



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Application 56 of 2009

SAMUEL GITHINJI KIMARU.....1ST APPELLANT

PETER MWANGI WANJIRU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(From original conviction and sentence in Criminal Case No.3876 of
2008 of the Chief Magistrate's court at Nakuru – J. ONYIEGO, AG. PM)***
JUDGMENT

SAMUEL GITHINJI KIMARU and **PETER MWANGI WANJIRU**, the Appellants, were, with another, charged in count 1 with robbery with violence contrary to **Section 296(2)** of the **Penal Code** and in count 3 with stealing contrary to **Section 275** of the **Penal Code**. The first Appellant was alone charged in count 2 with being in possession of ammunition without a firearm certificate contrary to **Section 4(1)** as read with **Section 4(3)** of the **Firearms Act**. They denied the charges. After trial before the Ag Principal Magistrate at Nakuru, the Appellants were convicted of only the robbery charge and sentenced to death. Their co-accused was acquitted of all the charges. The Appellants have appealed against both that conviction and sentence on similar grounds that their trial was a nullity as the police officer who appeared for the prosecution was, contrary to **Sections 85(2)** and **88(i)** of the **Criminal Procedure Code (CPC)** unqualified; that their identification was irregular and unreliable and that contrary to **Section 169(i)** of the **CPC**, the learned trial magistrate ignored their defences.

The Appellants also filed similar written submissions. On the first ground they submitted that their trial was a nullity because, contrary to **Sections 85(2)** and **88(i)** of the **CPC**, the lady Grace who appeared for the prosecution at the time of taking plea did not identify herself as a police officer or give her rank.

On the second ground, conceding that the complainant was indeed robbed, the Appellants submitted that they were not involved in his robbery and that their identification by a single witness was mistaken and therefore unreliable. They said although the learned trial magistrate warned himself of the danger of relying on the evidence of a single visual identification witness, he did not apply that warning to the facts of the case by examining that evidence with the greatest care as required by law. They cited the case of **Gikonyo Kirima & Another Vs Republic, [1980] KLR 23** in support of that contention. The first Appellant said PW1 called him “Mogaka” which is not his name, a clear indication that he was mistaken on his identity.

The Appellants dismissed the identification parade as irregular for several reasons. One, the first report in which their names and/or descriptions were given was not produced. In their opinion, the officer to whom the robbery report was made should have testified and produced the

OB extract from Bahati police station where the report was made and stated what exactly he was told about the robbers. In support of this contention, they cited the case of **Mohammed Bin Allui Vs R. EACA 72** in which it was allegedly held that “The first report of the victim to the police should be put forward in evidence so as to check whether or not a witness thinks he can identify the suspect and by what means.” The second Appellant argued that there was no need of the parade for him as PW1 said he had known him previously and had even given his name to police. He wondered why the complainant did not lead police to his residence where he claimed he used to drop him previously instead of leading them to where he was abandoned.

Two, they complained that they were ferried in the same vehicle with the complainant to the first Appellant's house where the police conducted a search before the identification parade was held. Three, IP Albanus Kimango, PW6, who conducted the parade was at the same time one of the investigating officers in their case. They said he participated in the search for firearms and the alleged recovery of the ammunition the possession of which the first Appellant was charged with. Four, PW6 neither explained to both the Appellants and the identifying witness the purpose and procedure of the parade. He also did not tell the Appellants that the parade was optional and that they had a right of calling their counsel or other people to witness its conduct. And lastly that the people in the parade were of different sizes and body physique. The first Appellant referred us to his testimony in which he complained that he was the only brown person on the parade.

On the last ground, the Appellants submitted that the trial court ignored their defence that the first Appellant was a phone repairer and the second a farmer and that as conceded by PW2, they were not arrested for committing any specific offence but on an allegation that they were preparing to commit a felony. They said contrary to **Section 169** of the **CPC**, the learned trial magistrate ignored their defences. They urged us to allow their appeals.

On his part Mr Nyakundi, learned state counsel submitted that the identification of the Appellants by the complainant was proper as it was both visual and voice identification. He said although it was night time, there was ample light from the nearby petrol station in the first instance and from the medical staff quarters later on. He saw no fault in the identification parade.

We have considered these submissions and carefully read the record of appeal. We find no merit in the first ground of appeal that the prosecution was partly conducted by an unqualified police officer. For a trial to be declared a nullity, the unqualified person appearing for the prosecution must have prosecuted the case. Whatever her rank may have been, Grace only appeared for the prosecution during the plea. As she did not prosecute the case thereafter, we find that the

Appellants' trial was not in any case vitiated.

The Appellants' identification has caused us considerable anxiety. It is unsafe to uphold a conviction based on improper identification. The law in this regard has been stated in many cases including **Abdallah Bin Wendoh –vs- R [1967] 20 EACA 166** and **RORIA –vs- R[1967] E.A. 583**. In the case of **R-vs- Eira Sebwata [1960] EA 174** the point was stated thus:-

“Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction”.

If the only evidence against an accused person is that of visual identification by a single witness:-

“a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.”-Wamunga Vs Republic [1989] KLR 424 at p. 426.

This point was reiterated in the case of **Ogeto Vs Republic, [2004] 2 KLR 14** in which the Court of Appeal held that although a conviction can be based on the evidence of a single visual identification witness, there is need to test with the greatest care the identification evidence of a single witness especially when it is shown that conditions favouring a correct identification were difficult.

In this case PW1 testified that on

27th July 2008 while he was seated in his taxi registration No. KAV 781C at Kenol Petrol Station, he received a call from the second Appellant whom he knew only as Peter to pick his visitor from the nearby the Akamba Bus offices and take him to his residence at medical staff quarters. After that call the first Appellant went to his vehicle and asked for the owner. That question caused him to be suspicious. However, when the second Appellant called him again and identified the first Appellant as the visitor he wanted dropped at his residence, he agreed to drop him. He knew Peter who was his customer whom he had dropped at the medical staff quarters previously.

The encounter with the first Appellant was at Kenol Petrol Station which, as PW1 said, was well lit. We are in the circumstances satisfied that the conditions were favourable for a positive identification and that PW1 positively identified the first Appellant.

The second Appellant had instructed PW1 to drop his visitor at the medical staff quarters where PW1 had dropped him previously. On nearing the place, he saw the second Appellant and he stopped. We are also satisfied that there was enough light from those staff quarters for PW1 to clearly see the second Appellant otherwise he could not have stopped. In addition to that, PW1 having previously known the second Appellant his identification was also based on recognition. As the Court of Appeal stated in the case of **Anjononi & Others Vs R. (supra)**:-

“recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

Although the learned trial magistrate mentioned that the complainant talked with the second Appellant, he did not as such rely on voice identification. We are, however, satisfied the identification of the second Appellant by voice lent credence to visual identification. PW1 had talked with the second Appellant previously and knew his voice. That is why when he was first suspicious of the first Appellant, the second Appellant's second call cleared that suspicion and he agreed to drop the first Appellant.

Like visual identification, “Identification by voice can be a sound and reliable method of identification.”-**Maghenda Vs Republic [1986] KLR 255**. “It can be equally safe and free from error, more so if the identification takes place at night”-- **Njeri Vs Republic [1981] KLR 156 at p. 159**--when there is no likelihood of any noise from any quarter. However, care should be taken to ensure that there is no possibility of error and that the voice that was heard was actually that of the accused. In **Mbelle Vs R. [1984] KLR 626**, while sounding this caution, the Court of Appeal laid guidelines as regards the evidence of voice recognition as follows:

- (a) “In relation to identification by voice, care would obviously be necessary to ensure (a) that it was the accused person’s voice, (b) that the witness was familiar with it and recognized it, and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it.”

These guidelines were followed in **Choge Vs Republic [1985] KLR 1 at p.52&53**, **Libambula Vs Republic [2003] KLR 683**, and in **Bernard Kipkurui Chepkwony & Another Vs Republic, Nakuru HCCR. APP. Nos. 141 143**. In **Njeri Vs Republic (supra)** voice identification was accepted because the witness had known the Appellant for a long time while in **Choge Vs Republic (supra)** the evidence of the voice identification witness was rejected because he did not give Choge’s name at the first available opportunity.

PW1 had not known the first Appellant before but he said he could identify him as he saw him clearly on the material night. He had casually known the second Appellant as a customer and only by one name-Peter. In those circumstances the police were right in conducting an identification parade for both of them.

In this case when PW1 reported the matter to police, he gave the first name of the second Appellant as well as the descriptions of all his assailants and said he could identify two of them. PW5 corroborated that testimony. In our view that sufficed in as far as the authenticity of the report was concerned. Though desirable, it is not mandatory, as the Appellants claimed, that an extract of the OB entry in respect of every first report should be produced in court unless it is

challenged and/or the accused demands that it be produced.

As is clear from the evidence of PW5 the police were investigating a series of robberies when they received information that the appellants had been spotted appearing suspicious. The robbery in this case was at Menengai. There was another one at Bidco. Because the complainant in the Menengai robbery had given the name of one of his assailants as Peter and one of the suspects the police had was known as Peter, an identification parade was conducted and PW1 identified the Appellants as among those involved in the Menengai robbery. But staff from Bidco did not pick either of the Appellants in another identification parade held for the robbery at Bidco.

IP Albanus Kimango, PW6, conducted the identification parades in respect of the two robberies. He recorded that the second Appellant was satisfied with the way the parade was conducted but the first Appellant was not although he did not give any reasons. Although PW6 went to the second Appellant's house, he was investigating another robbery and not the one in this case. Other than the Appellants' claim in their submissions, there is no evidence on record that the Appellants were transported in the same vehicle with PW1. They do not even say how PW1 came to be in the party searching for guns in second Appellant's house for him to have been transported in the same vehicle. As we have pointed out, the staff from Bidco did not identify anybody. PW1 did not identify the third suspect. In the circumstances we are satisfied that the parade was conducted regularly and fairly.

Taking all the above factors into account, we are satisfied that although Appellants were identified by only PW1, the conditions were favourable for a positive identification and the learned trial magistrate was right in basing the Appellants' conviction on the evidence of that witness. We find no merit in the Appellants' contention that he did not apply the warning of relying on the evidence of a single visual identification witness to this case. In the case of **Gikonyo Kirima & Another Vs Republic, [1980] KLR 23** that they cited in support of this contention, the trial court had overlooked the fact that the complainant had assumed the people he had been with earlier on in the day are the ones who robbed him. In those circumstances the High Court was right in holding that the learned trial magistrate had not applied the warning to the facts of that case. In this case the learned trial magistrate carefully analysed the evidence on record with that caution in mind. We accordingly dismiss that ground of appeal as well.

That leaves us with the last ground that the learned trial magistrate ignored the Appellants' defences. The Appellants denied being involved in the robbery. In their sworn testimonies, they steered clear of the allegations against them and concentrated on their arrest. In the circumstances what did they expect the learned trial magistrate to say about their defences but to dismiss them as he did as mere denials? We find no merit in this ground either. And with that we dismiss the appeals against conviction.

There is only one sentence for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and that death. That is the sentence passed against the Appellants. In the circumstances, our hands are tied. We therefore dismiss the appeals against sentence also.

In the upshot we dismiss these appeals in their entirety.

DATED and DELIVERED this 26th day of April, 2010.

D. K. MARAGA

JUDGE.

J. A. EMUKULE

JUDGE.