



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 320 of 2006**

**FUJO IDD.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Fujo Idd, (hereinafter “the appellant”) together with one Samuel Mbuli (hereinafter “the 2<sup>nd</sup> accused”) were jointly tried on a charge which carried 7 counts of robbery with violence contrary to Section 296 (2) of the Penal Code. They were convicted on five of the counts and sentenced to suffer death on the 1<sup>st</sup> count. The sentences in respect of the other four counts were held in abeyance. Being dissatisfied with his conviction and sentence, the appellant has preferred this appeal on 8 grounds. Those grounds raise the following broad issues: That the Learned Principal Magistrate convicted the appellant on insufficient evidence of identification; That the Learned Principal Magistrate failed to comply with the provisions of Section 200 of the Criminal Procedure Code; That the trial proceeded in contravention of Section 77 of the Constitution since the appellant was not furnished with copies of proceedings of the trial despite his request for them; That the Learned Principal Magistrate failed to appreciate the conflict and discrepancies in the evidence presented by the prosecution and thereby failed to find that the prosecution had not discharged its burden of proving the case against the appellant beyond reasonable doubt.

The particulars of the counts upon which the appellant was convicted were as follows: Count (1): That on the 6<sup>th</sup> July 2004 at about 11.20 p.m., at Kaloleni Bar, Magadini Changamwe in Mombasa District within Coast Province, the appellant and the 2<sup>nd</sup> accused, jointly with others not before court, while armed with offensive weapons namely, pangas, bows and arrows robbed Samuel Kinyungu Nganyi (PW 1) of Kshs. 6,800/= and at or immediately before or immediately after the time of such robbery, wounded the said Samuel Kinyungu Nganyi. Count (2): The appellant and the 2<sup>nd</sup> accused, on 6<sup>th</sup> July 2004 at about 10.30 p.m. at Kwahola village in Mombasa District within Coast Province, jointly with others not before court, while armed with offensive weapons, namely, pangas, bows and arrows, robbed Juma Nzaka Munga of cash Kshs. 1,600 and at or immediately before or immediately after the time of such robbery, wounded the said Juma Nzaka Munga. Count (3): That the appellant and the 2<sup>nd</sup> accused, on 6<sup>th</sup> July 2004 at about 11.20 p.m. at Kaloleni Bar, Magadini Changamwe in Mombasa District within Coast Province, jointly with others not before court, while armed with offensive weapons, namely, pangas, bows and arrows, robbed Moses Musango of Kshs. 2,100/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Moses Musango. Count (5): That the appellant and the 2<sup>nd</sup> accused on 6<sup>th</sup> July 2004 at about 11.20 p.m. at Kaloleni Bar, Migadini Changamwe in Mombasa District within Coast Province, jointly with others not before court, while armed with offensive weapons, namely pangas, bows and arrows, robbed Purity Njeri Mungai of Kshs. 1,000/= and a Motorola mobile phone all valued at Kshs. 5,800/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Purity Njeri Mungai. Count (6): That the appellant and the 2<sup>nd</sup> accused, on 6<sup>th</sup> July 2004 at 11.20 p.m. at Kaloleni Bar, Migadini Changamwe in Mombasa

District within Coast Province, jointly with others not before court, while armed with offensive weapons, namely pangas, bows and arrows, robbed Beatrice Bahati of Kshs. 1,100/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Beatrice Bahati.

It was the prosecution case that on the material date, 6<sup>th</sup> July 2004, the appellant, the 2<sup>nd</sup> accused and others who were not charged were on a robbery spree. They robbed PW 1 and PW 2 who were on their way home. They also went to Kaloleni Bar where they attacked bar patrons. PW 3, a waiter at Kaloleni Bar was also attacked and robbed of a mobile phone and cash. PW 4, Esther Nyambura Mishelle, another waiter at the said bar, was also threatened and money demanded of her. She went as if to get money and in the process pressed an alarm button. Moses Musumba Musango (PW 7) was one of the patrons who were at the said bar. He was attacked and robbed of 2,100/=. PW 8, Beatrice Bahati a waiter at the said bar was also attacked and robbed of Kshs. 1,100/= and as the robbers lost concentration, she also, like her colleague (PW 4), pressed an alarm button. PW 5, PC Philip Kathingo and PW 6, PC Daniel Ongai, both police officers were on duty on the material night when they heard noise and screams coming from the direction of Kaloleni bar. As they went there to investigate, they met people running towards the gate of the bar. Those people were armed. PW 5 shot in the air and the duo arrested two of the robbers from whom they recovered two bows and arrows. They also recovered Kshs. 1,700/= from the appellant's pocket. The officers then escorted the appellant and the 2<sup>nd</sup> accused to the bar where some patrons identified them.

PW 9, another police officer, had remained at Changamwe Police Station on standby duties on the material night. At about 10.30 p.m., two people reported to him that they had been attacked and robbed by people they knew. He advised them to seek treatment. Shortly there after, he received a report of a robbery in progress at Kaloleni Bar. He proceeded there and found that PW 5 and PW 6 had arrested two suspects. The trio then took the suspects to the police station. They found the people whom PW 9 had advised to seek treatment waiting at the police station. The two people identified the two suspects they had arrested as having been in the gang which had attacked them earlier in the night. The record shows that the appellant declined to make any statement in his defence.

In a reserved judgment, the Learned Principal Magistrate found that the appellant had been identified by PW 1 and PW 2 by means of an electric light. Indeed, according to the Learned Principal Magistrate, PW 1 recognised the appellant as his neighbour and had at the time of making his report given the appellant's name to the police. She further found that the appellant had been close to PW 1. With regard to the identification by PW 2, the Learned Principal Magistrate, found he too, had positively identified the appellant having seen him twice on the night of the robbery. The Learned Principal Magistrate also found that the appellant had been arrested while raiding Kaloleni Bar which reinforced the evidence of identification. That was not the only evidence on identification according to the Learned trial Magistrate. There was also the evidence of PW 3, Purity Mungai who testified that the appellant was the 1<sup>st</sup> to enter the bar and was the one shouting orders for people to remove money and mobile phones.

There was also the evidence of PW 4, Esther Nyambura, who testified that she had known the appellant before the incident and saw him when he was being arrested. There was further the evidence of the police officers PW 5, PW 6 and PW 9. On the evidence of all the said witnesses, the Learned Principal Magistrate stated that she was satisfied beyond reasonable doubt that the appellant was one of the robbers who attacked the complainants. She emphasized that the appellant was known by PW 1 as his neighbour and another witness who worked at Kaloleni Bar before the robbery. The Learned Principal Magistrate further observed that the instances of robbery occurred in well lit areas and in any event the appellant was arrested at the scene with a bow and arrows.

This is a first appeal. We are therefore duty bound to re-evaluate the evidence which was adduced before the Learned Principal Magistrate to reach our own conclusion. In doing so, we bear in mind that we have not had the advantage of seeing and hearing the witnesses testify as did the Learned Principal Magistrate. (See **Okeno – v – Republic [1972] EA 32**). We also bear in mind that an appeal court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial court is shown to have acted on wrong principles in reaching the findings it made. (See **Chemogong – v – Republic [1984] KLR 61**).

With regard to the identification of the appellant, our re-evaluation of the evidence, which was accepted by the Learned Principal Magistrate leads, to the conclusion that the appellant was positively identified by the complainant in count one, Samuel Kinyungu Nganyi who testified as PW 1. Although he gave the date of the robbery as 27<sup>th</sup> July 2004, it is our view that that was a human error in recall which error did not vitiate the witness's entire evidence. We have no doubt that PW 1 was testifying on the events of 6<sup>th</sup> July 2004. After the attack, PW 1 stated that he was able to identify the appellant who was his neighbour and even mentioned the appellant's name to the police. The place of attack was lit by light from a globe. Indeed PW 1's testimony in our view amounted to identification by recognition.

Juma Nzaka Munga, the complainant in count two and who testified as PW 2, also identified the appellant. He stated that on the material date, while in the company of PW 1, as he went home, he was cut on the finger with a panga and struck on the eye with an arrow. He was robbed of Kshs. 1,700, driving licence, identity card, shoes and a jacket. The scene was lit by a light from a long pole and he was able to see the appellant well and further that it was the appellant who grabbed him and robbed him of the money, driving licence and identity card.

PW 1 and PW 2 had a second opportunity to see the appellant after his arrest at the second scene of robbery at Kaloleni Bar. The appellant was also seen being arrested by PW 4, Esther Nyambura Mishelle at the said bar. She knew the appellant before the robbery as he stayed in the neighbourhood. The evidence of PW 4 was buttressed by that of PW 3, Purity Mungai, another waiter at Kaloleni Bar. She testified that the appellant was the first one to enter the bar and he was armed with bows and arrows. He cut PW 3 and took her mobile phone and Kshs. 1,000/=. As the appellant and the 2<sup>nd</sup> accused still struggled to snatch items from patrons at the bar, they were arrested. During the robbery, according to PW 3, the bar had full lights.

PW 5, PC Philip Kathingo, was one of the police officers who were on patrol near Kaloleni bar. He was in the company of Daniel Ongai, PW 6. The duo heard screams from the direction of the bar and rushed there to investigate. At the gate they met a group of people who were armed, running away. PW 5 shot in the air and the two officers arrested the appellant and the 2<sup>nd</sup> accused.

One of the patrons at Kaloleni bar was Moses Musumba Musango, who testified as PW 7. On the material date, while enjoying his beer, gangsters armed with bows, arrows and pangas stormed into the bar and ordered everyone to lie down. PW 7 did not lie down and was hit with a panga on the shoulder and robbed of Kshs.2,100/=. The gangsters then left the bar and when PW 7 went out of the bar he found that the appellant and the 2<sup>nd</sup> accused had been arrested by security men.

Arising from the accounts of the witnesses, some of whose evidence has been outlined above, it would be safe to conclude that the appellant could have been one of the group who robbed the complainants in counts 1, 2, 3, 5 and 6.

The discrepancies and conflict in evidence alluded to by the appellant were insignificant and did not, in our view weaken the testimony of the witnesses. There are however two issues raised by the appellant which deserve careful consideration. The first is the alleged breach of the appellant's trial rights under the constitution. The appellant in the cause of trial applied for copies of proceedings and an order was made on 17<sup>th</sup> October 2005, that the same be supplied to the appellant. On 28<sup>th</sup> November 2005, the appellant informed the court that he would not make his defence until the proceedings were supplied. He maintained that stance upto 15<sup>th</sup> May 2006 when he informed the court that he would not defend himself. The record does not show that the said proceedings were ever made available to the appellant.

We do not know how the appellant intended to utilize the proceedings. However, having ordered the proceedings to be supplied to the appellant, it is our view that the order should have been complied with. Alternatively the Learned Principal Magistrate should have stated the reason why the proceedings could not be furnished.

The second issue which merits our careful consideration is the complaint made by the appellant that

when the original trial magistrate was transferred, the magistrate who then tried the appellant did so without complying with the provisions of Section 200 (3) of the Criminal Procedure Code. That sub-section gives an accused person the freedom to choose whether or not to recall a witness or witnesses. As most accused persons would not know their rights under the sub-section, the same sub-section, imposes a duty on the succeeding magistrate to inform them of the right.

When the 1<sup>st</sup> trial magistrate was transferred, the case was mentioned before B. Olao, Chief Magistrate on 26<sup>th</sup> September 2005. The Learned Magistrate directed that the case be heard by Ndungu – Principal Magistrate under Section 200 of the Criminal Procedure Code. The Principal Magistrate on taking over the trial is recorded to have said as follows:-

**“Case to be taken over from where left. Accused so informed. Proceedings so far to be typed.”**

It is not clear whether the Learned Principal Magistrate merely informed the appellant and the 2<sup>nd</sup> accused that she had taken over the trial or whether she informed them of their right to demand that any witness already heard be resummoned and be reheard as mandated by Section 200 (3) of the Criminal Procedure Code.

Mr. Ondari, the Learned Assistant Deputy Public Prosecutor did not address us on the issue, yet the appellant had specifically raised the same in his amended Grounds of Appeal which had been filed with the leave of the court. As matters stand now, the complaint made by the appellant that there was breach of Section 200 (3) of the Criminal Procedure Code may very well be well founded. Taking into account the appellant’s complaint regarding failure to supply him with proceedings, which may have precipitated his subsequent failure not to make any statement in his own defence, we have come to the conclusion that his conviction was not safe. Should we order a retrial? The guiding principles which must exist before a retrial may be ordered were stated in the case of Fundi Reuben Ngala – vs – Republic (CR. APPEAL NO. 268 OF 2000) (UR). The Court of Appeal stated as follows:-

**“Whether or not a retrial shall be ordered is within the discretion of the court and will be dictated by the circumstances of each case. Ordinarily a retrial would be the appropriate order to make where there are fundamental irregularities which would result in a miscarriage of justice which is not curable under Section 383 of the Criminal Procedure Code.”**

AND in Murangi – v – Republic [1983] KLR 522 the same court observed as follows:-

**“A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result.”**

Applying the above principles to this appeal, we have come to the conclusion that there should be a retrial of the appellant. We have already found that there was acceptable evidence that the appellant may have been in the group which attacked and robbed the complainants in counts 1, 2, 3, 5 and 6. The record of the Lower Court suggests that the prosecution had no difficulty in availing witnesses. We therefore believe that a retrial will be held with dispatch. The appellant will not therefore be prejudiced.

In the end we allow the appeal by quashing the appellant’s conviction. The sentence imposed upon the appellant is set aside. The appellant will be retried before a different Magistrate with competent jurisdiction. Pending his retrial, the appellant shall be remanded at Shimo La Tewa Prison.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS...12<sup>Th</sup> ....DAY OF MAY 2009.**

**J. K. SERGON**

**JUDGE**

**F. AZANGALALA**

**JUDGE**

Read in the presence of: