



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 63 OF 2008

NATHAN KAMAU MUGWE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos

(Ojwang' & Lenaola, JJ) dated 22nd April, 2008

In

H.C.Cr.A. No. 176 of 2006)

JUDGMENT OF THE COURT

Nathan Kamau Mugwe, the appellant herein, was tried by a Senior Resident Magistrate at Machakos on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of that charge were that on 5th day of May, 2005 at Athi River in Machakos District within Eastern Province, the appellant, jointly with others not before the court and while armed with dangerous or offensive weapons, namely a hammer and screw drivers, they robbed James Mungai Ngumba of his motor vehicle registration number KWF 837, Toyota Corolla, a mobile telephone, a mobile charger, a torch and K.shs.600/- cash, all valued at Kshs.205,000/- and that in the course of the robbery, they threatened to use actual violence to the said James Mungai Ngumba.

The Magistrate heard and recorded evidence from a total of five prosecution witnesses and the appellant in turn gave sworn evidence denying the charge. At the end of it all, the trial Magistrate believed the evidence presented to him by the prosecution witnesses and he rejected the sworn evidence given by the appellant. The Magistrate then convicted the appellant and duly sentenced him to death. That is the only penalty provided by law for the offence the appellant was convicted of.

Following the conviction and sentence, the appellant appealed to the High Court and by its judgment dated and delivered on 22nd April, 2008, that court (J.B. Ojwang and I. Lenaola, JJ) dismissed the appellant's appeal against the conviction and confirmed the sentence of death. The appellant's appeal before us is, therefore, a second appeal and that being so the jurisdiction of the Court is confined to considering only issues of law – see **section 361** of the Criminal Procedure Code.

The appellant had on his own filed a memorandum of appeal containing a total of seven grounds of appeal. Before us, the appellant was represented by Mr. Obuo who also filed a supplementary memorandum of appeal with six grounds of appeal. Mr. Obuo abandoned all the grounds which had been filed by the appellant in person and only argued the six grounds contained in the supplementary grounds of appeal.

In respect of ground one the complaint was that the charge as drawn was not proved because the particulars contained in the charge had declared that during the robbery, the appellant and his colleague(s) were armed with a hammer and screw-drivers which were therein described as offensive weapons. Mr. Obuo's contention was that neither James Mungai Ngumba (P.W1 - hereinafter "James") who was the victim of the robbery nor Mwendo Munyao (PW2 – hereinafter "Mwendo") who was said to be the other witness connecting the appellant with the robbery, ever said that he had seen the appellant with a hammer and a screw – driver. We think there is not much substance in this contention and Mr. Obuo did not really argue it with conviction. In the circumstances surrounding the robbery, the issue whether the appellant was armed or not armed was really not material. James swore that having been hired by the appellant alone he (James) drove the appellant to some gate and there the appellant was joined by another person. The appellant and the new person were said to have attacked James, tied him up, drove the vehicle to another place and abandoned James there. It was not the contention of the appellant that James was never robbed by two people; James was clearly robbed by two persons who abandoned him in some bush and drove away James' vehicle after taking his mobile telephone, Kshs.600/- and a torch. The fact of robbery was proved and two persons were involved in the robbery. The appellant's contention was that he was not involved in the robbery. He did not, and if he was not involved in the robbery, he could not have known how many people had robbed James. The particulars of the charge clearly stated that more than one person was involved in the robbery. To prove a charge of robbery under **section 296 (2)** of the Penal Code, the prosecution is not required to prove that the robbers were armed with dangerous or offensive weapons and that there were more than two people and that they beat, wounded etc their victim. It is enough to prove any one of those ingredients and in this case the prosecution proved that two people robbed James. That was sufficient and the issue of whether those people were armed with dangerous or offensive weapons became irrelevant – see **JOHANA NDUNG'U VS. REPUBLIC**, Criminal Appeal No. 116 of 1995 (unreported).

Ground one of the appellant's grounds of appeal must accordingly fail.

Mr. Obuo next argued grounds two and six contained in the supplementary grounds of appeal. These are:-

***“2. THAT the learned judges erred in not finding that P.W3 produced the second Identification Parade Form unprocedurally as the appellant was never asked if he objected to the said production.*”**

6. THAT the learned judges erred in not finding that the identifying witnesses did not give a description of the appellant prior to the holding of the identification parades.”

As to the complaint in ground two the issue arises because the police decided to hold two identification parades to test the assertion by James and Mwendo that they would be able to identify the person whom each one of them said they had seen and dealt with during the night of the robbery. Mwendo (PW2) was a watchman at Cheers Makuti Bar at Athi River. Mwendo swore that when James was away in his taxi cab the appellant had approached him and asked him for a vehicle which he, the appellant, could hire. Mwendo said he pointed out another vehicle which was available there but that the appellant insisted he wanted a particular vehicle which turned out to be that of James. Mwendo told the appellant to wait in the bar and he (Mwendo) would notify the appellant upon the return of James. The conversation was at night but the witness stated they talked at a place lit by electric light. Upon the return of James, Mwendo went to the bar and informed the appellant. The appellant went out, negotiated with James and Mwendo saw them drive away.

James also said that upon his return, Mwendo informed him about a waiting customer and Mwendo went and brought out the appellant. He (James) negotiated the hire charges with the appellant and they did so

at a place lighted by electricity. Upon their agreeing the fare, he drove the appellant to the gate where another man joined the appellant and they attacked him and robbed him of his vehicle and other items. Neither James nor Mwendo had seen the appellant before that night and hence the decision by the police to put the appellant on identification parades to see if James and Mwendo would pick him out.

The parade at which James identified the appellant was conducted by Inspector George Mutonga (PW3). That was on 10th May, 2005 at 3.45 p.m. James had no difficulty in picking out the appellant and apart from the complaint in ground six that James and Mwendo had not given a description of the appellant before the parades were conducted we did not hear any other complaint with regard to the conduct of the parade. The parade at which Mwendo is said to have identified the appellant was conducted by some other unnamed Inspector on 16th May, 2005. That Inspector was never called to come and testify and produce the parade form. No explanation at all was offered for the failure to call him and the appellant was never asked if he had anything to say on the issue of inspector George Mutonga (PW3) producing the parade form. This was clearly wrong as the procedure adopted deprived the appellant of his right to cross-examine the parade officer as to the conduct and validity of the parade. The parade form was and still is not a document which could have been admitted under **section 77** of the Evidence Act, **Cap 80** without calling the maker thereof. The documents which can be admitted under that section are clearly set out therein and a parade form is certainly not one of them. The same must apply with respect to the statement of another uncalled police officer which statement was produced by Constable James Mwangi (PW4). That statement did not qualify for admission under any of the provisions of **section 33** of the Evidence Act. Accordingly the evidence regarding the second identification parade at which Mwendo is alleged to have identified the appellant ought to have been and must now be excluded. We must also exclude from consideration the evidence touching on a witness statement which statement was produced by Constable Mwangi contrary to the provisions of existing law. We must also exclude from consideration the evidence to the effect that the appellant led police officers to the recovery of the motor vehicle. That evidence must have been admitted pursuant to the repealed **section 31** of the Evidence Act, which, before its repeal by **section 102** of the Criminal Law (Amendment) Act, i.e. Act No. 5 of 2003, had allowed the reception of such evidence – see, for example, **KENNEDY OTIENO ODENY VS. REPUBLIC**, Criminal Appeal No. 100 of 2007 (unreported).

So that the only acceptable evidence which the two courts below could have relied on in support of the charge was the identification of the appellant by James (PW1); the purported identification of the appellant by Mwendo remained only dock identification and in that connection Mr. Obuo relied on the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982 – 1988) 1 KAR 1134** where the Court had held that:-

“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.”

That was the position for sometime after GABRIEL Case which was decided in 1982. In 1984 the Court further re-emphasized the position in the case of **KIARIE VS. REPUBLIC [1984] KLR 739** where it was stressed that the identification of an accused person in court by a complainant is almost worthless without an earlier identification parade. But in 2002, the Court started to move away from that position. In **MUIRURI & 2 OTHERS V. REPUBLIC [2002] 1 KLR 274**, the Court consisting of Kwach, J.A as he then was, Bosire & Ole Keiwua, J.J.A stated at pg. 277 between paragraphs 25 and 40:-

“But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if

satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

That position was again followed in the recent decision of the Court in the case of **GRACE WAMBUI NJOROGE alias WANANCY & 3 OTHERS VS. REPUBLIC**, Criminal Appeal No. 201 of 2006 (unreported). Having considered and compared the decisions in GABRIEL’s Case, supra, and that in MUIRURI’s Case, supra, we have come to the conclusion that the more correct position at law is the one propounded in MUIRURI’s case and not that stated earlier in GABRIEL’s case. We accept the position as stated in MUIRURI’s case rather than that in GABRIEL’s case. We must point out that Mr. Obuo must have been unaware of the latter two decisions for he did not cite any of them to us.

James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade. True, the evidence of James was that of a single witness and the courts below did not warn themselves on the dangers of relying on it, but if the two courts had the correct principles in mind, they would have realized that the dock identification of the appellant by Mwendo must have lent some weight to the identification by James. We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person.

As to the complaint in ground six that the witnesses had not given to the police a 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.

On the failure to produce the car taken away from James, nothing can turn on that. The photographs of the car taken by the police were produced and there was no complaint by anyone that the photographs were not a true representation of the car. Other items such as money were stolen and were never recovered. We find no substance in the complaint with regard to the car.

In our view, the charge against the appellant was proved beyond any doubt that is reasonable and that being the view we take of the matter, we must order, as we hereby do, that his appeal against the conviction be dismissed. The sentence imposed was the only one available in law and there can be no basis for interference by us. The appeal fails in its entirety and these shall be the orders of the Court.

Dated and delivered at Nairobi this 12th day of June, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR