



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 78 OF 2017

STEPHEN MURIGI NJOROGE.....1ST APPELLANT

JULIUS KIARIE GACHUKI.....2ND APPELLANT

JAMES IRUNGU NJOGU.....3RD APPELLANT

JOHN NDETI MBITE.....4TH APPELLANT

JAMES NJENGA KAMAU.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Thika Chief Magistrate's Court Criminal Case No. 5346 of 2014 delivered by U.P. Kidula Chief Magistrate on 16th March 2009)

JUDGMENT

1 The appellants herein were the accused at the Chief Magistrates Court in Thika in Criminal Case No. 5346 of 2006. They were charged with three counts of Robbery with Violence Contrary to Section 296(2) of the Penal Code. The offences are said to have been committed on 22nd November 2006 at Kiboko Dam in Maragua District within Central Province. The rest of the particulars are as stated in the copy of the charge sheet which forms part of the record of appeal.

2 They pleaded not guilty to the above charges and trial ensued which *resulted in their conviction and death sentence*. They were aggrieved with the whole judgment and each filed an appeal citing several grounds which they kept changing. The grounds cited are similar and I will refer to the common grounds which are as follows:

1. That the learned trial magistrate erred in both law and fact by failing to find that circumstances of identification were not conclusive.

2. That he learned trial magistrate erred in both law and fact by failing to find that no parade was held in their respect though it was crucial.

3. That the learned trial magistrate erred in both law and fact by failing to find that they were identified innocently due to mistaken identity.

4. That the learned trial magistrate erred in both law and fact by failing to find that no description were given to those arrested them and they failed to arrest the right culprit.

5. That the learned trial magistrate erred in both law and fact by failing to find that the alleged foot marks would not have led to the precise perpetrator of offence in question.

6. That the learned trial magistrate erred in both law and fact by basing conviction on contradictory evidence.

7. That the learned trial magistrate erred in both law and fact by failing to find that the charges preferred against them were not proved to the required legal standard

8. That the learned trial magistrate erred in both law and fact by failing to consider adequately their defence which is cogent and plausible to displace the prosecution case.

3 The case before the trial court was as follows: PW1, James Muiruri Ngaruiya a security guard at Kakuzi recalled that on the material day at about 6:20a.m, he was proceeding on off duty from Kiboko Pump. On arrival at Makuyu Golf Club while riding his bicycle, he met two men who raised their pangas and rungu at him. They ordered him to stop and give them money and his phone. On alighting from his bicycle, he saw four other people coming from the bush with one of them carrying a sack. He told them that he had no money or phone and one of his attackers hit him on the back while the other hit him with a slasher on the head.

4. They searched him and took his small sunny radio, watch, whistle, gum boots, umbrella and gloves. Thereafter they deflated his bicycle tyres and ran off with his things warning him not to pass the Makuyu Road but to follow the golf club road. Two of them escorted him while hitting him on the back and left him later.

5. As he proceeded to the Pump, he met the assistant manager of the forest and informed him what had befallen him. The assistant manager made a radio call and informed his bosses about the incident. The security manager came to see him and advised him to report the robbery incident to the police which he did.

6. He recalled that the 2nd and 3rd appellants are the two people who stopped him at first at 6:20a.m in the morning. That the 2nd appellant had a slasher (**EXBI**), 3rd appellant had a panga and the rest came from the bushes after the 2nd and 3rd appellants had stopped him. He identified his gumboots **EXB2** and gloves **EXB3**.

7. On the afternoon of the same day he had been attacked, he was called to Makuyu Police Station and found that the 1st, 2nd 3rd and 4th appellants had been arrested. He confirmed that he had seen all of them during his attack. On cross examination by all the appellants he said that no identification parade was conducted and that he only identified the appellants when he saw them at the police station.

8. PW2 Charles Ayoo Oguna a watchman employed by Kakuzi recalled that on the material day at about 6:30 a.m, he was in his house when he received a call from his boss one Frankline Kiviungu informing him that Pw1 and Kirubo had been attacked. He organized a group of about 10 people and started looking for the attackers. He met with Pw1 who indicated to them the directions the attackers had taken. He recalled that during the night before Pw1 was attacked, it had rained and they were able to see footsteps.

9. They followed the footsteps and 100m to Mangamari Road, they saw five people walking along the Kakuzi road. They followed them but on nearing them, the people started running into the forest. They pursued them inside the forest whistling and shouting, the people in the village joined them in the chase and they were able to apprehend them. One of the fleeing persons had a slasher which he used to cut one villager.

10. They caught up with him with the assistance of the villagers and took him to where two arresting persons were. Furthermore, the villagers had also arrested one more person and the number of people arrested was 4. The arrested persons were beaten by the villagers. The security manager came and took them in a vehicle to the police station. He identified the 1st- 4th appellants as the people they arrested.

11 It was his evidence that the 4th appellant was the person who had cut the villager with a slasher (**EXBI**). He also explained that while the appellants were fleeing they were dropping whatever they were carrying as they ran. The items that were dropped were later found by the villagers and he identified them as gumboots **EXB2**, gloves **EXB3**, rain coat **EXB4**, hat **EXB5** and sack **EXB6**. He was not able to tell what the 2nd appellant was carrying and/or wearing.

12 **PW3 Joseph Kivolu Nzioka** a guard working with Kakuzi Security told the court that on the material day at round 6:00a.m, on Kirairo road, he saw a person standing on the side of the road about 100m away. When he was about 10m away he saw about four people acting like they were hiding. He stopped and asked them why they were hiding and suddenly, they came out and rushed towards him with pangas and rungu. He left his bicycle and took to his heels.

13 They in turn chased him but they did not get him. They went back to where his bicycle was and started cutting it up. He telephoned his boss Frankline who came with other guards and he showed them the direction the persons had taken. He further stated that he was able to identify the 1st -4th appellants as they were the people who were chasing him.

14 He further said that the 5th appellant was not among the 1st-4th appellants when they were brought. He was not robbed of anything apart from his bicycle which was cut up. He identified the bicycle as **EXB7**. It was his evidence that no identification parade was conducted for him to pick his assailants.

15 **PW4 Samuel Ndungu Mwaura** a farmer who lives at Kakuzi recalled that on the material day at about 9am, he was escorting cows to the herdsman when he heard screams and whistles. He saw two people being chased. One person ran towards Kiboko Dam while the other person ran towards the field. He followed the one who ran towards the field and when he approached him, he removed his shirt, threw it way, remained with the slasher and cut him on the fingers of the right hand. He then ran and threw the slasher in some water.

16 Afterwards, he was caught by some people who were going to the shamba. He joined the people who had arrested him and ongoing back towards the road, they found that three other people had been arrested by security guards. He identified the person he chased as the 4th appellant. He also identified the 5th appellant as the person who ran towards Kiboko Dam as he had seen his face.

17 After treatment he boarded a motorcycle and met the 5th appellant coming from the Kiboko Dam direction. When he asked him where he was coming from the 5th appellant said he was coming from his sister's place. The 5th appellant then removed a knife and threatened to cut

him but people came and he was arrested. He identified the slasher, knife and a t- shaped metal (found on 5th appellant) as **EXB1, EXB1,8** and **EXB9**.

18 **PW5 Franklin Kirungi** head of Kakuzi security guards corroborated Pw3's evidence that he received a call from (PW3) informing him that he had been attacked by robbers while going on duty. He then left his house in the company of 10 watchmen cycling and went towards the direction where PW3 had been attacked. On arrival, they found PW1 and PW3 who showed him the direction the attackers had taken. He said they followed the foot marks since it had rained the previous night and on reaching Mamboleo route, they saw 5 people ahead of them the people started running and they followed them.

19 They split into two groups and the group he was in, found an old man by the name of Elema Boru whose hands had been tied pointing towards fleeing persons. They untied him and continued chasing the robbers. That his group followed a person who went towards Kiboko Dam but they did not catch up with him. He however found some people arrested by members of the public.

20 He stopped them from lynching them and instead called his manager who came and they took them to the police station. He identified the slasher, gum boots, radio and gloves, rain coat and bicycle as **EXB 4, 6, 2, 3, 5, 7** respectively.

21. **PW6 Simon Wambua Makau** a businessman in Kitutu shopping Center recalled that on the material day at around 8:30 a.m while on his way to Stima Stage near the road to Kakuzi stage, he saw 5 young men while he was on his bicycle riding. They all passed in front of him and hit him on the right shoulder. The second time they passed in front of him he rode faster. One of them turned back and hit him on the right shoulder. He fell down, rose up quickly and found that his attackers had surrounded him.

22 One of them cut him at the back of his head while others attacked him. He managed to throw Kshs 400/- coins at them as they pursued him. He ran through the forest into a certain house and informed the people there what was happening. He was escorted to Makuyu Police Station where he reported and recorded his statement.

23 At Makuyu, he was given a P3 form to go with to the hospital. As he left he saw a vehicle from Kakuzi carrying 4 people who had been arrested and beaten up. He was asked if those were the people who attacked him, he confirmed they were the ones except that the 5th appellant was missing. He otherwise identified the 1st-4th appellants.

24 He testified that the 1st appellant was the one who cut him with a panga, 2nd appellant hit him with a rungu and he fell off his bicycle, 3rd appellant had a slasher which he tried to cut him with and he ducked, 4th appellant was the one who put his foot (nipped) in front of him but he jumped over it, while 5th appellant was the one who wanted to knife him on the chest but avoided the thrust. He identified his bicycle in court and produced his treatment notes as **EXB 10**.

25 **PW7 Elma Boru** a watchman told the court that on the material day at about 8a.m, he was at Kakuzi farm going to his nephew's place. On reaching Mambo leo Camp, he met about five young men, one on the road and the others on the sides. That on passing, the man on the road pounced on him together with others coming from the side. They then told him to lie down and give him them money. They ransacked his pockets, removed his clothes from the bag, took his hat and overcoat. On realizing that he had no money, they tied him up and pulled him off the road.

26 Later, he went to report the matter at Makuyu Police Post. At the police post, he was able to pick his bag, overcoat and hat amongst the recovered items. The appellants were also removed from the cells and he identified all of them as the people who had robbed him in broad day light.

27 **Pw8 No 55551 Corporal Johnson Wambua** told the court that on the material date at about 7a.m, he was at Makuyu Police Station when he was instructed by the OCS to investigate a crime that had happened at golf Kirimari Yakungu road. At 10.20 a.m security officers from Kakuzi brought him suspects i.e the (1st -4th appellants) who had already been beaten by members of the public.

28 That the officers brought with them slashers **EXB I**, panga **EXB II**, one pair of gum boots **EXB 8**, 1 glove **EXB 3**, 1 dark blue rain coat **EXB 4**, 1 hat **EXB 5**, 1 sack soko **EXB 6**, 1 bicycle **EXB 7**, 1 knife **EXB 8** and 1 T shaped metal **EXB 9** and a sharp metal **EXB12**. That he also took PW7 to hospital and was issued with treatment notes **EXB 10**. He produced the items in court as **EXB 1-12**.

29 When placed on their defence all the appellants elected to give unsworn statements and called no witness.

30 The 1st appellant told the court that on the material day, he was at Kakungu when he met 5 people and before he could tell them where he was going, they beat him up with pangas and rungu. He was later taken to hospital and after treatment he was brought to court. He denied the charges.

31 The 2nd appellant stated that on the material day he was going to his grandmother's place at Makuyu and on the way he met people who stopped him, questioned him and later took him to the police station. He denied the charges facing him.

32 The 3rd appellant said that on the material day he left for a safari to Kithuiru. On reaching the place he alighted from the vehicle and started walking on foot. He saw people walking in front of him and these are the witnesses who testified for the Prosecution. These people beat him and he ran away but they caught up with him and took him to the police station and charged him.

33 The 4th appellant stated that on the material day he was delivering milk at a shop and while on his way back, he met a group of about 20 people who inquired where he was from. That as he gave his answer, another group came from the bushes and started beating him up saying he was one of the people who had robbed them. He was taken to the police then to hospital. He denied the charges facing him.

34 The 5th appellant told the court that on the material day, he was in Makuyu at his sisters place when he met 3 men who questioned him and attacked him. A vehicle from the Council came along and they ran away leaving a knife behind. The vehicle stopped and he was identified as one of the people who had robbed them. He was later taken to the police station and charged. He denied the charges he was facing.

35 When the appeal came for hearing Mr Muturi Njoroge for the 1st appellant told the court he had filed 8 grounds of appeal and he would consolidate them into 3 grounds. On ground 1, 2, 3, 4, 5 and 6 he submitted that there was no specific case which was availed to the trial Court to confirm the 1st appellant's identification. He argued that the investigating officer on being allocated the case found that all appellants had been arrested by members of the public, yet he did not conduct any identification parade.

36 He further submitted that no interrogation was made on identification of the appellants and no descriptions were given of them. That hearsay evidence was adduced as all witnesses said they had no prior knowledge of the 1st appellant. Counsel submitted that this was all dock identification and relied on the case of Muktar Iman Huka v Republic [2018] Eklr. On ground 5 counsel submitted that without a dangerous weapon & P3 forms there can be no robbery with violence. He relied on the case of Emmanuel Mwashime v R. High Court Criminal Appeal No. 42 of 2015 and Seif Juma Mohammed v R Malindi High Court Criminal Appeal No. 61 of 2005.

37 On ground 7 he contended that every evidence admitted was inadmissible evidence since the documents were not certified by the witnesses.

38 The 2nd -5th appellants who were unrepresented filed written submissions. They are mainly challenging their identification by the witnesses. The 4th appellant submitted that he was arrested by members of the public and the Investigating Officer did not conduct any investigations. They contended that they were not arrested with anything. They asked the court to consider the Supreme Court decision in the case of Francis Muruatetu and Anor Petition No. 15 and 16 of 2015 and review their sentence.

39 Mr. Maatwa for the respondent opposed the appeal and submitted that the ingredients of robbery with violence were all proved. He said the evidence adduced was consistent and the witnesses explained what they experienced. It was his submission that the 2nd appellant was identified by PW1 while the 2nd-4th appellants were identified by pw1, PW2, and PW4.

40 He further submitted that the 2nd appellant in his defence placed himself at the scene. He said there was no identification of the 5th appellant who was merely arrested with the others. Counsel contended that the charge facing the appellants is known in law and the sentence is lawful.

41 This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of Okeno vs Republic 1972 EA 32.

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 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 v R, [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if 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 v Sunday Post, [1958] E.A 424.”

42 The Court of Appeal further in the case of Muthoko & Anor v Republic [2008] KLR 297 held as follows:

“It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion being in mind that it did not hear or see the witnesses and making allowance for that.”

43 I have considered the evidence on record, the grounds of appeal, the submissions by Counsel and the appellants. I have also considered the authorities cited. Upon considering all I have stated above the issues I find falling for determination in this appeal are:-

- 1. Whether the ingredients of the charge or robbery with violence were proved.**
- 2. Whether each appellant was properly identified.**

44 With regard to the first issue for determination the ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of Oluoch v Republic [1985] KLR where it was held:-

“Robbery with violence is committed in any of the following circumstances:-

- a. The offender is armed with any dangerous and offensive weapon or instrument, or**
- b. The offender is in company with one or more person or persons or**
- c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other**

personal violence to any persons.....

45 The use of the word **OR** in this definition means that proof of any of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. From the evidence of the prosecution witnesses it has been established that the attackers were more than one and were armed and they used violence before robbing them. I am therefore satisfied that more than of the ingredients for the offence of robbery with violence was proved.

Issue No ii Whether each appellant was properly identified

46 The appellant's conviction was based on identification evidence. The trial court made a finding that the appellants were positively identified, which has been disputed by the appellants. Time and time again the Court of appeal has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the case of **R -vs- Turnbull and others (1976) 3 All ER 549**, an English case, Lord Widgery C.J. had this to say:-

“First, wherever the case against an appellant depends wholly or substantially on the correctness of one or more identifications of the appellant which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the appellant in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the appellant under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the appellant before? How often? If only occasionally, had he any special reason for remembering the appellant? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the appellant given to the police by the witness when first seen by them and the actual appearance?”

47 In the instant case, all the prosecution witnesses testified that the attack occurred between 6:30a.m - 9:00 a.m and the assailants had not covered their faces; PW1 testified that that 2nd and 3rd appellants are the two people who stopped him at first at 6:20a.m in the morning. That the former had a slasher while the latter had a panga. PW3 was able to identify the 1st -4th appellants as they were the people who were chasing him.

48 PW4 identified the person who chased him as the 4th appellant and the 5th appellant as the person who ran towards Kiboko Dam. PW7 identified the 1st appellant as the one who cut him with a panga, the 2nd appellant as the one who hit him with a rungu and he fell off his bicycle, the 3rd appellant as the one who had a slasher which he tried to cut him with and he ducked, the 4th appellant as the one who put his foot (nipped) in front of him but he jumped over it and the 5th appellant as the one who wanted to knife him on the chest but avoided the stab. 49 From the evidence of the prosecution witnesses it is clear that most of them were attacked between 6.00-6.30 a.m. They were each attacked by about five armed people. They ran for their dear lives with some riding bicycles and others running after their bicycles were taken away or tyres depleted. They are said to have identified their attackers at the Police Station.

50 It must be established whether the conditions were suitable for a positive identification and whether their identification can be said to have been satisfactory. In the case of **Kiarie v Republic [1984] KLR 739 the Court of Appeal** said this:

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

51 Similarly in In **Maitanyi -v- Republic [1986] KLR 198 at 201**, the Court of Appeal rendered itself as follows-

“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the “greatest care” the evidence of a single witness?”

52 The witnesses identified the appellants in the dock, and at the Police Station, where the appellants were presented to them. In **Ajode -v- Republic [2004] 2 KLR 81**, the Court had a very dim view of dock identifications and held thus:

*“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the appellant and the police should then arrange a fair identification parade (see case of **Gabriel Kamau Njoroge v Republic [1982 – 88] 1 KAR 1134**.)”*

53 The appellants were not known to the witnesses before the incident. The said witnesses gave no description of the assailants but identified them at the police station. There was no identification parade conducted in respect of any of them. There was absolutely no reason why an

identification parade was not conducted in respect of all the appellants so as to give the witnesses an opportunity to identify them.

54 Their evidence of identifying the appellants at the scene is therefore not corroborated. From the testimony of the witnesses it is the police who were showing them the purported assailants before they confirmed to them that they were the ones.

55 A number of items were recovered and identified by the complainants as belonging to them. The recoveries were never explained by PW8, the Investigating officer. It was not explained as to who was found with what. It is therefore not possible to attach the items to any of the appellants.

56 On the totality of the evidence and from my analysis of the authorities I am not persuaded that the prosecution did prove beyond reasonable doubt that in fact it was the appellants who attacked the complainants. They may or may not be. The appellants will benefit from that doubt.

57 I find merit in the appeal which I hereby allow. The conviction against all appellants is quashed and sentences set aside. The appellants shall be released forthwith unless lawfully held under separate warrants.

Orders accordingly.

Dated, signed and delivered this 3rd day of August 2018 in open court at Kiambu.

HEDWIG I. ONG'UDI

JUDGE