



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CRIMINAL APPEAL NO. 3 OF 2018**

**ANDERSON KAMAU GATUTHU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the judgment of Hon E. Kimilu (PM) delivered on 16<sup>th</sup> March, 2018*

*in Naivasha CMCR 1181 of 2015)*

**JUDGMENT**

1. The Appellant and two others, were charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The alternative charge was handling stolen goods. The particulars were that on the night of 8<sup>th</sup> July, 2015 along Maai Mahiu Naivasha highway they, jointly with others not before the court and armed with dangerous weapons, namely pistols, iron bars and rungun, robbed Joseph Mukondi Asenga of several items: a motor vehicle registration number KBX 748F Mitsubishi Lorry valued at Kshs 4.52 million, 75 sheets of Ms Plates, 88 bundles of Y12 Metal, a spare wheel, one mobile phone make Forme worth Kshs 1,595/= and cash of Kshs 10,000/=. All the items totaled Kshs 5,591,595/=. It was alleged that immediately before and at the time of such robbery, they used physical violence upon Joseph Asenga.

2. The accused also faced a charge of handling stolen property contrary to **Section 322 (1) (2)** of the **Penal Code**. The particulars were that the accused on 9<sup>th</sup> July, 2015 at Mirera Estate in Naivasha, jointly with others not before the court otherwise than in the course of stealing, dishonestly retained 75 Ms Plate, 88 bundles of y 12 metals and one spare tyre all valued at Kshs 730,000/= the property of Paul Mwangi Maina.

3. After hearing eight (8) prosecution witnesses and the three defendants, the trial magistrate acquitted the other two accused person for the offence of robbery with violence but convicted them with the alternative charge of handling stolen property. The Appellant who was the 3<sup>rd</sup> Accused, was however, convicted with the offence of robbery with violence. On sentencing the trial magistrate stated that the law has set a mandatory sentence for robbery with violence and sentenced the Appellant to serve death sentence.

4. Dissatisfied, the Appellant has filed this appeal against both conviction and sentence on the following amended grounds of appeal:

*1. That, the Learned Trial Magistrate erred both in law and fact in accepting the prosecution evidence of identification without considering the fact that PW2 was a single identifying witness. He was attacked at night, there was no clear evidence of the intensity of the light used and PW2 did not give marks of identification to the police or to the person who rescued him. It was an error in law to rely on such flimsy information.*

*2. That, the Learned Trial Magistrate erred in both law and facts in finding that the identification parade conducted was properly procured while there were glaring irregularities procedural technicalities were flawed.*

*3. That, the Learned Trial Magistrate erred in both matters of law and fact in misconstruction the circumstances of arrest of the Appellant in connecting him with the robber committed against one Joseph Mukondi Asenga along Maai Mahiu Naivasha Highway.*

*4. That, the Learned Trial Magistrate erred in both matters of law and fact in shifting the burden of proof to the appellant and failed to evaluate conclusively the appellant defence of Alibi alongside the prosecution evidence the defence was not given adequate consideration.*

5. From the grounds of appeal and submissions, the issues for determination are:

- a) Whether the appellant was properly identified.
- b) Whether there was a nexus between the arrest and the present offence.
- c) Whether the burden of proof was shifted to the defendant in light of his alibi.

6. As required by law, this court must re-evaluate the evidence and come to its own conclusions. (see **Okeno v Republic 1972 EA 32**).

### **Identification**

7. The complainant was on 8<sup>th</sup> July, 2015 a driver of Mitsubishi lorry KBX 748F. He left Nairobi at 8.00pm with a load of construction goods including metal plates, Y12. He was instructed to follow another vehicle to Naivasha. When they reached a place called Kosovo, he was blocked by cars in front and behind. People came out of the vehicles that blocked him and ordered him to alight. He saw one of them very clearly from the light of passing vehicles. One of the assailants entered his lorry from the conductor's side. They were armed with metal rods and forced him out of the lorry, beating him in the process. The assailants forced him into a culvert after tying him up. There were two other people in the culvert.

8. On going through the culvert they emerged in a bush. He was with two other people. Shortly thereafter, they heard gunshots and the other two ran away. He was left in the bush. In the morning, he saw a knife with a black handle next to him. He also saw a Good Samaritan with whom he pleaded to untie him. He then went to Longonot Police Station where he reported the incident and some officers took him to hospital. He was also robbed of his phone and Kshs 10,000/=.

9. The complainant identified the assailant who had come beside him as the 3<sup>rd</sup> Accused (the Appellant) during an identification parade. He also identified the rope he was tied with; the knife he found at the scene; Y12 bars, metal sheets, invoices of the goods he carried and a spare tyre for his lorry' P3 form.

10. In cross-examination, he stated that he saw the Appellant from the light of passing vehicles; that they spoke to one another for some minutes when the assailant was ordering the complainant out of the vehicle; that during the identification parade, he had come from Busia, waited outside, and was finally called into the station where he found nine people in an identification parade; and that he had not seen the Appellant immediately before the parade.

11. PW7 PC Stephen Kimathi was the arresting officer. He testified that he received information about a public outcry on highway robbery along Longonot Maai Mahiu road. He was instructed to go there with PC Obongi by PW4 Chief Inspector Nzioka. They had information from informers that one suspect was in a club at Mabatini within Maai Mahiu. They spotted the Appellant and arrested him on the strength of informers' information.

12. In cross-examination, PW7 said that the complainant had reported the incident before the arrest, and had described the Appellant. The informer assisted him in the arrest.

13. PW4 Chief Inspector Nzioka Singi testified that he conducted an identification parade on 28<sup>th</sup> July, 2015 in respect of Appellant, on request by Sergeant Makau. According to PW4, the complainant arrived at the police station at 2.00pm. PW4 went to organize a parade, using members of the public. The Appellant objected to two members of the parade, so PW4 got others from among persons who had come for certificate of good conduct. Appellant again objected to one of them, and he was replaced. The Appellant then signed the identification parade form accepting to participate but asked for his wife to be present. The wife was brought but she refused to attend the parade.

14. The Appellant then opted to stand between suspect No. 6 and 7. PW4 explained to the complainant that he had to identify the suspect by touching his shoulder. He identified the Appellant. The Appellant however refused to sign the parade form to acknowledge his satisfaction with the parade arguing that the complainant had seen him in the crime office being interrogated. On his part, PW4, signed the parade form, and produced it as Exhibit 17.

15. The Appellant's argument is that the circumstances for identification were difficult, and that identification was by a single witness; that the claim that the complainant could see the Appellant's face from the light of passing vehicles was ridiculous; that there was insufficient time and light to see the Appellant who was a stranger.

16. In light of the above evidence, the question is whether the trial court gave careful consideration to the issue of identification and whether it scrutinized it thoroughly. The Appellant properly cited two authorities on this point. The first was **Gikonyo Karume & Another v Republic (1980) KLR 23** and **Kariuki Njiru & 7 Others v Republic CR App No. 6 of 2001** (Unreported).

17. In **Gikonyo's case** the court stated regarding identification evidence as follows:

*“.....before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of and the source of light in relation to the accused, and time taken by the witness to observe the accused so as to be able to identify him.”*

In **Kariuki's case** the Court of Appeal stated:

**“.....the law of identification is well settled and this court has from time to time said that, evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibilities of error. The surrounding circumstances must be considered.....”**

18. The trial court set out, scrutinized and assessed the evidence of PW2, PW4 and PW1 in determining the issue of identification as follows (Page 75 typed proceedings and judgment):

**“In his testimony PW2 testified that during the incident the truck lights were full and he could see the attackers clearly. He managed to identify the 3<sup>rd</sup> Accused amongst the other five (5) attackers. The headlights were clear and he saw two of his attackers face. He told officers he would be in a position to identify two of his attackers if he saw them again..... He attended the parade and positively identified 3<sup>rd</sup> Accused.....**

**It is the finding of the court the 3<sup>rd</sup> accused was properly identified by PW2 using motor vehicle headlights. 3<sup>rd</sup> Accused went closer to PW2 and that is why he managed to identify 3<sup>rd</sup> Accused.”** (Emphasis added)

19. The evidence of the source, nature and intensity of light is required to be considered carefully, and it should be determined if the evidence of identification is free from error. PW2 testified that the incident occurred at night. He had left Nairobi at 8.00pm. It is not clear how dark the night was. PW1 said that after his lorry was blocked:

**“I saw one of them very clearly on his face. Others went to conductor’s side. Other vehicles were passing and as they flash light I could see one (attacker) on his face clearly..... I had seen one suspect clearly and could identify him. I could see him from lights of motorists passing by. He was the first to come to my side.”**

20. It is clear from the above that the light by which PW2 alleged he saw the Appellant was the light of passing vehicles as they flashed by, and not the truck’s light as found by the trial magistrate. This is confirmed by the cross-examination when PW2 said:

**“When you came to me you asked me to alight and other vehicles were passing by. I saw your face using that light..... I did not see your clothes but I saw your face clearly. We talked with you when you were asking me to alight. We talked with you for about 6 to 7 minutes.”**

21. There was no evidence that the attackers came into the view of the truck’s headlights and therefore the trial magistrate’s assessment that “the lights were full and he saw his attackers clearly”, and that “the headlights were clear and he saw two of his attackers face” is not based on the evidence. The evidence is that two attackers came to his side and he saw them by the light of passing vehicles.

22. I understand this to mean that two attackers came to the right side of the lorry, to the driver’s side. There is no indication whether they came from its front or from behind it. It is clear that the lorry had been blocked by vehicles both in front and behind.

23. It is also clear that the light source was the flashing lights of passing vehicles. From that light source, PW2 said he could see the attacker’s (Appellant’s) face clearly, but that;

**“I did not see your clothes, but I saw your face clearly.”**

This suggests that the intensity and nature of the light was not sufficient to enable positive identification free from errors.

24. Further, it is clear that although an identification parade was held, and the Appellant signed agreeing to participate in it, he was dissatisfied with the way it was conducted. I have carefully perused the original Identification Parade Form, Exhibit 17. Part B has some areas redacted with white out. This did not come out in evidence during the trial. Further although the Appellant’s signature is visible at two of the appropriate places, the following writings also appear:

**“Mimi Anderson Kamau sijalidhika na hiyo parade.”**

Translated, this means that:

**“I Anderson am dissatisfied with this parade.”**

The police officer conducting the parade properly indicated in Part E the Appellant’s dissatisfaction with the parade.

25. Part B of the Identification Parade form, is as follows in response to the question whether the accused desired a friend or solicitor to be present:

**“He said he does not need any of them.”**

However, in his evidence, PW4 CI Nzioka who conducted the parade said:

***“He told me he wanted his wife to be present but when she got to the report office she walked away and refused to attend the parade.”***

In cross-examination PW3 said the accused called his wife and she came to the report office but refused to come inside the cells. In re-examination PW4 repeated this evidence.

26. What is concerning, then, is that the Identification Parade from does not record this occurrence and that it instead indicates that the accused said he does not need any family member or solicitor present. It needs no restating that instructions for identification parades must be strictly complied with, and the information indicated in them must accurately reflect what in fact occurred at the time of the parade.

27. All in all, I am not satisfied that the identification of the accused was properly ascertained. The source of light being from vehicles passing by at night, is an unsteady source of light, so unsteady that PW2 did not see the clothes of accused; the flashing light of vehicles zooming by would naturally present light and darkness, brightness and shadows, making it difficult to clearly identify someone who the accused did not recognize or previously know.

28. The trial magistrate in my view, got it wrong when she assumed the light used to identify the accused was the steady light from the stationary truck’s headlights. Accordingly, I am not satisfied that the identification was free from the possibilities of error, and it was unsafe to convict the appellants on the basis of that identification. This ground of appeal succeeds.

### **Nexus between the arrest of Appellant and the Offence**

29. The Appellant argued that he was not arrested at the scene nor was he found with any stolen item. He says the evidence by PW7 that information was received from an informer that one suspect was at Mabatini was insufficient to point to him as the guilty person in the present case.

30. The DPP, on this issue, confirmed that no stolen items were found on the accused. That could be accounted for by the fact that the accused could have already disposed of them. On the failure to call the informer to testify, the DPP stated that the identification parade aided to the identification and obviated the informer’s testimony. She relied on **Republic v Kelvin Kamau Gatora & 2 Others [2018] eKLR** where Mutuku J held that:

***“Where the prosecution case is weak for lack of sufficient evidence and the evidence of the informer would make a difference in strengthening that case, it would be prudent to call that informer to testify and if it becomes necessary, their evidence can be taken in camera. Where there is strong evidence against an accused person so that there is no need to have the informer testify then the police need not call the informer to testify.....”***

31. What is not clear is how the link between the crime and the accused was made by the informer or the investigating officer given that no description of the accused had been recorded at the police station.

32. PW1 Sergeant Makau was the one who requested CI Nzioka PW6 to conduct an identification parade so the complainant could identify the accused. Equally, PC Kimathi PW7 who arrested the accused said that while on patrol he was called by CI Nzioka to attend to a public outcry on highway robbery at Longonot -Maai Mahiu road. PW7 said he had information that one suspect was in a club at Maai Mahiu. He went there and on reaching the club the informer pointed out the accused who they arrested.

33. In addition, no evidence was given as to how the connection between the robbery or the stolen goods was made to the accused. No one, not even the Appellant’s co-accused who were found guilty of handling stolen property, testified that the accused disposed of any of the stolen goods to them. In addition there is no evidence that any of the police officers had a description of the accused.

34. In my view, there is a gap leaving an extremely weak link between the evidence of the robbers and the arrest of the accused given that no description had been given of him, and given that the dubious identification was allegedly based on the flashing lights of passing vehicles at night. This is all that was relied upon for the arrest. Nevertheless, Sergeant Kimathi PW7 in cross-examination stated:

***“The complainant in this case reported before you were arrested. The complainant described you and informer assisted us. You were moving from one place to another evading arrest.”***

35. But PW2, the complainant’s evidence in cross-examination on this aspect was contrary, as follows:

***“We were with you for about 6 - 7 minutes. I did not identify you for police to arrest you. I was called to identify you in a parade which I did.”***

So the question is to whom did the complainant describe the accused and why was that person not called to testify? PW7 did not assert that the complainant described the accused to him, nor did any other witness who was called to testify assert that the accused’s description was given to him.

36. From the foregoing evidence it is impossible to know how the link between the accused and the robbery was made since the police had no prior description of the accused. PW2 when recalled said in his cross-examination:

***“Police never asked me to describe my attackers.”***

37. In his sworn testimony, the Appellant stated that he was a lorry driver. On 27<sup>th</sup> July, 2015, he said, he had loaded maize at Suswa and spent the night at Maai Mahiu. He had to pay a broker some money, parked his lorry and went to look for some cash. On returning the broker was nowhere to be seen. He called him and the broker said he was in the bar at Mabatini bar. The Appellant went there and he was met by some people. One introduced himself as a police officer and searched him, took some items from him which they inventorised, then arrested him.

38. The accused produced D. Exhibit 1 dated 25<sup>th</sup> July, 2015 being the inventory list. It has the signature of the accused and is witnessed by Richard Malel and Nzioka Singi (PW4). He also produced D. Exhibit 2 of same date indicated as an Investigation Diary which refers to OB 45/25/7/2015. It shows that the accused was booked in by PC Richard Malel and CI Nzioka Singi. When cross-examined by the State Counsel, his evidence remained unscathed.

39. What is interesting is that the Applicant alleges he was arrested by CI Singi PW4. And although PW4 denied this, D. Exhibit 2 corroborated the accused’s evidence as it show that at 23.35 hours CI Singi and PC Malel booked the accused in. PW7 Stephen Kimathi who said he was the Appellant’s arresting officer, testified that the accused was pointed out by an informer, and that the accused had been involved in several highway robberies. This suggests that the police had been looking for someone who fit into the description of having been involved in several highway robberies. Nevertheless, there is no evidence on record that suggests the link between the accused and the offence for which he was charged.

40. The trial magistrate wholly relied on the evidence of identification to connect the accused to the crime. However, the improper identification in this case, juxtaposed with the failure to provide concrete evidence of a substantive link between the Appellant and the persons who committed the crimes lead, me to the conclusion that the conviction of the accused was unsafe. Accordingly, I would set aside the conviction on the basis that the nexus between the accused and the crime was not established by any evidence.

41. Coming to the issue of sentencing, I think that having already found the conviction to be unsustainable on the grounds already analysed, any assessment on sentencing would be merely academic. I therefore decline to make any finding therein, other than to say that no sentence could be meted out in the absence of a conviction.

**Disposition**

42. Ultimately, the appeal succeeds on the grounds of failure of proper identification and lack of evidence to link the accused to the crime as analysed herein.

43. Accordingly, the trial court’s judgment is set aside and the conviction is hereby quashed. It is hereby ordered that the accused be set at liberty forthwith unless otherwise lawfully held.

**Administrative directions**

44. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

45. A printout of the parties’ written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

46. Orders accordingly.

**Dated and Delivered in Nairobi by teleconference this 22<sup>nd</sup> Day of October 2020**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

Delivered in the presence of:

1. Ms Maingi for the State
2. Anderson Kamau Gatuthu - Appellant in person in Naivasha Maximum Prison
3. Court Assistant - Quinter Ogutu