



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Criminal Appeal 1091, 1092 & 1093 of 1991

JAMES KINYANJUI NDUATIAPPELLANT

-versus-

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1458 of 1988 of the Chief Magistrate's Court at Nakuru: R. Walekhwa)

CONSOLIDATED WITH

PAUL KAMAU NJOROGE.....APPELLANT

-versus-REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

(From Original Conviction and Sentence in Criminal Case No. 1458 of 1988 of the Chief Magistrate's Court at Nakuru: R. Walekhwa)

JOSEPH CHARLES KINYUA..... APPELLANT

-versus-REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1458 of 1988 of the Chief Magistrate's Court at Nakuru: R. Walekhwa)

Coram: Patel, J

Oguk, J.

1st, 2nd & 3rd Appellants present (un-represented)

Mrs. Ondieki (State Counsel) for Republic

JUDGMENT

Criminal Appeal No. 1091/91; Cr. Appeal No. 1092/91 and Cr. Appeal No. 1093/91 have been consolidated.

The 1st Appellant, James, Kinyanjui Nduati (original A2); 2nd Appellant, Paul Kamau Njoro

(original A1); and 3rd Appellant, Joseph Charles Kinyua (original A4); were jointly with another, John Macharia Kamau (original A3 - now deceased); convicted on three counts of the offence of robbery with violence contrary to

section 296(2) of the Penal Code and sentenced to death by the learned Chief Magistrate, Nakuru. Their appeals to this court are against their convictions and sentence.

It is quite surprising, that the 2nd Appellant, who had been excluded throughout the trial by the two learned Magistrates who separately heard the case, was eventually convicted in absentia and sentenced to death. On the 6th of March, 1989, the 2nd Appellant was excluded from the trial by the learned Principal Magistrate, Mr. I.C.C. Wambilyangah (as he was then) for feigning madness to disrupt the proceedings. He then heard evidence from 18 prosecution witnesses in the absence of the 2nd Appellant. After Mr. Wambilyangah was elevated to the High Court as a Puisne Judge, the conduct of the proceedings was taken over by the learned Chief Magistrate Mrs. R.N. Walekhwa (as she was then). She, too, excluded the 2nd Appellant from the proceedings on the 18th of March, 1991 as he was violent, talking nonsense and fighting people. She then heard 7 other prosecution witnesses in his absence. He was never heard on his defence and the learned trial Magistrate made the following observation in her Judgment at p.19;

"The 1st Accused who feigned madness did not give any

evidence." With respect, we consider that the conviction of the 2nd Appellant was wholly erroneous. Having been excluded from the trial, he could not at the end of the trial be convicted of the offences laid therein. He could not lawfully be convicted in a trial in which he had never participated. Moreover, Medical

4

evidence from three Doctors PW12, PW17 and PW25 to the effect that the 2nd Appellant was merely feigning madness to avoid prosecution was adduced in court after he had already been excluded from the trial. This means that the court had prematurely excluded him from trial without the benefit of any medical evidence, which could probably have enabled the court to arrive at a proper conclusion or persuaded the court to take a different course such as by firmly dealing with him during the trial to control his misbehaviour, instead of excluding him from the trial. The use of his photographs to try him, to our mind, was an error in law.

We are satisfied that the 2nd Appellant had not been tried on the offences that were laid against him as he had made it difficult for the learned magistrate to continue with the hearing while he was in court. He could do all sorts of mischief to disrupt the proceedings by either shouting or jumping up and down in the dock. The court having excluded him from the trial should have directed the prosecution to withdraw the charge against him and charge him separately instead of using his photographs to try him. He was never heard in his defence. We are satisfied that the 2nd Appellant did not have a satisfactory trial and his subsequent conviction was a nullity. In those circumstances, the proper order to make is that of a re-trial.

We observe that the 2nd Appellant was arrested on the 24th of July, 1988 and has since then remained in custody for over a period of slightly more than 9 1/2 years. He is largely to blame for having made it difficult for the lower courts to give him a fair

trial by feigning madness against Medical advice from three Doctors who examined him. We have no much sympathies for him because to set him free would create a dangerous president.

For reasons given, we set aside the conviction of the 2nd Appellant on all the 3 counts and we also set aside the sentence that was imposed upon him in respect of each count. We order that there be a re-trial before the learned Chief Magistrate Nakuru. The 2nd Appellant shall therefore be expeditiously produced before Mr. William Tuiyot, the learned Chief Magistrate, Nakuru for pleas and fixing of new hearing dates.

Turning now to case against the 1st and 3rd Appellants, the evidence adduced by the prosecution witnesses, was that on the morning of the 21st of July, 1988, Chandrakan Karamesh Gada, (PW1), who was a businessman in Nakuru running a wholesale shop under the name of Menengai Wholesalers, left his house at Shabab Estate along Gusii Road for his shop leaving behind his wife Reena Shah (now deceased), his brother's wife, Chandrika Shah (PW6) who is the 2nd complainant, his mother, V.K. Gada (PW7) together with their house

servant, Francis Otieno (PW5) who is the 3rd complainant. At about 9a.m., the old lady (PW7) also left the house for the Mosque. Shortly thereafter, Otieno (PW5) saw 4 men at the gate to the compound which was about 10 yards away. Three of the said men were wearing overalls with the labels of Kenya Power & Lighting Company then entered the compound and moved towards behind the kitchen while one other man who had no overall remained standing at the gate. He and the deceased then went to where the said men

were. They introduced themselves as employees of KP & L. Co. Ltd. and stated that they had come to check on the lighting system in the house. Otieno testified that he clearly saw the said men and they were the 1st and 3rd Appellants herein together with the 2nd Appellant whose appeal we have now disposed of. The 1st Appellant was wearing a blue overall (ex.2) while the 3rd Appellant was wearing a green overall (ex.7). Their companion who appears to have been their leader (original A1) was wearing a white overall (ex.6) and was carrying a file (ex.5), and a brown bag (ex.12). Reena Shah (now deceased) then told Otieno to show them where the main switch was located. The 1st and 3rd Appellants then started switching the lights in the kitchen and living rooms on and off while their leader (original A1) was scribbling certain things in his file. He then gave orders to the Appellants by shouting the words: "Anzeni Kazi" meaning start work. This was confirmed by Chandrika (PW6) who was then resting on the sofa set as she was then expectant.

As soon as such orders were given, the said men started to attack them with pangas. This was after they had been in the house for about 5 minutes moving from the kitchen to the sitting room and other rooms checking on the lighting system. They were badly beaten till each of them became unconscious, but whereas the old lady (PW7) came back from the mosque in time to call for assistance which enabled Otieno (PV/5) and Chandrika (PW6) to be rushed to the hospital, Reena, was however, so badly beaten that she was just pronounced dead. They all had sustained severe head injuries with

deep cuts and fractures of the skull extending to the brain. This was clear from the testimony of Dr. Angelo D'Cunha (PW4), who is a surgeon based at Nakuru. He attended all the injured including the deceased and later assessed the degree of injuries suffered by PW5 and PW6 as grievous harm and produced relevant P3 forms (ex. 9 & 10).

The house where the family of Chandrakan Gada (PW1) was residing was then ransacked by the said gangsters who were posing as employees of KP & L. Co. Ltd. They made away with several

Jewellery, bangles, earrings, necklaces, leg rings, hair chains, one Omax wrist watch and one disco wrist watch belonging to Otieno. The particulars of the stolen items are well set out in the charge sheet, all valued at shs. 63,450/-.

The incident was reported to the police and immediately a team of CID officers among them Sgt. Songwa (PW19) rushed to the scene. He found when the victims had been rushed to the hospital where two of them were admitted and one was already dead. There was a lot of blood inside the house. At the scene, he was handed a file (ex.5) which had apparently remained behind when the gangsters were fleeing after the robbery. Inside the file was an envelop (ex.25) bearing the name of one Paul Kamau Njoroge c/o Benson Kuria Mwangi, KGGGCU Stationery Section, P.O. Box 35, Nakuru. He traced Benson Kuria Mwangi (PW18) who confirmed to the police and in his evidence in court, that he knew the said Paul Kamau Njoroge (original AI) to whom the said envelop had been addressed. He was his former school mate at Afraha Secondary School in 1974 and 1975 and at the request

8

of the said Njoroge, he had allowed him to be using his postal address. He volunteered to show the police officers where the said Njoroge was staying. He led the police officers to his house but as soon as he entered the house the said Njoroge left saying that he was going to buy some cigarettes. The police officers laying ambush never caught up with him and he disappeared. His house was then searched and inside a coat in that house, the police officer (PW19) found one earring (ex.13) which was later identified by the family of the deceased as one of the items that had been stolen in the course of the said robbery.

The police officers continued to look for the said Njoroge (original AI) and on the 24th of July, 1988 he was arrested by P.C Silas Kipruto (PW20) at Nakuru Bus Stage before he could board a Matatu vehicle for Nyahururu. Upon his arrest, he was taken to Provincial CID Headquarters, Nakuru for interrogation.

In the course of interrogation by Senior Sgt. John Ndungu (PW16), he testified that the said Njoroge (original AI), volunteered information and led him and Sgt. Saisi (PW23) back to his house at Ronda Estate. He took out the keys to the padlock and himself opened the door. They then entered the house. Njoroge then took out one necklace (ex.19) from his box which was later identified as one of the items which the complainants had been robbed of. Inside that house, they also recovered an iron bar, a Somali sword and a metal bar kept in a brown bag (ex. 12, 13 & 14) together with a certain small sword (ex.31). He further gave him information leading to the arrest of the 1st and 3rd Appellants.

9

He led the police officers to J.J.H Garage in Shabab area, Nakuru where he pointed out the 1st Appellant and he was arrested. When questioned about the stolen items, the 1st Appellant went with the police officers to a grounded vehicle at the said garage and from the boot of the said vehicle Reg. No. KCX 081, he produced one overall (ex.8) and some 5 bangles (ex.16) which were later identified as some of the Jewellery the complainants had been robbed of. This was confirmed by Sgt. Thomas Saisi (PW23) who was among the police officers present during the recovery of the exhibits.

After the arrest of the 3rd Appellant, at Langa Langa Estate, the police officers went with him to search his house at Ronda Estate but nothing was recovered. On further interrogation, Senior Sgt. Ndungu (PW16) and Sgt. Saisi (PW23) testified that the 3rd Appellant took them to a certain bush and there pointed to a certain hole from where they had buried some 2 bangles, 6 necklaces and 3 earrings. Both Njoroge (original A1) and the 3rd Appellant upon further interrogation led the police officers to Ronda Estate and from a certain hole which they pointed out, PW 16 and PW23 testified that they recovered 2 overalls (ex. 6 & 7) which had the labels of KP & L. Company. Asked who had sewn the said labels, they led the police officers to one Chunu Ezegere (PW3) who is a tailor. This was confirmed by PW3 in his evidence. He testified that on the 13th of July, 1988 one Njoroge (original A1) who had been his customer brought to him one white overall (ex.6) and one green overall (ex.7) and asked him to sew on them the labels of KP & L.

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10

Company since he had lost the labels on the said overalls but he wanted to go and exchange them for new ones. He stated that Njoroge was then accompanied by someone who looked like the 1st Appellant. He did the work and was duly paid shs. 5/- for each label by Njoroge. He identified the said red labels on each of the two overalls (ex. 6 & 7). Njoroge later brought to him 3rd overall blue in colour and asked him to sew a similar label on it and he did so. He identified the said overall (ex.8). Later police officers came with Njoroge and the said 3 overalls and he identified them as the ones which Njoroge had brought to him to sew the KP & L Company labels on them.

All the recovered items were handed over to C.I Edward Cheruiyot (PW21) who produced them in court as exhibits.

On the 1st of August, 1986} at 10.55 a.m. I.P. Peter Ngugi (PW11) of the provincial CID, Nakuru, conducted an identification parade in respect of the 1st Appellant, Kinyanjui at the request of C.I Cheruiyot (PW23). He explained in court the procedure he followed. At that parade, the suspect and all the parade members were dressed in blue overalls. The 1st Appellant was identified by the witnesses, Francis Otieno (PW5) who touched him. He produced the parade form in court as exhibit. (Ex. 16(a), (b)).

On the same day, 1st of August, 1989, I.P Gideon Karani (PW10) of the CID, Nakuru also conducted a separate parade in respect of the 3rd Appellant, Kinyua at around 10.30a.m. He explained the procedure which he followed. All the witnesses including the suspect wore green overalls. The 3rd Appellant was duly identified

11

by the witnesses, Francis Otieno (PW5) who touched him. He produced the parade forms (ex.15).

On the 29th of July, 1988, the 1st Appellant was taken before I.P Wicliff Atuga (PW22) then attached to the Provincial CID< Nakuru for charge and caution. He made a statement which was objected to during the trial but was admitted in evidence after trial within trial was held (ex.30). It amounted to a confession of his involvement in the said robberies.

Post mortem examination on the body of the deceased, Reena Shah (count 1) conducted by Dr. Kimaiyo indicated that there was depressed and fractured skull with broken pieces of the skull

causing damage to the brain; deep cut wound on the left posterior occipital region behind the ear which extended to the left temporal region; another injury on the anterior frontal region causing subdural haemorrhage; another injury on the vertex region (top of the head); superficial bruises on the right forearm. The doctor concluded that the cause of death of the deceased was due to cardiac pulmonary Arrest which was due to severe head injury caused by a blunt object which would have been a hammer. The post mortem form was produced in evidence (ex.32).

After the conclusion of the police investigations, the Appellants were then jointly charged with the aforesaid offences. One of those who were jointly charged with the Appellants herein (original A3) died in custody during the trial in the court below.

12

Both 1st and 3rd Appellants denied any involvement in the said robberies.

The 1st Appellant, Kinyanjui testified that at the time of the alleged robbery is said to have taken place, he was at his place of work at the garage. He later left the place shortly just to go to a nearby shop to buy a soda and a cake. He then came back to continue with his work. He stated that he was not aware of any robbery having taken place till Njoroge (original A1) came with police officers at his place of work in the garage to ask for the things he had left with him. He went on to say that on the 21st of July, 1988 at 3p.m., Njoroge (original A1) came to his garage with some things in a paper bag which he asked him to keep for him saying that he would come back for them later. He then handed them in the office in an open space. Njoroge never came for them till some 4 days later in company of police officers. He then handed to them the things which Njoroge had left with him which he had not even looked at. He denied that he had produced the said items from the boot of motor vehicle Reg. No. KCX 081 as alleged by the police officers. He also denied having accompanied Njoroge to the tailor (PW3) to have the labels of KP& L. Co. Ltd. sewn on overalls. He denied having ever gone to the house of the complainant's where the said robbery is said to have taken place.

The 3rd Appellant, Kinyua, testified that he was nowhere near the scene of the alleged robbery on the material day. He stated that on that day, he left his home in the morning for work at a construction site where he and two others had been engaged by

13

Councillor Samuel Mara to construct for him a kitchen chimney. He worked there till evening when he went back home after they had been paid their dues. Later on the 26th of July, 1986, police officers came to his house at Langa Langa which they searched but recovered nothing. He was then taken to a police vehicle where he found Njoroge (original A1). The said Njoroge led the police to his house at Ronda where they came out with a bag containing weapons. From there Njoroge led the police officers into a Maize plantation and they came back with nylon bag containing one green overall and one white overall.

The 3rd Appellant called Samuel Thamu Mara (DW1) as a witness. He testified that he had known the 3rd Appellant as a fundi and on the morning of 27th July, 1988, he gave him some work at Mugo Hotel to repair the kitchen chimney. This was at 7 a.m. He later left between 8.30 - 9a.m and came back between 4p.m and 5p.m. He could not tell what had transpired during the day while he was away.

Both Appellants in their respective Petitions of Appeal alleges in ground 1 that:-

1. That the learned trial magistrate erred both in law and fact in holding that they had been properly identified at the scene of crime by Francis Otieno (PW5) who was a single witness and yet he did not have ample opportunity to see his attackers. The 1st Appellant then adds the following grounds.
2. That the learned trial magistrate erred in relying on the identification parade which was unfairly conducted and had lost its probative value.
3. That the learned trial magistrate erred in law in placing reliance on the dock identification by Paul Chunu Ezegere (PW3) who purported to have seen him and identified him as the one who had accompanied Njoroge (original A1) to sew the KPL Ltd. labels on some overall.
4. That the learned Chief Magistrate misdirected herself seriously in rejecting his explanation as to how he had come by the items allegedly recovered from him which explanation was and still is plausible as he did not know the contents of the paper bag.
5. That the learned trial magistrate erred in acting upon the repudiated charge and cautionary statement (ex.30) allegedly made by him as it was not proved to have been voluntarily obtained.
6. That the learned magistrate erred in law in failing to consider his alibi defence which defence was not displaced by the prosecution.
7. The conduct of the case was irregular and prejudicial to him as the learned magistrate who took over the case and concluded the same had no advantage of seeing the demeanour of the main witness who had previously testified and so she could not properly come to the right conclusion.

3rd Appellant on his part adds the following:-

2. That the learned trial magistrate erred in law and fact by so acting on the circumstantial evidence relating to the exhibits allegedly recovered from him which evidence was not properly tied up and was doubtful.
3. That the learned trial magistrate erred in fact and in law in admitting in evidence the charge and cautionary statement attributed to him (ex.19) and relying on the same without sufficient corroboration.
4. The learned trial magistrate erred in law in that she did not make any finding on his alibi defence which was supported by his witness (DW1).
5. That he was not given a fair and impartial trial.
6. That his conviction was against the weight of evidence adduced which did not prove the charge(s) beyond all reasonable doubts.

There is no dispute on the recorded evidence that on the morning of 21st of July, 1988, shortly after 9a.m., a gang of 4 men posing as employees of Kenya Power & Lighting Company went to the house of C.K. Gada (PW1) at Shabab Estate, Nakuru. Only three of the said men who were dressed in overalls bearing labels of KP&L Co. entered the compound. While the 4th man who had no overall remained at the gate possibly keeping watch. All this was clear from the testimony of the house servant Otieno (PW5). By then there were two young Asian women in the house whose husbands had gone to work at the family wholesale shop while their mother-in-law, V.K. Gada (PW7) had gone for prayers at the mosque. One the ladies, Chandrika Shah (PW6) was then expectant and was just resting on a sofa set. She saw the said three men enter the house to check on the electrical system but never saw any of them sufficiently well be able to identify them as she was then tired due to her pregnancy and did not even leave her sofa set upon which she was resting.

It was only the other lady, Reena Shah (now deceased) and the house servant, Otieno (PW5) who had a conversation with the said men outside the kitchen door. They introduced themselves as employees of the KP & L. Company who had come to check on the electric system in the house. Indeed each of them had labels of KP & L. Company sewn on their overalls. Reena then allowed Otieno to show the said men where the main switch was. They were then allowed into the kitchen where the main switch was and they proceeded to the living room where two of the said men were switching on and off the lights while their colleague who was carrying a bag and a file was then scribbling certain things. They remained in the house for about 5 minutes checking on the switches and the lighting system while Otieno and Reena were looking on. It was then that the man who was carrying the file gave orders to his colleagues to start work. All over sudden, the said man drew weapons and took out others from the bag which their leader was carrying and they started to mercilessly beat Reena Shah (deceased) and Otieno (PW5). They did not even spare the expectant and tired lady PW6 who was sleeping on the sofa set. The manner of attack was so severe as they were just hitting them on their heads. According to Medical evidence, all of the three victims sustained skull fractures. The old lady, V.K. Gada (PW7) who had gone out for prayers in the Mosque came back to the house to find Reena already dead while both Chandrika Shah (PW6) and Otieno (PW5) were

17

unconscious. The house was ransacked and things were scattered all over while there were blood stains everywhere in the kitchen and the living room. This was confirmed by C.K. Gada (PW1) who received a phone call from the neighbours regarding the incident and rushed back to the house. The same was also confirmed by the police officers who went to the scene. While Reena was pronounced dead on arrival to the hospital, both Chandrika Shah (PW6) and Otieno (PW5) managed to survive after elaborate and extensive surgery was carried out by Dr. Angelo D'Cunha (PW4) surgeon based at Nakuru. He assessed the degree of their injuries as grievous harm.

We agree with the submissions by the Appellants that their convictions were based first and foremost, on the evidence of visual identification at the scene of crime by a single witness, Otieno (PW5), who was the house servant. This witness had never known them before. He was the first person to spot them at the gate even before they entered the compound. By then he was in the company of Reena (now deceased) in the kitchen. The learned trial magistrate who visited the scene of crime, found that the said kitchen was only some 10 meters away from the gate to the compound and from that kitchen, one could have a clear view of the gate. Those people arrived at the gate of the said compound shortly after 9a.m just after the elderly lady, V.K. Gada (PW7) had left the house for the Mosque. As three of the said gangsters posing as employees of the KP & L. Co. employees entered the compound, they stood outside the door of the kitchen. Reena (deceased) and Otieno (PW5) who were in the kitchen they came out to enquire to acquire

18

from them the purpose of their mission. On hearing that they merely wanted to check the electrical system in the house for any fault, Reena directed Otieno to show them where the main switch was. He was with them in the kitchen and in the living room where he says the 1st and 3rd Appellants were switching lights on and off, while their companion (original A1) who was then carrying a file and a bag was busy scribbling certain things in his file. They made no attempt to disguise their appearances. Visibility was good as it was day time. For at least 5 minutes that Otieno (PW5) was in the house with the said men, there was nothing to suggest or — could arouse any suspicion that they were bad people till the man who was carrying the file said to be the original A1, gave orders

VI

to his colleagues that they should start working. That when the said men drew weapons and started attacking the two ladies and Otieno.

Otieno (PW5) maintains that he saw all the three men quite well while they arrived outside the kitchen where they talked first before they entered the kitchen and proceeded to the living room. 4) He is certain according to his testimony that the 1st and 3rd Appellants were among the said gangsters. Chandrika Shah (PW6) who was also in the house lying on the sofa set as she was expectant did not bother to look at the said men once she had been told that they were employees of KP&L Company who had come to check on the lighting system. She got surprised when they turned to be robbers and started to attack her. She could not identify any of them.

19

Thus, Otieno remained the sole identifying witness at the scene since Renna who was with him with the said gangsters was beaten to death.

We are of the view that circumstances favourable for positive identification existed at the scene of crime that could have enabled Otieno (PW5) to properly identify the said gangsters. We have had in mind the authoritative decisions in the cases of ABDULLAH BIN WENDO -vs- R. (1953) 20 EACA 166; RORIA -vs- R. (1967) EA 583 dealing with single witness identification. We believe that where a conviction depends upon the identification of the defendant by a single witness, the evidence of that witness must always be tested with the greatest care and, on a first appeal, in such a case, the court must satisfy itself that it was safe to act upon the evidence. (See GIKONYO KARUMA & ANOTHER -vs- R (1980) KLR 23. Even though it does not come out clearly from the record of the court below that Otieno (PW5) who was the sole identifying witness had given the police any description of the said gangsters as he had been rendered unconscious during the said robbery and had to undergo an elaborate skull and brain surgery to be revived; the only way in these circumstances, where the police had

carried out arrests while he was still hospitalised; to test

his ability to identify such witness was by conducting a proper identification parade. See: GABRIEL NJOROGE - vs- R. (1982 - 88) 1KAR 1334 at p. 1136 Although This case deals

largely with dock identification and whether the identifying

witness in his early report to the police had indicated that he could identify the accused and given his description the case goes on to stress the need for testing the ability of such witness to identify the accused at an identification parade. It must be emphasised that what is being tested in primarily the impression received by the single witness at the time of the incident: See-CHARLES O. MAITANYI -vs- REPUBLIC. C.A CR. A. No. 6/86 (unreported). The way to go about testing such evidence with the greatest care was succinctly set out by the Court of Appeal in England in R. -vs- TURNBULL (1976) 3 All ER 549 which has since been repeatedly followed in Kenya.

We have had all these guidelines in mind, but in the circumstances of this case, what must not be lost sight of, is the fact that Otieno (PW5), the sole identifying witness, survived by sheer good luck after his head had been properly smashed during the robbery and he was left for dead in a state of unconsciousness. We are on our part, satisfied that Otieno (PW5) was able to see and in good light and without any obstruction for at least five minutes the said gangsters before they attacked him and that he was able to subsequently identify them at properly conducted identification parades. We are unable to agree with the Appellants as alleged in their Petitions of Appeal and in their written submissions that the identification parades at which Otieno (PW5) identified them was not properly conducted. We have scrutinised the evidence of I.P Peter Ngugi (PW 11) and I.P Gideon Karani (PW 10) who separately conducted the two parades at which the 1st and 3rd

Appellants were identified by Otieno (PW5) who was the sole identifying witness. (See Ex. 16(a) (b); and ex. 15).

Apart from the evidence of Otieno (PWB) of his visual identification of the 1st and 3rd Appellants at the scene of crime and his subsequent identification of the said Appellants at the identification parades; we find other corroborating evidence in support the correctness of his testimony in the fact that both Appellants were found in possession of the articles which the complainants had been robbed of a few days after such robbery.

As for the 1st Appellant, when the police investigating officers, Senior Sgt. Ndungu (PW16) and Sgt. Saisi (PW23) went to his place of work at JJ.H Garage, just within 4 days of the said robbery, in company of Njoroge (original AI), he took out from the boot of an abandoned vehicle Reg. No. KCX 081 one overall (ex.8) with the labels of KP & L. Company still thereon and some 5 bangles (ex.16) which were later identified by V.K. Gada (PW7), and Chandrika Shah (PW6) as some of the Jewellery they had been robbed of. Otieno (PW5) identified the overall (ex.8) as one of those which the gangsters had been wearing. The 1st Appellant admits that he had indeed been found with those items, but alleges that it was his co-Accused, Njoroge (original AI), who had brought to him the same on the 21st of July, 1988 at 3p.m to keep for him. This was the very day the robbery had occurred at the house of C.K. Gada (PW1). He urged the court to accept his version of the story that he had innocently received them from his co-Accused, Njoroge (original AI). However, his charge and caution statement (ex.30) although

repudiated, amounts to a confession of his participation in the said robbery. In that statement, he states how they had shared the stolen jewellery after the robbery. The 5 bangles (ex.16) appears to us to have been his share of the loot. More so, when they were found kept together with the overall (ex.8) which he had used in the robbery.

After careful consideration and evaluation of the recorded evidence together with the written submissions of the Appellant, we are satisfied that the learned trial Magistrate rightly disbelieved his version of the story that he had merely been given the said overall and the 5 bangles (ex.8) & 16) by his co-accused to keep. The totality of the evidence against the 1st Appellant when considered together, that is to say; his identification at the scene of crime by Otieno (PW5) who subsequently identified him at a properly conducted identification parade; his being found in possession of some of the items stolen in the course of the robbery, the 5 bangles (ex.6) together with the overall used by the gangsters to disguise themselves as employees of KP&L. Company, just within 4 days of the robbery; and his repudiated statement amounting to a confession of his involvement in that robbery (ex.30); proves beyond all reasonable doubts that he had taken part in the said robbery.

For the same reasons given, we do not believe his defence that he had remained at the said garage throughout the day of the said robbery. In fact this was the said garage where some of the stolen items were found in the boot of an abandoned vehicle.

Turning to the case of the 3rd Appellant he raised an alibi defence that on the day of the said robbery, he was throughout at his place of work where his witness, Samuel Thamu Mara (DW1)

had given him some work to repair a chimney at Mugo Hotel. This witness left him sometimes between 8.30 and 9a.m according to his testimony and did not come back till much later between 4 and 5p.m. The robbery in this case took place shortly after 9a.m. Admittedly, the 3rd Appellant was working with some two assistants. In our view, it was all possible for him to leave his assistants at the place where they were working to participate in the said robbery only to come back thereafter. His alibi defence does not at all throw any doubt in our minds that it could possibly be true. We believe that the same was duly considered by the learned trial Magistrate and rightly disbelieved.

Apart from the 3rd Appellant identification at the scene of crime by Otieno (PW5); when the police officers (PW16 & PW21) went to his house in the company of Njoroge (original AI) nothing was recovered in the house, but upon further interrogation, he led the police officers to a certain bush where 2 bangles, 6 necklaces and 3 earrings were found buried in the ground. The same were identified by the complainants as some of the items stolen from the complainants in the course of the robbery. He further led the police officers to Ronda Estate and from a certain hole which he pointed out, the police officers recovered 2 overalls (ex.6 & 7) with KP&L.Co. labels. These overalls were identified by Otieno (PW5) as the ones which the said gangsters had used in the robbery.

24

He later identified the 3rd Appellant at a properly conducted identification parade as one of the said robbers (see ex/ 15). The police officers later found in the course of their investigations where the said labels on the said overalls were sewn on the 13th of July, 1988 by Ezegere (PW3) at the request of Njoroge (original AI). Then there is the charge and cautionary statement of the 3rd Appellant (ex.19) which although repudiated amounts to a confession of his participation in the said robbery. His claim that he was not given a fair trial does not hold any water.

All the above, touching on the 3rd Appellant, to which we have referred, when considered together, leaves no doubts at all in our minds that the 3rd Appellant was a member of the gang that had taken part in the said robbery.

We are satisfied that there was overwhelming evidence against the 1st and 3rd Appellants proving beyond all reasonable doubts that they had taken part in the robbery that occurred at the house of the complainants on the morning of 21st July, 1988 at which Reena (shown as the complainant in count 1) died. This was a well organised robbery which was carefully planned as early as the 13th of July, 1988 when Chunu Ezegere (PW3) was approached by Njoroge (original AI) to put labels of KP&L. Co. on the 3 overalls that he gave him. After the details of the intended robbery had been perfected by the Appellants according to their repudiated statements, they fixed the appropriate date of the said robbery as 21st of July, 1988 which was methodically and calmly carried out after which the loot was shared out amongst the participants.

25

We are satisfied that there was good, reliable and sufficient evidence upon which the conviction of the 1st and 3rd Appellants would safely be based for the offence of robbery with violence contrary to section 296(2) of the Penal Code. We uphold the convictions of the 1st and 3rd Appellants on counts 1, 2 and 3 and the sentence of death that was imposed.

These appeals are accordingly dismissed.

Dated and delivered at Nairobi this 24th day of February,

1998

V. V. PATEL

JUDGE

S. O OGUK

JUDGE