



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 245 OF 2009

BETWEEN

1. NZAU MULI

2. SAMUEL MURIITHI MBUIAPPELLANTS

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Lenaola & Warsame, JJ.) dated 19th August, 2009

in

H.C.Cr.A. Nos. 138 & 139 of 2006)

JUDGMENT OF THE COURT

Nzau Muli and **Samuel Muriithi Mbui**, the 1st and 2nd the appellants herein, were charged in the Senior Principal Magistrate's Court at Kitui with three counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge on the first count are that on the 29th day of June, 2000 at Kalundu market in Kitui District of the Eastern Province jointly with others not before the court while armed with dangerous or offensive weapons, to wit, an AK47 rifle and a panga they robbed **Geoffrey Kasamba Mue** of cash Kshs.3,000/= and at or immediately before or immediately after the time of such robbery killed the said Geoffrey Kasamba Mue, (*the deceased*). In counts 2 and 3 it is stated that on the same day and at the same market while armed with the same dangerous or offensive weapons the appellants with others not before the court robbed **Jane Esther Kasamba** and **Jeremiah Kinyamasyo** of cash Ksh.5,000/- and Kshs.4,000/= respectively and at or immediately before or immediately after the time of such robbery wounded or threatened to use actual violence to the said Jane Esther Kasamba and Jeremiah Kinyamasyo, the complainants.

The case was heard by the Senior Resident Magistrate (*Mr. Makori*) of Kitui Law Court. **Jane Esther Kasamba** (PW1) was the wife of **Geoffrey Kasamba**, the deceased. They owned a shop at Kalundu market. On 29th June, 2000 at 8.00 p.m. she was at the shop with the deceased and her sister in-law, Elizabeth (PW2). Two people who posed as customers entered the shop. When PW1 asked them

what they wanted to buy, one of them pulled out a gun while the other pulled out a panga. They ordered PW1, PW2 and the deceased to lie down and to give them money. Though they got some money, they claimed it was not enough. They took the deceased to the back door and demanded to be given more money. In the meantime the two people had hit PW1 on the face whereupon she fell down and became unconscious. When she regained consciousness the robbers had vanished. She did not find PW2 at the scene and when she looked for the deceased she found him at the front door where he was lying on the floor badly injured. PW1 was taken to Kitui District Hospital leaving the deceased at the scene. She learned while at the hospital that the deceased had died. Then on 20th July, 2000 she was called to the police station to attend an identification parade on which were nine people. Out of these PW1 identified the 1st accused. He is the 2nd appellant in this appeal.

She testified that:-

“I did see the person who was tall in that parade. I did touch him over the shoulders. That I have known his face and that he had one tooth broken. It was also his physical appearance. There was somebody who had a gun, it was him. It is the 1st accused at the dock in there” (witness points to 1st accused).”

Then on 23rd January, 2001 PW1 was again called to identify another suspect on a different identification parade. She went and saw nine members on the parade. She testified as follows:-

“I did identify the shorter person in the parade. I did touch him over the shoulders. What made me identify him was his appearance. He also had big eyes. That during the attack he had a panga. It is him who took things from the shop.”

She stated that the shorter person was the 2nd accused. He is the 1st appellant in this appeal.

Elizabeth Kasau Mue (PW2) testified that on 25th June, 2002 at 8.00 p.m. she was at the ‘duka’ of the deceased washing clothes “*behind the shop*”. That from the place she was washing clothes she could see inside the shop because there was lots of light at the shop. She saw somebody with a gun who called out,

“Kujeni hapa mara moja ama utakiona” which means “*come here quickly or you will see it*”

According to her, the caller was a tall middle aged man wearing a dark jacket and trouser. She pointed out that person as 2nd appellant. The other person she saw had a panga and a green paper bag. He was the 1st appellant. She testified that they were then ordered to lie down by the 2nd appellant. They were asked for money and the 1st appellant took some from the drawer. The robbers took the deceased away to show them where he slept, and then there was a gunshot. That when the 2nd appellant came back to the shop he commented

“huyo nimemumaliza” which means: “*I have finished that one.*”

It is then that the appellants left the shop with the paper bag and their weapons. According to the evidence of PW2, it was the 2nd appellant who had earlier attacked the deceased using heavy boots. Later members of the public and police officers came to the scene and took the deceased body away. PW2 was then called to an identification parade on 20th July, 2002 where she identified the 2nd appellant by touching him over the shoulders. She testified that;

“It’s the physical appearance, which made me to see him. That the way his ears were, they were small folded ears. One of his teeth was broken. That is what made me identify him.”

Then on 23rd January, 2001 she was again invited to another identification parade. She said she had explained to the police the second suspect as “*a young fellow of dark complexion*”. She testified that

when she went to that parade that description assisted her. She stated:

“The fellows were of the same size. I did manage to identify him. He was dark and small. Its then I did touch the fellow over the shoulders. During the day in question he carried a panga. I did touch him. It’s the 1st and 2nd accused at the dock (witness point to both the 1st and 2nd accused at the dock). I have never known any of the fellows there before.”

Anastacia Mwikali (PW3) testified as to how on 28th June, 2000 she was introduced to two customers by a boy called Wambua. She let to them rooms at MAPS lodging where she worked. She told the court that one was a young “lad” who she could not see in court then while the other person was tall whom she identified as the 2nd appellant. According to her evidence the two people stayed at MAPS lodging for three days and they left on 1st July, 2000 at 6.00 p.m. The witness was invited to an identification parade on 29th July, 2000 where she identified the 2nd appellant as one of the people she had hired a room at MAPS lodging between 28th June to 1st July, 2000. She identified him because he had short ears and from the clothes he wore and a cut mark on the head. **Samuel Mbui Mue** (PW4), the deceased’s brother went to Kitui District Hospital mortuary on 7th July, 2000 at 3.00 p.m. to witness a postmortem examination performed on the deceased’s body.

No. 2311 **IP. Ernest Malinga** (PW5) attached to the Provincial Criminal Investigations Office Embu at the time of the incident testified that he visited the scene of the commission of the offence on 29th June, 2000 and took photographs thereof. Then on 30th June, 2000, he visited Kitui Hospital mortuary where he also took photographs of the deceased body. He produced all these photographs in the case as evidence.

Jeremiah Kinyamasyo Kisovove (PW6) also testified in the case and said how he was robbed of more than Kshs.4,000/= by two (2) men armed with a gun and panga respectively on 29th June, 2002 at 8.00 p.m. He identified the two suspects as the 1st and 2nd appellants on two separate identification parades held on 20th July, 2000 and 23rd January, 2001 respectively. He gave no description which made him to identify them except to say he identified the 1st appellant at the identification parade because he used to buy goods in his shop.

Jeniffer Mwendu Munyasya (PW7) testified about two people who came to her shop on 29th June, 2000 looking for her husband but as he was not present they went away promising to come back later but they did not return. When later she received a report about the murder of the deceased, she reported the incident to the police. She was called to an identification parade on 20th July, 2000 where she identified the 2nd appellant. She was, however, not called to the identification parade held on 23rd January, 2001 to identify the other suspect who was with 2nd appellant on the day of the visit to her shop. She testified:-

“I was never called to identify the 2nd accused but today I can see him. That I talked to him for quite a while so I did mark his appearance.”

Nyerere Mwalule (PW8) a taxi driver testified about 29th June, 2006 when one Wambua went to see him in company of the 1st appellant. That the 1st appellant asked this witness to drive him to a place where he intended to commit a robbery but that the witness refused. Then on 20th July, 2000 he proceeded to the police station where he was asked to identify the 1st appellant which he did as he was

“a fellow I had stayed with. Its how we had talked. It was physical identification.”

Cpl. Stanley Manore (PW9) was the investigating officer in the case who arrested the 2nd appellant at Divisional C.I.D. Meru on 19th July, 2000 and the 2nd accused at Upendo Primary School Mombasa on 17th January, 2001. They were respectively escorted to Kitui Police Station where they were subsequently charged at the Principal Magistrate’s Court Kitui as herein before stated.

Dr. John Omondi Amolo (PW10) conducted a postmortem examination on the body of the deceased at Kitui District Hospital Mortuary on 7th July, 2002. He completed a report thereof in which he detected the following wounds:-

1. 2x2 cm wound on left side of the chest
2. A wound on the right lower side of the lateral aspect of the chest.
3. Wound on respiratory system on left lung.
4. Ruptured heart.
5. Diaphragm was torn and
6. Torn liver on left side.

According to the doctor the death of the deceased was due to pulmonary arrest due to failure of internal organs. The wound was caused by a bullet.

When placed on their defence the appellants denied the offence in unsworn statements. The 2nd appellant stated that he does farming and deals in greens. That he left Kitui on 11th July, 2000 to go to Makutano in Meru for orders of vegetables. While there, two people claiming to be C.I.D. officers arrested him and took him to Meru Police Station where it was alleged he was involved in robberies under the names of John Mungania. He denied he was John Mungania but that he was Samuel Mureithi Mbui. Later he was taken to Kitui Police Station where the robbery charges were framed against him. Although he told the police officers where he was on 29th June, 2000 they did not listen. He told the trial court that he believes the charges were planted on him to prevent him from suing police officers who had assaulted him in Meru. He stated that he was returned to Meru and charged with a similar offence as the one which faced him at Kitui court but that the Meru police officers failed to appear and to testify in that case. He was then acquitted. This is when he was brought to Kitui Police Station to be charged with the same offences he had been charged with in Meru. According to his evidence it was *Joel Wambua*, *Julius Mungania* and *Mary Ngare* who should be facing these charges and not him.

The 1st appellant also denied the offence and testified that on 29th June, 2000 he was in Mombasa with his parents and that he woke up in the morning and went to school. And when it was alleged he was at Kalundu market at 8.00 to 9.00 p.m. he was actually in the house of his parents at Mombasa. He testified further that on his arrest on 17th January, 2001 he was found in class at Upendo Primary School. He was then brought to Nairobi and then to Kitui Police Station where he was charged with an offence he knew nothing about.

The trial Magistrate who heard this case made the following concluding remarks in his judgment:-

“1. The evidence offered by the identifying witnesses: PW1 Esther, PW2 Elizabeth and PW6 Kinyamasyo is sufficient. It was night but clearly there was light. The assailants were seen. They were not masked. One was tall with broken tooth. That the witnesses had time to see them clearly because the incident took time. The lights were never put off or tampered with. All opportunities to me were therefor the witnesses to identify the assailants. They did attend parades albeit the forms are not present. What is important is that they saw them. The alibi by the accused is scotched by the evidence of those witnesses.

2. That the circumstances surrounding the incident show that the accused were actually planning to execute the robberies by lodging at MAP lodging Kalundu and also planning to recruit people like PW8 to assist in the activities. This evidence is quite significant to point out that the accused were actually involved in the matter.

When the incident did happen the 1st accused escaped to Meru while the 2nd accused escaped to Mombasa.

I am satisfied that there is no element of mistaken identity as raised by the 1st accused was improperly connected with this matter. I will dismiss their alibi.

My final finding is that the prosecution has proved its case on (sic) beyond reasonable doubt basis (sic) in respect to all the counts herein. The accused are hereby convicted as charged in COUNT I, COUNT II and COUNT III.”

Upon their conviction, the trial Magistrate imposed on the appellants the mandatory sentence of death as provided by law. Their appeals to the superior court (*Lenaola & Warsame, JJ.*) were dismissed, hence these second and final appeals.

The 1st appellant filed a home-made memorandum of appeal which had three grounds of appeal. They questioned his identification, failure to consider that he was a minor at the time of sentencing him and that his defence was wrongly rejected. It was supplemented by the supplementary memorandum of appeal filed by the firm of *Messrs Kinyori N. M. & Company Advocates* for both the appellants dated 3rd and lodged in Court on 4th May, 2010. It had eight grounds of appeal. The grounds questioned the burden of proof of the case against the appellants at the trial court, their identification at the time of the commission of the offence, failure by the trial court to consider and allow a request by the 2nd appellant to produce certain documentary evidence, failure to consider the appellants' case, and lack of corroboration of the evidence of prosecution witnesses.

When the appeals were heard in this Court on 25th May, 2010, ***Mr. S. O. Oguk***, learned counsel for the 1st appellant submitted on the basis of the home-made memorandum of appeal filed by the 1st appellant and supplemented by the supplementary memorandum of appeal filed by *Messrs. Kinyori N.M.* He condensed all the grounds into three, namely the identification of the 1st appellant, failure by the trial and first appellate courts to consider the 1st appellant's alibi defence and the failure to consider that the 1st appellant was a minor at the time the offence was committed during imposition of the sentence on him. On identification, he submitted that since PW1 entered the shop contemporaneously with the thugs and that PW2 was at the back of the shop washing clothes, the two witnesses did not tell the court the truth that they saw and/or identified the appellants in view of the confusion which reigned when they were told to lie down and harassed to produce money. According to counsel the evidence of PW1 and PW2 was not confirmed by that of the officer who conducted the identification parades as he did not testify and/or produce the parade forms. Counsel discredited the evidence of PW1 and PW2 because the descriptions they gave about the appellants in Court were not revealed in their original statements recorded with the police. He also discredited the evidence of PW8 as that of an accomplice and wondered why one Wambua said to have introduced the thugs to the said PW8 and who led police to the arrest of the 2nd appellant in Meru did not testify or was not even charged together with the appellants.

As to the alibi defence raised by the appellants counsel stated that it was not displaced by the prosecution evidence. And as to the age of the 1st appellant, counsel stated that having been arrested from the school, his minority age should have been confirmed and taken into account at the time of sentencing him.

Mr. Gakinya, learned counsel for the 2nd appellant submitted that PW3 was unable to identify the 1st appellant in Court and no receipt was produced by her to prove the appellants slept at MAPS lodging for three days from 28th to 30th June, 2000. He stated further that Police Occurrence Book (O.B.) for 1st July, 2000 which had names of the people who committed the offence was never produced. According to his submissions, the evidence of PW6 did not place the 2nd appellant at the scene of the offence.

Mr. Monda, learned Senior State Counsel did not support the appellants' conviction, because PW1 and PW2 did not know the appellants before and though PW1 alleged there had been a robbery there by

then the appellants had already left. According to his submissions, PW3 did not reveal the names of the alleged customers at MAPS lodging on 28th and 29th June, 2000 and who had appeared with the sack of goods. Also, that the evidence of PW3 and 8 was more of guess work or imagination than of a real situation. The Senior State Counsel submitted further that the evidence of PW6 was worthless as he admitted during cross-examination that he had been hired to come and testify against the appellants. Such evidence according to him was not sufficient and could not be trusted to prove the charge in count 2 against the appellants; nor could that of PW8 who depicted himself as an accomplice of the robbers and whose evidence was not corroborated by other independent evidence.

These being second and final appeals, by dint of **section 361(1)** of the Criminal Procedure Code, our jurisdiction is confined to matters of law only. In the case before the trial court, PW2 testified that after the robbers left she went outside to check what had happened to the deceased. She was with some neighbours who had come to the scene on hearing the gunshots. But PW1 who regained consciousness ten minutes after being hit by the robbers said she did not find PW2 at the scene. She found the deceased seriously injured. He was bleeding profusely and not talking. In that kind of situation we are of the view that PW1 and PW2 could not have told the truth that they were able to observe and identify their attackers as vividly as they led the trial Magistrate to believe.

And when they attended identification parades and purported to identify the appellants' there at that evidence of identification was worthless as it was not confirmed by the parade officer who conducted these identification parades and who did not testify in the case to confirm this and to produce parade forms used in the exercise. The descriptions PW1 and PW2 gave to the Court about the appellants for the identification purposes were not sufficient. They talked of the tall and short persons, middle aged, short folded ears, broken tooth, appearances or mode of clothes they wore. But these descriptions were not recorded in police statements on their first reports there. The evidence of PW3 was not helpful either because it did not identify the appellants with the people who hired a room at MAPS lodging on 28th June, 2000. Her attempt to connect her customers at the lodging to the appellants as the robbers at Kalundu market on the night of 29th June, 2000 fell far short of expectation.

We have considered the record of evidence of the trial court, the superior court and submissions from the learned counsel for the appellants and the learned Senior State Counsel. During **Cpl. Manori's** (PW9) investigations into this case, he testified that according to what he found, one Wambua – whom he referred to as the suspect, had come from Nanyuki with two other people, a man and a woman whom he also considered as suspects in the commission of these offences. And when the 2nd appellant testified in the trial Magistrate's court he stated that when he was arrested allegedly for the commission of these offences he was at Meru Police Station where he had been detained since 11th July, 2000 on allegation of the robberies he had committed there, which turned out to be similar to those giving rise to these appeals. That there had been attempts by the police in Meru to force him into signing some documents in relation to those robberies under the name of Mungania which he refused to do; denying that he was Mungania. He testified that when he was handed over to the arresting officers in this case from Kitui Police Station he tried to tell them where he was on 29th June, 2000 but they ignored. This is when he was returned to Meru where he was charged with offences which are the same as that subject of the present appeals but that officers from Meru Police Station declined to testify, and then he was acquitted. This is when he was turned over to the police at Kitui to face the charges which gave rise to these appeals. But according to him, the people mentioned by Wambua in the robberies were John Mungania and Mary Ngare, but not himself. It is our view that PW9 did not inquire to find out the connection between the case the 2nd appellant was charged with in Meru and the one giving rise to the appeals herein or who John Mungania and Mary Ngare were in connection with these offences.

And in the case of the 1st appellant PW9 testified that he arrested him from a Primary School in Mombasa. When the 1st appellant himself testified in his defence, he stated that he was a student at Upendo Primary School in Mombasa where he was in his parents' house on 29th June, 2000. The appellants were actually raising alibi defences which it was upon the prosecution to displace. We are of the view that the prosecution evidence did not do this. In the case of ***Osiwa v Republic [1989] KLR 469*** where the issue of identification of the appellant and his alibi defence were raised, this Court had this to

day on identification:-

“Where the only evidence against an accused is, as here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of identification are favourable and free from a possibility of error before it can safely make it the basis of a conviction.”

Thus it makes no deference whether the evidence be that of identification or recognition. It must be examined carefully before a conviction can be based thereon. Failure by the police officers who conducted identification parades on 20th June, 2000 and 23rd July, 2001 to testify and produce the parade forms and failure by the eye witnesses to give description of their attackers in their police statements seriously dented their evidence on the identification of the appellants. As regards the defence of alibi the same Court stated:-

“The appellant put forward a defence of alibi but the trial court totally disregarded it; this was noted by the High Court which then erroneously shifted the burden of proof to the appellant. As this is a matter that is covered by authority we reiterate that an accused who pleads alibi as a defence assumes no burden to prove it. See Leonard Aniceth v Republic [1963] E.A. 206, Ssentale v Uganda [1968] E.A. 365.”

In respect to the 1st appellant who was arrested from Upendo Primary School in Mombasa, it was not difficult for the investigation officer to produce the schools register for the Court’s perusal to find out if this appellant was in that school on 28th, 29th to 30th June, 2000, if these were school days. No such evidence was adduced to displace this appellant’s evidence that he was in Mombasa during the night of the commission of the offence. And in the case of the 2nd appellant who alleged he was facing a similar offence to the one giving rise to this appeal in Meru under the names ***John Mungania***, there was nothing difficult for the police to produce the charge sheet in that case for comparison with the one in Kitui Senior Resident Magistrate’s Court. And the part played by master Wambua in the commission of these offences was not inquired into as he was neither charged with the appellants nor called as a witness in the case. If the superior court had considered all these issues we are certain it would not have upheld the appellants’ conviction by the trial court. In the circumstances we agree with the Senior State Counsel that the prosecution did not prove the robbery charges against the appellants beyond any reasonable doubt. We allow these appeals, quash the appellants’ convictions and set aside the sentence imposed on them. Unless they are otherwise lawfully held, we direct that they be set at liberty forthwith.

Dated and delivered at Nairobi this 9th day of July, 2010

P. K. TUNOI

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR