IN THE COURT OF APPEAL
AT NYERI

CRIMINAL APPEAL 57 & 58 OF 2004

BETWEEN

1. JOHN WACHIRA WANDIA

2. FREDRICK JUMA MURIUKI…….....…….APPELLANTS

AND

REPUBLIC …….....……RESPONDENT

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

(J.V.O. Juma & N.R.O. Ombija, JJ) dated 13th August, 2003

in

H.C.CR.APPEAL NO. 252 & 253 OF 1999)

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JUDGMENT OF THE COURT

The first appellant ***John Wachira Wandia*** and the second appellant ***Fredrick Juma Muriuki*** were convicted by the Principal Magistrate Nyeri of four counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code and each sentenced to death. Two other persons who were jointly charged with them were acquitted. Their respective appeals to the superior court were dismissed hence the two consolidated second appeals. The 2nd appellant died before his appeal was heard. His appeal has thus abated.

On the night of 29th January, 1999 at about 9.30 p.m. a gang of about 10 robbers raided Flamingo bar at Gitugi Market, Othaya. All the four complainants namely, Samuel Wanjohi Kingori. Complainant in count 1, (Wanjohi) Ephantus Maina Wangai, complainant in count 2 (Wangai), Richard Kihato Kingori, complainant in count 3 (Kihato) and Peter Theuri Kahia, complainant in count 4 (Theuri) were patrons in the bar. The bar was owned by Wanjohi and Kihato who are brothers.

The two brothers and Wangai were seated together at the verandah of the bar. There were other patrons inside the bar. Two of the robbers one armed with a rifle and the other with a knife confronted Wanjohi, Kihato and Wangai. The robber who was armed with a knife identified as the 1st appellant, demanded car keys from Wanjohi for his motor vehicle Reg. No. KAC 512C Toyota Corolla, which was parked outside the bar. Wanjohi released the car keys. The robbers then ordered the bar patrons to lie down. Kihato

resisted and hit one robber with a chair but lay down after he was stabbed with a knife. The robbers ransacked the pockets of the bar patrons. They robbed Wanjohi of Kshs. 500/- and a wristwatch; Wangai of Kshs.500/- a wrist watch and a bank plate; Kihato of Kshs. 600/- and a wristwatch and Theuri of Kshs. 200/- and a hat.

After the robbery the gang drove away in Wanjohi's motor vehicle. On the following day, Cpl. John Ringera recovered the motor vehicle, which had been abandoned at Kiamwathi area about 10 km from the scene of the robbery.

The conviction of the 1st appellant was based on the evidence of identification and the confessionary statement. There are six grounds of appeal the main one being ground No. 3 thus: -

"3. That the High Court Judges did not consider the source of light alleged to have been used to identify the appellants. It was during the night and those persons were scared and shocked and could not identify anybody."

The trial magistrate appreciated that the robberies were committed at night and that the issue of positive identification was of crucial importance. He concluded that there was security lights outside the bar and electricity lights inside the bar and that the bar was well lit. The trial magistrate was satisfied that the first appellant was identified by Wanjohi; Kihato, and Eunice Nyokabi (PW8), the bar maid. The trial magistrate also found that the 1st appellant and the deceased 2nd appellant were picked by Kihato during the identification parade. He said:-

"***He too picked them during the identification parade."***

The superior court was also satisfied that the 1st appellant was identified by Wanjohi and Kihato through electricity light and that:-

"***This accused was identified during the police identification parade by the two brothers."***

The conviction of the 1st appellant was mainly dependent on the identification by three witnesses 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 a conviction. (see ***Nzaro v. Republic*** [1991] KAR 212 and ***Kiarie v. Republic*** [1984] KLR 739 .

It is true that Kihato; Elizabeth Mwangi (PW5) and Eunice Nyokabi (PW8) all testified that there were security lights. Kihato is the only witness who said that there was sufficient light both from the security lights and the lights inside the bar.

However, the two courts below failed to evaluate and exhaustively scrutinise the evidence of identification and did not in fact make a specific finding that the circumstances were favourable for positive identification. Wanjohi did not even mention the existence of electricity lights. Wangai who was at the same table with Wanjohi and Kihato confessed that he did not identify anybody. Similarly Theuri did not identify any of the robbers.

Moreover, the evidence of identification of the first appellant by Wanjohi; Kihato and Eunice Nyokabi as the one who had a knife and as the one who stabbed Kihato was contradicted by the evidence of Elizabeth Mwangi who said that it was the 3rd accused at the trial (the deceased 2nd appellant) who was armed with a knife.

Mr. Mburu the learned counsel for the 1st appellant submitted that there was no evidence that identification parade was held and that his identification was mere dock identification, which is of no value. This Court has on many occasions reiterated that dock identification without an earlier identification parade is almost worthless (see ***Kiarie v. Republic*** (supra) and ***Njoroge v. Republic*** [1987] KLR 19 although not all dock identification is worthless (see ***Muiruri & 2 Others v. Republic*** [2002]

KLR 274 at page 277 para 25-35). The submission of Mr. Mburu is correct for there was no evidence that identification parades were held in respect of the 1st appellant and that the 1st appellant was identified by any witness at the identification parade.

The finding by both the trial magistrate and the superior court that the 1st appellant was identified by witnesses at the identification parade is a gross misdirection.

It is clear from the record that the only evidence of identification of the 1st appellant is that of dock identification by three witnesses who identified the 1st appellant at the trial about 2½ months after the robbery. The two courts below did not appreciate this and therefore did not make a finding whether it was safe to rely on the evidence of dock identification or otherwise.

The 1st appellant states in ground 6 of the memorandum of appeal that he was forced to sign the statement. The trial magistrate made a finding that the retracted confession of the 1st appellant was corroborated by the evidence of Wanjohi, Kihato and Eunice Nyokabi (that is by the evidence of identification). The superior court without evaluating the evidence merely said that the trial magistrate properly directed himself and that even without the statement the evidence against the 1st appellant was sufficient.

Mr. Mburu contended that the statement of the 1st appellant was recorded on 13th March, 1999 after the 1st appellant had been charged in court on 8th February, 1999. That is, with respect, not the correct position. The 1st appellant stated that he was arrested on 13th March, 1999. The statement was recorded on the same day 13th March, 1999 and the 1st appellant was charged in court through a substituted charge on 19th March 1999.

In the statement the 1st appellant is recorded to have answered each of the four charges in Kiswahili:-

"***HII NI KWELI"*** translated as "***This is true".*** This is a bare statement.

In ***Tuwamoi v. Uganda*** [1967] EA 84 the predecessor of this Court enunciated the correct approach to a retracted or repudiated confession.

It is clear that the evidence of identification that the trial magistrate relied on as corroborating the repudiated confession was itself almost worthless being dock identification. It is also clear that the superior court failed to re-evaluate the evidence touching on the confession and to make its own independent finding.

It is clear that in this case the superior court did not perform its duty as the first appellate court and that both the trial magistrate and the superior court grossly misdirected themselves on the identification of the 1st appellant at the identification parades. That misdirection renders the findings of the two courts that the 1st appellant was properly identified faulty.

The quality of the evidence against the 1st appellant was poor. The investigating officer or the officer who arrested the 1st appellant did not testify at the trial. It was not therefore proved that the 1st appellant was arrested in connection with the robberies at Flamingo bar Gitugi. The dock identification of the appellant and the uncorroborated repudiated confession was, in our view, weak evidence which renders the conviction unsafe.

For these reasons, we allow the appeal of the 1st appellant, quash the convictions and set aside the respective sentences with the result that the 1st appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 3rd day of November, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR