



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Appeal 64, 65, 66 & 67 of 2009

**INZANO NGONYA MZOMBA
GEORGE KATANA SALIM
HAMISI KATANA MWAMBEGU
KATANA KAZUNGU NGALAAPPELLANTS**

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Inzano Ngonyo Mzomba (1st appellant) George Katana Salim (2nd appellant) Hamisi Katana Mwambegu (3rd appellant) and Katana Kazungu Ngala (4th appellant) were convicted on a charge of robbery with violence contrary to section 296 (2) Penal Code and sentenced to death. The robberies all occurred on 17th September 2006 at Mkangoni village in Gede location involving, J.Y.K, J.J.Y and L.Y.F, who were violently robbed of their properties and cash. In the course of the robbery J.Y was wounded.

The evidence of PW1, J.Y.K was that on 17-09-06 at about 1245am, he was asleep inside his four roomed house with his wife J, his daughter L, and his grandchildren, R, K and F. His wife woke him up to say they were under attack – infact when he woke up, he found his wife pushing their bedroom door, in an attempt to stop the intruders from entering. PW1 got up, dressed and joined his wife in pushing the door. The small bulb lit by solar power was on. They were eventually overpowered and six people entered. PW1 was immediately hit on the head and told he was wanted.

The six people were known to PW1 as they were residents of Matsangoni area – he saw and recognized Katana Kazungu, Hamisi Katana, Kesi Kaseu and Wazi Kasere, George Katana and Inzano Ngonyo. Someone hit PW1 with an axe on the mouth and between the eyes, he fell and lost consciousness. When he came to, he realized the wardrobe had been broken into and their valuables stolen. The robbers also cut and killed their dog named Bobesi. It was his evidence that the robbery lasted half an hour, he saw the robbers when they entered the house, then they smashed the bulb. All of them were armed and they had blue torches.

His testimony was;

“...they had not covered their faces. I have never differed with accused persons. They are from my village. I know them.”

On cross-examination he stated that after the robbers smashed the bulbs, they used their blue torches which distort a person’s image and he said ***“I could not tell who was doing what because of the blue torches”***

He explained that he never gave the names of the attackers to police when recording his statement because he was never

asked. His evidence was that R was raped. J.N.Y (PW2) the wife to PW1 confirmed the incident and said that there was a kerosene lamp burning in the verandah, while a solar light lit another room. She confirmed that once inside their bedroom the robbers smashed the bulb and ransacked the bedroom taking their valuables and she noticed that her husband had fallen and was bleeding from the face. After the robbers left, she learnt that R had been raped.

It was her evidence that she saw the appellants inside her house when they entered, before they smashed the bulb and that the incident lasted for about one (1) hour.

On cross-examination she stated:

“The night was dark but we had lights...the thugs had blue torches. They then broke the bulb, but I had already seen them. The accused persons are from the village. I know them, I know their names. I have known them for a long time.”

She too did not give their names to police officers because the person recording her statement never asked her.

R.K (PW3) a girl aged 13 years was inside her grandparents' house (i.e PW1 and PW2) when the robbers struck. She was in a separate bedroom with her aunt L and a maid – she was reading using a lantern lamp which was on the table because the lights had gone off earlier. After the lights came back, she reduced the kerosene flame. Three people walked in when the light bulb was on, and ordered them to lie on the floor facing the ground – they obeyed. The intruders hit them with pangas and announced that they had been sent to collect Ksh. 3million. She heard her grandfather being hit in the next room while two people remained in their room. One of them picked her, placed her on her bed defiled her for about 15 minutes during which her eyes were open and she recognized her defiler whom she named as Wasi (not among the appellants). It was her evidence that during the robbery, she recognized Katana (4th appellant) and Hamisi (whom she identified as 2nd appellant)

It was her testimony that

“The thugs had torches with them. I recognized them using the light from their torches... I told police that I had recognized the robbers and the rapist, after I was discharged.”

On cross-examination she stated:

“I recognized the robbers when they entered my house. The light from the bulb was still on... the thugs were people I had known for a while. I knew them prior to this incident...”

W.F.B (PW4) aged 16 years was also inside his grandparents' (PW1 and PW2) house on the night in question when he was woken up by noises of thugs approaching at about 12.45am. He opened his bedroom door to look outside and put on the lights. Upon opening the sitting room door, he saw a group of five men already inside the house. He was afraid and tried to lock his bedroom door, but it cracked loudly, alerting the robbers and the five men went to his room. PW4 recognized them because the lights were still on – he recognized 2nd appellant whom he knew as Adire (a neighbour) 4th appellant, also a neighbour whom he knew as Katana. They pulled him to his grandmother's bedroom where he found his bleeding grandfather. PW4 was ordered to lie on his stomach and not look at the robbers – then they took his cousin R to another room where the gang raped her. He was then forced to have sex with his aunt L while the gang watched. It was his evidence that 3rd appellant is their neighbour and he did not see him on that night, and although 2nd appellant had covered his head with a headscarf, PW4 was still able to see his eyes, nose and mouth and recognise him as a neighbour.

He described 4th appellant as having a headscarf and a jacket but the other men who were from far had not covered their heads.

On cross-examination PW4 insisted he had given police the name of 2nd appellant although it did not appear in his statement. He stated:

“They asked me and I gave them your name. I told my grandfather that I saw you at the scene of crime. I do not know why your name does not appear in my statement and yet I told the police”

On re-examination, he clarified that he spoke as police recorded what he said.

F.L.Y (PW5) a daughter to PW1 and PW2 was also inside the house on the night of the robbery and confirmed being beaten by the robbers who found her asleep on the bed. She stated:

“The light was on. I do not put out lights when I go to sleep. I woke up to find a man standing beside my bed, then he started beating me using a panga ...the person ordered me to get out of the bed and lie down... he was masked. Another one came in ...I saw his face. He had not covered his face. I knew him prior to this date. He is from the neighbourhood. He pulled me and then took me to show him where my father keeps his money.”

Inside her father’s room she saw 1st and 3rd appellant who had not covered their faces, and 2nd appellant warned her that if she did not show them where the cash was then she would bleed like the others and she watched him ransack her parents’ bedroom while 1st appellant kept banging the wardrobes using a panga which he had.

She was very specific regarding what role each appellant played inside her parents’ bedroom. She identified second appellant as the one who forced PW4 to have sex with her, having pushed her onto her father’s bed and forced her legs to spread open.

Like the other witnesses, she too knew the names of most of their attackers and she told police so, but this was not recorded in her statement.

PW5 Dr. Ali Hussein confirmed that PW1 sustained injuries and PW3 was defiled as she had tears on the hymen. He filled, signed and produced their P3 forms.

A report about the robbery was made to Watamu police station and Pc Johnson Watune investigated the matter and arrested and charged the appellants. Later an identification parade was conducted and some of the appellants were picked from there; however CIP Odede who conducted the identification parade failed to attend court to testify.

Upon being put on their defence all the appellants gave sworn testimony in which all appellants described events of the day they were arrested and each was taken to PW1’s house, exposed to the witness, taken to the police station where the different complainants went to see them with consumables in the cells, then later an identification parade was carried out where some of those very witnesses purported to identify them. All appellants alleged that they had been framed up for the offence.

In her judgment, the trial magistrate was satisfied that the complainants were robbed of valuables on the night in question

and PW3 was raped. She found that there was sufficient light from the solar bulbs which lit the different rooms in the house and that the witnesses had spent sufficient time with the robbers so as to be able to see and identify them. The trial magistrate noted that apart from the solar light, there was light from the robbers' torches and kerosene lamp, all which boosted the opportunities for identification by the witnesses and that this was a situation of identification by recognition as these were people from the same neighbourhood.

Their defences were considered and rejected – the trial magistrate termed 4th appellant's defence as an afterthought as he introduced issues he had not raised during cross-examination to enable prosecution confirm or rebut: the trial magistrate also considered the medical report which confirmed that PW3 had been raped as her hymen was torn and her genitalia was swollen but held that the evidence did not point at any of the appellants as the people who raped her, since she had specifically named one Wasi who was not arrested.

All the appellants filed similar grounds of appeal which were also reflected in their written submissions raising the following:

- (1) There wasn't enough light to enable positive identification as the offence took place at night – they questioned the existing circumstances and opportunity for favourable identification.
- (2) Prosecution witnesses contradicted each other
- (3) The trial magistrate erred in finding that the appellants were armed with dangerous weapons.
- (4) Prosecution had not proved its case beyond reasonable doubt.
- (5) Their defences were not considered.

It was the appellant's contention that the opportunity for identification was not satisfactory because none of the prosecution witnesses gave a clear credible description as each simply talked about the presence of light in their respective rooms and in any event the source of light was smashed the minute the thugs gained entry into the house – so in PW1 and PW2's case, they couldn't have seen the assailants properly because in any event they used blue light torches which distorted the images.

Further that PW1's ability to see and identify the assailants was marred by the fact that:

- (a) he had just been woken from sleep
- (b) he was drunk
- (c) the solar bulb was smashed broken one minute after the thugs entered the bedroom
- (d) the images of the people inside the bedroom got distorted because of the blue light torches.
- (e) PW1 was hit and lost consciousness.

They wondered how the other witnesses' such as PW4 and PW5 could identify PW1 as the one who had ordered them to have sex while in PW1's bedroom, yet the evidence is that the bulb in PW1's bedroom had been smashed and the torch lights the robbers had distorted images.

In response to this Miss Waigera in opposing the appeal on behalf of the State submitted that the trial magistrate analyzed in detailed how each witness was able to see, identify and recognize each of the attackers separately and so the prosecution had proved its case.

From our re-evaluation of the evidence, all the prosecution witnesses who were at the scene of robbery consistently referred to the house being lit with solar powered light. It is true that PW1 and PW2 said the bulb in their bedroom was smashed by the robber – but this was not immediately, it was after the robbers had entered into the bedroom, spoken to PW1 saying he was the one they wanted, then smashed the bulb so as to use their torches.

According to PW2, this was one minute after the robbers had entered and they had opportunity to see them and had no difficulty in recognizing them as these were persons well known to them over the years. Indeed the trial magistrate considered this in her judgment.

But that was not the sole evidence on identification, the trial magistrate in the last page of her judgment found as follows:

“The 1st accused was recognized by PW3 and PW5. The 2nd accused by PW3, PW4 and PW5. The 3rd accused by PW5 while 4th accused was identified by PW3, PW4 and PW5.”

From the evidence of PW1, the house had four (4) rooms. Indeed on cross-examination of PW2 she stated;

“They then broke the bulb, but I had already seen them”

With regard to identification of appellant apart from PW1 who specifically named him in court as being among the people he saw inside his bedroom, there was evidence of PW3 who had both a kerosene lamp and the solar bulbs – it is clear from her evidence that

“The bulb was on and there was a lantern lamp on the table. I was reading using the lamp because the lights had gone off earlier. After the lights came back, I reduced the kerosene flame.”

PW3's evidence was that six robbers first entered her bedroom where she was ordered to lie face down, then two robbers were left with her in the room but that during the robbery she recognized 4th appellant (Katana) and 3rd appellant (Hamisi) and Kaithe whom she identified as 1st appellant. Although later in her evidence she said the robbers had torches and that she recognized them from the light of their torches, this must be considered along with her earlier evidence of the available light in her room and her explanation as to why the light in her room was on at that hour – she was studying.

Indeed on cross-examination she stated:

“I had recognized the robbers when they entered my house. The light from the bulb was still on.”

PW4, W first saw the robbers as they stood inside the sitting room where according to him a light bulb was on. When he rushed back to his room, the robbers followed him – the light in his room was still on and he saw the 2nd appellant and 4th appellant. He was very specific that although the 2nd appellant had covered his head with a scarf, this was someone he knew as a neighbour and recognized his features saying;

“I saw the eyes, nose and mouth and recognized him. His is a neighbour.”

PW5 (L) who was in her room also confirmed that the light in her room was on, because she never puts off the light when going to sleep. She woke up to find a man standing beside her bed, he started beating her, then ordered her to get out of bed and lie down, he was masked. Then she claims to have seen 1st, 2nd and 3rd appellants inside her father's room. – it is not clear how she was able to see them yet according to her parents the bulb had been smashed and the blue

torch lights distorted people's images. – we don't think PW5's evidence regarding opportunity for identification was very safe – however as we've noted earlier, she was not the only identifying witness.

We are satisfied that the opportunity prevailing was adequate and favourable for positive identification which was by recognition. The robbery lasted more than half an hour, so it was not as though the witnesses merely had a fleeting glance.

As regards the identification parade, the trial magistrate correctly noted that failure to produce the identification parade forms occasioned no prejudice to the appellants as they were people already known to the complainants. Actually we are of the opinion that such an identification parade was a fallacy, considering that the appellants were known to the complainants.

Yes it is correct that appellants' names do not appear in the witnesses' statements but we think this must be understood in the context of what PW1 stated regarding how their statements were recorded – the police officer would ask a question, get the answer and record, so the names did not appear because the question was never asked.

PW3 and PW4 were insistent that they told the police names of the attackers (meaning the police who were writing the statements) and the witnesses cannot be faulted for that omission.

Appellants also submitted that there was no evidence of them being armed, but this is deflected by evidence of PW1 who said he was hit in between his eyes with an axe, and PW5 who said that the man who stood by her bed hit her using a panga.

As for the charge sheet not showing the time the offence took place, we do not consider that to be a fatal omission because

- (a) The particulars clearly meet what is anticipated in framing of a charge.
- (b) The evidence of the witnesses clearly prepared the appellant for their defence as each witness consistently stated the incident occurred after midnight.

We find no prejudice in that.

Indeed as the trial magistrate noted, appellant made no reference as to their whereabouts on the night in question, preferring to dwell on events of the days they were arrested and she rightly rejected the defences.

We find no merit in the appeals and they are rejected. We uphold convictions and confirm the sentences.

Delivered and dated this 7th day of **June 2010** at Malindi.

H. A. Omondi
JUDGE

M. Odera
JUDGE