



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.295 OF 1998

DAVID MACHARIA GACHANJA.....1ST APPELLANT

(Original Accused No.4)

=V E R S U S=

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.294 OF 1998

OSMAN KIBWANA.....2ND APPELLANT

(Original Accused No.1)

=V E R S U S=

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.297 OF 1998

MUIRU KARANJA.....3RD APPELLANT

(Original Accused No.3)

=V E R S U S

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.296 OF 1998

JOSEPH ONYANGO.....4TH APPELLANT

(Original Accused No.2)

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appeals No.294 of 1998, No.295 of 1998, No.296 of 1998 and No.297 of 1998 were consolidated.

The Appellants **DAVID MACHARIA GACHANJA, OSMAN KIBWANA, JOSEPH ONYANGO** and **MUIRU KARANJA** (hereinafter referred to as “the first”, “the second”, “the third” and “the fourth” Appellant respectively) were convicted of 3 offences in three counts: Robbery with Violence contrary to Section 296(2) of the Penal Code; Being in Possession of a Firearm without a Firearm Certificate contrary to Section 4(2)(a) as read with Section 4(3)(a) of the Firearms Act; and Being in Possession of Ammunition without Firearm Certificate contrary to Section 4(2)(a) as read with Section 4(3)(a) of the Firearms Act. They were each sentenced to death in Count 1 and 3 years imprisonment each for Counts 2 and 3. Sentence to run concurrently.

Their appeals to this court are against both conviction and sentence. The main point in this appeal is the issue of identification of the Appellants on the persons who attacked and robbed the complainant on the night of 5th March, 1998. The evidence led was as follows: The complainant had arrived at his gate with his girl-friend Rehema PW.4. The watchman PW.1 opened the gate for them and they entered.

Immediately thereafter dogs started barking and the complainant and the watchman moved close to the fence and on observing they saw people outside the fence. Those people immediately jumped over the fence and ordered them to raise their hands. The watchman ran to the rear of the house to make an attempt to raise an alarm while the complainant retreated into the house but before he could close the door, those assailants followed him and cut him on the hand and demanded shs.20,000/- from him which he had withdrawn from the bank. In the meantime PW.4 Rehema had taken her child to bed upstairs. When she heard the commotion and came to the door one of the assailants who was armed with a pistol ordered her to go away or else he could blow her brain out with a bullet. While those assailants demanded more money, and were talking with the complainant, PW.1 had raised an alarm and guards from PW.1’s firm rushed to the scene. When those attackers heard a vehicle coming they escaped.

The complainant’s account of the attack is corroborated by that of PW.1 the watchman and PW.4 the girlfriend. PW.1 said when the complainant arrived with PW.4, he opened the gate for them and immediately thereafter dogs started backing. He accompanied the complainant to the fence. He saw 4 people outside the fence. They jumped over the fence into the compound and ordered them to raise up their hands. One of them was armed with a pistol and the other 3 with pangas. He saw them well. He ran to the rear of the house and raised an alarm. A vehicle from Securicor arrived within 3 to 4 minutes. When those robbers saw that vehicle they escaped. While PW.4 said when they arrived at the gate of the complainant the watchman PW.1 opened the gate and they entered. Dogs started barking. She entered the house and took her child who was with her to bed upstairs. She came down and found the complainant struggling to close the door. There were 4 people at the door whom she identified as the 4 Appellants. The complainant had been cut on the hand and was bleeding. One of the 4 men had a pistol and he ordered her to go away or else he could blow her brains. She went away.

On 17.3.98 the 2nd Appellant was taken to the Police at Malindi Police Station by members of the public for theft of a bicycle. When he was interrogated by PW.6 IP Kombo, he led the police to an abandoned house in a bush opposite Tropical Village where they found 3 people who started to flee when they saw the Police. Police ordered them to stop. Two of them stopped but one disobeyed and was shot and fatally wounded. The 2 were arrested. They are Appellant 3 and 4. PW.6 recovered the pistol from the Appellant 3 and 4. Acting on information he went and arrested the 1st Appellant and who led them to where they recovered one round of ammunition. PW.1 and PW.4 were later called to attend an

identification parade where PW.1 identified all the 4 Appellants as the ones whom he saw at the material night when PW.5 was robbed.

In their defence all the Appellants denied the offence and maintained that they knew nothing about it. The issue here is identification. Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence. Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger whenever the case against an Appellant depends wholly or to a great extent on the correctness of one or more identifications of the Accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the Defendant in reliance on the correctness of the identification.

We have on our part re-examined the evidence relating to the identification of the Appellants as the persons who attacked the complainant; the circumstances were far from ideal for identification.

The complainant on arrival at his house was alerted by his dogs of the presence of strangers around the homestead. He moved to the fence accompanied by PW.1 the watchman. They saw people outside the fence who on seeing them jumped over the fence into the compound and ordered them to raise their hands. Those assailants were armed, one with a pistol and the others with pangas. PW.1 said he saw 4 people while PW.4 said she saw 4 people.

PW.1 rushed to the rear of the house where he raised an alarm while PW.4 retreated to the house but as he tried to shut it, those assailants cut him with a panga. PW.4 who had taken her child to bed upstairs. On coming back found the complainant struggling to close the door while those assailants were pushing the door trying to gain entry into the house. The man who was armed with a pistol ordered PW.4 to go away or else he could blow her head. She obliged. Strangely the complainant had denied in his evidence-in-chief that the man he saw armed with a pistol was not in court and he was never called to the identification parade despite the fact that he was the one who had spent more time with the assailants than both PW.1 who had ran to the rear of the house and PW.4 who had gone to the room upstairs. PW.1 maintained that the man who was armed with a pistol was in court and he had allegedly identified him at the Identification Parade. This contradicted the evidence of the complainant who had said that the man who was armed with the pistol was not one of those who were in court.

All in all it seems to us that the identification evidence here is not such as to exclude the possibility of mistaken identity. We consider the conviction for Count 1 unsafe and we give the Appellants the benefit of doubt. We quash the conviction for Count 1 and set aside the sentence of death awarded to the Appellants..

The convictions for Count 2 and 3 were not challenged by the Appellants either in their Memorandums of Appeals or in their submissions in court and we do not therefore interfere with the findings of the Learned Trial Magistrate except on sentence.

The offence carries a maximum sentence of 10 years imprisonment. We consider the sentence of 3 years awarded to each Appellant for Counts 2 and 3 is too lenient. Accordingly we enhance the sentence to 8 years imprisonment for each Appellant for Count 2 and 3 respectively. Sentences to run concurrently with effect from 16th September, 1998 when they started serving sentences.

Order accordingly.

Dated and delivered at Mombasa this 27th day of September, 2001.

J.L.A. OSIEMO

J U D G E

J. N. KHAMINWA

COMMISSIONER OF ASSIZE