



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 375 of 2007

VICTOR MWENDA MULINGE *alias* Mwenda.....1ST APPELLANT

GORDON ONYANGO WANYANGE *alias* Iron.....2ND APPELLANT

DAVID MUTUGI MWANGI *alias* Beast.....3RD APPELLANT

GEORGE MUNGAI WANJIRU *alias* Brown Jijo.....4TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4457 of 2003 in the Chief Magistrate's Court at Kibera – Mr. M. Maundu (SRM) on 7th June 2011)

JUDGMENT

1. The appellants **Victor Mwenda Mulinge *alias* Mwenda, Gordon Onyango Wanyange *alias* Iron, David Mutungi Mwangi *alias* Beast, and George Mungai Wanjiru *alias* Brown Jijo** were convicted on three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It had been alleged that on the 7th May 2003, at Bellevue along Mombasa road in Nairobi while armed with dangerous weapons, namely rifles and pistols, they robbed Edward Mbugua Gichuru of a motor vehicle registration No. KAH 990 W white Toyota Corolla, valued at Kshs.300,000/= in **count 1**.

2. It was also alleged that on the same date of 7th May 2003 at Mountain View Estate in Nairobi while armed as stated above, they robbed Samuel Abiero Okumu of a set of Securicor Uniform valued at Kshs.1600/= in **count 2** and Elizabeth Ndinda of Kshs.5400/= in **count 3**.

3. In all three instances it had been alleged that, at or immediately before or immediately after the time of such robbery they threatened to use actual violence against each of the 3 complainants. They were each sentenced to death as by law prescribed.

4. At the hearing of the appeal, Mr. Oguk the learned counsel for the 2nd and 4th appellants collapsed all the grounds of an appeal advanced by the two appellants and argued them under three heads.
5. **On the first ground**, Mr. Oguk urged that the learned trial magistrate erred in law and in fact by finding that the evidence of visual identification was cogent and sufficient to sustain a conviction in count 1, count 2 and count 3 against the two appellants.
6. **On the second ground**, Mr. Oguk urged that the identification parades were conducted in contravention of the Forces Standing Order and were therefore null and void. That the conviction of the two appellants revolved around the issues of both, visual identification, and identification at the parade, yet **PWI** who was the complainant in count I testified that he did not identify anyone from the time they were at the scene of the first robbery until they reached the gate at Mountain View, and that he identified two of his attackers when he was taken into a servant quarter at Mountain View.
7. Mr. Oguk further urged that it was the testimony of **PWI** that, he identified the 2nd and 4th appellants when they busied themselves in stripping the watchman naked. That this witness did not subsequently give any descriptions of the assailants to the police, and that the police showed him the two people after their arrest before he was invited to identify them at the identification parade.
8. Mr. Oguk also urged that **PW2** also, did not give any description of the assailants in his report to the police, although he told the police that he would be able to identify the assailants if he saw them again. That he therefore identified the 2nd and 4th appellants from the identification parade because the police had shown them to him and told him that they were involved in the robbery.
9. On this ground Mr. Oguk also urged that **PW4** also testified that she did not identify her assailants, because her face was covered and that she picked the 2nd and 4th appellants from the identification parade because she had met them in an office first.
10. The learned counsel referred us to the case of **David Mwita & others vs Rep Cr. App 117 of 2005** in which the Court of Appeal declared identification in such circumstances a nullity.
11. **On the third ground**, the learned counsel urged that the learned trial magistrate should not have dismissed the alibi defence of the 2nd appellant as manufactured, without giving it due consideration.
12. The 1st and 3rd appellants raised several grounds which similarly revolved around the issue of visual identification, faulty parade identification, inconsistent prosecution evidence and lack of appreciation of the defence evidence.
13. In response, Miss Mwanza the learned state counsel opposed the appeal and stated that she supported the conviction of the four appellants on the basis of the evidence adduced before the trial court. She urged that **PWI** testified that he was able to identify the appellant, who hired the car from him, that at the gate at Mountain View there were lights, and that he identified the appellants by appearance. Further that he identified the 2nd and 4th appellants when they were in a room where there were lights and they were stripping the watchman of his uniform, without covering their faces.
14. Miss Mwanza also urged that **PW1** identified the 3rd appellant whom he said had peculiar ears, and was with him in the Servant Quarters until he heard shots at the gate. That he had no doubt in his mind when he picked the 2nd, 3rd and 4th appellants, from the parade. She urged that although the witness saw two people in an office at the Police Station, they were not the same persons he identified at the identification parade.
15. Miss Mwanza urged that **PW2** was not able to identify any one at the gate where he was found although there were lights, but he was escorted to the Servant Quarters where there were lights, ordered to remove his uniform and beaten. That he identified the 3rd appellant because he had funny looking ears,

was clean shaven and had broken teeth, and was the one who took his uniform.

16. Miss Mwanza clarified that the persons whom **PW2** saw in the office before the parade were 1st and 4th appellants. On the fourth parade therefore he identified a person whom he had seen in an office at the police station while he identified the 2nd appellant as the one who had a pistol and who beat him up.

17. **PW4** identified the 2nd appellant whom she described as being dark, and the 3rd appellant whom she described as clean shaven, with a gap in the front teeth as if he had some of the teeth missing. She said she was raped by one of the robbers who was clean shaven and huge, but did not state which one it was.

18. In the opinion of the learned state counsel, identification parades for the 2nd and 3rd appellants were done according to Identification Parade Rules, but the evidence was however, not clear, as to how the 1st and 4th appellants were identified, and they appeared to have been exposed to the witnesses before the parade.

19. We have analysed and re-evaluated the evidence on record to make our own findings and draw our own conclusions, in line with what was stated by the Court of Appeal in **NZIVO V REPUBLIC CR. APP NO. 81 OF 2003 [2005] 1 KLR PG 700**. In the stated case the learned Judges of Appeal, Tunoi, O’Kubasu and Waki JJA, held *inter alia* that:

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts’ own decision on the evidence.

2. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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.”

20. A summary of the prosecution case is that on 7th May 2003 at 8.00 p.m. **PW1** Edward Mbugua Gichuru, a taxi driver, was at his place of work at Bellevue, with motor vehicle registration No. KAH 990 W Toyota Corolla white in colour, when a man approached him and requested to be taken to town, via South C, where he was to pick his sister and brother. When they reached South C the person alighted and pretended to make a call.

21. Suddenly a person who was armed with a pistol emerged and bundled **PW1** into the back seat of the car. The 1st person took control of the vehicle and drove off with **PW1** sandwiched between two people in the back seat, while another person sat in the co-driver’s seat. The motor vehicle refuelled at Westlands, and proceeded to Mountain View Estate, where it stopped outside a gate and hooted. When the watchman came forward he was held by two (2) of carjackers.

22. **PW1** was taken to the Servant Quarters together with the watchman and there they found the house girl of that homestead. The watchman was stripped of his uniform, and one of the robbers wore it. **PW1** was made to lie on the floor with the watchman, while the maid lay on the bed. They were each bound hand and foot and left under the guard of one robber in the Servant Quarters.

23. He testified that there was light in that house and he was able to identify the attackers, and specifically that he identified the 2nd and 3rd appellants. He recalled that three of the assailants were armed with pistols, while the fourth was armed with a rifle. While in the Servant Quarters he heard the sound of a motor vehicle being driven into the compound, followed by the sound of gun shots and screams. Then there was silence.

24. After sometime police officers and security guards arrived at the scene and untied them. He went

out, of the Servant Quarters and found bodies of three people, which were later identified by witnesses as those of Dr. Ezra Teri who was the owner of that home, his wife Isobel Ezra Teri, and his brother John Allan Teri. **PW1** accompanied police officers to Kabete Police Station where he recorded a statement.

25. Later he was summoned to Pangani Police Station to attend identification parades, at which he was able to identify all the four appellants. On 8th May 2003 **PW3**, P.C. Robinson Tamu found the missing motor vehicle intact, at the junction of Kiremia and State House roads, having been abandoned.

26. In considering the evidence of identification we have referred to the direction of the Court of Appeal in the case of **JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212** in which the court stated that:

“A careful direction regarding the condition prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential.”

27. We analyzed the evidence of identification from the three identifying witnesses, **PW1**, **PW2** and **PW4** against the evidence tendered in defence. We are aware that there can be errors even in identification. This was the finding of the Court of Appeal in the case of **Abdalla Bin Wendo Vrs Republic [1953] EACA 166**, where the Court of Appeal of East Africa had this to say:-

‘..... but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true’

28. The proceedings show that **PW1**, the taxi driver, identified the 2nd and 3rd appellants. That it was the 3rd appellant who ordered him out of the car at the gate at Mountain View Estate and escorted him into to the Servant Quarters. That there were lights at the gate and in the Servant Quarters where he, the watchman and the maid were held under guard by the 2nd appellant.

29. **PW1** was consistent in his testimony that he picked the 2nd and 3rd appellants from the identification parade because he had positively identified them at the scene of the robbery. We found this witness to be a truthful one for the reason that where he only identified the 1st and 4th appellants with help from the police he said so in his testimony. He testified that the police showed the 1st and 4th appellants to him in an office at the Police Station, and told him that these suspects too were involved in the robbery. Thereafter the officers mounted an identification parade where he identified the same people he had just seen in the office.

30. Upon a scrutiny of the entire record it would appear that it was the learned trial magistrate who erred, by recording that **PW2** identified “**Accused 2**” and “**Accused 4**” in one sentence in the examination in chief of **PW2**. Throughout the rest of his testimony however it is evident that **PW2** only identified the 2nd and 3rd appellants.

31. **PW2** Mr. Abiero the watchman, testified that it was the 2nd appellant who first addressed him at the gate, where there were lights. The 2nd appellant emerged from the car first, armed with a pistol, followed by the 3rd appellant who was armed with a rifle. The 3rd appellant ordered him to open the gate and remove his uniform. He recalled that the 2nd appellant was rough with him, and beat him thoroughly demanding to know where Dr. Ezra kept his money.

32. He too, like **PW1**, saw the 2nd and 3rd appellants at the gate and in the Servant Quarters, and there were lights in both places. The robbers did not cover their faces.

33. **PW4**, Miss N the house help recalled only two out of the four attackers, and these were the 2nd and 3rd appellants. In her statement to the police she said she did not identify any one, but in her testimony she said that she had only told the police so, out of fear of reprisal from the robbers. Her testimony was

that the 2nd appellant approached her first and carried a pistol. The 3rd appellant appeared next and slapped her in the face. She picked these two from the identification parade.

34. Both **PW2** and **PW4**, just like **PW1** testified that they picked the 2nd and 3rd appellants from the identification parade because they had identified them at the scene of the robbery, and that they picked the 1st and 4th appellants only because they were shown to them by police officers before the parade and told that they too had participated in the robbery.

35. After a careful analysis of the evidence on record we are satisfied that there was no error in the identification of the 2nd and 3rd appellants since this was not a case of a single identifying witness. The conditions under which the identification was done were favourable. The robbery occurred at night but there was light at the gate and in the Servant Quarters where the robbers under observation did not cover their faces. The observation lasted a considerable length of time according to the three identifying witnesses. The witnesses and the appellants were in close proximity to each other with no crowd which could have interfered with the observation of the assailants by the witnesses. The witnesses identified the appellants by their appearances and not by clothing.

36. **On the identification parades**, the court examined the evidence of **PW10** who conducted the parade, for the 2nd appellant at Pangani Police Station. According to **PW10** the witnesses were accommodated at the traffic office which is far from where he was to mount the parade. The parade was conducted in an enclosed corridor between the office and the cells which was however well lit. **PW10** informed the 2nd appellant of his rights to elect where he would stand, to change his clothing if he so wished and to have a friend or counsel present at the parade.

37. The 2nd appellant did not change his clothes or ask for anyone to be present at the parade, but he did elect to stand between member No. 4 and 5.

38. **PW10** also explained to **PW1** that the person he was looking for may or may not be on that parade. **PW1** did identify the 2nd appellant by touching.

39. The 2nd appellant did exchange his clothes with another member of the parade and remove his shoes. The 2nd witness also identified him as did the 4th witness even though the appellant changed his clothes and his position on the parade once more.

40. It was only after he had been identified that he said that the police had his photograph and may have shown them to the witnesses. There is however no evidence on record, that the witnesses were shown pictures of the appellants by the police, before the parade.

41. It was the evidence of **PW10** that he ensured that the witness who had already been to the parade did not meet with those who were yet to attend the parade before the latter had had their chance at the parade.

42. We are therefore satisfied that the 2nd appellant's parade was conducted properly and in accordance with the Identification Parade Rules. There however appears to be no evidence from the officer who mounted the identification parade in respect of the 3rd appellant.

43. In our assessment we have found that whereas there was consistency in the evidence of **PW1**, **PW2** and **PW4** concerning the presence of the 2nd and 3rd appellants at the *locus in quo*, the arms they carried and the roles they played, all three witnesses were however candid enough to testify that they identified the 1st and 4th appellants at the parade only because the police showed them the suspects in advance and advised them that they too were involved in the robbery.

44. It cannot therefore be stated with certainty that the 1st and 4th appellants were identified as having participated in the robbery. They shall therefore benefit from the doubt which has been created.

45. The evidence shows that the 3rd appellant was a stranger to the witnesses, was not arrested at the scene, was in fact arrested a week later somewhere else, and was not found in possession of anything connected with the robberies. It was necessary that an identification parade be mounted in his respect. This indeed was done as can be evinced from the evidence of **PW2**. **PW2** who stated as follows:

“An identification parade was conducted. In a group of people I identified one of them. He had funny ears, he was shaved completely and had broken teeth. He is the one who took my uniform. He is Accused 3 (points at Accused 3)”.

46. This case started de novo on 10th July 2006 after 17 witnesses had testified. Whenever a case starts de novo the prosecution needs to exercise caution and remember that all witnesses whose evidence had already been received, must be recalled to testify fresh because the evidence already on record does not form part of the record of the new trial.

47. It is on record that the manner in which the Identification Parade was mounted has been faulted and forms part of the grounds of appeal, it was essential that the officer who conducted the parade should be recalled to testify and be subjected to cross-examination. That lapse on the part of the prosecution earns the 3rd appellant benefit of the doubt.

48. **On the 3rd ground** in which it was urged that the defence statements were not considered, and in particular that the alibi defence of the 2nd appellant was dismissed without due consideration, we reassessed the proceedings to make our own finding, and draw our own conclusion. The 2nd appellant Mr. Gordon Onyango Wanyange gave a detailed narration of what transpired on the evening of 16th May 2003 when he was arrested, and recoveries made of his household goods from his house, and of his subsequent charging in court.

49. He made no reference to the 7th May 2003 when the robberies occurred, nor the fact that several witnesses placed him at the scene of robberies.

50. It must be borne in mind that this was a criminal trial and the appellant had no obligation to defend himself or indeed to explain his innocence. In Sekitoleko v Uganda [1967] EA 531 the Chief Justice Sir Udo Udoma as he then was, stated as follows:

“as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R. V Johnson [1961] 3 All E.R. 969 applied; Leonard Aniseth v. Republic [1963] E.A. 206 followed)”.

The evidence of the appellant is however, not considered in a vacuum. It is considered in the context of the rest of the evidence on record. The alibi defence raised by the 2nd appellant was in regard to the 16th May 2003 and not the 7th May 2003 when the offence occurred. In this case where there was overwhelming evidence from **PW1**, **PW2**, and **PW4** placing the 2nd appellant at the scene of the robberies the defence statement did not dislodge it, neither did the cross-examination cast any reasonable doubt on the prosecution case.

51. For the foregoing reasons therefore, we find that the convictions of the 1st, 3rd and 4th appellants were not founded on sound evidence. We quash the convictions in respect of each of them on each count and set aside the sentences flowing therefrom.

The 1st, 3rd and 4th appellants are set at liberty forthwith unless otherwise lawfully held.

The **appeal by the 2nd appellant** is found to be **lacking in merit**, and is **dismissed**.

SIGNED DATED and DELIVERED in open court this 26th *day* of **November 2012**.

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE