



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 249 OF 2008

BETWEEN

1. BONIFACE WAHOME MAINA
2. SAMUEL MBUGUA MBURUAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 21st October, 2008

in

H.C.CR. APP. NO. 60 OF 2005)

JUDGMENT OF THE COURT

The first appellant **Boniface Wahome Maina** was the second accused at the trial while the second appellant Samuel Mbugua Mburu was the first accused. They were jointly charged with three others with two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. The trial magistrate convicted the two appellants and others but acquitted the 5th accused. On appeal to the superior court, the two co-accused were acquitted but the appellants' appeal against both conviction and sentence was dismissed.

In the first count, the appellants and the three co-accused were alleged to have robbed Peter Waweru Muchina (1st complainant), (Waweru) on 12th May 2005 of Ksh.8,000/=, radio cassette, two pangas and a Somali sword at Gakuu village Maragua District.

In the second count, the appellants and co-accused were alleged to have robbed Dorcas Wairimu Waweru (2nd complainant), on the same date and at the same place of one mobile phone and Ksh.300/=.

On the night of 12th May 2004, a gang of robbers raided the home of the first complainant at about 11 p.m. When the dogs started barking, the 1st complainant opened the window and saw about 10 people in the compound, with the aid of moonlight, who called him to open the door claiming to be policemen who had been sent by the Chief. The first complainant however recognized the voice of the 1st appellant declined to open the door whereupon the robbers broke the wooden doors with a big stone, destroyed the mud wall and about five robbers entered into the house. The 1st complainant's wife – Agnes Waringa Peter (PW2) (Waringa) lit a lantern. In the course of the robbery, the robbers beat the 1st complainant unconscious using pangas and axes. Meanwhile, Waringa and her daughter Dorcas Wairimu the 2nd complainant, were taken outside the house and forced to sit down while being guarded by some robbers. Both Waringa and the 2nd complainant testified at the trial that they recognized the two appellants through moonlight and torchlight as some of the people who were guarding them. The 2nd complainant testified that she was robbed of the mobile phone and Ksh.300/= by the robbers who were armed with pangas and clubs before she was taken outside.

When the robbers left, the 1st complainant discovered that the robbers had stolen his Ksh.8,000/= which was in his wife's handbag and a radio cassette. The robbery was reported to the police on the following morning and the 1st complainant who sustained a fracture of the left hand was taken to hospital. On the same morning the two appellants and two of the co-accused were arrested by members of vigilante group and the 2nd complainant's mobile phone and a radio cassette belonging to 1st complainant were recovered.

On 18th May 2004, IP Simeon Ngethe Ndonge of Maragua police station held an identification parade where the 1st and 2nd

appellants were identified by the 2nd complainant. Each of the appellants denied taking part in the robbery and added that they were in their respective houses at the time of the robbery.

The trial magistrate convicted the appellants on the basis of identification and recent possession of the radio cassette and mobile phone. The superior court on its part upheld the appellants' conviction on the basis of identification.

In this case the appellants and two of the co-accused were arrested on the morning following the robbery (that is on the morning of 13 May 2004) by members of the vigilante group from their respective houses and the group handed them over to the Assistant Chief who in turn handed over the appellants to the police. Although the Assistant Chief and the police officers who received the appellants gave evidence, not a single member of the vigilante group gave evidence.

The result is that the prosecution did not call evidence to link each or any appellant with the possession of the radio cassette and the mobile phone which were identified in court by 1st and 2nd complainant and produced as exhibits. It follows therefore that the prosecution case was solely dependent on the identification of the appellants. The law is clear that where the prosecution relies on the evidence of a single identifying witness such evidence should be tested with the greatest care especially when it is known that conditions favouring a correct identification were difficult. (see ***Maitanyi v. Republic [1986] KLR 198***).

Even where the prosecution relies on the evidence of identification from more than one witness such evidence should be watertight to justify a conviction. (***Kiarie vs. Republic, [1984] KLR 739***).

There are four grounds of appeal in the supplementary memorandum of appeal three of them questioning the reliability of evidence of identification.

It was submitted in support of the ground that the identification parade was unlawfully conducted that one parade was conducted in respect of all witnesses without members of the parade changing. No authority was however cited to show that where there are several identifying witnesses at the identification parade members must be different for each identifying witnesses. That would not be logical unless contrary to the Police Force Standing Orders or in the conduct of the identification parades the witnesses are allowed to communicate with each other in the course of the parade. If the Force Standing Orders are followed it would not matter that the members of the parade are not changed because to each witness, the parade members are strangers to the witnesses. The only requirement as stated in ***Force Standing Order No. 6 (IV) (e)*** is that:-

“the accused/suspected person shall be allowed to take any position he chooses and will be allowed to change his position after each identifying witnesses has left, if he so desires.”

It has not been contended that this requirement was not complied with. Indeed the evidence of IP. Simeon Ngethe Ndonge shows that he complied with all relevant Force Standing Orders. We are thus satisfied that the identification parades were properly conducted.

It has further been submitted in essence that the voice identification by the 1st complainant was unreliable because although the 1st complainant claimed to have identified the voice of the 1st appellant he nevertheless failed to identify him at the identification parade.

It is true that the superior court partly relied on the evidence of the identification of the 1st appellant by voice for the court said:-

“PW1 recognized the voice of the third appellant which he had often heard at the shopping centre.”

The superior court with respect misdirected itself in partly relying on the evidence of voice identification of the 1st appellant by the 1st complainant when the 1st complainant failed to identify the “owner” of the voice physically at the identification parade. There cannot be identification by voice or reliable identification by voice unless the identifying witness is able to say conclusively whose voice it was, and, in addition, be able to identify physically the person whose voice he has recognized.

There was however other evidence of identification against the appellant from Waringa and the 2nd complainant. The two witnesses were consistent that they were taken outside and were forced to sit down where they remained under the guard of the two appellants while the other robbers remained in the house with the 1st complainant. Waringa testified that she recognized the two appellants whom she knew before through torch lights from appellants' torches and from moonlight. Waringa however failed to identify the 2nd appellant at the identification parade. Her visual identification of the 2nd appellant was unreliable having failed to identify him at the identification parade. It follows that the only evidence against the 2nd appellant is the evidence of identification by the 2nd complainant.

Both Waringa and 2nd complainant testified that they identified the 1st appellant Boniface as he was guarding them outside the house. Both witnesses identified the 1st appellant outside the house through both moonlight and torchlight. The two witnesses remained under guard for about fifteen minutes. Waringa even noticed that the 1st appellant was wearing a pair of shots.

In the circumstances, we are satisfied like the two courts below that the identification of the 1st appellant by Waringa and 1st complainant was reliable.

Although the conviction of the 2nd appellant was dependent on the evidence of the 2nd complainant a single identifying witness at night, the superior court considered the circumstances of his identification and accepted the evidence as reliable. It has not been shown that the superior court misdirected itself in the manner it re-evaluated that evidence or that the quality of 2nd complainant's evidence was poor. We are similarly satisfied that he was properly convicted.

For the foregoing reasons we dismiss the appeal of each appellant.

Dated and delivered at Nyeri this 25th day of June, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR