



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 80-85 of 2008

SHABAN GAMBO MUYE
DANIEL MWARINGA
LEWA CHIBANZA
SHUME RONGOMA
JUSTUS CHARO CHIBEYU
GARAMA GONA MWACHIROAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Shaban Gambo Muye, Daniel Mwaringa, Lewa Chibenza alias Ndovu, Shume Rogoma, Justus Charo Kalembe, Garam Gona Muchiro (hereinafter referred to as 1st, 2nd 3rd, 4th, 5th and 6th appellants respectively) were convicted on four counts of robbery contrary to section 296(2) Penal Code and sentenced to death.

2nd appellant was sentenced to five years imprisonment on the charge of assault contrary to section 251 Penal Code, 5th appellant was sentenced to serve 10 (ten) years imprisonment on a charge rape contrary to section 3(1) of the Sexual Offences Act No. 3 of 2006. All the six appellants were sentenced to serve 7(seven) years imprisonment on the charge of breaking into a building and committing a felony contrary to section 306(a) Penal Code.

The appellants had denied the charges or which they were convicted.

The prosecution case was based on particulars that on 27th day of September 2007 at Takaungu area within Kilifi District of Coast Province, jointly while armed with dangerous weapons, namely pangas and rungun robbed Peter Wavia of cash Ksh. 10,000 and two wrist watches all valued at Kshs. 13,200/-, and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Wairia, on the same date and place they jointly violently robbed Jacob Muriithi Stephen of cash Kshs. 4,200/-, one mobile phone make Nokia 1112, a radio cassette, a pair of shoes and a traveling bag, all valued at Ksh. 15,000/- - they also jointly violently robbed Justus Gazohere Kambu of cash 500/-, a mobile phone make Motorola c200, all valued at Kshs. 7,000/-, still on the same date and place, they jointly violently robbed Florence Zawadi of cash Kshs. 5000/-. **The charge in relation to 5th Appellant stated that on 27-9-07 at Takaungu area, Kilifi District, he intentionally and unlawfully had carnal knowledge of A M.**

The assault charge for which 2nd appellant was convicted stated that on the same date and place, he willfully and unlawfully assaulted. John Njue Ngala thereby occasioning him actual bodily harm.

On the charge of breaking and committing a felony contrary to section 306 Penal Code all six were alleged to have jointly broken and entered into a shop belonging to P.W.M and stolen from there one box of 200ml milk, 48 packets of

250ml milk, seven pieces of 10 grams Blue Band, fourteen pieces of small torches, coins and airtime cards, all valued at KShs. 5414/-, the property of the said P.W.M

Appellants had denied all the charges – and after due trial in which prosecution called nine witnesses and appellants were the only defence witnesses, they were convicted on the aforementioned charges.

(PW1) P.W.M is a trader at T. On 27-9-07, he was at home sleeping, when he heard the door being banged and people entered. He recognized the one at the front as Ndovu (3rd appellant), he was followed by Shume (2nd appellant), Garama (6th appellant), Kalembe (5th appellant), Kai (2nd appellant), and Shaban (1st appellant).

The light in the house was on – there were three other people whom PW1 did not recognize Ndovu had a rungu and a panga and had wrapped his head, all the others were armed with pangas. Ndovu put a rungu on PW1's head and demanded for money – PW1 was slashed and his wallet containing KShs. 10,000/- taken away. Nzaro also took his radio and two watches and gave to the others. They left and returned a second time, held PW1's wife in his presence, then 5th appellant raped her. On finishing, as they left, the others inserted their fingers into her private parts. They then went to his shop and stole from there. PW1 and his family were afraid to come out until they heard their neighbours, and on coming out PW1 found that his radio had been recovered. It was his evidence, that at the time of the robbery, he knew Garama Kea and Kalembe by name, and the other three he knew by appearance, and where they lived. So he led police to the arrest of all the appellants.

It was his evidence that he had been in the area for seven (7) years, previously selling clothes and that is why he knew the appellants.

On cross-examination PW1 stated he saw nine people in his house during the robbery and that he knew 2nd appellant by the name Ken, being a tout at the stage. He was certain 5th appellant is the one who raped his wife and even left his cap behind at the house – he used to see him at the stage where people called him Kalembe.

Although he did not mention 4th appellant in his statement to the police, it was his evidence on cross-examination that he was present during the robbery and had no shirt, but was armed with a panga. As for 3rd appellant, PW1 stated on cross examination ***“I know you for two years, I have been to your home in Kadzinuni...I know you by the name of Nzovi...”***

With regard to 1st appellant, PW1 said he stood by the door during the incident and had no shirt but was armed with a panga. He did not know his name.

PW1's wife A.M (PW2) confirmed the incident saying there was light inside and she was able to see and recognize some of the attackers were people she used to see in the area. – she singled out 2nd appellant and 5th appellant as touts at Kibaoni stage, and that 1st appellant had been passing outside the shop – further that she knew 2nd appellant by the name Kea, and 5th appellant as Kalembe. She did not mention 1st appellant by name as she did not know his name, but she used to see him and he would even make purchases from her shop. Her evidence was that although the gangsters had torches the light was on and bright.

Jacob Mureithi Stephen (PW3) was also a victim of the spate of robberies that occurred on 27-09-07 at T area. When the

gang struck, one person entered into his house armed with a panga and a club – the window was open and from the moonlight he could see four (4) people. The one in front demand for money and his phone – PW3 recognized him as Lewa (3rd appellant) whom he had known since 2001. PW3 gave him Kshs. 4200/- and a Nokia mobile phone. They searched his house and took away his shoes, panga, and traveling bag – he also recognized Kalembe (the 5th appellant), Shabana (1st appellant) and Wiseman Shume (4th appellant) - they all had pangas, rungas and torches. They locked PW3 inside the house and left, warning PW3 not to scream. Shortly 3rd and 4th appellants returned, opened the door, and ordered PW3 to go and show them where the owner of the shop lived. When he got outside, he saw five people – he told them the shop owner lived in Mnarani and in the process PW3 managed to flee.

His evidence was that 6th appellant was present during the robbery and PW3 saw him when he was taken outside as was the 2nd appellant. On cross-examination PW3 said he knew 6th appellant as Garama Gona, having known him for some time and even knew his residence.

Further that he was able to identify 2nd appellant by his voice she could hear him order PW3 to get out or he would shoot him and that he had no shirt and was armed with a panga.

PW3 did not name the 3rd appellant in his statement to police but he insisted he was among the robbers and was armed with a panga on the right hand and a torch and rungu on the left hand.

He was certain 1st appellant was among the four who entered his room and that third appellant was the first one to enter the house – the entire group wore no shirts.

Florence Zawadi (PW5), a hawker at Kibaoni also fell victim to the robbery – she woke up from sleep, looked outside and saw people – her door was smashed and four people entered armed with panga, torches and rungas – she screamed. They robbed her of Kshs. 5000/-, then left - among those she recognized were Shume, Lewa and Kalembe – the fourth person stood aside. She was able to recognize them as people from the locality whom she had grown up with. It was her evidence that Shume (4th appellant) is the one who took the money.

PW6 Justus Gazohere Kambu, a resident of Kibaoni was awoken by PW5's screams and banging of a door. He was warned not to move or he would get shot. His door was broken into and four people entered – their leader asked for his mobile phone and money, and PW6 gave them kshs. 500/- and his phone. His evidence was that the gangsters were armed with pangas and although PW6 had only been in the area for a week he was able to recognize the face of one of them i.e the 3rd appellant (who was the one giving orders). How was he able to see 3rd appellant ?

He stated:-

“The ones behind him were shining torches and I saw him.”

On cross-examination he stated that he did not know 3rd appellant before the incident, but he saw his face on that night.

John Njui (PW7), also a resident of T was at home at about 3.00am on 27-9-07, when he heard lady's voice asking for money. He opened the window – there was moonlight – then he heard PW5's door break. He got out of the house and

bumped into a group of people – Lewa (3rd appellant) shone his torch on PW7), and the 2nd appellant hit him on the head and ribs. They disarmed him. Shume (4th appellant) and Lewa (3rd appellant) pushed him back into his room and took some money. He also recognized 1st appellant who had asked why the gang was taking long. He also recognized Garama (6th appellant) Kalembe (5th appellant)

The evidence of PW5, PW6, PW7 is that Lewa (3rd appellant) had long hair and had a ribbon on his head, and that all the gang members wore no shirts.

On cross-examination he stated that 2nd appellant was standing between Lewa and Shume, and is the one who then hit him on the head.

John Njue Nyaga (PW7), also residing in T was woken up by screams from his neighbour's house and the sounds of banging on the door. It was his testimony that there was bright moonlight, he picked his panga and walked out. He saw more than twelve people, and a bright torch was directed at him.

The 2nd appellant hit him on the head using a rungu. He was sandwiched between Shume Rongoma (4th appellant), and Shabana Lewa Ndovu (1st appellant) who had pangas and rungu. Shume (4th appellant) had a torch and a piece of metal bar – the 3rd appellant and 5th appellants were the ones who pushed him back into the house and demanded for money and a phone – they also took away the panga PW7 was holding. He was able to identify 1st appellant, 4th appellant and 5th appellant and says they were carrying goods stolen from the shop. He also saw Justus Charo alias Kalembe (3rd appellant).

On cross-examination, he said those were people he knew very well as the moon was very bright. In particular he had known 1st appellant since his childhood and saw him carrying batteries and a weighting scale on that night.

Pc Derrick Mutua who received the report concerning the robbery informed the trial court that those who reported told him that they knew the gangsters by name.

Dr. Mansoor (PW4) of Kilifi District Hospital examined the rape victim, A.M and found she had no bruises, her hymen was broken, spermatozoa was seen, and she was found to be pregnant.

All the appellants gave unsworn testimony.

1st appellant described events surrounding his arrest which was on 30th July 2007. 2nd appellant referred to an incident where he was being beaten after disagreeing with some market women and 5th appellant ran to his rescue – he reported the matter to police and was advised to come back the next day for a copy of the P3 form. When he returned to the police station he was arrested and charged with the present offence.

The 3rd appellant also described events surrounding his arrest on 3-10-07 and made no reference to 27-9-07 – this was in fact the same approach adopted by all the appellants in their defences – that they were all arrested while going on with their daily routines and had nothing to do with the events of 27-9-07.

In his judgment, the learned trial magistrate found that a series of robberies did take place on the night of 27-9-07 at

Takaungu, where residents of Kibaoni were robbed and the robbers were more than six persons armed with dangerous weapons, namely pangas, rungas and metal bars. He found that the evidence presented to the court led to the conclusion that a lot of violence was unleashed on the villagers of Kibaoni. He further found that the evidence of PW2 (A.M) regarding the rape incidence was corroborated by the evidence of PW1 (her husband) who witnessed the rape. The trial magistrate's finding was that identification was by recognition which he held to be the best mode of identification and that all six complainant's know each of the appellants – in this instance all the appellants were well known persons who lived in the vicinity and neighbourhood of Kibaoni and the witnesses were able to give details of what role each appellant played during the robbery.

The trial magistrate then stated:

“I have considered the issue of lighting available in the odd hours of the night to assist in recognition. PW1 states that “ the light was in the house” PW2 states that “There was light inside. I could see the attackers, some I recognized” PW9 states “the window was open and from the moonlight....I could see 4 people” PW5 Zawadi Charo stated that she saw 4 people whom she recognized PW6 observed that the attackers were shining torches at each other and he was able to recognize 5th accused. PW7, John Njue stated that there was moonlight which the witnesses described as bright”

The trial magistrate found the witnesses to be consistent and truthful and that prosecution was able to employ identification by recognition with no possibility of mistaken identity noting that lights were on and the moon was bright. The evidence of the appellants was considered and the trial magistrate observed that none of them had exonerated himself from criminal liability arising from the circumstances of the case and he held that all the charges were proved.

The appellants contested the findings of the trial magistrate and each filed written submissions which they relied on in arguing their appeals that the charge was defective as it failed to include the words dangerous offensive weapons and the particulars did not state what time the offence was committed. – reference was made to section 137(f) of the Criminal Procedure Code.

They all contested the trial magistrate findings as regards identification saying it was basically dock identification, which was worthless and that identification was not supported by a fairly conducted identification parade bearing in mind that in respect of the 1st appellant, a witness like PW3 did not know him by name but only by appearance, yet her statement did not contain any form of physical description of the appellant, and that such failure rendered her allegation unreliable. The case of **Patrick Nabiswa v R Criminal Appeal No. 80 of 1997 (C.A. Msa)** was cited where the Court of Appeal noted:

“Where the police arrest a suspect on the basis of other evidence and there are witnesses who might be called to identify the suspect, it is prudent to arrange for an hold an identification parade”

Further that, the nature of the alleged light, strength and source in as much as position in relation to the suspects was never disclosed to buttress this argument they cited the infamous case of **Charles Matanyi v R Criminal Appeal No. 6 of 1986** which held that:

“It is at least essential to ascertain the nature of the light available, what sort of light, its size and position, relative to the suspect are all important matters helping to test the evidence with greatest care.”

As to the trial magistrate placing such a high premium on recognition, appellants submitted in the absence of description of light, then such recognition was not fool – proof and they cited the case of Roria v R and Turnbull v R 11976 3All ER 549 at 552 which noted that:

“Recognition may be more reliable than the identification of a stranger, but even when he witness is purporting to recognize someone whom he knows, the jury should be reminded that mistake in recognition of close relatives and friends are sometimes made”

The learned ADPP, on behalf of the State, conceded this appeal and on the point of identification, Mr. Ogoti (ADPP) submitted that the manner in which identification was dealt with, is wanting. He pointed out that PW1 did not state the source of light – simply saying that:

“the light was on in the house”

And the same goes for PW2.

Mr. Ogoti poked holes at the evidence of PW3 saying that his testimony about being able to identify the attackers with the aid of moonlight lacks weight as it was not indicated how he was able to use he moonlight to see the people who had entered his house.

He also pointed out that PW5 did not indicate the source of light and that the trial magistrate failed to reconcile the paradox in PW7’s evidence when he said there was bright moonlight, while at the same time saying that the robbers beamed a bright, torch at him. It was Mr. Ogoti’s argument that the issue of light was not properly evaluated especially on the bearing in mind that this was identification under very difficult circumstances and it was important to determine the source of light clearly.

As regards the charge of rape, then Mr. Ogoti submitted that the trial magistrate entertained doubt, yet failed to bring out his reason as to why he accepted the evidence simply saying he was satisfied that the third appellant raped the complainant.

The crucial issue in this appeal really is the identification – even the trial magistrate recognized as much. Indeed this was not identification based on a first time encounter of strangers but recognition by witnesses who knew their attackers as people they had seen within the area for a long period – some of them even having known them since childhood. Each witness referred to the presence of light the question is – what was the source of light? – we recognize that in each incident, the witness was woken up from sleep by the commotion which was outside – there is no evidence that PW1 and pW2 would go to sleep leaving the lights burning, or whether the lights were switched on upon hearing the commotion. And if there were lights what kind were they, how much light could they give and how were the lights placed in relation to the position of the attackers.

In this, we are guided by the decision in Maitanyi v R (1986)1 KLR page 198 which noted that a standard of care must be exercised and outlined factors to be taken into consideration – we are hereby, aware that the scenario in Maitanyi’s case related to identification by a single witness under difficult circumstances.

Maitanyi's case addressed the issue of lighting conditions and why it is important to pay keen attention to the source saying:

“...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 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...”

Certainly in the present case, none of the witnesses referred to the source of light inside the house. The witnesses who referred to the moonlight as being the source are PW3 and PW7 – one simply did not clarify how he was able to use the moonlight to identify people inside his room – what type of windows were there, and of what material, how high was the door so as to allow the moonlight to illuminate the house totally unhindered? Then PW7 who referred to a bright moon without describing its size – again to many people “bright is relative – a quarter moon for instance may still give light, but its brightness may not be enough for one to satisfactorily recognize another as compared to say a ¾ or full moon – that lack of description was fatal.

There is another aspect of recognition alluded to by PW3 on cross-examine – that he heard 2nd appellant's voice – saying he would shoot PW3 if he got out.

However there was no reference as to peculiarity or manner of speech or voice which enabled PW3 to recognize the voice as that of 2nd appellant, bearing in mind that some people are able to imitate the voices of others perfectly, and voices may sound the same especially where one is not seeing the speaker.

We are in agreement with the learned Counsel for the State that the trial magistrate did not adequately evaluate and determine the source of light leading to identification by recognition.

Appellants had also raised issues of the charge being defective, saying the charge sheet did not mention the time that the offence occurred and did not describe the weapons as dangerous or offensive and that this failed to meet the requirements under Section 137(f) of the Criminal Procedure Code. It is true that at the time of the robbery was not indicated on the charge sheet – yet was this so defective as to render the accuseds prejudiced.?

This aspect has been repeatedly raised in many appeals – while we recognize the provisions of section 137(f) Criminal Procedure Code, this must be considered in the light of the entire section 137 of the Criminal Procedure Code and not in isolation. Indeed section 137(III) has a proviso that nothing shall require more particulars to be given than those required, and indeed where the date and place have been referred to, and the evidence led in court was clear as to the time – so that by the time the appellants were being called to make their defences they were well aware and were not prejudiced in preparation of their defences. We think such omission would only be fatal if witnesses had testified to totally different times eg. Day and night, morning, afternoon or evening – which is not the case here and in any case section 382 Criminal Procedure Code which provides:

“subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

That issue of identification then takes care of the evidence led on assault and rape – it is all inter-related.

As for the omission of the word offensive/dangerous – that is a non starter because

- (a) The particulars refer to the weapons as dangerous
- (b) The moment an individual arms himself/herself with an object in perpetration of an offence – then the object, no matter how friendly or innocent it is regarded in every day social operations becomes dangerous – and therefore offensive as it is used in the activity or attack – on this point we say accuseds are splitting hairs.

See **Moses Mattu Kimani v R (2005) KLR**

The upshot of our finding is that the appeal succeeds purely on the ground of insufficient evaluation and consideration of evidence surrounding identification. The convictions are therefore quashed and sentences are set aside.

We order that the appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 17th day of **March 2010** at Malindi.

H. A. OMONDI
JUDGE

M. ODERO
JUDGE