



(From the original conviction and sentence in criminal case No. 468 of 2002 of the Chief Magistrate’s Court at Nairobi, M.A. Odero, (Mrs.) SPM)

JOHN NJAGI KADOGO
APPELLANT

VERSUS

REPUBLIC **RESPONDENT**

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 65 OF 2004

FRANCIS MWANGI MUIRURI
APPELLANT

VERSUS

REPUBLIC **RESPONDENT**

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 66 OF 2004

PETER MUTHEE NJAMWEYA **APPELLANT**

VERSUS

REPUBLIC **RESPONDENT**

JUDGMENT

JOHN NJAGI KAROGO, FRANCIS MWANGI MUIRURI and **PETER MUTHEE NJAMWEYA** hereinafter referred to as the 1st, 2nd and 3rd appellants respectively were jointly charged with seven counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The 2nd appellant was charged in addition with three counts of being in possession of a firearm contrary to Section 4(2) of the Firearms Act and one count of being in possession of Ammunitions contrary to Section 4(2) (3) of the firearms Act. Upon a full trial in which the prosecution lined up fourteen witnesses, the trial Magistrate M.A. Odero (Mrs), SPM found the appellants guilty on the seven counts of robbery with violence and accordingly convicted them. On the Firearm and ammunition related offences, against the 2nd appellant, the learned trial magistrate found the appellant innocent and accordingly acquitted him of the charges.

Upon conviction the learned magistrate imposed the sentence in the following terms:

“.....The offence accused committed are capital offences. The sentence is mandatory. Each

accused is sentenced to death as provided by law on each of the seven counts.....”

It is clear that the learned trial Magistrate fell into an error in the course of imposing the sentence. We have repeatedly said, and we repeat it here, that where a person is sentenced to death on more than one capital charge as was the case here, the right thing to do is to sentence him to death on only one count of the many counts and leave the others in abeyance, including any sentence of imprisonment. The reason why the court should take this course of action is that in case of death, if the sentence is carried out, that person can only be hanged once and not many times over and hence the necessity for leaving sentence on the other counts in abeyance. The Court of Appeal has had occasion to comment on the issue in several decisions to wit: **MUIRURI –VS- REPUBLIC (1080) KLR 70, ABDIHUSSEIN KAIMOI –V- REPUBLIC, CR. APPL. NO. 47 OF 2001, ABDULL DELANO BOYE & ANOR –VS- REPUBLIC, CRIMINAL APPL. NO. 19 OF 2001 (unreported), and SAMUEL WAITHAKA GACHURU –VS- REPUBLIC CR. APPL. NO. 261 OF 2003 (unreported).** In the later case the court delivered itself thus

***“.....we have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and have the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hangedthrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing counts will take head of these simple requirements and act appropriately*”**

The Court of Appeal has spoken. Need we say more; except to emphasize the need for the courts below to adhere to the aforesaid requirement. Be that as it may, the appellants were not amused by their conviction and sentence. They accordingly and separately lodged appeals against the said conviction and sentence. We ordered for the consolidation of the three appeals for ease of hearing and as they arose from the same trial in the court below.

The appellants advanced the same grounds of appeal in their various petitions of appeal to wit;

- (i) Their identification
- (ii) Contradictions and inconsistencies in the prosecution evidence and
- (iii) Failure by the trial Magistrate to give due consideration to their defences.

The brief facts of the case as narrated to Court by the various prosecution witnesses were that on 3rd February, 2002, P.W.1 was driving motor vehicle registration number KAM 426T along Makutano – Embu Highway in the company of P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6. They were all Miraa traders and were headed for Meru from Nairobi where they had delivered a consignment of miraa. As they slowed down to go over the bumps near Mwea Muthiti area at about 3.30 p.m. suddenly a white saloon car drove past them and blocked their way. Inside the said saloon car were four or so armed men. They ordered P.W.1 to stop. These witnesses were then ordered to put their hands in the air. Some men came out of the saloon car, opened the door to P.W.1’s motor vehicle and pushed P.W.1 to the back of the pick up. One of the thugs then took possession of the motor vehicle. Two others climbed into the back of the pick up and ordered some of the witnesses aboard to lie down and not to resist. The pick up vehicle was driven back towards Nairobi and into a deserted earth road where all the witnesses were ordered at gunpoint to alight and undress. All the witnesses were then robbed of various sums of money as well as

clothes and shoes. Thereafter the thugs then drove off with P.W1's pickup leaving P.W.1 and the rest in the bush. The witnesses then walked to the main road and sought assistance from the nearby Wamumu Police Station and who later referred them to Wanguru Police Station. After a few days the motor vehicle was recovered, through car track system, at Zimmerman Nairobi, albeit with fake registration numbers – KAL 426 T. With the assistance of one Rose Wangechi, in whose compound the motor vehicle was traced she led the police to the arrest of the 1st and 2nd appellants respectively. In turn the 2nd appellant led the police to the arrest of the 3rd appellant.

Put on their defence, all the appellants elected to give statements of defence. They all denied involvement in the crime. In respect of the 1st appellant, he stated that he was an electrician. That he was arrested by two policemen on 5th February, 2002 on his way to Kirinyaga Road from old Nation roundabout in Naiorbi. He knew one of the policemen, one – P.C. Munyao who had sometimes on 13th December, 2001 arrested him in a police raid but was not happy when he was subsequently released. He swore to teach the appellant a lesson. Upon his arrest he was taken to flying squad offices and later to his house in Ruiru. A search was conducted but nothing was recovered. Subsequently, on 15th February, 2002 an identification parade was conducted and he was identified by P.W.1, P.W.4, and P.W.6. However he claimed that the identification parade was unfairly conducted as the said witnesses had seen him earlier. He was then charged with an offence he knew nothing about alongside other people he did not know.

As for the 2nd appellant, he stated that he was on 5th February, 2002 near old nation house road about at about 12.30 p.m. He was on his way to Ngara where he hawks shoes when he was arrested. The police officers whom he knew asked for his identity card and he gave them. Thereafter they took him to Pangani Police Station where he was held for 15 days before he was charged for robberies he did not commit.

The 3rd appellant on his part stated that on the day of the alleged robbery, he went to church with his family between 10.00 a.m. and 12 noon at Buru Buru A.I.C. Church. He then came back and never left the house. On 8th February, 2002 he was arrested from his house by police from Pangani Flying Squad where he was held in the cells until 20th February, 2002 when he was charged for offences he knew nothing about.

In support of their appeals, the appellants tendered written submissions which we have carefully considered. They all claimed that the circumstances obtaining during the robbery were such that the witnesses who had purported to identify them could not have been in a position to do so. That none of the said witnesses made a first report giving their description. That in any event then their identification was dock identification and was therefore worthless. The appellants also submitted that the prosecution case was littered with numerous contradictions. Such contradictions should have been resolved in their favour by the learned magistrate. Finally, they all pointed that they had given sworn statements of defence in which they denied their involvement in the crime. Although they were intensely cross-examined by the prosecutor, they remained firm and were not shaken at all. However, the learned magistrate ignored the defences and proceeded to convict them.

Miss Nyamosi, Learned State Counsel appeared for the state. She conceded the appeal with respect to the conviction on count six. She stated that the complainant in that count, David Kalunge Jacob did not testify. However the learned State Counsel supported the conviction and sentence with regard to counts 1,2,3,4,5 and 7. In support thereof, Counsel submitted that there was overwhelming evidence linking the appellants to the crime. That the evidence was one of the eye-witnesses who corroborated each other in material particulars. Counsel submitted that the trial magistrate observed the demeanour of the witnesses and concluded that they were credible. Counsel further submitted that the robbery was committed at 3.00 p.m. in broad day light and took 45 minutes. The robbers did not cover their faces. In the premises, Counsel submitted, the conditions that obtained were favourable for positive identification. Counsel further submitted that an identification parade was conducted in respect of the 1st appellant and P.W.1 and P.W.4 positively identified him. No identification parades however were conducted with respect to 2nd and 3rd appellants. Counsel conceded that the evidence regarding their identification was therefore dock

identification. Counsel submitted that in as much as dock identification is worthless, the roles played by the appellants were ably described and the learned magistrate took note of that fact in convicting the appellants. As regards the appellants' defences, it was the Learned State Counsel's view that they were considered by the trial magistrate and rejected in the light of sound prosecution case.

As we consider the submission of the appellants as well as the State Counsel, we should not lose sight of the fact that as this is a first appeal, we are duty bound to examine and re-evaluate the evidence on the record so as to reach our own conclusions in the case, always remembering that we had no advantage, as the trial Court, of seeing and hearing witnesses and making due allowance thereof. See **OKENO –VS- REPUBLIC (1972) E.A. 32.**

It is also an established principle that an Appeal Court will not normally interfere with a finding of fact by the trial Court, whether in a civil or criminal case, unless it is based on no evidence, or an misapprehension of the evidence, or that the trial Court is shown demonstrably to have acted on wrong principles in reaching the finding. See **CHEMAGONG –VS- REPUBLIC (1984) KLR 611.**

The prosecution case revolved around evidence of identification by P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6. It is trite law that where the prosecution bases its case upon evidence of identification, such evidence must be watertight to justify a conviction. This was stated in the case of **REPUBLIC –VS- ERIA SEBWATO (1966) E.A.)** in the following terms:

“.....where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction.....”

Reading through the evidence of these witnesses regarding identification, one gets the distinct feeling that they were reading from the same script. It does appear to us that the evidence was indeed rehearsed. The witnesses only departed from the script under cross-examination as expected of witnesses who have been couched. If the Court had been alive to the possibility that witnesses had been couched then it would have been cautious in accepting such evidence.

Yes the incident may have occurred at 3.00 p.m. in broad daylight, and took over 30 minutes and the robbers did not as much as attempt to disguise themselves. In ordinary circumstances this would have been a perfect setting for easy identification of the appellants. However was this the case in the circumstances of this case? We do not think so.

First we note that none of the witnesses, when they gave their first reports to the police, described any of the appellants. Secondly, none of the said witnesses, except P.W.1, recorded any statements until after the appellants had been arrested. Thirdly there is material discrepancy in the witnesses evidence as to the number of robbers involved and who among them did what. The discrepancy is such that it casts doubts as to whether they were in a position to observe any of the robbers.

The 1st appellant was the 2nd accused person in the trial. He is the one who was alleged to have taken possession and driven P.W1's motor vehicle during the robbery. He was subsequently identified on an identification parade by both P.W.1, P.W.4 and P.W.6. In the absence of a first report to the police by these witnesses giving a description of the appellant, their subsequent identification of the appellant on an identification parade cannot be said to be foolproof. It is trite law that an identification parade can only be said to have been properly conducted where a witness had given a description of the attackers to the police in the first report and then his alleged identification is tested by the subsequent identification parade. Failure to observe the foregoing renders any subsequent identification to be dock identification that adds little value to the prosecution case. In the case of **KAMAU NJOROGE –VS- REPUBLIC (1982 – 88) KLR 1134,** the Court of Appeal held

“.....Dock identification is worthless unless preceded by a properly conducted identification parade. The complainant should also be asked to give description of the suspect, and police should arrange for a fair identification parade.....”

In the present case, no such description was given to the police in the first report by all the identifying witnesses that would then have warranted an identification parade being conducted. Worse still, P.W.1 had said in his statement to the police that he could not identify his attackers

He stated:

“.....In my statement, I did not include any descriptions of the robbery. I did not tell the police that I would be able to identify the robbers.....”

The other witnesses – P.W.2, P.W.3 and P.W.5 only identified the appellant in the dock. They never made a report of the incident at either Wamumu or Wanguru Police Stations and neither did they attend any identification parade. Their identification is that of dock identification. Dock identification has been frowned upon by the Court of Appeal. In the case of ***OLE MWENDA –VS- REPUBLIC CR. APPL. NO.51 OF 1988 (unreported)***, the Court of Appeal delivered itself on the issue in the following manner:-

“.....the practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock is undesirable and should be avoided...”

However, not all dock identification is worthless. A Court might base a conviction on the evidence of dock identification, if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the Court warns itself of possible dangers of mistaken identity. See ***MUIRURI & OTHERS –VS- REPUBLIC (2002) KLR R 274.***

Apart from this evidence of identification, there is no other evidence which places the appellant at the scene of crime. Nothing incriminative was found in his possession when his house was searched. He was only arrested because he was in the company of the 2nd appellant whom the police tracking down with the assistance of one Rose Wangechi in connection with PW1’s motor vehicle which had been found parked in her compound and which she claimed that it had been parked there by the 2nd appellant.

In our view we do not think that the identifying witnesses were credible. There were major contradictions in their evidence. For instance P.W.1, whilst reporting the incident to the police, stated that he was robbed of Kshs.4,500/=. When testifying in court, he stated that he lost Kshs.413,000/= to the robbers. However the charge sheet indicates that he was robbed Kshs.417,000/=. When confronted with these discrepancies he owned up and stated:-

“....In my statement at Pangani, I told police 413,000/=. My statement is incorrect.....”

Turning to P.W.4 and P.W.6, they both alleged to have reported the incident at Wanguru police station. This evidence was however countered by P.W.7 who stated that it was only P.W.1 who reported the incident at the police station. Moreover, P.W.10 stated that when P.W.1, P.W.4 and P.W.6 identified the 2nd appellant in the identification parade, they alleged that it was him who was on top of the pick up demanding money from the victims whereas it is clear on perusal of the record that these witnesses had initially indicated that the 2nd appellant was the one who took possession and drove the subject motor vehicle. These discrepancies to our mind cannot be termed as minor considering the defence put up by the appellant.

From the foregoing it is quite apparent that these witnesses could not pass the test of credibility.

It is also noteworthy that when the 1st appellant allegedly took control of the motor vehicle, he boxed P.W.1 and bundled him to the back of the pick up where he joined, PW.4 and P.W.6 and the other complainants. All of them, according to the record, were ordered to lie with their faces down. Under those conditions we doubt whether they could have identified whoever was driving the motor vehicle. It was only P.W.2 who alleged that, she remained in the front cabin with the 1st appellant and claimed to have positively identified the appellant. Unfortunately, she did not attend any identification parade and consequently her identification of the 2nd appellant subsequent was dock identification.

As for the identification parade, it would appear that the appellant's complaint that he was exposed to the identifying witnesses prior to the identification parade is not without merit. All the identifying witnesses confirm that they visited the police station severally following the appellant's arrest. Secondly P.W.1 stated that he waited outside at the road until he was called to the parade. Yet according to the parade officer (P.W.10) all the three identifying witnesses were accommodated in the radio room. However, she did not know when the said witnesses arrived at the station. She did not even know where they were prior to that and could not tell exactly what time they entered the radio room before she moved the appellant from the flying squad officers across the road to the police station where the identification parade was conducted. Consequently, the claim that the appellant was exposed to the witnesses in the process of being moved on foot with the parade officer in tow cannot be overlooked. Why was it deemed necessary to move the appellant as the parade was about to be conducted?

Finally and which is a surprise to us P.W.12, who was the investigating officer disowned the parade. He stated under cross-examination by Counsel for the appellant and we quote:-

".....I am the investigating officer in this case. I did not organize the identification parade at which accused 2 and 3 were identified. I do not know who organized those parades....."

From the foregoing, it is obvious that the identification parade was not fairly conducted. The value of the identification parade was thus compromised.

As parting shot, we reiterate what was stated in the case of **WEEDER –VS- REPUBLIC, CR. APP. NO. 228 OF 1980 (unreported)** that:-

".....Identification can be poor even though it is given by a number of witnesses. They may all have had an opportunity of a fleeting glance or longer observation in difficult circumstances....."

With regard to the 2nd and 3rd appellants, what we have said with regard to identification of the 1st appellant applies with equal force with purported identification of these appellants by the six witnesses. The only exception being that these appellants were not subjected to an identification parade.

The only evidence that would have incriminated the appellants with the crime was the purported recovery of the motor vehicle belonging to P.W.1 and which was stolen during the robbery. According to the evidence, car track personnel traced the motor vehicle to a plot in Zimmerman and called in aid police officers who included P.W.11. The motor vehicle was found and one Rose Wangechi claimed that the motor vehicle had been left in the plot by the 2nd appellant. She volunteered and took the police officers to the house of the 2nd appellant. He was absent. She then took them to town where she pointed out the appellant and he was arrested in the company of the 1st appellant. Upon arrest the 2nd appellant was taken to his house and a search was conducted. The police managed to recover AK rifle, pistols, ammunition, registration number plates KAL 301K, rubber shoes, three wrist watches, car radio, 2 sisal robes etc. Some of these items were identified by some of the complainants as belonging to them particularly the wrist watches. Some of them stated that the AK rifle was similar to the one used by the robbers during the incident. The learned magistrate considered at length this issue of recovery when dealing with the counts under the Firearms Act in respect of this appellant. The learned magistrate state:-

".....The police told the Court that they were led to the house of accused 2 by one Rosa. This said Rosa is the one who told police that the house belonged to accused 2. She is therefore a key witness but was not called to testify in Court. This remains hearsay evidence and is not admissible in Court. On his part accused 3 (sic) denies that any items or weapons were ever recovered in his house. Even if such weapons were truly discovered there, then it has not been proved that the accused was the only occupant of that house neither is it proven that it was accused 2 who hid the weapons there. In other words his possession is not proven beyond all doubt....."

This reasoning and logic applies equally to the purported recovery of the other items apart from the guns and pistol. Indeed it was not established by evidence that the appellant owned the house. The tenancy if any was not also established. This could easily have been done by calling the landlord or his agent as a

witness considering that nothing linking the appellant to the premises was recovered from the premises.

The 2nd appellant’s apprehension was at the behest of Rose Wangechi. She was never called to testify for reasons best known to the prosecution. No doubt she was a crucial witness and would have shade light under what circumstances the 2nd appellant, if at all, left the subject motor vehicle in her custody. What was her relationship with the 2nd appellant if any. Was she an accomplice!. In our view Rose Wangechi would have provided answers to these critical questions. In the absence of such answers, the evidence of the alleged recovery of the motor vehicle and then linking it to the appellant becomes doubtful. The doubt is further cast wide considering that even the car track personnel involved in the tracking and eventual recovery of the motor vehicle were also not called as witnesses.

Finally, with regard to the 3rd appellant, we have no doubt at all that what we have said about the identification of the other two appellants also applies to the 3rd appellant. He too was never subjected to any identification parade. He was only arrested because the police were led to him by the 2nd appellant. Nothing remotely connected with the offence was recovered from his residence when searched. There are contradictions galore in the evidence of the witnesses who purported to identify the appellant and what role he played in the robbery.

In a nutshell, we are persuaded first like in the case of 1st and 2nd appellants that the identification of the 3rd appellant was not beyond reproach.

To conclude this judgment, we hold the view that the conviction of the appellants was unsafe. Accordingly, we allow the appeals, quash the conviction and set aside the sentences imposed. The appellants and each one of them are set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 26th day of September, 2006

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgement read, signed and delivered in presence of

Appellants: Present

Mr. Imbali: For State

Erick/Tabitha: Court clerks

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LESIIT

JUDGE

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MAKHANDIA

JUDGE