REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 86, 87 & 89 of 2005 (Consolidated)

EDWARD MARWA MAISORI…..……1ST APPELLANT

ALFRED MAHERE RIOBA……..2ND APPELLANT

GEORGE BIKERI NYAKUNDI…….…..…..3RD APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT.

EDWARD MARWA MAISORI, ALFRED MAHERE RIOBA and **GEORGE BIKERI NYAKUNDI** were, jointly charged with the offence of robbery with violence contrary to **Section 297(2)** of the **Penal Code** in Nakuru CMCCC No.2114 of 2003**.** The particulars of the charge against them were that on 30th October 2002 at about 8.30 p.m. at 20 Acres Area, Molo in Nakuru Distric of Rift Valley Province, jointly with others not before the court, and while armed with dangerous weapons namely G3 Rifle, clubs and pangas, they robbed Evelyn Wangui Kshs. 200/-, one 24" TV set, one portable radio, 2 pangas, and a pair of children's sports shoes and that at or immediately before or immediately after the time of the said robbery they used personal violence on Anne Mumbi Njenga. They pleaded not guilty to the charge but upon trial they were convicted and handed down the mandatory death sentence. They have all appealed to this court against that conviction and sentence.

The prosecution case was that on the material day and time Ndungu Gitau, PW3, while at the home of the complainant, Anne Mumbi Njenga, PW1, the latter called him and as he walked to her house he heard people walking behind him and in no time he was surrounded by the assailants. With a gun trained at him he was ordered to enter the complainant's house. In the house, he and the complainant as well as her daughter PW2, they were all ordered to lie with their heads facing the ground. The robbers then ransacked the house and robbed PW1 of the items listed on the charge sheet after which they disappeared. The matter was reported to police and after their arrest at various places, on identification parade was conducted, was able to identify PW1 and PW3, the Appellants who were charged with this offence.

The case was first heard Mr. B.K. Kirui the SRM at Molo who heard the entire prosecution case and upon his transfer it was completed by Mrs T. Wekulo, SRM at Nakuru. Upon being put on their defences the Appellants gave unsworn statements and called four witnesses. Their evidence as well as that of DW4 dwelt mainly on their arrest. DW1, DW2 and DW3 produced OB reports.

In their petitions of appeal and submissions, the Appellants have raised four main grounds of appeal, they complained that **Sections 169(1), 200** and **211** of the **Criminal Procedure Code** (the CPC)were not

complied with; that the learned trial magistrate erred in relying and convicting them on flawed identification evidence; that the trial magistrate erred in refusing the appellants the right to call all their witnesses and failing to adequately consider their defences finally their conviction was against the wait of evidence on record.

In his written submissions the first Appellant who raised ground one argued that upon being called to defend themselves the trial magistrate failed to warn them on their defences. (whatever that means) He also contended that the trial court rejected their defences for no good reason and in so doing failed to write a judgment as required by **Section 169(1)** of the **CPC**. As regards **Section 200**, he submitted that the magistrate who took over the case did not explain the import of that section to them thus occasioning them serious prejudice.

On identification the Appellants submitted that besides failing to realize that the identification parade was conducted in contravention of the **Police Standing Orders**, the learned trial magistrate also erred in failing to realize that the evidence of the identifying witnesses, especially that of PW1, could not be relied upon as they had not given the Appellants' descriptions to the police prior to the parade. They contended this was clear from the OB reports produced and PW1's testimony that she did not give their descriptions because she was not asked. They also submitted that given the suddenness with which the robbery was carried out and a gun trained at them, the identifying witnesses could not have identified anybody.

The first Appellant took serious issue with the evidence of PW7 who said that the first Appellant led him to the recovery of the gun produced in this case. He submitted that that allegation amounted to a confession which should have first been recorded in accordance with the Judges Rules. That having not been done he urged us to reject his evidence. If we overrule him on that he submitted that we should nonetheless reject that evidence as none of the other police officers and the informer who were with him was called to give evidence. There was no ballistic expert evidence that the gun was capable of firing a bullet. It was not in any case dusted for finger prints.

On the weight of evidence, the Appellants contended that their arrests was not no linked to the case they were charged with and convicted of. Moreover, they further contended, they were not arrested with anything that linked them with the offence. They said the investigating officer's failure to testify was fatal to the prosecution case. They also urged us to dismiss the evidence of PW2 as she was a child of tender years. On the whole the Appellants submitted that there was no sufficient evidence to support their conviction and urged us to allow these appeals.

Supporting the Appellants' conviction, Mr. Mugambi, the learned state counsel, started by dismissing the third Appellant's allegation that he was detained in police custody for more that 14 days and said that having had several cases, it is not clear if the third Appellant was not in custody in respect of other cases. On the appeal itself, he submitted that there was a spate of robberies in Nakuru District in October, November and December 2002 including the one in this case. He submitted that although some of the Appellants were arrested for other offences, investigations led to their involvement in the robbery in this case. ??

As regards identification he said that the robbery took about 20 minutes and there was electric light throughout which enabled the witnesses to see the robbers. He concluded that the identification of the Appellants was proper and that there was overwhelming evidence to support their conviction.

We have anxiously considered these submissions and carefully read the record of appeal. To start with, we agree with the learned state counsel that the third Appellant's allegation of having been detained in police custody for more than 14 days before he was taken to court has no basis. He himself admitted that he had other cases. It is therefore not clear for which one he was in police custody and when. We accordingly dismiss that complaint.

We also find no substance in the other Appellants' contention that **Section 200** of the **CPC** was not complied with and that their defences were not properly considered. The first Appellant is shown at page 45 of the record as saying that they had "agreed that the matter should proceed from where it stopped."

What seems to have been their major concern was the disappearance of the police file which had delayed the hearing. In her judgment, the learned trial magistrate said she complied with that section. We are therefore satisfied that **Section 200** of the **CPC** was complied with. We are also satisfied that the learned trial magistrate considered their defences in detail and dismissed them. Whether she was right in so doing is another issue.

On the main grounds of appeal it is clear, from the perusal of the record, that the Appellants' conviction is based solely upon evidence of visual identification. It is trite law that:-

"**Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction" - *R-Vs- Eira Sebwata [1960] EA 174.***

It is also trite law that the trial court is enjoined to consider such evidence carefully and satisfy itself that the prevailing circumstances were favourable for a proper identification. This is how the Court of Appeal expressed itself on this point in **Wamunga Vs Republic [1989] KLR 424 at p. 426**:-

"It is the law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction."

A witness can be honest but mistaken-**Kiarie Vs Republic [1984] KLR 739**-there is always a requirement that**:**

"**In every case in which there is a question as to the identity of the accused, the fact of there being a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given"-*David Masinde & Another Vs Republic, Criminal Appeals Nos. 33 &34 of 2004 (consolidated).***

Applying these principles to this case we are satisfied that the purported identification of the Appellants by PW2 and PW3 cannot be relied on. When the robbers entered the house they ordered everybody to lie down and PW2 lay on the sofa set and covered herself with a blanket throughout. She uncovered herself when the robbers had left. Having not even participated in the identification parade her dock identification of the Appellants was useless. On his part PW3 lay facing down until he was ordered to stand without facing the robbers and taken into a toilet where he was locked up. He was therefore not able to properly see the attackers. We are, however satisfied that PW1 properly identified the Appellants. Having born in mind the warning contained in several decisions including **Cleophas Otieno Wamunga vs. Republic - Criminal Appeal No. 20 of 1989** and also warned ourselves of the danger of basing a conviction the on the evidence of a single visual identification witness we are nonetheless satisfied her evidence can be relied upon.

Despite thorough cross-examination PW1 was categorical and we agree with her that she saw the Appellants clearly. Her house was lit with electricity throughout the robbery. Although she was, together with PW2 and PW3 initially ordered to lie facing down, PW1 was grabbed and taken around in the house, from the lounge to the kitchen and finally into the bedroom and asked to give the robbers money. As the Appellants were no masked, she was able to see what each carried and she gave details of the role each played during the 20 minutes ordeal she was taken through.

As regards the conduct of the identification parade we find no fault with it. PW5 testified that while conducting the identification parade for the first Appellant who had gunshot wounds on the leg all the parade members were seated with their legs covered. PW1 had no problem picking the first Appellant. She had also no problem identifying the second and third appellants. In the circumstances we find that the Appellants were properly identified by PW1 and we accordingly dismiss this ground of Appeal.

DATED and Delivered at Nakuru this 11th day of December, 2008.

M. KOOME

JUDGE.

D.K. MARAGA

JUDGE.