



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 82, 83, 84 & 85 of 2011

1.KIOKO KILONZO

2.ATHUMANI MUSYOKA KIVONYA

3. BANJAMIN MUIMI VAATI

4. GREGORY NZAU MUTUNGAAPPELLANTS

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 1225/2003 by Hon. H.M. Nyaberi,SRM on 14/4/2011)

JUDGMENT

The appellants were 3rd, 1st, 4th and 2nd accused respectively before the Senior Resident Magistrate's Court at Mwingi in which they were jointly charged in count 1 with the offence of robbery with violence contrary to section 296(2) of the Penal Code. Particulars of the offence were that on 9th January, 2003 at [particulars withheld] in Mwingi District within Eastern Province, jointly with others not before court while armed with firearms, rungu, pangas and axe robbed **Mrs N K** cash Ksh. 10,000/= and 1 radio cassette make "sony" all valued at Kshs. 13,000/= and at or immediately before or immediately after the time of such robbery shot dead one **T K** and seriously injured **Mrs. N K** and **K K**.

In count II the 2nd appellant alone faced the offence of being in possession of ammunition contrary to section 4(2) (a) of the Firearms Act. Particulars being that on 17th December, 2003 at Ukasi Location in Mwingi District within Eastern Province, he was found in possession of 5 rounds of 7.62MM special ammunition without a firearm certificate. The appellants denied the charges and were soon thereafter put on trial, for the 2nd time over the self same charges. This was a retrial following decision of the High Court of Kenya at Machakos in Criminal Appeal Number 65 of 2007. The appellants had earlier been tried and convicted for the said offences. They lodged the appeals which were consolidated in the above criminal appeal file. The appeal was subsequently heard and determined by **Lenaola and Warsame, JJ**. They held and it was not contested that the plea in the first instance had been taken by a DMII who had no jurisdiction to attend to the charges preferred against the appellants. It was also noted that at the time of plea, the prosecutor was a person who was not competent to prosecute the case due to his rank in the police force. The judges therefore ordered a retrial.

At the retrial **P N** the complainant in count I on the fateful night of 9th December, 2003 at about 8.00pm was seated inside her kitchen next to the door with her children, **R W K**,(PW1), **K K** (PW3) **T**

K(deceased), **P** and **B** when she saw 4 people walking very fast towards them. On sensing danger, she alerted her children to close the door. Immediately, she heard a bang on the door and they started screaming. The people went round to the window where they shot into the house. She was shot on the shoulder whereas her daughter **T K** was short and died in the kitchen. Her other daughter, (PW1) pleaded with them not to kill them. They demanded that she opens the door. When she went to open it, PW4 went through the rear door together with PW3, Peter and Bernard. When she came back, she found the assailants demanding money from PW1. The attackers led her to the bedroom where she gave them a sum of Kshs. 10,000/=. They then led her to her co-wife's house, ransacked it but they did not find any money but picked a radio cassette make "sony", a purse and some other items. Finally, they left while shooting in the air. Among the first people to arrive at the scene was **KilonziKimanzi**(PW7) who later went to report the incident to Ukasi Police Station. Her daughters, **R W K**, (PW1) and **K K** (PW3) echoed what their mother said in her testimony. However, they added that when the attackers shot in the house, **R** pleaded with them and asked what they wanted. They replied that they wanted money and assured her that they will not harm her if she opened the door. Upon complying they immediately grabbed her on both sides of the shoulders and took her into the house where she gave them money. They later went to her stepmother's house where they took a radio, a purse and some items. On returning to the kitchen she found her sister **T K** having been shot dead while her mother was short on the shoulder. Apparently, the incident lasted for some time. She managed to identify the 1st appellant in the process as she had schooled with him at [particulars withheld] Primary School and was in fact a distant neighbour. She also identified the 2nd and 4th appellants as they flashed their torches whilst scrutinizing the money. She also alluded to the fact that there was moonlight although it had rained earlier at about 7.00pm. When the police arrived, the injured victim and the body of **T** were taken to Mwingi District Hospital.

PW7, KilonziKimanzi upon arrival at the scene together with **Syengo**(now deceased), found PW4 short in the shoulder whereas **T** had a short wound in the chest and was lying on the floor of the kitchen. He went back, took his motorbike and reported the incident to Ukasi Police Station. **PW7** while in the company of **PW13, C.I.P Lawrence Riungu** and other police officers returned to the scene of robbery. **PW13** on the way passed through Nguni Police Post where he picked some other police officers among them **CPLMwangi**. Upon arrival at the scene he found PW4 injured whereas **T** was dead inside the kitchen. PW4 told him that, they had been shot from the window while they were inside the kitchen. He collected 8 spent cartridges from outside the house and directed **CPLMwangi** to take the injured victim and the body of **T** to Mwingi Hospital. They attempted to follow footmarks apparently of the thugs. However, on getting on the road heading to Ukasi those footmarks disappeared.

The following day he went back to gather more information. At about 2.00pm, he received information from an informer that some people were seen carrying a firearm in a sack the previous night at Ukasi town and they had left for Bangale. He was given one of the suspect's name as **Athumani** who operated a video shop at Bangale. Acting on this information, he proceeded to Bangale Police Station where he was given 3 police officers. The officers happened to know the suspect very well. They proceeded to his shop at about 5.00am and found him in the house together with the 3rd and 4th appellants. They arrested all of them and brought them to Ukasi Police Station and finally to Mwingi Police Station.

On 23rd December, 2003, he conducted an identification parade for **Benjamin Muimi** the 3rd appellant. He was duly identified by PW1 and PW4. Again he conducted a parade for 2nd appellant. He too was positively identified by **R** and **N**. He further conducted another identification parade for 4th appellant. The same witness identified him. However, 3rd appellant was not identified in this parade. He confirmed that the forms that were completed were for those suspects who had been identified. He also confirmed that he participated in the investigation but the witness did not come into contact with the suspect prior to the identification parade. Later, the matter was taken up by the DCIO Mwingi for further investigations.

I.P Timothy Mwangi (IPW12) confirmed that at the scene, he saw several gun shots on the wall and there were spent cartridges outside the house near the window. They collected 8 spent cartridges, 3 live ammunition and subsequently took the victims to Mwingi District Hospital while **T** (deceased) was taken to the hospital mortuary. On 16th December, 2003, the 1st appellant was brought by members of the

public with allegations that he was one of the suspects in the robbery. He re-arrested him and booked him for the offence of robbery with violence. Thereafter, he forwarded the spent cartridge and live ammunition to a ballistic examiner Nairobi.

S/Sgt Evans Mwangi(PW11) recorded witness statements. In the course of his investigation, the 2nd appellant led him and other police officers to his home at Ukasi village to allegedly recover ammunition. He led them to a spot which was about 50m from his mother's house, scooped the soil and they recovered of 5 rounds of ammunition that were in a brownish bag. They tried to trace the gun but were unsuccessful. He then issued the victims of the robbery with P3 forms. Later a postmortem was conducted on the body of the deceased and report thereof completed.

Fredrick Mutua (PW8) a clinical officer at **Mwingi** District Hospital produced the P3 form that was completed by **Dr. Kariuki**. The doctor had observed that **R** sustained 2x2 cm entry wound on the right lateral side upper arm and exit wound (*gaping*) medial side upper arm. The probable weapon was given the shot was gun. **Non** the other handsustained a gaping wound 3cm long on the right upper arm, probable weapon used was gun shot. The injuries were both classified as harm. The postmortem on the body of **T** the deceased was conducted by **Dr. Owinoon** 11th December, 2003 at Mwingi District Hospital. The doctor observed that there was injury on the upper right chest. The entry of the injury was measuring 1.5cmx2cmx6cm with a posterior exit (back) which was 3x4.5x5.5cm. There was a crushed fracture on the right scapula bone and severe injury of upper right lobe of lung. The cause of death was hemorrhagic shock with cardio pulmonary arrest due to severe lung injuries.

At the close of the prosecution case, the trial court found that each of the appellant had a case to answer and put them on their defence. The 2nd appellant who was the 1st accused elected to give sworn evidence whereas the rest gave unsworn evidence. None of them though called witnesses.

The 2nd appellant stated that on 9th December, 2003 he spent the whole day at his workshop at Bangale. On the same day at about 8.30p.m he assisted one **Mohammed** to remove the door lock after he lost his keys. He later retired to his bed. The following day, he went back and repaired the door lock. On 12th December, 2003 at about 5.00am, he was arrested by PW13 who was in the company of other police officers. He was taken to Bangale Police Station where he was joined with the 3rd appellant. They were brought to Ukasi Police Station where they found the 4th appellant. He was finally brought to Mwingi alone, beaten while being asked to name his accomplices in the robbery that occurred at Yatwa. On the 17th December, 2003 the 3rd and 4th appellants were brought. The following day, they were taken to CID offices where they found a woman and a lady. They were asked whether they knew them and or robbed them. They denied the allegations and were taken to police cells. On 23rd December, 2003, an identification parade was conducted on him by PW13. They were paraded in a single parade. The woman and the lady came in turns and identified all of them. A third lady was brought but she was unable to identify any of them. He also denied any knowledge of the ammunition. He vehemently denied being involved in the robbery herein.

The 4th appellant who was 2nd accused in his unsworn statement in defence stated that on 12th December, 2003 at about 4.00am, he was arrested from the house at Ukasi by OCS **C.I.P Irungu**(PW13). The following day, he saw the 2nd and 4th appellants being brought. Thereafter he was taken to Nguni Police Post where he stayed until 16th December, 2003 where he saw 2 women. He was asked whether he knew them or was aware of the robbery that occurred at Yatwa which he denied. He also reiterated the sequence of events as stated by the 2nd appellant as from 17th December, 2003 onwards until the conduct of the identification parade.

The 1st appellant who was the 3rd accused stated that on 9th December 2003 he had travelled to Bangale. The following day, he tried to get some casual work but he was unsuccessful. He borrowed fare and came back on 11th December, 2003 when he was arrested by members of the deceased family. At Nguni Police Post he found the 4th appellant. Later, he was taken to Ukasi Police Station where he found

the 4th appellant again. On 18th December he was interrogated in the presence of **N** and **R** who are his neighbours about the robbery at Yatwa which he denied. On 23rd December, 2003 an identification parade was conducted involving him. They were arraigned in series and **N** and **R** came in turns and identified all of them whereas **K** was unable to identify them.

The 4th appellant in his unsworn statement in defence alluded to the fact that he was arrested on 12th December, 2003 at about 6.00am from his house at Bangale by **CIPirungu** of Ukasi Police Station. At Ukasi Police Station, he was joined by the 2nd appellant and brought to Ukasi Police Station where they found the 4th appellant.

On the nights of 16th and 17th December, 2003, he was removed and brought to Mwingi Police Station. He also reiterated the sequence of events as narrated by the 2nd appellant from 23rd December, 2003 onwards and what transpired at the identification parade.

At the conclusion of the defence, **Mr. MusyokaWambua**, learned counsel representing the appellant gave detailed oral submissions revolving around the identity of the assailants, circumstances surrounding their identity, the manner in which the identification parade was conducted and the glaring contradictions in the prosecution evidence. The prosecution did not reply to the defence submissions since it did not have the right of reply.

The learned magistrate having carefully evaluated the evidence came to the conclusion that all the appellants were involved in the robbery, convicted them and sentenced them to the mandatory death sentence. Having so convicted the appellants on the 1st count the learned magistrate decided and rightly so in our view not to belabor count II with regard to the 2nd appellant.

Being aggrieved by the conviction and sentence aforesaid, the appellants individually and separately lodged appeal to this court. The appeals raised similar grounds to wit;

- The case was stage managed,
- Evidence of identification was unreliable
- The identification parade was conducted in violation of the law
- Their mode of arrest impressed the trial magistrate and that their defences were not given due consideration.

When the appeals came before us for hearing on 10th July, 2012, they were consolidated. **Mr. Musyoka**, learned counsel for the appellants submitted in support of the appeal on 3 broad grounds, identification, recognition and hearsay evidence. He contended that the trial court's finding that the appellants were properly identified at the scene was an error as the evidence on record did not support such finding. The court did not address its mind to the circumstances obtaining during the alleged identification, the light and its intensity nor was there description of the appellants. Identification parade was conducted in violation of the law. He advanced similar arguments in respect of the alleged recognition of appellants and added that the initial report did not mention the recognition of the 1st appellant. On hearsay, counsel made reference to the evidence of PW11 and 13 and submitted that to the extent that the informer was not called as a witness, the evidence of arrest of 2nd, 3rd and 4th appellants was hearsay. Further, these appellants were not found in possession of any of the stolen items. On the whole counsel submitted that there was insufficient material upon which the court could convict the appellants.

Mrs. Gakobo, learned Principal Counsel opposed the appeals and submitted that the key witnesses on identification, spoke to the appellants in the course of the robbery, they were with them for a considerable period of time and walked with them, there was moonlight, PW1 had schooled with the 1st appellant and was therefore familiar with him making his recognition easier. There was nothing on record to suggest

that the night was cloudy. Accordingly, conditions obtaining were favourable for positive identification. Identification parade was conducted after 2 weeks. The time frame was such that the minds of the witnesses were still fresh and they could easily recall the attackers. Initially, the appellants were disguised. However, as the robbery progressed the head gears were removed which afforded the witnesses chance to see the hoodlums. Therefore the evidence of identification/recognition was sufficient to find a conviction.

On hearsay, counsel submitted that the appellants were not arrested merely on the information of the informer but on other evidence which was placed before court.

We have now carefully considered the complaints by both appellants just as we have carefully re-evaluated all the evidence tendered at the trial as we are obligated by law to do so as a first appellate court. We have reminded ourselves of our duty as a first appellate court to review all the evidence on record and draw our own conclusions. We draw such inspiration from the case of **Okeno v Republic [197] E.A. 32**

We begin by noting that the learned magistrate convicted the appellants solely on the grounds of identification/recognition. Ofcourse it has been said time and again that such evidence should be treated with great care, caution and circumspection before a conviction can be founded on it. In the case of **Clephas Otieno Wamunga v Republic, [1989] KLR424 No. of 1989 at Kisumu**, the Court of Appeal expressed itself on the issue thus:-

“We now turn to the more troublesome part of this appeal namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa(PW1) and Lilian Adhiambo Wagude(PW13.) Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them. We have already recounted the material parts of this evidence and there is no need to recite it again. What we have decided is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriages of justice and is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant 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. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J. in the well known case or Republic vs Turnbull[1976] All E.R. 549 at page 552 where he said:

Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knew, the jury should be reminded that mistakes in recognition of close relatives and friends are sometime made.”

It is true that the conviction of the appellants turned on their identification and recognition. However, a careful perusal of the recorded evidence on those twin issues does not give us the comfort to say that, the said evidence should have founded a conviction. Only 3 witnesses testified on this aspect of the case, **R**, **K** and **N**. However their evidence does not flow at all, such that it does not clearly and irresistibly point to the clear identification /recognition of the appellants

Regarding identification at the scene, **N** stated that she had never seen or known the appellants prior to the incident. However, she told PW11 that although she did not know any of the appellants she could still identify them. **R**, on the other hand stated that she identified the appellants because of the moonlight and again as they flashed their torches on the money. She also claimed that she had walked to the house of PW5 with them. **K** recognized the 1st appellant in the same circumstances, and more so, since they had schooled together way back. Despite the confidence exhibited by these witnesses with regard to identification of the appellants, none of them gave a description of the appellants to the police or a person in authority in their 1st report. It is such description that is subsequently used for purposes of police identification parade. These witnesses should have gone ahead and described how the appellants looked like, any outstanding features about them, mode of dress, style of walking, speaking etc. So then,

what was it about the appellant that made them stand out for easy identification and which would have been confirmed by the identification parade? A first report is very important especially where it is made when the complainant's mind is still fresh after the incident. Such report serves 2 purposes as stated in the case of **Terekali & another vs Republic [1952] EACA-**

“... Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

It is these first impressions that are tested subsequent at the identification parade. In the absence of such report and description, any subsequent identification parade carried out will be of little or no evidential value at all. In the instant case, these 3 witnesses were in contact immediately after the incident with persons in authority. Indeed PW7, 9, 11 and 12 all testified that they were never given any description of the appellants by the witnesses. PW7 and 9 were relatives. Indeed it was PW9 who reported the occurrence to the police and escorted the witnesses to the hospital. Why could these witness not volunteer the information as to who their attackers were and or their description. Yet PW11, 12 and 13 were police officers who reported to the scene shortly thereafter. In fact they accompanied the 3 witnesses to hospital, whereas PW13 was the OCS Ukasi Police Station. The officer who conducted the initial investigations was left at the scene. From his testimony he was not given any description of the appellants. This being the case the subsequent police identification parade was worthless. In any event even the evidence tendered by these witnesses in that regard was suspect. There are contradictions. First it is not clear how many such parades were conducted. Since there were 4 suspects, 4 different parades ought to have been conducted. Though PW11 testified that he conducted 4 parades for each appellant, however he only managed to tender in evidence 3 identification parade forms in respect to 2nd, 3rd and 4th appellants. He admitted though that similar identification parade was conducted in respect of 1st appellant, he could not however tell what became of his parade forms. The appellants have complained that only one parade was conducted in respect of them all. PW11 claimed that he produced the 3 identification parade forms because, they are the ones in which identification was made. He saw no need to produce the forms of the appellant who was not identified. This is a ridiculous reason. It is a requirement that every evidence in the possession of the prosecution whether positive or negative against the accused should be tendered in evidence to enable a court to arrive at a just decision. Withholding evidence as it happened here may lead justly to the conclusion that such evidence was unfavourable to the prosecution and favoured the appellants. We would so hold in the circumstances of this case. It is also not lost on us that the 3 witnesses gave incoherent account of how many parades were performed. On the whole it would appear that only one parade was conducted in which all the appellants participated, which was irregular. Finally, even the credibility of the parade is questionable as the parade officer was involved initially in the investigation of case. Indeed he arrested 2nd, 3rd and 4th appellants. He was therefore not impartial and could not detach himself from the investigations as required of officers called upon to conduct police identification parades. The likelihood of him interfering with the parade for his desired results cannot be gainsaid. In the premises the parade was conducted in violation of Force Standing Order No. 6 (4) (b).

Coming back to the scene of crime, we are satisfied that the circumstances and conditions obtaining did not favour positive identification. There was evidence that it had rained that night. The offence was committed at about 8pm. The rains must have been heavy since some rivers had broken their banks. This alone suggests poor visibility. The evidence regarding the presence of moonlight is of little assistance to the prosecution. No inquiry was made by the trial court with regard to the intensity of the light emitted by moon, the size of the moon, the position of the moon in relation to the witnesses and the appellants and for how long the appellants were in the glare of such moonlight. This was fatal omission. See *Maitanyi v Republic, [1989] KLR 198*

There is evidence also that when the attack was launched, the hurricane lamp which was alight fell down and went off. The house fell in darkness save for the light provided by the torches of the appellants if at all. We do not believe that the appellant would shamelessly direct the torches on their faces to make them easier targets of identification and or recognition. The evidence is that **R** identified the appellants as they

directed their torches on money and the resultant reflection enabled her to see the appellants. This is highly improbable. What kind of money can cause powerful reflection when light is directed at it, such that it would have enabled the appellants to be identified? We cannot think of any.

There is also evidence that the faces of the appellants were covered. This must have impeded their identification. The State has submitted that although the appellants had initially covered their faces, they somehow removed the covers as the robbery progressed. However there was no such evidence on record. Again it does not make sense to us that the appellants who had taken steps to ensure that they are not identified would suddenly drop their guard and remove the disguise.

Finally, there is no doubt that the attack was sudden and violent, involving gunshots. Similarly the 3 witnesses were roughed up. In the process a daughter/sister was shot dead. The atmosphere was full of tension, fear, stress and shock. Certainly such conditions do not provide conducive atmosphere for observation. Those witnesses were more concerned with their self-preservation as opposed to identifying the culprits. They had no time to look at the appellants sufficiently to be able to identify /recognize them.

On the whole we find that the evidence of recognition and identification was unsafe. The circumstances obtaining at the scene of crime were unfavourable for positive identification/recognition. The conviction of all the 3 appellants was solely based on the evidence of 3 witnesses on this aspect of the matter. These convictions are unsafe for the reasons given and consequently cannot be allowed to stand. Accordingly, we allow the appeals, quash the conviction and set aside the sentences imposed. The appellants and each one of them shall be set free unless otherwise lawfully held.

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

ASIKE MAKHANDIA

GEORGE DULU

JUDGE

JUDGE