REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 576 OF 2000
(From Original Conviction and Sentence in Criminal Case No. 1650 of 2000 of the Principal Magistrate's Court at Malindi J. Manyasi SPM)

ALPHONCE MODI KAIMA …… APPELLANT

Versus

REPUBLIC ……. RESPONDENT

J U D G M E N T

ALPHONCE MODI KAIMA (the Appellant) was convicted by the Senior Principal Magistrate, Malindi, on a charge of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that the 20th day of May 2000 at Shella Village in Malindi Location within Malindi District of the Coast Province, jointly with others not before the court while armed with rifles he robbed Abdul Munem Abdallah Seif of cash 1620 US Dollars 200,500 Italian Lire, 2300 Deutch Mark and cash Ksh. 196,000/= all of a total value of Ksh. 486,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Abdul Munem Abdallah Seif. He was sentenced to death. He has appealed against both the conviction and sentence on seven grounds which can be condensed into three main grounds. The first one was that the learned trial magistrate erred in law in basing his conviction on the evidence of a single visual identification witness. The second ground was that the identification parade was flawed. The third and last main ground of appeal was that the learned trial magistrate erred in relying on a retracted confession.

The Appellant filed written submissions and he also addressed us briefly during the hearing of this appeal. He attacked the evidence of P.W.1 and the identification parade. In respect of the testimony of P.W.1 he argued that the attack on him was sudden and guns were pointed at him. He was then ordered to lie down with his face turned to the ground. He could not have identified anyone in those circumstances. The identification parade he said was flawed because he was placed among 7 people contrary to the identification parade rules contained in the Force Standing Orders, Chapter 46. He was also not allowed to have his advocate as he requested and that the identification witness said he was not sure of his identity. Regarding the alleged confession he said he was forced to sign a prepared statement after he had thoroughly been beaten.

On his part Mr. Monda, learned State Counsel, supported the conviction. While admitting that the only evidence against the Appellant was that of P.W.1, a single visual identifying witness Mr. Monda submitted that the same was nonetheless safe to act upon and the trial court warned itself on it as required. As regards the identification parade he could not find any fault with it.

We have considered these submissions and carefully read the lower court record. We would like to start with the alleged confession. Referring to it the trial court stated that **"the accused was taken to Malindi Police Station where he confessed having taken part in the robbery**". With respect to the trial

magistrate, that was a grave misdirection. The statement is not a confession. It makes no mention of the robbery incident. It is a detailed account of how the Appellant spent the day, 20th May 2000, taking round his siblings who had visited him. There was nothing in it to corroborate the evidence of P.W.1 as the trial magistrate found. In as far as this case was concerned that statement was worthless.

That brings us to the evidence of P.W.1 which we now wish to consider. The only evidence against the Appellant in this case was that of P.W.1. It was evidence of a single visual identification witness. The law on such evidence is settled. Such evidence has to be treated with the greatest care especially if the conditions respecting identification were poor. In the old case of **Abdallah bin Wendo Vs Republic (1953) 20 EACA 166 at page 168**, regarding such evidence the Court of Appeal for Eastern Africa stated:-

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

This decision has been followed in several subsequent cases. Quoting the above passage the court in **Roria Vs Republic [1967] EA 583** stated that:-

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness … [The] danger is, of course, greater when the only evidence against the accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself in all circumstances, that it is safe to act on such identification".**

The Court of Appeal reversed the trial courts in the two cases because the conditions respecting a favourable identification in both cases were poor.

In this case P.W.1 said that he had about Sh. 486,000/= in various currencies staghed in his pockets. He wanted to go and bank it. As he opened the gate to his compound he saw two people near his neighbour's house. One was wearing an Arabic Kanzu and a cap and the other a buibui. When he had opened the gate and got into his vehicle ready to drive to the bank 3 people approached him from behind and while pointing guns at him they ordered him to lie down with his face turned to the ground which he did. They then emptied his pockets of all the money he had and disappeared. Later he was called to the Police Station where he identified the Appellant as one of the people who robbed him and the one who was wearing an Arabian Kanzu and cap. He said that although the whole episode took between 40 seconds to one minute he was able to clearly identify the Appellant. The identification parade form, however, shows him recorded that he was not sure of the identity of the person he picked.

Although the alleged robbery took place during broad day light, however, given the fact that the attack was sudden with guns pointed at him and the whole incident took about 40 seconds and the doubt expressed at the parade we do not think that P.W.1's identification of the Appellant was safe. It cannot therefore be relied upon.

The identification parade itself was flawed. Contrary to the Force Standing Orders contained in chapter 46 which require the suspect to be placed among at least 8 other people, the Appellant in this case was placed among 7 people. Dealing with a similar situation in **Samuel Ngumbao & Another Vs Republic, Mombasa HCCr. Appeal Nos. 42 & 43 of 2000** Onyango Otieno J (as he then was) and Commissioner of Assize Omwitsa stated:-

> **"The provision requires a suspect to be placed among at least eight persons, not seven**

persons. The suspect is expected to be the ninth person in a properly conducted identification parade and not the eighth person as happened here where … members of the parade were only seven and not eight. We do not think both parades were properly conducted and we do feel the learned magistrate ought not to have put any weight on the results of the … parades".

Simpson and Muli JJ had echoed the same views in **Mboche & Another Vs Republic [1973] EA 95**. In the circumstances we find that the identification parade in this case was not properly conducted and was therefore also worthless. And there being no other evidence against the Appellant his conviction cannot stand. Accordingly we allow this appeal quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED this 6th day of July 2004.

J. MWERA

JUDGE

D.K. MARAGA

AG. **JUDGE**