



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CRIMINAL APPEAL NO. 90 OF 2014

BETWEEN

PATRICK NGUNJIRI KARIUKI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Nyeri (Ougo, Abuodha, JJ.) dated 6th November, 2013

in

H. C. CR. A. No. 273 of 2008)

JUDGMENT OF THE COURT

1. A multiplicity of five accused persons and no less than six main counts of robbery with violence contrary to **Section 296 (2)** of the **Penal code**, two main counts of being in possession of firearms and ammunition without a licence contrary to **Section 4** of the **Firearms Act**, and two alternative counts of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code** were placed before the Chief Magistrate’s court at Nyeri in May 2006. After the trial, however, only the appellant now before us, **Patrick Ngunjiri Kariuki**, was convicted on four of the main counts of robbery with violence and one of his co-accused was convicted for unlawful possession of two AK 47 rifles and 22 rounds of ammunition without a licence. The rest were acquitted at the trial, either because the complainants did not testify or because the police did not adduce “*sufficient or proper*” evidence to connect them with the offences charged. The conviction of the appellant was based on his identification by a single witness and in his appeal he challenges that concurrent findings by the two courts below. We shall revert to that evidence and the challenge to it, presently.
2. On the 13th July 2006, at about 8.00 am, a bread van belonging to M/s Tosti Bakery of Nakuru was heading to Nyeri along the Nyeri-Nyahururu road, when at a point near Solio ranch in Mweiga, the three occupants in the vehicle were ambushed by a gang of robbers who had parked their own vehicle on the side of the main road. According to PW1, there were three robbers, two of whom wore masks and held rifles while one was not masked. However, the driver of the van, PW2, saw four robbers, two of whom wore masks and held rifles while two were unmasked. The

third passenger did not testify. The three occupants were ordered out of their vehicle at gun point. They were stripped of their phones and whatever cash they had and were locked up at the rear of the van. None of them was able to identify any of the attackers.

3. At about the same time, a saloon car came along and was stopped at the same spot. The driver was PW3 who saw two masked men with AK 47 rifles who ordered him to stop and when he did they took away his phone and cash. His other passengers were his wife, PW5, and his son. They were also stripped of their phones and cash before all three were herded into the van and locked up together with the earlier victims. PW3 was unable to identify any of the attackers and the son was not called as a witness. The wife, **Purity Wanjiru** (PW5), testified that apart from the two masked robbers who approached their car and robbed them, she saw a third robber as she entered the van who abused her and took Shs. 200 from her handbag before shoving her into the van. That robber was not masked and she identified him as the appellant. The robbers drove off in PW3's car which had other personal effects and clothes. About thirty minutes later, the six victims were rescued by the police.
4. Five days later, on 18th July 2006, Police officers from Nyeri CID office, among them PW6, raided several houses at Blue Valley and King'ong'o areas in Nyeri town and recovered many items and various firearms. Some of the items were identified by the victims as theirs. None of the houses was proved to belong to the appellant and therefore he was not in possession of any stolen item or firearm. PW3's stolen car was also recovered and taken to Nyeri police station together with some of the stolen property but it is not clear where or how it was recovered as there was no evidence adduced from the Investigating officer. The appellant was arrested on 19th July, 2006 along the Nyeri/Kamakwa road following a tip-off from an informer who remained anonymous.
5. In his defence, the appellant pleaded an *alibi* and testified on oath that he was nowhere near the scene of crime on 13th July 2006 as he was in Mombasa. He did not know any of his co-accuseds and never had possession of any of the items and firearms produced in evidence. He also complained that he had been unlawfully detained by the police for 17 days before he was brought to court. He was not cross examined on that evidence.
6. As stated earlier, only the appellant was convicted on the robbery charges. The trial court was persuaded that PW5 positively identified the appellant describing him as '*chocolate in colour*'. The court's finding was as follows:-

“Accused No 1 was positively identified at the scene of crime by PW5. The conditions for identification by a single witness was favourable since the offence took place in broad day light. PW5 saw the accused No 1 physically at the scene and infact accused No 1 demanded Kshs 200/- from PW5 at the scene. There was no chance for a mistaken identity.”

7. Upon re-evaluation of that evidence, the High court stated as follows:-

“It emerges from the testimony of PW5 that she was positive that she saw the appellant at the scene of the robbery and actually it is the appellant who robbed her of 200 shillings and abused her. It is however not clear in her evidence if she was called by the police to identify the appellant when he was arrested. No evidence is on record if any identification parade was ever conducted. In the circumstances PW5's identification of the appellant would appear to us to be dock identification.”

8. Despite that finding, the court upheld the identification on the authority of this Court's decision in **Muiruri & Two others v. R [2002] 1 KLR 274** that dock identification was not entirely worthless. The High Court held:-

“From the foregoing, it is clear to us that the trial magistrate was alive to the fact that he was relying on the evidence of a single identification witness and was persuaded that the circumstances were favourable for identification. It can therefore be said as it were that PW5 was not meeting the appellant for the first time in court for it to qualify as dock identification. In any event, as the Court of Appeal observed in Muiruri's case

cited above, not all dock identification are worthless and cannot be relied upon.”

9. On the appellant’s *alibi* defence, the trial court stated as follows:-

“The defence of accused no. 1(the appellant) was in form of an alibi that he, accused No 1 was not at the scene of crime and that he was away in Mombasa. The defence of accused No 1 was however lacking in both the evidential and for(sic) persuasive value. Accused No 1 did not call witness in support of his defence.”

10. In its re-evaluation of that finding, the High court simply agreed with the trial court that *“the alibi defence was lacking in both evidential and persuasive value as the appellant never called any witness in support of his alibi defence”*.

11. Those are the main issues raised by the appellant in his six grounds of appeal argued by learned counsel **Mr. Moragia Ogaro**. Before we examine the submissions on the main issues, we note that Mr. Ogaro argued one ground of appeal contending that the appellant was not found in possession of any weapon or ammunition. With respect, we can find no basis for such submission. On our reading of the record, the appellant was not charged with possession of any weapon or ammunition. Only two accused persons, **“David Kagaita Wanjohi”** and **“Danson Kambo Wanjiru”** were charged with possession of 2 AK 47 Rifles and 22 rounds of ammunition. The trial court exonerated David Kagaita Wanjohi but convicted Danson Kambo Wanjiru who had pleaded that he was in the house of the appellant when the firearms and ammunition were recovered therefrom by the police. In convicting Danson, the trial court found that there was no evidence that the house in which he was found belonged to the appellant. David’s defence was found to have *“no evidential or persuasive value.”* The ground of appeal therefore has no relevance and we ignore it.

12. On the identification issue, Mr. Ogaro submitted that the finding that it was proper was wrong. He referred to the evidence of PW3 who said three robbers were masked and wondered how PW5 could have identified the appellant when none of the other five victims could. He submitted that there was no evidence on how long PW5 saw the appellant and that there was no description of the appellant given to the police in the first report. To make it worse, no identification parade was held to test the identification of PW5 at the scene of crime. Finally, counsel submitted that it was incumbent on the two courts below to warn themselves about reliance on the evidence of a single witness on identification before accepting it, citing for that proposition the cases of **Maitanyi v. Republic [1986] KLR 198**, **Daniel Kimayi Kamau v. Republic, Cr. App. No.104 of 2013 (UR)** and **Stephen Ngungu Maina v. Republic Cr. App. No. 147 of 2005 (UR)**.

13. In response to those submissions, learned Assistant Director of Public Prosecution **Mr. Kaigai** supported the findings of the two courts below on their appreciation of the sole evidence on identification by PW5. That is because the witness took time with the appellant when he was asking her for money and was able to have a good look at him. He conceded that it was desirable to hold an identification parade when the appellant was arrested six days later, but in his view, this was not fatal since dock identification was equally good. As for the submission that the two courts did not warn themselves before relying on the evidence of PW5, Mr. Kaigai submitted that it was a rule of practice and not a requirement of law. The most important finding was that both courts were convinced about the identification.

14. As regards the defence of *alibi*, Mr Ogaro submitted that the two courts below required the appellant to have proved it which was the wrong approach. He cited the case of **Wang’ombe v. Republic [1980] KLR 149** where the court emphasized that:

“if an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution.”

Mr Kaigai did not respond to that issue.

15. We have anxiously considered the two issues on identification and *alibi* defence. They are both issues of law which fall within the jurisdiction of the Court on second appeal under **Section 361** of

the **Criminal Procedure Code**. On matters of fact, this Court will defer to the two courts below unless the findings were not based on any evidence, or on a misapprehension of the evidence, or it is shown demonstrably that the courts acted on the wrong principles in making the findings. See **Chemagong v. Republic [1984] KLR 213**. We shall also be mindful that we did not see or hear the witnesses testify and give allowance for any findings on credibility made by the trial court which had that advantage.

16. We shall first dispose of the issue of *alibi* defence. As correctly submitted by Mr. Ogaro, no burden of proof lies with an accused person who raises a defence of *alibi* and there is no dearth of authority on that proposition. We take it from **Saidi –vs- R [1963] EA 6** which was decided more than half a century ago:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”

17. In an equally old Ugandan case which has been followed by the courts in this country for half a century, **Sekitoleko –vs- Uganda [1967] EA 531**, the Chief Justice, Sir Udo Udoma had this to say in relation to *alibi* evidence:

“(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R.v. Johnson, [1961] 3 All E.R. 969 applied; Leonard Aniseth v. Republic [1963] E.A 206 followed);

(ii) the burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself”

18. With such a long track record of decisions, one wonders whether the decisions of this court percolate to those in the criminal justice system who enforce the law, including police investigators, prosecutors and courts of first instance. Be that as it may, it bears repeating that the shifting of the burden of proving an *alibi* defence is erroneous in law and in this case the two courts below fell into that error. It would be speculative to determine what conclusion the two courts would have arrived had they followed the right procedure on the matter and we will not hazard one. The appeal on that ground is allowed.

19. As for identification, we shall precede our decision with the observation that this case was not only poorly investigated but prosecuted with laxity. Some complainants were not called leading to acquittals under **Section 215** of the **Criminal Procedure Code**, essential other witnesses including the Investigating officer were not called thereby leaving gaping holes in the evidence, and there was no identification parade conducted when it was the obvious thing to do. All these omissions were injurious to the prosecution's case.

20. Take the evidence of PW5 which was the sole evidence upon which the appellant was convicted. It is, of course, trite law exemplified by the decision of this Court in **Roria v. Republic [1967] EA583** that:

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification was difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

See also **Abdullah bin Wendo & Another v. R (1953) 20 EACA 166**.

21. The need for exercise of special care was called for in this case where the assailants were strangers and no description of the assailant was given by PW5 other than a general assertion that she would remember if she saw the assailant again. As this Court has stated before in **Maitanyi - vs- R(1986) KLR 198 :-**

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description.”

22. It was also necessary, in our view, to hold an identification parade to test the accuracy of PW5's identification, as the High Court correctly held. In the case of **James Tinega Omwenga –vs- R-Criminal Appeal No. 143 of 2011**, this Court expressed itself as follows:-

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.”

23. That is the same conclusion made by this Court in the earlier decisions of **Gabriel Njoroge v R [1982-1988] 1 KLR 1134** and **Amolo v R [1991] 2 KLR 254** which explained the rationale for reluctance by the courts to accept dock identification as:

“...part of the wider concept, or principle of law that it is not permissible for a party to suggest answers to his own witness, or as it is sometimes put, to lead his witness.”

24. The High Court was aware of those decisions but was of the view that the **Muiruri case**(supra) reinstated the utility of dock identification and used it to fortify the evidence of PW5. This is what this Court stated in the **Muiruri case**:-

“It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.

But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla Bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583 and Charles Maitanyi v. R [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

25. In our view, the **Muiruri case** did not overrule the rationale for exercising caution when dealing with dock identification evidence. The bottom line in those authorities is that the court will only base a conviction on such evidence:

“...if satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

26. In this case, there was not only lack of warning by the two courts below, but the facts and circumstances of the case raised reasonable doubts. There is no evidence from PW5 as to how long she took to see the appellant who she said was not masked. That assertion itself was also cast in doubt by the admission by PW5 in cross examination that in her first report and statement to the police, she recorded that **“all three men at the scene were masked”**. It did not help that all the other victims who testified saw different numbers of assailants and were not in agreement whether or not some or all were masked. In the end none of them was helpful in supporting PW5. It would have been helpful if the identification was tested in a properly organized parade but none was held. There was no other evidence, direct or circumstantial, to connect the appellant with the offences charged. We find and hold that the two courts below erred in the evaluation of the evidence on record and, as a result, drew the wrong conclusions of law. We would allow the appeal on this ground also.

27. The upshot is that the appeal is allowed. We order that the conviction of the appellant be and is hereby quashed and the sentence set aside. The appellant shall be released forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 17th day of June, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR