



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 11 OF 2000'A'**

**JOSEPH NTHATU NDIKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH HCCRA NO. 11 OF 2000'B**

**MUSYOKA MALASI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH HCCRA 219 OF 2002**

**MARTIN SHIKUKU MUNGUTI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

This is an appeal from the judgement in SRMCRC 286/98 Kangundo court. The 2nd appellant Daniel Malasi was the 3rd accused in the lower court case, while the 1st appellant Joseph Nthati was the 2nd accused. The 3rd appellant Martin Shikuku Mutungi was the 1st accused in the lower court case. They were all convicted on the 1st count which was one of robbery with violence contrary to section 296(2) of the penal code. Two others charged with them were acquitted. The three appellants were aggrieved with the conviction and sentences and filed their various appeals in Crc. 11'A'/00, 11'b'/00 and 219/02 respectively. The 1st and 2nd appellants were represented by Mrs. Nzei advocate who argued the appeals whereas the 3rd appellant argued his appeal in person.

They were consolidated and heard as one appeal as Crc. 11/00 (A).

Briefly stated, the evidence that was adduced in support of the charge is that PW1 Elizabeth Mbithe was asleep in her house at kambusu with her husband who is now deceased. Their two sons PW2 Obadia Mutie and PW3 Peter Monthe were asleep in separate rooms adjoining the parents house. They heard dogs barking at about 1.00a.m. PW1 peeped through the window and saw several torches outside. The intruders started to break the wall of the house and the window panes. The two started to scream and were ordered to be quiet. Some people entered into the house through the sitting room while others came in

through the bedroom and started beating them demanding money. They were first given Kshs.4,000/= but demanded more and the deceased asked PW1 to get a further Kshs.40,000/=. They continued to beat the deceased exploded something and left. The deceased had sustained deep cuts and on arrival at hospital he was pronounced dead. PW1 said that some robbers entered the house while others remained outside and that those outside flashed lights on her as well as the other robbers and she was able to identify the appellants because of the torch light and moonlight from outside as the curtains had been removed. She later identified them at a parade conducted by PW10. She said some of the robbers wore hoods and that is why she was not able to identify all. She also claimed to have been tied with a lessa on the eyes but it did not totally cover her eyes.

PW2 was woken by noise outside their house. He saw about 20 people outside the father's house, they broke his door and entered his house but he ran out but was caught by those outside, and beaten unconscious. He came to when the robbers had left. PW2 said he was able to identify the 3 appellants using moonlight and the torchlight which they had. He later identified them at a parade.

PW3 heard the robbers break into the parents house. He climbed on the roof. He watched events unfold from the roof and was able to identify the 3 appellants from the roof using torchlight which the robbers had.

The 3rd appellant was arrested on 14.5.1998 at about 8.00p.m. by PW4 Benjamin Musembi who suspected the appellant who was a stranger in their area. Later the 1st appellant gave a statement under enquiry to PW11 Inspector John Muru in which he named the 2 other appellants who were then arrested and charged along with 3rd appellant. Though retracted the confession was admitted in evidence after a trial within a trial.

In their defence all the appellants denied having been involved in the robbery. 3rd appellant still denied making the confession and each related how they were arrested in different incidents.

Mrs. Nzei for the 1st 2 appellants raised 4 grounds of appeal. The same were argued by the 3rd appellant. They are that the identification of the appellants was unsatisfactory; that the ingredients of the offence of Robbery with violence were not met; that the court erred in basing a conviction on a retracted confession and lastly that the sentence was excessive in the circumstances. The learned state counsel opposed the appeal and we shall consider his submissions in the course of considering the appeal.

The first issue we shall deal with is whether or not the ingredients of robbery with violence were met in the circumstances of this case. It was argued for the appellants that since there was no medical report in respect of PW1 or post mortem report in respect of the deceased, the charge should have been reduced to one of simple robbery under section 296 (1) penal code or mere theft as was held in the case of JOSEPH LEBOI OLE TOROKE VERUS REPUBLIC CR. APP. 204 OF 1987. The state counsel argued that it was enough that one of the ingredients required to prove robbery with violence was present. A robbery with violence under Section 296 (2) of the Penal Code is committed in any of the following circumstances.

(i) If the offender is armed with any dangerous or offensive weapon or

(ii) if the offender is accompanied with one or more other persons or;

(iii) if at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other form of personal violence to any person.

The fact that the offender is armed with any offensive weapon at the time of the robbery or if one is in company of another, that constitutes an offence of robbery with violence. There is evidence that the robbers were many and in fact we have the 3 appellants charged jointly. There is evidence that the offenders were armed so that they even made a hole through the wall to reach the deceased and PW1. Medical evidence was therefore not necessary in this case. It would have been necessary if they were only relying on the ingredient of assault or violence. In the case of CHARLES OTIENO ATUNDA VERSUS

REPUBLIC CR. APPL. 215/02 the court of appeal sitting at Mombasa emphasized that only one of the 3 ingredients needs to be established in proving a charge of robbery with violence.

We now move to the very crucial issue of identification. The offence was committed at about 1.00a.m. It is settled law that before a court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight, and visual identification must be treated with the greatest care. That is what the court of appeal held in the cases of PETER KIMARU MAIMO VERSUS REPUBLIC CR. APP. 111 OF 2003; MOHAMED MAFHABI AND OTHERS REPUBLIC CR. APP. 15 OF 1983; REPUBLIC V. ERIA SEBWATO 1960 EA 174. In the present case the appellants were allegedly identified by PW1, 2 and 3. It is the appellants contention that due to the difficult circumstances that the witnesses found themselves, the witnesses could not ably identify the offenders and the identification is therefore unsafe to sustain a conviction. We have carefully considered and evaluated the evidence before the lower court. PW1 said that the robbers outside flashed torches at her and those who were inside the house and that is why she was able to see the 3 appellants. The court was not told how powerful these torches were whether the torches were directed at the faces of the robbers or not. At one time PW1 claimed to have had her eyes covered. If indeed the torches were directed at her eyes then it would not have been possible for her to see other people. We also consider the state in which P.W.1 must have been, terrified and harassed by the robbers. These are people she had never seen before and she never described any of them to the police. When cross examined, she was not able to describe how any of them was dressed or his appearance.

As regards PW2, he ran out of his house once the robbers entered. He also claims to have seen them by use of torches and moonlight. He did not explain how he came to be able to see the faces of the appellants. If the torch was directed at his eyes there is no possibility of him seeing the intruders. It also seems to have happened so fast that it is questionable whether he had the time to take in the appearance of the 3 appellants. PW2 was not able to describe any of the robbers to police nor was he able to say how they were dressed.

PW3 was on the roof top. He claims to have seen the robbers from the roof. Infact the magistrate in his judgement observed that he had the best vision of the robbers. PW3 described the night as “a night of darkness.” This is unlike what PW1 and 2 said that there was moonlight. Since PW3 was outside he must have known better. If torches were flashed at the house, how was PW3 able to see the faces of the robbers? He also claimed to see robbers while inside the house but it was not at all clear how he was able to do this from the top of the roof. The magistrate never considered further on how this was possible.

An identification parade was conducted by PW10 Inspector Walubuka on which the three witnesses PW1-3 purportedly identified the three appellants. The appellants have challenged the parade as being unprocedural. We have looked at the record and although the witnesses totally deny having been shown the appellants before hand, this is what PW10 said of PW1:-

**“I called the first witness Elizabeth Mutie Mbithe. I informed her to choose the suspect who attacked her. The witness went round and touched the suspect by touching him.”**

The above was in respect of identification of 3rd appellant. In respect of 2nd appellant, PW10 repeated the same thing to PW1.

**“I told her to identify the suspect.” He repeated the same to PW1 in respect of the 1st appellant.**

The statement made by PW10 to PW1 and possibly to PW2 and 3 suggested that the suspects were actually on the parade. PW10 should have merely told the witnesses that the suspects may or may not be

on the parade. PW10's statement to PW1 seemed to suggest that PW1 should have known that the suspects were on the parade and was there to merely pick them out. We find that the identification parades were conducted unprocedurally and contrary to the judges rules.

After this careful consideration of evidence regarding identification, we find that in the circumstances prevailing during the robbery the witnesses could not have had an ample opportunity to identify the appellants. Identification was not watertight.

The 1st and 3rd appellants allegedly confessed to the offences. The said confessions were retracted but after trial within trial the court admitted them in evidence. I have looked through the file and have only had a chance to see EXHIBIT IV the confession of 3rd appellant Shikuku. The one in respect of 1st appellant Nthatu is not on the file. There is no list of exhibits to enable court confirm whether or not it was produced in evidence. What I noted with concern is that the confession was allegedly taken from 3rd appellant at 10.10p.m. why was it necessary for the police to take the statement so late in the night. It could not wait till morning? The time raises eye brows. That aside a confession if properly obtained would not normally require corroboration. It is different for a retracted confession. In the case of TUWAMOI VERSUS UGANGA 1967 EA 84 it was held:-

***“it is unsafe for a court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case, the court is in the position to come to the unhesitating conclusion that the confession is true, that is to say usually unless the confession is corroborated in material particulars by credible independent evidence or unless the character of the confession and the circumstances under which it was taken indicate the truth”.***

In the confession, 3rd appellant allegedly named his co-accused as accomplices. So far there is no independent evidence on record corroborating this confession. Since I have not seen the other confession, it is not possible for the court to say whether there is independent evidence corroborating it or not. The confession by 3rd appellant cannot be a basis to sustain a conviction.

The last issue to consider is whether the sentence meted on the appellants was excessive. Having found that the offence committed was one of robbery with violence, that issue does not arise.

The above notwithstanding, we find that all things taken into account the conviction of the appellants was unsafe as the evidence was inadequate. We accordingly quash the convictions, set aside the sentence and the appellants are set at liberty forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 22nd day of September, 2004.

**LESIIT J.**

**JUDGE**

**WENDOH R.**

**JUDGE**