



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 141 OF 2009**

*(From the original conviction and sentence in criminal case no. 1005 of 2008 of the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM)*

**SAMSON MATENDE ONGUTE ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged before the Chief Magistrate's Court Malindi in 2008 with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. Particulars of the charge stated:

**“That on the 21<sup>st</sup> day of July, 2008 at PK Estate in Malindi District within the Coast Province, jointly with others not before court, being armed with dangerous weapons namely pistols robbed BRYAN WARREN PAYNE (1) Kshs. 4000/-, (2) a Barclay Card, (3) A Credit Card, (4) Alien identity card, (5) a DVD machine and (6) A DSTV controller all valued at Kshs, 12,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said BRYAN WARREN PAYNE.”**
2. The appellant denied the charge. At the conclusion of the trial he was convicted and sentenced to death. He filed an appeal before the High Court in 2009. The said appeal was argued before Omondi and Odero JJ and judgment delivered on 23<sup>rd</sup> November, 2010 dismissing the appeal.
3. Aggrieved by the decision of the High Court, the appellant lodged an appeal to the Court of Appeal in the year 2010 (Cr. App. No. 536 of 2010 Samson Matende v R). The appeal was allowed and a retrial ordered. For the reason that the judgment of the High Court was not signed by the two High Court judges and was therefore a nullity vide Section 169(1) of the Criminal Procedure Code and on the authority in **Lokwachama vs R [2005] KLR 379** and **Paulina Amana v R (Eldoret Cr. App. No. 604 of 2010 (UR))**.
4. Pursuant to the judgment of the Court of Appeal the appellant filed fresh grounds of appeal, seemingly abandoning the Amended Grounds filed on the first appeal. He also filed fresh written submissions in support of his appeal. Four of the grounds of appeal seek to assail the identification evidence upon which the Lower Court based its judgment. The appellant also

- complains that his defence in the Lower Court was not properly considered. The State through Mr. Nyongesa opposed the appeal and asserted that the identification evidence was solid and the appellant was properly convicted.
5. As the first appellate court we are obligated to re-examine and re-evaluate the evidence adduced at the trial and draw our own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify (see **Okeno v R [1972] EA 322**).
  6. Briefly, the prosecution case in the Lower Court was that on the evening of the 21<sup>st</sup> July, 2008 the complainant Bryan Warren Payne (PW1) and his wife Selina Njeri (PW2) were at their home in Malindi's P.K. Estate. At about 8.30pm four men who brandished pistols stormed into the house demanding for money. One of them seized PW1's wallet containing Shs. 4,000/- and assorted credit cards. They also took the television set and DSTV decoder. His wife who was upstairs locked herself in the bathroom when one of the robbers went there. Meanwhile PW1 activated the alarm system prompting the robbers to flee as the security personnel arrived. The appellant was arrested three days later with two others who were acquitted in the Lower Court. An identification parade was held in which the complainant picked out the appellant.
  7. The appellant elected to make a sworn defence statement to the effect that he was a resident of Kwandomo, Malindi and a carpenter by trade. That on the night of 23<sup>rd</sup> July, 2008 he was with one of his co-accused in the Lower Court. Police came to the house demanding that he produces a gun, beat him and searched his house, recovering nothing. He was arrested and placed in custody. On the next day at 10.00am he was called to the report office and met some "white man". Thirty minutes later he was paraded with other persons. The "white person" he had seen at the report office touched him. He said he was wrongly charged as he is innocent of the offence. He did not call a witness.
  8. Although there were other persons present at the scene of the crime on the material night, only one of them, PW1 claimed to have seen and identified the appellant as one of the robbers. His wife PW2 did not see the robbers as she hid herself in a bathroom when they struck, while the security guard George Namaswa Simiyu (PW3) similarly took cover behind a flower pot.
  9. In the recent case of **Joseph Muchangi Nyaga & Anor v R [2013] eKLR** the Court of Appeal sitting in Nyeri had opportunity to consider the question of identification. The court reviewed a long line of relevant authorities starting with **Abdalla bin Wendo & Anor vs R (1953)20 EACA 166** where it was held that identification evidence at night or in difficult circumstances by a single witness must be tested with the greatest care. The test laid down in **R v Turnbull (1976)3 WLR 445** by Lord Widgery L. CJ in the following words:
 

***“How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a procession of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused?...”***
  10. The decision in Turnbull was considered in other subsequent decisions including **Wamunga v R [1989] KLR 424** and **Maitanyi v R [1986] KLR 198**. In the latter case, the Court of Appeal stated inter alia that:
 

***“The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”***
  11. In the present case the trial magistrate was alien to this caution and did warn herself accordingly. From the record of the proceedings there was evidence by the complainant that though the attack

occurred at night, his living room, the scene of actual robbery as well as the vicinity (compound) were well lit. From his description the complainant had opportunity to observe his attackers as the attack took about ten minutes and the appellant did not wear a disguise or covering. The complainant said the appellant who came up close to take his wallet seemed to be the leader of the gang. Said the witness:

**“He was a short stocky... man, ... not hooded. He is the 2<sup>nd</sup> accused... I saw his face when the people came into the lounge. He was close to me.”**

12. In his submissions, the appellant has emphasized the alleged first report by the complainant indicating that the robbers were of “Somali origin”. Responding, Mr. Nyongesa referred to the cross-examination of the complainant based on the OB report which was tendered at the trial. When the complainant was questioned on this aspect and confronted with the OB extract to the general effect that the complainant was robbed by “four Ormas/robbers of Somali origin” the complainant stated:

**“After the robbers left I did not give the police a description of the robbers. I only told them that there were robbers with two armed with pistols ... I do not recall having mentioned that the robbers were Ormas or of Somali origin ...it was easy to identify you (appellant). Concentrated on your face because I had been robbed before...”**

13. This witness also had the presence of mind to activate the alarm system in the course of the robbery thereby cutting short their mission. This dispels the notion that he was too frightened to make positive identifications. Four days later, the witness was able to pick out the appellant at an identification parade conducted by IP Peter Mwaura (PW4). The appellant faults the manner in which the parade was conducted. PW4 denied that the appellant was exposed to the witness prior to identification or that he forced the appellant to sign the parade forms. The said forms indicate that the appellant did not raise an objection to the conduct of the parade before appending his signature. The allegation of prior exposure was not put to the complainant during cross-examination by the appellant.

14. In our view the trial court properly evaluated the identification evidence at the scene and the identification parade and dismissed suggestions that the appellant was exposed to potential witnesses prior to the parade. She gave reasonable grounds for believing the complainant’s denial that he had described the attackers as of Orma or Somali origin. Hence the description disavowed by the complainant cannot be used against him following upon the principles set out in **Terekali v R [1952] EACA 259**.

15. With regard to the identification parade members, the requirement is that they be “as far as possible of similar age, height, general appearance and class of life as the appellant”. That is not a requirement that the members be exactly the same as the appellant. While PW4 said they were of similar body stature PW1 admitted that he could not be certain about the body sizes. Then he went on to state that they were of various body sizes. That admission does not in our view detract from the evidence of PW1 and PW4 in a situation where the former witness recalled the role of the suspect as the gang leader. We can find no reason to fault the findings of the Lower Court in these aspects.

16. In our evaluation of the evidence of the trial, the circumstances obtaining at the scene of robbery were conducive to positive identification that was free from the possibility of error. The appellants defence was displaced by this evidence and was properly dismissed by the trial court.

17. Finally, with respect we are unable to follow the appellant’s complaint that the charge sheet did not “originate” from the first OB report. He cited Section 214 and 275 of the Criminal Procedure Code in bolstering the argument. There is no requirement or legal basis for the charge sheet to be “extracted” from the first OB report. If indeed this compliant alludes to the possibility that there

was variance between the charge and the evidence with regard to the identity or description of the attackers that is neither here nor there as no such description at all is required to be drafted into the charge sheet.

18. Upon a full evaluation of the record of the trial we are satisfied that the appellant was properly convicted, and upon mitigation was sentenced accordingly. We therefore find no merit in the appeal and dismiss it. The conviction and sentence of the Lower Court are hereby respectively confirmed and upheld.

Delivered and signed at Malindi this 7<sup>th</sup> day of **March, 2014** in the open Court

**C.W. Meoli**

**A. O. Angote**

**JUDGE**

**JUDGE**