



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 38 OF 2007

(AS CONSOLIDATED WITH CRIMINAL APPEALS NOS. 39 & 40 OF 2007)

(Appeals arising from the conviction and sentence of (MR. S.A. OKATO, SRM) delivered on 28th February, 2007)

**SAMUEL KITHITA NGONDU.....1ST
APPELLANT**

**PETER MUSYOKI MWINZI.....2ND
APPELLANT**

**JULIUS MUNYOKI MUSYOKI alias MBULA.....3RD
APPELLANT**

V E R S U S

**REPUBLIC.....RESPONDE
NT**

JUDGMENT

The appellants, Samuel Kithita Ngondu, Peter Musyoki Mwinzi and Julius Munyoki Musyoki alias Munyoki Mbula were charged with four counts of **robbery with violence contrary to Section 296 (2) of the Penal Code**. The particulars of the offence were that on 30th August 2004 at Baraka Nursing Home in Mwingi Township, jointly with others not before the court, while armed with dangerous or offensive weapons namely pangas, bow and arrows robbed David Muthui Maluki, Damaris Ngoki Muthui,

Margaret Mumbe Muthui and Purity Kavengi Mulwa of various sums of money ranging from KShs.9,000/= to KShs.170/= and at the time of such robbery used personal violence to the said David Muthui Maluki, Damaris Njoki Muthui, Margaret Mumbe Muthui and Purity Kavengi Mulwa. The appellants pleaded not guilty to the charge when they were arraigned before the trial magistrate's court. The prosecution called six (6) witnesses in bid to prove its case against the appellants. After the conclusion of the prosecution's case, the appellants were put to their defence. They adduced unsworn evidence in their defence. After the conclusion of the trial, and upon assessing the evidence, the trial court reached determination that the prosecution had proved its case on three counts of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The appellants were convicted and sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence. Each appellant filed a separate appeal challenging his conviction and sentence.

In their petitions of appeal, the appellants essentially raised the same grounds of appeal. They challenged the decision the trial magistrate in convicting them on the basis of the evidence of identification which in their view did not establish their guilt to the required standard of proof. They were aggrieved that the trial magistrate had failed to take into consideration the fact that the prosecution had not adduced sufficient evidence which placed them at the scene of the robbery at the time of the robbery. They faulted the trial magistrate for reaching the finding that the evidence in respect of the identification parade that was conducted by the police established that indeed the complainants had identified the appellants at the scene of the robbery. They were aggrieved that the trial magistrate had not taken into consideration the fact that the circumstances prevailing at the time of the robbery were not conducive for positive identification. They faulted the trial magistrate for failing to take into consideration their respective defences. In their view the said defences exonerated them from the crime. In the premises therefore, the appellants urged the court to allow their appeals, set aside their respective convictions and sentences, and thereafter acquit them of the charges.

Prior to the hearing of the appeals, the court consolidated the three separate appeals that had each been respectively filed by the appellants. This is because the appeals arose from the same trial before the subordinate court. At the hearing of the consolidated appeal, the appellants presented to the court their respective written submissions in support of their respective appeals. They urged the court to favourably consider their appeals, and allow the same. Mr. Gitonga, learned State Counsel, made oral submissions urging the court to dismiss the appeals. He submitted that the prosecution had proved, to the required standard of proof on a balance of probabilities that indeed the appellants were identified by the complainants at the time of the commission of the robbery.

Before giving reasons for our decision, it is imperative that we set out the facts of this appeal, albeit briefly. On 30th August 2004, at about 3.00 a.m., PW1 David Muthui Maluki, took his wife PW3 Margaret Mumbe Muthui to Baraka Nursing Hospital within Mwingi Township for treatment because she had fallen ill. PW1 and PW3 were accompanied by PW2 Damaris Njoki Muthui, a cousin to PW1, to the said hospital. According to PW1, while PW3 was being admitted at the said hospital, he walked out of the main building of the hospital to a toilet outside to answer a call of nature. He recalled that while he was about to enter the toilet, he was accosted by three men who were armed with a panga, bows and arrows. The three men demanded that he surrenders whatever cash that was in his possession. He robbed of KShs.9,000/=. After the robbery, PW1 was locked inside the toilet. PW1 testified that although he saw the appellants for the first time, he was able to identify them by the security lights that had been lit outside the said hospital. When PW1 made the report to the police, he told them that he would be able to identify his assailants if he saw them again. PW1 testified that he recorded a statement with the police about a month after the robbery. He conceded that he did not give any physical description of the robbers in the report that he made to the police. PW1 was later on 10th December 2004 and 14th April 2005 summoned to Mwingi Police Station to attend police identification parades which were respectively conducted by PW4 IP Bernard Wambua and PW5 SP Joseph Ng'ang'a. PW1 testified that in the said identification parades, he was able to identify the three appellants as persons who robbed him on the material night of the robbery at Baraka Nursing Hospital.

On their part, PW2 and PW3 testified that on the material night while they were inside a ward at Baraka Nursing Hospital, they saw one person (whom they later identified as the 1st appellant) enter the ward.

He did not talk to any person in the ward. He walked out only to return later with two other men. The three men robbed PW2 and PW3 of cash amounting to KShs.9,000/=. It was PW2's and PW3's evidence that they were able to identify the appellants during the course of the robbery because the electric lights in the ward had been put on. PW2 and PW3 testified that the appellants were armed with a panga, bow and arrows during the robbery. PW3 testified that during the course of the robbery she was shocked that they were being robbed at the hospital. They both testified that they did not give any physical description of the robbers in the first report that they made to the police. Just like PW1, PW2 and PW3 identified the appellants in identification parades conducted by the police which were respectively conducted three (3) months and eight (8) months after the robbery incident.

When the appellants were put to their defence, they gave unsworn evidence denying involvement in the robbery. It was evident to the court that the appellants were convicted solely on the evidence of identification. No item that was stolen during the robbery incident was recovered in possession of the appellants. The appellants were arrested more than three months after the robbery incident. The appellants were not known to the complainants prior to the robbery incident. Their evidence cannot therefore be said to be evidence of identification by recognition.

As the first appellate court, it is the duty of this court to reconsider and reevaluate the evidence adduced before the trial court with a view to reaching a determination whether or to uphold the conviction of the appellants. In reaching its determination, this court will of course take into account the grounds of appeal put forward by the appellants (see **Okeno v R [1972] EA 32**). As stated earlier in this judgment, the conviction of the appellants was based solely on the evidence of identification. Evidence of identification, especially identification made in circumstances that are not conducive to positive identification should always be treated with caution. The court cannot convict an accused person based solely on the evidence of identification unless the court is certain that the identification of the appellants as the persons who committed the robbery is beyond any reasonable doubt. In **Maitanyi v Republic [1986] KLR 198** and at page 201, the Court of Appeal had this to say in respect of evidence of identification, especially in regard to the evidence of identification by a single witness:-

“In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did? 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 greater brightness, so the chances of a true impression being received improves. 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? There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect unless explained. It is for the magistrate to inquire into these matters.”

In the present appeal, it was evident that the complainants did not give the description of the persons who robbed them in the first report that they made to the police. All the three identifying witnesses testified that they told the police that if they ever saw their assailants, they would be able to identify them. This court wondered how the appellants would be able to identify their assailants if they saw them again if

they did not give their initial impression of the robbers in form of a physical description in the first report that they made to the police. In the present appeal, the complainants did not even describe the clothes that their assailants wore during the robbery. Matters were not helped by the fact that one of the witnesses (PW3) testified that she was in terror during the entire course of the robbery. It is highly improbable that such a distressed witness could have been in a position to positively identify her assailant.

The circumstances under which the appellants were arrested lend credence to the fact that such evidence of identification could not sustain a conviction. The trial court was not told the circumstances under which the appellants were arrested to illuminate how the appellants came to be connected with the robbery. It is highly unlikely that the complainants could have been in a position to identify the appellants in identification parades which were conducted three and eight months respectively after the robbery incident. This is taking into account the fact that the period in which the robbery took place could not have been such a long period of time that would have enabled the trial court to accept at face value the evidence adduced by the complainants that they indeed were able to identify the appellants. Further, in the absence of a description made in first report to the police, a subsequent identification parade conducted by the police is of little or no evidential value. This is because there is nothing by which the investigating officer will be able to go by to assist him to determine beforehand whether the person sought to be pointed out in the identification parade fits the profile of the person that the complainant had earlier given description of.

In the premises therefore, it is this court's considered view that the prosecution did not establish to the required standard of proof beyond reasonable doubt that indeed the appellants had been identified as the persons who robbed the complainants on the material night of the robbery. The appellants' appeal established that indeed the circumstances under which the complainants are said to have identified the appellants were not conducive to positive identification and therefore raise reasonable doubt that the appellants were in actual fact identified as the robbers in the robbery incident. Matters were not helped by the fact that the complainants did not give a comprehensive description of the robbers in the first report that they made to the police. The appellants' consolidated appeals have merit and are hereby allowed. Their conviction on the evidence of identification on the three counts of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** cannot be sustained. It is hereby set aside. Their respective sentences on the three counts are also set aside. The appellants are acquitted of the said charges. They are respectively ordered set at liberty forthwith unless otherwise lawfully held.

DATED AT MACHAKOS THIS 25th DAY OF MAY 2011

P.K KARIUKI

J U D G E

L. KIMARU

J U D G E