



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL 164 OF 99

DAVID MACHARIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL 165 OF 1999

JOSEPH ONYANGO MWANGALWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

AND

CRIMINAL APPEAL NO. 166 OF 1999

MWUIIRU KARANJA APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

These three Appeals were consolidated and were heard together. The first Appellant before us is David Macharia (H.C. Cr. A. No.164 of 1999).

He was the second accused in the subordinate Court. The second Appellant is Joseph Onyango Wangalwa (H.C.Cr.A. No.165 of 1999). He was the third accused in the court below and Muiru Karanja the Appellant in H.C. Cr.A. No.166 of 1999 is the third Appellant. He was the first Accused in the court below. They were charged with two counts of robbery with Violence contrary to Section 296(2) of the Penal Code in the subordinate court. The particulars of each charge were in respect of the first count that the three of them on the 8th day of March 1998, at around 7.30 p.m. at Maweni Village in Malindi

Location within Malindi District of the Coast province, jointly being armed with a Pistol, iron bars and rungs robbed David Yawa Mgoma of his bicycle Frame No.1313N.7, a paper bag containing two shorts, one vest, four pairs of socks, one tie and two exercise books all valued at KSh.7,280/- and at or immediately before or immediately after the time of the robbery used actual violence to the said David Yawa Mgoma. The particulars in respect of the second charge were that on 8th March 1998 at around 8.00 p.m. at Muyeye Village in Malindi Location within Malindi District of the Coast Province jointly armed with a pistol and rungs robbed Garama Katana of his bicycle make Raleigh F/No A 421928 valued at KSh.5,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Garama Katana.

They all pleaded not guilty to the same charges. After full hearing each was found guilty of each charge and was convicted and sentenced to death in respect of each count. Each of them has filed an appeal and as we have stated hereinabove the said appeals were consolidated and heard together. Each of the Appellants amended his ground of appeal and the amended grounds of appeal are as follows in respect of each appellant. First appellant's grounds of appeal briefly stated that the learned

Magistrate erred in law in basing his conviction on identification evidence given by PW.2 and PW.3 without proper caution that a possibility of error or mistake could exist as it was at night and the only source of light was moonlight which is normally unreliable for identification of strangers. Further she did not consider that number of attackers and the way the same attackers were armed could have affected the witnesses' ability to observe the attacks properly and the Magistrate should have considered that the two were denied opportunity to observe the assailants as they were attacked immediately upon confrontation. The second ground of appeal was that the Magistrate erred in putting any weight to the alleged evidence that a coaccused led the police to the Appellant whereas the same co-accused was not shown to have confessed to the crime and the appellant was not found with anything incriminating according to the O.B. of 17th March 1998; that it was an error in law to have the alleged confession read in trial within trial and the Appellant was not given a chance to defend himself in the trial within trial; that the learned Magistrate erred in law in failing to find that the charge was defective as it did not state the weapons alleged to have been dangerous and/or offensive and the charge was not consistent with the evidence adduced; that the prosecution had not discharged the burden of proof and the defence which raised doubts in the prosecution's case should not have been rejected.

The Second Appellant's grounds of appeal as amended grounds of appeal were that the learned Magistrate failed to consider that identification could not be proper because the attack was sudden and brief, that the presence of attackers who were strangers to PW.2 must have shocked PW.2 and made it impossible for him to make a positive identification; that PW.2 did not disclose the duration he kept the said robbers under observation before he was hit and fell down, that there was not description of the moonlight whereas in most cases moonlight is not a valuable kind of light. In the same way, (the Memorandum of Appeal continues) PW.3 could not also properly identify the Appellant as the attack was terrifying and robbers were strangers to the same PW.3 and PW.3 was continuously assaulted, cut and stabbed with various weapons such that he could not properly identify the attackers and further PW.3 did not describe the weapons his attackers had. The learned Magistrate, should have considered the same when considering identification of the Appellant. The Appellant states further that PW.3 was not certain as to which group took his bicycle and the evidence of PW.3 that the sun was setting when he was attacked was not supported by evidence of PW.2. He contends that there was no proof of the allegations by the victims that they reported the incidents to the police on the same day and told the police that they could identify their assailants and the learned

Magistrate failed to consider the same; that the learned Magistrate erred in holding that the Appellant was found with the stolen bicycle whereas none of the members of the Public who arrested him gave evidence in support of PW.1 on that issue. That the learned Magistrate erred in law and in fact in holding that the Appellant led the police to where the other appellants were arrested as there was no support or corroboration of PW.1's evidence on that and no cautionary statement was availed to show that he voluntarily led the police to the other Appellants; that identification parade was flawed and was prejudicial to the Appellant; that the cautionary statement was not voluntary and should not have been admitted; that the charges were defective as particulars of the charges were at variance with the evidence,

and the weapons named in the charge sheet were not described as offensive or dangerous and lastly that the Magistrate erred in law in failing to consider his defence.

The third Appellant Muiru Karanja filed five amended grounds of appeal which were in brief that the learned Magistrate erred in law in basing his conviction on identification whereas the same identification may not have been proper as there were possibilities of error and mistake because the source of light being moonlight was not a proper source of light for identification of strangers and further the number of attackers, armed with different threatening weapons and the immediate assault on the witnesses could have affected the witnesses' ability for positive identification. The learned Magistrate erred in placing any weight on the evidence that coaccused led the police to the appellant without first considering that the same co-accused had not confessed to the crimes before he allegedly led the police to arrest the others and without considering that there was no proof that the appellant was arrested with anything incriminating according to O.B. report of 17th March 1998, and that the alleged weapons found in his possession were not identified by the complainants. That the learned trial Magistrate erred in accepting the retracted confession in support of the prosecution case without considering that it required corroboration before it could be used as evidence corroborating the evidence of identification which also required corroboration. That the charges were defective as the words dangerous or offensive were not used to describe the weapons and the charges were not consistent with the evidence adduced and that the learned Magistrate erred in rejecting the Defence case whereas the prosecution had not discharged the onus of proof. Before the hearing commenced, the Appellants wanted to introduce additional evidence namely part of the entry into the OB of 17th March 1998 and of 8th March 1998. After efforts were made to trace the same entries did not have any positive result except in respect of the OB of 8th March 1998. The Appellants decided on 1st October 2002 that the Appeal should proceed without that OB entry of 17th March 2002 and so the Appeal was fixed for hearing and was heard in 22.10.2002 without the same OB being produced.

We have perused the entire proceedings in the entire case. We have considered the decision of the subordinate court, the grounds of appeal filed by each appellant, the able submissions by the Appellants and by the learned State Counsel. The brief facts of the entire case as appears from the record is that PW.3 David Yawa Nguma who was staying at Muyeye was on 8th March 1998 at about 7.30 p.m. on his way to work on his bicycle. He was a security guard (askari). He met a group of people, about 11 in number. Five of those people were on each side of the road while one person was in the middle. After he passed them he heard one say "hey". When he turned he says that they wanted to hit him with an iron bar on the head. One on his side kicked him. One aimed the metal bar at him but he evaded it and he fell into the bush. The rest took the bicycle while four of them followed him and he threw the paper bag at them. They took it but continued beating him. He managed to run away. The sun was setting late and so there was still some light and he saw all the people very well. He went to General Hospital where he was treated and then he went to police station. He reported to the police. The bicycle was his and he produced receipt for it. Its frame Number was 1313N 7. He told the police he could identify the people if he saw them again and later on 24th March 1998 he identified the three appellants as among the people who took part in the robbery against him. He identified the third Appellant as the person who had a panga, and a small gun, and though did not cut him, that Appellant was behind the rest. First Appellant had an iron bar and knife. He (First Appellant) hit PW.3 on the left arm and left shoulder. 2nd appellant was the one who hit him first. He cut him and stabbed him on the left arm. He saw the bicycle at the Police Station after the Appellants were arrested and he identified it as his bicycle by its seat, make and frame number.

PW.2 Garama Katana had borrowed a bicycle (different bicycle) from PW.1 on the same day. That was bicycle frame No.A 41928. He stays at Mkangangani in Gede Location and works at Casuarina. He went to a shop with it but on his way back from the shop, he found three people who stopped him and ordered him to leave the bicycle and go. Before he could release the bicycle one of them hit him with rungu at the back of his head. He fell down and the three men took the bicycle and ran away. One of the three had an iron bar and knife. He had fish on the bicycle. He said it was moonlight and he could identify the three people if he saw them again. He reported the incident to PW.1 and both reported to police. He told the police he could identify the people if he saw hem. On 18th March 1998 he learnt that the bicycle had been recovered. He went and saw it at the police station and identified it to be the bicycle stolen from him, but a number of things were missing from it.

PW.4, PC. Joseph Ringera of Malindi Police Station received a report of robbery at Maweni at about 10.00 p.m. from PW.2 Garama Katana. He booked the report and went to the scene at Maweni. While at the scene he got a report through a radio call from the Police Station that another robbery had occurred in the same area. He together with other police officers patrolled the area but made no arrest that night. On 17th March 1998, a report was made that PW.1 the owner of the bicycle taken from PW.2 had arrested the 2nd Appellant with his bicycle. The same second Appellant was taken to the Police Station with the same bicycle. On interrogation the 2nd Appellant volunteered to take PW.4 and others to the other people who were with him during the robbery. He took police to Casuarina area, in a bush about 200 metres from the Tropical hotel. There was a shelter there where the police found First and third Appellants together with another man who was shot dead. The First and third Appellants were seated but on seeing the police they ran in different directions. The police arrested 1st and 3rd Appellant and took them back to the shelter where they recovered a Somali sword, a pistol and the second bicycle. Pw.2, and PW.3 were issued with P3 forms which were duly filled. PW.4 then made arrangements for identification parades to be conducted and these were conducted by PW.8 and were only in respect of the 2nd Appellant, Joseph Onyango Wangalwa. The Police also took charge and caution statements from all the appellants which were produced after trial within trial in respect of each statement. In their defence, the first Appellant David Macharia said he was arrested on his way to purchase his merchandise as he is a hawker, police took him to station, beat him and told him to sign a statement which was recorded and if he did not sign it he would be killed as the man with whom he was had been killed. He signed it. The 2nd Appellant Joseph Onyango said he is a mason at Maweni. On 16.3.98 he woke up at 6.10 a.m. and went to Kibokoni where he was working. He found no work in progress there and decided to return home. On his way back he met a man with whom he had disagreed. That person with two others stopped him. They quarreled and he fought them. When they realised he was winning they took him to police station where he found 1st and 3rd Appellants. He was charged together with them in this case but he never took part in the two robberies.

The 3rd Appellant said that on the day of his arrest he met police at Casuarina as police were looking for suspects. They took him to Malindi Police Station where he was beaten and forced to record a statement, but he refused to do so.

The above was the evidence that was before the learned Magistrate. We propose to consider the appeals separately as we feel that justice requires us to do.

First Appellant David Macharia was allegedly identified by PW.2 as one of the three men who attacked him and robbed him of his bicycle. PW.3 also alleged that he (the Appellant) was one of the eleven people who attacked him and robbed him of the bicycle and other items. There is also a charge and caution statement he is alleged to have written at the Police Station and of course there is also the evidence that the 2nd Appellant took police to the hide out where 1st Appellant was together with others and that this Appellant was implicated by the other appellants in their statements – charge and caution statements. These were in our humble opinions the evidence adduced against this Appellant. We will on our own consider these to see if they or any of them did amount to the standard of evidence required in a criminal case and particularly in a charge such as the Appellant faced such that the court could act upon to convict the Appellant. Put another way did the evidence against this appellant establish proof beyond reasonable doubt that this appellant took part in either or both of the robberies?

Both PW.2 and PW.3 alleged that they did identify the Appellant very well. As far as PW.2 is concerned he borrowed the bicycle from PW.1 at 7.30 p.m. He went to the shop with it and he was robbed of it when he was coming from the shop. That must have been after 7.30 p.m. and there was according to PW.2 moonlight on and that was the only source of light which helped him to identify the robbers who were three and were strangers to him. Unfortunately the court was not told the strength of the moonlight and although the witness PW.2 says he told the police that he could identify the attackers if he saw them again no identification parade was arranged for him to identify the Appellant who was arrested on 17.3.1998, about nine days later. Thus the identification of this appellant in the court by PW.2 remained no more than dock identification which is of very little value and is in fact described in the case of Gabriel Kamau Njoroge vs. Republic (1982 -88)1 KAR 1134 as worthless. The same also applies to evidence of PW.3 who claimed that he was robbed at 7.30 p.m. but claims that there was still some day light on as it had not

become completely dark. He claims to have identified all the eleven people who attacked him very well. On our own we doubt this allegation as he had no good reason for identifying each of the 11 people when he was approaching them and immediately he made to pass them he was hit with an iron bar on the head and kicked and he was manhandled and fell down. One naturally wonders what time he had for identifying each of the 11 people with the help of only "some" light from the sun which was setting late at 7.30 p.m. He does not talk of the moonlight although this was on the same day and according to evidence coincidentally at the same time though at different places in the same area. However, what we find important is that again this identification by PW.3 was no more than dock identification and was worthless. We thus find that the identification of this Appellant was not proper and we are of the feeling that if the learned Magistrate had directed her mind to all the above, she would have found it difficult to place any reliance on the alleged identification of this appellant by the two witnesses.

However, the learned Magistrate also relied on the evidence of a statement allegedly made to the Police by this Appellant which she said, though retracted was admitted by the court. We need to correct that part of the learned Magistrate's decision which seems to suggest that once a retracted statement is admitted as having been given voluntarily it ceased to be a retracted statement. In our mind a retracted statement is a statement which the person alleged to have given it alleges not to have been given voluntarily without threats, promise, force or inducement and it does not cease to be a retracted statement simply because it is admitted by the court. It still remains a retracted statement and would normally require corroboration unless the court having warned itself of the need for the same corroboration still believes it reflects the truth. Be that as it may, back to the statement of the appellant, PW.5 IP William Nyakundi is the witness who took his charge and caution statement. What is on record is that when the same witness gave evidence in chief and identified the statement and just as he was about to produce it as Exhibit, this Appellant objected to the production of the same statement. The learned Magistrate then rightly ordered Trial within Trial to proceed. However, in the trial within trial the same Police Officer gave evidence and was cross examined by the Appellant. For some unknown reasons, that witness was allowed to read over the same subject statement before cross examination. After the witness was cross examined by the appellant, the learned Magistrate made a ruling straightaway in which she admitted the statement without the appellant having been given opportunity to defend himself in the trial within trial. In fact the learned Magistrate never put the Appellant to his defence in the trial within trial and never allowed him to defend himself. She admitted the same charge and caution statement on the main reason that it contained details which PW.5 could not have invented. With respect the learned trial Magistrate did not direct herself to the fact that the statement was being retracted and not being repudiated. In short she did not direct her mind to the issue before her which was that the appellant was saying the statement was obtained from him by threats of torture and death which could mean that he may have given the statement but it was not voluntary. We think that the learned Magistrate's failure to conduct the trial within trial properly which ended in her denying the Appellant opportunity to defend himself in trial within trial were fatal to the admission of the statement and we thus find that that statement was improperly admitted.

Having made findings that the identification of the first appellant by Pw.2 and PW.3 could not be relied upon as they were no more than dock identification and that the First Appellant's statement was not properly admitted, what remains by way of evidence against the First appellant? There is the evidence that the other two co-accused i.e. 2nd and 3rd appellants implicated him in their charge and caution statements, and that the 2nd Appellant took police to a hide out where the First Appellant was found and where the bicycle was found.

The statements by co-accused, though they were inculpatory, were according to law evidence of the weakest kind and could only be used to lend assurance to some other evidence. See case of ANYANGU & OTHERS VS. REPUBLIC (1968) EA 239 . We cannot therefore put reliance on the statements by the other two appellants unless there is some proper evidence that the same statements would lend support to. The second bicycle was found in a shelter where three other people were apart from the second Appellant who had taken the police there. The bicycle was recovered from them on 17th March 1998 about nine days after it was stolen. Those found with it could be thieves or receivers. Because of what we have said about the identification of this appellant, we cannot say that it has been proved that he was the thief.

The conviction against this Appellant was in our humble opinion unsafe. We allow his appeal on both

counts, quash conviction and set aside the sentence. He is released forthwith in respect of both counts in this case unless otherwise lawfully held.

The second Appellant is Joseph Onyango. The evidence against him which the learned Magistrate did accept was that he was identified by PW.2 as one of the people who robbed him of the bicycle. PW.3 also identified him as one of the eleven robbers who robbed him of his bicycle. He was arrested with the bicycle which PW.1 claimed to be his and which he had given to PW.2 and was taken away from PW.2. After members of the Public took him to the police station, PW.4 says he (Appellant) offered to take the police to where the other robbers were. He took the police to that place and the second bicycle taken from PW.4 was recovered plus a pistol and Somali sword. He is also alleged to have given a charge and caution statement and lastly when identification parade was arranged PW.2 and PW.3 did identify him at the two parades.

We have anxiously considered the evidence that was adduced against this Appellant. His identification by Pw.2 and Pw.3 at the two scenes could not, as we have stated in respect of the first Appellant, be relied upon purely because we are not satisfied that moonlight was enough for PW.2 to identify these strangers and also as we have said it does not appear to us that at 7.30 p.m. there is still any more sun light to ensure proper identification of eleven strangers who as we have said, had just been passed by PW.3 and were attacking him from behind. However, this appellant was later arrested with the bicycle and it was Pw.1 who saw him with the bicycle and caused his arrest with the help of members of the public. It is noteworthy that PW.1 was not at the scene of the robbery. Further, Pw.2 and PW.3 each identified this Appellant at identification parades. We have perused parade Form Exh.12 and we cannot detect any defect in the parade as was conducted by Pw.8. But even if the parade results were marred by the fact that the circumstances on the date and time of robbery were not conducive to proper and accurate identification as we have observed above, still there is the evidence that this Appellant gave a statement which was admitted after proper trial within trial in which he was given full opportunity to defend himself and he did. Further he led the police to where the second bicycle was recovered plus a pistol and Somali sword. It is true his retracted statement was read to the court during trial within trial and that should not have been so but on the whole when that statement is taken together with his leading the police to where some of the stolen properties were found, we feel that that statement was properly admitted. In any case he was found with another bicycle stolen from PW.2

This Appellant's defence was that the person who arrested him (PW.1) was a person with whom he had disagreed. That person followed him with two other people. They quarreled and he fought them but when they saw he was winning they took him to the police station.

Surely a person winning a fight could not be taken to police station by those he has overcome. Only a person overpowered could be taken to police station. When PW.1 gave evidence, it would appear that the Appellant in cross examining PW.1 suggested that PW.1 had offered to sell him the bicycle at KSh.250/-. No questions were put to PW.1 to suggest he had disagreed with the appellant nor to suggest any of the people who arrested the Appellant with the bicycle had had any disagreement with this appellant. No suggestion was made to PW.1 that he (PW.1) did not arrest the Appellant with the bicycle. It is true the charges preferred against the Appellant did not describe the weapons the robbers used as offensive or dangerous but the same weapons were named in the first count as pistol, iron bar and rungu and in the second count as pistol and rungu. These weapons needed not be described as offensive or dangerous for they are in themselves offensive and dangerous. We find that he was also implicated by the inculpatory statement of Muiru Kanja, a co-accused which was properly admitted.

In our humble opinion, the evidence against this appellant was overwhelming and met the standard required before a person can be convicted of the offences with which the Second appellant was charged. We see no reason to disturb the conviction and sentence. They will stand. The appeal by the Second appellant Joseph Onyango is dismissed both on conviction and sentence.

The third Appellant is Muiru Karanja. The evidence adduced against him was to an extent close to the evidence against the First Appellant. However in his case, the statement taken from him was admitted after proper trial within trial in which he was given full opportunity to defend himself and he did so. The

full evidence against him was that PW.3 alleged that he saw him among the 11 people, he met and who just after he passed them attacked him and robbed him of his bicycle. He made a statement in which he confessed having taken part in the robbery. 2nd Appellant implicated him in his charge and caution statement and took the police to where he was found and arrested. The bicycle stolen from PW.3 was found in the same place where this Appellant was. Other things like a pistol and Somali sworn were also found there. These were the evidence against this Appellant together with others. In our view, though the identification of this Appellant by a single witness was not safe and the court could not put reliance on the same, yet his statement which the learned Magistrate admitted was clearly detailed on the part he took in the robbery and was fully corroborated by the evidence of what was found at their hideout. Further there was also the statement of the Second Appellant which was inculpatory and which also implicated this Appellant. Although that was evidence of the weakest kind it did lend support to the Appellant's statement.

In his defence in the court below he said that he was a scrap dealer. On the day of his arrest he met police at Casuarina. The Police were looking for suspects. They took him to Malindi Police Station where he was beaten and forced to record a statement. He refused to do so. In our mind, the learned Magistrate was right in rejecting that evidence and she was right in relying on the contents of the statement given by this Appellant. Again we feel that as we have stated hereinabove, since the weapons used were named in the charge sheet, the omission to describe the same as dangerous or offensive in the charge sheet did not occasion any injustice.

We do find no proper reason to interfere with the conviction of this appellant. His appeal against conviction and sentence are dismissed. In conclusion and for clarity purposes Appeal filed by the First Appellant David Macharia is allowed, conviction quashed and sentence set aside. Appeals filed by 2nd Appellant Joseph Onyango and by the third Appellant Muiru Karanja are each dismissed both on conviction and on sentence. Judgment accordingly.

Dated at Mombasa this 7th Day of November 2002.

J.W. ONYANGO OTIENO

JUDGE

L.O. OUNA

JUDGE