



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 118 OF 1998

SAID BAKARI ALI FIRST APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 119 OF 1998

HASSAN ODHIAMBO SECOND APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 120 OF 199

KENNEDY KAVAI ABDALLA THIRD APPELLANT

-VERSUS

REPUBLIC..... RESPONDENT

**(From Original conviction and Sentence in Criminal Case No.1305 of 1996,
Principal Magistrate's Court, Malindi – J.R. Karanja)**

JUDGEMENT

The three Appeals were consolidated and heard together at the request of the State Counsel and there being no objection by the Appellants. The Appellants were among 7 accused persons before the Principal Magistrate where they faced a charge of Robbery with Violence contrary to Section 296(2) of the Penal code. The Appellant in Criminal Appeal No. 118 of 1998 SAID BAKARI ALI (SAID) was the 1st Accused, Appellant in Criminal Appeal No. 119 of 1998 HASSAN ODHIAMBO SAID (HASSAN) was the 7th Accused and Appellant in Criminal Appeal No. 120 of 1998 KENNEDY KAVAI ABDALLA (KENNEDY) was the 4th Accused. They were each convicted and sentenced to suffer the only penalty prescribed by the law for such an offence.

On the fateful evening JUSTINE MWAMUYE CHIVATSI (PW.1) was attacked by a group of people around 8.00 p.m. while at his quarters within his employer's premises otherwise known as KAOLE HOUSE. They took his Radio but he said he could not identify any of them. It would appear that immediately or simultaneously the same group attacked his employer and guests while they were enjoying their Dinner outside their verandah. CAROLINE ANRITA (PW.2) said while they were enjoying their Dinner they were attacked by a group of people armed with arrows, bows, knives and pangas. They were manhandled, threatened and some of their property taken before her husband MANCA FRANCO (PW.3) managed to sneak away and pressed the alarm. He had tried to calm the attackers and in the meantime he said he was able to recognize 4 of them among them the 2nd and 3rd Appellants whom he also identified at a parade conducted at the Malindi police station. He said the attack took about 15 minutes and that there was adequate light. In cross-examination by 3rd Appellant PW.2 said he, the Appellant was among the first person to arrive and that she had marked his face and could not forget it and that he was armed. On his part PW.3 when cross-examined by 2nd Appellant said he identified him as the person who had violently hit the table with a panga and he also spoke to the others in his language. PW.3 however confirmed he had not known the 2nd Appellant before this incident.

PW.5, LEVIS ELISABETTE was a guest at the time. He too suddenly saw a group of people armed with pangas and arrows attack them. They took from him a pullover and a wrist watch which were later recovered. On cross-examination he told the 1st Appellant that he had not seen him before but during the attack he saw his face clearly. In fact he went further and admitted that he was shocked by the attack but he did not panick. PW.6, ALLEGRETI ELLIO, said she was able to recognize 4 of the attackers and identified among others Appellants 2 and 3. Again in crossexamination by 2nd and 3rd Appellants she said she had not met the two previously but had no doubt she had seen them at the scene. She also admitted having experienced fear.

IP. ISSA WANJA (PW.4) conducted the identification parades in respect of the Appellants as well as others. He informed them the purpose of the parades. At the close of the exercise he signed and the Appellants' counter-signed the parade Forms signifying their satisfaction in the manner the parades were conducted.

All three Appellants have challenged their identification. The 1st Appellant, SAID said the trial court had erred in convicting him on the evidence of a single identifying witnesses and without warning itself of the danger in so doing. He also said the light at the scene was not shown as having been adequate for purposes of identification. He further challenged his arrest on the ground that the evidence by PW.7 P.C. PATRICK KIDAI who said he had arrested him at Maweni area contradicted that by PW.8, SGT. PATRICK MWANGI, who said he had arrested the Appellant at Casuarina Area. In cross-examination by 1st Appellant he said the Appellant together with others led him to another suspect where they recovered the wrist watch and pullover and later to an area near Malindi Airport where the weapons were recovered.

The 2nd Appellant, HASSAN, also challenged identification on the ground that none of the witnesses had given any description of their assailants to the police prior to the arrests and conducting of the identification parades. He also challenged the identification parades in that he was subjected to the exercise twice. PW.8, in answer to this said the Appellant however did not object to the said parades.

On his part the third Appellant, KENNEDY also challenged identification on the same ground that no description of assailants had been given to the police by complainants prior to his arrest and identification at a parade.

The state Counsel supported the conviction of all the Appellants on the ground that the evidence shows out that they were each identified at the parades by different witnesses. He further said the light was adequate and conducive coupled with the fact that the incidence took about 5 to 15 minutes according to the witnesses.

We, on our part have read and evaluated the evidence as is required by law. There is no dispute that the 5 complainants were indeed attacked by a group of people armed with an assortment of weapons like pangas, arrows and bows. It is also not in dispute that all the three were identified by different witnesses when identification parades were carried out save that the 1st Appellant says the court erred in relying on such evidence by a single witness while Appellants 2 and 3 say the identification was improper because witnesses did not give any descriptions of their attackers to the police. PW.7 and 8 said in their evidence that it was the 1st Appellant who led them to where 2nd and 3rd Appellants were arrested including another suspect by the name of Mwangi who had escaped but in whose possession they recovered the Radio, watch and pullover. These items were identified by PW.1 who identified his stolen Radio while PW.5 identified his watch and pullover. This evidence of the recovery corroborates the evidence of identification of 1st Appellant by PW.5.

As for the 2nd Appellant, PW.6 said she was able to identify at least four of the attackers as there was adequate electric light. This was despite the fact that she had been injured. In cross-examination she was firm that she had seen him at the scene. PW.8, said it was 2nd Appellant together with 1st Appellant and others who led the police to the scene where weapons were recovered. He was also identified by PW.3 who said she could identify 4 people who were at the scene and 2nd Appellant was one of them and indeed spoke to the others during the robbery.

On the part of the 3rd Appellant, PW.3 did identify him as having been at the scene and as the person who violently hit the table. He was also identified by PW.5 and PW.6.

We have noted that although throughout the record, the witnesses are recorded as having said they recognized the Appellants at the scene, it is also clear from the same record that the witnesses on cross-examination said they had not seen their attackers before the incident but they were able to remember them from that particular day. The trial court used the words recognition and identification interchangeably but it is clear from the proceedings the witnesses meant identification.

The 1st and 2nd Appellants gave unsworn defences and denied any involvement and that they were each arrested separately. The 3rd Appellant gave a sworn defence in which he stated on his arrest he was not identified by any of the witnesses.

In all we find the evidence did point to the Appellants involvement in the said robbery and as a whole find no good reason to interfere with the Magistrate's findings and that the conviction of the Appellants was safe. As a result we Dismiss the Appeals.

Dated at Mombasa this 24TH day of May 2001.

P.N. WAKI

JUDGE

P.M. TUTUI

COMMISSIONER OF ASSIZE