REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 160,158,161 & 163 OF 2009

CHARLES GITONGA NJUGUNA…….…….…..... 1ST APPELLANT

JOHN KARIUKI MWANIKI ….....2ND APPELLANT

MARTIN MUGENDI IRERI …..... 3RD APPELLANT

JOHN MURIUKI MUGO ….....4TH APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 64 of 2008 at the Senior Principal Magistrate's Court at Runyenjes

JUDGMENT

The 4 Appellants were charged before Runyenjes Senior Resident Magistrate\'s Court with the following offences;

COUNT 1

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

The particulars as stated in the charge sheet were as follows;

1. CHARLES GITONGA NJUGUNA alias MANOTI (2) JOHN KARIUKI MWANIKI alias KASUMUNI (3) MARTIN MUGENDI IRERI alias MOST(4) JOHN MURIUKI MUGO alias KANG\'ONDU: On the 6th day of September 2007 at Iriari market,Kiangungi sub location, Kyeni North location in Embu District within Eastern province jointly with others not before Court while armed with dangerous weapons namely axes, pangas and 6 iron bars robbed FABINUS NJERU KANJAMA of cash ks.1700/=, mobile phone make Nokia 1110, two dozens of T-shirts, seven lessos, sixteen pairs of sport shoes, four sufurias, seven pairs of shoes, safaricom cards and celtel cards all valued at ksh.15,490/= AND at or immediately before or immediately after the time of such robbery beat the said FABINUS NJERU KANJAMA.

COUNT II

ATTEMPTED ROBBERY WITH VIOLENCE CONTRARY TO SECTION 297(2) OF THE PENAL CODE

The particulars as stated in the charge sheet were as follows;

1. CHARLES GITONGA NJUGUNA alias MANOTI 2. JOHN KARIUKI MWANIKI alias KASUMUNI 3. MARTIN MUGENDI IRERI alias MOSI 4. JOHN MURIUKI MUGO alias KANG\'ONDU: On the 6th day of September 2007, at ACK Gitare Secondary School, Gitare sub-location, Runyenjes West location in Embu District within Eastern Province jointly with others not before Court while armed with axes, pangas and iron bars, attempted to rob DANIEL MURIITHI HARON of his mobile phone make Motorola C117 and at or immediately before or immediately after the time of such attempted robbery with violence beat DANIEL MURIITHI HARON.

COUNT III

BEING IN POSSESSION OF BHANG CONTRARY TO SECTION 3(2) (a) of the NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCE CONTROL ACT NO.4/94

The particulars as per the charge sheet were as follows;

1. JOHN KARIUKI MWANIKI alias KASUMUNI: On the 11th day of September 2007 at Ivanguare village, Kathageri sub-location, Kyeni North location in Embu District within Eastern Province was found in possession of cannabis sativa (bhang) to wit five hundred grammes valued at ks.100/= which were not under medial preparation.

COUNT 4

BEING IN POSSESSION OF BHANG CONTRARY TO SECTION3(2) (a) OF THE NARCOTIC DRUGS AND THYROTROPIC SUBSTANCES CONTROL ACT NO.4/94

The particulars as per the charge sheet were as follows;

MARTIN MUGENDI IRERI alias MOST: On the 11th day of September 2007, at Mufu sub-location, Kyeni North location in Embu district within Eastern Province was found in possession of one stone of Bhang valued at ks.500/= which was not under medical preparation.

The case proceeded to full hearing and they were convicted and sentenced to death. The sentences on Count 2, Count 3 and Count 4 were to remain in abeyance. And being aggrieved by the Judgment they have appealed against conviction and sentence. They have raised the following common grounds:

1. That the learned trial magistrate erred in both laws and facts when he convicted the Appellants in this case while relying on the evidence adduced and that of identification made by P.W.1, P.W.3 and finally P.W.4 without considering that circumstances that prevailed at the locus quo was not conducive as the same remained mistaken.

2. The learned trial magistrate erred in law and fact when he convicted the Appellants in this case while relying on contradicted evidence adduced by the prosecutions witnesses.

3. The learned trial magistrate gravely erred in law and fact when he convicted the Appellants in this case while being so much impressed with their mode of arrest without him considering that they were innocent in this offence.

4. The trial magistrate erred in law and fact when he convicted the Appellants in this case without him considering that vital crucial witnesses were not availed in Court by the prosecution side.

5. **Finally the learned trial magistrate erred in law and facts when he rejected the Appellants defence without him properly explaining for its rejection and thus violated the law of provision under section 169(1) of the Criminal Procedure Code.**

When the appeal came before us for hearing all the Appellants presented written submissions. Their main submission details the issue of identification. They submit that the complainants did not know the attackers prior to the date of incident. And they did not give any description to the police officers. Even the nicknames were given by members of the public. They say it was not possible for P.W.4 to identify the attackers as he was hiding under the bed. So he could only see the legs of the attackers. They also submitted that the arresting officers never came to testify.

M/s Macharia for the State opposed the appeal. She submitted that P.W.1 identified one of the attackers who used to buy sweets from his shop. P.W.1 was injured during the robbery. The attackers had torches which they flashed. P.W.5 was on duty at a secondary school when he heard the attackers and sensed they were robbers. The 2nd Appellant switched on the lights in the dormitory and P.W.3 and P.W.4 were able to identify them at an identification parade. The identification parades were conducted in accordance with the law.

This being a first appeal we are enjoined to re-evaluate and reconsider the evidence and come to our own conclusion. We also bear in mind that we did not see nor hear the witnesses. ***(Ref: GABRIEL KAMAU NJOROGE [1982-1988] 1 KAR 1134.)***

In the 1st Count the victim was P.W.1. He was asleep in the room beside his shop when on 6/9/2007 the attackers struck. They had torches on and used them to ransack P.W.1\'s house. They demanded for money. They beat him as they asked him for the money. The attackers were armed with an axe, metal bar and a panga. They beat him throughout. They stole things from his shop and left him lying on the floor. He went to the hospital and was treated. The police officers came to see him at home and he told them he recognized one person by appearance. Later he was asked to go to the police station where he met a group of five. He attended 4 parades. He picked 4 persons. The person he recognized by appearance was the 1st Appellant. He also identified a pair of baby shoes (blue and white) stolen from him.

P.W.2 was the complainant in count 2. He is a watchman at Gitare Secondary School. On the early morning of 7/9/2007 he was on duty seated next to the coffee barns where there is electricity light, and a carpentry workshop. He saw some 4 torches. He thought it was students looking for him. He realized it was not students. He saw a tall man wearing a long black coat walking towards his direction. He carried a torch and something that looked like a gun. He ran towards the students dormitory shouting for help. The attackers followed him. He pushed the dormitory door but found it locked from inside. He dashed into a nearby coffee and napier grass farm and hid there. He used his phone to call the Principal, OCS and Assistant Chief to inform them of the on goings. Students were all over and before long the police arrived. This witness did not identify any of the attackers.

P.W.3 and P.W.4 were students at Gitare Secondary School. They were in the dormitory on 6/9/2007 at 1am when he heard P.W.2 shout that they open the door for him. P.W.3 who slept near the door woke up to open. It was not the watchman who entered, but somebody carrying something like a gun. The person switched on the light. He was followed by three other people carrying pangas and rungus. He saw the 4 attackers well, before he ran out of the dormitory and he later identified them at 4 different parades. P.W.4 was also asleep in the dormitory. He heard the knock and woke up. A tall man entered the dormitory with something like a gun. Other students took off but he hid under a bed and watched them. After the attackers had walked through the dormitory he too ran out to join others. He identified all the 4 attackers in 4 different identification parades.

Both P.W.3 and P.W.4 indicated that the 2nd Appellant is the one who had been carrying something like a gun. P.W.5 (Dr. Maina) confirmed that P.W.1 had injuries (EXB 2). P.W.6 conducted 4 identification parades. He had 4 witnesses. All the 4 witnesses identified all the Appellants. P.W.8 IP Muoki investigated the two Counts (1&2). He stated that P.W.1 described to him two of the attackers who

were tall and of dark complexion. He then got the names of 4 suspects from members of the public. On 11/9/2007, him, P.W.7 and others went out to arrest the suspects. They started with the house of the 3rd Appellant who is also known as MOST. In his house they recovered bhang. He was arrested. Next was the 2nd Appellant\'s house. He is also known as KASUMUNI. They arrested him after recovering bhang from his house. They then went to house of the 4th Appellant. He was arrested. They next arrested the 1st Appellant at his house in Kiangungi. Identification parades were conducted and all the Appellants were identified. What was recovered from the houses of the 2nd and 3rd Appellants is the subject of count 3 and count 4.

The 1st Appellant in his unsworn statement stated that on 13/9/2007 he disagreed with a customer he had carried in his taxi over change. The customer threatened him. And on 16/9/2007 at 5am police officers arrived at his home with this customer. The OCS refused to release him as he did not give him shs.2000/=. He denied the charges.

The 2nd Appellant also unsworn stated that on 10/9/2007 he left home for Kathangeri where he is a conductor. The matatus he worked in were not there. As he was in a certain matatu he assisted one lady carry a child. He did not know this was a policeman\'s wife. The policeman came and kicked him. The next day the policeman who had kicked him previous day arrived with others and arrested him. He denied the charges.

The 3rd Appellant also unsworn stated that on 10/9/2007 he spent his day doing his things. He retired to bed at 8.00pm. He was woken up on 11/9/2007 at 2am by police officers who searched his house for illicit brew. They got none but they took 2 drums of brew from his brother\'s house. He was arrested.

The 4**th** Appellant also gave an unsworn statement. He stated that on 11/9/2007 he was asleep when officers came to arrest his brother who sells machore. They missed him and decided to take him as they thought he had hidden his brother. The police demanded shs.5000/= from him so that he could be released. He was later charged.

All the Appellants admitted having participated in the identification parades where they were picked, by witnesses.

P.W.2 and P.W. 4 also confirmed that the next morning they found when the Accounts Clerk\'s office had been broken into.

For Count 1 the complainant was P.W.1. He explained that the attackers were 4. They were armed with an axe, mental bar and panga. They broke the door. They took away the items mentioned in the charge sheet. They beat him as they took away his things. P.W.6 confirmed that P.W.1 was injured. We therefore find that indeed the offence of robbery with violence was committed.

Count 2 is attempted robbery with violence. The particulars are that the Appellants while armed with axes, pangas and iron bars attempted to rob Daniel Muriithi Harun of his mobile phone Motorolla C117. The complainant in this count was P.W.2. No where in his evidence did he talk of a Motorolla phone. Infact he only makes mention of a phone when he was calling from the coffee plantation. He does not also say he was beaten by anyone. We find that there was no attempted robbery on P.W.2 and so the conviction of all Appellants on count 2 was without basis. We quash it and set aside the sentence of death on it.

The robbery in count 1 took place in the night. The issue for determination is whether the witnesses properly identified the attackers.

We shall start with the evidence of the investigating officer (P.W.8). He indicates at page 35 lines 16-23;

"As I commenced the investigations I established that the descriptions given by the watchman Mr. Muriithi, students of Gitare Secondary School and the one by Mr. Kanjama had some similarities. I established that in both incidents two of the thugs were tall with the same complexion. I established that one of the pairs of the shoes recovered at the scene at Kathageri was the one stolen from Kanjama. From a tip from some members of the public I was able to get the names of the suspects. I was able to get names of 4 suspects. I was given the nicknames of suspects. The nicknames were Most, Kasumuni, Kangondu and Manoti".

And on page 40 at lines 18-20 he states while under cross-examination;

"I got intelligence reports implicating you. I was not given any description but you were identified at the parade."

It is clear from the answers of P.W.8 that he was never given any description of the attackers by the witnesses. He got all this from members of the public. The members of the public were not witnesses simply because they did not witness the attack. So they were giving this information based on what? What were they telling P.W.8 that the Appellants had done?

There was recovery of a pair of children\'s shoes which were identified by P.W.I as part of the items stolen from his shop.

P.W.7 and P.W.8 who are police officers and investigating officer have not told this court where these shoes were recovered from. Secondly the same were never produced herein as an exhibit. They were therefore not of any evidential value herein.

We are only therefore left with the evidence of identification which tends to link the Appellants to this offence. Having dismissed count 2 we are only left with evidence of P.W.I as the single identifying witness.

When dealing with such evidence the Court must be very careful and even warn itself before founding a conviction on such evidence. Ref:

- ***CHARLES O. MAITANYI VERSUS REPUBLIC [1985] 2 KAR 75***
- ***RORIA VERSUS REPUBLIC – [1967] EA 583***

In the present case P.W.I said he was able to recognize the 1st Appellant who had been buying sweets from his shop. He was seeing the others for the first time. He stated that there was enough light from the torches the attackers had. The attackers were in his shop for 20 minutes. But besides all this he gave no description of these people including the 1st Appellant to the police.

In the case of **CHARLES O. MAITANYI (SUPRA)** The following is what the Court of Appeal said about the importance of such description.

" *There ought to have been a further enquiry whether the complainant was able to give some description or identification of the assailants to those who came to her aid or to the police".*

There must be a description or an explanation of sorts given to enable the investigating officer arrange for an identification parade. People are not just arrested and bundled into an identification parade, for the sake of it. Secondly an identification parade is a re-affirmation that indeed a witness did identify a suspect. The identification parade must therefore be preceded by a description or some explanation which is lacking in this case. The Appellants herein have complained that they were sighted by the witnesses before being picked at the various identification parades. That cant be ruled our especially after the manner the parades herein were conducted. The parade officer (P.W.6) said he conducted four identification parades and the witnesses were also four. A perusal of all the parade forms produced herein shows and confirms to us that the same 8 members were used as parade members with a slight variance

when they were identifying the 3rd Appellant. These identification parades were conducted on the same day in a span of 1 hour 10 minutes. It therefore clearly shows the parade officers were retaining the same members and only changing the suspects. This made it very easy for the witnesses to pick out the ***"new member"*** who was obviously the suspect. This was contrary to what identification parades are supposed to be for.

We do find that the identification parades conducted herein were botched and have no evidential value in this case.

The evidence of P.W.1 without the back up of evidence of a properly conducted identification parade amounts to dock identification which is the weakest form of identification.

In the case of ***GABRIEL NJOROGE VERSUS REPUBLIC [1987] I KAR 1134*** which was followed in ***WALTER AWINYO AMOLO VERSUS REPUBLIC [1991] 2 KAR 254*** the Court of Appeal held as follows:-

"Visual identification must be treated with the greatest care and ordinarily a dock identification alone should not be accepted unless the witness has in advance

(a) given a description of the assailant.
(b) identified the suspect on a properly conducted parade".

In the present case P.W.I did not do either of the above. All the Appellants denied the charges against them. And from the analysis we have done we do find that the identification of the Appellants was not without errors. And the upshot is that the appeal is allowed. The convictions on the charge of Robbery With Violence is quashed and the death sentence set aside.

The convictions on Count 3 and Count 4 which were in respect of 2nd and 3rd Appellants are upheld. They were each sentenced to 6 months imprisonment. They have been in prison since 12/8/2009. The 6 months sentence has been covered.

We therefore order for the release of all the Appellants unless otherwise lawfully held under separate warrants.

DATED AND DELIVERED AT EMBU THIS 21ST DAY OF SEPTEMBER 2012.

LESIIT J. **H.I. ONG'UDI**

JUDGE **JUDGE**