



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI, MARAGA & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 6 OF 2008

BETWEEN

FREDRICK KINUTHIA WAMBUI

PETER MBURU NJERI

GODFREY GICHIRA NJOKI

BONIFACE NJOROGE WANJIRUAPPELLANTS

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court at Nairobi (Ojwang & Dulu, JJ) dated 19th
February, 2008

in

H.C.CR.A NOs. 34, 35, 36 & 37 OF 2006)

JUDGMENT OF THE COURT

Background

The appellants, **FREDRICK KINUTHIA WAMBUI**, **PETER MBURU NJERI**, **GODFREY GICHIRA NJOKI** and **BONIFACE NJOROGE WANJIRU** were, before the Chief Magistrate's court at Kibera, jointly charged, tried, convicted and sentenced to suffer death on a single count of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the offence alleged that on 27th June 2003 at about 1.00 pm, with others not before court and while threatening to strangle and /or stab one Joseph Mucheru Mwangi (the complainant), they robbed him of cash of Kshs.20,000/= at Kagunduini Trading Centre in Maragwa District of Central Province. The complainant reported the matter to the local

Chief and later to Kabati Police Station. In the evening of that day, the appellants went to PW1's home and threatened to kill him if he dared report them. As they were doing that, the complainant's wife, screamed and they fled.

The appellants were later arrested and charged with capital robbery. They denied the charge but after trial, as we have said, they were convicted and sentenced to death. The trial court found that the prosecution had proved its case against the appellants beyond reasonable doubt, convicted them of the offence charged and sentenced them to death.

Aggrieved by the decision of the trial court, the appellants filed an appeal in the High Court but the learned Judges [*Ojwang, J {as he then was} and Dulu, J*] found their appeals devoid of merit and dismissed them.

In their appeal to this Court, the appellants challenge the decision of the two learned Judges of the High Court on several grounds as outlined in the Supplementary Memorandum of Appeal filed on 24th January, 2014 by the appellants' learned counsel, Mr John Swaka. Those grounds can be summarized as follows: that the charge sheet was defective as, *inter alia*, evidence tendered was at variance with its particulars; that the prosecution case was not proved beyond reasonable doubt; that the evidence was contradictory and inconsistent and that the Judges failed to exhaustively re-analyse and re-evaluate it; that vital witnesses were not called and that the conviction based on the appellants' purported identification was erroneous.

Submissions by counsel

Mr Swaka, in his submissions before us, argued that the charge preferred against the appellants was defective in that the evidence adduced was at variance with the particulars of the charge. Further, that there was no witness who testified that there was an offensive weapon; that the particulars of the charge did not contain the ingredients of the offence of robbery with violence as stipulated in **Section 296 (2)** and that the KShs.20,000/- allegedly stolen from the complainant was not proved in court and therefore there was no evidence to establish that the amount reflected on the charge sheet was stolen.

Mr. Swaka further submitted that the prosecution evidence was contradictory and inconsistent. He argued that only one witness, PW1, testified that the assailants had a knife while PW2 did not give such evidence. He further argued that PW1 contradicted himself by testifying that the 4th appellant was the one holding the knife and at the same time was holding him. In illustrating more inconsistent and contradictory evidence, Mr. Swaka submitted that PW4 had testified that he received information at 3.15 am that one person by the name of *Ngomu*, who was a suspect in a series of robberies was living within the neighbourhood of Kagunduini. In the course of looking for that wanted criminal, they arrested five suspects among them the four appellants herein. Contrary to that statement, upon cross examination by the 2nd appellant, PW4 stated that he arrested the 2nd appellant at 12.15 am on 24th September, 2003, and that PW2 had testified that PW1 had a swollen eye yet PW1 in his testimony did not mention any injury that he sustained during the incident. Mr. Swaka argued that those overwhelming inconsistencies and contradictions could only lead to the conclusion that the evidence was fabricated.

The defence counsel further contended that the prosecution failed to call key witnesses. He advanced the argument that the prosecution should have called the Chief who was the first to receive the report of the robbery, PW1's wife who is alleged to have received death threats from the assailants and that eye witnesses at the scene of the robbery should have been called to add credence to the prosecution case.

On the issue of identification, Mr. Swaka argued that the identification of the appellants was unsafe and therefore unreliable. Whereas PW1 stated that he knew the assailants who attacked him, he did not give their descriptions to the police prior to purporting to identify them in court. He contended, therefore, that this was a case of mistaken identity. In conclusion, Mr. Swaka argued that the learned Judges of the High Court failed to analyse and re-evaluate the evidence as tendered at the trial court and urged us to allow the appeal.

Mr Monda, the Senior Principal Prosecution Counsel, representing the State, opposed the appeal. He submitted that the prosecution evidence placed the appellants at the scene of the crime and the offence of robbery with violence was proved against all the appellants. On the issue that the evidence was at

variance with the particulars of the charge, he submitted that the charge sheet disclosed that the offence of robbery with violence was committed by the appellants jointly with others not before the trial court. Mr Monda further submitted that the first report was actually used during the trial proceedings where the complainant stated that he knew who his attackers were.

Mr Monda submitted that the High Court evaluated the evidence on record in a proper manner and that that is why one of those arrested on suspicion of being one of the assailants was released for lack of evidence. He further submitted that the circumstances were favourable for a positive identification as the offence was committed in broad daylight. He contended, therefore, that the contradictions alleged do not go to the root of the matter and the argument of mistaken identity in respect of the appellants cannot hold. Further, on the issue of the time of arrest, Mr Monda submitted that there was a consensus that all the appellants stated that they were arrested in the morning of 24th September, 2004. Accordingly, the issue of contradiction as regards whether the arrest took place at 12.15 am or 3.15 am, as stated by PW4, was not material. Mr Monda submitted that it was not necessary to call the Chief, PW1's wife or members of the public at the scene of the robbery as witnesses and that failure to call them was not prejudicial to the appellants. Mr Monda urged us to dismiss the appeal.

In reply, Mr Swaka argued that the prosecution has not demonstrated that the identification of the appellants was safe. He contended that the appellants were not convicted on safe and sound identification.

Analysis and determination

This is a second appeal and by dint of **Section 361 (1) (a) of the Criminal Procedure Code**, this Court has jurisdiction to consider only matters of law. It is also trite law that a second appellate court cannot interfere with the concurrent findings of the two courts below unless such findings are based on no evidence.

This Court stated this principle in ***KARINGO V R, [1982] KLR 213*** at page 219 in the following words:

“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.”

We have carefully considered the record of appeal, the rival submissions by counsel for either side, principles of case law relied upon by either side and we proceed to make our determination as hereunder.

As the determination of this appeal turns mainly on the question of identification, a brief summary of the prosecution evidence is imperative.

On 27th June, 2003 at 1.00 pm, the complainant, **Joseph Mucheru Mwangi** (PW1), was in possession of KShs.20,000/- for the purpose of purchasing cattle at Kagunduini Trading Centre for slaughter. He left the butchery where he worked and accessed Kagunduini Cattle Market through a rear door and passage. Just before he got into the market, he met the four appellants herein and two others who were not before the trial court.

PW1 testified that he knew the appellants as they lived in his neighbourhood in Kagunduini; that the 1st appellant held him by the neck while the 4th appellant brandished a knife at him; the 2nd and 3rd appellants physically extracted the money from PW1's pockets; and after robbing PW1 of the money, the gang of four assailants fled the scene. Two businessmen saw the appellants run away and they rushed to the **locus in quo** to assist PW1. PW1 reported the matter to the local Chief and, subsequently, to Kabati

Police Station.

PW1 further testified that on the evening of the robbery incident, the appellants went to PW1's house where PW1's wife who was the first to see the four robbers, raised an alarm. As the four were making death threats against PW1, members of the public arrived and the four robbers fled. After the report to Kabati Police Station was made, the appellants herein were arrested.

In cross examination by the 1st appellant, PW1 stated that the violent robbery had taken place in broad daylight and that he had clearly seen the attackers.

PW2, Elijah Kariuki testified that he was at Kagunduini Market on 27th June, 2003, when he was called by one Ibrahim to help PW1 who was being attacked. PW2 further testified that he found PW1 surrounded by a group of men and on inquiring what was taking place, one of the assailants told him to shut up. PW2 further testified that one of the assailants was holding a stone and that one of the other assailants were also holding PW1's jacket; but they fled when members of the public approached the **locus in quo**. PW2 testified that PW1 informed him that he had been robbed of money which was intended for purchasing cattle and that he knew the assailants, the appellants herein.

PW3, Stephen Gichuki Muiruri, testified that he was at the market on 27th June, 2003, at 9am and that he gave PW1 KShs.20,000/- for the purchase of cattle. He was later informed that the money that he had given PW1 had been stolen. PW1 gave him (PW3) the names of the four assailants and informed him that there were two other assailants. PW3 further testified that he reported the violent robbery to the Chief and the Police Station. He further testified that on the same night, PW1's wife had reported to him (PW3) that there were people threatening her husband with death. PW3 testified that he rushed to PW1's house but found that the assailants had fled.

PW4, Sgt Steve Guthatie [Police Force No. 49729], testified that he and his fellow officers had been on patrol at about 3.15am on 28th June, 2003, when they received information leading to the arrest of the four assailants [appellants herein]. PW1 positively identified the four men who had stolen the money from him as they were known to him and he knew their names. The police arrested the appellants and charged them with the offence of robbery with violence.

The appellants were placed on their defence on the basis of the foregoing evidence. In their defence, the appellants all gave unsworn testimony. They all denied the charge and testified that they were found asleep in their houses. In respect of the defence, the High Court stated:

“The scenario of fact emerging is, in our opinion, far from a laboured one, and it is far from a crafted one; it is a logically flowing concatenation of events and facts. This is the mark of a true account, not a frame up of a suspect as contended by the appellants herein. The appellants, moreover, have given a standard account which focuses on the day of the arrest, but avoids anything to do with the material date, even though alleging no alibi. We find the defence position to be, in design, evasive, and therefore, incapable of shaking the weighty prosecution case. This is a mode of expressing our finding herein: the prosecution did prove their case beyond reasonable doubt, as against all the four appellants.”

After perusing the record, we find that, consistent with their duty as spelt out by this Court in a long line of cases including ***OKENO V R, [1972] EA 32***, the learned judges of the High Court conducted a thorough and exhaustive re-appraisal and assessment of the evidence as summarized above.

Proper identification of an accused person is crucial if his conviction is to be sustained. In this regard we are guided by the case of ***FRANCIS KARIUKI & OTHERS V R, C.R.A NO. 6 OF 2001***, where this Court held:

“... The law on identification is well settled, and this court has from time to time said

that the evidence relating to 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 possibility of error. The surrounding circumstances must be considered. 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.

From the record, regarding the appellants' identification and recognition, the High Court stated:

“That several robbers attacked and stole from the complainant, on the material date, is not in doubt. The theft took place in broad daylight and the complainant has said he very well observed the robbers at the material time. The complainant says he recognized these robbers, who are known to him by appearance and by names, as they live and work in one locality, Kagunduini. The complainant’s testimony is well corroborated by that of other witnesses, some of whom (particularly PW2) do, very well, know the appellants as residents of Kagunduini. PW1 had an opportunity to observe the attack and, indeed, to talk to one of those executing the robbery attack. He observed these attackers and gave testimony on assault weapons then being wielded by the attackers. There is more corroboration in PW4 arresting five suspects, and out of them the complainant picking out the four who had attacked and robbed him of money in broad daylight.”

In the instant case, the appellants were identified by recognition by PW1 and PW2. Recognition is more reliable than identification of a stranger. As this Court stated in case of ANJONONI V R, *KLR 1 [1976-1980] at 1566 to 1568* this is because:

“... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

We agree with counsel for the appellant that in cases of recognition of the assailant by appearance only, for consistency and assurance that the witness indeed identified his assailant, a description of the assailant to the people the witness first reports the incident or police is of crucial importance. This Court made that quite clear in the above case of Francis Kariuki and in the case of MAITANYI V R, (1986) *KLR 198*. In the latter, this Court stated:

“...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 the instant appeal, PW1 and PW2 identified the appellants by recognition as they knew them from their neighbourhood. PW1 gave the appellants' names, descriptions to the Chief and the police.

The learned Judges of the High Court cannot, therefore, be faulted for finding as they did. The cogent and consistent evidence from the complainant, PW2, PW3 and PW4 regarding the violent robbery dispels any doubts as to the correctness of the identification by recognition of the appellants as the robbers.

We therefore dismiss the ground of identification.

The second ground is that the charge against the appellants was fatally defective. Counsel for the appellants argued that the charge was defective as it did not indicate that an offensive weapon was used during the robbery. In his view, this was a vital ingredient of the offence of robbery with violence and its omission rendered the charge fatally defective with the result that the proceedings were a nullity.

We agree with counsel for the appellant that a charge which does not incorporate its salient ingredients is fatally defective and any proceedings based on it are a nullity. Emphasizing this point in the case of

ISAAC OMAMBIA V REPUBLIC, [1995] eKLR, this Court stated:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from **Archbold, Criminal Pleading, Evidence and Practice (40th Edn)**, page 52 paragraph 53, this Court stated in **YONGO V R, (1983) eKLR** that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;***
- ii. when for such reason it does not accord with the evidence given at the trial.”***

In the instant appeal, however, we find that the ingredients for the offence of robbery with violence were present and sufficiently stated in the charge sheet to sustain a charge against the appellants. **Section 296 (2) of the Penal Code** provides as follows:

“(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

The above ingredients of the offence of robbery with violence were further elaborated by this Court in the case of **OLUOCH V R, (1985) KLR** where it was held:

“Robbery with violence is committed in any of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or***
- b. The offender is in company with one or more person or persons; or***
- c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”***

The use of the word “or” implies that if any of the three conditions is fulfilled then the offence is complete. This is the position taken by the High Court in **MOHAMED ALI V R, (2013) eKLR** where it was held:

“The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.”

In this case, the robbers were more than one and we are satisfied that the first two courts below were justified in finding that the omission to state that offensive or dangerous weapons were used or there was a threat to use them was inconsequential to the success of the prosecution of the appellants in connection with the offence of robbery with violence.

On the issue that vital witnesses were not called, that is, the Chief, PW1's wife and members of the crowd who were present at the scene of the robbery, we are guided by the case of MWANGI V R, [1984] KLR 595 where it was stated:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

No such motive has been suggested in the failure to call the Chief, PW1's wife and/or the unnamed members of the crowd who were present at the scene of the robbery. We find no defect in the prosecution's election not to call them.

Whatever differences there may have been in the prosecution case, consisting of minor discrepancies and inconsistencies, they were not of a material nature and did not dilute or weaken the probative value of the evidence on record.

The upshot of our assessment is that the appeals by the four appellants are devoid of merit and are hereby dismissed in their entirety.

Dated and delivered at Nairobi this 6th day of June, 2014.

P. KIHARA KARIUKI, PCA

JUDGE OF APPEAL

D. K. MARAGA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

