



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MOMBASA

**Criminal Appeal 86 &
88 of 2006**

**1. JOSHUA
MWANGANGI**

**2.
SALIM KATSANGA
.....
APPELLANTS**

- Versus -

**REPUBLIC
RESPONDENT**

J U D G M E N T

The Appellants, Joshua Mwangangi and Salim Katsanga, were charged in the Chief Magistrate's Court, Mombasa, jointly with others not before the court, with robbery with violence contrary to Section 296(2) of the Penal Code. At the end of a full trial, they were found guilty and sentenced to death. They appealed to this court against conviction and sentence.

The particulars of the offence with which the appellants were charged were that on the 28th day of May, 2005, at Majengo Mapya Village in Likoni Location within Mombasa District of the Coast Province, the appellants, jointly with others not before the court, while armed with dangerous weapons namely pangas and iron bars, robbed Joseph Wainoka of cash money Kshs. 800/-, a wallet and identity card all valued at Kshs. 1,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Joshua Wainoka. As this is a first appeal, we are duty bound to re-examine and re-evaluate the evidence upon which the appellants were convicted.

We note that the complainant is referred to in the charge sheet both as Joseph Wainoka and Joshua

Wainoka. We have assumed that both names refer to one and the same person and that the one is an alias for the other.

According to the evidence of the complainant, he was walking to his place of work at 5.00am on 28th May, 2005, when three people ambushed him. With him was his neighbour, one Fred. One of the three chased Fred away. The other two attacked him while armed with pangas and iron bars. They cut him on the left hand using a panga and on the head as well. The one who had chased Fred away joined them and they all ransacked the complainant's pockets and took away his wallet containing his identity card and cash Kshs. 800/- then they escaped. As there was electric light in the shops nearby, the appellant said that he was able to recognize his attackers as people who used to visit his neighbour Omari but he did not know their names. He reported the incident to the police on 30th May, 2005 where he was issued with a P3 Form. In his report, he said that he knew the robbers and that he could identify them although he did not know their names. About two months later, he saw two of them visiting Omari and sent his wife to call the police. The two were arrested and they were the ones in the dock.

Fred Epari testified as PW2. He said he was going to work with the complainant when they met three people who greeted them. Two of them held the complainant while the third one chased PW2 away. He did not see them well, nor what they did or what they carried. He was not able to identify them in court as he had ran away and gone back home. Later that day, he met the complainant who told him the attackers had beaten him and robbed him, and he showed PW2 an injury to his head and hand. The complainant also told him that he knew the robbers and he could identify them if he saw them.

The third prosecution witness was Kibiego Rono, the investigating officer. He testified that on 30th May, 2005, he received a report from the complainant to the effect that he had been robbed and that he could recognize the robbers. He thereupon issued the complainant with a P3 Form. Thereafter, the complainant's wife went to the Police Station on 17th July, 2005 and reported that they had spotted the robbers. The police were then led where the robbers were and arrested them. The last prosecution witness was Dr. Chidagaya Swalehe who produced the P3 Form which had been filled in by Dr. Njoroge.

In an unsworn statement in self defence, the 2nd appellant said that he was arrested while watching television at home and did not know anything about this charge. The 1st appellant also said he was arrested while in the company of the 2nd appellant and that they were alleged to be having stolen property in their house, and also to have injured the complainant. He also said that the complainant had previously quarrelled with the 2nd appellant over an allegation that the latter had injured the complainant's child and so the complainant had a grudge against them.

After considering the evidence on record, we take the view that the main issue for determination in this matter is whether the appellants were properly identified as the robbers. The only evidence of identification is that of the complainant himself, who testified that he recognized the appellants as persons whom he used to see visiting his neighbour Omari. The evidence of a single identifying witness must be taken with the greatest circumspection before it can be used as a basis for a conviction. We are also alive to the fact that recognition of an assailant is much more reliable than identification of a total stranger, and that in this case the complainant testified that he recognized the appellants. It is common ground that the alleged robbery took place at about 5.00am. It is usually very dark at that hour, but the complainant testified that there was electrical light radiating from the shops nearby, and that he recognized the appellants from that light. However, there is no evidence as to how far the parties were from the light, how bright the light was, or its relative position to the parties.

In the case of MAITANYI v. REPUBLIC [1986] KLR 198, the Court of Appeal had this to say about identification by such light –

“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve ... It is at least essential to ascertain the nature of the light available. What sort

of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into ...”

In this case, even though the complainant said that there was electric light, there is no evidence on the important matters relating to its size and especially its position relative to the suspects.

Secondly, there is no evidence as to how long the attack took and how much of that time the complainant had to identify the faces of the attackers. It is possible that he could have mistaken them for the people who come visiting his neighbour Omari, and the moment such a mistake occurs, he would have no problem perverting it by identifying Mr. Omari’s visitors as he would have mistaken them for the genuine robbers. Not even an identification parade can cure such an error. We note that in cross examination by the first appellant, the complainant said –

“I knew you well and I told the police as much. It is not possible for people to look alike.”

We need say no more than that the second sentence is unfounded totally erroneous. People do sometimes resemble, and cases of mistaken identity do occur. In R. v. TURNBULL [1976] 3 All ER 549, Lord Widgery, C.J., said at page 552 –

“... recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

If mistakes in recognition of close relatives and friends are sometimes made, we should be ready to acknowledge that many more such mistakes are also likely to be made in respect of those who are not well known to us, especially when lighting conditions are not favourable, and more so when the party identifying is under a sudden attack.

For the above reasons, we think that it is possible that the complainant could have made a mistake. We therefore allow the appeal, quash the conviction for robbery with violence and set aside the death sentence. The appellants are accordingly set free forthwith unless they are otherwise lawfully held.

Dated and delivered at Mombasa this 25th day of November 2008.

L. NJAGI

JUDGE

F. AZANGALALA

JUDGE