



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 697 OF 2010 (R)

BETWEEN

ALEX WANJALA MUREFU 1ST APPELLANT

RONALD SIMIYU NGOYOMALI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

***(An appeal from a Judgment of the High Court of Kenya at Bungoma (Onyancha & Muchemi, JJ.)
dated 29th June, 2010***

in

HCCR.A. NO. 71 OF 2009

Consolidated with

HCCR.A. NO. 72 OF 2009)

JUDGMENT OF THE COURT

1. Alex Wanjala alias Linos Wafula Murefu and Ronald Simiyu Ngoyomali, the first and second appellants respectively, were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the night of 24th February 2008 at Kwa Temba area, Misikhu Location, Bungoma while armed with dangerous weapons namely; a knife and toy gun, they robbed Bernard Waweru of a motor cycle registration number KAZ 612Y valued at Kshs. 130,000.00 and at or immediately before or after the time of such robbery used actual violence against the said Bernard Waweru.

2. The first appellant faced a second charge of possession of Government stores contrary to section 324(2) of the Penal Code. The particulars of that charge were that on 25th February 2008 at Kwa Dina Estate, Webuye Township in Bungoma, he had in his possession public stores namely; one green jungle trouser of the Kenya Police Department, such property being reasonably suspected of having been stolen or unlawfully obtained.

3. The appellants were tried before the Senior Resident Magistrate's Court at Webuye. They were convicted as charged in a judgment delivered by that court on 17th June 2009. Each one of them was sentenced to suffer death for the offence of robbery with violence. In light of that sentence, the trial court did not sentence the first appellant on the second count.

4. The appellants' appeal to the High Court against the conviction and sentence was dismissed in a judgment delivered on 29th June 2010. Aggrieved, they have challenged the convictions and sentence in this Court.

5. Section 361 of the Criminal Procedure Code limits the grounds on which this Court can entertain a second appeal to only matters of law. See **M. Riungu v. Republic [1983] KLR 455**. Furthermore, this Court cannot interfere with concurrent findings of fact by the two courts below unless such findings are not based on any evidence at all or are based on a misapprehension of the evidence or if the findings are plainly wrong such that no court, properly directing itself, would make such findings. See **Bwayo vs. R [2009] KLR220 at 222**.

6. Learned counsel for the appellants, Mr. Akelo Job Cletus, referred us to the memoranda of appeal filed by the appellants themselves on 12th July 2010 as well as a supplementary petition filed on 14th September 2012. He submitted that the appellants were not positively identified, that the circumstances under which the appellants were identified were not conducive to positive identification; and that it was necessary, in the circumstances of the case, for an identification parade to have been conducted, absent which reliance on the evidence of PW 1, 2 and 3 on identification was not safe. In that regard counsel referred us to the case of **Martin Lawrence Ochieng vs. R [2009] eKLR**.

7. Mr. Akelo also submitted that crucial witnesses were not called by the prosecution to testify and as a result the offence was not proved to the required standard. According to counsel, the person who gave information to PW 2 and PW 3 that the complainant's motorcycle was involved in an accident and from whom PW 2 and PW3 took the motorcycle should have been called as a witness.

8. Counsel went on to say that the death sentence meted out to the appellants should be set aside as it is unconstitutional; and that the trial court should have, in any case, considered that the death sentence is not mandatory and should have given a lesser sentence.

9. Finally, counsel argued that the appellants were deprived of a fair trial, as they did not have the benefit of legal representation.

10. Opposing the appeal, Mr. Job Mulati, learned Principal Prosecution counsel, submitted that an identification parade was not essential; that PW1, PW 2 and PW3 positively identified the appellants; that it was not necessary to call additional witnesses, as the chain of events linking the appellants to the crime was well established; and that the prosecution evidence tendered was sufficient to establish the appellants' guilt to the required standard.

11. As regards sentence, counsel submitted that the death sentence is constitutional and referred us to the decision of this Court in **Joseph Njuguna Mwaura and two others vs. R [2013]eKLR**.

12. As for the claim that the appellants were not provided with legal representation, counsel argued there was no requirement when the hearing of this case commenced for provision of legal representation at State expense.

13. We have considered the appeal and submissions by learned counsel. The issues that arise for determination are, firstly, whether the lower courts proceeded on the correct legal basis regarding identification of the appellants and whether an identification parade was required; secondly, whether the charge was proved to the required standard of proof; thirdly, whether the sentence meted out was legal; and finally, whether the appellants were denied the right to legal representation.

14. We will consider those issues in the context of the facts as established by both lower courts as

hereunder.

15. It was common ground the appellants were admitted and hospitalized at Webuye District Hospital from 24th February 2008 until 25th February 2008 when they were discharged. The controversy is the circumstances under which the appellants found themselves in hospital.

16. The prosecution version of how the appellants got to the hospital is as follows: The complainant, Bernard Waweru, (PW1), owned motorcycle registration number KAZ 612Y. He operated taxi business with that motorcycle. On 24th February 2008, PW 1 was at a place called Kamukuywa stage looking for passengers. The first appellant approached him and requested him to ferry him to a place called Wabukhonyi. They settled on a fee of Kshs. 100.00. The first appellant informed PW1 that they would pick up another person on the way at a place called Kamukuywa Junction. They got on their way. At Kamukuywa Junction they stopped and picked up the second appellant. The second appellant had a black bag. The first appellant was sandwiched between PW 1 and the second appellant. On reaching Wabukhonyi, PW 1 stopped the motorcycle. The second appellant changed the destination to a place called Kwa Temba. The appellant agreed to top up the fare by Kshs. 50.00 for the additional journey. On reaching the shops at Kwa Temba, PW 1 stopped the motorcycle. The second appellant told PW1 to stop slightly ahead of the shops. PW1 complied.

17. On stopping the motorcycle ahead of the shops, the appellants turned into assailants. The first appellant grabbed PW1's neck and tried to strangle him. He got PW1 off the motorcycle. The motorcycle fell on the road with the engine still running. The second appellant held and lifted PW1's legs and together with the first appellant moved PW1 to the side of the road. A struggle between the appellants and PW1 that lasted over ten minutes ensued. The second appellant's bag fell on the ground. The appellants subdued PW1 who felt dizzy and let go of the second appellant who he was holding onto. PW1 saw headlights of a vehicle; extended his hand and felt "*something heavy and hard*" that he later realized was a knife. He held on to it. The second appellant saw the knife and let go of PW1. The first appellant continued holding PW1. The second appellant then picked up his bag from the road, and proceeded to lift the motorcycle and held on to it. He then reversed it. The first appellant summoned the second appellant back "*to come and finish their business*". PW1 managed to lift his hand with the knife and to aim and stab the first appellant on the face after which the first appellant groaned and released PW1.

18. PW1 did not thereafter see the first appellant again until the following day in hospital. PW 1 then managed to stand up and decided to run and seek help and not to bother about the motorcycle and his helmet which he had managed to unfasten. It had fallen at the scene.

19. PW1 found a young boy at a nearby home and together they called for help. PW1 telephoned his neighbour at Kamukuywa. His neighbour came with a vehicle and a police officer. Together they went back to the scene where PW1 was attacked. Neither the motorcycle nor the assailants were there. They proceeded towards Misikhu and turned to go towards Kamukuywa. Not far from the scene of attack, they saw PW1's helmet.

20. The following morning PW1 went to Misikhu AP's Camp and reported the incident. Accompanied by AP/Sergeant Jackson Nalo (PW5) from Misikhu AP Police Post and APC Biwott they went to the scene of attack. There, they found an imitation of a gun and a sheath for the knife that PW1 had collected and used to stab the first appellant. While at the scene, they received a report of an accident involving a motorcycle near Misikhu. They went there. Meanwhile, a motorcycle was ridden past which PW1 identified as his. They followed it up to Makhese market and found it with Bernard Munyange Wafula (PW3).

21. PW3 testified that he is an employee of Moses Wafula (PW2) on whose behalf he operates a motorcycle as a taxi. On 24th February 2008 at about 8.30 pm he was carrying PW2 on a motorcycle from Misikhu to Makhese. On the way, they found the appellants having crashed with a motorcycle. Both appellants were injured, although the first appellant's injuries were more severe. A person known as Muchuuzi was assisting the second appellant to push the motorcycle off the road. There were other people at the scene as well. Muchuuzi requested PW 3 to assist in taking the appellants to hospital. The motorcycle that was being pushed by Muchuuzi was functional. PW 3 placed both appellants on it to take

them to hospital as PW 2 took over the motorcycle that PW2 had been driving.

22. After a short distance, the second appellant asked PW3 to stop, got off the motorcycle and went towards some bushes. PW 2 went after him. He refused to be taken to hospital. PW 3 drove in the direction of Webuye District Hospital. Near the hospital, the second appellant, who had a black bag, said he should be taken home. PW3 became suspicious and drove into Webuye Police Station where they reported the accident.

23. At the police station the first appellant began to groan in pain, whereupon the police officers requested PW 3 to rush the appellants to hospital. PW 3 then took the appellants to Webuye District Hospital where they were admitted before PW 3 left to go home. PW 3 informed the security guards at the hospital that they would take the motorcycle. He also telephoned the corporal at Makhese AP Camp to inform him about the motorcycle.

24. That then is how PW3 ended up with PW1's motor cycle when PW 1 and PW5 caught up with him at Makhese with PW1's motorcycle. PW 3 then led PW 1 and PW 5 to Webuye District Hospital where PW1 identified the appellants as the persons who were his passengers the previous day and who had turned against him and attacked him. The police at Webuye Police Station were then called to the hospital and the appellants were arrested.

25. Police Constable Vincent Ngereza (PW4) carried out investigations into the matter before charging the appellants with the offences for which they were subsequently convicted.

26. According to the first appellant, a resident of Sweet Waters, Webuye and a hawker, he spent all day on 24th February 2008 at Misikhu selling wares as usual. He closed business at 6.00pm that evening and went to Makemo Junction intending to board a vehicle to Webuye. He flagged down a vehicle, a matatu. A motorcycle emerged from a nearby junction and knocked him down. He sustained injuries, lost consciousness and was taken to Webuye District Hospital. On regaining consciousness the following day, he saw three people who asked him to accompany them to the police station to record a settlement. At the police station he was placed in the police cells. He was later charged, alongside the second appellant who he described as a "strange person" with an offence he knew nothing about.

27. On his part, the second appellant, a resident of Misikhu, carried on the business of video show at Misikhu. On 24th February 2008 at about 6.00pm, he was at his video shop watching a broadcast of a live football that ended about 7.40 that evening. He then borrowed his employee's bicycle to go home with it. He was in the process of crossing a road when, in his words, he was "hit by something I did not know." Like the first appellant, he lost consciousness and found himself at the hospital the following day at 6.30 am where he learnt that he had been taken there by a good Samaritan. Later that morning, police officers went to the ward and requested him to accompany them to the police station. He was then charged with an offence he also knew nothing about.

28. The learned trial magistrate carefully considered and analyzed the prosecution and defence evidence. He succinctly summarized the prosecution evidence as follows:

"The prosecution evidence is very consistent and credible. It irresistably points at the two accused persons as the ones robbed [sic] the complainant as alleged. The prosecution evidence establishes an unbroken chain of events from the time the accused persons lived [sic] the complainant to ferry them to the time the two were arrested at Webuye district hospital;- the 1st accused convinced the complainant to take him to Wabukhonji at an agreed fare of 100/=. Ahead they picked the 2nd accused who had a black bag after 1st accused person said he had a friend. At Wabukhonyi the [sic] requested to be taken to Kwa Temba, a distance ahead where they turned against the complainant wounded him and went away with his motorcycle. A few minutes later the two accused persons got involved in a road accident with the stolen motorcycle. They were rescued and taken to the hospital via Webuye Police Station. The good samaritans decided to go home with the accident motor cycle what [sic] is then seen and identified by the complainant. It then leads back to the hospital where the accuseds are arrested after being

identified by the complainant.”

29. In the magistrate’s view “*the defence of the accused persons [was] only intended to mislead the court in an attempt to extricate themselves from blame.*”

30. He concluded that the robbery was “*committed by two people who were [PW1’s] pillion passengers*” namely the appellants. Before doing so, he cautioned himself regarding the circumstances under which the appellants were identified. It is necessary to capture at length what he had to say:

“There is no doubt that the robbery incident herein happened at night, when conditions favouring a positive identification are either absent or minimal. However, the complainant was categorical that the two accused persons were the suspects who robbed him of his motorcycle. On cross-examination by the 1st accused person the complainant told the court that he saw the 1st accused very well when he approached him at the stage which was well lit by lights from the nearby shops and motor vehicles’ headlights. The complainant also saw the 2nd accused person with the aid of his motor cycle head lamp and stopped to pick him. The 2nd Accused had a black bag which was the same bag the complainant again saw at Webuye district hospital where both the accused persons had been admitted. It was the complainant’s further evidence that he could not fail to identify the two accused persons who he had been with from the time he carried them on his motorcycle all the way to Wabukhonyi and then to Kwa Temba where they talked and eventually struggled before he was wounded and robbed of the motor cycle. That he even stabbed one of the accused persons with a knife which may have been dropped by one of them at the robbery scene.”

31. It was incumbent upon the High Court on appeal to reconsider and re-evaluate the evidence and to draw its own conclusions. [See Okeno vs. R [1972] E.A 32.] We would be entitled to interfere with the decision of the High Court if it failed to discharge that obligation. The High Court did review the evidence before concluding that:

“We independently came to the same conclusion as did the trial magistrate, that the time taken with the two attackers by the complainant, from when he was hired, to the time he had to stop along the road to pick the 2nd attackers and, finally, during the time of fighting back the two during the robbery, the complainant had sufficient opportunity to observe the appearance and feature [sic] of the attackers. It is not surprising therefore that he recognized them when he once more came face to face with them in the ward at Webuye district hospital after being led there by PW2 and PW3.”

32. Based on our own review of the record, we are fully in agreement with the conclusions reached by the lower courts. We are unable, as a matter of law, to find fault with both judgments of the lower courts regarding the approach taken and the conclusions reached as pertains to the identification of the appellants. As this Court stated in Adan Muraguri Mungara vs. R [2010] eKLR, we must:

“Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

33. We also do not think that calling Muchuuzi as a witness or mounting an identification parade would have, in the circumstances of this case, added any value as the evidence as it stood was, in our view, watertight.

34. The issue of legality or constitutionality of the death sentence was addressed by this Court in Joseph Njuguna Mwaura and two others (supra). We have no basis for interfering with the sentence in this case. It is a legal sentence.

35. Finally there is the question of legal representation. The appellants’ counsel asserted that the appellants’ right to a fair trial was compromised, as they did not have legal representation.

36. Article 50 of the Constitution of Kenya, 2010 enshrines the right to a fair trial which includes the right to choose, and be represented by an advocate, and to be informed of that right promptly, and under Article 50 (2) (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.”**

37. In the context of the Constitution of Kenya 2010, this Court addressed the issue of legal representation as a necessary component of a fair trial, in the case of **David Njoroge Macharia vs. Republic [2011] eKLR** where it held that persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. See also the decision of this Court in **Douglas Kinyua Njeru vs. Republic [2015] eKLR**.

38. In the more recent case of **Isaiah Moroo vs. Republic [2015] eKLR**, this Court has addressed the same issue in the context of the right to legal representation with particular reference to appeals, and whilst doing so stated:

“The importance of legal representation cannot be gainsaid and in a criminal trial where the life, liberty and property of an accused person is at stake, it is a critical cog in the wheel of justice and a signal step towards attaining equality of arms. Thus, the constitutional thought behind these provisions must be that an advocate is essential to criminal proceedings and so the trial court has a duty to inform an accused person, and promptly so, of his right to hire one and, if he be unable to, of the right to be provided with one at State expense. The Constitution itself limits the right to legal representation at State expense to only those cases in which “substantial injustice would otherwise result” a phrase the precise contours of which are yet to be delineated whether by statute or by judicial pronouncement”

39. The appellants’ trial commenced and was concluded prior to the promulgation of the Constitution of Kenya, 2010. The right to legal representation as a component of a fair trial was as important then as it is now, except that there was no legal requirement for legal representation at State expense. We have gone through the record of the trial court and have not been able to find any indication that the appellants stated that they wished to be represented by an advocate and their request was turned down. At the time of their trial, the state was not obliged to provide them with counsel to defend them. Their claim that their *“right to legal representation was denied”* has therefore no merit.

40. For all those reasons, the appellants’ appeals fail and are hereby dismissed.

Dated and delivered at Eldoret

This 10th day of December, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR