



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 954, 955, 956 & 957 of 2003

JOSEPH GITUKUI CHEGE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 955 OF 2003

(From original conviction and sentence in Criminal Case No. 3629 of 2002 of the Chief Magistrate's Court at Thika – Betty Rashid, P.M.)

DAVID MUNENE NJENGA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 956 OF 2003

(From original conviction and sentence in Criminal Case No. 3629 of 2002 of the Chief Magistrate's Court at Thika – Betty Rashid, P.M.)

JOHN MBUI NJENGA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 957 OF 2003

(From original conviction and sentence in Criminal Case No. 3629 of 2002 of the Chief Magistrate's Court at Thika – Betty Rashid, P.M.)

SAMUEL NJUGUNA THUA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

JOSEPH GITUKUI CHEGE, DAVID MUNENE NJENGA, JOHN MBUI NJENGA and **SAMUEL NJUGUNA THUA** to whom we shall hereinafter refer to as the 1st, 2nd, 3rd and 4th appellants respectively were charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. On the 1st count, it was alleged that on 23rd November, 2000 at Karangi coffee estate Ruiru in Thika District within the Central Province jointly with others not before Court they whilst armed with dangerous or offensive weapons namely pistols robbed one Charles Kibe Karanja one motor vehicle Registration No. KAK 295H make Datsun Pick Up valued at Kshs.300,000/= and at or immediately before or immediately after the time of such robbery killed the said Charles Kibe Karanja. Particulars of the second count were that on the same day and place whilst armed as aforesaid, the appellants robbed one Philomena Ndanga Karanja cash Kshs.300,000/= and one T.V. receiver all valued at Kshs.350,000/=. The appellants were duly tried and convicted. They were then each sentenced to death as provided for under the law.

The appellants were aggrieved by the conviction and sentence. They each separately lodged appeals to this Court which we have consolidated for ease of hearing. All the appellants fault their conviction by the trial magistrate on the basis of identification, credibility of witnesses and failure to consider their Defences by the trial Magistrate.

The brief facts of the prosecution case were that on 23rd November, 2000 at about 9 p.m., PW1 heard a loud bang as she watched T.V. upstairs in her house at Karangi Coffee Estate, Ruiru. PW1 then switched off the T.V. and walked downstairs. Along the staircase she bumped into 4 men, two of whom were armed with guns. The 4 intruders then demanded money from PW1 from the 3 safes they claimed were in the bedroom. PW1 complied and led them towards the bedroom and as she opened the bedroom door she saw via a large size mirror a person whom she recognized. That person as it turned out was the 3rd appellant whom she knew very well as he was her former employee. Whilst in the bedroom PW1 asked one of the intruders who was tall to get the safe keys from the top of the curtain box. The tall intruder then stepped on the toilet seat and retrieved the keys which he handed over to PW1. It was at this point that PW1 was able to identify the said tall person. He is the 2nd appellant herein. She opened the safe and handed over the 3 envelopes that contained Kshs.100,000/= each. In the process of handing over the money, PW1 also managed to identify the other intruder who she claimed was the 1st appellant. The four intruders then left and she followed them outside only to find her compound teeming with thugs. One of the thugs with a gun confronted her and demanded for her husband's gun but she told him that he had none and some of the thugs then walked towards the house after ordering her to sit down. Whilst seated and being guarded by other thugs, she observed that her husband's motor vehicle had hit the gate and was surrounded by some other thugs. Soon thereafter one of the thugs started the motor vehicle registration number KAK 235H belonging to Charles Kibe Karanja that was in the compound and shouted to the rest to board it as they were now leaving. When the thugs left, PW1 went to her husband's motor vehicle at the gate and noted that he, Charles Kibe Karanja had been shot dead. PW1's workers who had also been confined to their quarters by the armed thugs then came out. The police were contacted over the incident who came over immediately and took the body of PW1's husband to the mortuary.

Two years later on 3rd June, 2002 and 19th June, 2002 respectively PW1 managed to identify the 1st and 2nd appellants as having been part of the gang that raided her house on the material day in an Identification Parade. According to PW10, the Investigating Officer, the appellants were implicated in the crime by one Harrison Njenga Gitau who was a co-accused in the Subordinate Court but who escaped from lawful custody when the prison authorities were transporting remandees from Court back to prison custody. He had been arrested by the witness in connection with another case of robbery with violence. Following interrogations he led the police to the arrest of the appellants. Following further investigations, the appellants were charged accordingly.

When put on their defence, the 1st appellant, testified that on 26.5.2002, 4 police officers arrested him and took him to Thika Police Station where he was remanded for 2 days. Thereafter he was questioned over matters he knew nothing about. That a lady was later brought who carefully looked at his ear and mouth for special features. An Identification Parade was subsequently conducted at which the said lady picked him out. According to the appellant he was jointly charged with people he did not know and over offences he never committed.

As for the 2nd appellant, he testified in his defence that on 13.6.02 at 8 p.m., police officers arrested him and took him to Pangani Police Station. The following day he was questioned over these offences which he knew nothing about. Later on he was made to sign papers already written and which he had been made to copy.

The 3rd appellant on his part testified that he was driving a matatu in Mombasa on a day he could not remember when he was stopped and arrested by police officers. He was then taken to Central Police Station, Mombasa where he was remanded for 9 days before being brought to Pangani Police Station. It was his defence that PW1 had a grudge against him as she believed that the appellant had stolen and sold her lorry whilst in her employment.

The 4th appellant stated in his defence that on 2/5/02 at 7 a.m. he was arrested by 3 people who took him to Thika Police Station and questioned him regarding the theft at Karangi Coffee Estate. On 6/6/02 he was brought to Court and charged with the offences he knew nothing about. He stated further that on the day that the robbery was committed, he as an employee of PW1 was guarding the water pump on the farm the whole night. At dawn he took the keys to the security officer of the farm who informed him about what had transpired during the night. He continued working for PW1 until 2001 when he left PW1's employment and was paid his dues. He denied that he had escaped soon after the robbery.

In support of the appeals, each appellant tendered written submissions which we have carefully read and considered.

The state through Mrs. Kagiri, learned State Counsel, opposed the appeals and supported both the conviction and sentence. Counsel submitted that the robbery was so brutal that PW1's husband was killed in the process. Counsel submitted that there was evidence that the assailants were armed with guns. That the evidence on record shows that PW1 was able to identify some of the robbers as the electric lights were on throughout the incident. The learned State Counsel further submitted that PW1 was able to recognize the 3rd appellant through the full size mirror in the bedroom. The 3rd appellant was her former employee. For this reason, Counsel submitted that police did not find it necessary to conduct an Identification Parade in respect of this appellant.

With regard to the 1st and 2nd appellants, Counsel submitted that PW1 was able to see them clearly and even described them as the two tall men. According to PW1 it was the 2nd appellant whom she directed to where the keys to the safe were. That the 2nd appellant got the keys and handed them to her whereupon she was able to see the 2nd appellant clearly and that is why she had no problems at all in pointing him out in an Identification Parade. As for the 4th appellant, learned State Counsel submitted that PW1 recognized him during the robbery. He was PW1's watchman. According to the State Counsel, the evidence of PW1 was clear and consistent. That PW4 corroborated the evidence of PW1 to a large extent.

In reply, the 1st appellant submitted that although PW1 stated that there was light during the incident, she did not however elaborate on the intensity of the said light. That further PW1 had stated in cross examination that she was not able to identify any of the robbers. On his part the 2nd appellant stated that in his alleged confessionary statement he only mentioned the 3rd appellant. The 3rd appellant in his reply stated that PW1 never said that she told him where the keys to the safe were and that he went for them. Further that PW1 said in cross-examination that she did not mention that she had identified any one. That PW1 knew the appellant very well and if she had recognized him, she could have mentioned his name.

As for the 4th appellant he stated in reply that if PW1 had seen him during the robbery she could have given his names to the police since he was her employee to facilitate his immediate arrest.

We have considered this appeals and re-evaluated the entire evidence on record so as to come to our own conclusion bearing in mind that we neither saw nor heard the witnesses and giving due allowance See **OKENO VS REPUBLIC (1972) E.A. 32.**

Identification is the key issue raised by the appellants in these appeals. As circumstances of identification of 1st and 2nd appellants were different from those of 3rd and 4th appellants we propose to deal first with identification of 1st and 2nd appellants individually. However before we do so we wish to observe that the robbery was well coordinated, executed and involved many thugs. Whereas the other robbers guarded the employees of PW1 so that they could not come out of their quarters to the aid of PW1, others were in the meantime at the gate waylaying PW1's husband whom they killed in the process. Others were in PW1's house. PW1's compound was literally swarmed with the thugs. As a result there was pandemonium all over the place. In the house, PW1 was being forced to produce money whilst guns were drawn at her. It was at night. In those circumstances it is clear to us that any identification if at all could have been made under very difficult circumstances. As held in the case of **KARANI VS (1985) KLR**

“..... A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care evidence of a single witness in respect of Identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence----.”

In the instant case PW1 was the only identifying witness. The identification of the appellants is further compounded by the fact that they were arrested two years after the incident. Two of them, 1st and 2nd appellants were subjected to an Identification Parade whereby they were allegedly pointed out by PW1 and PW2.

The evidence of identification of the 1st and 2 appellants was given by PW1. The 1st and 2nd appellants according to this witness were among the four robbers who forcefully gained entry into the house and forced PW1 to give them Kshs.300,000/=. That as they moved up and down the house looking for the safe keys, PW1 was able to Identify them due to the light in the house. The trial Magistrate found as a fact that the appellants had been properly identified for she stated:

“.....The Court is satisfied into positive Identification of 4th and 5th persons in a well lit rooms.....”.

This finding is not supported by any evidence on record. PW1 did not say in her testimony that the room was well lit. All that she said was that there was light in the room. The learned trial Magistrate did not make the necessary inquiries as to the source of light, its intensity and of course the source of light in relation to the appellants. As held in the case of **WANG'OMBE VS REPUBLIC (1980) KLR 149**

“---- In the case where guilt turned upon visual Identification by one or more witnesses, a reference to the circumstances usually requires that the Judge to deal with such important matters as the length of time the witness had for seeing who was doing what is alleged, in what position and the quality of light.”

No evidence was led as to how long PW1 had kept the appellants under close observation as to be able to identify them later. From the evidence, it does appear that there were close to eight thugs in the house. They were moving all over the house. When going to get the keys to the safe, PW1 was sandwiched between these thugs. Two of them had guns drawn at her. They kept harassing her to act quickly. It is the evidence of PW1 that she managed to identify the two appellants. In our own evaluation of the evidence on record and the prevailing circumstances we doubt whether the appellant would have had the presence of mind to be able to identify any of the appellants. Had the trial Magistrate

made the necessary inquiries aforesaid, we are certain that she would have come to a different conclusion other than that the 2 appellants were positively identified.

PW1 was very candid in her evidence that she was shocked and scared upon encountering the robbers. In her testimony in Court, the only identification she talks about or gave is that the two robbers were short and two were tall. In our view this generalization is not descriptive in any way. If indeed PW1 had identified the appellants, it would have been more plausible had she described in her report the clothing the robbers wore or any special features and or marks she noted about them. This is because in the event of a subsequent parade or arrest this first report would have come in handy.

Unfortunately, there was no descriptive evidence given in the first report to the police. Considering the circumstances obtaining at the scene, it is hardly surprising. PW1 was shocked and scared and above all, under extreme duress. Hardly had she recovered from the initial trauma than she found her husband shot dead. In the case of ***KIPWENEN ARAP MOSONIK VS REPUBLIC (1980) KLR 153***, the Court of Appeal stated

“----- No proper first report was given in support of the witness identification. A proper description of the assailant was essential to enable the witness identify the assailant later-----.”

There having been no 1st report tendered in evidence, PW1's alleged identification of the appellant almost 2 years later cannot be said to be full proof.

PW2 was with PW1 throughout the ordeal. She was the granddaughter to PW1. She was forthright in her testimony that

“---- From time I met those thugs and we went upstairs, stayed in sitting room etc. I didn't recognize anyone. 3rd accused was our watchman. I didn't identify any one of the thugs ----.”

This is telling and goes to show the extreme difficult situation PW1 and PW2 were in during the robbery rendering positive identification if at all impossible.

The appellants throughout the hearing demanded to be availed OB's for both Gatundu and Ruiru Police Stations dated 24/11/00. So as test and or challenge the alleged 1st report made by PW1. The said OB's could not be produced on the basis that they were lost. The trial Magistrate then observed rightly so in our view that:

“...its very surprising that the two OB's of 2002 cannot be traced brought to Court ---.”

The trial Magistrate held that in the event that the OB's were not produced, she would hold it against the prosecution and accept the appellant's story as to what transpired. However in her Judgment, the learned trial Magistrate departed from this position and held that failure to produce OB as demanded by the appellants did not occasion them a miscarriage of justice or any prejudice as they had already been arrested. We do not understand this reasoning. The appellants had requested for the OB's and the first report in order to test the credibility of the evidence of PW1 regarding their identification. Failure to avail the same cannot be said not to have occasioned any prejudice to the appellants. The appellants were denied a chance to compare what PW1 had told the police in her 1st report and what she had stated in Court.

On identification parades of the appellants we note that although PW2 was emphatic that she did not recognize any of the thugs, she however surprisingly turned up at an identification parade conducted by PW8 on 3/6/02 and purportedly picked 1st appellant as having been one of the robbers. How is this possible? The appellants have claimed that the parades were conducted contrary to identification parade rules in that they were exposed to the witnesses before the parade was conducted. We think that in light of PW2's testimony, that possibility cannot be ruled out. We are talking here of identification parades being conducted two years after the event. It is a fact that visual memory fades with the passage of

time. Had the trial Magistrate appreciated this aspect of the matter, she may as well have come to a different conclusion as regards to the evidence of identification parade.

“The purpose of holding an identification parade is always to test the correctness of a witness identification of a suspect at the time of the alleged offence -----.”

(See ***PETER MWANGI VS REPUBLIC, CR. APP. NO. 175 OF 1985***. In the instant case PW1 only alleged as already pointed out that she identified the robbers as being tall and short without disclosing anything spectacular about them that would have made her recognize or recall them easily after such long duration of time.

It has always been held that accomplice evidence is evidence of the weakest kind. From the recorded evidence it is clear that the appellants were not arrested on the identification made at the scene but on the strength of a co-accused purported confession. Yet these appellants were not given a chance to cross-examine the co-accused as he escaped from custody. The trial Magistrate in our view ought not to have placed much reliance on the alleged confession to convict these appellants. The maker of the confessional statement was not subjected to any cross-examination by those he implicated to test his veracity.

Having carefully evaluated the evidence tendered herein with regard to identification of these witnesses we are unable to reach the same conclusion that the two appellants were positively identified at the scene of crime by PW1. Conditions favouring positive identification were lacking. PW1's first report to the police was of no use as she did not give any useful description of the appellants. Further the identification parades were conducted poorly and two years after the incident.

As for the 3rd and 4th appellants they were all former employees of PW1. Whereas the 3rd appellant was previously a lorry driver of PW1, the 4th appellant was a watchman. In her Judgment, the learned trial Magistrate stated thus regarding the identification by recognition of these appellants.

“---- As for the 2nd accused person, the complainant testified that she saw the 2nd accused person through a full length mirror when he passed by as the 4 robbers two armed, were escorting her to open the safe. She noted that there were sufficient lights and she clearly saw 2nd accused whom she knew as he used to work for her as a driver and once lost a lorry -----.”

A question that immediately springs to mind is where was the location of this mirror. Further was robber in front or behind PW1 when he passed and he was reflected in the mirror. Was the view of PW1 impeached in anyway? In her evidence on the issue she testified

“---- As we went up the stairs 2 were pointing 2 guns at me and each from each side. We went up and the keys to my bedroom where safe keys were in the sitting room and we went to get them from the fire place. I took the keys and then we went towards the bedroom but when I was opening the bedroom door, I saw another person who passed us and went towards the sitting room. He came up as I was opening and there is a full size mirror next to the door to the bedroom. I recognized him and he is the 2nd accused (pointed). I had known him before as he was once my driver in our firm -----.”

From the foregoing, it emerges that the mirror was located at the door next to the bedroom. Now if PW1 had guns trailed on her from each side, and further there were two other robbers in the house but with no guns but still guarding her as well, how was she able to see the appellant through the mirror that was on the side? It is to be noted that there was no evidence on record that suggested that when PW1 was opening the bedroom door, there was a time she looked side ways to the next door that the mirror was said to be located. In our view there were some impediments that made alleged identification of the appellant through the mirror improbable. Further even if we were to accept that PW1 may have seen the appellant through the mirror, there is no evidence as to how long she was able to observe the appellant in the mirror. Did she have a long gaze at the appellant or was it just a flirting glance. From the evidence it would appear that it was a mere flirting glance. In our view we doubt whether in those circumstances,

one could really have been in a position to identify anybody. Further, if the house was well lit as claimed by PW1, then there is possibility that PW1's vision good have been impeded by the reflection from the alleged mirror. There was therefore need to lead evidence to eliminate the possibility that the lights in the house were not reflected by the mirror.

We observe that the truth of the prosecution case rested on the 1st report that PW1 made to the police officer who visited the scene and to her workers. In her first report she stated

“---- I later learned that my son who lived nearby had rung one of our son in law who had rung Thika Police Station. The police finally came but not immediately and they confirmed he was dead. When we were waiting, the workers were talking among themselves and they said none of them would have come out as each place was guarded by the gangsters who threatened to shoot any person who dared to come out ----.”

In our view if the 3rd appellant was one of the gangsters that had robbed PW1 of her property and killed her husband and had been recognized by her, she could not at least have failed to mention that fact to PW2 who was with her throughout the incident or to her workers. It is also noteworthy that when the police visited the scene and confirmed that her husband was dead, PW1 did not as much as mention the name of this appellant to them. This is how she delivered herself on the issue under cross-examination by Counsel for the appellant then

“----- I knew 2nd accused then. I reported to the people who entered the house. But I did not give his name ---- and I did not report at Ruiru Police Station that I had seen 2nd accused ---- I did not mention anyone-----.”

Having thoroughly reexamined and reevaluated the evidence tendered with respect to the recognition of the appellant by PW1, we are not persuaded as was the trial Magistrate, that the appellant was positively recognized by PW1.

We wish briefly to comment on the arrest of this appellant. According to PW9 and PW10, the appellant was implicated in the crime by 1st and 5th accused persons. However the confessionary statement of the 1st accused was not produced as he escaped from custody. As previously stated, the statement of the 1st accused having not been produced in evidence, and those implicated having had no opportunity to cross-examine the 1st accused on the same, it was of little evidential value and the trial Magistrate ought not to have disregarded the same. At most it was hearsay evidence.

It is further noted that there material contradictions regarding where the appellant was arrested. According to PW10, the appellant was arrested at Pangani Shopping Centre. Whereas according to the appellant, he was arrested in Mombasa as he was driving a matatu. He was booked at Central Police Station Mombasa for 9 days before being ferried to Nairobi and booked at Pangani Police Station. This issue would easily have been resolved by production of relevant OB's. This was not to be as the said

“OB's could not be traced and brought to Court as defence exhibits-----.”

We have our own doubts that all the OB's requested by the appellants from various Police Stations would just disappear. We think that this could not have been a mere coincidence. There is more than meets an eye on this. The trial Magistrate should have held the alleged disappearance of the OBS in favour of the appellant. That being the case, we would hold as testified to by the appellant that he was arrested in Mombasa. Having been arrested in Mombasa, why should PW10 come up with the story that the appellant was arrested at Pangani Shopping Centre? We think that someone somewhere is not being candid.

With regard to the 4th appellant much of what we have said with regard to the 3rd appellant's identification by recognition applies with equal force to the 4th appellant. After all the 4th appellant was

an employee of PW1 as well. He was the watchman. It is on record that PW1 when adducing her evidence in chief mentioned that this appellant was one of her servants (watchman) but not as one of the gangsters. She even confirmed that the appellant was on duty on that day for she said

“----- I know 3rd accused who was a watchman at the time, he was on duty on that day -----.”

PW1 did not mention that this appellant was one of the attackers contrary to the finding by the trial Magistrate that the ***“3rd accused was implicated by his co-accused person and was seen at the scene -----.”*** PW2 also testified on the issue in the following terms:

“---- After the thugs left, PW1 did not tell me that she had seen anyone she knew ----- I know 3rd accused who was on duty on that material night -----.”

Further PW4 a co-worker with the appellant testified

“----- I know 3rd accused whom we used to work with. I did not see him that night and thereafter worked as usual -----.”

From the recorded evidence neither PW1 nor PW2 said that following the incident, the appellant escaped. He continued working for PW1. According to the appellant he continued working for PW1 until 2001 when he voluntarily left. This evidence was not seriously challenged by the prosecution. The only witness who claimed that the appellant escaped after the incident was PW10, the investigating officer. However this allegation is not borne out by the evidence on record. Had the appellant escaped as alleged, there was nothing to stop PW1, PW2 and PW4 from saying so. They did not. The employer would in particular have known whether the appellant escaped. It was therefore wrong for the trial Magistrate to act on the evidence of PW10 in convicting the appellant. The said evidence was even, in our view hearsay. We do not think that the conduct of the appellant after the commission of the offence is consistent with a person who had just participated in such heinous crime. The appellant was implicated in the crime by the 1st co-accused. We have already said much regarding this aspect of the matter in the previous pages of this judgment. We need not say more.

In the end, we think that we have said enough to demonstrate that the conviction of the appellants was not safe. Accordingly, we allow the appeals, quash the conviction and set aside sentences imposed. Each appellant should forthwith be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 2nd day of May, 2006.

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LESITT

JUDGE

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MAKHANDIA

JUDGE