REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL 288 & 289 OF 2004
(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.1704 of 2003 of the Senior Resident Magistrate's Court at Mombasa – J. D. Kwena, SRM)

BENSON NJEHIA

ADEN ABDI .....
APPELLANT

Versus

REPUBLIC .....
ACCUSED

Coram: Before Hon. Justice Mwera &

Hon. Lady Justice Khaminwa
Mr. Gakuhi for Appellant 1 (2nd accused)
Mr. Kariuki for Appellant 2 (1st accused)
Miss Mwaniki for state
Court clerk – Kazungu / Jason

JUDGEMENT

The two appeals herein were consolidated and determined together, having arisen from one lower court case.

In the lower court Aden Abdi (Appellant 1 CR.A 288/04) was the 2nd accused while Benson Njehia (Appellant 2, CR.A 289/04) was accused 1. They were charged with two others with 3 counts of robbery with violence contrary to section 296(2) of the Penal Code thus:

Count 1:

That on 3/5/2003 at Tudor area Mombasa jointly with others not before court while armed with dangerous weapons (pistols) robbed Rispa Marenya of motor vehicle registration No. KAL 078V Toyota, cash, a golden chain and a ring and earings plus sunglasses all valued at Sh. 1,439,000/=. That at the time before or immediately after the robbery, they threatened to use actual violence on Rispa.

Count 2:

That on the same day and place and in the same manner the accused persons robbed Kennedy Muchiri

of Sh. 1,000/=. As for count 3 the accused persons were similarly charged under Section 296(2), of the Penal Code that on the said date and place they robbed Charles Onyango, Sh. 3,000/=.

The 4th and 5th counts involved Appellant 2 (Njehia) alone. That on the said 3/5/2003 at Kisauni Mombasa he was found in possession of a firearm BERRETTA without a firearm certificate. And the last count read that on the same day and place he was also found in possession of five (5) rounds of ammunition without a firearms certificate. Both counts were laid under Section 4(1) Firearms Act.

After trial the two appellants were convicted: appellant 1 (Aden) on counts 2 and 3 only while appellant 2 (Benson) was convicted also on counts 4 and 5 (on firearms). They were convicted to suffer death while for Benson, sentence on counts 4 and 5 was held in abeyance. They appealed. Aden put forth six grounds of appeal (some with subgrounds) and Mr. Gakuhi argued this appeal on that basis. He argued all the grounds as one because they all centered around IDENTIFICATION. Benson's appeal of five (5) grounds (some with sub-grounds) was argued by Mr. Kariuki.

Mr. Gakuhi told us that the identification of Aden could not be without fault even if it took place in what was described as broad day-light. Evidence of Kennedy Muchiri (P.W.1 – complainant in count 2,) had it that the incident took place at about 11.45 a.m. That the robbery took place suddenly, it caused fright to P.W.1, he was confused and so he could not positively describe all or any of the several armed thugs who attacked him. To P.W.1, the robbers were three while another witness spoke of four. That this witness said so himself in cross-examination. And that even if he claimed that he gave description of Appellant 1 (Aden) to the police, nothing of the sort had been said in the statement that formed the basis of evidence in the lower court. That he had answered in cross-examination that he made 3 statements to the police - at Nyali, Makupa and Urban Division but only the Urban Division statement was produced in court. Mr. Gakuhi continued that if Muchiri (P.W.1) surely described the appellant (Aden) to any police officer, that officer was bound to repeat the description in his own testimony later, but that in all events that description would have been the basis of an identification parade – to be confirmed by identifying appellant 1 or not.

We were further told that the identification parade was irregularly carried out because there were more than twenty (20) people of various features, ages etc, and with nothing nearly as close as possible to Aden's physique etc, would end in a proper and valid parade. So the identification of appellant 1 by Muchiri (P.W.1) on the parade was discredited. Mr. Gakuhi could not even accept the learned trial magistrate's view that when P.W.1 and appellant 1 rode in the motor vehicle from Tudor to Kisauni he had ample opportunity to observe the appellant. And that warning herself of the dangers of convicting on evidence of one witness could not save the situation either. The cases of CHARLES OUMA VS REPUBLIC CR.A 222/2002 (C.A.) and MOHAMED BIN ALLUI VS REPUBLIC (1942) 9 EACA 72 were cited to us.

Mr. Kariuki (for Benson, appellant 2) began by submitting on the counts of being in possession of a pistol and ammunition (counts 4 and 5). That the evidence did not support the charge at all. He drew our attention to count 4 which bore the make of the pistol allegedly found with Benson as a BERRETTA while the evidence to support that charge spoke of HELWAN pistol of Egyptian origin. (see Lawrence Nthiwa P.W.2, a firearms examiner). On reading P.W.2's evidence we noted that he told the lower court that the 4 catridges he examined had been modified to load a HELWAN pistol and the microscopic examination showed that they were fired from that firearm (Exh. No.1).

Without being detained on this aspect unnecessarily, it is in order to say that the learned State Counsel conceded the appeal on these 2 counts, of being in possession of a pistol and ammunition without due certificate(s). She observed that there appears to have been a mix-up in the exhibits taken to the firearms examiner by different officers, ending in the evidence being at variance with the charge(s). We consider that conceding the appeal on the foregoing was right in the case, and so the conviction on these counts 4 and 5 is quashed. It shall be noted that the learned trial magistrate held sentencing on these counts in abeyance and so there are no sentences to set aside.

Going back to Benson Njehia regarding conviction and sentence on the robbery counts (2 and 3), Mr.

Kariuki told us that there was confusion and conflicting evidence as to how many robbers were involved. That while P.W.1 (Muchiri) spoke of three P.C. Singila (P.W.6) said that four robbers were at the scene. We noted that P.W.6 was not at the scene but that he was only called by 999 controller and told of the robbery. Anyway, Mr. Kariuki faulted the non-production of the motor vehicle KAL 078V as an exhibit in which his client was said to have been found at the time of his arrest. To him, there was so link between appellant 2, the arrest and the connection to the robbery charges. And that even as no stolen property was recovered from Benson Njehia, he put forth an alibi that the prosecution did not displace.

As stated earlier the learned State Counsel conceded Benson Njehia's (appellant 2) appeal against conviction on counts 4 and 5 and the grounds already gone over. However coming to conviction and sentence based on the two robbery counts (2 and 3) we heard that nothing was amiss. That the robbery took place during day; P.W.1 saw particularly appellant 1 (Aden) and he described what act each robber engaged in e.g. Aden ordering to be given the van keys and taking cash and wallets. That they even rode in this van, which one thug drove all the way from Tudor to Kisauni and that that added time to see the robbers. That they conversed as they drove including proposing to dump the victims at Kisauni. That when they got to Kisauni they were alarmed by security guards pursuing them. They stopped the van, jumped out and ran leaving Benson (appellant 2) trapped in the vehicle's rear part because he was unable to open the door out. That the security guards caught him and the police arrested him there in the presence of P.W.1, 3 and others. That there was thus nothing more required to show that appellant 2's alibi did not have to be displaced. We noted that this said alibi consisted of a claim by appellant that he was at home all the time with his brothers – a matter he never raised at any other time until his unsworn statement in defence.

On the identification parade the court was told that appellant 1 (Aden) was arrested on 10/6/2003 and Muchiri (P.W.1) was able to identify him well from the description he gave to the police and his own recollection at the scene and on the away from Tudor to Kisauni. That the way the parade was conducted is as per the identification parade report which I.P. Kuria (P.W.9) completed. There was no irregularity.

That the learned trial magistrate took all the above in regard, warned herself of convicting on identification by a single witness before convicting and sentencing. After the foregoing including the disposal of the grounds touching on counts 4 and 5 (against Appellant 2 alone), we now consider all over again the evidence laid before the lower court in the light of that court's conclusions regarding the robbery counts 2 and 3 against both appellants.

On 3/5/2005 Muchiri (P.W.1) got into a van registration No. KAL 078V TOYOTA, which one Rispa was driving to go and collect money for their employer Sara Lee Household & Body Care Products. They got to Tudor, got out of the van and went to collect cash. He was given Sh. 2,201/= and as he returned to the van, with Rispa still in, he found some other salesmen of Cadburys Ltd., talking to Rispa. However as P.W.1 made to enter their van, some 3 armed gangsters bounced beginning with Charles Obonyo (P.W.4) of Cadbury's, and then accosting P.W.1 as well. P.W.1 saw appellant 1 and 2 particularly as they came their way. That appellant 2 (Aden) demanded for van keys from Rispa and from P.W.1, the boot keys. That apapellant 2 opened the van and appellant 2 (Benson Njehia) got into the rear. Then another robber took control of the van squeezing P.W.1 and Rispa in between with Appellant 1. Appellant 2 was at the back. The van took off with P.W.1 and Rispa sandwitched between appellant 1 (Aden) and the thug driver. Aden took the Ksh. 2,201/= from P.W.1 together with his wallet with Sh. 1,000/=. He took cash and jewellery from Rispa, as they drove through Buxton. That they proposed to dump these two victims at Nyali. P.W.1 said:

> '*We were looking at them. We were never ordered to face down."*

Then appellant 2 said that a security vehicle was chasing them. That the driver took Kisauni direction. He stopped the van suddenly. The driver and appellant 1 jumped out and ran away. Appellant 2 was left in the rear because that door jammed and he was trapped in. The 2 victims ran and stopped a short distance from their van. The security guards got there. Three shots were fired from their van. Police arrived. One officer took the van keys from the ignition. He opened the rear door.

They got in and removed Benson (appellant 2, accused 1). They removed a pistol from a box near where he was sitting and recovered spent cartridges. Appellant 2 was taken to Nyali Police Station. P.W.1 recorded a statement here. They went to Makupa Police Station where again he recorded a statement. Later P.W.1 learnt that another suspect was arrested and he later went on an identification parade at Makupa Police Station to identify him – appellant 1 (Aden). He added:

> *"I identified him by facial appearance and I had noted he was of well build (sic). During the robbery I saw the second accused. From Tudor to Kisauni surely there was ample time and opportunity to see him well. The second accused is the one who demanded money from us. I could look at his face and see him well ... never ordered us to face down."*

P.W.1 during cross-examination said that the gangsters appeared suddenly. He was sand witched between Appellant 1 and Rispa. He had feared for his life and he was confused. That appellant 2 (Benson) was not on the identification parade. But he had seen him when police opened the van when it stopped at Kisauni. He repeated that he recorded details of identification of the gangsters in his own hand at Makupa Police Station and not the one he made to the C.I.D. Urban Division, which seemingly was the one before court.

As to the parade at Makupa Police Station P.W.1 told the learned trial magistrate that there were 20 people in the parade – some looked shaggy, others brown, black, slender, heavy, tall, short etc. That these members of the public did not look alike, but still P.W.1 could not mistake appellant 1 (Aden); he picked him out. That P.W.1 had not only given the physical description of appellant 1 at Makupa Police Station but he had also said that he wore a T-shirt, short jeans, blue in colour.

Okoth Ochieng (P.W.3) of Radio Sentry got a call that a robbery had taken place in Tudor area. When they got to the described place, they got word that a motor vehicle KAL 078X had been hijacked and driven off in a direction pointed to them. P.W.3's group followed the route past Khamis Secondary School chasing the stolen motor vehicle through Tom Mboya Street towards Nyali. He called his office who in turn alerted the police. The chase continued. The stolen motor vehicle turned to Kisauni, stopped abruptly and "ones" in the front fled. The one at the back was trapped in. P.W.3's team kept guard until police arrived and caught appellant 2 (accused 1) from inside. That he came out with his hands in the air pleading that he had nothing. Like P.W.1, P.W.3 spoke of the pistol being recovered from a box near where appellant 2 was seated.

According to Cpl. Kamau (P.W.4) appellant 1 (Aden) was arrested with other suspected robbers on 10/6/2003. They were held and were at Changamwe Police Station. He proceeded there and took charge of them. Thus it will be noted, was slightly over a month since the robbery in question took place on 3/5/2003. The appellant had been arrested on information at Narok Bar & Restaurant, Magongo (see P.C. Mutuku P.W.5).

P.C. Singila (P.W.6), as said earlier, got word from 999 controller about robbers who had hijacked motor vehicle KAL 078V Toyota and they were driving towards Nyali Bridge. This is the team which immediately arrived when the van had been abandoned at Kisauni with appellant 2 inside. He raised his hands and they arrested him, with a HELWAN pistol and collected 4 spent cartridges. That the appellant told them that he lived with his brother-in-law called Aden, appellant 1 who was later arrested.

We now turn to the evidence of Charles Obonyo P.W.7 (complainant in count 3). He was the Cadbury man who was talking to Rispa, the driver of motor vehicle KAL 078V, when the armed thugs attacked them. He was attacked from behind. They commanded him to lie down on his stomach. He heard the van (KAL 078V) move off. When he woke up, he saw Tudor Security personnel there. He noticed he had lost cash Sh. 3,000/=. A police van came and she went to write a statement at Central Police Station. He added.

> *"I think I saw one of the people. I saw the 2nd accused."*

At that point Mr. Gakuhi acting for appellant 1 (Aden, accused 2) objected to dock identification by this

witness and the learned trial magistrate upheld the objection. P.W.7 did not attend any identification parade.

The other evidence we considered relevant here came from I.P. Kuria (P.W.9). He conducted the questioned identification parade at Makupa Police Station on 19/6/2003 – about a month and 2 weeks since the robbery of 3/5/2003. To him, he chose 8 men of (near) identical features like Aden (appellant 1), light complexion and stood them on a parade. He stood between nos. 7 and 8 when Rispa (she was not a witness), identified him. That he changed position and Muchiri (P.W.1) was called out. He picked out appellant 1 in connection with the subject robbery. That Aden registered no objection and he signed the parade report which P.W.9 also counter signed (Exh.P8) P.W.9 had met the victims (not suspects, surely) at the scene where they had been abandoned. They gave P.W.9 their contacts and that the witness jotted in his note book the description of the suspected robbers. That he selected parade members from the many people who were in the cells at the station; he did not agree with (P.W.1) that some were shaggy and others had no shoes. That he selected members of fair complexion and well-built as Aden (the accused No.2). That he had never met Aden before and he did not hand his notebook over to the investigating officer.

Beginning with Benson Njehia (Appellant 2) and having gone over the evidence and the judgment, we are not in doubt that he was not identified by Charles Obonyo (P.W.7) as one who robbed him. Obonyo only tried to identify Aden (appellant 2) from the dock. Obonyo was the complainant in count 3. For there being no evidence to link Appellant 2 to this offence then we are obliged to allow his appeal as regards that count.

However as to count 2 – robbing Muchiri (P.W.1) of his cash, the conviction is upheld on evidence recorded and as considered by us. P.W.1 said that when Aden (appellant 2) took the van key from Rispa, he opened its rear and Benson got in. Aden himself sat in the front squeezing P.W.1 and Rispa in between with the thug driver. The van was driven to Kisauni and when the thugs sensed danger, it was suddenly stopped. Aden and the driver fled but Benson was trapped in the rear because the door could not open.

Security guards (Okoth Ochieng P.W.3) drove up. They were told that one robber was still in the back of the van. They kept watch. Police came. They opened the rear door. Benson Wanjehia (appellant 2) came out with arms raised. He was arrested right there. Benson was not a co-worker of P.W.1 and he had not been a lawful and peaceful passenger in that van. P.W.1 had seen him as part of the gang or robbers jumping into the rear of their van right from Tudor to Kisauni. He was among the robbers. He is lucky that due to the prosecution mix-up of the type of pistol that Njehia was caught with, Helwan, from which he fired four times, was not the one stated in the charge sheet. The charge sheet described the pistol as a BERRETTA and not a Helwan. On that basis his appeal on the two counts of having a pistol plus ammunition without a firearms licence was allowed. Otherwise he was found with a Helwan pistol and he had fired from it while in the van. Both the pistol and 4 cartridges were recovered from the rear of that van where he sat. But be that as it may. The conviction of appellant 2 on count 2 was on proper evidence. His alibi which he brought up in his defence anyway, and not earlier during the prosecution case, cannot be considered of substance at all. The prosecution case squarely puts him on the scene and in the robbery until his arrest.

We now turn to Aden (appellant 1) and the conviction on counts 2 and 3.

Again beginning with count 3, Obonyo (P.W.7) attempted a dock identification of Aden. The lower court rejected it and rightly so. Obonyo lay down on his stomach as he was so ordered by the thugs who approached from behind. He did not raise his head until the van KAL 078V had driven off with the 3 thugs plus P.W.1 and Rispa. He could thus not identify Aden and connect him to his (Obonyo) being robbed Sh. 3,000/=. We allow the appeal of Aden on this count.

Now we turn to Count 2. The complainant here was Muchiri (PW1). His evidence was that he saw Aden well at the scene. He marked his features – well built wearing a T-Shirt. He noted this in the statement he made at Makupa Police Station. They rode in the same van from Tudor to Kisauni with appellant 1 sitting close to him on his left. Appellant who had demanded for keys from Rispa at Tudor, now took the money

and jewellery from him and Rispa on the way to Kisauni. At this stage of the robbery, we hold, that the victims were no longer still in confusion, fear and all. That must have been at the beginning of the ordeal and correctly so. In the van and over the distance from Tudor to Kisauni, PW1 and Rispa were in the front:

> *"..... looking at them. We were never ordered to face down."*

Then the thugs said that they would dump PW1 and Rispa at Kisauni. Then PW1 heard Njehia from the back of the van announce that a security van was following them to which the driver, another thug, responded "let them come." All this to us means, PW1 had recovered from the initial fright, he was now alert. Then the van came to an abrupt stop. Aden and the driver fled. Appellant (Njehia) called to them not to leave him. Then he fired from the rear of the van. In assessing this, we came to the conclusion that even if PW1 was initially confused and in fright at the beginning, he was alert and able to keep his identification of Aden from the start, with all he did, then on the trip to Kisauni and also what he did to them.

It is apparent that the Makupa Police Station statement in which PW1 gave Aden's description was not the one from which he testified before the learned trial magistrate. But his evidence was that he had described appellant 1's appearance and body – built. IP Kuria who conducted the identification parade over a month later had been at the scene where PW1 and Rispa were abandoned by the thugs. When they were taken to the police station to record statements, seemingly PW9 was there. He took down the contacts of PW1 and Rispa and noted the description of the robbers in his note book – not from the statements.

Then when called to carry out all identification parade he took out 8 men of identical features light is complexion and body - built as appellant 2. (see PW9's evidence in-chief and in cross-examination by Mr. Gakuhi). Then the parade was conducted.

Mr. Gakuhi held the view that PW1 did not give the description of Aden to any one prior to the identification parade. PW1 maintained that he did and PW9 (IP Kuria) told the court that he took the descriptions down in his notebook which he usually carried. Then he arranged the parade involving people of complexion and body built of the appellant. We were told that such description as recorded in the note book of PW9 ought to have been put in evidence. And Mr. Gakuhi cited the case of Mohamed Allui (above) to support this point:-

> *"This court has previously pointed out, and we wish to repeat, that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the person or persons who gave the description and purported to identify the accused, and then by the person or persons to whom the description was given.*
>
> *It does not seem to be realized that Section 157 of the Evidence Act when a witness had given evidence of having given a certain description of an accused, the person to whom that description was given may be called "to corroborate the former statement" made by the first mentioned witness. If the description is recorded at the time in an Occurrence Book, Diary or in any other form of writing such book or writing should be put in evidence, if admissible under Section 35 of the Evidence Act or be used for the purpose of refreshing the witness's memory under Section 159.*
>
> *In the absence of evidence regarding any description of the burglar by the persons who purported to identify him as the appellant eleven months later, that identification loses much of its value."*

In the above case the appellant (Allui) had been convicted on several charges including wounding and burglary. He was convicted and sentenced to serve prison term. It had been said that an identification parade was conducted eleven months later and the issue fell to be determined if one of the victims of wounding purporting to identify the appellant, had given at the time the description of his assailant. That led to the Court of Appeal repeating the principle quoted above. The appeal was allowed.

In our present appeal more or less same circumstances obtain. Here, the identification parade was conducted over a month after the incident. PW1 gave evidence that he gave the description of Aden to the police in a statement. I.P Kuria (PW9) who was present at the scene and the police station when PW1 gave the descriptions of the robbers took more of the same in his notebook which he said he always carried. And he arranged the parade with people of looks and body – built as described.

Mr. Gakuhi urged us to find that since PW1's statement in which he described Aden was not brought before court or that PW9 did not put in evidence his note book, then there was no description of his client prior to the identification parade and thus it had no value. That is quite a strong point in the light of **Allui's** case (above). But we were greatly hampered in agreeing with Mr. Gakuhi particularly that we did not have before us SS. 35, 157 of the Evidence Act as it was in 1942 which that case was decided. Such an Act was not readily available to us from our limited library and equivalent the sections in the present Cap. 80 were not suggested.

The Allui case alluded to a witness using previously recorded statements to refresh his memory. Something to that effect appears in the present Section 153 Cap. 80 and the present Section 35 refers to statements in documents produced in civil proceedings – not criminal. PW9 spoke of his notebook he carried as a policeman. He had made entries of description of Aden there. But Mr. Gakuhi did not press PW9 to produce and refer / refresh his memory from that notebook during his testimony.

In many cases in our courts where a witness claims that description of an accused person was given and for instance entered in the O.B., the OB is required if the accused person creates a doubt whether such entries were made. Production of such records even persist into appeals as additional evidence. But here Mr. Gakuhi did not seem to doubt PW9 at all. He did not insist that he produce his notebook before the learned trial magistrate and without the benefit of the old SS. 35, 157 of the Evidence Act, we were left with the view that PW9 had the description of Aden as given by PW1 and the identification parade was accordingly arranged, where PW1 picked out Aden. We do not think that in the circumstances of this case, in a month or so after the incident, this identification had lost value.

The next point was whether the parade had a mix of over twenty people or appellant 2 was placed in a row of eight men of his likeness. The learned trial magistrate found that even if PW1 claimed a mix of people but it did not prejudice the appellant (Aden). On our part we went over the evidence of PW1 as well as I.P Kuria (Pw9) who arranged the parade. Cross – examined by Mr. Gakuhi on the manner PW9 arranged the parade and its members, the answer was that some of the parade members were not shagay while others were smart. That it was not true that some had shoes on while others did not. And that all were of fair complexion and built as the appellant (Aden).

In the totality of this case we were left with the view that the identification of appellant 1 regarding count 2 was thoroughly considered by the learned trial magistrate who even went as far as warning herself of the dangers that attend convicting on evidence of identification by one witness. In all this and after our own assessment of the evidence conviction of Aden on count 2 should not be faulted.

In the result that both appellants lose their appeals on conviction regarding Count 2. Their appeals are allowed in respect of Count 3. For appellant 2 his appeal against Counts 4, 5 (on firearms) is also allowed. A death sentence should only be handed down on one count at a time where conviction has been entered in more than one count in a given case. But having upheld conviction on one count only in the present matter each appellant will suffer death as by law mandated on account of Count 2 herein.

Judgement accordingly.

Delivered on 25th October 2005.

J. W. MWERA

JUDGE

J. KHAMINWA

JUDGE