



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 343 & 346 of 2003

[From original conviction and sentence in Criminal Case No. 2155 of 2001 in the Chief Magistrate's Court at Nakuru – J.S. KABURU [S.P.M.]

PAUL KELLY KILOVIA 1ST APPELLANT

GERALD NGERU KARIUKI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, *Paul Kelly Kilovia* and *Gerald Ngeru Kariuki*, the 1st and 2nd appellants respectively were charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

The particulars of the charge stated that on the nights of 9th and 10th August 2001 at the Nakuru General Post Office, Nakuru town, Nakuru District within the Rift Valley Province jointly with others not before court and while armed with dangerous weapons namely pistols and iron bars robbed ***Julius Ongweyi Omae*** cash Kshs.2,300/- and at or immediately or immediately after the time of such robbery threatened to use personal violence to the said ***Julius Ongweyi Omae***.

They also faced an alternative charge of breaking into a building and committing a felony contrary to **Section 306 (a) of the Penal Code**.

The particulars of the alternative charged stated that on the nights of 9th and 10th August 2001 at the Nakuru General Post Office, Nakuru town, Nakuru District within the Rift Valley Province, jointly with others not before court broke and entered the post office strong room and committed therein a felony namely stealing.

The appellants pleaded not guilty and after a full trial, they were convicted of the main charge and sentenced to the mandatory death sentence.

Being dissatisfied with the conviction and sentence, the appellants have appealed and their appeals were consolidated and heard together. In their petitions of appeal, the appellants have challenged the conviction which was based on evidence of identification which the appellants contended was difficult

due to the prevailing circumstances.

They also faulted the conviction which they submitted was based on the evidence by the prosecution's witnesses which failed to prove the offence of robbery with violence beyond reasonable doubt. The appellants argued that vital witnesses such as the arresting officer were not called to give evidence. It was also the appellants' contention that the trial court failed to take into account the evidence by **PW 9** whose evidence could have exonerated the appellants.

They also faulted the evidence of an identification parade which in they argued in their submissions was conducted irregularly.

These grounds of appeal are similarly raised in respect of the petition of the 2nd appellants. During the hearing of this appeal, the appellants applied and were granted leave to rely on further grounds of appeal and written submissions in addition to their oral submissions.

This appeal was opposed by the State, the learned State Counsel, **Ms Obati** supported both the conviction and sentence which she submitted was based on evidence of identification of the appellants by no less than three prosecution witnesses.

This being the first appeal, this court is required to reconsider and re-evaluate the evidence before the trial court and arrive at our own dependent determination on whether or not to uphold the conviction of the appellants. This court has to bear in mind that it neither saw nor heard the witnesses as they testified. (See the case of **Njoroge Vs Republic KLR page 19**).

We therefore set out briefly the summary of the evidence before the trial court:

On the night of 9th and 10th August 2001, **Julius Ongwenyi Omae, PW 1** was guarding the premises of Post Office at Nakuru as an employee of Modern Security Guards. At 3.00 a.m. as he opened for the Post Office Mail vehicle, a gang of six people attacked him, tied his neck with his tie, took him to one of the rooms and one of the robbers guarded him, while one of the robbers took **PW 1**'s guard's uniform wore them and stood at the gate, pretending to be **PW 1**.

At 5.30 a.m. **Christopher Onyango Sumba, PW 4** also an employee of Modern Security Guards made a routine check on their Security Guard at the General Post Office which was being guarded by **PW 1**. He was accompanied by a driver and when they hooted at the gate, he saw two people walking from inside the premises; one of them was wearing the uniforms for Modern Security Guards. **PW 4** told the court that he noticed that, the person he saw was not the **PW 1** and when he started interrogating him, he realized that the person was not their guard. He tried to hold him but the person started fighting back and within no time, **PW 4** was confronted by other robbers. That is when he realized that the premises are surrounded by robbers. In the cause of the scuffle and the fight, he scratched this person and he raised an alarm and all the robbers disappeared. **PW 4** reported the matter to the police and realized that their guard **PW1** had been tied. They untied him and recorded a statement with the police.

Simon Imbiaka, PW 6 also an employee with Modern Security Guards and he was with **PW 4** when they visited the General Post Office and when they were confronted at the gate by two people, one of the robbers was posing in their guard in **PW 1**'s uniform while the other one was wearing a red jacket. **PW 6** told the court that he struggled with the one wearing a red jacket and **PW 4** struggled with the one who was wearing the uniform.

David Marit Koech, PW 2, the Postmaster confirmed that the Post Office safe was broken into by use of gas frame and Kshs.956,000/- was stolen. The breakage was also confirmed by **Jane Kipkemo, PW 3** the assistant cashier also used to work with **PW 2**, she testified about the breakage in the strong room and safe and the fact that money was stolen during the night of 9th and 10th August 2001.

Inspector of police **Johnson Lymbila, PW 8** was attached to Nakuru police station when they received

the report of breakage and theft at the General Post Office on the night 9th and 10th August 2001.

Two months later in October 2001, while **PW 8** was on duty, they received information about breakage and theft at the Uchumi Supermarket. The breakage and method of entry by use of gas cylinders was similar to the one that was used at the General Post Office. Through investigations the police were able to trace the taxi driver or the vehicle that ferried the gas cylinders to Uchumi Supermarket. The appellants were arrested the same night when Uchumi Supermarket was broken into.

An identification parade was conducted by Chief Inspector **Paul Kirui, PW 5** on 11th October 2001. **PW 1** and **PW 6** were able to identify the 2nd appellant at that parade. The second identification parade was conducted by the Inspector of Police **John Mithanga, PW 7** in respect of the 1st appellant. The 1st appellant was identified by **PW 1**.

Put on their defence both appellants gave a sworn statement of defence and denied having had anything to do with the robbery and breakage of the premises. The learned trial magistrate found the evidence of **PW 1, PW 4** and **PW 6** regarding the identification of the appellants credible and he proceeded to make the following findings;

*“What I have to decide is whether or not accused persons were involved. The most relevant evidence is that **Angwenyi, Sumba** and **Imbiaka** who are guards with Modern Security Guards. **Ongwenyi** told the court that the Post Office where he guarded had powerful security lights. I believe him because when **Sumba** came to check on him he immediately saw that the man in uniform was not **Ongwenyi**. He had also seen two people walk inn the yard. It is my finding that there was enough light, the conditions were favourable a positive identification. Therefore **Ongwenyi** saw accused 2 well. He picked him easily in an identification parade. Also **Sumba** and **Imbiaka** picked the 1st accused easily at an identification parade.”*

This appeal turns only on the issue of whether the appellants were properly identified. The principles governing the identification and the standards of care when a court is dealing with evidence of identification especially from a single identifying witness or when the circumstances of identification can be said to be difficult were set out in the case of **Maitany Vs Republic KLR [1986] page 198**. The Court of Appeal reiterated those principles in the well known authority in the case of **Abdullah Bin Wendo and Another Vs Republic [1953] 20 E.A.C.A page 166** and retaliated the oven repeated words as follows: -

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In this case, it is clear from the records that the robbery took place at about 3 a.m. and it went on up to about 5.30 p.m. when **PW 4** and **PW 6** visited the premises. According to the evidence, there was light from the security lights that lit the Post Office premises. **PW 1** who was the victim of robbery identified the 1st appellant, **Paul Kelly Kilovia** as one of the robbers who kept him guarded at the back of the premises while the robbery was continuing. **PW 1** said that there were powerful security lights and he was with the 2nd appellant for more than an hour and that is how he was able to identify him at the identification parade.

The 1st appellant was identified by **PW 4** and in his evidence, he said he was able to identify him because when they struggled he scratched the 1st appellant on the face and he was able to identify the scratch mark that he inflicted on the 1st appellant at the identification parade. The 1st appellant was also identified by **PW 4** at the identification parade.

Upon evaluation of the evidence before the trial court, we are satisfied that the identification of the 1st appellant was free from any mistake because the evidence of **PW 4** is clear that he gave the description of the assailant, he was able to identify him because of the scratch mark he had inflicted on him during the scuffle that ensued during the robbery. The 1st appellant is also the person who was wearing the guard's uniform and was pretending to be the guard from Modern Security Guards. **PW 4** also interrogated him when he realized he was not their guard and they started fighting when PW 4 inflicted on him the scratch on the face.

We are satisfied that the identification of the 1st appellant by **PW 4** and **PW 6** was safe and we confirm the conviction and sentence.

As regards the identification of the 2nd appellant, he was identified by **PW 1** who was the victim of the robbery and who said that the 2nd appellant guarded him throughout the robbery operation which is said to have lasted for about thirty minutes. He described how he was able to see him through the security lights which lit the premises. Further, **PW 1** was able to identify the 2nd appellant during the identification parade.

PW 1 did not give any distinctive features that were attributable to the 2nd appellant and which enabled him to identify the 2nd appellant. It is noteworthy that **PW 1** who was the victim of robbery had been attacked and tied, there is a possibility that he might have been in a state of shock.

The other witnesses namely **PW 4** and **PW 6** who came to the premises and even fought with the robbers were not able to identify the 2nd appellant during the identification parade. For this reason, we are not satisfied that that conviction against the 2nd appellant is safe and we quash the conviction and set aside the sentence in respect of the 2nd appellant.

In the upshot of the above analysis, we dismiss the appeal by the 1st appellant; we confirm the conviction and sentence by the trial court. We allow the appeal in respect of the 2nd appellant; quash the conviction and sentence, and unless the 2nd appellant is otherwise lawfully held he is hereby set at liberty.

It is so ordered.

Judgment read and signed at Nakuru on this 15th day of March 2007.

M. KOOME

JUDGE

L. KIMARU

JUDGE