



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL NOS. 140, 141, 142, 143 AND 145 OF 2017**

**MOHAMED AFTAM DIMA.....1<sup>ST</sup> APPELLANT**

**JOSEPH NJENGA MWANGI.....2<sup>ND</sup> APPELLANT**

**JOSEPH MWANG MUCHUNGA.....3<sup>RD</sup> APPELLANT**

**JOHN NJOROGE NGECHU.....4<sup>TH</sup> APPELLANT**

**JAMES CHEGE NGECHU.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being appeals from the original convictions and sentence***

***dated 22<sup>nd</sup> December 2017 in Criminal Case No. 993 of 2011 in the***

***Chief Magistrate's at Narok, Republic v Mohamed Aftan Dima & 4 others)***

**JUDGEMENT**

1. The appellants have appealed against their conviction and sentence of death in respect of two counts of robbery contrary to section 295 as read with section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.

2. The appeal of each appellant will be dealt with separately as required by law.

**The appeal of the 1<sup>st</sup> appellant – MOHAMED AFTAM DIMA**

3. This appellant has raised four grounds in his amended grounds of appeal.

4. In ground 1, the appellant has faulted the trial court for convicting him on the evidence of identification by Pw 1, Pw 2 and Pw 3, which evidence was not free from error. In this regard, the evidence of David Boro Kimani (Pw 1) is that the appellant was the first person to approach Pw 1 as they were in their vehicle, which had to stop due to the illegal road block that the appellants had erected. The appellant had a torch and was called by the other co-appellants as corporal. Pw 1 described the appellant as a person with a thin face and had a somali appearance. He also had a somali accent. Furthermore, he asked many questions. He was also tall and light skinned. He also did not have straight teeth. The appellant wore an Ap jungle jacket, black trousers, police boots and had a police stick.

5. Furthermore, the appellant was close to the vehicle of Pw 1. It was the evidence of Pw 1 that the encounter with this appellant lasted fifteen minutes.

6. Pw 1 further testified that he was able to identify this appellant due to moonlight and light from the headlamps of the vehicle.

7. In addition to the evidence of Pw 1, there is the evidence of Elijah Waweru Mucheru (Pw 2), who was with PW 1 in the vehicle. Pw 2 identified the appellant. Pw 2 described the appellant as one that looked like a somali. Pw 2 also testified that the appellant wore a jungle jacket and held a stick as an inspector. Pw 1 further testified that this appellant was three metres away from his vehicle. According to Pw 2

the ordeal took three hours.

8. It is clear from the foregoing evidence that although it was night time, the circumstances favoured identification. First the appellant was close to both P w 1 and Pw 2 in terms of distance. There was light from the headlamps of the vehicle and from the moon. I therefore find that the identification of the appellant was positive. In the circumstances I find no merit in ground 1, which I hereby dismiss.

9. In ground 2 the appellant has faulted the trial court both in law and fact for convicting him on evidence of a flawed identification parade. In this regard, the evidence of former deputy DCIO, Peter Muiruri (PW 8) is that he conducted police identification parades for the second, third, and fourth appellants. No identification parade was held in respect of this appellant. This ground is therefore irrelevant and is hereby dismissed.

10. In ground 3 the appellant has faulted the trial court for misconstruing the circumstances of his arrest from a certain plot. The evidence of the prosecution evidence through PC Collins Okoth (Pw 9), who is the investigating officer, is that this appellant was arrested in a house in Majengo in Narok town. The appellant told Pw 9 that he was the owner of that house. In that house was found a cell phone hand set that bore No. 0716 697 586. This phone was produced as exhibit 1 and was on the table in the possession of this appellant.

11. Furthermore, there were two tyres (exhibit 5A) next to the door, military jungle green jacket (Exhibit 5A), jungle green trousers (exhibit 5B), a plastic police stick (exhibit 9), which Pw 9 described as a swagger stick. Pw 9 recovered a wallet which had a safaricom registration card of Mpesa services bearing the name of Mohamed Aftam of cell phone no. 0716 697 536. This is the cellphone the police were following. The Mpesa registration card was produced in evidence as exhibit 16.

12. Furthermore, the evidence of Pw 9 is that Pw 1 was forced to transfer money in his mpesa account to another account namely 0716 697 586, which belonged to the appellant.

13. It is therefore clear from the foregoing evidence that the circumstances of the arrest of this appellant were clear. I therefore find no merit in ground 3, which I hereby dismiss.

14. In ground 4, the appellant has faulted the trial court in convicting him in the face of his plausible evidence and also failed to give reasons for rejecting his defence. The defence of the appellant was that on 7<sup>th</sup> October 2011 at about 3.00 pm he was in his house; when a person went to his house and identified himself as a police officer. After identifying himself the appellant allowed him to carry a search in his house. The appellant testified that he carries on business of mali mali and that he sells wrist watches, perfumes and handkerchiefs. The rest of his evidence relates as to how the police carried a search in his house, which is not reproduced herein. It is clear that his defence is that of an alibi, that is, that he was not at the scene of crime. The credible evidence of Pw 1 and that of Pw 2 places this appellant at the scene of crime. His defence of alibi is therefore disproved.

15. After independently re-assessing the evidence, I find that the trial court was entitled to prefer the evidence of both Pw 1 and Pw 2 that placed the appellant at the scene of crime. That court therefore found the appellant's defence evidence to be incredible. This is the reason why the appellant's defence was rejected. Furthermore, the trial court also believed the evidence of the investigating officer in respect of recently stolen goods of Pw 1 that were found in the appellant's possession. Additionally, there is credible evidence that the money that was transferred from the complainant's cell phone was transferred into the appellant's mpesa account. I therefore find no merit in the appellant's ground 4, which I hereby dismiss.

16. After re-assessing the entire evidence as a first appeal court, I have come to the conclusion that this appellant was convicted on ample evidence. His appeal against conviction fails and is hereby dismissed.

17. The complainants were traumatized. They were tied and taken to a bush where they were abandoned. They did not suffer any physical injuries. In the circumstances, the sentence of death was not warranted. I hereby quash it. In its place, I hereby impose a sentence of life imprisonment, which he now has to serve.

#### **The appeal of the second appellant- Joseph Njenga Mwangi**

18. The appellant has raised 9 grounds in his petition of appeal to this court. It is only grounds 2 to 7 that are important, the rest are formal grounds that do not touch on his conviction and sentence.

19. In ground 2 the appellant has faulted the trial court for convicting him on evidence of identification, when there was no initial or first report made to the police. In this regard the evidence of Pw 1 is that he identified this appellant at the scene of crime. Pw 1 testified that this appellant was light skinned and that he had a mark in his face. Additionally, Pw 1 testified that it was this appellant who elbowed him. He was able to see this appellant due to moon light and due to the headlamps of his vehicle. Pw 2 who was at the scene did not identify this appellant.

20. Furthermore, Peter Muiruri (Pw 8), who was the then deputy DCIO, Narok north, conducted a police identification parade, in respect of this appellant, among others. In that parade this appellant was identified by Pw 1 and Gideon Karanja Kinoo. Gideon Karanja Kinoo was not called as a witness in the trial of the appellants. Pw 8 then produced this appellant's identification parade form as exhibit 14D. Furthermore, it was the evidence of Pw 8 that he used the same members as parade members' suspects who were in police cells. He did not change these parade members as he had problems of getting members to form the parade. It is for that reason that he did not change members of the parade. Rules for conducting parades require that all members should be similar like the suspect. In the circumstances, the evidentiary value of this parade is not reliable. This ground of appeal succeeds and I therefore uphold it.

21. It is clear that the only evidence against this appellant is that of Pw 1. There is no initial or first report of Pw 1 to the police in respect of the description of this appellant. The evidence of Pw 1 is not corroborated by any evidence. The trial court did not warn itself that the only

identification evidence against this appellant was that of Pw 1.

22. In the circumstances, I do not find any other tangible and admissible evidence to connect this appellant with the commission of these two offences. It is therefore unnecessary to consider the other remaining grounds. I therefore allow his appeal against conviction and sentence. I hereby quash his conviction and sentence. He is hereby set free unless he is held on other lawful warrants.

### **The appeal of the 3<sup>rd</sup> appellant- Joseph Mwangi Muchunga**

23. This appellant has raised 8 grounds in his petition to this court. In grounds 1 and 2 the appellant has challenged his visual identification for it was not free from mistake or error. This appellant was identified by Pw 2 as the person who was carrying spikes that were used in erecting the illegal road block. Pw 2 testified that he was able to identify this appellant due to the light from the moon and the headlamps of the vehicle, in which they were travelling. The evidence of Pw 2 is not corroborated by any other independent evidence.

24. This appellant was identified by Pw 2 in a police identification parade (exhibit 14E). The evidence of the parade officer (Pw 8) is that he used the same parade members in all the parades. This rendered the identification parade evidence unreliable.

25. The only other evidence that connects this appellant to the offence is that of the investigating police officer, Collins Okoth (Pw 9). According to Pw. 9, this appellant rang the first appellant as to where they were to meet and share the loot. Pw 9 then asked the first appellant on the whereabouts of this appellant. As a result, the first appellant led the police to the house where this appellant was, who was then arrested. The safaricom call data of this appellant was not tendered in evidence. Moreover, the evidence of the first appellant is accomplice evidence in terms of section 141 of the Evidence Act (Cap 80) Laws of Kenya. This evidence lacks corroboration.

26. The defence of this appellant was that he had gone to repair a switch in house No I from where he was arrested. His defence therefore is that of an alibi.

27. I have independently re-assessed the entire evidence in respect of this appellant as required of a first appeal court. As a result, I find that the conviction of the appellant is unsafe. I therefore allow his appeal against both conviction and sentence, which are hereby quashed. He is hereby set free unless he is held on other lawful warrants.

### **The appeal of 4<sup>th</sup> appellant- John Njoroge Ngechu**

28. This appellant has raised 9 grounds of appeal in his petition to this court. The major and decisive grounds of appeal are grounds 2 and 3, in which he has challenged his visual identification for not being positive. In this regard, the evidence of Pw 1 was that he identified this appellant both visually and by voice. He was recognized by voice because he spoke "bonoko." He had a panga and threatened Pw 2 that he could shave him with his panga. The evidence of Pw 2 (the conductor) is that he also visually identified this appellant both by appearance and voice. It was the evidence of Pw 2 that this appellant threatened to shave him using his panga. Pw 1 testified that they were with the appellant for fifteen minutes.

29. The evidence of both Pw 1 and Pw 2 is that they were able to visually identify this appellant due to moon light and light from the head lamps of the vehicle in which they were.

30. He was identified in a police identification parade (exhibit 14B). The evidentiary value of the parade is unreliable for reasons that are set out in the foregoing paragraphs.

31. In his unsworn statement this appellant testified that he had paid a visit to his brother in Narok. He decided to look for rental premises, as he did not want to live with his brother as this was going to encroach on his brother's privacy. He then found a vacant house at London, but the landlord was not there. He decided to wait for him. In the course of waiting for the landlord, police came and arrested him. His defence is that of an alibi.

32. The issue before this court is whether or not he was positively identified. I have independently re-assessed the entire prosecution and defence evidence. As a result, I find that this appellant was positively identified by both Pw 1 and 2 as being at the scene of crime. It therefore follows his defence of alibi has been disproved.

33. I therefore confirm his appeal against conviction. As a result, I hereby dismiss his appeal against conviction.

34. I now turn to the issue of sentence. The complainants were tied with ropes and were abandoned in the bush. Other than being traumatized, they did suffer physical injuries. In the circumstances, a sentence of death was not called for. I therefore quash it and in its place I hereby impose a term of imprisonment for life, which he now has to serve.

### **The appeal of the 5<sup>th</sup> Appellant- James Chege Ngechu**

35. This appellant has raised 9 grounds in his petition to this court. In grounds 2 and 3, the appellant has challenged his conviction, which he states is based on a faulty identification police parade. In substance the appellant is saying that his identification was not positive. In this regard, I have already found that the evidence of Peter Muiruri (Pw 8) is not reliable in respect of the identification parades, which he conducted. In the parade (exhibit 14A), this appellant was identified by Pw 1, Pw 2 and Pw 3. This ground of appeal succeeds with the result that I hereby uphold it.

36. In his evidence, Pw 3 testified that he identified this appellant at the identification parade. His evidence on identification is not

corroborated by any witness.

37. The sworn defence of this appellant was that he operates motor cycle tax business. He further testified that on 7<sup>th</sup> October 2011, he went with his brother, now the 4<sup>th</sup> appellant to look for a rental house for him. They found the house, but the landlord was not there. As they were awaiting the landlord about 20 people came, whom they thought were thugs. These people turned out to be police, who proceeded to arrest them. His defence is that of an alibi.

38. I have re-considered the entire evidence of the prosecution and that of this appellant as a first appeal court. As a result, I find that the alibi defence was not disproved.

39. The upshot of the foregoing, is that the appellant's appeal succeeds. His conviction and sentence are hereby quashed. He is hereby set free unless held on other lawful warrants.

**Judgement signed, dated and delivered in open court at Narok this 29<sup>th</sup> day of July, 2019 in the presence of appellants and Mr. Omwega for the respondent.**

**J M Bwonwonga**

**Judge**

**29/07/2019**