



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 124 of 2004**

SAMUEL MUSYOKA KIMANGU.....1ST APPELLANT

JOHANA MANGOKA KINYILI 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1730 of 2002 of the Senior Resident Magistrate's Court at Machakos by Mr S.M. Kibunja – Senior Resident Magistrate)

J U D G M E N T

SAMUEL MUSYOKA KIMANGU and JONAH MANGUKA KINYILI were convicted for the offence of robbery with violence contrary to Section 296(3) of the Penal Code. Both of them were thereafter sentenced to death, as by law prescribed. Being dissatisfied with both their convictions and the sentences, the two lodged appeals to the High Court.

When the appeals came up for hearing, the same were consolidated.

In the respective petitions of appeal, the appellants have raised the following issues for determination:

- (i) *There was no credible evidence on record, which could sustain their convictions.*
- (ii) *They were not positively identified or recognized. Had the witnesses recognized them, they would have given their names or their descriptions to the police.*
- (iii) *As this was allegedly a case of recognition, the Identification Parade was not useful, in law.*
- (iv) *The evidence tendered was contradictory and inconsistent; and could not therefore sustain a conviction.*
- (v) *Some essential witnesses did not testify: Those included John who took the injured victims to hospital; the members of public who came to the victim's rescue; and the informer.*
- (vi) *The defence was rejected without any sound reason.*

During the trial, the first appellant herein was the 2nd accused, whilst the second appellant herein was the 6th accused.

The other four persons who had been charged alongside the appellants, were acquitted.

In determining this appeal, we shall re-evaluate all the evidence on record and draw our own conclusions. However, in arriving at our said conclusions, we shall bear in mind the fact that we did not have the benefit of observing the witnesses as they testified.

We shall also consider whether or not the circumstances prevailing at the time of the incident were unfavourable for positive identification of the culprits. We shall also give consideration to all the issues raised by the appellants herein.

The incident in question took place at about 7.30p.m., on 8th May 2002.

According to PW 1, VERONICA MBITHA MULU, she used to operate a shop at Kasayani Market. On that evening, she closed – up the business at about 6.30p.m., and then left for home, on a bicycle.

At about 7.30p.m., when darkness had set in, PW 1 noticed two people on the road ahead. She also saw many other people on the side of the road. When the said people shone torches on her, and the other persons who were on two other bicycles, PW 1, stopped. She was ahead of the other two bicycles.

According to PW 1, she recognized the 1st appellant, and she identified the 2nd appellant physically.

It was her testimony that the 1st appellant was armed with a panga, which he used to cut her viciously. When PW 1 fell down, the 2nd appellant continued beating her.

PW 1 was then robbed of KShs.3,000/- from her dress pocket.

When asked how she was able to identify the appellants herein, PW 1 explained that her bicycle stopped a metre away from the 1st appellant. PW 1 said that she saw the 1st appellant very well, as she was able to see and recognize one who was even 3 metres away.

PW 1 also explained that whilst the 1st appellant directed the light from his torch, at the faces of the victims, the robbers who were on the side of the road had directed the light from their torches, at PW 1 as well as the appellants herein and the other victims of the robbery. It is the light from the torches of the robbers who remained on the road-side which enabled PW 1 to see the appellants.

PW 1 also emphasized that she did tell her fellow victims and the police, that she had recognized the 1st appellant, and also that she had identified the 2nd appellant.

PW 2, JOHN CHAMUKA, was an employee of PW 4. On the material evening, he went to Kasayani Market, on a bicycle, which he was to use in ferrying PW 4 home.

On their way home, PW 2 was accompanied by PW 1 and PW 3, each of whom had his/her own bicycle. It was PW 2's evidence that PW 1 was ahead, whilst PW 3 brought up the rear.

PW 2 said that he saw 2 people who were ahead of them, and who put on and off, a torch. At that point, PW 2 started overtaking PW 1. He then heard her scream. He therefore stopped his bicycle. PW 3 then screamed.

PW 2 then saw several people come from the sides of the road. The people hit the bicycle on which PW 2 was carrying PW 4, and the bicycle fell down.

PW 2 said that several torches were being shone in his general direction, as he ran away. Although he did not recognize the first two people who he saw, PW 2 testified that he did recognize MUSYOKA. He explained that Musyoka (the 1st appellant) and he, used to work together at the home of PW 4. He further explained that the 1st appellant and he used to call each other NGULI, at the time they worked for PW 4.

As the 1st appellant chased after him, the said appellant called him Nguli, but PW 2 kept quiet because he feared that the said appellant could harm the other victims if he thought that PW 2 had recognized him.

According to PW 2, the 1st appellant threw a panga at him but missed.

PW 2 also said that he identified the 2nd appellant, who was armed with a club.

After PW 2 escaped, he sought help from Munyara's home. When he returned to the scene, he had a torch and a panga. He and the neighbour shone torches at the scene, prompting the robbers to run away.

It was PW 2's evidence that when he reported the incident, at the Makindu Police Station, he not only told the police that he had recognized two of the robbers, but that he also gave the names of the appellants' herein. PW 1 also said that he did give to the police a photograph of the 1st appellant herein.

Later still, after the 2nd appellant was arrested, PW 2 identified him at an Identification Parade.

During cross-examination, PW 2 said that the robbers were about six in number. He also told the 1st appellant that apart from him (PW 2) and the 1st appellant, he did not know any other person called Ngilu.

PW 2 also explained that when the 1st appellant was chasing after him, a torch was shone at him, from the back, and that that enabled the witness to see the 1st appellant well.

Finally, PW 2 said that the 1st appellant was arrested in July 2002, which was about 2 months after the robbery incident.

PW 3, PETER NYAMAI NDEKE, lost his sight in the attack by the robbers. He said that on the material evening, he was with both PW 1 and PW 2, when they left the Kisayani Market, for home.

As they were approaching PW 4's home, PW 3 saw people on the road. The said people had lit their torches, but they did not give way to PW 1, who was riding ahead of the other two bicycles.

Suddenly, both PW 1 and PW 3 were attacked viciously, with pangas.

PW 3 lost consciousness for 3 days, and was admitted at Kenyatta National Hospital for two weeks.

As the attack was sudden, and because it was a dark night, PW 3 did not recognize any of their attackers.

PW 4, JOYCE MWANYA MUTISO, is a sister to PW 1's husband. She confirmed that on the material night, PW 2 ferried her on his bicycle, whilst PW 1 and PW 3 rode their respective bicycles.

As they neared her home, PW 4 heard PW 1 scream, and then PW 3 screamed. PW 2 then released the bicycle on which PW 4 was being ferried, causing the bicycle to fall down.

As she was on the ground, PW 4 was attacked viciously. She was cut with a panga, on the right leg, left thigh, right hand and back. The right leg was broken.

However, PW 4 was not able to recognize any of her attackers.

It was her evidence that PW 1 did tell the other victims that she had recognized the 1st appellant. PW 4 also said that PW 1 told them that she had identified one other robber.

Whilst PW 4 was admitted at Makindu Hospital, she was told by PW 2 that he had recognized the 1st appellant, and had also identified one other robber. That information was given to PW 4, some two

weeks after the incident. But PW 1 did give the same kind of information to PW 4, immediately after the attack, whilst the victims were still at the scene.

When PW 4 said that both PW 1 and PW 2 told the police that they had recognized the 1st appellant, the said appellant told the trial court that he would wait for the police to make available the O.B where the first report was recorded.

On 30th April 2003, the learned trial magistrate did order that the O.B. in which the first report was recorded was to be made available to the court.

PW 5, BENJAMIN MUKORA, is an Assistant Chief of Kathiaka Sub-location. He testified about an ongoing boundary dispute between PW 4 and the 1st accused.

Later, PW 5 learnt that PW 4 and other persons had been attacked and robbed on the night of 8th May, 2002.

However, PW 4 did not give to PW 5, the names of those who robbed her and the other victims.

PW 6, MARTIN MWANYA MWENDO, used to assist PW 4 in buying maize, which the latter then re-sold.

On the material evening, he was at Kasayani Market, when PW 4 left with PW 2, PW 1 and PW 3, to go to their respective homes. When he learnt that PW 4 and the others had been attacked, PW 6 rushed to the scene.

Although PW 4 told PW 6 that she had not recognized any of the robbers, PW 1 did tell PW 6 that he had recognized the 1st appellant.

PW 6 testified that he told the police that PW 1 had recognized the 1st appellant as one of the attackers.

PW 7, GEDION KASANGA NZINGA, told the court that the 1st accused did threaten to “finish” PW 4 and her children.

Some days later, PW 7 learnt that PW 4, PW 1 and PW 3 had been attacked and robbed.

PW 8, PAUL NDAMBUKI, also told the trial court of the threats which the 1st accused issued against PW 4 and her family.

After about one week PW 8 went on safari. On his return, he learnt of the robbery on PW 1, PW 3 and PW 4.

PW 9, JOSIAH MALITI, told the trial court about the boundary disputes between PW 4 and the 1st accused. PW 9 did participate in the meetings of elders, which were called to resolve the disputes.

PW 10, PATRICK MULI NZEMBEI, was a pastor with Gospel Furthering Bible Church, Nthange. He knew that the 1st appellant had been an employee of PW 4. He also said that after PW 4 (and the other two people) had been attacked and robbed, his uncle told him that the 1st appellant was a suspect.

The uncle to PW 10 took PW 10 to PW 4, who told him that if he saw the 1st appellant, he (PW 10) should tell the police to arrest him.

Two days later, PW 10 was assisted by one Sila, to arrest the 1st appellant. They then took him to Kibwezi Police Station.

When asked about the identity of the uncle who told him that the 1st appellant was a suspect, PW 10 said it was KYALO NDUWA.

According to PW 10, it was PW 1 and PW 2 who had told Kyalo Nduwa that the 1st appellant was amongst those who had robbed them. However, PW 10 did not know whether or not the 1st appellant had participated in the said robbery.

At the conclusion of the testimony of PW 10, the 1st appellant once again asked for the production of the O.B. for 8th May 2002, from Kibwezi Police Station.

In response, the trial court ordered that the O.B. for Kalawa Police Station, for 8th May 2002, be provided to the court. That order was made on 17th September, 2003.

PW 11, DR. JARED OMOLO, said that PW 4 was taken to the Makindu Sub-district Hospital on 9th May 2002. PW 4 was unconscious. He assessed the degree of her injuries as grievous harm.

PW 11 also examined PW 1 on 9th May 2002. That patient was unconscious when admitted in hospital. She had lost 3 teeth; her cheek and nasal bone was fractured and she had a single cut across the left eye to the right cheek bone. PW 11 assessed her degree of harm as grievous harm.

PW 11 also examined PW 3, who suffered a cut across the face. The cut went from the right eye to the left eye.

PW 12, CHIEF INSPECTOR JOHN ONDERI, was the OCS Kibwezi Police Station at the material time. He arranged an Identification Parade at which the 2nd appellant was a participant.

According to PW 12, the suspect and the other eight parade members were similar in height and complexion.

First, the 2nd appellant was identified by PW 1. Thereafter, the said appellant was identified by PW 2.

PW 13, KIILU MATUU, had let out a premises which the 1st appellant and Kenyatta operated as an hotel. Later, the hotel was closed down, and the police sought to know from PW 13 how he had come to know the 1st appellant.

When the police arrived at the premises of PW 13, they had the photograph of the 2nd appellant.

By the time the hotel closed down, the 2nd appellant and his colleagues had operated it for one month.

PW 14, JOSEPHAT MUSYOKA YOMBWEYA, was the Chief of Kikimbinyo Location. He told the trial court about the boundary disputes between PW 4 and the 1st accused.

PW 15, SGT. CHARLES MALUKI, was working with the C.I.D. Kibwezi, at the material time.

On 15th July 2002, he accompanied PW 16 to investigate allegations that 1st accused had threatened to kill PW 4. They were also to inquire into the robbery against PW 1, PW 3 and PW 4.

According to PW 15, the 1st appellant was arrested by members of the public, at Machinery Market. He was then taken to the police station, where he was re-arrested.

It was the evidence of PW 15 that it was the 1st appellant who led the police to Emali, where the 3rd and 4th accused were arrested.

PW 15 also said that the 1st appellant disclosed that the 1st accused had funded the accused to commit the offence.

When PW 15 was arrested by the police, he is said to have conceded having stolen money from PW 4, when he had worked for her.

According to PW 15, the investigations diary shows that the report was initially made by JOHN KIUSYA on 9th May 2002. The report mentions one suspect as having been identified; and that suspect was the 1st appellant herein.

During cross-examination by the 1st appellant, PW 15 said that;

“The initial O.B. of 9/5/02 indicated you had been seen and recognized among the robbers.”

It is noteworthy that PW 15 readily conceded that none of the items which were stolen from the complainants were recovered from any of the six accused persons.

Furthermore, PW 15 said the following about the 2nd appellant;

“You were initially arrested for possession of suspected stolen properties. You were not found with any goods belonging to complainants herein. Informers are the ones who incriminated you in this case and not any of the accused or witnesses...”

PW 16, INSPECTOR JUSTUS MBURUNDI, worked with the CID, Kibwezi, at the material time. He got a letter from CID Headquarters, informing him about a lady who had been hospitalized with injuries, after she had been robbed.

When PW 16 visited the complainant she mentioned the 1st appellant herein, as a suspect. But it was not until August 2002 when the 1st appellant was arrested by members of the public.

According to PW 16, an Identification Parade was conducted, at which the 1st appellant was picked out as being one of the suspects.

PW 16 also said that PW 2 did tell him that he had recognized the 1st appellant as one of the robbers.

But during cross-examination by the 2nd appellant, PW 16 said;

“You were incriminated by an informer but not complainants or co-accused.”

It is evident that the Investigating Officer (PW 16) did confirm that none of the complainants incriminated the 2nd Appellant. And, on his part PW 15 said that none of the complainants incriminated the 1st appellant.

If that be the correct factual position, it would imply that the O.B. of 9th May 2002 could not have indicated that the 1st appellant had been recognized as being one of the robbers; unless the said entry in the O.B. was made by an informer.

On the other hand, if PW 1 and PW 2, or either of them, did tell the police that they had recognized the 1st appellant and had identified the 2nd appellant, it would follow that it was the two complainants who had incriminated the appellants: yet the Investigating Officer categorically stated that it was an informer who had incriminated the appellants.

To our minds, it cannot be doubted that the circumstances prevailing at the time the robbery was

executed, were not favourable for positive identification.

All the prosecution witnesses confirmed that the incident took place after darkness had set in. It was about 7.30p.m. PW 1, PW 2 and PW 3 were each riding their respective bicycles.

Both PW 1 and PW 2 testified that they did recognize the 1st appellant. Whilst PW 1 said that he saw the 1st appellant from close-up, as the said appellant was only one metre away from her; PW 2 said that he saw the 1st appellant when the said appellant chased after him, whilst armed with a panga.

Both PW 1 and PW 2 said that the 1st appellant had a panga. In that respect, the evidence was consistent.

Secondly, as PW 1 said, and as submitted by the learned state counsel, Mr. Wang'ondy, for the assailant to attack PW 1 with a panga, he must have been very close indeed to her. Therefore, all that evidence tends to show that in all probability, PW 1 did have an opportunity to see the 1st appellant in close proximity. In effect, PW 1 would have been able to positively identify the 1st appellant.

She said that she not only did identify the 1st appellant positively, but also that she told the police about that fact.

If that is what transpired, we are then at a loss as to why the Investigating Officer stated, quite categorically, that none of the complainants had incriminated the appellants.

To our minds, if the O.B. was produced in court, as was asked for by the accused persons; and in terms of the court orders made by the trial court, it would have assisted the court to verify whether or not in their first reports, the appellants' names or descriptions were given by PW 1 or PW 2.

As the O.B. was not produced in court notwithstanding court orders, that it be produced, we are unable to verify the contention of PW 1 and PW 2, to the effect that they did notify the police about having either recognized or identified the two appellants herein.

Secondly, had either PW 1, or PW 2, or PW 4 positively identified, (or otherwise recognized), either of the appellants, the said complainants or witnesses should have led to the arrest of the appellants. Instead, as PW 15 said, the 2nd appellant was initially arrested in relation to suspicion that he was in possession of suspected stolen properties. Those properties had nothing to do with the offence herein.

But when the 2nd appellant was in custody for that other suspected offence, informers incriminated him in relation to this case.

JOHN KIUSYA, who is cited in the investigations diary as having been the person who made the initial report, in which the 1st appellant was identified, did not however give evidence at the trial. Therefore, what PW 15 told the court, as having been stated by the said John Kiusya, was not admissible in evidence.

In this case, the 1st accused is said to have had ongoing boundary disputes with PW 4. He is therefore thought to have organized and funded the thugs who then attacked PW 1, PW 3 and PW 4. But when reports were first made to the police, it appears that the police did not commence investigations immediately.

As PW 15 conceded, it was not until PW 4 lodged a complaint with the CID Headquarters that CID from Kibwezi were instructed to take over the investigations from the OCS Kibwezi Police Station.

In the light of the fact that none of the stolen items were recovered from the appellants or at all; and as none of the weapons allegedly used in the robbery were ever recovered; and as the appellants were

arrested long after the incident notwithstanding the absence of any suggestion that they had gone into hiding; and also because the complainants did not lead to the arrest of the appellants; it is critical that there be absolutely no doubt at all about their positive identification, if the appellants' convictions are to be upheld.

Regrettably, although the victims suffered grievous harm, in the robbery, for which it would have been good to have one or more persons held responsible, we find ourselves unable to state with any degree of certainty that those persons are the appellants herein.

In the event, we allow the appeal, quash the convictions of both appellants, and order that the sentences be set aside.

The appellants are to be set at liberty forthwith unless they or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Machakos, this 22nd day of September 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE