



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 114-120 OF 2010 (CONSOLIDATED)

(From the original conviction and sentence in Criminal Case No. 879 of 2010 of the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM and previously Criminal Case No. . 775 of 2009 of the Principal Magistrate's Court at Kilifi)

EMMANUEL MASHA MATHO

CHAPA MWANJE KITI

KARISA VIDZO KAWARI

FRANCIS MUTIRIA MWEVI

MAMBO MICAH KENGA

NGALA MUMBO JAMBO

BENSON CHIGUNDA MWACHIZIGWAAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The above separate appeals were consolidated during the hearing. For purposes of the appeal, the appellants will be referred to in the order they were charged and tried in the Lower Court.
2. On the night of 13th and 14th September, 2009 a gang of about seven men who were armed with a pistol, machetes, iron bars and other crude weapons descended on a village called Chumani. They broke into the shop/cum residence of **Amani Joseph Saa** (PW1) and robbed him of cash Shs. 28,000/- and an assortment of shop goods.
3. The gang then proceeded to Linda Camp where **J A** (PW2) worked as a caretaker. He occupied a

room in the camp with his wife A K (PW3). The camp driver **Karisa Charo** (PW4) occupied a separate room. About midnight, PW4 had gone out of his room to use the external toilet when he saw torches flickering near the main house of the camp. When he drew close to enquire, the gang got hold of him and forced him at gunpoint into PW2's room as the door gave way. He was cut on the head. The robbers also slashed PW2 on the head with a panga while demanding money. PW2 passed out. The robbers took his phone and cash shs. 2000/-. The attackers injured the wife (PW2) and gang raped her before leaving.

4. Police were called to the scene. There are conflicting statements concerning whether the robbery victims named or described the robbers to the police just then. However, there is no dispute that the police swung into action arresting the 1st and 2nd appellants on the evening of 14th September, 2009 from a "*mangwe*" (*mnazi* bar) within Chumani. By 1st October, 2009 the other appellants (2nd to 7th) were arrested and identification parades conducted by IP Morris Otieno (PW7). It is during the said parades that the seven appellants were identified by the victims as members of the gang that robbed and terrorised them. None of the stolen property was recovered. This was the prosecution case in the Lower Court.
5. Initially the appellants were arraigned before the Senior Resident Magistrate, Kilifi. Two witnesses testified before the trial magistrate disqualified herself following threats issued by the appellants. I pause here to observe that a trial court must not allow itself to succumb to intimidation by accused persons or litigants and should make use of relevant laws in that regard. The trial started afresh before Nyambu, PM (Malindi) on 17th January, 2011 as Criminal Case No. 879 of 2010. In their defence, all the appellants denied involvement in the robbery. The 1st to 4th appellants stated that they were arrested in *mangwes* on different days and subjected to identification parades before being charged. The 2nd appellant said that PW1 was known to him and that there was a grudge between them. The 3rd appellant said that he knew PW4 well before the incident. The 4th appellant said he was arrested after a quarrel at a *mangwe* but was eventually placed in an identification parade where someone identified him.
6. The 5th appellant said he is related by marriage to PW4 and had previous disagreement with PW2 and there existed a grudge between them. He was arrested in connection with a different matter but "framed" in this case by PW2 and PW4. The 6th appellant said he spent the night of 13th and 14th September, 2009 in his home, but on 5th October, 2009 police accompanied by PW1 and PW4 arrested him. He met PW2 in the police vehicle. He was subjected to an identification parade where PW1 – 3 purported to identify him. He said he knew PW1 and that the relationship between them was strained. He also knew PW4 but not PW2 who he met for the first time in the police vehicle. The 7th appellant said he had been arrested in connection with a complaint made by his father which was later withdrawn. He was however detained and charged with robbery. He maintained that he was innocent.
7. The seven appellants except the 7th who was acquitted on the second count were convicted on the two counts of Robbery contrary to Section 296(2) of the Penal Code. Particulars of the first count are that on the night of 13th and 14th September, 2009 at Chumani location in Kilifi District within Coast Province while armed with a pistol, bar, metals and pangas the appellants jointly robbed Amani Joseph Saa of Kshs. 28,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Amani Joseph Saa.
8. In the second count it is alleged that on the night of 13th and 14th September, 2009 at Chumani location in Kilifi District within Coast Province jointly robbed Anold Jebu Cash 2,000/- and one mobile phone make Nokia and at or immediately before or immediately after the time of such robbery wounded the said Anold Jebu.
9. The convicted appellants were sentenced to 15 years imprisonment on both counts. The sentences were to run concurrently. They have now appealed to this court against both the conviction and sentence. By their respective grounds of appeal and submissions, the appellants Nos. 2, 3, 4, 5 and 7 strongly attack the identification evidence of the complainants which forms the basis of their

conviction. The 1st to 5th appellants were unrepresented at the trial. The 1st appellant was represented at the appeal stage by Mr. Gekanana while Mr. Lewa acted for the 6th appellant as he had in the Lower Court. Mr. Gekanana relied on written submissions made by Mr. Lewa on behalf of the 6th appellant but clarified that the appeal was only against the conviction.

10. In summary, the 1st and 6th appellants, rely on more or less similar grounds as the other appellants. The key ground as stated in the submissions of the 6th appellant is that “the learned trial magistrate erred in law and fact in holding that the circumstances on the night of the robbery were favourable for a positive identification.” (sic). Secondly that the learned trial magistrate “erred in law and fact in failing to find that there were glaring discrepancies in the evidence tendered by the prosecution evidence”. Several authorities were cited.
11. This appeal turns ultimately on the question of identification. As the first appellate court we are obligated to appraise the evidence afresh and draw our own conclusions (**Okeno v R 1973 EA 322**). While so doing we have considered all the evidence tendered at the initial trial, and subsequently through the prosecution witnesses. In this regard we cannot but agree with the counsel for the 1st and 6th appellants that indeed there were discrepancies in the two sets of testimonies given by PW1 and PW2 in the two trials. Several discrepancies have been highlighted in the written submissions, but in our view the material ones relate to whether three or four men, one of them wielding a rifle or pistol entered PW1’s house, whether the men had uncovered faces or tried to conceal them with their torches even while directing the light upon the victim’s faces; or the kind of clothes 6th accused wore on the material night - whether a suit and gumboots or short sleeved shirt; and whether or not PW2 saw the 6th appellant before the identification parade. We propose to deal with these first.
12. On the question of the clothes worn by 6th appellant on the material night, PW4 said he was dressed in a black T-shirt and striped red and black pair of shorts. PW4 stated that there was a hurricane lamp on during the episode which illuminated PW2’s room. However, PW2 said there was a candle on as well as the light from the robbers’ torches (in his evidence in chief) but substituted with a hurricane lamp during cross-examination.
13. PW3 who was in the room with her husband PW2 at the time said the five robbers who entered the room each had torches with bright lights. In addition a hurricane light was burning. Even PW1 who was also robbed allegedly by the same gang at a different house stated that the torches had blinding lights. This witness had testified before the trial court that the 6th, 2nd and 7th appellants entered his living quarters while the other appellants stood outside in the darkness (appellants 1, 3, 4 5). The witness however maintained that he was able to see them clearly.
14. With regard to the first count, the prosecution relied on the visual identification evidence of a sole eye witness at night. That is PW1. We have already adverted generally to the prevaricating nature of some aspects of his testimony in the two trials. Several appellants have correctly cited the case of **Ndungu Kimani v R 1976 – 80)1 KLR 1442** to their aid.

In that case the Court of Appeal stated that:

“...the witness in a criminal case upon whose evidence it is proposed to rely should not create an impression on 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”

This is the light from which the contradictions between the two sets of testimonies by PW1 have to be seen.

15. With regard to the second trial the court must ask itself whether the conditions at PW1’s house

favored positive identification. There is a long line of authorities dealing with this question since Abdalla bin Wendo & Anor vs R [1953]20 EACA 166, Waithaka Chege vs R [1979] KLR 271 and Maitanyi v R [1986] KLR 198. Evidence of visual identification requires a careful approach especially in difficult circumstances at night and by one witness. The court must enquire as to the presence, location, nature, intensity and source of light and the duration the appellant was under the observation of the witness (See also R v Turnbull & others [1970] QB 224.)

16. We agree with Mr. Nyongesa for the State that the circumstances obtaining in Chabali & Anor v R [1988] KLR 1 cited by Mr. Lewa differ from this case. Because the robbery occurred in PW1's house and PW1 knew appellants 6 and 7 who allegedly entered the house it was a case of recognition and there was no point in PW7 conducting an identification parade in that regard. He had stated in his evidence in chief that a hurricane lamp was burning. In closing his evidence in chief he stated that he was familiar with all the appellants but added;

“I do not know how the accused were arrested. I did not give the description of the robbers.”

17. The sticking point is whether in the circumstances of the robbery incident PW1 could recognize the appellants. PW1 admitted under cross examination by Mr. Lewa that the robbers' torches blinded the occupants of his room and that the robbers made efforts to cover their faces with torches. He claimed however that he could see the “area very well making it easy to identify... faces” during cross-examination by the 1st appellant.

18. In our considered view, if the trial magistrate had evaluated the evidence, according to the relevant principles, she would have come to a different conclusion regarding the identification, of the robbers by PW1. The circumstances described by PW1 were not conducive to positive identification that is free from the possibility of error. Firstly, PW1 could not possibly have been able to see from inside his quarters the alleged appellants who stood outside. There was no light there. Secondly even inside the house, his eyes were dazzled by the robbers who tried to conceal their faces while harassing him and demanding for valuables.

19. It is not clear how long the episode lasted but police came to the scene in under an hour. However, PW1 did not name any of the attackers to them. Indeed contrary to what Sgt. Charles Murage (PW9) asserted, IP Newton Mjomba (PW6) told the trial court that he made the first arrests (1st and 2nd appellants) from information given by an informer and that the victims of the robberies including PW1 did not give a description of the robbers he had seen on the material night. Yet PW1 knew some of the appellants even by name or nicknames: Obi (appellant 2), Rasta (appellant 3), Star (appellant 7), Mapengo or Mmeru (appellant 4). All that PW1 said to PW9 regarding the 4th appellant is that he “suspected a Meru man who sells scrap metal and one Karisa”. The assertion by Mr. Nyongesa that the evidence of the prosecution placed the appellants at the scene of robbery in count one, with respect, cannot therefore stand.

20. The denials contained in the appellants' defences therefore were not displaced. In the circumstances we are not persuaded that the appellants were properly convicted on the first count as the quality of evidence was questionable. We will therefore quash the convictions and set aside the sentence of fifteen (15) years imprisonment in respect of the 1st to the 6th appellants.

21. As concerns the second count there were three witnesses, PW2, PW3 and PW4. PW2 said there was a candle in his room when the robbers struck, while PW3 and 4 said it was a lantern or hurricane lamp. Immediately the robbers came in PW2 attempted to resist them. He was slashed and soon collapsed. He only identified two of the five robbers, being the 5th and 6th appellants, but he admitted in cross-examination that he was blinded by light from the robbers' torches. He said that the 6th appellant was armed with a pistol and the robbery took five to ten minutes. Further that the 5th appellant was a stranger to him until that date.

22. Like PW1 he said he subsequently did not lead police to arrest the 5th appellant although he subsequently identified him during an identification parade. Similarly the 6th appellant was not known to PW2 before the robbery. This witness it must be recalled had stated during the first trial that he had seen the 6th appellant at Chumani under arrest before the identification parade was held. According to APC Nur Hamisi (PW5) and Cpl. Hillary Mwasi (PW8) it is PW2 who called police to say that the 3rd and 7th appellants being suspects in the case had been spotted in a *mnazi* den on 1st October, 2009. During the subsequent identification parades the 3rd appellant was only identified by PW3 (PW2's wife) and PW4, the latter who knew him as a neighbor. It is telling that of the five men who entered the room PW3 could only identify one robber (3rd appellant) while PW2 who was busy fighting the robbers before collapsing claims to have identified two people even while being blinded by bright torch lights (per PW3).
23. PW5 testified that the 3rd appellant had been named in a string of robberies and that acting on information from PW2 they arrested him. If indeed PW3 did not know the 3rd appellant prior to the robbery it is not clear how PW2 identified him sufficiently for arrest by PW5. Subsequent to the arrest he was identified at the parade by PW3. Although PW3 claimed that the 3rd appellant spoke to him during the incident she did not say where that happened and the sort of light illuminating the area. It is also inconceivable that in the midst of five bright shining lights in a small room, PW3 could see the face of one person – the 3rd appellant very clearly when a torch was allegedly held near him by his accomplices.
24. As for PW4, his first encounter with the robbers was in the darkness outside the camp and he was forced at gunpoint into PW2's room. He was beaten and injured. Soon after entering the house he went under the bed. He claimed that from under the bed he saw and recognized the 2nd and 4th appellants when PW3 lifted off the mattress. This latter action is not mentioned by PW3, who also should have seen the two men if they were so close to the bed as to be seen by PW4 in the available light. The witness (PW4) later identified the 2nd, 3rd, 4th, 5th and 6th appellants during the subsequent parades. He testified that the 6th appellant is the one who pushed him with a rifle into PW2's house. He was personally known to him as were the other persons he identified. The identification parades were therefore of no consequence.
25. PW4 said in cross-examination that he did not tell the police that he had recognized the robbers. Yet they were all known to him and in particular, the 5th appellant was his brother in-law and the 6th appellant was known to him for "a long time". He did not tell his parents to whose house he ran soon after the ordeal or police that these persons had participated in the robbery, or that the 4th appellant had gaps in his teeth and was a scrap metal dealer. It is not clear from the evidence what role if any the 1st appellant played in the robbery at PW2's house. In his testimony PW9 admitted that PW4 did not mention the 4th appellant in his statement to police. It does appear that all the complainants and eye witnesses were at pains to deny that they mentioned the appellants to police. Whether this is borne out of fear of retaliation or not, it has a bearing on the credibility of their evidence. There is therefore a lacuna as to how the appellants were identified for arrest before being placed in identification parades by witnesses who in several instances knew them.
26. And while every case must be decided on its own peculiar facts, we think that the principles enunciated in **Terekali & Anor v R [1952] EA** still hold true. Here is a case where victims of robbery who know the culprits deny having named them to police for arrest, begging the question how the police connected the appellants with the robbery, arrested and subjected them to identification parades. Assertions by the police that the witnesses gave them names or descriptions are denied by the witnesses. Is it possible that the police, merely arrested the suspects without any firm evidence? In **Terekali** the court stated:

“We have had reason before to comment on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in

authority has not been adduced. Such Statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judge, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”

27. And in the case of Rex-vs- Shabani Bin Donaldi (1940) 7 EACA 60 it was held;

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

28.Hence the OB abstract that says that PW1 or other witness initially told police that he “suspects a Meru man who sells scrap metal and one Karisa” cannot be wished away. This first description does not amount to a positive accusation that any appellant participated in the robbery. The trial magistrate correctly observed that the police investigations were shoddy. She ought to have proceeded to acquit all the appellants because the identification evidence tendered does not pass muster the necessary test. We are of the considered view that the conviction of the appellants on the second count is unsafe and cannot be allowed to stand. We accordingly quash it and set aside the sentence. In light of the foregoing, we direct that the appellants be set at liberty unless otherwise lawfully held.

Delivered and signed at Malindi this 7th day of March, 2014.

C. W. Meoli

O. Angote

JUDGE

JUDGE