery.

2. We wish to outline albeit briefly the highlights of the evidence before the trial court that led to the conviction and sentence of the appellant. On 7th March 2009, Paul Mwangi Wamiti (PW1) was meeting a friend at Muteja Bar within Uplands shopping centre. He left the bar at about 11pm, as he was walking after about 20 metres, he was attacked by a group of people and robbed of Ksh 2800/=, ATM, NHIF and voters cards. PW1 said he recognized one of the attackers as Muthama; he even asked him why they were attacking him. PW1 screamed and some people came to his rescue and as the attackers were running away, PW1 grabbed one of the attackers and did not let go of him until people who came to his rescue assisted him to arrest the said attacker.

3. Among the people who responded to PW1's distress was Peter Kingori (PW2). He told the learned trial magistrate that on the material date, at about 11pm, he was on duty guarding Uplands Independent Church where he was working as a watchman, which was about 20 metres from the scene of attack. He responded when he heard someone screaming; he found PW1 holding someone who was among the people who had robbed him. The person PW1 was holding was the appellant who was the 1st accused person before the trial court. PW2 said they took the appellant to Lari police station, and he recorded his statement with the police.

4. Simon Njuguna Kigotho (PW3) and Yustus Nyaga (PW4) were also inside the said bar at the material time, they went out when they heard someone screaming and found PW1 holding on to somebody's hand. PW1 told these witnesses, the person he was holding, was among the people who had attacked him. They took the person to Lari police station and during the hearing they identified the appellant as the said person. PW1 was taken to Tigon Hospital where he was treated and the P3 form was filled by Samuel Kariuki who testified as PW5. The matter was investigated by police Cpl Eloti. He interrogated the appellant who named two of his accomplices whom he charged with the appellant but they were acquitted as the learned trial magistrate was not satisfied with the evidence of their identification.

5. The appellant was nonetheless put on his defence, he gave sworn evidence; he said on the material day at about 10:30pm, he was leaving his place of work, a butchery within Uplands shopping centre. He had been paid his salary, and on the way he met a crowd of people that scared him, so he started running away and they chased him and arrested him. The crowd took him where the complainant was and he said the appellant was one of the people that had attacked him. He was arrested by the watchman and taken to the police station where he was charged with the aforementioned offence which he denied.

6. The learned trial magistrate was satisfied the prosecution proved its case in regard to the appellant. He was convicted and sentenced to suffer death. However, the 2nd and 3rd co-accused were acquitted for lack of sufficient evidence that linked them to the offence. As regards the appellant, this is what the learned trial magistrate posited in a pertinent portion of her judgement;

“In his evidence PW1 stated that when he was attacked he held accused 1 until members of public arrived. Accused 1 gave the names of the 2 accused. His evidence is corroborated by that (sic) to PW2 a watchman who responded to the complainant's scream.

He found him holding accused 1 at the scene. PW3 also went to the scene and found accused there while PW4 found accused having been arrested by complainant and he found he had suffered harm. From the evidence of PW1, PW2, PW3 and PW4, it is quite clear that accused 1 did not leave the scene as he was arrested by the complainant immediately as the others fled. ...

From the foregoing there is no doubt that accused 1 was one of the robbers as he was arrested immediately after the robbery his defence that he was running away from the crowd when he was arrested is not convincing and has no supportive evidence. I dismiss it (sic) was untrue. I find him guilty as charged and convict him accordingly. For accused 2 and 3, there is no sufficient evidence to link them to the offence. They may or may not have been at the scene. I will give them the benefit of doubt and acquit them under section 215 CPC.”

[7] The appellant unsuccessfully appealed before the High Court hence this second appeal which by dint of the provisions of **section 361** of the Criminal Procedure Code turns only on points of law. This is because the two courts below are supposed to have gone through the facts of the matter and thrashed them to a pulp and thus settled them by concurring. Our task is to ensure, the conclusions drawn by the High Court are sound in law. This appeal was argued based on the appellant's own home grown grounds of appeal and a supplementary memorandum of appeal that was filed by **Mr Ratemo Oira**, learned counsel for the appellant. The two sets of grounds of appeal are almost similar except the home grown set, revisits the issue of an alleged breach of his constitutional rights under the provisions of **section 72 (3) (b)** of the retired Constitution. The appellant contends that he was remanded in police custody for 15 days which was contrary to the 14 days provided under the old Constitution.

[8] Counsel for the appellant went on to submit that the evidence relied on by the two courts below was not satisfactory and it fell short of proving the case to the required standard. Counsel poked holes on the evidence by the complainant who admitted that he did not know the appellant before the attack, yet he said he recognized him by the voice; counsel drew our attention to a portion of the complainant's evidence where he said he recognized Muthama as one of his attackers. The said Muthama was nonetheless acquitted for lack of evidence while the appellant who was a stranger was convicted.

[9] Mr Oira went on to submit that if the learned trial magistrate found the complainants evidence untenable in respect of the accused persons who were acquitted and those are the ones he said he knew before the attack, then the same should have applied to the appellant as well who was a stranger to the complainant. Although the complainant said he held on the hand of the appellant, there were no finger prints that were taken to test the veracity of this evidence. The occurrence book was also not produced to shed light on how the appellant was arrested. Lastly, Mr Oira submitted that the defence by the appellant was not considered. It was a credible defence that challenged the prosecution's evidence.

[10] On the part of the State, Mr. Orinda, learned Assistant Director of Public Prosecution opposed the appeal. He reminded us, this being a second appeal, what falls for our determination are only points of law and not facts. The two courts below established the factual basis upon which the conviction of the applicant is based. These facts were based on the direct evidence by PW1, PW2, PW3 and PW4. When the three witnesses came to assist the complainant and found him clinging on to the hand of the appellant, PW2 and PW4 took him to the police station. It is while at the police station that he mentioned his co-accused. However, this evidence was not found safe to sustain a conviction in regard to the co-accused but as regards the appellant, Mr. Orinda submitted the trial court believed the evidence of the four prosecution witnesses; on re-evaluation by the High Court, the judges concurred with the trial court; it was not necessary to conduct an identification parade, as the appellant was arrested at the scene and escorted to the police station by the witnesses who would have participated in the parade; the defence by the appellant was taken into account but it was dismissed for lacking credibility in the face of the prosecution evidence.

[11] This is a second appeal, by dint of the provisions of **Section 361 (1) (a)** of the **Criminal Procedure Code**, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See ***Kavingo – vs – R***, (1982) KLR 214, where it was held that a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In ***David Njoroge Macharia – vs-R***, [2011] eKLR it was stated that under **Section 361** of the **Criminal Procedure Code**:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong vs. Republic* (1984) KLR 213).”

[12] We shall address the issue of whether the appellant was accorded a fair trial for reasons that he was held in police custody longer by one day. However, looking at the judgement of the High Court, we are satisfied this ground was adequately dwelt with by the learned Judges; we cannot do any better in dealing with the same issue, but reproduce a portion of the said judgement where they said;-

„,The court record shows that the appellant was arrested in the night of 7th of March 2009 and the plea taken on 25th March 2009. The proceedings of 24th March 2009 show that the accused was arraigned in court on that day but the plea deferred to 25th March 2009. The accused was received at Lari police station around midnight of the 7th and 8th March 2009. From 8th to 23rd is a total of 15 days in police custody. The repealed constitution section 72(3) (b) allowed 14 days remand period pending investigations for capital offences. The police over remanded the appellant for one (1) day. The appellant raised the matter in his defence but it appears that the

issue was not dealt in the judgment. The magistrate ought to have dealt with the matter as required by the law. It was the duty of the magistrate to seek explanation for the delay in arraigning the appellant in court. At this stage it is not possible to examine the issue since the delay was not explained by the prosecution...??

[13] The learned Judges went ahead to consider case law in this regard especially the case of **Albanus Mutua vs Republic** H.C Criminal Appeal No. 120 OF 2004 in which it was held, proceedings against a person who was remanded in police custody beyond the statutory provisions were declared a nullity. The judges went on to consider the latest case law especially the case of **Julius Kamau Mbugua vs Republic** Criminal Case No. 50 of 2008 where it was held extra-judicial incarceration has no relation to criminal trial process and each process must be dwelt with separately. The court pointed out the provisions of **Section 72 (6)** of the retired Constitution that allowed aggrieved parties whose rights are breached through extra-judicial incarceration an avenue of redress by seeking compensation through a civil process. In this regard, we are satisfied the issue of incarceration of the appellant in police custody for one day more than the prescribed time, was properly addressed and we need not belabour the same.

[14] The next issue raised in the grounds of appeal is that both courts below failed to consider there was insufficient evidence of identification. The offence occurred late in the night, the appellant was arrested by members of public therefore according to counsel for the appellant, it was imperative for the prosecution to conduct an identification parade. The two courts below believed the evidence of the complainant that he held on to the hand of the attacker until PW2, PW3 and PW4 come to his rescue. PW2 and PW3 arrested the appellant and escorted him to the police station. The arrest was instantaneous; the appellant was taken to the police station immediately where he was re-arrested. Just like the two courts below found, we are of the same view that failure by the prosecution to conduct an identification parade was not fatal in the circumstances of this case. The appellant was arrested by PW2, PW3 and PW4 who took him to the police station. Moreover, although the appellant was not obliged to say anything in his defence, he admitted that he was arrested by a watchman and indeed one of the witnesses was a watchman.

[15] The two courts below believed the evidence of these witnesses who went to rescue the complainant and found him holding the appellant and the other attackers managed to run away. Although it was at night, both courts below were satisfied there was no possibility of mistaken identity in view of the fact that the two witnesses who removed the appellant from the grip of the complainant escorted him to the police station where he was re-arrested. We find no justifiable reasons to discount the evidence of credibility of the three prosecution witness who went to the scene and found the complainant clinging on the hand of his attacker. See the oft' cited case of; - **Kiarie v Republic**, [1984] KLR at 739, especially the holding that:

“The Court of Appeal on a second appeal may upset a finding of fact by the trial or the first appellate court where there is misdirection but such misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by Jury, the Jury would not have returned their verdict had there been no misdirection. It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken”.

[16] Counsel for the appellant submitted that it was erroneous for the trial court to acquit the co- accused persons, especially one who the complainant recognized and gave his name to the police as **Muthama**. The evidence on record shows the two co- accused were named by the appellant. They were not arrested at the scene, none of them is called **Muthama (as far as we can see from the records)** and no identification parade was carried out to corroborate the evidence of the appellant. It is a well known principle in criminal law that evidence of an accomplice is weak and requires corroboration. See the case of; -

R VS KIPKERING ARAP KOSKE & 2 OTHERS (1949) EACA 135, in which the Court of Appeal for East Africa had the following to say regarding evidence of an accomplice:

“That in the present case, as witness Chepkowny was an accomplice, it would be wholly unsafe

to accept his evidence without corroboration, and corroboration could only remove the taint of suspicion as to his credibility from an otherwise credible witness.”

We are satisfied the trial magistrate properly acquitted the co-accused persons and in doing so gave reasons. The co-accused persons were arrested under different circumstances from those obtaining in the case of the appellant.

[17] The last issue we think we should address is whether due to the contradictions in the evidence of the complainant when he said he did not know the appellant prior to the attack and during cross examination he said he knew the appellant and recognized him by voice; the question we have asked is whether this contradiction affected the overall weight of the prosecution’s case.

We have closely considered that inconsistency in the complainant’s evidence, but we are of the view that the case and thread of the prosecution’s case can be deciphered that notwithstanding; the appellant was not arrested and charged based on voice recognition. He was arrested from the grip of the complainant who held him after the robbery. To us this is a minor inconsistency which can be cured under the provisions of **Section 382 of the Criminal Procedure Code, Cap 75, Laws of Kenya** which provides;

“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

[18] Also see the case of; ***Joseph Maina Mwangi -vs- Republic- Criminal Appeal No. 73 of 1993 Tunoi, Lakha and Bosire JJA***, held:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

For the reasons given here above, we find both courts below properly discharged their mandate, the Judges re-evaluated the evidence before them, analysed it against the law and well established principles in case law and we find no justifiable reasons to set aside their judgement. This appeal therefore lacks merit and it is dismissed.

Dated and delivered at Nairobi this 26th day of February, 2016.

M.K. KOOME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR