REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL 78, 80 & 86 OF 2009

SAFARI KARISA MBULA

JUSTICE BOKORO MAZUNGA

KESI KATANA ....APPELLANTS

VERSUS

REPUBLIC ....RESPONDENT

JUDGMENT

Safari Karisa Mbula, Justine Bokoro Mazunga, and Kesi Katana (referred to as 1st, 2nd and 3rd appellants) were convicted on a charge of robbery with violence contrary to section 296 (2) Penal Code and sentenced to death.

They had been charged on three other counts of robbery with violence contrary to section 296(2) but were acquitted under section 215 Civil Procedure Code. The charge for which they were convicted was that on 22nd September 2007 at Kachoroni area in Kilifi District, jointly with others not before court (including two who were acquitted), while armed with dangerous weapons, namely, panga, rungus and whips, robbed Monica Wanje Ziro of cash Ksh. 17,000/- and at or immediately before or immediately after such robbery, used actual violence to the said Monica Wanje Ziro. Appellant denied the charge.

Monica Wanje Ziro (PW1) told the trial court that on the night in question at about 1.00am while inside the house with her mother, some people knocked at the door, broke it down and four people armed with pangas, rungus and torches walked in, demanding for money and torches. PW1 gave out Kshs. 17,000/-. She described

the torches as very bright and that her lantern lamp was also on, so she was able to identify them. She testified that 1st appellant was the one who demanded money and when she gave Ksh. 17000/-, he was very near to her so she could see him clearly, he had a panga and even snatched her bag.

She also saw 3rd appellant as he was searching all over the house, found a box for a mobile phone, and asked PW1 to give her the mobile phone. She recalled that he had a panga and a torch. PW1 testified saying the house was such that the next room was the shop i.e the bedroom and shop were adjacent.

When the arrests were made, she identified 2nd and 3rd appellants at an identification parade.

On cross-examination she stated that 3rd appellant was less than a meter away from her on the night of the robbery, the room was small, so light from the many torches lit up the room and the thugs kept on pointing the torches at each other

The other prosecution witnesses whose homes also fell victims to the robbery on that night were not able to identify any of the robbers.

PW6 (Ag. Insp. Newton S. Mjomba) upon visiting the victims learnt that they could identify their attackers and the specifically Monica Wanje Ziro told PW7 Pc Patrick Situma that she knew the attackers. So an identification parade was organized and IP Mjomba requested inspector Samuel Bosire to conduct the same but the appellants refused to take part in the parade without giving any reason.

All the appellants gave unsworn evidence – all appellants described events of 3-11-07 when they were arrested how they were searched, nothing was recovered, then they were charged for an offence they knew nothing about.

The trial magistrate in his judgment found that there was evidence confirming that the appellants were armed, and were in a gang of more than four people and they threatened harm on anyone who did not comply with their orders.

The trial magistrate examined the evidence of PW1 regarding opportunity for identification – that the gangsters had torches which they kept pointing at each other in her small room as they searched for valuables and he was satisfied that there was ample opportunity for identification.

In the amended grounds, applicants contest both conviction and sentence on similar

amended grounds that:

(1) Their constitutional rights were violated

(2) Identification was not satisfactory

(3) Evidence was contradictory

(4) The charge sheet was defective.

(5) The trial magistrate failed to consider section 169(1) and (2).

They filed written submission which were replicate of each other arguing that they were arrested on 2nd November 2007 and taken to court on 28-11-07, and on the strength of the Court of Appeal decision of **Albanus Mwasia Mutua v R Criminal Appeal No. 120 of 2004,** they ought to be acquitted. Miss Waigera in opposing the appeal, submitted that this was not a ground of appeal and it should not be entertained. Actually it did form one of the grounds in the amended grounds of appeal. The information in the charge sheet shows that appellants were arrested on 2-11-07 and taken to court on 28-11-07 – certainly more than fourteen days had lapsed – Under the constitution Section 72 (3) (b) for persons charged with a capital offence, they ought to have been taken to court at the earliest opportunity available, and in any event not later than fourteen days from the date of arrest and in the event of such failure then it was incumbent on prosecution to give an explanation regarding any delay beyond the recognized statutory period. In this instance the appellants remained in custody for a further 12 days before being taken to court – certainly this was a violation of their constitutional rights. No explanation was offered for such delay and we concur with the appellant that indeed their rights under section 72(3) (6) of the Constitution were violated. What then is the remedy? We are keenly aware of the Court of Appeal decision in **Albanus Mutua's** case where the appellant had been held in custody for eight months without any explanation and the court acquitted him on that ground alone, saying that it did not matter what the weight of the evidence could be, once there was violation without any reasonable explanation, then an acquittal was the remedy. We have read through section 72(1) to (6) of the Constitution, our understanding of the provisions is that where there is such delay, then the remedy lies under section 72(6) for compensation by way of damages. And we think this is solely provided so as to cater for the rights of the appellants (now convicted of an offence, which by the way is violation of the victim's constitutional right to own and peacefully enjoy ownership of that property). We think that provision also

recognizes the fact that the victim may in no way have contributed to the delay, and that the court has an equal duty to protect the constitutional rights of the victim and ensure a sense of fairness and justice. So yes the appellants' constitutional rights were violated under section 72(3) (b) of the constitution and they are entitled to pursue compensation by way of damages under section 72(6) of the Constitution.

Another limb of their submissions is that there was no positive identification and that PW1 was not being candid when she claimed that she identified 2nd and 3rd appellants at an identification parade, yet the evidence of the police officers. PW5 and 6 is that the appellants declined to participate in the parade. To this, Miss Waigera responded that appellants were property identified by PW1, arguing that even though the incident took place at night, it was not under difficult circumstances and in any event there was a lantern burning and the appellants kept pointing their torches onto each other as they searched for valuable on.

We recognize that this was identification based on the evidence of a single witness at night. In this, we are guided by the decision in **Charles O. Maitanyi V R 1986 KLR pg 198** which posed the following considerations;

(1) Although it is trite law that a fact may be proved by the testimony of a single witness, the greatest care must be taken in evidence of a single witness respecting identification.

(2) Careful inquiry must be made as to the nature of the light available, conditions and whether the witness was able to make a true impression and description.

(3) The court must warn itself of the danger of relying on evidence of a single witness when the evidence is being considered and before the decision is made.

(4) Failure to undertake an inquiry of careful testimony is an error of law and such evidence cannot safely support a conviction.

In the present instance prosecution did inquire as regards the condition of lighting prevailing at the time – this was at the time of taking evidence and the trial magistrate considered that this was a small room which had a lantern burning and which was further boosted by the myriad of torches the attackers flashed and

beamed onto each others faces as they ransacked the room for valuable and all this would have stood very well except that as the applicants pointed, PW1 seemed eager to nail the appellants by insisting that she identified 2nd and 3rd appellants at an identification parade, yet the evidence of PW5 and PW6 (who were police officers) were categorical that no identification parade was conducted because the appellants declined to participate – why the contradiction – why was PW1 so keen to persuade the court that she had picked out the appellants at an identification parade yet no such parade ever took place. This contradiction makes us question the veracity and credibility of PW1. Could she also have made up the lighting conditions she referred to? We tend to think that she was determined at all costs to insist that appellants were the culprits – this contradiction can only be resolved in the appellants favour and we hereby do. As a consequence of this then the appeal succeeds and the conviction is quashed and sentence set aside. Appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **8th** day of **June 2010** at Malindi.

H. A. Omondi **M. Odera**

JUDGE **JUDGE**