REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 62 OF 2014

FORMERLY NAKURU CRIMINAL APPEAL NO. 206 OF 2013

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 1482 of 2012 by S. M. Githinji - CM)

STANLAUS KITONGA MUSEMBI……APPELLANT

-VERSUS-

REPUBLIC……..RESPONDENT

J U D G M E N T

1. The charge sheet upon which the Appellant was arraigned before the court indicted him of the offence of Robbery with violence Contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars thereof stated that on the 9th day of May, 2012 at Kikopey in Gilgil District, within Nakuru County, jointly with others not before court, being armed with a dangerous weapon namely a pistol he robbed **David Kamau Wakaba** of a **Toyota Hilux** Pick-up white in colour, **Nokia** phone model 1200 and cash Kshs 3,500/= all valued at Kshs 407,000/=, and at or immediately before on immediately after the time of such robbery used actual violence to the said **David Kamau Wakaba**. The Appellant denied the charges. The prosecution closed its case after calling three witnesses.

2. In brief, the prosecution case was that the Complainant **David Kamau Wakaba** (PW1) was an employee of one **John Kamau Ireri** (PW2). PW2 owned two pickups registration numbers KAA 617L Toyota Hilux and KAN 417F. PW1 was employed as the driver of the former pickup. Both operated from Limuru town, apparently for hire.

3. On 8/5/2012 the Appellant in the company of a woman approached both PW1 and PW2 at different times, claiming to be a police officer on transfer from Elementaita to Tigoni. The Appellant desired to hire a pickup to move his goods. He negotiated with both PW1 and PW2, agreeing eventually to return on 9/5/2012 in order to proceed to Elementaita for the goods. Later PW1 and PW2 in discussion realized they had been approached by the same people and decided to wait for the customer.

4. On the next morning PW1 received a call to meet the clients at Limuru market. They embarked on their journey after fuelling the vehicle, shopping once at Kikopey Gilgil at the Appellant's request. Soon, they took the rough road towards Elementaita. Before long, the Appellant made

a second request to stop ostensibly to enable him contact his sons. No sooner had PW1 stopped than 3 men, one of them toting a pistol emerged from bushes and ordered him to alight. Then after sandwiching him between two men, the woman moving to the back of the pickup, the armed man took control of the vehicle.

5. After driving for a short period the armed man ordered the complainant to alight before forcing him to drink from a bottle containing a milky substance. They trussed his hands to the back, frisked him for valuables including a **Nokia** model 1200 phone and Shs 2,500/= before abandoning him driving away in the pickup.

6. After freeing himself, PW1 managed to inform PW2 with the help of good Samaritans, who also escorted him to the Gilgil Police Station, where he made a report to **Sergeant Benson Wambua** (PW3). He collapsed soon after and was admitted into hospital. It would seem that police were led to the arrest of the Appellant, consequent to which, both PW1 and PW2 were called to Narok Police Station, supposedly to identify some suspects. On 19/5/2015 when PW1 and PW2 visited the CID Office, they saw the Appellant and immediately recognised him. No identification parade could be held thereafter.

7. In an unsworn defence statement the Appellant narrated that on 16/4/2015, a friend called Joseph Kamau requested his help as he was in custody at Narok Police Station. The Appellant was arrested and subsequently charged with two unrelated cases. On 19/5/2012 he met both PW1 and PW2 at the CID Office at Narok, and later when informed of an intended identification parade involving the two men, he protested. He denied that he was in Limuru on the date of offence, or that he committed offence. The trial court found the Appellant guilty and sentenced him to life imprisonment.

8. In the amended ground of appeal filed on 12/6/2015 the Appellant raises six challenges (grounds 2 – 7) to the quality and adequacy of the evidence forming the basis for his conviction. Ground 1 attacks the charge sheet for duplicity. He relied on written submissions and authorities in support of his grounds.

9. In summary, concerning ground 1 the Appellant asserts that duplicity arose from the framing of the charge under two sections of the Penal Code, namely Section 295 and 296 (2). In addition, it is asserted that the ownership of the **pickup** and existence of Nokia phone or loss of Shs 2,500/= all, stated in the charge sheet were not proved.

10. In regard to ground 2 and 3 these attack the identification evidence against the Appellant and question the circumstances of his arrest, respectively. On grounds 4, 5, 6, and 7 the Appellant contends that the prosecution evidence was inadequate and incapable of dislodging his *alibi* defence.

11. Through Mr. Kibelion, the Director of Public Prosecutions opposed the appeal, reiterating the evidence of PW1 and PW2. He contended that their testimony was corroborated by the recovery of the cell phone and sim card and identification of the number the Appellant used to call PW1 and PW2. He argued that the said evidence dispels any doubt concerning the identification of the Appellant by PW1 and PW2. In his reply the Appellant pointed out that no such cell phone was identified at the trial.

12. The duty of the first appellate court was succinctly stated in **Okeno –Vs- Republic [1972] EA 32** and is worth restating as a useful guide on a first appeal:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."

13. Starting with the complaint that charge sheet was duplex, we found no substance in the assertion. Section 295 of the Penal Code contains the definition of the offence of robbery while Section 296 (2) of the Penal Code specifically creates the offence of robbery with violence and the punishment therefor. It was superfluous for the prosecution to cite both sections in the statement of the offence but no prejudice was occasioned upon the Appellant: his robust participation in the trial demonstrates that he fully understood the charges facing him.

14. We do however agree with the Appellant's submissions that apart from the oral evidence by PW1 and PW2 no document of ownership respecting the alleged stolen vehicle was tendered. A document of ownership (log book) identified by PW2 and marked MFI 1 was not produced as an exhibit, as the investigating officer was not called to testify. Indeed the charge sheet merely described the **pick-up** by colour and not the registration mark. Equally, no receipts in respect of the **Nokia 1200** phone were exhibited. Another pertinent observation by the Appellant was that the robbery victim PW1 did not in his initial report include the loss of the sum of Shs 2,500/=.

15. We would therefore agree with the Appellant's submissions that the prosecution evidence was shaky in regard to the items listed in the charge sheet as stolen. It is therefore a misdirection for the trial court to have stated in the judgment after summarizing the respective cases, that the only issue for determination was the identification of the robber(s). A proper evaluation of the evidence reveals that there were more issues in dispute and requiring the court's determination.

16. The evidence against the Appellant was based entirely on the identification evidence by PW1 and PW2. On this aspect, the learned magistrate sought guidance from relevant case law. He correctly relied on the decisions of the Court of Appeal in **Republic -Versus- Sebwato** and **Joseph Ngumbao Nzaro -Versus- Republic [1991] KAR 212**.

17. The second authority was recently considered, with other related decisions, by the Court of Appeal in **Simon Kangethe -Versus- Republic [2014] eKLR**. The court observed:

"It is trite law that evidence of identification must be tested with the greatest care (See Republic -Versus- Turnbull [1976] 3 ALLER 549). The evidence must be absolutely watertight to justify a conviction. (See Nzaro -Versus- Republic [1991] KAR 2012 and Kiarie -Versus- Republic [1984] KLR 739). We reiterate the holding in Wamunga -Versus- Republic [1989] KLR 424, where the court held at page 426: It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence with care and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction."

18. The offence occurred during the day. The trial court properly noted that no description of any of the robbers was given on the first report or initial statements of the PW1 and PW2 to police.

Indeed in his evidence-in-chief PW1 did not indicate what role the Appellant played during the actual robbery – he made references to “that man” without linking the reference to the Appellant, although he claimed that the Appellant had already introduced himself as Musembi. This name was also not mentioned in his statement to police.

19. PW2 admitted during cross-examination that he did not tell police in the first statement that he had also met with the Appellant as a prospective customer a day before the robbery, or give a description of him to police.

20. The trial court noted these matters stating in the judgment:

“**I have considered that the two witnesses, PW1 and PW2 did not describe the assailants in their statements to the police and even in the Occurrence Book report at Kikopey. They did not even state the single strong statement, that they would recognize the assailants if they happened to see them again.”**

21. In our view, this matter however did not receive adequate further attention by the court while analyzing the evidence of the witnesses. In the case of **Tekerali s/o Kirongozi and 4 others -Versus- Republic [1952] 19 EACA 259** the court noted:

“We have had reason before to comment on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such Statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”

22. And in **Republic -Versus- Shaban Bin Donaldi [1940] 7 EACA 70** the court held:-

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

23. First of all, if indeed the two witnesses had seen and spoken to the Appellant one day before the offence, one would expect that they would have been able to offer a description to police. More so PW1 who allegedly saw him twice. It is not enough that their statements referred to a man and woman as the said prospective customers. Equally, we find it difficult to believe PW2’s explanation for his failure to tell police of his first alleged encounter with the Appellant one day before the theft. This raises the question whether PW2’s evidence asserting the contrary should be treated as an afterthought or mere dock identification, and not the more reliable recognition (See **Anjononi Versus Republic (1980) KLR 57).**

24. It also raises a question on the credibility of PW2. In ***Ndungu Kimanyi -Versus- Republic***

(1979) KLR 282, Court of Appeal stated in such regard that:-

"…we lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence."

25. Notably, no identification parade could be held in respect of PW2 as he and PW1 were supposedly accidentally exposed to the Appellant at Narok CID Office. We say supposedly because, from the evidence of PW1 and PW2, that exposure was not by chance as the police had called the witnesses to go to the station for the purpose of identifying the robbers. Thus all efforts should have been made to shield the Appellant from potential witnesses before the identification parade.

26. With regard to PW2 therefore it is doubtful that his evidence could corroborate PW1's identification of the Appellant as the trial court found. PW1, if he is to be believed spent several hours on the day of the robbery with the robber who had approached him on the previous day. Still he was unable to describe him to the police on his first report and statement to police. Whether this omission was innocent or not becomes an important question when the mystery surrounding the arrest of the Appellant is considered.

27. The investigating officer and officer who effected arrest not having testified, the trial court was left to contend with hearsay evidence by PW2, supported in part by the Appellant in his defence, that the Narok Police first traced a stolen Nissan matatu with other suspects and that the Appellant was then arrested. PW2 said that:

"**Police told me that the suspects found with the Nissan could be the same ones who had our vehicle….. Some people called me and told me the newspaper of 22/5/2012 had reported about arrest of the suspect in Narok." (sic)**

28. If indeed police tracked the Appellant by the telephone line he used to call PW1, that evidence was not placed before the court. Why was the Appellant arrested and in what circumstances" There is no answer to these questions and the failure to call the relevant witnesses was not explained. Could it be that the police charged the Appellant out of mere suspicion due to his alleged involvement with the theft of the Nissan Matatu"

29. If that is not so, why did the CID Narok allow the exposure of the Appellant to PW1 and PW2 on 19/5/2012" Why was the exposure necessary: the only reasonable answer appears to be that PW1 and PW2 could not identify him. It seems possible that police heaped this charge against the persons they had arrested for a similar offence elsewhere. By failing to call the investigating officer and the arresting officer, the prosecution introduced a major fault in their evidence. It is therefore believable that but for police, PW1 and PW2 had no way of tracing or identifying the robber, based on their meagre statements.

30. In our considered view the loose ends in the prosecution case were fatal and the evidence did not establish a proper basis for a conviction against the Appellant. Had the trial magistrate properly addressed these matters we believe the result would have been different.

31. For all the foregoing reasons we are satisfied that the appeal before us is merited and will allow

it. The conviction against the Appellant is therefore quashed and the sentence set aside. The Appellant is to be set at liberty unless otherwise lawfully held.

Delivered and signed at Naivasha, this **6th** day of **November, 2015.**

In the presence of:-

State Counsel : Kibelion/Ms Waweru

For the Appellant : N/A

C/C : Steven

Appellant : Present

M. A. ODERO **C. MEOLI**

JUDGE **JUDGE**