



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 82 OF 2013

BETWEEN

RICHARD GATHECHA KINYARU.....1ST APPELLANT

JOHN THENDU NDICHU.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi

(Ochieng & Achode, JJ) dated 4th December, 2012)

in

HC.CRA NO. 290 OF 2009)

JUDGMENT OF THE COURT

[1] This is a second appeal from the judgement of the High Court of Kenya at Nairobi (Ochieng & Achode JJ) wherein the conviction and sentence of Richard Gathecha Kinyaru and John Thendu Ndichu, 1st and 2nd appellants respectively was confirmed. Aggrieved by the said judgement, both appellants have filed this second appeal which 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 -v- 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 – v-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).

[2] In order to place the entire appeal into perspective, and to properly appreciate the points of law raised herein, it is imperative to re-visit, albeit briefly, the case that was before the High Court. The appellants were convicted on the basis of the sole evidence of identification which was adduced by Stephen Wanyeki Ndichu (PW1) the complainant in this matter. The other witness who responded to PW1's distress call arrived at the scene after the assailants had fled. The appellants were arrested at different places, the 1st appellant was arrested almost 10 months after the offence, that was on, 7th June 2008, for a different offence of being in possession of *cannabis sativa* but while at the police station it transpired that a report of robbery with violence was made and he was named as one of the perpetrators. There is no clear evidence of how the 2nd appellant was arrested but from his own defence, it seems he was arrested on 27th September 2008.

On the material day which was on the 1st August 2007, at Githunguri-Gakoe Giathieko village within the county of Kiambu, PW1 testified that he was operating his own taxi business with motor vehicle registration no KDL 453 Toyota Corolla. On the material day, he woke up at 4.am, he drove his vehicle and parked it at Gakoe shopping distance of about 5 minutes from his home. Upon parking the car, he heard a sound of a shop being opened. He turned to check and saw two people emerge from the shop. He switched on his torch and pointed towards the two people who were about ten metres from where he was parked. He saw one of the assailants was armed with a club and the other one a machete.

PW1 said he recognized the two people and called them by their name, that is, Gathecha (1st appellant) and Thendu (2nd appellant) and asked them what they wanted. The two assailants ordered him to keep quiet or they would kill him, and immediately descended on him hitting him with the club on the head. PW1 managed to grab the club from Gathecha and pinned him down holding his neck. The other assailant broke the window of the vehicle and cut PW1 with a panga on the head thus he released Gathecha which gave him an opportunity to go round and cut PW1 on the head. PW1 lost consciousness and when he came to his senses, he realized his wallet, telephone and watch were robbed from him.

The complainant was rescued by Joseph Muchiri Gathogo (PW3), he had just woken up and was preparing his motor vehicle when he heard screams from Gakoe Trading centre about a kilometre and half away from his house. He rushed to the scene and on arrival he found PW1 sprawling helplessly on the car, he was wounded badly and he told PW3 that he was attacked by two people whom he named as Thendu and Gathecha. PW3 took the complainant to Githunguri police station, where the matter was reported. He then took Githunguri health centre but he was referred to Kiambu District Hospital for further treatment.

The injuries suffered by the complainant were confirmed by Dr. Caroline Njeri Ngunu (PW1) who testified that she treated him for the injuries sustained during the robbery. According to the P3 form that was produced in evidence, the injuries were probably inflicted with a blunt or sharp object and the injuries were classified as harm. The other set of evidence that was relied upon by the trial court was by AP Chief Inspector James Macharia (PW4) who at the material time was attached to DC's office Githunguri.

On the 7th June 2008, while on patrol duties within Githunguri township, they were informed of a group of 4 people who were harassing people. They encountered the 4 men and upon ordering them to surrender, they ran away but they managed to arrest the 1st appellant who was in possession of 10 rolls of cannabis. They took him to Githunguri Police station where it transpired a report of robbery with violence had been made regarding Gathecha from Gakoe, in Giathieko and it turned out to be the same suspect. That is how the 1st appellant was arrested.

The arrest of the 2nd appellant remains mystery and this was also noted by the learned trial magistrate when he remarked in part of his judgment that, "*It is not clear how exactly Thendu was arrested but it is after 1st accused had initially been charged alone, before the two matters were consolidated.*" It was only

indicated on record that the 2nd appellant was arrested by Administration Police from Ruiru.

Be that as it may, the appellants were put on their respective defence; the 1st appellant gave a sworn statement of defence and denied the offence. He claimed the day he was arrested on 7th June 2008; he was on his way home after completing his work of washing *matatus* which closes late. While on his way home, he was accosted by police officers from Githuguri police station, they arrested him and demanded money from him and since he had none they told him he was found in possession bhang, he was charged with the offences of being in possession of bhang and robbery with violence which he said he knew nothing about.

As regards the defence by the 2nd appellant, John Thendu Ndichu, he too gave a sworn statement of defence, he claimed that on the day he was arrested, that is, on 27th September 2008, he was coming from Ruiru market where he used to sell clothes. He was accosted by three Administration Police while at the bus stage. They arrested him and remanded him in the police cells, and on 29th September 2008, he was picked by police officers from Githunguri Police station. While at Githuguri police station he was asked whether he knew the complainant. He said he knew the complainant very well but they were not in good terms because the complaint was having an affair with his wife. During cross-examination the 2nd appellant maintained the complainant had a grudge against him; this issue of the grudge also featured when the 2nd appellant cross-examined the complainant, when he admitted having carried the 2nd respondent in his taxi after she was evicted by the 2nd appellant.

[10] It was on the basis of the above evidence the 1st and 2nd appellants were found guilty, convicted and sentenced to death. Their appeal before the High Court was dismissed on the grounds that the complainant gave the names of the attackers to PW3 who came to his rescue and also to the police officers when he made the first report at the police station. In regard to this appeal, Mr. Amutallah, learned counsel for the 1st appellant relied on the supplementary grounds of appeal dated 22nd September 2015, which raises some four grounds of appeal to wit:-

The learned judges were faulted for;

- Failing to note there was no proper identification of the 1st appellant
- Failing to note the 1st appellant was convicted on the basis of the evidence of PW2
- Failing to re-evaluate and re-analyse the entire evidence as required by the law
- Concluding the prosecution's case was proved beyond reasonable doubt when the evidence clearly left out some gaps

In further arguments to support the above grounds, Mr. Amutallah, learned counsel for the 1st appellant submitted that when the attack occurred, it was dark, that the complainant said the assailants were about 10 metres away from where he had parked his motor vehicle, and that he was armed with a spot light when he turned back and saw the appellants. According to counsel, it was not possible for the complainant to see the attackers while inside the vehicle which was a small saloon vehicle; moreover the lighting that was emitting from the spot light was not tested; the complainant gave only one name of the 1st appellant 'Gathecha' thus the evidence of identification was not safe to sustain a conviction,

[12] On the issue of re-evaluation of evidence, the two courts below were faulted for not analysing the evidence of the injuries sustained by the complainant. According to counsel, the evidence given by the complainant on the injuries he suffered during the attack were not the same ones indicated in the P3 form and thus the offence was not proved to the required standard; the appellants were also arrested several months after the offence was committed and that there was no evidence to show the 1st appellant had escaped arrest as he stated in his defence he used to wash *matatus* at Githuguri town, they were

neighbours with the appellant and the day he was arrested he was going about his business.

Counsel also cited the cases of;

1. **Francis Muchiri Joseph v Republic** [2014] e KLR
2. **John Muriithi Nyagah v Republic** [2014] e KLR
3. **R V Newland** (1988) ALL E.R 891
4. **Yongo v Republic** (1983) KLR 319

In the case of Francis, this Court differently constituted, found that when the complainant made a first report to the police about a robbery, the name of a 'Macharia' was mentioned as the assailant, however, there was no evidence led by the prosecution to show that the appellant whose names in the charge sheet did not include 'Macharia' was the same person as the one charge. In the case of John Muriithi, the Court found there were factors that weakened the quality of evidence of identification that eluded both courts below and there were glaring inconsistencies observed in the P3 Form and the evidence adduced in court by the doctor. We were urged to allow the appeal. The last two cases deal with the issue of drafting charge sheets, this argument was nonetheless not pursued in the oral submissions but we shall comment on it in due course.

[14] On the part of the 2nd appellant, Mr. Wagara, learned counsel relied on the grounds listed in the memorandum of appeal dated 8th July 2015 which can be summarized as follows;-

The learned judges erred in law by;-

- Holding the evidence of identification/recognition was not safe to sustain a conviction of the 2nd appellant
- The complainant's evidence of identification/recognition was not corroborated by PW3 and PW6 as postulated by the judges
- It was necessary to hold an identification parade at Githuguri police station to rule out a mistaken identity
- Failure to re-evaluate the evidence in its entirety especially the circumstances of the arrest of the 2nd appellant that left a gap in the prosecutions' case.

In further arguments, Mr. Wagara submitted the finding by the High Court judges that there was other evidence on record to support the sole evidence of identification of the 2nd appellant by the complainant was erroneous; the fact that the complainant repeated to PW3 and PW6 that he was attacked by Gathecha and Thendu could not amount to corroboration but a mere repetition of what they were told. The OB report was not produced in evidence, the appellant's had no burden of producing it but the burden remained with the prosecution to prove the names were recorded in the first report; the complainant became unconscious after the attack, and it was after gaining consciousness when he gave the names of the appellants. Counsel also faulted the evidence of how the 2nd appellant was arrested, several months after the offence in Ruiru and there was no evidence to show how his arrest was effected let alone how the arresting officer connected him with the offence. On the defence offered by the 2nd appellant, counsel was of the view it clearly established there was a grudge, based on allegations of love affair between the complainant and his wife, which was cogent as the complaint admitted having ferried his wife in his taxi when she fled from the home of the 2nd appellant.

On the part of the respondent, the state was represented by Mr. Kivihiya the learned Assistant Director of Public Prosecution. He submitted that the two courts below were concurrent in their findings that the

evidence by the complainant who recognized the appellants and gave their names to PW3 and the police, was safe to sustain a conviction. Counsel for the state argued that the appellants were well known to the complainant and they also confirmed it in their defence evidence; moreover the complainant struggled with the appellants when they attacked him and during the attack they were communicating in Kikuyu, thus, there was no need for an identification parade; the complainant sustained injuries during the attack and evidence was adduced to show they were inflicted with a blunt object; the OB was produced in court but the appellants failed to cross-examine the witness on it. Counsel for the state urged us to dismiss both appeals.

To us, there are three issues of law raised in this appeal and that is whether the appellants were properly identified as the perpetrators of robbery with violence, whether the High Court discharged its duty of re-evaluating the evidence by the trial court as it is mandated by law, and lastly, whether the charge sheet in respect of the 1st appellant was defective. In analysing the issue of identification, we appreciate the learned judges took note of some of the leading authorities such as the case of;- **Wamunga vs. Republic, (1989) KLR 424** where it was stated that:

“It is trite law that where the only evidence against a defendant is evidence of identification or 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.”

[18] It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where conditions for identification are difficult, the law requires the evidence on identification to be weighed with greatest care. The court must satisfy itself that in all circumstances, it is safe to act on such identification. In the instant case, the trial magistrate seems to have been oblivious of the above requirement, that is, the dangers of basing a conviction on the evidence of a sole identifying witness, the learned judges were of the view that this was inconsequential as they stated as follows in a pertinent portion of the judgement;

“Even though the learned trial magistrate did not expressly warn himself about the danger of basing conviction on the evidence of a single identifying witness, the respondent submitted that that, of itself, cannot undo the otherwise cogent evidence. We have re- evaluated all the evidence on record, and have drawn our own conclusions.”

[19] The learned judges found the complainant’s evidence was corroborated by the evidence of PW3 and PW6 as he repeated the names of Gathecha and Thendu as the people who had attacked him immediately after the robbery. With tremendous respect, the evidence of PW3 and PW6 was not independent evidence, it was a mere repetition or confirmation that the complainant was consistent in his evidence that he was attacked and robbed by Gathecha and Thendu. It therefore follows the learned judges of the High Court had a duty to answer the fundamental question of whether due to the circumstances that were prevailing at the time the robbery took place, it was in the wee hours of morning, 4 am, therefore it was dark, the complainant said he saw the attackers at about 10 metres from where he had parked his car, the appellant was attacked while inside the car and at one time he became unconscious but when he regained consciousness he named to PW3 the persons who had attacked him. The crucial question that needed to be answered was whether the light emitting from the spot light could shed sufficient light from inside the car to enable the complainant identify the attackers.

[20] Was there a possibility of mistaken identity? It is evident the complainant stated that he recognized the two assailants and even gave their names to the police. In the oft’ cited case of; **R. -vs- Turnbull and others (1976) 3 All ER 549**, Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some

reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?

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Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

[21] The complainant was 10 metres away when he saw two people whom he recognized and called them by their names before they pounced on him viciously hitting him with a club and a panga. The complainant was consistent that he recognized the appellants, and it is trite, evidence of recognition is more reliable as it is based on knowledge. See Anjononi & Others -vs- Republic, (1976-80) 1 KLR 1566, this Court held at page 1568:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”

[22] The two courts below however needed to rule out a possibility of mistaken identity by examining the circumstances, such as the lighting vis vis the distance as a mistaken identity can occur even among family members. What confounds this matter even further is the fact that the complainant gave only one name to describe the appellants and no other description. The complainant was armed with an electric spot light, and the pertinent issue remains the distant that light could cover as there was no other light; the complainant was in his vehicle and he said he turned back and saw the appellants with the use of the spot light, how far can a spot light see when one is inside the vehicle. We think this is the kind of evidence that required further corroboration so as to sustain a conviction.

As pointed out earlier, the evidence of PW3 and PW6 merely confirms the complainant was consistent; the appellants were not arrested with any of the stolen items. They were arrested nearly a year after the robbery. We agree with the submissions by the state that it was not necessary for the prosecution to conduct an identification parade as the appellants were well known to the complainant. What was required was evidence that perhaps placed the appellants at the scene of robbery at the material time.

The appellants were arrested a year later, as regards the 2nd appellant there was no evidence at all regarding his arrest. It remains a mystery how the Administration Police in Ruiru linked him up with the offence and arrested him. The 2nd appellant also gave a defence which was ignored by both courts below and in our view it called for a re-evaluation. The 2nd appellant alleged there was a grudge between him and the complainant over his wife whom the complainant transported in his vehicle when they disagreed. This defence coupled with the mysteries around the arrest of the 2nd appellant leaves some doubts in our minds that would lend credence to the submission that the 2nd appellant was perhaps a mere suspect.

[25] In regard to the ground of appeal that the charge sheet was defective for omitting the section of the law that defines the offence of robbery with violence and merely cited **section 296 (2)** which prescribes the punishment. This was addressed by the learned trial magistrate but just as an obiter dictum when he stated in his judgement that;

“...the statement of the charge as drawn is faulty. The offence of robbery with violence is created by section 295 and section 296 (1) and 296 (2) of the penal code only offer punishment for the offence of robbery with violence.”

He went on to conclude that the drafting error was not fatal to the case, the judges of the High Court did not address this issue specifically but it seems they were of view that the appellants effectively participated in the trial. On our part, we are of the view that the particulars of the offence disclosed the offence was committed and violence was meted out on the complainant. Also the evidence adduced clearly demonstrated the offence of robbery was committed with violence. For this reason we find the appellants were not subjected to any prejudice.

[26] For the aforementioned reasons, we find the High Court Judges failed in their duty of re-evaluating the evidence of identification especially how the evidence of identification of the 2nd appellant led to his arrest in Ruiru; there was no connection between the report of the offence and the arrest; the evidence of identification of both appellants by a sole identifying witness was not subjected to scrutiny. Accordingly, we find merit in this appeal which we allow. The convictions of the 1st and 2nd appellants are hereby quashed and the death sentences set aside. Unless the 1st and 2nd appellants are otherwise lawfully held, they are to be set at liberty forthwith.

Dated and delivered at Nairobi this 19th day of May, 2016.

E.M. GITHINJI

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JUDGES OF APPEAL

M.K. KOOME

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JUDGES OF APPEAL

H.M. OKWENGU

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JUDGES OF APPEAL

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

DEPUTY REGISTRAR