REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 509 of 2007

PETER KARIUKI KIMANI .....1st APPELLANT

SIMON KIMANI MAINA ……...… 2nd APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga & Sergon JJ.) dated 20th December 2012

in

H.C.CR.A. NO. 232 OF 2008)

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JUDGMENT OF THE COURT

1. The appellants through their counsel Mr. Muthui Kimani filed Supplementary grounds of appeal dated 12th April 2013 containing 10 grounds to challenge their conviction and sentence. The appellants were charged and tried before Muranga Senior Principal Magistrate with the offence of attempted robbery with violence contrary to ***section 297 (2)*** of the Penal Code. They were sentenced to life imprisonment. The first appeal to the High Court on both the conviction and sentence was dismissed. This is a second appeal. As stated in the case of **Okeno-v- R, (1972) EA 32** it is the duty of the first appellate court to re-evaluate the evidence and arrive at its own independent conclusion. It is our duty as the second appellate court to satisfy ourselves whether the first appellate court did discharge its obligation to re-evaluate the evidence. Appeal to this Court lies on matters of law.

2. In the charge sheet, it is alleged that on the 20th April 2005, at Mioro village in Muranga District within Central Province jointly with others not before the court, the appellants while armed with dangerous weapons namely AK47 rifle, panga, rungu and iron bars attempted to rob Jeremiah Gioche Wachira of cash money and household goods and at immediately before or immediately after the time of such attempted robbery used actual violence to the said Jeremiah Gioche Wachira.

3. The learned trial magistrate was satisfied on the evidence of prosecution witnesses, that it was proved beyond reasonable doubt that Jeremiah Gioche Wachira (PW1) ("*the complainant*") was on the material day at about 9.00 p.m. in his kitchen together with his wife (PW2. She testified that they heard a knock on the door and when she opened, the person did not enter but instead asked them to go to the main house. In the process, another man came holding a gun pointing at them ordering they go to the main house. They complied and PW 2 ran to the shamba while screaming. Nothing was stolen from the complainants.

4. The grounds of appeal are that:

(i) The trial magistrate erred in law by failing to analyze and give proper weight and consideration to the evidence of all prosecution witnesses which evidence was glaringly contradictory in material respects.

(ii) The trial magistrate erred in law in failing to consider the totality of evidence adduced before the court before arriving at the decision to convict the appellants.

(iii) The trial magistrate erred in law in convicting the appellants when the prosecution had not proved its case beyond reasonable doubt.

(iv) The trial magistrate erred in law in convicting the appellants when the ingredients of the charge of attempted robbery with violence had not been established and proved to the required standards.

(v) The trial magistrate erred in law in failing to test with the greatest care the evidence of PW 1 and PW 2 respecting identification of the appellants and failing to appreciate the need for the trial court to be satisfied that it was safe to act on such evidence especially in the instant case where it was manifestly evident that the conditions favouring a correct and accurate identification were difficult.

(vi) The trial magistrate erred in law in failing to conduct a careful inquiry into the nature of light available at the scene of crime and all the conditions obtaining then and whether PW 1 and PW 2 were able to make a true and accurate visual impression, identification and description of the appellants.

(vii) The trial magistrate erred in law in casually dismissing the evidence adduced by the defence.

(viii) The trial magistrate erred in relying on suspicion rather than actual proof in finding that the fact of the first appellant being found some far distance from the scene of crime was conclusive evidence of guilt on the part of the appellant

(ix) The trial magistrate erred in law and in fact in relying on the evidence of an accused person against co-accused.

(x) The High Court as the first appellate court erred in law and failed in its duty to conduct a thorough and exhaustive evaluation of the record of proceedings and evidence before the trial court to establish whether the same supported the conviction before dismissing the appeal.

5. At the hearing of appeal, learned counsel Mr. MUTHUI KIMANI appeared for the appellants while Mr. KAIGAI, Assistant Deputy Director of Prosecution, represented the state.

6. Mr. KIMANI urged us to allow the appeal as the ingredients of robbery with violence was not proved as no demand for any property or thing was made to the complainants. He submitted that the conviction of the appellants was in error as it was based on recognition yet there was conflicting evidence as to whether the complainants could recognize the persons who entered their house. He submitted that there were contradictions in the testimony of PW 1 and PW 2 relating to the colour of the trouser worn by one of the persons who entered the house. PW 1 testified that the person who entered the house had a white trouser while PW 2 stated he wore a black trouser. This inconsistency showed that positive identification was difficult taking into account the events took place at night; the lighting was inadequate for effective recognition or identification. On this basis, the prosecution did not prove its case beyond reasonable doubt. The learned judges of the High Court failed to re-evaluate the evidence on

identification against the lighting situation that prevailed.

7. Mr. KAIGAI for the state in opposing the appeal submitted that the prosecution's case was proved to the required standard. That the complainants identified the appellants through solar panel and pressure lamp in the kitchen. There was sufficient lighting and there was concurrent findings of fact by two lower courts. That the jacket worn by the 1st appellant and the spent cartridges were produced in court as exhibits. That possession of the gun and firing gun shots was proof of attempted robbery. That the evidential burden of the 2nd appellant being found on top of a tree should be explained. That there was a common intention on the part of the appellants in the attempted robbery.

8. Learned counsel for the appellant in reply stated that it is not enough to submit that there was a common intention; each appellant as an accused person is entitled to have his case proved individually beyond reasonable doubt.

9. The key issue for our consideration is ground six of the appeal relating to identification of the appellants. We shall consider the testimony relating to identification of each appellant separately and examine if the trial magistrate and the learned judges of the High Court arrived at the correct conclusion.

10. The testimony relating to identification of the 1st appellant is that PW 1 struggled with one of the men who entered his house while holding a gun; this man in the course of struggle fired two shots attracting members of the public. The men ran away and members of the public arrested one of them who turned up to be the 2nd appellant.

11. The second appellant named the 1st appellant as an accomplice.

12. PW 7 (Inspector of Police) conducted an identification parade where both PW 1 and PW 2 were able to identify the first appellant through touching as the person who had the gun and the one with whom PW 1 struggled. PW 1 also testified that when PW 2 opened the door, he was able to recognize the 1st appellant since there was enough light. He stated that the 1st appellant was wearing a leather jacket.

13. PW 6 (investigating officer) testified that when the 1st appellant was arrested, the leather jacket was found and produced as an exhibit. PW 1 identified the jacket as the one worn by the 1st appellant at the time of attempted robbery. PW 2 also identified the jacket as the one that was worn by the 1st appellant at the time of attempted robbery. PW 1 testified that the leather jacket was stolen from him and the first appellant was wearing the jacket which he was able to identify with the inner lining which he knew very well.

14. The conviction of the appellants was mainly dependent on the identification by two witnesses PW1 and PW 2 at night. The evidence of identification at night must be tested with the greatest care using the guidelines in **Republic - v- Turnbull (1976) 3 All ER 549** and must be absolutely watertight to justify conviction. **(See Nzaro -v- Republic 1991 KAR 212 and Kiarie - v- Republic 1984 KLR 739**). In the case of **Maitanyi - v- Republic 1986 KLR 198,** this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

15. In the instant case, both PW 1 and PW2 stated that the light available was from a solar bulb and a pressure lamp. PW 2 testified that the man she saw with the pressure lamp was the 2nd appellant and she saw his face for about five minutes. He was short and brown. PW 2 also testified that when she opened the door, the solar light reflected outside and the persons moved away ostensibly to avoid it's illumination.

16. The trial magistrate posed the question whether the complainant and his wife were able to identify their attackers. The trial magistrate found corroborative evidence of identification of the appellants in the description of the jacket worn by the 1st appellant and the identification parade where the appellants were identified. The learned judges of the High Court found that there was sufficient light to enable PW 1 to

identify the appellants and that PW 1 had time to struggle with the 1st appellant and there was enough opportunity to recognize him.

17. The testimony of PW 1 was that when PW 2 opened the door, there was light from the solar bulb. In cross examination, PW 1 testified that there was pressure lamp in the kitchen placed on the table. He was able to see the 1st and 2nd appellants using the pressure lamp light. PW 2 testified that when she opened the door, the solar light reflected outside. Both PW 1 and PW 2 stated that one of the men who committed the offence was wearing a leather jacket. The only difference between the testimony of PW 1 and PW 2 is that PW 1 stated that the assailant who was wearing a leather jacket had a white trouser while PW 2 stated it was a black trouser. Is the difference or contradiction in testimony relating to the colour of the trouser material as to impair the testimony on identity of the appellants? We think not. There is other material testimony that goes towards identifying the 1st appellant. The first appellant was named and mentioned by the 2nd appellant. The 1st appellant was identified both by PW 1 and PW 2 at the parade. It was not challenged that the 1st appellant was wearing a leather jacket that was produced in exhibit. All these facts taken in totality identify the 1st appellant as the perpetrator of the crime. We find that identification of the 1st appellant was free from error in the circumstances of the case. We are satisfied that there was adequate lighting from the solar bulb and pressure lamp for the complainants to identify the appellants. We find the testimony of PW 2 that when the solar light reflected outside, the appellants moved. The inference was that the light was of such intensity that visibility was sufficient for identification.

18. The trial magistrate found that the identity of the appellants was corroborated through an identification parade. In the case of **Fredrick Ajode - v- Republic, Criminal Appeal No. 84 of 2004**, this Court stated that before an identification parade is conducted, the witness must be informed to give the description of the accused and the police to conduct a fair parade.

19. PW 7, an Inspector of Police, testified how he conducted the identification parade. He testified that two parades were conducted one for each appellant; that there were eight persons in each parade with persons of the same height and similar characteristics with each appellant. Some members of the parade were black others brown. The appellants were identified by touching. PW 2 testified she gave description to the police that the man with a gun was wearing a black jacket and had big eyes, was black and short and at the police station she saw the jacket the 1st appellant was wearing. PW 1 stated he did not give a description of the appellants but described the clothes worn by the 1st appellant. Having examined the record of proceedings before the trial magistrate, we are satisfied that the identification parade was conducted in a fair manner in accordance with the laid down procedures. The appellants have not challenged the conduct of the identification parade.

20. We have considered the issue of identification of the 1st appellant and we are persuaded that the two courts below were right in finding that the 1st appellant was recognized by the complainant at the scene of attempted robbery.

21. We now turn on evidence relating to identity of the 2nd appellant. The testimony on identification of the 2nd appellant is that upon hearing gun shots, members of the public were attracted and arrested the 2nd appellant. PW 3 testified that the 2nd appellant was arrested on top of a tree. In **Njoroge Ndungu - v- R, Criminal Appeal No. 31 of 2000**, this Court held that the evidence of identification should be considered together with evidence of arrest. PW 1 testified that he saw the man arrested by members of the public. This is the man who he had seen in his house and this man revealed the name of the 1st appellant. At the hearing of the appeal, the state submitted that the 2nd appellant was arrested at the scene of the crime. While admitting that the burden of proof rested with the prosecution, it was submitted that the evidential burden to prove what he was doing at the scene was upon the 2nd appellant. It is our considered view that this submission is erroneous as it may shift the burden of proof to the appellant. We note that both the trial magistrate and the learned judges of the High Court did not require the 2nd appellant to explain what he was doing on top of a tree.

22. At the identification parade, the 2nd appellant was identified and pointed out by both PW 1 and PW

2. It is instructive to note that the 2nd appellant having been arrested at the scene named the 1st appellant who was positively identified and found with a leather jacket that one of the persons who committed the crime was wearing. We uphold the finding of the learned judges of the High Court that the identity of the 2nd appellant was established beyond reasonable doubt.

23. In ground nine, the appellants aver that the learned judges did not carefully consider the evidence of one accused person against another. It is true that the 1st appellant was mentioned by the co-accused, the 2nd appellant. What is the probative value of this testimony? Indeed, this is evidence of the weakest kind which can be taken into account under Section 32 (1) of the Evidence Act. **(See Raphael Oduor Ngoya & 5 others - v - Republic Criminal Appeal No. 136 of 1981 and Stephen M'riungi & 3 Others -v - Republic Criminal Appeal Nos 134, 135, 136 and 137 of 1982).** Nevertheless, we find that the naming of the 1st appellant by the second appellant lends assurance to an otherwise strong case against the 1st appellant. There were various corroborative evidence linking the 1st appellant to the crime. The evidence tendered leads irresistibly in pointing to the 1st appellant to the exclusion of all others within the meaning of the case of **R-v- Kipkering arap Koske & another 16 EACA 135**.

24. The appellants argue that the prosecution had not proved its case beyond reasonable doubt and that the ingredients of attempted robbery were not proved. It was submitted that for the offence of attempted robbery to be proved, there must be a demand of goods capable of being stolen and nothing should be stolen. It was submitted that from the evidence on record, nothing was stolen from the complainants and no demand was made. That both PW 1 and PW 2 did not testify that any demand was made for them to part with any item or money. Must there be demand for the offence of attempted robbery to be proved?

25. It is our considered view that demand need not be proved. A charge under Section 297 (2) of the Penal Code is proved where a person assaults another with intent to steal anything and at or immediately after the time of assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen and in addition, if the offender is: (i) either armed with any dangerous or offensive weapon or (ii) is in company with one or more other person or (iii) immediately at or immediately after the time of the assault he wounds, beats, strikes or uses any other personal violence to any person.

26. In the instant case, we find that the *actus reus* for attempted robbery was proved. The testimony of PW 1 and PW 2 that persons entered their house is not challenged. The identity of the persons who entered has been established beyond doubt to be the 1st and 2nd appellants. It has been proved that there was assault on the person of PW 1. The 1st appellant carried a gun which is an offensive and dangerous weapon and fired shots from the gun. This is proof of use of actual violence immediately before or after the attempted robbery.

27. On the issue of *mens rea*, a presumption of intent to steal was established by entering the dwelling of the complainant without permission and ordering the complainants to go to the main house where household goods and other valuables could be found. The 1st appellant was accompanied by the 2nd appellant; they were armed with a gun which is a dangerous weapon; they used violence on the person of the PW 1 and the struggle between the 1st appellant and PW 1 was proof of intent to overcome or prevent resistance. We find that all ingredients for the offence of attempted robbery were proved.

28. The appellants contend that the trial magistrate and the learned judges ignored the defence raised. The trial magistrate discredited the defence of the 1st appellant as a mere denial lacking credibility. The 2nd appellant's defence was also discredited as holding no water. The two courts below evaluated the defence by the appellants and we find no reason to interfere with the conclusions arrived. We are satisfied that the defence was properly considered and adequate weight given thereto. The defence did not shake the prosecution's case on identity of the appellants as perpetrators of the crime.

29. The upshot is that the appeal by the appellants is lacking in merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 16th day of May, 2013.

ALNASHIR VISRAM
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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR