



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

Criminal Appeal 87 of 2008

**KENNEDY PETER MENGUAPPELLANT
VERSUS
REPUBLIC.....RESPONDENT
JUDGMENT**

The appellant, **Kennedy Peter Mengo**, was charged in the Kwale Senior Resident Magistrate's court with 12 counts of robbery with violence contrary to Section 296 (2) of the Penal Code. At the end of a full trial, he was found guilty on three of the counts (2, 4 & 12) and sentenced to death. The particulars of count two stated that the appellant, on the night of 12th day of July, 2006, at Rossy Cottages Diani in Kwale District of the Coast Province, jointly with others not before the court, while armed with dangerous weapons namely pangas, rungas and pistols robbed Richard Nyagau Onsongo of a cash sum of Kshs. 7000/- and one mobile phone make Nokia 6310 valued at Kshs.6000/- and at or immediately before or immediately after the time of such robbery, used personal violence to the said **Richard Nyangau Onsongo**. I will hereinafter refer to him as "**the 2nd complainant**". The particulars in the 4th count stated as follows:- That the appellant on the night of the 12th day of July 2006, at Rossy Cottages Diani in Kwale District of the Coast Province, jointly with others not before the court, while armed with dangerous weapons namely pangas, rungas and pistols, robbed **Rosemary Mwikali** of a cash sum of Kshs. 3700/- one mobile phone –make Nokia 6230, one Barclays Bank Card, one National Identity Card, ignition keys, one hand bag and one gold necklace all valued at Kshs. 64000/- and at or immediately before or immediately after the time of such robbery, used personal violence to the said Rosemary Mwikali (**hereinafter "the 4th complainant"**).

The 12th count carried the following facts: That on the night of the 12th day of July 2006 at Rossy Cottages Diani, in Kwale District of the Coast Province, the appellant, jointly with others not before the court, while armed with dangerous weapons namely, pangas, rungas and pistols robbed **Basil Khan** of a cash sum of Kshs. 14,600/- a mobile phone make Samsung valued at Kshs. 25000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said Basil Khan hereinafter the "12th complainant").

The appellant was not satisfied with his conviction and sentence and has appealed to this court on the main grounds that the evidence on identification was not positive; that his arrest was not related to the offence charged; that he was convicted on contradictory and inconsistent evidence and that his defence was not adequately considered.

When the appeal came up for hearing before us, the appellant appeared in person and relied solely upon written submissions which he had previously filed with the leave of the court. **Mr. Muteti**, Learned Senior State Counsel who represented the Republic, opposed the appeal contending in the main that the circumstances favoured a positive identification and that the evidence against the appellant was water-tight.

This being a first appeal, we are enjoined by law to re-evaluate and re-consider the evidence which was presented before the learned Senior Resident Magistrate and arrive at our own independent conclusion on the same but bearing in mind that we did not see and hear the witnesses testify and must give allowances for that. (**See Okeno -V- Republic [1972] (EA 32)**).

At the trial, the prosecution called a total of 14 witnesses. Its case was that the complainants were enjoying an evening of drinks at Rossy's Cottages in Diani South Coast, when they were attacked by thugs who included the appellant. The thugs were armed with rungas, pangas, and one had a pistol. They hit the 2nd complainant on the head

with the blunt side of a panga and robbed him of his mobile phone, car keys and 7000/-. He allegedly identified the appellant through electric light and further purportedly identified him at an identification parade conducted by **Chief Inspector Edward Chagas (PW13)**. The thugs also hit the 4th complainant with a panga and robbed her of her mobile phone, a gold chain and a cash sum of Kshs. 3,200/-. She allegedly identified the appellant because, according to her, there were lights at the scene. She further purportedly identified the appellant at the identification parade conducted by (PW13).

The 12th complainant was also robbed of his Samsung mobile phone and a cash sum of Kshs. 14,600/-. He too testified that he identified the appellant at the scene because the scene was well lit.

In an unsworn statement, the appellant stated that on 14.7.2006 he was at Diani Police Station having been summoned by the DCIO to offer him police informer duties which offer he refused whereupon he was arrested and incarceration by **PC Bernard Gikandi**. The latter, according to the appellant, took his 15000/- which was never produced. He also contended that the identification parade was not properly conducted because the parade members were not like him and that the witnesses saw him before the identification parade was mounted. In the end, he claimed that he had been framed because he refused to be an informer.

After analyzing the testimony which the prosecution produced before him, the learned Senior Resident Magistrate convicted the appellant on the said counts on the basis that the appellant had indeed been positively identified at the scene of crime and at the identification parade. He rejected the appellant's allegation of a frame up.

Having subjected the evidence which was presented before the trial to an exhaustive examination, we have made the following observations. The learned Senior Resident Magistrate made the following concluding remarks:-

“This court is satisfied that the clarity with which these witnesses mentioned above had about how they identified accused at the scene shows that indeed accused was amongst the robbers. There was bright light at the scene. And the witnesses’ description of the weapon accused had, the cup he had, his red lips and the order he gave are exactly the same. The same witnesses went on and identified accused at the identification parades that were held in (sic) different dates and times without problems”

We find this conclusion on the evidence puzzling. We are so puzzled because our examination of the evidence of the same witnesses reveals serious conflict which the learned Senior Resident Magistrate appears to have failed to notice or which he ignored without explanation. The three complainants would appear to have been together at Rossy's Cottages when the thugs struck. The 12th Complainant Bazir Khan stated as much.

In his own words:-

“On 12.7.2006 at about 8.30 p.m I was at Rossy's Cottages Diani Beach when we were attacked. I had been with my friends Richard Onsongo, Rosemary and many others.”

The three Complainants however gave conflicting testimonies as to events of the night. The 2nd Complainant **Richard Nyangau Onsongo**, in his testimony said that at the material time of the material date, he saw three attackers who were wearing black raincoats and they came from an open space.

The 4th complainant **Rosemary Mivingu Mwikali** on her part stated that she saw about 10 people who appeared from the bush. The ring leader, according to her, was the appellant and he wore a shirt and a cap. The 12th Complainant on his part saw 30 attackers but only 10 attacked them. The conflicting evidence in our view was gigantic for witnesses who were together and observing the same events. Was the appellant wearing a shirt or a rain coat? The attacker cannot have been the same. The Senior Resident Magistrate also clearly placed reliance upon the evidence of the identification parade. He concluded that the complainant had identified the appellants at different identification parades. The testimony of PW13, **C.I. Edward Chagas**, however shows that he conducted only one identification parade on 24.2.2006 at which the 2nd complainant and the 4th complainant identified the appellant. He did not conduct an identification parade at which the 12th complainant was a witness. The 12th Complainant **Bazir Khan**, PW5 indeed testified that he did not attend any parade. In our view he could not, because he had seen the appellant at the Police Station just before the parade was mounted. Conducting an Identification Parade in those circumstances would have been a waste of time. His testimony, therefore remained dock identification which is generally worthless.

With regard to the identification of the appellant by the 2nd complainant, the record shows that the identification he purported to make at the Identification parade was without value. In his own words:-

“I am the one who showed, the police the accused”.

If Richard Nyangau (PW2) pointed out the appellant to the police, there was no point in mounting an identification parade with him as a witness. So, his purported identification of the appellant was worthless. In those premises his purported identification of the appellant was mere dock identification.

With regard to the identification by the 4th Complainant, **Rosemary Mwikali** (PW1), we have already noted that she is the only one who saw him with a white shirt a description which did not agree with that of the 2nd complainant who saw him wearing what looked like a raincoat. Although she testified that she described the appellant before the parade, she was not supported in that regard by PW3 **C.I. Edward Changas**. In his own words.

“I was not given any descriptions. The parade members were dressed differently(sic).”

On the authority of **Ajode - V- Republic [CR. Appeal No. 87 of 2004] (UR)**, the testimony on the identification of the appellant by the 4th complainant could not have been reliable. There is also no clear evidence on how the appellant was arrested. The arresting officer was not called as a witness. There is however, the testimony of **Boniface Kyalo** (PW6). I have noted that he identified and pointed out the appellant at the office of the CID where he (PW6) was recording a statement. The appellant was then standing outside the CID office at Diani Police station. There was no evidence presented at the trial as to what had taken the appellant to the said CID offices. The evidence of PW6 is also significant for the following reason. When he was cross-examined by the appellant, he testified that the appellant had the cap which he had worn at the time of the robbery when he pointed him out at the police station. That testimony was in sharp conflict with the testimony of PW8 PC **Norman Musyoka**. In his own words:-

“We left with him (appellant) and he led us to Ibiza area Diani to an open yard near a water kiosk where he removed a bag containing clothes, on searching we recovered a black cap. We took the cap after taking him to Diani Police Station. The cap was identified by some complainants)...”

So, which cap did PW6 see the appellant wearing when he pointed him out at the police station and he was promptly arrested and which cap did PW8 recover from the appellant at his place of abode? That discrepancy was never resolved.

In all those premises, we have come to the conclusion that the evidence of identification was not positive and that there were unresolved inconsistencies in the evidence of the complainants. That being our view of the matter we do not find it necessary to consider the other issues raised by the appellant in his grounds of appeal and written submissions. The conviction of the appellant was in our judgment unsafe. We therefore allow this appeal and quash the conviction.

With regard to sentence, only one sentence of death can be executed. The learned Senior Resident Magistrate should have imposed only one sentence of death. Having imposed the sentence of death on the 2nd count, he should not have proceeded to impose the sentence of death on the 4th and 12th count. The sentences on the two counts should have been left in abeyance. That is however now academic since we have allowed the appeal. The sentences imposed are hereby set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2010.

J.B. OJWANG
JUDGE

J. AZANGALALA
JUDGE

Read in the presence of:-
The Appellants and Mr. Onserio for the Republic.

F. AZANGALALA
JUDGE
22ND SEPTEMBER 2010