



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

CORAM: VISRAM, KOOME & ODEK, JJ.)

CRIMINAL APPEAL NO. 28 OF 2013

BETWEEN

DOUGLAS KINYUA NJERU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Muga Apondi

& Makau, JJ.) dated 18th December, 2012

in

H.C.CR.A No. 119B of 2010)

JUDGMENT OF THE COURT

1. The appellant was charged with four counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in Principal Magistrate's Court at Chuka.

2. The particulars of the first count were that on 26th May, 2009 at Chuka Township in Meru South within the then Eastern Province, the appellant with others not before the court while armed with dangerous weapons namely two sterling SMG guns and Somali swords robbed Eliud Gitonga of cash Kshs. 70,000/= and immediately before or immediately after such robbery threatened to use actual violence to the said Eliud Gitonga. On the second count the particulars were that on the above mentioned date and place, the appellant jointly with others not before the court while armed with the above mentioned dangerous weapons robbed Elisio Mugambi Kathai of cash Kshs. 20,000/= and a mobile phone make Nokia 2300 valued at Kshs. 5,500 and immediately before or immediately after such robbery threatened to use actual violence to the said Elisio Mugambi Kathai.

3. The particulars of the third count were that on the above mentioned date and place, the appellant jointly with others not before the court while armed with the above mentioned dangerous weapons robbed Moses Kimathi Murungi of his mobile phone make Motorola W180 valued at Kshs. 7,500 and immediately

before or immediately after such robbery threatened to use actual violence to the said Moses Kimathi Murungi. The particulars of the fourth count were that on the above mentioned date and place, the appellant jointly with others not before the court while armed with the above mentioned dangerous weapons robbed Stephen Mugambi Nyaga of his mobile phone make Nokia 1100 valued at Kshs. 5, 200 and cash Kshs. 2,000/= all valued at Kshs. 7,200 and immediately before or immediately after such robbery threatened to use actual violence to the said Stephen Mugambi Nyaga.

4. The appellant pleaded not guilty to all counts and the prosecution called a total of 10 witnesses. It was the prosecution's case that on 26th May, 2009 at around 7:00 p.m. a gang of robbers invaded and robbed several businesses in Chuka Town. On the material day while PW2, Moses Kimathi (Moses) was in his shop two young men dressed in long black coats came and ordered Moses and his customers to lie down. Sensing that some of the customers were hesitant one of the robbers pointed a gun at them and they complied. With the aid of the electricity lights that were inside and security lights which were outside the shop Moses was able to see the robbers. After the robbers left Moses noticed that Kshs. 75,000/= was missing from the till.

5. PW8, Negus Muciri Suverino (Negus), was accosted in his shop by three robbers who stole Kshs. 15,000/=. According to Negus one of the robbers was dressed in police attire. Thereafter, while PW1, Elisio Mugambi Kathia (Elisio) was in his butchery he saw six men who had worn rain coats at a distance of 7meters from his butchery; one of the men suddenly removed a gun and shot in the air three times. Three of the robbers entered the butchery and stole Kshs. 20,000/= and a mobile phone from Elisio.

6. Meanwhile PW3, Stephen Mugambi Nyaga (Stephen) thought that the first gunshot was a tyre bust and he came out of his shop to find out what was happening. After the second and third shots were fired Stephen ran back to his shop where he was ordered by one of the robbers to surrender. Stephen was able to get a good impression of the said robber who was then facing him. Stephen was robbed of Kshs. 1,000/= and his mobile phone.

7. After the robbers left members of public discovered that PW7, Alexander Kinyua Kathuni (Alexander) had been shot and he was rushed to hospital. The incident was reported to the police who visited the scene on the material day. Thereafter on the same day the police carried out a man hunt for the said robbers who had fled on foot and put up road blocks on various roads. At the Chuka/Embu highway police officers stopped a matatu and searched it; PW9, SGT Silas Kubai (SGT Silas) noticed that two passengers in the said matatu appeared anxious. One of the passengers was the appellant. After searching them the police found money wrapped in polythene papers hidden inside their inner pants. The appellant had Kshs. 5,310/= while the other passenger had Kshs. 5,500/=. The said passengers were unable to give an explanation of possession of the said money. SGT Silas arrested the said passengers. The following day an identification parade was conducted and only Moses and Stephen were able to pick out the appellant as one of the robbers.

8. In his defence the appellant gave a sworn statement. He denied committing any of the offences he was charged with. He testified that he was arrested on 13th May, 2009 and not on 27th May, 2009. On the day he was arrested he had boarded a matatu heading to Meru via Embu; after paying his fare he was left with Kshs. 5,310/=. While on their way the matatu was stopped by police officers and he was arrested. He was later charged with the aforementioned offences.

9. At the conclusion of the trial the trial court convicted the appellant of the four counts of robbery with violence and sentenced him to death. Aggrieved with both the conviction and sentence the appellant filed an appeal in the High Court. The High Court vide a judgment dated 18th December, 2012 set aside the appellant's conviction in respect of the first and second counts of robbery with violence and upheld the appellant's conviction in respect of the third and fourth counts. The High Court also upheld the death sentence. It is that decision that has provoked this appeal based on the following grounds:-

- ***The learned Judges erred in law in finding that there was proper identification based on the identification parade.***

- ***The learned Judges erred in law in not finding that the appellant’s fundamental right to a fair trial was breached in that he was not informed of his right to representation by an advocate.***
- ***The learned Judges erred in law by upholding the conviction against the appellant by the trial court which conviction was arrived at in total disregard of the defence raised by the appellant.***

10. Miss Thibaru, learned counsel for the appellant, faulted the identification parade that was carried out. She submitted that the parade was not properly conducted because the members of the parade were not of similar height and features. She argued that PW2 (Moses) was only able to pick the appellant from parade since he was the shortest; PW3 (Stephen) recorded his statement after participating in the parade contrary to the law. According to her, the identification of the appellant was dock identification and the same was worthless. Miss Thibaru further submitted that the appellant’s right to a fair trial had been infringed since he was not afforded legal representation by the State as required under **Article 50** of the **Constitution**. She urged us to allow the appeal.

11. Mr. Mungai, the prosecuting counsel, in opposing the appeal submitted that the appellant’s conviction was also based on recovery of the firearm. He argued that the identification parade was comprised of people of similar height to the appellant; the parade was conducted a day after the incident when the appellant was positively identified. Mr. Mungai submitted that witnesses had given the description of the appellant in their initial reports; he was light skinned. On the issue of violation of the appellant’s right to representation, he contended that the same was never raised in the High Court, the appellant also did not apply for legal representation and that the appellant’s trial took place under the former Constitution. He urged us to dismiss the appeal.

12. This is a second appeal and this Court by dint of Section 361 of the Criminal Procedure Code is restricted to delve on matters of law only. In **Karingo –vs- Republic (1982) KLR 213**, this Court at page 219 stated:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja –vs- R (1956) 17 EACA 146)”

13. On the alleged violation of the appellant’s rights, the issue that arises for consideration is whether the appellant was entitled, as of right, to legal representation at the state’s expense. If so, whether the rights of the appellant, who was not represented by counsel at the trial, were violated.

14. The appellant's trial took place between the year 2009 and 2010 under the former Constitution. Section 77 of the former Constitution provided in part as follows:-

“77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law

(2) Every person who is charged with a criminal offence

.....

(a) shall be given adequate time and facilities for the preparation of his defence;

.....

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses

called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

.....

(14) Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense. *Emphasis added.*

Based on the foregoing an accused person was not entitled to legal representation at the State's expense under the former Constitution. In *Charo Karisa Thoya –vs- Republic- Criminal Appeal No. 274 of 2002*, it was held:-

“As we have indicated before, in so far as the appellant before this Court is concerned, his trial took place under the old Constitution and he would not be entitled to free legal representation during the trial.”

15. However, the right to legal representation at the State's expense is provided under **Article 50** of the current Constitution which provides in part:-

“Article 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.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) ...

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;...”
Emphasis added.

16. This Court while considering the importance of legal representation in the *David Njoroge Macharia –vs- Republic - -Criminal Appeal No. 497 of 2007* expressed itself as herein under :-

“The counsel’s role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact, sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel’s participation was succinctly articulated by Lord Denning in his decision in Pett –vs- Greyhound Racing Association (1968) 2 All E.R 545, at 549. He had this to say:

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”

The right to legal representation is integral to the realization of a fair trial more so in capital offences.

17. In *David Njoroge Macharia –vs- Republic (supra)* this Court held,

“Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

Under the current **Constitution** an accused person is entitled to legal representation at the State's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the **David Njoroge Macharia –vs- Republic (supra)** the **Constitution** does not set out what constitutes substantial injustice. Chapter 18 (transitional & consequential provisions) of the current **Constitution** places an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under **Article 50** within four years of the promulgation of the **Constitution**. It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. Whereas it was the intention of the framers of the **Constitution** that there be a right to legal representation we appreciate that the same can only be achieved progressively. Bearing the foregoing in mind we implore Parliament to enact the relevant legislation.

18. We have perused the record and we cannot find any evidence that a firearm was recovered in the appellant's possession as alleged by Mr. Mungai. The only evidence that was against the appellant was that of identification. Both lower courts made concurrent findings that the appellant was positively identified as one of the robbers. Therefore, before we can interfere with the said findings we must be satisfied that there was no basis from the evidence on record for such findings. Time and time again this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the 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?”

19. In this case both Moses and Stephen testified that they did not know the appellant prior to the incident; they were able to identify him with the aid of electricity lights that were inside their various shops and the security lights that were outside. They were both able to get good impressions of the appellant's physical attributes during the incident hence they were able to positively identify the appellant in the identification parade. The appellant faults the said identification parade on several fronts. Firstly, the appellant contends that the parade was irregular because it was not preceded with the witnesses giving a description of the assailants. Secondly, the members of the parade were not similar to the appellant in height and complexion.

20. Identification parades are meant to test the correctness of a witness's identification of a suspect. See

this Court's decision in *John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68 & 69 of 2008*. In *Mwangi Mahita –vs- Republic (1976-80) 1KLR 153* this Court held,

“Whether or not a parade is so irregular as to necessitate being disregarded is, in our view, a question of degree which has to be decided in the light of the circumstances of each case.”

21. During cross examination Moses testified that though he had given the description of the appellant to the police the said description was not indicated in his initial report. Stephen testified that when he went to record his statement he was informed that suspects had been arrested and was requested to participate in an identification parade. He testified that he recorded his statement after he identified the appellant from the identification parade. Based on the foregoing there is no evidence that the said witnesses gave the appellant's description prior to the identification parade.

22. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In *Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008* this Court faced with a similar situation expressed itself as follows:-

“As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness ‘SHOULD’ be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

23. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence.

24. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in *David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-*

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic

[1986] KLR 422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

25. PW4, SP Morris Asila (SP Morris), gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; the parade comprised of members of similar height and complexion. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identification parade was properly conducted. We note that the identification parade was conducted a day after the incident while the impressions of the assailants were still fresh in the complainants minds. We find that the identification evidence was safe and free from error.

26. We find that the evidence tendered by the prosecution was overwhelming and pointed towards the appellant’s guilt. Therefore, we concur with both lower courts that the appellant’s defence was displaced by the evidence on record.

27. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed. Given that this Judgment raises a constitutional issue in respect of realization of the right of an accused person to legal representation, we direct the Deputy Registrar of this Court to formally serve a copy of this Judgment to the Hon. the Attorney General, the Constitutional Implementation Committee and the Law Reform Commission for their records and necessary action, as may be appropriate.

Dated and delivered at Meru this 26th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGE OF APPEAL