



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 419 OF 2001

RAJAB KYONZO CHAKA 1ST APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONCOLIDATED WITH

CRIMINAL APPEAL NO.4220 OF 2001

MAAZERA NYANJE MAZERA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

AND

CRIMINAL APPEAL NO.421 OF 2001

MUSA NDEGWA KOMBO 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

AND

CRIMINAL APPEAL NO.423 OF 2001

SAID MWANDIKA MRIMA 4TH APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(Being appeals from original conviction and Sentence in Criminal Case No.
1032 of 2001 of the Chief Magistrate's Court at Mombasa Ms. L.N. Mbatia,
SRM)**

JUDGMENT

The first Appellant in this appeal, is Rajab Kyonzo Chaka. He is the Appellant in HCCR Appeal No.419 of 2001. He was the first accused in the subordinate court – Cr. Case No. 1032 of 2001. The second Appellant is the Appellant in Cr. A. No.420 of 2001. He is Mazera Nyanje Mazera and he was the third Accused in the subordinate Court Cr. Case No.1032 of 2001. The third Appellant is Musa Ndegwa Kombo who is the Appellant in Cr. Appeal no.421 of 2001 and was the 4th Accused in the subordinate Court. The last Appellant Saidi Mwadika Mariwa was the second accused in the subordinate court and is the Appellant in Criminal Appeal No.423 of 2001.

All the Appellants were charged in the subordinate court with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the same charge were that on the 9th day of May 2001, at Kirewe village, Mwaluphamba location in Kwale District, within the Coast province, jointly with others not before court while armed with dangerous weapons, namely panga, robbed Mkalla Punga Mazera of cash KSh.121,000 and at or immediately before or immediately after the time of such robbery wounded the said Mkalla Punga Mazera. They each pleaded not guilty to the charge but after full trial each was found guilty, convicted and sentenced to death.

Each Appellant has filed an appeal against the same conviction and sentence. All the appeals were consolidated and were heard together. The first appellant Rajab Kyonzo Chaka stated in his amended grounds of appeal what we do summarise as follows namely that the learned Magistrate failed to consider that identification of the appellants was by a single witness, at night with the help of only moonlight which is not the best light and the attack was sudden; that the learned Magistrate did not consider the first reports to PW.2 and PW.5 who were the first to meet the witness and whom the witness PW.1 told he never knew who his attackers were; that evidence of PW.1 and PW.2 contradicted each other, and evidence of PW.2 and PW.4 also contradicted each other on material aspects; that the evidence as to the owner of the umbrella produced in court was not proved within the standards required in law; that there were contradictions between PW.3 and PW.6 which was not considered, and that his defence was not considered.

The second Appellant Mazera Nyanje Mazera stated in his grounds of appeal in brief that the learned Magistrate erred in basing his decision on the evidence of a single identifying witness without considering that the circumstances that prevailed at the scene could not allow for positive identification; that the first report made by the complainant PW.1 to the police did not implicate him; that the learned Magistrate failed to consider the first reports made by the complainant to the people who went to his rescue; that the learned Magistrate erred in failing to consider that the complainant could have made a mistake even in cases of recognition; that the learned Magistrate failed to consider the conduct of the Appellant after the incident; the which conduct was consistent with the Appellant's evidence as he did not disappear from his home area; that the defence was not displaced by the prosecution case and should have been considered. There was a supplementary ground of Appeal filed by the same Appellant and that was that the learned trial Magistrate erred in law by disqualifying his prospective defence witness from giving evidence for the reason that she was in court when other witnesses testified.

The third Appellant Musa Ndegwa Kombo filed ten grounds of amended appeal. These were in a summary form that identification by a single witness was not proper as the circumstances did not call for a positive identification; that the learned Magistrate failed to consider the first reports made to PW.2 and PW.3 that the complainant never knew his attackers; that contradictions in the evidence of the prosecution witnesses were not considered; that the name Baisa used by the complainant to describe him was not his name and the court should have considered the same; that PW.6 who arrested him did not know him and looked for him under the name of Baisa and not under his own name, and that the learned trial Magistrate erred in law and in fact in failure to consider his defence.

The fourth Appellant Saidi Mandika Mrima filed ten grounds of appeal which were the same in most respects to the grounds filed by the other appellant – particularly that identification by a single witness with the help of moonlight after sudden attack was not proper that in his first reports the complainant did not mention his attackers and that there were contradictions in the material aspects of the case.

The facts of the entire case were straightforward and simple. The complainant (PW.1) Mkala Punga Mazera was a businessman and had a shop at Kirewe area about one kilometre away from where he lived. At 6.00 p.m. he alleges the first Appellant bought some fish from his shop. At 8.00 p.m. he closed the shop in the presence of his child and employee and walked home having been left behind by his employee and his son. A few paces away from his shop he saw someone approaching him seeking to poke him with umbrella. There was moonlight and he identified that person as first Appellant who had earlier on bought fish from his shop. He saw Rajab and one called Baisa whom he identified in court as the fourth accused. Umbrella was being held by 2nd accused in that court – i.e. Mwadiga. He says in his evidence in chief that that night he saw four people and recognised them all. The third accused was a distant relation of his. Rajab and Baisa got hold of him and threw him on the ground. He managed to free himself. Mazera also attacked him. Mwadiga had a knife and cut him on the left leg and buttocks. They left him naked and Baisa was left behind struggling with him over umbrella. They took all his money KSh.121,000/- which was in his trouser pocket. They removed his trouser and cut up his underwear into pieces. Members of the public went to his rescue and asked if he knew his assailants but as they were relatives of Mazera he told them he had been attacked by 7 people he did not know. He went home and was given first aid. After 1 ½ hours, Mazera went to his home. Complainant shouted his child in the shop was in danger and Mazera went to the shop. Next day he told PW.2 that Rajab and Mwadiga are the ones who had attacked him. They went to the scene and collected umbrella and pieces of wood and took them to his home. His wife collected them. He later went to Kwale Hospital and was referred to Police Station where he was given P3 and referred to Hospital. Police later collected umbrella from home. PW.1 went to Nairobi for 2 days but on his return he found Rajab had been arrested and later all appellants were arrested. Later he went to Police Station and told police those arrested are the ones who had attacked him.

We have anxiously considered the evidence that was led by the prosecution before the learned trial Magistrate. We have considered the submissions that were made before us in court. It is not in dispute that the entire evidence as to identification was that of a single witness, the complainant PW.1. It is not in dispute that the identification was by recognition as the complainant said all the appellants were people from his area where he lives and some were his relative whereas he had known some for a long time. The learned Magistrate after summarising the evidence and after giving some reason for her being satisfied that the complainant properly identified the Appellants states as follows:

“This detailed account of the sequence of events leaves me in no doubt that the complainant was fully conscious of what was taking place that night. He did recognise the robbers and they are the accused persons before the court.

The evidence of the medical officer confirms further that indeed the complainant did sustain some injuries during the attack.

The evidence adduced by the prosecution witnesses is overwhelming and I find that the case against all the accused persons has been proved beyond reasonable doubt. The accused persons denials are a sham. The fact that nothing was recovered from them is not material.

The complainant did recognise them during the robbery.”

This is a first appeal and sitting as a first appellate court, we propose to evaluate the evidence that was before the court afresh to see if we would come to the same conclusion but of course putting in mind that we have not had the benefit of seeing the witnesses and seeing their demeanor. It is trite law that evidence of identification by a single witness under difficult circumstances needs to be examined with greatest care before a conviction can be entered on such evidence even if the evidence is on recognition. It is also a requirement that the learned trial court warns itself of the need to examine such evidence with caution.

In the case of **CLEOPHAS OTIENO WAMUNGA VS. REPUBLIC C.A CRIMINAL APPEAL NO.20 OF 1989** , the Court of appeal had this to say:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied

that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

This was a case of recognition of the Appellants by the complainant. Although recognition may be more reliable than identification still even in recognition mistakes can occur and the court still has the duty as stated hereinabove in the case of Wamunga to examine such a case carefully. In the case of **R. vs. Turnbull (1976) 3 All ER 549** it was stated at page 552 as follows:

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

Thus even on recognition, the trial court had to warn itself of the dangers of convicting the appellants upon the evidence of a single witness. We need to say here that in our own assessment it would appear that the learned Magistrate did not specifically warn herself of the dangers involved in convicting the Appellants on the evidence of PW.1 only on recognition. He was nonetheless aware that she needed to be satisfied that the Appellants took part in the commission of the offence with which they were charged. We feel that for the benefit of courts which deal with similar matters of identification and recognition almost daily, we need to put down here the relevant part of what has come to be known as The Turnbull Guidelines as found in Archbold Criminal Pleadings, Evidence and Practice 1998 Chapter 14, page 1163:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic, or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the Police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance ---- Finally he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of identification evidence. If the quality is good and remains good at the close of the accused’s case, the danger of a mistaken identification is lessened, but the poorer the quality the greater the danger.”

It goes without saying that the single witness upon whose evidence the court will rely on to convict an accused person on identification or recognition evidence must be a reliable witness, for if he is not reliable witness then the quality of his evidence cannot be said to be good and to remain good at the close of the accused’s case. If he is not reliable then it would not be safe to convict on his evidence even if his evidence on the actual identification may at first seem good. In the case of **NDUNGU KIMANYI VS. REPUBLIC (1979) KLR 282**, the Court of Appeal laid down the minimum standard of a witness upon whose evidence the court can rely to convict an accused person as follows at page 284:

“We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

As we stated earlier on in this judgment we propose to evaluate the evidence that was adduced before the learned trial Magistrate. We now proceed to do so with the above legal propositions in mind.

First how many people attacked the complainant that night? The attack on the complainant took place at night about 8.00 p.m. The only source of light that enabled the complainant identify his attackers was moonlight which the complainant described as bright moonlight. The complainant was not aware of the attack. He was then attacked and he says in his evidence in chief:

“That night I saw 4 people. I recognised them all. They are before court.”

When people went to his rescue, and asked him if he knew the robbers, he told them he had been attacked by about 7 people. That is the evidence the complainant gave in chief. When he went to Kwale Police Station, he said:

“At the police station I reported that Baisa, R ajab, Mwadiga and Mazera and others I did not recognise had attacked me.”

Thus the complainant in his evidence in Chief was apparently not certain as to how many people attacked him that night. He said he saw 4 people that night and recognised them all, but with the same breath he said he had been attacked by seven people, and at the same time he said at the police station he reported that Baisa, Rajab, Mwadiga and Mazera and others he did not recognise had attacked him. These are three versions and one is not certain how many people attacked the complainant that night as far as the evidence of the complainant is concerned. Further, according to PW.3 Abdalla Ali, the complainant PW.1 told him as follows:

“He told me that he had recognised 4 of the 6 attackers.”

And PW.5 Kombe Mwalewa said the complainant told him he was attacked by 4 gangsters.

Thus as concerns the number of people who attacked the complainant; the evidence given by the complainant to the court was contradicted by what he told other people and it is not clear as to whether he was attacked by 4 people, or six people or seven people.

The next evidence we need to consider is whether the complainant gave the names of the Appellants to the people he met immediately after the attack. According to the complainant PW.1, immediately after the attack, members of the public came to his rescue and asked him if he knew the robbers. He told them he had been attacked by about 7 people whom he did not know. This was because, the same people were relatives of Mazera, the second Appellant and he knew if he told them he had recognised the men, the suspects would run away. He thus did not tell them he knew the attackers and did not give them the names of the attackers. After 1 ½ hours, the 2nd appellant Mazera Nyanje Mazera went to the complainant. The complainant did not confront him with the allegation that he (Mazera) was one of the thieves. Instead, the complainant demonstrated his concern for his child whom he said was alone in the shop. The 2nd Appellant went to shop in what complainant calls a pretence to assist him. It is not easy to comprehend why the complainant did not resist the 2nd Appellant’s move to the shop where his child was if he knew that the 2nd Appellant was such a dangerous man who had just attacked him less than two house back. PW.2 was one of the people who went to the rescue of the complainant. PW.2 asked complainant who had attacked him but the complainant did not answer. It was when the complainant had been taken home that he gave the names to PW.2. This was according to PW.2’s evidence. According to PW.1 he saw Gereza Mwanguna his relative the next morning and he told him that Mazera, Rajab and Mwadiga are the ones who attacked him. That left out the name of Musa Ndegwa Kombo and that also

represented a serious contradiction on the people who attacked him and their names. If PW.1's evidence is to be accepted, then PW.2 was not at the scene that night and PW.1 is the one who called at PW.2's home and that was the next morning and that is when they went to the scene and collected umbrella and pieces of wood whereas if PW.2's evidence is to be believed then he went to the scene the same night. Indeed PW.2 confirmed that aspect when he said that PW.1 told him he would go to Police Station next morning. Whichever is the position, complainant PW.1 did not tell PW.2 the names of his attackers immediately. The same night PW.5 who responded to complainant's screams and rushed to the complainant's rescue was also told by PW.1 the complainant that he did not know who had attacked him. This witness PW.5 took the complainant to his home and went back to his (witnesses) home.

One is bound to ask why the complainant said to all these people who went to his rescue that night that he did not know his attackers. If he feared naming them because he felt they would disappear then why did he not merely say to those people that he knew them but would not give their names then. Why for instance did he not tell the villagers once he was at his house and Mazera went there that Mazera had robbed him? What was the fear?

The next thing we want to consider is the conduct of the Police for we think it throws doubt as to whether they were given names of the robbers. PW.6 P.C. Saul Ingwela states that a report of the alleged robbery was made to him on 10th May 2001. He stated that the complainant gave the names of the four appellants although one name was given as Baisa. He does not state when he arrested each appellant, and he does not state that the Appellants disappeared or that he searched for them. Throughout his evidence he does not state when he arrested each accused. His evidence of arrest was as follows:

"The complainant had reported that he knew the 4 people who had robbed him namely Rajab, Mazera, Baisa and Mwadika. The umbrella handle had the name Rajab. This is the umbrella – id.

I went and arrested Rajab – 1st accused id. And continued with investigations. I later arrested Baisa (4th accused – id) then 2nd accused (id) and then Mazera – 3rd accused id. I then charged them."

One gets the impression from this evidence that the appellants were arrested immediately after the report and were arrested at approximately the same time. However when one looks at evidence of PW.3 a different impression comes out. PW.3 was a youthwinger. He says that he is the person who took the exhibits namely 2 pieces of wood, a piece of underwear, trouser and umbrella to the police station and he is the one who arrested Rajab on 12th May 2001. He then arrested Mwadiga next day (i.e. 13th May 2001) and about one month later on 10th June 2001 he arrested Mazera. He ended that part of evidence by saying the 4th accused Musa Ndegwa Kombo or Baisa was arrested by his colleagues on a day he did not know as he was not present. One is bound to ask, who arrested each accused? Were they each arrested by police or by youthwingers or by both police and youthwingers acting together? If by both police and youthwingers acting together then why are the police concealing that fact? The next question is if police had a full report of the robbery together with the names and the same names were of the people coming from the surrounding area as the complainant, then why wait till 12th i.e. two days later to effect the first arrest and if Mazera was so well known why arrest him one month later? Further as for the third Appellant who was arrested on unknown date according to prosecution witnesses and was arrested by PW.3's colleagues whose names were not disclosed and never gave evidence, one may ask who identified him to police or to whoever arrested him as the person called Baisa by the complainant? Even more confusing, the 4th Appellant, Mwandika Murima in his Defence says he was arrested on 27th without stating the month. We feel it was 27th May 2001. He says he was arrested by youthwingers and police. PW.3 as we have stated said this appellant was arrested on 13th May 2001 and police are silent on the date of his arrest. The third Appellant says he was arrested on 22.5.2001 by police officer. This meant that if one is to go by the evidence of the Appellants, then only Rajab was arrested two days later, whereas third Appellant was arrested on 22.5.2001 about 12 days later, 4th appellant was arrested on 27th May 2001, about 15 days later and 2nd Appellant was arrested on 10th June 2001, a month later. There is no proper explanation for such a delay in arresting the appellants who were allegedly known to the complainant and whose names were allegedly taken to police one day after the incident, and who were

within the vicinity all the time. One is left in doubt as to whether the court was told the whole truth.

All these matters we have considered were not considered by the learned Magistrate. In our mind, if she had considered them in her attempt to consider carefully the evidence on identification or recognition and reliability of the witnesses before her, she might have come to a different conclusion as to the guilt or otherwise of the appellants. We do not attach much importance to the alleged name of Rajab on the umbrella recovered because the record shows that the court found it faint and could not read it properly so one cannot for certain say it belonged to Rajab in the absence of any other supportive evidence as in any case at the time of the alleged attack, the person allegedly holding umbrella was Mwandika and not Rajab.

We do agree robbery took place that night and complainant was the victim but the evidence before us, part of which we have reproduced above makes us feel that the conviction of all the appellants was not safe.

The Appeals are each allowed, convictions quashed and sentence set aside. The Appellants are each set free unless otherwise lawfully held.

Judgment accordingly.

Dated and delivered at Mombasa this 25th Day of February, 2003.

J.W. ONYANGO OTIENO

JUDGE

G.A. OMWITSA

COMMISSIONER OF ASSIZE