



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 63 OF 2014

BETWEEN

JOHN MWANGI KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Sergon & Wakiaga, JJ.) dated 4th October, 2012

in

H.C.CR.A No. 126 of 2005)

JUDGMENT OF THE COURT

1. This is a second appeal from the judgment of the High Court (Sergon & Wakiaga, JJ.) wherein the appellant's conviction and sentence was upheld. This appeal is based on the following grounds:-

- *The learned Judges of the superior court erred in law when they held that the appellant was properly identified by the prosecution witness whereas there was no mention or description of the appellant in the first report, and the prevailing circumstances were not favourable for positive identification. Sic*
- *The learned Judges erred in law in failing to observe that the prerequisites to holding an identification parade were not met.*
- *The learned Judges of the superior court erred in law in failing to note that the identification parade was faulty and/or faulted by among other things using the same parade members.*
- *The learned Judges of the superior court erred in law when they only rehashed evidence but failed to re-evaluate it and reconsider it afresh.*
- *The learned Judges of the superior court erred in law in failing to scrutinize the exhibits produced for the defence which showed that the witness statements had been altered for purposes of fixing the appellant and also failing to note that the investigating officer did not testify. Sic*

2. The background of this appeal is that the appellant and one Joseph Ndungu were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in the Chief Magistrate's Court at Nyeri. The particulars of the offence were that on 24th June, 2003 at Kagumo-ini Market in Nyeri District within the then Central province, the appellant and his co-accused jointly with others not before the court while armed with dangerous weapons namely pistols robbed Joseph Wanjohi one mobile phone make Motorola, Kenya cane whisky and cash Kshs. 152,397.80/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Joseph Wanjohi.

3. It was the prosecution's case that PW1, Eliud Wamae Wachira (Eliud), PW2, George Muri Nduto (George) and PW3, Joseph Gerishon Wanjohi (Joseph) were employees of Jomaki Ltd. charged with the duty of distributing beer. Eliud was the driver of a lorry registration number KAG 359G, George was the loader while Joseph was the salesman. On 24th June, 2003 Eliud, George and Joseph were distributing beer with the aforementioned lorry in various towns. At around 3:00 p.m. they arrived at Kagumoini and just as George had offloaded nine crates of beer from the lorry, six men approached the lorry; Eliud, George and Joseph thought they were customers. George saw one of them remove a pistol and point it at him; he lay down on the crates of beer which were at the back of the lorry. Suddenly, the said man shot in the air and Joseph came out of the front cabin. Joseph met the man armed with a pistol who ordered him back into the lorry. Joseph and Eliud testified that two of the assailants entered the front cabin.

4. The robbers ordered Joseph to open the safe in the lorry and took Kshs. 152,397.80/=; they also stole Joseph's mobile phone make Motorola. Joseph and Eliud were ordered to lie down in the front cabin and the two assailants therein sat on them. One of the assailants drove the vehicle with Eliud, George and Joseph on board. After a while the lorry stopped and the robbers ordered Joseph and Eliud not to look up; the robbers fled on foot. Eliud, George and Joseph testified that they were able to identify the assailants because the robbery had taken place in broad day light; the robbers had not covered their faces. The incident was reported to the police.

5. On 27th June, 2003 PW4, CPL Fabian Wanjohi (CPL Fabian), received information from an informer that there were two suspicious characters in 7 star bar. CPL Fabian in the company of the OCS, PW6, PC Gideon Makori (PC Makori) and other police officers went to the said bar. On arrival, the OCS and PC Makori went into the bar while CPL Fabian and other officers were left outside the bar. Inside the bar, PC Makori noticed that the appellant and his co-accused were seated at the same table. Immediately the appellant and his co-accused saw the police they stood up and walked in different directions. The appellant's co-accused ran out of the bar and was apprehended by CPL Fabian while the appellant was arrested in the bar. Upon searching the appellant, PC Makori found a revolver pistol and six rounds of ammunition on him.

6. Subsequently, an identification parade involving the appellant and his co-accused was conducted by PW5, IP Francis Weru (IP Francis); Eliud, George and Joseph picked the appellant and his co-accused as some of the assailants who attacked them on the material day. Eliud, George and Joseph identified the appellant as the assailant who was armed with a pistol; they also identified the appellant's co-accused as his accomplice. The appellant and his co-accused were arraigned and charged in court.

7. In his defence, the appellant gave a sworn statement. It was his evidence that he used to sell tobacco before his arrest. On 27th July, 2003 at around 8:00 p.m. while on his way home he saw three police officers at a petrol station; they approached him and asked him his name and where he worked. He was searched by the OCS who recovered Kshs. 20,800/= in his pocket which he intended to purchase building materials with. He was arrested and taken to Nyeri police station. On 29th July, 2003 he was escorted to his house by police officers; the officers searched his house and took his photographs, jacket and Identification Card; he was taken back to the station and placed in custody. On 4th July, 2003 an identification parade was conducted and he was picked by PW1 (Eliud), PW2 (George) and PW3 (Joseph). It was his evidence that he had raised an objection over the parade because the members of the parade were not similar to him in height and complexion. He denied committing the offence he was charged with. The appellant's co-accused also gave a sworn statement denying any involvement in the

said offence.

8. Being convinced that the prosecution had proved its case, the trial court convicted the appellant and his co-accused and sentenced them to death. Aggrieved with the said decision, the appellant filed an appeal in the High Court which was dismissed by a judgment dated 4th October, 2012. It is that judgment that is the subject of this second appeal.

9. Mr. Njuguna, learned counsel for the appellant, submitted that the appellant's conviction was based on identification. Although Identification evidence was not water tight; the robbery incident was sudden and took a short time; there wasn't ample time for the witnesses to get a clear impression of their assailants; the witnesses did not give the description of the assailants to the police in their initial report. According to Mr. Njuguna, the witness statements had been altered to implicate the appellant. He argued that when the appellant was arrested he was not found in possession of any of the stolen items. He contended that the pistol which was found on the appellant did not link him to the robbery in question. Mr. Njuguna faulted the identification parade and urged us to allow the appeal.

10. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, submitted that the evidence of the witnesses was cogent; the appellant was arrested with a pistol similar to the one used in the robbery; the appellant was identified in an identification parade. According to him, the circumstances that were prevailing during the incident were such that positive identification of the assailants was possible. He argued that the witnesses spent a long time with the assailants; the assailants had not covered their faces. Mr. Kaigai submitted that the identification parade was conducted within a week of the incident. Therefore, the physical attributes of the robbers were still fresh in the witnesses' minds.

11. 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)”

12. The appellant's conviction was based on identification evidence. Both lower courts made concurrent findings that the appellant was positively identified. 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**, an English case, 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?”

13. In the instant case, Eliud, George and Joseph testified that the incident occurred at around 3:00 p.m.

in broad day light; the assailants had not covered their faces; the incident took a considerable period of about 15 minutes enabling them to get impressions of the assailants physical attributes. Eliud testified that he recognized the appellant as he was the one holding the pistol. He studied the appellant when he was ordering Joseph to open the safe and as he took the money therein. George testified that he clearly saw the appellant when he pointed the pistol at him while he was at the back of the lorry. Joseph gave evidence that he saw the appellant and his co-accused clearly when they were demanding for money and as he was opening the safe. The trial court was convinced that Eliud, George and Joseph were credible witnesses. In *Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008*, this Court held,

“As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.”

We see no reason to interfere with the finding regarding the witnesses’ credibility because the trial court had the benefit of seeing their demeanour as they testified. Further, there is no evidence on record that suggests the said findings were erroneous.

14. The appellant was not known to Eliud, George and Joseph before the incident. The said witnesses picked the appellant as one of the assailants in an identification parade. They were categorical that it was the appellant that was armed with the pistol. 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 parade was conducted with the same members occasioning prejudice to the appellant. Thirdly, the members of the parade were not similar to the appellant in height and complexion.

15. 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 this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants’ were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In *Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134*, this Court observed:-

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

16. 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 compliant 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.”

17. 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. 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;”

18. PW5 (IP Francis) 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; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. IP Francis testified that the appellant changed his position in the parade when each of the witnesses identified him. 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 also note that each witness identified the appellant as the assailant who was armed with the pistol. Therefore, there was corroboration of the identification evidence. We are of the considered view that the identification evidence was positive and free from error.

19. Having perused the record, we find there is no evidence that supports the appellant’s allegation that the witnesses’ statements had been altered. We also note that the allegation that the first appellate court merely summarized the evidence on record is not tenable. After all, there is no set format for re-evaluation of evidence. In *David Njuguna Wairimu –vs- Republic- Criminal Appeal No. 28 of 2009*, this Court stated,

“In Okeno –vs- R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

20. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 17th day of December, 2014.

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