REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1030 & 1031 of 2003

JOSEPH GITAU……..…….....……..……..APPELLANT

VERSUS

REPUBLIC…….....…….....……..…....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1031 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 3835 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – SPM)

COLLINS OMUKOTO RUBAI..…...…….....……..……..APPELLANT

VERSUS

REPUBLIC…….....……..…....RESPONDENT

J U D G M E N T

JOSEPH GITAU and **COLLINS OMUKOTO RUBAI** were jointly charged with four counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** before the Senior Principal Magistrate's Court at Kibera. After a full trial, each of them was found guilty and convicted for each of the four counts and sentenced them to death in each count. It was erroneous to sentence the Appellants to death in each of the four counts. As we have said time and again, a person can only suffer death once. Where the accused faces more than one capital charge, the trial court has one of two choices. Either sentence the person to death in each count and then suspend the sentence in all except in one count. Alternatively, the trial court can sentence the person to death on one count and leave the rest of them with no order as to sentence. (See **Meru Ndenge Boru & Another vs. Republic, Cr. App. No. 1907 of 2001** (unreported)

We consolidated the Appellants' appeals.

The Appellants have raised similar grounds of appeal in which they have challenged the accuracy and credibility of the evidence of identification by four witnesses, PW1, PW2, PW3 and PW4 contending that the said identification was made under difficult circumstances, was not supported by first reports in which the Appellants descriptions were given and lack of identification parades. The second ground was the lack of evidence to establish the offence charged in terms of lack of P3 form to prove assault and lack of proof on the required standard of proof. The last ground was that the Appellants' defences were rejected without convincing reasons.

MR. MAKURA, learned counsel for the State opposed the appeal. The learned counsel submitted that the evidence adduced by the prosecution was sufficient to sustain the convictions. That contrary to the Appellants' submissions, identification parades were conducted in the case in which PW1 and PW2 identified the 1st Appellant while PW3 identified the 2nd Appellant in another identification parade. Learned counsel submitted that the incident in respect of PW1 and PW2 took place at 4.00 p.m. in broad daylight and that PW1 and PW2 were together at the time and each corroborated the other's evidence. PW6 arrested both Appellants separately as they tried to attack him. The learned counsel also submitted that the Appellants' defences were duly considered by the learned trial magistrate before they were dismissed for being unbelievable. Counsel urged us to find the appeal without merit and to dismiss it.

We have analyzed and evaluated afresh the evidence adduced before the lower court giving due allowance for the fact that we neither saw nor heard the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32, PANDYA vs. REPUBLIC 1957 EA 336**.

The facts of the case were that on 25th January 2003, at 4.00p.m. PW1, PW2 and PW3 drove with friends to Jamhuri Park where 10 young men armed with machetes attacked and robbed them. They made reports to the police. Later, they claimed, PW1 and PW2 identified the 1st Appellant as their attackers in identification parades. PW3 on his part identified the 2nd Appellant as the one who robbed him. PW1 was the Complainant in Count1, PW2, Complainant in count 2 and PW3 the Complainant in count 3.

In a separate incident on 16th February 2003 at 1030 p.m. PW4 was walking from Jamhuri Park accompanied by his sister when he asked directions from the Appellants and another. PW4 claimed that the three misdirected him and soon thereafter in a group of about 8, the pair robbed him of personal documents and cash. In the course of the robbery, the 2nd Appellant hit PW4 on his leg with a panga and he, PW4 managed to apprehend him. With help of a good Samaritan PW4 took the 2nd Appellant to the police station where PW6 re-arrested him and recovered a panga from him. From the evidence of PW4 it appears that the learned trial magistrate included inadmissible evidence which shows how PW4 managed to apprehend the 1st Appellant.

Both Appellants denied the charges in their defences.

It is true that the Appellants were both convicted on the basis of visual identification. The learned trial magistrate made this observation in that regard: -

"***The Court observes that PW1, PW2 and PW3 were all attacked during the day i.e. 3.30 p.m. They were able to identify the 1st and 2nd accused as having been in the company of 10 other people who attacked and robbed them on 25/1/03. The witnesses were able to identify the two at an identification parade".***

The Appellants submitted that there was no evidence adduced by a parade officer to show that any identification parades were ever conducted for the identification of the Appellants. It is quite clear from the evidence that no evidence to prove that identification parades were conducted was adduced before the court. We are perturbed by the learned trial magistrate's 'observation' that any identification parades were conducted by the police and equally perturbed by the courts finding that PW1, PW2 and PW2 identified the Appellants during the alleged parade. Learned counsel for the State in his submissions also contended that identification parades were conducted by the police and equally perturbed the court that PW1, PW2 and PW3 identified the Appellants during the alleged parades.

Even if there were any identification parades conducted in this case, no evidence was adduced before the Court to support such an allegation. The trial court must go by the evidence adduced before court and not by assumptions or summations. It is true that PW1, PW2 and PW3 said that they identified the Appellants in identification parades. However, being laymen, it cannot be assumed that what they perceived as parades were actually properly mounted, identification parades according to the law. PW6 who received most of the Complaints in the case stated clearly that he could not tell whether any

identification parades were mounted in the case because after the Appellants were received at their police post (Jamhuri) they were later transferred to Kilimani Police Station for purposes of investigations. No investigating officer testified in this case. No parade forms were displayed in court or admitted in evidence. We find that clearly from the record of the trial proceedings there was no basis of the finding by the learned trial magistrate that any parades were conducted in which the witnesses identified the Appellants.

That means that the only evidence against the Appellants in respect of counts 1, 2 and 3, was visual identification. In the case of **MOHAMED MAFHABI & OTHERS vs. REPUBLIC CA No. 15 of 1983** (unreported) quoted from an earlier court of Appeal case. **REPUBLIC vs. ERIA SEBWATE [1960] EA 174** thus: -

"***When the evidence alleged to implicate an accused is entirely on identification, that evidence must be absolutely water tight to justify a conviction."***

Can the evidence of PW1, PW2 and PW3 be regarded as watertight? It is to be noted that after the attack and robbery on 25th January 2003, these three witnesses next saw the two Appellants in court as they gave their evidence which was on 27th July 2003. That was a lapse of a period of seven months from the date of robbery to the date of their testimony in court. The attack was sudden, unexpected and took a minute according to PW1. it is also noted that two of these witnesses, PW1 and PW2 identified the 1st Appellant while the 2nd Appellant was identified only by PW3. in respect of the 2nd Appellant his identification was by a single witness. When asked whether they had described any of their attackers to the police, only PW3 said he gave a description to the police but he failed to disclose the sort of description he gave. PW1 and PW2 did not give any description. PW6, who seems to have received their first report, did not say that the reports included any descriptions of the assailants. The evidence of identification by PW1, PW2 and PW3, as per this record can only properly be described as dock identification made after a lapse of 7 months.

While dealing with such evidence the Court of Appeal in the case of **PETER KIMARU MAINA vs. REPUBLIC CA No. 111 of 2003** stated thus: -

"…***visual identification must be treated with greatest care and ordinarily dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect on a properly conducted parade…"***

The evidence of visual identification by PW1, PW2 and PW3 fails to meet the required test for having lacked support of prior descriptions of the Appellants by the witnesses to the police and in view of the lack of any evidence of identification at properly mounted identification parades. The fact that two witnesses, PW1 and PW2 identified the 1st Appellant does not make the identification any more credible. Their evidence needed corroboration from other evidence, whether direct or circumstantial, for it to be relied upon. There was no such corroboration of their evidence.

The Appellants' complaint that the evidence of identification was made under difficult circumstances and lacked credibility for being dock identification was not without merit. Considering the manner in which the attack on the three occurred, we are in doubt whether these three witnesses were in a position to identify those who attacked them several months down the line in the circumstances. The evidence of identification was shaky and unreliable to base a conviction upon for the 1st, 2nd and 3rd counts against the Appellants.

The 4th count was from an incident which took place on 25th January 2003 against one **SAM DE SOUZA**. No such complainant testified before the Court and we fail to understand how the court came to the conclusion that this offence was proved. In fact there was a failure to prosecute this particular charge and the learned trial magistrate ought to have acquitted the two Appellants for count 4 under **Section 210** of the **Criminal Procedure Code** at the ruling stage for lack of evidence. The conviction is unjustifiable and cannot stand.

Having considered the Appellants' appeals, we are unanimous that their convictions were dangerously unsafe and ought not to be allowed to stand. We allow the two appeals, quash all the convictions and set aside the sentences imposed. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 16th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE

Read, signed and delivered in the presence of;

Appellant(s)

Mrs. Kagiri for the State

Ann/Eric– CC

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

JUDGE