REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 53,54,55 & 56 OF 2011

(CONSOLIDATED)

1. JOSPHAT NDOLO KAWANGI

2. BRIAN MARTIN MUTISYA

3. PETER MUSYOKI

PIUS

4. ONESMUS MUTUA KAVUYA ……………….……..APPELLANTS

VERSUS

REPUBLIC ……….…………........……………….RESPONDENT

Being an Appeal from the original sentence and conviction in Makueni Principal Magistrate's Court Criminal Case no 352/2008. By Hon. J. Karanja. on 14/3/2011)

JUDGMENT

Josphat Ndolo Kawangi, Brian Martin Mutisya, Peter Musyoki Pius and **Onesmus Mutua Kavuya** herein after together referred to as " the appellants" and separately as the 1st, 2nd, 3rd and 4th appellants respectively, were jointly charged with two counts in the Principal Magistrate's Court at Makueni as follows:-

Count 1: Robbery with violence contrary to section 296 (2) of the Penal Code. Particulars of the offence were that on the 4th March, 2008 at Kavatanzou market, Kilungu location in Makueni district within Eastern Province, jointly and while being armed with offensive weapons namely, a gun, pangas, hammers, and iron bars, they robbed **Philis Mumo Mailu** of cash Kshs.220,000/= Celtel and Safaricom Airtime valued at Kshs.30,000/=, Nokia mobile phone make 3310 valued at Kshs.3,500/=, motor vehicle ignition keys and a kitchen knife all to the total value of Kshs. 253,000/= and at the time of such robbery used actual violence to the said **Philis Mumo Mailu.**

In Count II, the appellants were charged with attempted robbery with violence contrary to section 297(2) of the Penal Code. The particulars of the offence being that on the same day, place, and in similar version they jointly with others not before court, attempted to rob **Jeremiah Malonza Mailu** and at or immediately after the time of such attempt used actual violence to the said **Jeremiah Malonza Mailu** by killing him instantly.

In the trial court the 1st appellant was the 3rd accused, 2nd appellant was 1st accused, 3rd appellant was 2nd

accused whereas the 4th appellant was the 4th accused. The appellants denied the charges and were subsequently tried.

In brief, the prosecution case was that the complainant in count 1, **Phillis Mumo Jeremiah Mailu** was on the material of day 4th March, 2008, at home with her husband, the late **Jeremiah Malonza Mailu,** her 4 children and her nephew all asleep. Suddenly at about 12.30 a.m, a gang of men broke into their house. She saw 5 men armed with hammers, pangas and what looked like a jembe. The men demanded money and threatened to kill them. The men took Kshs.220,000/= cash, Safaricom and Celtel airtime cards worth Kshs. 30,000/=. The men then led her to the shop of a neighbour one, **John Muia** and she was later told to go back home. At home PW1 was told by her children that her husband had gone to Kavatanzou. She was informed the next day at Kilungu Police Station that her husband had been killed. In the process of the robbery, she was able to identify, nay recognize the appellants.

The 3rd appellant was her cousin, as his grandfather and her grandfather were siblings making them 2nd cousins. On the other hand, she had done business with the 4th appellant for about 5 years, and that she had also been in school with the 1st appellant. She had been able to recognize them through the solar light which was switched on by the men, the moment they forced themselves into the house .They also had the bright torch light which also assisted her to recognize them. **Raphael Muthoka Mailu** was PW1's nephew. He was in the same house as PW1 when the appellants came calling. They demanded money and keys to the shop while threatening to kill his uncle, **Jeremiah Malonza Mailu**. The men then led him and PW1 to the shop.

PW2 saw 7 men one of whom had an AK 47 rifle. While they were in the shop with the thugs, PW2 heard the sound of 3 gunshots and the man with the firearm said he had shot one person. The others asked him why he had killed "*Sunday*". PW2 was later informed that his uncle was the one who had been shot at the shops. Of the 7 people, PW2 said he was able to identify four of them. The 2nd appellant had a hammer and a panga. 1st appellant and the 4th appellant used to come to his deceased uncle's shop where he occasionally used to assist. As for the 3rd appellant, PW2 said he had known him prior to the incident.

PW3, **James Mwiba Masaa** was at the material time the Chief of Kilungu location. He knew both **Jeremiah Malonza Mailu** *alias* "*Sunday*". On 4th March, 2008, at about a a.m. whilst asleep in his house he received a call from one, **Muia Kamota** who reported to him having heard gunshots from the local market. He suspected ongoing robbery. He armed himself and proceeded there. However he only arrived at the scene after the robbery and did not get to see the robbers. However, he came across the body of **Jeremiah Malonza Mailu** which had a wound on the left side of the chest. He was dead. He called the OCS, Kilome Police Station and reported the incident. After 10 minutes, the police arrived and carried away the body. He only later learnt that some people from his area had been arrested in connecting with the robbery

Police Corporal Boniface Ngale was at the time of the incident stationed at Kilome Police Station. On the night of the robbery he was on duty and was informed by the duty officer **Corporal Kimutai** of the robbery. He proceeded to Kavatanzou in the company of the said **Kimutai,** driver **P.C Njeru** and one **P.C. Kinya**. There they were met by the Chief (PW3) who led them to the scene. They found a body which PW4 identified as being that of **Sunday**, the nickname of the deceased which had a wound on the chest above the right breast.

PW5, **Dominic Muthama Mutisya** only testified on events on the 7th March, 2008 which bore no direct relevance to the robbery incident of 4th March, 2008. PW6, **James Mutava** was a watchman at Kavatanzou market on the night of the robbery. At about 1.00am, he heard a sound and when he approached the deceased's shop he saw a torch and heard a lot of noise and screams. He scampered for his own safety. He then heard a gunshot and went and hid till about 3.00a.m when the police came. He later saw the deceased's dead body.

PW7, **Cpl Peter Kariuki** was from Kilome Police Station. He was the duty officer on the material

night. At about 1.30am, he was called by the OCS, who had himself received a call from the Kavatanzou area informing him that gunshots had been heard in the area. He went to the area where he met the area chief and was shown the body of a businessman, "*Sunday*" whom he knew. PW7 picked up an AK 47 cartridge at the scene which he produced as exhibit 1.

PW8, **Ndambuki Stephen,** the District Medical Officer at Matiliku District Hospital had on 12th March, 2008 while stationed at Machakos District Hospital performed a postmortem examination on the body of **Jeremiah Malonza Mailu,** the deceased at Bishop Kioko Mission Hospital. The deceased had bruises on the head, chest, arms and legs and had a wound on the right side of the chest and another on the right side of the stomach. The head also had several fractures on the left side. As per his examination, the cause of death was cardiac arrest due to severe head injury and a bullet wound to the chest.

The final prosecution witness was **Corporal Bramwel Saima**(PW9) who at the time was stationed at CID Makueni. He took over the file from Kilome Police Station by which time witness statements had been recorded save for that of the complainant, PW1, which he took. PW1 informed him that she knew some of the men involved in the robbery by their names. The suspects were arrested later by PW9's colleagues but he arraigned them in court.

In their defence, the appellants all gave sworn statement as follows. The 2nd appellant narrated how he was arrested from his home on 1st September, 2008 and locked up at Makueni Police Station till 9th September, 2008 when he was fingerprinted. On 13th September, 2008 he was put in an identification parade where his cousin and his sister's son were to identify him. However, only his cousin identified him. Otherwise he did not know the charges that he was brought to court to answer.

The 3rd appellant on his part stated that he was in custody for another case on 8th October 2008 when he was taken to Machakos Court and told he was wanted in Makueni Police Station with his co-accused. On the day of the robbery, 4th March, 2008 he was at home for a funeral. The complainant was his cousin and they had a land dispute.

1st appellant on his part also stated that he was brought to court for an offence he did not know and that on the day of the alleged offence, he was not at home. He worked with the complainant in the same market after the incident and that he met her almost every day as he continued business for 8 months before he was arrested.

The 4th appellant claimed that he was charged with the offence which he knew nothing about. Just like the 1st appellant he had similarly worked with the complainant for over 8 months after the incident before he was arrested. He added that there was a grudge between him and the complainant.

The learned magistrate having considered the evidence on record, both for the prosecution as well as the defence was persuaded that the appellants were properly identified as the robbers. He proceeded to convict them. Thereafter he sentenced each appellant to death in respect of count I and to 7 years imprisonment in respect of count II.

Aggrieved by the conviction and sentence, the appellants separately lodged the instant appeals to this court which at the hearing were consolidated for ease of hearing and as they arose from the same trial. They all challenged their conviction on the grounds that the evidence of identification/recognition by PW1 and PW2 was not free from possibility of error or mistake, the evidence of PW1 & 2 was incredible, the burden of proof was shifted to them, the case was a frame up considering that there was bad blood between the complainant and appellants, the prosecution case was not proved beyond reasonable doubt, no names of the appellants was given in the 1st reports of the complainant and PW2, crucial witnesses were not called and finally, their defences were not given due consideration.

When the appeals came before us for hearing the 1st and 3rd appellants had instructed **Mr. Mulei** learned counsel to represent them whereas the 2nd appellant had instructed **Ms Betty Rashid,** learned counsel to

represent him. The 4th appellant appeared in person and with our permission, he tendered written submissions in support of his appeal which we have carefully read and considered. The State which opposed the appeals was represented by **Mrs Gakobo,** learned Principal Counsel.

In support of the appeal, **Mr. Mulei** submitted that though the complainant and PW2, purported to recognize the appellants both in the house and on the way to the shop, they never gave the names of the appellant to the police. The O.B read in court did not have the names, nor were they in their statements, though the 2nd appellant was subjected to an identification parade and that PW2 allegedly identified him, the parade form stated that PW2 never identified anyone. The appellants were arrested 6 months after the incident. If the appellants had been recognized why they were not arrested immediately? The evidence adduced by the prosecution was inconsistent. Accordingly, the conviction of the appellants was safe.

On her part, **Ms Rashid** submitted that conditions prevailing in the house and on the way to the shops did not favour positive recognition of the appellants. There was no reference as to the position, intensity and quality of the light. The appellants were alleged to have used their torches in the house yet it was solar lit. Reference to torches indicates that there was no sufficient light in the house. The 2 witnesses too did not say that the torches were being flashed in their direction.

The testimonies of the complainant and PW2 were in the circumstances afterthoughts. Indeed the case was a frame up. Finally, she submitted that PW1 and 2 contradicted themselves in material particulars as to render the conviction of the appellant unsafe.

In opposing the appeals, **Mrs Gakobo,** submitted that the appellants were sufficiently identified by PW1 and 2. Though the offence was committed at night the house had solar light which was switched on immediately the appellants forced their way into the house. The appellants were relatives and moved PW1 & PW2 from room to room. This gave them sufficient opportunity to confirm their recognition. The recognition was sufficient and there was no need for identification parade. The defences of the appellants were rightly rejected. The court was alive as to the circumstances that had obtained in the house during the robbery. PW1 and 2 had been attacked and, robbed and their husband and uncle killed. Any reasonable person would have been apprehensive to give out names of the suspects. There was no inertia with regard to the arrest of the appellants.

As a first appellate court, we have the opportunity and a duty to re-evaluate the evidence afresh and determine for ourselves whether the evidence as taken at the trial can sustain the convictions. We draw our matching orders in this regard from the case of **Okeno vs Republic [1972] E.A. 32.**

From a careful reading of the record, there is no doubt at all that the complainant was robbed and her husband killed in the process. The only question for determination, then, turns on whether it is the appellants who committed this horrendous crime. The evidence which the learned magistrate use to convict the appellants turned on the alleged recognition of the appellants at the three scenes of crime *viz,* in the house, on the way to the shops and at the shops.

The appellants are right when they submit that a court should only accept and act on evidence of visual identification after warning itself of the danger inherent in a conviction based on such evidence. In the case of **Paul Etole & another vs Republic, C.A. No. 24** of **2000[UR],** The Court of Appeal expressed this legal principal thus:-

[Evidence of visual identification] can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the Court should warn itself of the special need for caution before convicting the accused.

Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made.

Finally, it should remind itself of any specific weakness which had appeared in the identification

evidence.

It is true that recognition may be more reliable than recognition of a stranger; but even when a witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened but the poorer the quality, the greater the danger…

On this aspect of the case, PW1 and PW2 testified that it was around 12.30am when the incident happened. They were asleep when they heard men outside calling the name of the deceased. They then forced their way into the house and switched on the solar light. Through this light, both PW1 and 2 were able to see the appellants sufficiently to be able to recognize them. They remained with them in the house for a relatively long time as they moved them from room to room and talked to them in the process. They took Kshs. 10,000/= which the complainant had placed on top of the cupboard and Kshs. 60,000/= from the jacket of the deceased. They beat the deceased senselessly and left him for dead in the bedroom. They then dragged PW1 to the sitting room as they assaulted her as well. PW2 at this juncture was also forced out of his room by the appellants as they rained blows on him. It was then that the appellants asked them whether they could identify and or recognize them. Both PW1 and 2 feigned ignorance though they knew them very well. The element of fear overwhelmed them. However, she was even able to recognize them by the clothes they were wearing and the weapon that each one of them carried. The two were then led to the deceased's shop ½km away. As they walked along, the 2 witnesses even managed to recognize the appellant's voices. It is instructive that PW1 claimed to have known the 1st appellant as they attended same school. That her grandfather and that of the 3rd appellant were brothers. That she had also done business with 4th appellant for 5 years.

As for PW2 he also recognized the appellants. The appellant carried a hammer and panga. 1st and 4th appellants were known to him as they used to come to his uncle's shop to buy items accompanied by 1st appellant. Further these appellants were almost neighbours.

So far so good. However when these witnesses gave their 1st reports to the police they did not at all give out the names of the appellants or any one of them. The O.B. read in court did not include names of the appellants or any one of them. If anything it contained names of other people who had been arrested in connection with these offences but were subsequently released under unclear circumstances. If indeed these witnesses had recognized the appellants, why would they allow the police to go on a wild goose chase, arresting people whom they knew were innocent and leave the real culprits, the appellants to roam around in freedom?

PW1 and PW2 alleged that the deceased had also claimed that he had recognized the appellant during the incident. Yet when the deceased came across the chief as he rushed to his shop to confront the thugs and when asked by the chief whether he knew the thugs, he answered in the negative. We should appreciate that the chief, PW3 deals with matters of security in his location. This incident was a matter of security. Nothing therefore would have made the deceased and his wife or even PW2 not to confide into him. Nor did they even volunteer the information to the neighbours who came to their aid. They still remained mum to the police who came to the scene. The prosecution claim that this was because of fear. They feared that they would be targeted if they volunteered the information. We do not buy this story. There is no evidence of such threats. In any event how did the fear suddenly decipate when they subsequently allegedly confided into the police and gave them the names of the appellants.

Again although PW1 claimed to have given the names and were not recorded, PW7 who took her statement stated that no description of the appellants was given nor did he record that the witness had mentioned that she could recognize the appellants. It would also appear that PW1 and PW2 recorded two separate statements with two separate police officers. PW4 testified that he was the first to arrive at the scene and consequently recorded statements from PW1 and PW2. This differed with what PW1 and PW2 told the court, particularly in terms of the names of the appellants. Those original statements which did not contain the appellant's names miraculously disappeared from the police file. There can only be one

inference from this state of affairs. PW1 and PW2 never recognized the appellants during the commission of the offence. The subsequent statements recorded by these witnesses and which fingered the appellants were in our view, deliberately stage managed. Therefore the appellants' assertion that the charges were tramped up to unjustly convict them may very well be true.

PW1 testified as to the appellants asking her whether she had recognized them. She deliberately feigned ignorance. We do not buy this story either. We doubt very much that the appellants knowing that they could easily be recognized by the victims of the robbery would undertake such a mission with such bravado that they cared less whether or not they could be recognized. Robberies are not committed with such bravado. Such robbers would take steps to at least conceal their appearance or would ensure that witnesses do not look at them in a manner that would suggest their identification or recognition. **Lyon J,** was spot on when he stated in **Eria Sebwato** [**1960] E.A. 174;-**

"… ***That this accused, well known to the complainant should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view, casts doubt in the evidence of the complainant and his wife…"***

We entertain similar misgivings in the circumstances of this case.

Then there is the question of the time taken to arrest the appellants. The offence was committed on 4th March, 2008. The appellants were rounded up in September, 2008. This was in regard to another incident. As it were the arrest came 6 months after the incident. Surely, if they had been recognized as claimed by PW1 and 2 why were they not arrested immediately. In their defences, they all stated that they interacted with PW1 in their business even after the incident. Indeed even the 1st appellant attended the burial of the deceased and even consoled the deceased's family. PW9 claimed that he did not arrest the appellants' immediately because they ran away. This cannot possibly be correct. PW1 herself testified and confirmed that she used to see the appellants as free men after the incident. In any event the 1st appellant was even arrested in the police cells and that clearly is not running away.

Considering in totality the foregoing, that is to say the incredibility of PW1 and 2's statements and testimonies, failure to arrest the appellants immediately, the absence of the appellants' name in the 1st reports, the evident existence of 2 statements by PW1 & 2, the strong exculpatory evidence of PW4 and much more, we think that it was very unsafe to convict the appellants' purely on the basis of the accounts of PW1 and PW2.

It is for these reasons that we allow the appeals, quash the convictions and set aside the sentences imposed on each appellant. The appellants and each one of them should be set at liberty at once unless otherwise lawfully held.

DATED SIGNED, and **DELIVERED** at **MACHAKOS** this **5TH**day of **OCTOBER,** 2012.

ASIKE –MAKHANDIA | **GEORGE DULU**
JUDGE | **JUDGE**