



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(*Coram: Ojwang & Azangalala, J J.*)

CRIMINAL APPEAL NOS. 2 OF 2009, 3 OF 2009 & 4 OF 2009 (CONSOLIDATED)
- BETWEEN -

1. JOSEPH KYALO MWANZIA
2. VINCENT NZIVE MUVANDIAPPELLANTS
3. FRANCIS NDOLO DAVID

- AND -

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate T. Mwangi dated 23rd December, 2008 in Criminal Case No. 322 of 2008 at Mombasa Law Courts)

JUDGMENT

The appellants herein were jointly charged, in a first count, with robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya); and in a second count, with malicious damage to property contrary to s.339(1) of the Penal Code.

It was alleged in count 1, that the appellants herein, jointly with others not before the Court, and while armed with offensive blunt objects namely stones, on **2nd February, 2008** at 11.00pm, at Salambo Club along Moi Avenue in Mombasa, robbed **Francis Mutua** of cash in the sum of Kshs. 4,000/=, two cellphones (Nokia 6220 and Nokia 1100) – all bearing a value of Kshs. 11,500/= — and at or immediately before or immediately after the time of such robbery, wounded the said **Francis Mutua**. On the second count it was alleged that, on the date and at the place aforementioned, the appellants while in consort with others not before the Court, wilfully and unlawfully damaged two security lights, two display glasses and one snake-light, all valued at Kshs. 12,000/=, the property of **Bernard Gitonga**. The State’s case was that **Francis Kyalo Mutua** was, on the material night, parking his motor vehicle, Reg. No. KAM 155S, in which he had, as passengers, one **Paul Musau Mutua** (PW2) and one **Sammy Mwangangi**, in the area of Fontenella, along Moi Avenue in Mombasa. Before the complainant came out of the car, he was confronted by three men who demanded his cellphone; and within no time, one of the three intruders hit him with a stone on the right side and back side of the head. The complainant lost consciousness and, when he regained this, he found himself at Mombasa Hospital, where he remained admitted for eight days. The complainant testified that he lost Kshs. 4,000/= and two Nokia cellphones (being Nokia 6220), the combined value of which stood at Kshs. 14,000/=.

Dr. Ngone (PW7) gave evidence that he had examined the complainant following the incident, and found that he had sustained cut wounds on the back of the head, and on the right forehead, the probable object causing injury being of a blunt nature. PW7 assessed the said injury as falling within the category “harm”. **Paul Musau Mutua** (PW2) gave evidence reaffirming that of PW1; and he identified the appellants herein as the men who attacked PW1 on the material night. PW2 had run to Salambo Club at the material time, and when he returned to the place where PW1 had parked, he found PW1 lying on the ground. PW2 later identified the accused persons at the Central Police Station. PW2 said there had been bright lights at the **locus in quo** which enabled him to see the attackers, and he had noticed that the 3rd appellant herein was wearing dread-lock hair.

Bernard Gitonga Wachira (PW3), the manager of Salambo Club gave evidence consistent with that of PW1 and PW2. When, on the material night, PW3 heard noise outside his club, he referred the matter to

his security guards; he soon went to see for himself what was happening outside; and he witnessed a young man hit somebody with a stone; PW3 saw PW1 fall after being hit with a stone. PW3 identified 3rd appellant as the man who had hit PW3 with a stone; and he witnessed 3rd appellant and his accomplices run away, only to return with a much larger gang of attackers, about 10 men, who now began to aim stones at Salambo Club, damaging lights and glasswork. PW3 called the police, who came and arrested the three appellants herein.

On the state of lighting at the *locus in quo*, PW3 supported PW2's testimony: there were bright street lights at the scene, which enabled him to see 3rd appellant herein lift a stone and batter the complainant. PW3 was not able, however, to identify 2nd appellant or 1st appellant.

Oscar Okoth (PW4) a security guard at Salambo Club, testified that at the material time, he was on duty at the entrance to the club, and he witnessed a group of men attack the complainant: he (PW4) raised alarm by shouting "Thief! Thief!". This scared the attackers, and they ran away; but they later returned in a larger group of some 10 men who were now hurling stones at Salambo Club, causing damage. It was PW4's evidence that the street lights brightly illuminated the *locus in quo*, and this enabled him to see the suspects. PW4's evidence was supported by that of **Evans Omondi** (PW5), another security guard at Salambo Club. PW5 testified that 3rd appellant herein was arrested by members of the public, right at the scene, while 1st and 2nd appellants were arrested, also at the scene, by Police officers. PW5 confirmed that there was bright lighting at the scene, enabling him to see and identify the appellants herein, during the robbery incident.

The learned Magistrate considered all the evidence, and expressed his belief in the veracity of the accounts given by PW1, PW2, PW3, PW4, PW5, PW6 and PW7; and set out the Court's findings as follows:

"It is my finding that there is adequate evidence on the identification of the three accused persons.....Following the robbery, the complainant was injured and the money and phones.....stolen. These facts establish the ingredients of the offence of robbery with violence contrary to s.296 (2) [of the] Penal Code.....I find all the accused persons guilty and convict them as charged in count 1."

And as regards count 2, the Court held:

"There is overwhelming evidence by PW3, PW4 and PW5 to support the charge in count No. 2. The exhibits produced in Court [exh. 2 and 3] further support the charge of malicious damage to property in count No. 2".

The learned Magistrate convicted the appellants on the second count as well; took the statements in mitigation, and treated them as first offenders; sentenced each of them to death, as prescribed by law; and ordered that sentence in respect of count 2, for each appellant, was to remain in abeyance.

In their amended grounds of appeal, the appellants contended as follows:

- (i) ***the evidence of identification coming from PW2, PW3 and PW4 was not free of error;***
- (ii) ***an identification parade was not conducted;***
- (iii) ***the conduct of arrest was unrelated to the offences charged;***
- (iv) ***there were discrepancies in the prosecution evidence;***
- (v) ***"the investigations were very shoddy and fabricated";***
- (vi) ***the learned Magistrate rejected the defence cases without any justification.***

Each of the appellants filed pre-written submissions challenging the likely case of the respondent, on the basis of the amended grounds of appeal. The appellants submitted that there was a contradiction between the allegations recorded on the charge sheets, and the evidence of the prosecution witnesses; that the prevailing circumstances at the material time did not favour proper identification of suspects: in this respect the appellants urged:

"It should therefore be observed that the incident was sudden and terrifying.....[T]he attack on PW1 and PW2 must have caused fright and shock to them – hence it incapacitated [them in their] ability to make [a] positive identification."

The appellants contended that the intensity of lighting available had not been ascertained; in their words: ***".....[though they allege they were aided by] street lights, [they] did not reveal the power of the said lights; it was not disclosed what voltages of bulb were used; it is common knowledge that not all lights have the same brightness, and therefore some light may not be suitable for identifying a suspect at night."***

Learned respondent's counsel, **Mr. Muteti**, supported both conviction and sentence. Counsel urged that there had, as shown by the evidence, been sufficient lighting which enabled witnesses to perceive the suspects, at the material time; the suspects had battered and robbed the complainant, and had caused damage to the glasswork of Salambo Club; the suspects came in numbers, and invited still more persons to join them as they executed their assaults.

Counsel urged that there had been no room for mistaken identity, as, in favourable lighting conditions, the arrests were effected without delay; and that in these circumstances, the convictions were "entirely safe." The appellants made no response to learned counsel's submissions, stating on record that they were contented with their written submissions.

We have found nothing on record to show any concern by the trial Court, about witness demeanour, or lack of candour on the part of any of the prosecution witnesses. **Francis Kyalo Mutua** (PW1) gave straightforward evidence on the attack upon him on the material night, and his evidence was in all material respects corroborated by **Paul Musau Mutua** (PW2) who had been in his company at the material time. PW2 testified that he had clearly perceived 2nd appellant at the material time, and was able to identify this appellant. PW3 testified that he had clearly perceived 3rd appellant herein as 3rd appellant assaulted the complainant with stone-missiles; and that he was able to pick out the appellants herein as some of the suspects; and this evidence was substantially corroborated by that of PW5, who saw the 3rd appellant being arrested at the scene by members of the public. PW5 also witnessed 1st and 2nd appellants herein being part of the group that battered PW1 with stones.

Police Constable Charles Kariuki (PW6), of the Central Police Station, testified that the circumstances in which the arrests had been made, provided sufficient identification of the suspects: and it was not found necessary to conduct identification parades.

The second and third appellants gave unsworn evidence, while 1st appellant gave sworn evidence. The 1st appellant said he had been innocently walking along Moi Avenue, when police officers arrested him, at **9.30pm** on the material night; 2nd appellant said he was sleeping in the streets, at about **10.00pm**, when police officers from the Central Police Station came along and arrested him; and 3rd appellant said he was coming from his place of work, when Police officers arrested him and took him to Central Police Station. After considering all the evidence, we have come to the conclusion that the three appellants herein had been correctly identified by witnesses, on a night that was brightly lit by the street lights, as the perpetrators of acts of robbery with violence, and as the vandals who recklessly and wantonly crushed building glass - works with stone - missiles. There was, in our opinion, nothing in the defence case to cast doubts on the integrity of the prosecution evidence. It is clear to us that the learned Magistrate gave the defence case due attention, but found it devoid of merits. We have given due consideration to the grounds of appeal, and the written submissions from the appellants: we find them to focus on hypothesis, rather than disclose points of doubt on the real cause, in the prosecution case. The effect is that the prosecution case remained firm, and has established its indictment of each of the appellants, beyond any reasonable doubts.

We dismiss the three appeals; uphold the conviction in each case; and affirm sentence as imposed by the learned Senior Resident Magistrate.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 16th day of November, 2010.

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J. B. OJWANG
JUDGE

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F. AZANGALALA
JUDGE