



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

CRIMINAL APPEAL NO. 57 OF 2010
- BETWEEN -

WILLIAM PHILIPAPPELLANT

- AND -

REPUBLIC.....RESPONDENT
(Being an appeal from the Judgment of Senior Principal Magistrate Ms. L. Mutende dated 4th February, 2010 in Criminal Case No. 1493 of 2009 at Mombasa Law Courts)

JUDGMENT

The appellant herein was charged with robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya): the allegation being that he, jointly with others not before the Court, and while armed with dangerous weapons, namely knives and iron bars, on **21st March, 2009** at about 11.00pm at Bakarani Village, Bamburi Location in Mombasa District of Coast Province, robbed **Justus Mutua Mulundwa** of cash in the sum of Kshs. 4,000/= and, at or immediately before or immediately after the said robbery, fatally wounded the said **Justus Mutua Mulundwa**.

Noting that only one witness had seen the suspects at the material time, the learned Magistrate took caution as follows:

“.....right at the outset I do warn myself of the need to test with care the evidence of this single witness. I do it considering the fact that she is the wife of the deceased herein who may have been tempted to state what indeed she did not see.”

The learned Magistrate considered the evidence of identification, and made a conclusion as follows:

“Having considered the evidence in total, I find the prosecution [to have proved] beyond doubt that the accused was one of the persons who robbed the deceased and fatally wounded him. I therefore find the charge proved beyond any reasonable doubt. He is guilty and [is] convicted accordingly.”

The appellant filed amended grounds of appeal, contending as follows:

- (i) **the trial Court erred in fact and in law in entering a conviction, on the basis of evidence of recognition by a single identifying witness;**
- (ii) **the evidence of recognition had not been declared before the appellant was arrested;**
- (iii) **the main witness did not record her statement until the day of the identification parade;**
- (iv) **the appellant was arrested with no incriminating exhibit;**
- (v) **there was no reason for the appellant’s arrest in connection with the offence charged;**
- (vi) **the police investigation was ineffective;**
- (vii) **the appellant was denied an opportunity to cross-examine PW7;**
- (viii) **the trial Court erred in rejecting the appellant’s defence.**

The appellant did not say anything on the occasion of hearing, contenting himself with pre-written submissions which he had filed; but the respondent was represented by learned counsel, **Mr. Onserio**. The appellant contends in the submissions that “there was [a] great miscarriage of justice.....in the way in which the trial Magistrate handled the case,” and particularly in relation to the identification and

recognition evidence given by PW4. The appellant stated that even though PW4 said she had identified him on an identification parade, she “did not tell the Court when [the identification parade] was conducted”; and he faulted the evidence that it was on the day of the identification parade, that PW4 recorded a statement with the police; he urged that the evidence of identification should be disregarded. The appellant restated his grounds of appeal, in particular the contention that the investigations leading to his prosecution were ineffectively conducted.

Mr. Onserio, for the State, stated he was conceding to the appeal; in his words: “I perused the proceedings, and I was convinced that the recognition evidence was flawed; and so the conviction was unsafe”. Counsel urged that the said recognition was questionable, for it had taken as long as a month after the robbery incident before arrest was effected, and yet the appellant had not fled the locality.

Mr. Onserio also submitted that the police investigations had not been effectively conducted.

The essence of the respective parties’ positions, as summarized above, will not suffice as a basis for this Court to determine the outcome; and this goes to underline the established rule in judicial practice, that the first appellate Court must consider the evidence as a whole.

Hamisi Ndoro Kayuga (PW1), the chairman of the community policing set-up at Bakarani, received a report sometime between 7.00a.m and 8.00a.m., on **22nd March, 2009**, that his neighbour, the deceased, had been killed; and he immediately made a report at the police station, where he met the deceased’s widow. For sometime, no arrest was made in connection with the killing of the deceased.

The arrest by the local community policing unit, of the appellant, on **26th April, 2009** took place about a month after the killing of the deceased. PW1 took the appellant to his office, in the presence of irate members of the public who wanted to subject the appellant to violence; and he called police officers who came and took the appellant away.

John Mutuku Mulundwa (PW2), the elder brother of the deceased, was asleep at his home at Bakarani on the night of **22nd March, 2009**, when he was awakened by persons who informed him that the deceased had been attacked by thugs; and when he went to the deceased’s residence, he found that the deceased had just been taken to Bakarani Community Clinic; PW2 proceeded to the clinic and found the clinic was closed, but there was a crowd of people gathered there. PW2 proceeded to Bamburi Police Station, reported the matter, and the OCS accompanied him to the said clinic. When the clinic opened to PW2 and the OCS, they learned that the deceased had died; PW2 saw the deceased’s body: a sharp object had been used to cut him in the neck. The OCS had the body moved to the mortuary, and it was subsequently interred. It was on a later occasion, that PW2 learned that a suspect had been arrested in connection with the killing of the deceased.

On cross-examination, PW2 testified that he had not known the appellant herein, and had met him at Bamburi Police Station for the first time.

James Charo Mulundwa (PW3), another brother of the deceased, testified that the deceased, up to the time of his death, was running a shop at Bakarani in Bamburi. Although PW3 was away at Kibwezi on the material day, he had joined PW2 to identify the body of the deceased, on **25th March, 2009** for the purpose of post-mortem examination conducted by a doctor; and he had on that occasion recorded a statement with the police.

Florence Mwendu (PW4), the widow of the deceased, said she was unwell and was resting in her house at 11.00pm, on the material night, while the deceased was still conducting sales at his shop, situated on the same building as the residence, at Bakarani. Suddenly, PW4 heard a bang on the shop’s door; and she got out of the house and went up to the shop; she found three persons, and one of them demanded to know where she was coming from. These are the words of the witness:

“I asked why he was asking me where I came from, yet [this] was home. He then flashed a torch at me. It was dark but the lights in the shop were on. He flashed [at] my face and ordered me to give him money lest he [finish] me like my mate. I did not hesitate; I went to the drawer at the shop. It was a small shop.....The three followed me. I pulled the drawer and they took the money. They asked me for.....scratch-cards. I told them [the deceased] had sold all of them. The people left. They were wearing clothes. They had not concealed their faces. I recognized one of them. He is my customer. He used to buy from me Risla papers and cigarettes, I did not identify the other two. I then went outside to look for my husband. It was just in front of the shop. I found my husband had fallen down. He was bleeding from the head. People were not there. I went [and] called neighbours. I told them my husband was dead. Neighbours came. We carried my husband to Bakarani Health Centre. He was taken inside”.

It was PW4’s testimony that, by the time police officers came to the clinic, at about 12.00 midnight, the

deceased was already dead, and was taken to the mortuary.

While at home, sometime afterwards, PW4 was called by the Police: to come and identify a person who had been arrested. Already, PW4 had given to the community-policing unit the description of a person she recognized, on the material occasion; and she had indicated that she would be able to identify the person in question; a basic feature of the person which she had given on that occasion, was that “the person was tall”.

It was PW4’s evidence that an identification parade was conducted at Bamburi Police Station, and, out of a plurality of persons (whom she did not count), she identified one; she did not know his name: “I just knew him as a customer. I knew him by physical appearance and [by] how he was dressed”. The witness (PW4) further said:

“The person was tall and slim, hence I was able to identify him. I touched him. I then went and recorded my statement. I had not recorded any statement prior to that date. I can identify the person, who is the accused before the Court. The [suspects] – two of them – had iron bars twisted at the edge. The accused was one of them. I had been serving him as a customer for two years. He used to come to my shop on [a] daily basis. I did not know where he lived”.

On cross-examination, Pw4 said as follows:

“You are my neighbour and my customer. I saw you that night. You did not live far from my house. I reported to the police that night. I could not tell the police that night because you would have killed me, because you had threatened me. It is not true that you were arrested following another incident and then it was said you had murdered my husband”.

Police Constable Sammy Githiori (PW5), who at the material time was stationed at Bamburi Police Station, accompanied the OCS, **Chief Inspector Gonde** on **22nd March, 2009** to the **locus in quo**: and they found the deceased’s body and, at the shop, there were blood stains “all over the surface of the door”; the shop had been ransacked. About one month later, the said OCS found that a suspect had been arrested, in connection with the robbery.

Ag. Inspector Danen Odhiambo (PW6) had been asked by the investigating officer, on **21st April, 2009** at 11.30a.m. to conduct an identification parade, which he did. PW6 had lined up 11 men on parade, one of them being the appellant herein: and PW4 came along and picked out the appellant herein, as one of those she had perceived at the **locus in quo**. PW6 testified that he had conducted the identification parade in accordance with the governing rules: the parade members were held in an enclosed place, while the witnesses were in an outside building; he then called PW4; he gave the appellant a chance to take his preferred position on the parade; PW4 came in, and identified the appellant by touching him; the appellant responded by saying he “did not commit the offence”; he administered the identification parade forms to the appellant, who signed, and then PW6 counter-signed; the appellant confirmed that he had no question to ask, about the conduct of the parade.

Responding to cross-examination, PW6 said:

“I cannot tell if any member of the parade was known by the witness before. I would not tell if the witness identified you because you had known each other”.

Kishore Chandrea Mandalia (PW7) is the pathologist who conducted the post-mortem examination on the deceased, on **23rd March, 2009**, four days after the incident. It was PW7’s testimony that the deceased’s body had three cut wounds on the scalp, measuring respectively, 2cm., 4cm. and 5.5cm – at the back of the head. PW7 formed the opinion that the cause of death was internal haemorrhage due to the cut wounds. The record shows that cross-examination on the post-mortem evidence was nil (**17th December, 2009**).

The defence evidence was unsworn and brief: he said he had been arrested on **24th April, 2009** after he quarrelled with his neighbour, and many people had gathered outside his house on that occasion; he was then taken to the office of the community-policing unit, where the difference was settled, but thereafter, police officers came and arrested him; later he was charged with an offence he knew nothing about. As already noted, the learned Senior Principal Magistrate took full account of the range of, and the twists and turns in the evidence; and it is clear to us that she had no doubts as to the truthfulness of the witnesses. Our own detailed attention to the evidence does not disclose any want of candour on the part of the witnesses; and we take their testimonies to have been given in good faith, and without any intention to mislead.

We have given focused attention to the evidence tendered by the deceased’s widow (PW4), both in the evidence-in-chief and in the cross-examination. As the much-more-detailed evidence given by that witness in the examination-in-chief shows a consistent and matter-of-fact account, it is our opinion that

the minor inconsistency which appears to be introduced by the cursory record in the cross-examination, is inconsequential, in relation to the burden of the testimony.

We have found the evidence of PW4 to be of the greatest significance, and we note that the trial Court had taken all the proper caution in admitting that evidence as a reliable basis of identification of the appellant herein, as one of the suspects on the material night.

We do believe PW4, when she says she had a conversation with the suspects in an illuminated shop; she must have had some familiarity with at least one of the intruders, so she could remind them that she was coming up to the shop at that time of night because “this was home”; the attackers made a vague reference to “finishing PW4 like [they had done to] her mate”; PW4 walked along with the suspects up to the drawer, and she surrendered money to them; they had more conversation with her, asking for cellphone air-time; the suspects had not concealed their faces; the appellant was a frequent customer, and was not a stranger to PW4; quite consistent with the suspects’ remark about PW4’s mate, they had indeed delivered upon him mortal blows; they *knew* he was her mate; the blood gushing from the deceased’s head causally connects with the blood-stains found by PW5 all over the door to the shop.

We have no doubts that PW4 accurately identified the appellant herein as one of the three suspects – and this is confirmed beyond any doubt by her successful picking-out of the appellant, at a properly-conducted identification parade, at Bamburi Police Station.

The pillar upon which the appeal hangs is that of *identification*. We have no doubt that the appellant herein was accurately identified as one of the three persons who, on the material date, while armed with dangerous or offensive weapons, caused the death of the deceased, as they executed an act of robbery. We are distressed that learned counsel could lay only the barest facts before this Court, and urge acquittal, on the basis of lack of identification; and we must caution that the State, to effectually execute its constitutional obligation of criminal prosecution, shall endeavour to apprehend, in appeal matters, the entire evidence, and assist the Court to arrive at the correct and lawful decision.

We reject the State’s concession to the appeal; dismiss the appeal; uphold the conviction; and affirm sentence as delivered by the learned Senior Principal 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