REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 235 OF 2001

AS CONSOLIDATED WITH CRIMINAL APPEALS Nos. 352 of 2001 and 234 of 2001

LESIIT MAKAU, JJ.

MATHEW MWONGERA…..…………....………............1ST APPELLANT

SAMUEL MWITI……….……………..……….........2ND APPELLANT

LAZARUS MWENDA………………………….....….3RD APPELLANT

V E R S U S

REPUBLIC…………………..…………….................….RESPONDENT

(An appeal against the conviction and sentence in

Chief Magistrates court at Meru No. 3852 of 1999 by

Hon. D. K. Gichuki S.R.M.)

JUDGMENT

1. The three Appellants **MATHEW MWONGERA,** herein after the 1st Appellant, **SAMUEL MWITI** the 2nd Appellant and **LAZARUS MWENDA,** the 3rd Appellant were together with other 3 co-accused charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the case were that:

> **On the 8th November 1999 at Gachanga Sub location in Meru Central District within the Eastern Province jointly with others not before court, while armed with dangerous weapons namely axes, panga, and rungus robbed Peter Gitonga of one TV set make sony, a video machine make sony, 2 remote controls, 3 wrist watches make Seiko 5 Rando and Skanda, 2 torches, a video tape, a cap and cash Ksh. 5,050 all valued at Ksh. 71,200 and at or immediately before or immediately after the time of such robbery used personal violence to the said Peter Gitonga.**

2. The three Appellants were found guilty and convicted of the offence and each sentenced to death.

3. The appeals by the Appellants were heard by Juma and Tuiyot JJ. However the judgment which was dated 14th February 2002 was never found. On a further appeal to the court of appeal Visram, Koome, and Odek JJ.A. in their judgment of May 2013 ordered a retrial of the appeals before this court. We have consolidated them as they arise from the same trial in the lower court.

4. When the appeals came up for hearing, the three Appellants were unrepresented. The 1st Appellant relied on his earlier grounds of appeal. He had raised six grounds which we summarize as follows:

5. The first Appellants contend that the learned trial magistrate erred in law and misdirected himself without an initial report bearing the 1st Appellant's name or description. The 1st Appellant also faulted the evidence of identification and that of the ID parades; he also contends that the evidence adduced was not properly evaluated, that the vital evidence of the Investigating Officer was not given and that the learned trial magistrate failed to give due consideration of his defence without giving reasons.

6. The 2nd Appellant relied on his earlier grounds of appeal where he raised 6 grounds. These grounds are word for word as those raised by the 1st Appellant in his Petition of Appeal. In his oral submissions before the court the 2nd Appellant urged that the ones who identified him in the Identification parades were the same ones who carried him to the police station. He also contends that the same members of identification parade who stood with him were also used in the parade in respect of the 1st Appellant and finally the Appellant raised issue with the production of the television set as an exhibit in the absence of the Investigating Officer and the person from whom it was recovered.

7. The third Appellant relied on his earlier grounds of appeal. He raised 8 grounds of Appeal which we summarize as follows: The third Appellant contends that the circumstances of the lighting at the scene of the attack were not conducive for a positive identification of a stranger; he contends that the prosecution failed to call vital witnesses including the officer who arrested him and the officer who investigated the case. He raised issue with failure by the learned trial magistrate to take into consideration that the initial report by the complainant, PW1 did not give any special marks or descriptions which could enable him identify the robbers.

8. Mr. Mungai was for State in this Appeal. He opposed the appeal. In his submissions Mr. Mungai urged that the evidence of identification was good, proper, reliable and sufficient. He urged further that the identification parades conducted by PW6, 7 and 9 were well conducted and that the Appellants were properly identified. He urged the court to dismiss the appeal.

9. We have carefully considered these appeals. We have also subjected the evidence adduced before the lower court to a fresh analysis and evaluation and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the court of appeal decision in the case of **OKENO V. REPUBLIC [1972] EA 32** where the role of a first appellate Court is given as follows:

> "**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (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 conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 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] EA 424.)"

10. The facts of the case were that the complainant PW1 and his wife, PW4 were asleep in their house when robbers struck at around 2.30 am on the 8th November 1999. PW1 was the first to wake up after hearing a sound. On looking through the window he saw a tall man who resembled his son breaking the

pad lock of the gate. He called out his son's name and asked him why he was breaking the gate instead of opening the pad lock. PW1 soon realized that the man he thought was his son was not. He identified him in court as 4th accused. The 4th accused broke the gate and when he opened, a group of people entered. PW 1 identified the 1st and 2nd Appellants as among them and who came up to his window where they demanded money from him. He gave out 5,000/- which the 2nd Appellant took. According to PW1 the robbers demanded to enter the house and when he opened the door three men entered. He identified the 1st and 2nd appellant as among them. The two appellants took him to his bedroom where they demanded money in the presence of PW4 the complainant's wife. They could not get any more money. The complainant stated that he was taken to the corridor of his house where he was beaten by the 1st Appellant as he demanded more money. The 2nd Appellant was left with his wife in the bedroom where he stole some watches. Eventually the robbers left the complainant's house. PW3 who was the complainant's son was sleeping in a separate house and he too was attacked. In his evidence PW3 said that he saw the 3rd appellant, first inside his bedroom and later outside his window.

11. The Appellants denied the charges. The 1st Appellant stated that he was arrested on 11th November 1999 as he was going to a garage where he worked as a mechanic. The 2nd Appellant said that he was arrested on 9th November, 1999 and taken to the police by the complainant in his vehicle. The 3rd Appellant also denied the charge and said that the police officers who arrested him told him they were looking for Duncan Mwenda. He said that was not his name. He was still arrested and eventually charged with the offence.

12. The case against the appellants hinges on identification. There is no doubt that the incident took place at night. PW1 and PW2 were in the same room and saw the same things since they were together at the time of the incident. The lighting outside their bedroom window was described as an electric security light which lightened up the distance between the complainant's window and the main gate. Inside the house the lighting was described as fluorescent bulbs both inside the complainant's bed room and the corridor outside the bedroom.

13. We have considered the evidence of PW1 and PW2. Both of them claim that they saw the 1st and 2nd Appellants first just outside their window near the security light. The two were total strangers. They claim they saw them outside for 3 minutes. The two also claim that they saw both the 1st and the 2nd appellant inside their bedroom where they conducted a search for more money without success. The learned trial magistrate was impressed by the identification made by the complainant and PW4 as against the 1st and the 2nd Appellant and found it strong. The learned trial magistrate also found PW1 and PW 4 as people of good demeanor who impressed him as telling the truth.

14.Issues of identification are critical issues needing cautious and careful consideration especially where identification is made at night and where the persons identified are strangers. It is trite law that the evidence of identification should be scrutinized with caution in order to prevent a mistake or error occurring. In this case the 1st and the 2nd Appellants were identified by PW1 and PW4 as among a group of people who attacked them on the material night. They saw them under security lights for 3 minutes and then under fluorescent bulb for 15 minutes also.

15. In **CHARLES O. MAITANYI VS REPUBLIC(1985) 2 KAR 75** the Court of Appeal held:

> **"It must be emphasized 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 greatest care. It is not a careful test if none of these matters helping to test are known because they were not inquired into."**

16. The nature of the light, the strength of the light and the period of time the witnesses observed the Appellants were all given in evidence. In regard to the 1st Appellant the complainant and his wife identified him in an Identification parade conducted by PW7. Regarding the proper conduct of identification parades we noted that both the complainant and PW2 admitted in their evidence that they did not give any descriptions whatsoever of any of those who robbed them and neither did they specify to any one that they could be in a position to identify them if shown in identification parades. It is therefore clear that neither the complainant nor PW4 described the 1st Appellant before they were taken to identify him in the parade. Their ability to identify the 1st Appellant and the basis they had of identifying him were totally unknown to the parade officer before he conducted the identification parade.

17. In **DAVID KARANJA & OTHERS V REPUBLIC CA No.117 of 2005** the Court of Appeal, OMOLLO, WAKI and DEVERELL, JJ.A.

> **"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."**

18. In **GABRIEL KAMAU NJOROGE -V- REPUBLIC [1982-88] I KAR 1134** the Court held:

> **"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."**

19. As we have already observed neither PW1 nor PW2 was asked to give a description of the assailants they were able to identify and the basis of that identification before the Identification Parade was conducted. The identification of the 1st Appellant by PW1 and PW4 and the identification of the 3rd Appellant by PW1 in identification parades conducted by PW7 and 9 respectively were unreliable and improperly conducted. The identification was therefore worthless. It is our view that the conviction of the 1st and the 3rd Appellants on the basis of the identification parade identifications cannot be sustained.

20. In respect of the 2nd Appellant he was identified by PW1 and 4 in their evidence before the court. It was however not denied that PW4 and his son PW3 assisted to transport the 2nd Appellant to the Police Station one day after the incident. It is not clear who identified the 2nd Appellant in an identification parade because PW1 was very clear that he did not go to any parade to identify the 1st Appellant. However, but PW7 in his evidence said that PW1 was among the identifying witnesses. PW7 also said that PW3 and PW4 identified the 2nd Appellant in identification Parade he conducted.

21. In respect of PW3 his evidence is clear that he only saw the 2nd Appellant after his arrest when he and his father, the complainant escorted him to the police in the complainant's vehicle. The identification of the 2nd Appellant by PW3 was worthless as he never saw him during the robbery. That means only PW4 identified the 2nd Appellant. That evidence is not strong for the reason PW4 was not asked to describe the 2nd Appellant or to disclose the basis upon which she could identify him before the identification Parade was conducted.

22. Regarding the 3rd Appellant he was identified by PW1 in an identification parade conducted by PW9. PW1 in his evidence clearly stated that he saw the 3rd Appellant among those who robbed him.

However, he did not say what role he played if any. PW1, apart from saying that he saw him outside his window and that he was armed with a panga, did not say how far he was from his window when he saw him. More importantly however is the fact that PW4 who was with the complainant throughout the incident did not identify the 3rd Appellant as among those who robbed them.

23. PW3, a son of the complainant also identified the 3rd Appellant as among those who robbed them. PW3 said that he saw him twice. The first time inside his bedroom which was in a separate house from where the complainant was. He saw him under electric light. PW3 also saw the 3rd Appellant outside his house under security lights. Regarding the 3rd Appellant PW3 did not identify him in any identification parades. His identification of 3rd Appellant was therefore dock identification.

24. Regarding dock identification, the Court of Appeal, in **GABRIEL KAMAU NJOROGE -V- REPUBLIC,** supra, held that dock identification is worthless unless preceded by properly conducted identification parades. There was no identification parade in respect of the identification of the 3rd Appellant by PW3. The identification is therefore worthless and more so because we are convinced that having seen the 3rd Appellant for 3 minutes, PW3 had a flirting glance at the 3rd Appellant and in the circumstances the identification was not free from error or mistake.

25. We find that it was unsafe to base the convictions against the three Appellants purely on the basis of visual identification. What was required was other material evidence implicating the Appellants with the offence. An attempt was made to adduce other evidence in the form of recovered stolen property in the form of a TV set which was Exhibit 2. However, no evidence was adduced to connect any of the Appellants with the recovered TV Set. The persons from whom the TV set was recovered did not testify, and neither were they arraigned before the court. The recovery of the TV set which the complainant identified in court as his property stolen among others from him on the material night was, not proved to have any connection with the Appellants or with their arrest. That evidence of the recovery of the TV set was of no significance to the prosecution's case against the Appellants.

26. We have come to the conclusion that the evidence adduced against the three Appellants was shaky and unsafe, and could not found a conviction. We accordingly find merit in the Appellants' Appeals, and allow them. Consequently we quash the convictions and set aside the sentences. We order that the Appellants should be set at liberty forthwith unless they are otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF JUNE 2014

LESIIT J.	**J. A. MAKAU**
JUDGE.	**JUDGE**