



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A., VISRAM & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 69 OF 2015

BETWEEN

SIMON NDICHU KAHORO.....APPELLANT

AND

REPUBLIC..... RESPONDENT

*(An appeal against Conviction and Sentence from the Judgment of the High Court of Kenya at Nairobi
(Mwongo & Achode, JJ.) dated 25th November, 2013*

in

H.C. Cr. A. No. 45 of 2012)

JUDGMENT OF THE COURT

[1] The appellant, **Simon Ndichu Kahoro**, ("**Ndichu**" or "**appellant**"), comes before us on a second appeal against his conviction on one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It had been alleged that on the 10th day of October, 2010, at Kiguthi Village in Gatundu South within Kiambu County, the appellant, while armed with a dangerous weapon namely, a knife, robbed **Boru Abdudi Wario**, ("**Wario**" or "**Complainant**"), of his cash sum of Kshs. 3,000/=, and at the time of such robbery used physical violence to the said Ndichu. Upon his conviction, the appellant was sentenced to death. His appeal to the High Court was dismissed, hence this appeal.

[2] As this is a second appeal, only matters of law may be raised - see **Section 361** of the **Criminal Procedure Code**. We have said so in many of our decisions, including the case of **Mriungi -v- Republic**, [1983] KLR 455, where the following passage is found: -

"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts 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 decision of the trial or first appellant court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion, which would be the same thing as holding that the decision is bad in law".

[3] The issues of law raised in the home made memorandum of appeal and which were argued before us by learned counsel, **Mr. Mungatana**, for the appellant, are twofold:

1. ***That the High Court failed to apply Section 77 (1) of the retired Constitution now incorporated in Article 50 (1) and (2) (c) of the Constitution, 2010.***
2. ***That the High Court failed to observe that the weapon allegedly used by the assailant was not positively identified.***

[4] We shall carefully examine these two grounds presently but first, we would like to consider the concurrent findings of fact made by the two courts below.

Wario (PW 1), at the material time was a hawker in clothes, in Thika and Gatundu areas of Kiambu County. On 10th October, 2010, at a time he did not state, he was on Kagira road in Gatundu when he saw the appellant talking to a lady. He greeted the appellant and moved on. The appellant followed **Wario** and threatened him with a knife. He held **Wario** by his collar and stole Kshs. 3,000/=, which was in his pocket. **Wario** ran away as he screamed with the appellant in hot pursuit. The screams attracted workers from a nearby construction site who went to his rescue. They gave chase but the appellant escaped.

0. In his testimony, **Wario** continued as follows:

"We then reported to police. We returned with police officer, some fundis had known him, so when police came to the scene, we began searching for the accused person. Later, police went into the bush and arrested the accused person. He still had the knife MFI - 1, this is the knife the accused attempted to knife me with. So, the accused person was arrested. I later recorded my statement with police officer. I had known the accused person before on that road. When the accused ran away, I inquired from neighbours and they told [me] he is called Ndichu, he [is] the one in the dock."

(Underlining supplied).

[6] **Wario** was not alone in the hawking business in Gatundu area. **Abdul Wario Boru, (PW 2)**, ("**Boru**") was also a hawker in clothes in the area like **Wario**. On the material date, again at a time he did not specify, as he was carrying on with his trade, he heard people shouting and went to the scene to investigate. He found **Wario** running away who told him that he had been robbed by a person who knifed him and had escaped. **Boru** with other members of the public searched for the assailant to no avail. The two **Warios** then went to report the attack to Kingongo Police Patrol Base. The duo returned with police officers who took over the search. According to **Boru**, it was later that the police arrested the appellant from his hide out.

0. **PC Peter Omuga, (PW 3), (PC Omuga)**, is the police officer who received the report of the robbery. He visited the scene with **PC Simatwa (PW 4)(PC Simatwa)**. The duo accompanied **Wario** to the home of the appellant where they were informed that the appellant had gone to a coffee plantation. The police officers went into the coffee plantation and found the appellant and arrested him. The appellant had a knife on him.
0. In his defence, which was unsworn, the appellant denied committing the offence charged. He alleged that on the material day, he was at home with his child when his family went to church. At some stage, he left his home to get fodder for his goat from his piece of land where he was arrested by police officers.
0. The learned Chief Magistrate at Thika, **B. J. Ndeda**, in a two-page judgment, convicted the appellant as charged and sentenced him to death as already stated. In doing so, the trial magistrate stated that he found the prosecution witnesses credible and believable and that **Wario's** testimony was corroborated by **Boru's**.

0. In his first appeal to the High Court, the appellant complained that **Wario's** identification was mistaken; that his possession of a knife was innocent; that he was a victim of circumstances; that essential witnesses were not called; that **Section 215** of the **Criminal Procedure Code** was not complied with; that he was tried while sick and that his defence was rejected without reason.

[11] In a reserved judgment, the High Court (**Mwongo and Achode, JJ.**), dismissed the appeal as already stated.

0. Before us, the appellant through his counsel, **Mr. Mungatana**, relied upon the grounds of appeal contained in the Memorandum of Appeal filed by the appellant in person on 23rd December, 2013. Learned counsel, however, abandoned grounds 1, 3 and 4 and canvassed grounds 2 and 5. In arguing those grounds, **Mr. Mungatana** submitted that the trial was conducted in breach of **Section 77 (1)** of the retired **Constitution** i.e. in breach of the appellant's rights as to a fair trial. Those rights are now enshrined in **Article 50 (1) 2 (c)** and **(j)** of the **Constitution - 2010**.
0. **Mr. Omirera**, the learned Assistant Director of Public Prosecution, who appeared for the State, in opposing the appeal, submitted that the evidence of identification was positive as **Wario** knew the appellant and further that he was arrested soon after the attack on **Wario** and was in possession of the knife he had used in the attack which knife **Wario** identified. With regard to the complaint regarding breach of rights to fair trial, **Mr. Omirera** submitted that the same had not caused any prejudice to the appellant. Learned counsel, therefore, urged us to dismiss the appeal.
0. We have anxiously considered the record, the able submissions of learned counsel; the evidence which was adduced at the trial; the judgments of the trial court and the first appellate court and the applicable law. We propose to consider the twin complaints of the appellant seriatim.
0. We have perused the record and observe that before the prosecution case commenced, the appellant applied for copies of witness statements. That was on 10th February, 2010. The appellant was also indisposed and the trial magistrate ordered that he be taken to hospital and that witness statements be supplied to him.
0. The record shows that notwithstanding the two orders of the trial magistrate, the prosecution immediately called three of its witnesses to testify and they did, indeed, testify. The witnesses included **Wario, Boru** and **PC Omuga**. The only witness whose testimony was not taken then was PC Simatwa. In reality, therefore, almost the entire evidence of the prosecution was taken without their witness' statements being furnished to the appellant and while the appellant was indisposed.
0. This record does not have the written submissions the appellant made before the trial court and the trial magistrate made no mention of the same. The appellant was not represented at the trial and at the High Court. He does not appear to have challenged the prosecution's failure to disclose their evidence prior to the hearing and proceeding with the trial while he was indisposed in his memorandum of appeal. He did, however, make the complaint in his written submissions. The High Court should, in our view, have granted him leave to file a supplementary memorandum of appeal to incorporate those complaints.
0. One aspect of this complaint was, however, considered by the High Court. That is the failure to furnish the appellant with witness' statements prior to the hearing. The learned Judges of the High Court concluded that the appellant suffered no prejudice because of that failure. The learned Judges were of that view because:

"The cross-examination clearly appears to have been intended to challenge the accuracy and credibility of the prosecution witnesses, in relation to the offence with which the appellant was charged".

[19] **Article 50 (1)** of the **Constitution, 2010** provides:-

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

And **Sub-Article 2 (c) and (i)** are in the following terms: -

2. Every accused person has the right to a fair trial, which includes the right -

.....

(c) To have adequate time and facilities to prepare a defence".

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence".

[20] Our perusal of the record shows that on the first date the appellant appeared in court on 13th October, 2010, the trial magistrate ordered that the appellant be supplied with witness statements and a copy of the charge sheet. The appellant was also indisposed and applied to be taken for treatment which application was allowed. The case was then fixed for hearing on 10th December, 2010. The appellant then informed the court:

"I need witness statement".

The trial magistrate made the following orders:

"Court: Accused to be furnished with witness statement.

B. J. NDEDA

S.R.M.

10/12/10

Court: Accused is unwell.

Court: Accused to be taken to hospital for treatment.

B. J. NDEDA

S.R.M.

10/12/10".

[21] The record does not reflect that the appellant was then furnished with the witness statements or taken for treatment before the hearing commenced. The record, in fact, shows that soon after the trial magistrate made those orders, the hearing commenced and three prosecution witnesses testified: **Wario, Boru** and **PC Omuga**. Only one prosecution witness remained, **PC Simatwa**. That witness, when he finally testified on 29th June, 2011, gave evidence that was similar to that of **PC Omuga**. In reality, therefore, the entire prosecution case was completed before the appellant was furnished with witness statements and when he was indisposed. There was, therefore, clear breach of the provisions of **Article 50 (2) (c) and (j)** of the **Constitution, 2010**.

[22] All Constitutional provisions are important. **Article 50** enshrines right to fair trial under the **Bill of Rights**. It is our duty as Judges to whom the people of Kenya rely to protect their rights and fundamental freedoms to live upto their expectations. It is not lost to us that the right to a fair trial is

one of the fundamental rights and freedoms which may not be limited by virtue of the provisions of **Article 25 (c)** of the same **Constitution**. We do not think for a moment that the fact that the appellant cross-examined the witnesses cured the breach of his said rights. After all, the right to cross-examine is itself an independent right by virtue of **sub-article 2(k)** of **Article 50**.

0. We are unable to appreciate the want of prejudice the learned Judges of the High Court had in mind as they were considering an appeal from a conviction for a capital offence and the appellant had been sentenced to death. What prejudice is more grave? We emphasize that Constitutional provisions are not cosmetic artifacts?

It is also illustrative that the learned Judges made no mention of the prejudice which would be visited upon the appellant when the prosecution proceeded when he was sick. In the premises, in our view, and with all due respect to the learned Judges of the High Court, a clear case was made out with regard to breach of **Article 50 (2) (c)** and **(j)** of the **Constitution, 2010**.

0. The second complaint was argued by **Mr. Mungatana** in a rather interesting way. Learned counsel submitted that the weapon (*knife*) allegedly used in the attack upon the complainant was not positively identified. This complaint in reality is a challenge against the evidence of identification. It is, indeed, in that light that

Mr. Omirera approached the complaint when he addressed us on the issue of identification. We, therefore, propose to consider whether the appellant was properly identified within the standards required in law as the person who attacked **Wario**.

[25] It is not clear from the record as to the time the offence occurred but it is not in contention that it was during the day. However, only **Wario** allegedly identified the appellant during the alleged attack. This was not a case where **Wario**, the sole identifying witness, arrested and detained the appellant, nor was it a case where he chased the appellant throughout till the appellant was arrested without losing sight of him at any time. This was a case where **Wario**, having been attacked, first made enquiries from local people about the attacker and on being given the name

"*Ndichu*" went to report to Kigongo Police Patrol Base after the attacker had escaped.

0. After the report, police officers, **PC Omuga** and **PC Simatwa** accompanied him to the scene. Subsequent events after the visit to the scene are of significance. According to **Wario**, when the police arrived at the scene, their immediate search yielded no results. It is later that the police officers "*went into the bush and arrested the accused (appellant)*". **Wario** did not specify how long it took the police officers to apprehend the appellant. It is, however, significant that he did not accompany the police officers during the search which resulted in the appellant's arrest. **Wario** did not also mention going to the appellant's home.
0. **Wario's** testimony was not on all fours with that of **PC Omuga** and **PC Simatwa**. **PC Omuga** testified that from the scene, they went to the complainant's house in the company of **Wario** where they were informed that the appellant had gone to his coffee plantation. On his part, **PC Simatwa** did not mention that they went to the appellant's home before arresting him in the coffee plantation. The common feature, however, is that **PC Omuga** and **PC Simatwa** were not accompanied by **Wario** when they arrested the appellant in the bush or in the coffee plantation.

[28] It is not in contention that the two police officers did not know the appellant prior to his arrest. So, how did they identify him when they arrested him? The scenario is compounded by what **PC Simatwa** stated in cross-examination by the appellant. In his own words:

"Complainant came at around 11:05 and whoever told us he saw you rob the complainant and even directed us did not record statement". (Emphasis ours).

So, the person who identified the appellant to **PC Omuga** and **PC Simatwa** during his arrest neither

recorded a statement not testified at the trial. The trial court and the first appellate court may have felt this was a straight forward case of identification by recognition. With respect, however, on a proper analysis and evaluation, more serious aspects of the case needed to be considered before the identification of the appellant was accepted as being beyond reasonable doubt. Another way of putting the matter is that the evidence on identification needed to be considered with greater care than was done here.

[30] The law as regards the standard to be applied when considering a case based on identification where the accused person denies the identification is now well settled. In *Roria -v- R.*, [1967] EA 383, the Predecessor of this Court stated, inter alia, (as per *Sir Clement de Lestang, V.P.*), as follows:

"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 Section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the courts 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 of ten-if there are as many as ten - it is in a question of identity".

[31] We adopt those sentiments, hence the necessity to examine evidence of identification of an accused person with the greatest care to avoid a situation where an innocent person is convicted merely because of evidence of a witness who may be honest but, nonetheless, mistaken on his identification of the accused person. In the case of *Kamau -v-R.*, [1975] EA 139, it was stated:

"The most honest of witnesses can be mistaken when it comes to identification".

[32] Further afield, there is the English case of *R -v- Turnbull and Others*, [1976] 3 All ER 549, where *Lord Widgery, C.J.* stated:

"First, whenever 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 on 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 it elapsed between the 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 witnesses when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such description, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

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.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger".

(Underlining ours).

[33] The above is a mouthful but is relevant to the matter in issue in this appeal. The above quotation from **Lord Widgery, C.J.** sets out matters which a trial court and the first appellate court need to take into account as they consider evidence on identification. It is only after such examination that the court can feel safe to convict at the trial level and to confirm the conviction based on identification at the first appellate level. The sentiments expressed by **Lord Widgery, C.J.**, aforesaid, have been accepted in our jurisdiction. See, for example, the case of **Francis Kariuki Njiru & 7 Others -v- R., (Criminal Appeal No. 6 of 2007), (UR)**, where we said:

"The law on identification is well settled and this Court has from time to time said that the evidence of identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See R -v- Turnbull, (1976) 63, Cr. Appeal R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court in Mohamed Elibite Hibuya & Another -v- R. (Criminal Appeal No. 22 of 1996 (unreported) held that:

"It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the suspicions details regarding his features given to any one and particularly to the police at first opportunity".

[34] In our view, we think the appellant's complaint regarding his alleged identification by **Wario** is not without merit when the law in respect of the standards required as stated in the above cases is considered. The two courts below accepted without scrutiny the evidence of **Wario** on the identification of the appellant. They accepted **Wario's** alleged recognition on his mere saying so. We say so, because neither of the courts carried out the analysis we have ourselves undertaken. To augment, this point further, let us look at **Wario's** own alleged knowledge of the appellant. When the appellant challenged him regarding the alleged recognition, he stated in cross-examination as follows:

"I had known you, I had seen your face before, it's God who saved me..."

0. **Wario** did not testify that he had known the appellant's name before the attack. He did not say for how long he had known the appellant's face and in what circumstances. He had not even described the appellant to the police officers before the arrest was effected. He did not also state how often he had seen the appellant's face and what special features about him made him remember him. He did not state when he had last seen the appellant before the attack.
0. The appellant faced a capital offence which in itself required of the two courts below an in-depth scrutiny of **Wario's** testimony on identification. That, with respect, was not done. In a two page judgment, the trial court accepted, on its face value, **Wario's** evidence of recognition which finding was also accepted without any in-depth analysis by the learned Judges of the High Court.
0. We think we have said enough to show that the identification of the appellant was not free from the possibility of error.

Before penning off, we feel impelled to clarify a likely misapprehension of our finding regarding

infringement of the appellant's right to fair trial under **Article 50**

2. (c) and (j) of the **Constitution, 2010**.

0. We should not be understood to be setting up a general principle or precedent that every breach of **Article 50** of the **Constitution, 2010** should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case.
0. In this case, however, the upshot of the totality of our assessment is that this appeal has merit. We allow it, quash the conviction and set aside the sentence of death imposed upon the appellant. The appellant is set at liberty unless otherwise lawfully held.

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

P. KIHARA KARIUKI - P.C.A.

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR