REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL CASE NO. 743 OF 2006
(AS CONSOLIDATED WITH CRIMINAL APPEAL NOS. 744/06, 745/06 AND 746 OF 2006)

CHARLES RONO KIPKORIR ..... 1ST APPELLANT
JOHN N. GATHOGO .....2ND APPELLANT
ANTHONY OTIENO.....3RD APPELLANT
CLAVIN MWACHOVI .....4TH APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2845 of 2005 of the Chief Magistrate's Court at Makadara by Mr. Muneeni – Senior Resident Magistrate)

J U D G M E N T

The four appellants, **CHARLES RONO KIPKORIR, JOHN NDUNYA GATHOGO, ANTONY OTIENO JUMA,** and **CLAVIN MWACHOFI MWANGANGU** were convicted on three counts of Robbery with violence contrary to section 296 (2) of the Penal Code. Thereafter, each of the appellants was sentenced to death, as by law prescribed.

In this appeal, each of the appellants has submitted that they were not positively identified. The incident giving rise to this appeal is said to have taken place at about 10.30p.m. Secondly, the victims of the robbery were all made to lie facing the ground. They were then assaulted, using the belt of one of the said victims.

In those circumstances, the appellants believe that the conditions prevailing were not conducive for positive identification.

In any event, such light as might have been near the scene of the robbery, was not described in relation to its location, or its intensity. As far as the appellants were concerned, the complainants should have described how far from the scene, the lights were; how bright the said lights were; and the position of each of the said appellants vis-à-vis the said lighting.

The 1st appellant, Charles Rono Kipkorir also submitted that his constitutional rights had been violated. In particular, he pointed out that he was held in custody for over two (2) months before he was first taken to court. He believes that because the prosecution failed to offer any explanation for the delay in arraigning him before the court, that entitles him to an acquittal.

The 1st appellant also pointed out that he was arrested after more than eight (8) months had elapsed, since the robbery. As the delay in his arrest was not explained, the 1st appellant submitted that that alone did entitle him to an acquittal.

Another issue that was canvassed by the 1st appellant was that if an informer did not testify, the evidence should be disregarded. That submission was premised on the contention that the Investigating Officer herein **(PW 7)** did not tell the trial court, who had led him to identify the 1st appellant, at the bus stage.

Mr. Gathuka, the learned advocate for the 1st appellant, also submitted that the results of the Identification Parades were doubtful, because it is not clear where the complainants went, to after each of

them had identified suspects in the parade. If we understood Mr. Gathuka correctly, he was alluding to the possibility that the complainants may have met and discussed the members of the parade.

On his part, the 2nd appellant did submit that when about eight robbers were beating up the three (3) complainants, at night, it was very difficult for the complainants to positively identify the assailants. The shock, fear and confusion that the complainants were in, were described as an impediment to proper identification.

He also submitted that there was inconsistency between **PW 1** and **PW 3**, regarding the number of pistols which the robbers had. Whilst **PW 3** talked of one pistol, **PW 1** is said to have talked about pistols.

The 2nd appellant faulted the trial court for finding that he led to the recovery of a passport, which had been robbed from **PW 2.** His contention is that the passport was recovered from someone who did not testify before the court. That person was said to have been an essential witness. Therefore, as the prosecution did not have him testify, the 2nd appellant invited us to hold that the evidence which the said person could have given, would have been adverse to the prosecution.

And as regards his defence, the 2nd appellant submitted that it was rejected for no good reason.

His line of defence was that **PW 2** had a grudge emanated from the fact that the 2nd appellant had insisted that **PW 2** should queue up like everybody else, at the bus stage.

According to the 2nd appellant, when he insisted on doing his work, **PW 2** got annoyed, called him "Mungiki", and promised to ensure that the said appellant would leave the bus stage.

In a nutshell, **PW 2** and the 2nd appellant knew each other well. Therefore, the 2nd appellant's contention is that he cannot have robbed **PW 2** openly, and thereafter return to the bus stage, where he ordinarily worked.

The 3rd appellant was represented by Mr. Agina advocate. His first submission was that the language in which the plea was taken, is not recorded.

It was also the contention of the 3rd appellant that the only reason for his arrest is that **PW 2** used to see him regularly, at the bus stage. In other words, he was arrested, not because he was one of the robbers, but only because he was regularly at the stage.

He added that none of the witnesses, including the Investigating Officer, told the court why he had been arrested. It would have been useful for the court to have been given the reason, because the 3rd appellant says that as at the time the offence was being committed, he was already in the custody of the police. He could not therefore have committed the offence, he said.

Meanwhile, apart from the issue of improper identification, the 4th appellant submitted that the case against him was not proved to the required legal standards.

Furthermore, he said that the Identification parade was conducted in a manner that was not in accordance with the law.

Finally, he submitted that his defence was rejected for no good reason.

We shall take the aforegoing submissions into account. We shall also re-evaluate the evidence tendered, and then draw therefrom, our own conclusions.

First, we note that when the plea was taken on 4th April 2005, there were only three (3) accused persons. Thereafter, on 26th January 2006, the case was consolidated with ***Criminal Case No. 7219/2005***. Upon consolidation, there were now four (4) accused persons.

The record shows that the charge was read and explained to the accused. However, it is not indicated on the record, that the charge was read and explained in any particular language.

The only reference to language is that the accused persons answered to the charge in Kiswahili.

When the charge was amended on 31st January 2006, once again, the court did not indicate the language in which the amended charge was read and explained to the accused. However, the accused, once again, responded to the charge in Kiswahili.

Although the record of the proceedings did not indicate the language in which the plea was taken, we note that all the prosecution witnesses testified in Kiswahili. They were then cross-examined by all the accused persons. Thereafter, the accused also gave their respective defences in Kiswahili.

As the proceedings were conducted in the Kiswahili language, which the accused understood, the failure to indicate the language in which the charge was read out and explained to the accused, cannot and did not prejudice the accused persons.

The facts giving rise to the case can be stated briefly. The three (3) complainants are nationals of

Tanzania, however, they are resident in Nairobi, Kenya. Each of them is a business-person.

On the material day, 27th March 2005, they were walking home. Their said home is located in Mathare North. As they were approaching their home, they were suddenly confronted by three men. They were ordered to lie down.

As soon as they complied with the order to lie down, there appeared about eight (8) more men. The complainants were then robbed of their mobile phones and money. **PW 1** and **PW 2** also lost their passports to the robbers.

During the robbery, the complainants were beaten-up, using the belt belonging to **PW 3**.

The complainants were later treated for the injuries they sustained.

On the day after the robbery, the complainants went to the police station to report the incident. But whilst they were still on the way to the station, they saw the 2nd appellant at the Bus stage. The complainants then proceeded to the Muthaiga Police Station, where they were given two police officers, whom they led back to the stage, where the 2nd appellant was arrested.

Later still, the police officers did ask the complainants to attend Identification parades, at which the appellants were picked-out by the complainants.

The passport of **PW 2** was also recovered. The recovery thereof was attributed to the 2nd appellant, who is said to have led the police to the person who had the passport. Save for the passport, none of the items which the complainants lost to the robbers, were recovered. That means the most important issue in the case was that of identification.

Each of the complainants testified that they had known the appellants prior to the robbery. They said that they used to see them on a regular basis, at the bus-stage.

To our minds, the exercise of an Identification parade is only useful for the purposes of putting to the test, the ability of a witness to correctly recollect the features of a suspect who he saw committing the offence. In order to make the said test meaningful, the suspect should be a person who was not known to the witness prior to the incident giving rise to the case.

If the suspect was already known to the witness, that would mean that the suspect had been recognized by the witness. In that scenario, if a parade was conducted, it is difficult to envisage how the witness would be unable to pick-out the suspect, whom he already knew.

In the event, we hold the view that the Identification Parades held in this case, did not add any value to the prosecution case, as the identifying witnesses were being called upon to pick out people known to them. Their knowledge of such people would not be necessarily attributable to the fact that they saw the persons committing the offence; but could also be because they already knew the said persons.

Had the appellants been strangers to the complainants, prior to the robbery incident, we would have had little difficulty in upholding the integrity of the Identification Parades. We say so because it is clear from the record that the identifying witnesses were kept in separate rooms at all times. Each of them was only brought out to the place where the parade was mounted, at the time he was being asked to try and find out if the suspect he had seen during the robbery, was on the line-up of the parade.

As regards the issue of lighting at the scene of crime, both **PW 1** and **PW 2** said that there were security lights. Indeed, **PW 2** described the said lights as “bright lights”. In the presence of such lighting, it should have been possible to see the assailants.

However, we also take note of the fact that the complainants were ordered to lie down on their stomachs. They complied, because one of the robbers held a gun.

As they lay on the ground, the complainants were beaten up. Dr. Zephania Kamau classified their respective injuries as harm.

To our minds, the circumstances prevailing at the time of the robbery, were not conducive for positive identification. However, we are also aware that if the complainants had seen the robbers clearly, this would have been a case of recognition, not identification.

If the complainants had recognized the robbers, the easiest thing would have been for the complainants to give to the police, the particulars of the robbers, together with an indication about the fact that the said robbers were regularly to be found at the bus stage.

Curiously, however, **PW 1** told the trial court that the complainants found some suspects at the police station.

PW 1 said that he did not lead the police to arrest the 2nd accused (who is the 3rd appellant herein).

Similarly, **PW 1** said that the offered no descriptive features of the 4th accused, (who is the 1st appellant), to the police.

PW 2 also did not give to the police, the descriptions of the 2nd and 3rd accused.

Thereafter **PW 3** testified as follows;

*"**We learnt from the police there had been a swoop in that area. We were told to check whether the robbers were there."***

When the Investigating Officer, PC Patrick Ndwiga **(PW 7)** testified, he said that whereas the 1st accused was arrested at the stage;

"The others were in the cells."

That testimony is significant because both the 1st and the 2nd accused had, in their respective defences, said that they were originally arrested in respect of alleged rape. Therefore, we hold the view that the trial court erred by simply saying that the defence offered;

"by each of the accused does not wash. They were at the scene. They attacked and robbed the three complainants."

If three of them were in the cells, by the time the offence was committed; and as they had been arrested because they were suspects in a rape case, we find that their defences were plausible.

We have said enough, to make it clear that we find merit in the appeal herein.

However, we feel obliged to say that the person from whom the passport of **PW 2** was recovered, cannot possibly be called an informer. We say so because the prosecution did disclose his name during the trial, whereas the identity of informers is ordinarily kept hidden, so as to safeguard them.

As soon as the identity of the person was disclosed, it became necessary for the prosecution to make him available, as a witness. It is only by so doing that the said person would have enabled the court to ascertain how he got possession of **PW 2's** passport, which robbers had made away with. In effect, Karuiya, from whom the Investigating Officer recovered **PW 2's** passport, was an essential witness.

The prosecution is obliged to call all essential witnesses to testify at the trial. When the prosecution fails to call an essential witness, the court may infer that the evidence of the said witness would have been prejudicial to the prosecution.

Therefore, in this case, we draw such an inference.

For all those reasons, we hold that it would be unsafe to uphold conviction. Accordingly, we do now quash the convictions and set aside the sentences handed down to all the four (4) appellants. Finally, we order that they be set at liberty forthwith, unless they are otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 15th day of July, 2010

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J. LESIIT	**FRED A. OCHIENG**
JUDGE	**JUDGE**