



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

CRIMINAL APPEAL NO. 267 OF 1998

ANDREW APPELLANT (Original Accused 3)

=VERSUS=

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 268 OF 1998

JOHN KIWASA.....APPELLANT

(Original Accused 1)

=VERSUS=

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 356 OF 1998

KENYATTA IVALE AMUKASA..... APPELLANT

(Original Accused 4)

=VERSUS=

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 113 OF 1999

NDATI NGUNGU APPELLANT

(Original Accused 2)

=VERSUS=

**(From Original Conviction and Sentence in Criminal Case No.267, 268, 356 & 113 of
1997 of the Chief Magistrate's Court at Mombasa – J. Siganga Miss – S.R.M.)**

JUDGEMENT

All the four Appeals herein were consolidated and heard together as they arose from the same trial in the Lower Court. The Appellant in 267/98, Andrew Aule (Aule) was the third Accused; 268/98, John Kiwasa (Kiwasa) the first Accused; 356/98 Kenyatta Ivale Amukase (Kenyatta) the fourth accused; and 113/99 Ndati Ngungu (Ndati), the second Accused. They were all tried before Mombasa Senior Resident Magistrate for the offence of robbery with violence under S. 296 (2) of the Penal Code and upon conviction were sentenced to death.

On the night of 14th/15th February 1997, Ruth Mutave Kioko PW 1, (the complainant) was sleeping at her home in Langata Village, Njukini Location in Taita Taveta. With her were her three children but her husband was on Safari. At about 2.00 am the main door of her house was violently broken down and she woke up. A gang of five robbers had already entered the house and she met them in her sitting room. She saw at least three men one of whom was holding a large torch while each one held a panga. She recognized three of them, Kenyatta, Aule and Ndati. She said they were her neighbours and she had known them for one year each. The other two she could not identify.

According to her, Kenyatta's face was covered in polythene paper while the others were not. The gang then set on her with cuts and blows on various parts of her body and she sustained serious injuries. In the process Kenyatta's polythene paper fell off and she saw his face through the aid of the torch light which was being flashed around.

One of the robbers then took her bicycle as she struggled with the others. She went outside the house and collapsed there. Her sewing machine was also taken and placed near where she had collapsed. That is when she says she recognized Ndati and Aule. Kenyatta who was holding both a panga and a knife then warned her to keep quiet where she lay or he would kill her. Due to the commotion and screaming, one of complainant's children woke up. That was PW 2. At that point in time the complainant was already outside the house. As he emerged from the main door he was hit with the flat side of a panga on the eye. He collapsed near his mother. Both were bleeding profusely. The robbers left having stolen the bicycle and the sewing machine-head.

The complainant then struggled to crawl back into the house and instructed her son to go and call neighbours before she passed out. The neighbours who included village elders PW 3, PW 4 and an Administration Police Officer PW 5, came and assisted the complainant and her son to hospital where the complainant was admitted and was treated for more than one month. By the time she came out of hospital the Appellants had all been arrested and charged with the offence.

The arrests were made on the strength of what the son, PW 2, told the neighbours, PW 3, PW4 and the Administration Police Officer PW5. He said he had recognized Kiwasa. That is when the neighbours together with other members of the public started looking for Kiwasa and they met him on the way carrying a bag of maize on a bicycle. They apprehended him and took him to the Administration Police Camp. The Administration Police took him to Taveta Police Station where PW 6 Sgt Jackson Kieti received him. Sgt Kieti locked up Kiwasa in police cells and went to see the complainant in hospital but found that she could not talk. He returned to interrogate Kiwasa and testified that Kiwasa confessed to him about his involvement and that of his other 4 compatriots. He then gave instructions for those suspects to be arrested by Administration Police. The Administration Police arrested Aule and Ndati from their houses but found nothing incriminating. Kenyatta was arrested by members of public. One and a half weeks later when the complainant was able to talk she was shown the suspects and confirmed that she knew them. They all denied involvement in the Robbery.

Kiwasa said he slept at his house and in the morning woke up to go to his shamba where he was selling vegetables. Later in the day his wife harvested maize and asked him to take it to the market. He took his bicycle and was peddling to the market when he met two Administration Policemen who stopped him and asked him to accompany them to the Police Station. He went there but then he was set upon with beatings and questions about some bicycle and sewing machine he knew nothing about. He did not know his co-accused's and did not mention them.

Ndati was also at home where he slept throughout the night. He woke up and went on with his work throughout the day. Then at night police came and arrested him for reasons he was not told. He was beaten up to show where some bicycle and sewing machine had gone.

Aule was asked by some members of the public to go to Taveta Police Station on 17th February, 1997 which he did and saw the OCS. There he was questioned about some stolen property which he knew nothing about. He was still arrested and charged. On the night on the robbery he was sleeping at home.

Finally Kenyatta said he was at his shamba on 14th after which he went to watch a football game between 3.00 pm and 5.00 pm. He went home and slept. The next morning people came to his home with police and he was arrested and interrogated about a robbery he did not know about.

All of them said they were strangers to each other. All four appellants have challenged their convictions on one main ground amongst others. That is identification. It is also the main basis upon which they were convicted and it must therefore be put to close scrutiny in this Appeal.

The only evidence of identification came from the complainant and her son PW 2. That of PW 2 however was most crucial since he is the only one who said he identified Kiwasa who was the first to be arrested and according to the investigating officer PW 6 Sgt Kieti, he confessed his involvement and named his co-Appellants. The complainant did not identify Kiwasa and therefore the evidence of PW 2 stands alone in that respect. What is that evidence?

The learned trial Magistrate found that the witness was aged 10 years and was therefore a minor. In accordance with section 19 of the Oaths and Statutory Declarations Act Cap 15, the voir dire was conducted to determine whether the minor firstly understood the meaning, nature and purpose of an oath; and if he did not, whether he was possessed of sufficient intelligence to justify the reception of his evidence though not on oath. The trial Magistrate determined that the witness understood the meaning, nature and purpose of an oath and therefore his evidence was received on oath

. It would appear however that the learned trial Magistrate subsequently evaluated that evidence as if it was received from an adult and she laid total reliance on such sole evidence to convict. She stated:-

“PW.2 said that he saw Accused 1’s face outside the house and recognized Accused 1 as a former school mate and neighbour. He particularized that Accused 1 is the one who was carrying away the sewing machine head. Accused 1 was not recognized by PW.1. PW.2 further said that it is Accused 1 who hit his (PW.2’s) left eye with the blunt side of the panga. Further, Accused 1 accidentally flashed the torch on his (accused 1’s face) during the incident, so he (PW.2) clearly saw Accused 1’s face. Although Accused 1 denied any involvement in the robbery, from the evidence of PW.2, I am satisfied that accused 1’s denial is not candid and truthful.

Accused 1 was well known to PW.2 prior to this incident and there is no evidence that Accused 1 had disagreed with PW.2 earlier on prior to this incident. There is no evidence that PW.2, is framing accused 1 herein. He (PW.2) seemed as truthful witness by his demeanour and his evidence satisfies the requirement in criminal cases on the proof against the Accused 1. In my opinion, the lighting was sufficient to enable PW.2 clearly see Accused 1 and even see Accused 1’s role during the robbery.”

At no time did the learned trial Magistrate direct her mind to the mandatory requirements of S. 124 of the

Evidence Act Cap 80 which provides:-

“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him”.

Clearly the evidence of PW 2 required corroboration but none was sought. The closest the prosecution came to providing corroboration was in the evidence of the investigating officer PW 6, Sgt Kieti who testified that Kiwasa confessed his involvement to him. But then such evidence was improperly accepted on record. It was in contravention of S. 28 of the Evidence Act which provides:-

“No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it be made in the immediate presence of: -

(a) a magistrate; or

(b) a police officer of or above the rank of, or a rank equivalent to, inspector”.

There was neither a Magistrate nor a police officer of the rank or equivalent to an Inspector when Kiwasa purportedly confessed his crime to Sgt Kieti. Kiwasa himself denied having made any confession and it was therefore incumbent on the prosecution to tender a properly recorded confessionary statement if they wished to have such evidence accepted by the court or used to corroborate the evidence of PW 2.

Accepting the evidence of the two witnesses was a fundamental error of law and the evidence must be discounted. Without it there is no other evidence to connect Kiwasa with the alleged offence. Even the veracity of PW 2 as a witness is questionable.

He was asleep and only woke up after his mother had been assaulted in the sitting room and had collapsed outside the house where the robbers continued to attack her. PW 2 stated:-

“She had been out of the house so I followed her outside. As I emerged from the house, somebody hit my left eye with a panga. That person is accused 1. After I was slashed with a panga by accused 1, I fell down next to where my mother had fallen down. We were bleeding.”

He continued to state that it was dark when he emerged from the house and that all the attackers had torches. Then in cross examination by Kiwasa he stated:-

“I was inside the house when the torches were flashing inside the house. You dropped your torch and when you bent to pick it up, it flashed on your face and I identified you. You were five robbers in total. The other four robbers had covered their faces with masks I don't know how long the incident took”.

Either PW 2 found and recognized Kiwasa inside the house or outside. The inconsistency in his evidence casts doubts on its veracity. If it is true as he stated that he was hit on the eye and collapsed on emerging from the house into the darkness outside, then it defies logic how he clearly saw Kiwasa. He said he knew Kiwasa when he (PW 2) was a nursery school child and Kiwasa was in Standard 8 in an undisclosed year.

Even if the evidence of PW 2 could be acceptable on its own, which it is not, it leaves reasonable doubts along the way which must benefit the Appellant Kiwasa. Kiwasa's defence that he slept at home and was only arrested as he was innocently going to the market was not cross checked by the investigating officer and may well have been truthful. No reason was given by the learned trial Magistrate for rejecting it.

We have said enough to show that Kiwasa was not properly convicted and we allow his Appeal. He shall be set at liberty forthwith unless he is otherwise lawfully held.

As for the Appellants Ndati, Aule and Kenyatta, the only evidence remaining as to their identification is that of the complainant. The other reason given for their arraignment in court was that they were mentioned by Kiwasa and were therefore promptly arrested from their homes by Administration Police and members of the public. That they were mentioned by Kiwasa who was a co-accused however has on its own no probative value. As we have found Kiwasa's confession was in law a nullity. Even if it was not, such evidence requires corroboration and none was sought by the learned trial Magistrate.

Which leaves the only evidence worth considering in the matter that of the complainant. As the sole identifying witness it was necessary for the court to warn itself of the dangers of convicting on such evidence although in law the evidence of a single witness, if truthful, is sufficient to found a conviction. In assessing that evidence the trial court stated:-

“As for accused 2, 3 and 4, it is PW 1 who recognized them as her neighbours and customers in her kiosk for the past one year prior to the incident”.

Hers was therefore evidence of identification by recognition rather than visual identification. Such evidence has been held in some circumstances to be stronger than visual identification. But the conditions prevailing for positive recognition or identification must still be considered. We are alive to the dangers discussed in **BLACKSTONES CRIMINAL PRACTICE 1997** Section F 18 that:

“(a) Some persons may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances .

(b) Visual memory may fade with the passage of time; and

(c) As is in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender”.

What then were the conditions favouring positive recognition of the three Appellants?

In the first place there was no basis for the finding made that the complainant knew the Appellants as customers in her kiosk for a period of one year. Such evidence is not on record and it can only be some extraneous imposition by the lower court. There was also no support in the record that the complainant recognized the voice of Kenyatta.

Secondly it is not clear whether all the five robbers had a torch each and they flashed them around the house as testified by PW 2 or there was only one torch as the complainant stated. The finding made by the trial court was that there was one torch held by Kenyatta and its light together with moonlight were sufficient to see the faces of the three Appellants. Those faces it will be recalled from PW 2's evidence were masked. Again the trial court did not distinguish where the recognition took place. Was it inside the house where only the torch light was available or outside where there was moonlight.

According to the complainant's evidence the robbers set on her with panga slashes inside the house and she suffered very serious cuts on both arms, head and ribs. She miscarried a four-month pregnancy. That is when she recognized Kenyatta through torch-light when the polythene paper covering his face fell off. She did not recognize the other two Ndati and Aule until she collapsed outside the house. PW 2 said it was dark outside the house but the complainant contended that there was moonlight. But that is the moment she was about to succumb to the pain and haemorrhage from her injuries as she soon after became

unconscious.

It was not until after several weeks in Hospital that she was told about the arrest of the Appellants. The Appellants were not arrested out of information provided by her. The investigating officer PW 6 found she was unable to speak after Kiwasa was arrested. That she was able to “confirm” she knew the three appellants after their arrest is putting the cart before the horse. It makes no evidential impact as there was no earlier report on the Appellants.

We think in all these circumstances that it was not safe to reach the conclusion that the three Appellants were positively identified. They explained in their defences, which could have been disproved by the prosecution if there was proper investigation, that they stayed home with their wives on the night of the robbery. They were all found in their houses when they were arrested. No reasons were given for dismissing those defences.

In the event we give the benefit of doubt to the Appellants **Ndati Ngungu, Andrew Aule and Kenyatta Ivale Amukase** and allow their Appeals. We quash the conviction and set aside the sentences. They will be set at liberty unless they are otherwise lawfully held.

Dated this 31st day of July, 2001.

P. N. WAKI

JUDGE

P. M. TUTUI

COMMISSIONER OF ASSIZE