REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NOS. 26, 27 AND 28 OF 2008

ERIC MUSUNGU MANARI ………………..…..………….. 1ST APPELLANT
SAMUEL MUYONGA CHIMWANI ……………………. 2ND APPELLANT
DAVID MWANZIKI ANDAYI ………………..………… 3RD APPELLANT

VERSUS

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

(Being an Appeal against the conviction and sentence in Kapsabet Principal Magistrate's Court Criminal case No. 454 of 2005 delivered on 23.5.2008 by HON. S. ATONGA (Principal Magistrate)

JUDGMENT

ERIC MUSUNGU MANARI, **SAMUEL MUYONGA CHIMWANI** and **DAVID MWANZIKI ANDAYI** (herein, the first, second and third appellants respectively) appeared before the Principal Magistrate at Kapsabet charged with five counts of robbery with violence contrary to S. 296 (2) of the Penal Code.

It was alleged that on the 5th February 2005 at Chepsonoi Village North Nandi District, jointly with others not before Court, while armed with dangerous weapons namely pangas, rungus, swords, iron-bars and stones robbed, in count one, **MOHAMMED BURAE OSMAN** of one mobile phone make Motorolla and unknown amount of money and killed him in the process.

In count two, they robbed **FATUMA CHEPKERICH MOHAMMED** of Kshs. 45,000/=, three mobile phones, six pieces of bed sheets, two coats, one jacket, a wrist watch and a Somali sword and used actual violence on her.

In count three, they robbed **ABDI KADIR HUSSEIN** of Kshs. 500/= and a mobile phone and used actual violence on him.

In count four, they robbed **HEBRON LITSULITSA ADOLI** of Kshs. 500/= and a mobile phone and used actual violence on him.

In count five, they robbed **CATHERINE NASWA CHANGALWA** of Kshs. 1,000/= and a mobile phone and used actual violence on her.

Upon their plea of not guilty for all the counts, the appellants were tried and convicted. They were then sentenced to suffer death.

We note that the learned trial Magistrate did not specifically indicate the count on which the sentence was imposed. He however, made it clear that the sentence on other counts was suspended. We take this to mean that the appellants were sentenced to death on count one while the sentences on counts two, three, four and five were suspended or held in abeyance.

Indeed, a person cannot die twice. It was therefore correct for the learned trial Magistrate to impose sentence on one count and suspend sentences on the rest of the counts. This was in keeping with the decision of the Court of Appeal in the case of **BORU & ANOTHER VS. REPUBLIC (2005) KLR 649.**

Be that as it may, the appellants felt aggrieved by the conviction and sentence and filed separate appeals which were consolidated and heard together.

Learned Counsel, **MR. NABASENGE**, represented the appellants at the hearing while the learned Senior Deputy Prosecuting Counsel, **MR. OLUOCH**, represented the respondent.

The appeals as consolidated are based on the following grounds:-

(1) That the learned trial Magistrate erred in law and fact by basing his conviction and subsequent sentencing of the appellants on the evidence of identification parade and yet the same was not free of error.

(2) That the learned trial Magistrate erred in law and fact by failing to consider the appellants' defence of Alibi.

(3) That the learned trial Magistrate erred in law and fact by dismissing the appellants' defence without giving due credence to their evidence pertaining the circumstances that led to their arrest.

(4) That the learned trial Magistrate erred in law and facts by entertaining a defective charge sheet that was over - burdened by several counts and yet the appellants had been charged with robbery with violence a capital offence as a first count.

(5) That the learned trial Magistrate erred in law and fact by allowing the appellants to be charged jointly for robbery with violence amongst other counts and yet each appellant was arrested at different locations while alone away from the scene of crime.

(6) That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellants on five counts of robbery with violence and yet the same relates to one offence of robbery with violence. In the circumstances, the appellants suffered prejudice.

(7) That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellants on five counts of robbery with violence and yet the said appellants were arraigned in Court after fourteen (14) days and no explanation was given for the said unlawful delay.

(8) That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellants on five counts of robbery with violence while the evidence in support is remote and far fetched thus unreliable in law.

These grounds are argued in the written submissions presented and orally highlighted by Mr. Nabasenge.

On ground one, the appellants take issue with the identification parades and contend that the same were conducted in contravention of the Force Standing Order No. 6 and were not free of error. In that regard, reliance was placed on the said Order No. 6 of the Force Standing Orders and the decisions in **JUMA VS. REPUBLIC (2001) KLR 595, AJODE VS. REPUBLIC (2004) 2 KLR 82** and **SAMUEL KIPROTICH CHESEREK & OTHERS VS. REPUBLIC CRIMINAL APPEAL NO. 265 OF 2003**

On grounds two, three and five, the appellants contend that the learned trial Magistrate failed to consider their defence of Alibi and also failed to give credence to their evidence on circumstances leading to their separate arrests at different locations. Further, there was no evidence on the arrest of the second and third appellants. In that regard, the appellants cited the decision in **MUIRURI & OTHERS VS. REPUBLIC (2002) 1 KLR 274**.

On the defence of Alibi, the appellants cited the decisions in **NYANZI VS. REPUBLIC (1999) 1 EA 228, MILLER WANJALA MUCHACHA VS. REPUBLIC CRIMINAL APPEAL NO. 89 OF 2007 (C/A) AT ELDORET, SEKI TOLEKO VS. UGANDA (1967) EA 531** and **KIARIE VS. REPUBLIC (1984) KLR 739**. On grounds four and six, the appellants contend that the learned trial Magistrate erred in law and fact by convicting the appellants while relying on a defective charge sheet that was over-burdened by several counts. It is further contended that the first count was a capital offence yet the appellants were convicted on five counts relating to a single offence of robbery with violence. The decision in **LOWAYAKARA EJUROTO ELIMLIM VS. REPUBLIC CRIMINAL APPEAL NO. 219 OF 2006 (C/A) ELDORET** was cited.

On ground seven, the appellants cited S. 72 (3) of the Old Constitution and contended that they were arrested and arraigned in Court after fourteen (14) days yet there was no explanation for the unlawful delay. The decision in **GERALD MACHARIA VS. REPUBLIC (2007) e KLR** was cited in that regard.

On ground eight, the appellants contend that the evidence in support of the charges was insufficient, unreliable and lacked corroboration to warrant a conviction.

For all the foregoing grounds, the appellants urged us to allow the appeal.

The respondent on the other hand urged us to dismiss the appeal while contending that the evidence on identification of the appellant was adequate and corroborative as there was sufficient light at the scene and adequate opportunity for identification.

The respondent contended that there was no mistaken identification of the appellants and implied that the identification parades were properly conducted.

On the Alibi defence, the respondent contended that the same was considered by the learned trial Magistrate and disbelieved.

On the charges, the respondent contended that they were not defective for duplicity. On S. 72 (3) of the Old Constitution, the respondent contended that there was a remedy provided under S. 72 (6) of the same Constitution.

We have considered all the submissions by both sides. Our duty is to re-visit the evidence and draw out our conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses (See, **OKENO VS. REPUBLIC (1972) EA 32**.

In summary, the prosecution case consisted of the facts that follow:

On the material 5th February 2002, **HEBRON ADOLI (PW.1)** who was the fourth complainant was at home with his family consisting of his wife, the fifth complainant **CATHERINE NASWA CHANGALWA (PW 3)** and children when at about 10.30 p.m. a group of about eight people invaded and robbed them of their property including cash Kshs. 6,000/= and mobile phones. In the process, Hebron was assaulted and injured. He said that with the help of solar light he identified the first and second accused (i.e. first and second appellants) as some of the robbers. His wife (PW 3) said that in the process of the robbery, the light went off. It became dark and due to that, she was unable to properly identify any of the robbers. Earlier on the same date, at about 8.00 p.m., the second complainant **FATUMA CHEPKERICH MOHAMMED (PW 2)**, was in her home in the same neighbourhood

together with her husband, the first complainant Mohammed Burae Osman (now deceased). Also present in the home were **MUSTAFA RAMADHAN MOHAMED (PW 4), ABDUL RAHIM SABA (PW 9), ABDUL AZIZ ABBAS (PW 10)** (shown as PW 11 in the typed record), **ABDI KADIR HUSSEIN (PW 11)** (Shown as PW 12 in the typed record), all sons of the deceased. At that time, a group of about eight people armed with offensive weapons attacked the homestead and robbed the first, second and third complainants of money and mobile phones.

The second complainant (PW 2) in addition lost pieces of bed sheets, a jacket, a wrist watch and a Somali sword. She said that there were bright lights in the house such that she was able to identify the first and second appellants as being part of the offending group.

Mustafa (PW 4) said that the house had bright lights which aided in his identification of the first and second appellants. He said that he picked a stool and hit the second appellant with it before he was assaulted by the attackers and locked in a bedroom.

Abdul Ravin Saba (PW 9) said that he and Abdul Aziz (PW 10) were starting a vehicle when they were confronted by a group of about ten (10) people and ordered to lie down on the floor. They faced downwards as their hands were being tied up. He (PW 9) was assaulted when he made an attempt to look at the attackers. He did not therefore identify any one of them.

Abdul Aziz (PW 10) said that when the group of ten (10) people confronted him, the security lights were on. This enabled him identify two of the attackers. He said that the two were the second and third appellants. He said that the second appellant was carrying stones while the third appellant untied his hands and told him to remove a radio from a stationary vehicle. Thereafter, he was ordered into the house as his hands were re-tied.

Abdi Kadir Hussein (PW 11) was in the house at the material time when they were confronted by three people armed with machetes (pangas), iron-bars and stones. The three people ordered them to lie on the floor. He (PW 11) said that he identified two of those people as there was bright light from a florescent tube. He said that the two were the first and second appellants. He refused to obey them and threw a stool at the first appellant. Thereafter, he was hit with an iron-bar from the back by the second appellant even as additional attackers came into the house. He put up resistance but was over powered. His mobile phone and cash Kshs. 500/= were taken away. He lost consciousness and later found himself at the Eldoret Nursing Home.

JOSEPHAT SAWE (PW 12) (shown as PW 13 in the typed record) a clinical officer at Kapsabet District Hospital produced P3 forms showing that PW 1, PW 2, PW 4 and PW 10 were injured during the offences.

CPL. SAMWEL AWUOR (PW 14) of Kapsabet Police Station arrested the first appellant on the 16th February 2005 but did not recover anything from him. He said that at the time of the arrest, the first appellant had a swollen neck which he attributed to an attack by robbers.

SAMWEL KIPTOO (PW 15), an Assistant Chief acted on information and went to a Health Centre of 7th February 2005 in search of a suspect. He found that the suspect had been treated and had left the Health Centre. He followed the suspect and asked him to report to a nearby police post. He then told the OCS about the suspect whom he identified as the second appellant.

IP HILLARY SONGOK (PW 16), C. IP NDIEMA (PW 18) and **IP CHARLES OUMA (PW 20)** conducted identification parades in which the first second and third appellants were allegedly identified by some of the complainants. **PETER MOISH (PW 5)** and **GEORGE ASENGO (PW 6)** said that they saw the first appellant on the 6th February 2005 and noted that he had a swollen face and neck which he attributed to an attack by unknown people.

PHYSIL ABRAHAM (PW 7) also saw the first appellant on 6th February 2005 and noted that he

had injuries on the neck.

FRED WEKESA (PW 8) said that on the material date of the robbery at about 11.00 p.m. he was asleep in his house when he heard a voice warning others of reprisal. He later heard that some items were stolen.

SGT. RICHARD MAUBE (PW 17) investigated this case after the arrest of the three appellants. In the process, a broken stool and a Somali sword allegedly recovered from the house of the second appellant were handed over to him by one Cpl. Owuor. The items were received from the officer who first started the investigation of the case, one Sgt. Dorcas.

Sgt. Maube visited the scene of the offences and noted that some victims were injured. Later, one of the victims passed on and was buried immediately in accordance with Islamic rites. He (PW 17) further noted that the appellants lived in the same neighbourhood with the complainants but were not known to each other. Therefore, he arranged for identification parades and thereafter arraigned the appellants in Court.

The learned trial Magistrate considered the foregoing evidence by the prosecution witnesses and placed the appellants on their defence. It must however be noted that the handwritten record of the learned trial Magistrate more or less differs with the typed record with regard to the description of the witnesses by number. Nonetheless, we have endevoured to sum up as best as possible the evidence of all the prosecution witnesses for proper understanding and consideration by ourselves.

In their respective defence, the appellants denied the offences.

The first appellant (**Eric**) stated that on the material date he was at home from the morning upto 8.30 p.m. when he left for his sleeping place. On the way, he met two people wearing rain coats and appeared like police officers. They questioned him as to where he was coming from. He told them that he was heading to his place of sleep and they ordered him back to his father’s house. He was assaulted and rendered unconscious. His neighbour (PW 5) informed PW 6 who referred him to a clan elder (PW 7). He took medicine and proceeded to a cousin’s house where he slept. Police officers later arrived there, broke the door and arrested him. He was taken to Chepsonoi Police Post and then Kapsabet Police Station before being arraigned in Court.

The second appellant (**Samuel**) said that on the material date he was at home upto 10.00 a.m. when he went to attend to his brother’s shop. His brother returned at 6.00 p.m. and after listening to news he went home. On the way, at Tindinyo, he saw some people flashing torches. He was cut with a panga on the head but managed to escape while bleeding. He reported to his father who called a clan elder who told him to seek treatment. After treatment, he met the Area Chief who enquired as to whether he had reported to the police. He was interrogated at the police station by a S/Sgt. Dorcas. He denied the alleged offences but on 8th February 2005 he was told that he was a suspect. He was taken to Kapsabet Police Station. His house was searched and nothing was recovered. After about a week an identification parade was conducted during which he was not allowed to call an advocate or witness.

The third appellant (**David**) said that on the 8th February 2005 at about 8.30 a.m. he left his home on a bicycle and went to a local stage. It was raining and while cycling he knocked down a goat. The owner of the goat wanted payment for the accident. He did not have money and was taken to Chepsonoi Police Station from where he was taken to Kapsabet Police Station. Later, an identification parade was conducted. Thereafter, he was arraigned in Court.

The defence by the appellants was considered by the learned trial Magistrate together with the evidence adduced against them by the prosecution and in conclusion the learned trial Magistrate found that there was overwhelming evidence to warrant the conviction of the appellants on all the five counts of robbery with violence.

The learned trial Magistrate found as a fact that a series of robberies were committed by the

appellants on the material night. Our own re-evaluation of the evidence leaves no doubt in our minds that acts of robbery with violence were indeed committed against the five complainants on that material night. The attackers were a group of about eight to ten people. They were armed with crude weapons and in the process of their unlawful transactions they unleashed great violence on the victims such that one of them succumbed to the injuries sustained.

There was no particular dispute from the appellants on the occurrence of the offences. Their respective position was that they did not hold any responsibility for the offences. The first and second appellants indicated that they were separately walking to their homes or houses on the material night when they were assaulted and injured by unknown persons.

The third appellant indicated that he found himself in a predicament after knocking down a goat while not having money to compensate its owner for the accident.

Basically, the issue that fell for determination at the trial was whether the three appellants were positively identified as having been part of the group that violently robbed the complainants of their respective property on that material night.

The issue arose given that there was no dispute regarding the charges as framed. Herein, the appellants through the learned Counsel, Mr. Nabasenge, and in reference to grounds four, five and six of the appeal contended that the charges were defective and burdensome to the appellants since the first count was that of robbery with violence carrying a death sentence meaning that there was duplicity of counts thereby prejudicing the appellants.

In our opinion, the argument does not hold water. There were herein separate acts of robbery committed against separate complainants on a single night. It was perfectly correct for the prosecution to prefer separate counts representing each of the complainants. It is instructive to note that the acts of robbery were carried out in separate houses within the same neighbourhood. It was established that, more likely than not, the offenders were one and the same group. Consequently, the inclusion of five counts in a single case did not amount to duplicity notwithstanding the death sentence.

However, as observed herein above, in sentencing, a trial Court is required to impose sentence on the first count while the sentences on the rest of the counts remain in abeyance for obvious reason, one cannot die twice or even thrice. This is exactly what happened in this case. The death sentence was imposed on the first count only. We hold that there was no prejudice occasioned to the appellants by the framing of the charges and the sentence that followed after conviction.

On the crucial issue of identification, we are of the view that although the offences occurred in the hours of darkness, the scene was well lit by solar and electric energy. In the fourth complainants house (i.e. PW 1) there was solar light which later went off and made it impossible for the fourth complainant’s wife (PW 3) to identify any of the robbers. The fourth complainant was however able to identify the first and second appellants prior to the light going off.

In the house of the second complainant (i.e. PW 2) there was electric light both on the inside and the outside. The first complainant (now deceased) and the third complainant (i.e. PW 11) were in that house together with Mustafa (PW 4), Abdul Rahim (PW 9) and Abdul Aziz (PW 10). The second complainant Fatuma (PW 2) said that she identified the first and second appellants and so did Mustafa (PW 4) and Abdi Kadir (PW 11). Rahim (PW 9) was unable to identify any of the offenders while Abdul Aziz (PW 10) said that he identified the second and third appellants. Mustafa put up resistance and in the process hit the second appellant with a stool. Abdi Kadir also put up resistance and hurled a stool at the first appellant.

We agree with the learned trial Magistrate that the evidence by all the forementioned prosecution witnesses was particularly overwhelming against the first and second appellants. It was credible, cogent and corroborative for a safe finding that the two (first and second appellant) were positively identified as having been part of the robbers. They were clearly seen and identified at the scene by PW 1, PW 2, PW 4

and PW 11 whose evidence strongly indicated that they had adequate opportunity to make a correct identification. The solar and electric light provided conditions favourable for identification. PW 10 (Abdul Aziz) also said that he identified the second appellant in addition to the third appellant. His (PW 10's) evidence was the sole evidence of identification against the third appellant. Being aware of the dangers of convicting a suspect on the basis of evidence by a single witness in difficult circumstances, we are nonetheless of the view that Abdul Aziz (PW 10) offered credible evidence for a safe finding that the third appellant was also in the group of robbers.

Due to the strength and credibility of the evidence of the identifying witnesses, it followed that the alibis raised by the appellants were displaced and wanting in credibility. It was therefore correct for the learned trial Magistrate to dismiss the alibis after due consideration of the same. Grounds two and three of the appeal would in the circumstances be unsustainable and so would ground eight.

On the identification parades (ground one), we are satisfied that the evidence by PW 16, 18 and 20 accompanied by the appropriate identification parade forms showed that the parades were conducted in accordance with the law.

The pointing out of the appellants by the various witnesses was a confirmation of their identification at the scene of the offences. Even in the absence of the identification parades, the identification of all the appellants at the scene of crime was the most important and for the reasons given hereinabove, the identification was solid and reliable as to leave no room for erroneous, mistaken or incorrect identification.

Ground one of the appeal is also unsustainable and so is ground seven. The Charge Sheet shows that the appellants were arrested on 8th February 2005 and taken to Court on 23rd February 2006. If there was any delay, it was for two days or so. This cannot be said to have been inordinate. In any event, the prosecution may have had an explanation but were not accorded the opportunity to state it. The issue was brought up for the first time in this appeal. That notwithstanding, S. 72 (6) of the Old constitution provided a remedy for such delays if unexplained.

Ultimately, we find and hold that the evidence against all the appellants was sufficient and credible enough for a sound conviction on all the five counts.

Consequently, the appeals are devoid of merit and hereby dismissed in entirety. The appellants' convictions by the learned trial Magistrate are hereby upheld and the death sentence imposed on Count one confirmed. The sentences on counts two, three, four and five will remain in abeyance.

Ordered accordingly.

F. AZANGALALA
JUDGE

J. R. KARANJA
JUDGE

[Delivered and signed this 19th day of May 2011]