



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 866, 867, 869 & 870 of 1993

(From Original Conviction and Sentence in Criminal Case No. 3440 of 1992 of the Senior Resident Magistrate's Court at Kiambu: Mrs. Wachira)

STEPHEN NAMISI DAVID..... APPELLANT

Versus

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 3440 of 1992 of the Senior Resident Magistrate's Court at Kiambu: Mrs. Wachira)

CONSOLIDATED WITH

CRIMINAL APPEAL NO, 867 OF 1993

RASHID PETER KALENJE..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 3440 of 1992 of the Senior Resident Magistrate's Court at Kiambu: Mrs. Wachira)

consolidated with

CRIMINAL APPEAL NO. 869 OF 1993

TOM CHEMTAI MASAJI APPELLANT

versus

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 3440 of 1992 of the Senior Resident Magistrate's Court at Kiambu: Mrs. Wachira)

CONSOLIDATED WITH

CRIMINAL APPEAL NO- 870 OF 1993

WILSON OGOLI OBOK..... APPELLANT

Versus

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 3440 of 1992 of the Senior Resident Magistrate's Court at Kiambu: Mrs. Wachira)

Coram: OWUOR -J.

OGUK, J.

1st, 2nd, 4th and 5th Appellants in person (unrepresented)

Mrs. Ondieki (state counsel) for state

JUDGMENT

Criminal Appeal No. 866/93; Cr. Appeal No. 867/93; Cr. Appeal No. 869/93; and Cr. Appeal No. 870/93 have been consolidated. Cr. Appeal No. 868/93 abated following the death of the 3rd Appellant, Suleiman Osman Kasule before his appeal could be heard.

The 1st Appellant, Stephen Namisi (original A1); 2nd Appellant, Rashid Peter Kalenje {original A4); 4th Appellant, Tom Chemtai Masaii (original A1); 2nd Appellant, Rashid Peter Kalenie (original A4); 4th Appellant, Tom Chemtai Masaii (original A1); and the 5th Appellant, Wilson Ogoli Obok (original A5), were jointly convicted on count 3 of the offence of robbery with violence contrary to section 296(2) of the Penal Code by the learned Senior Resident Magistrate, Kiambu. Upon their conviction, each of them was sentenced to death. Their appeals to this court are against conviction and sentence.

Briefly, the Prosecution case was that on the 15th of August, 1992 at about 10.15 p.m, as the complainant, Patrick Gathenya Gathua (PW1) who is a businessman, arrived at his house at Ngegu village in Kiambu District, he parked his motor vehicle as usual outside the house. There were security lights outside the house which were on. Immediately he came out of his vehicle to enter the house, he was surrounded by a gang of three men who had apparently hidden inside his compound to way lay him. As they rushed towards him he noticed that one of them was armed with a pistol while two others had axes. The man with a pistol demanded money from him and he gave him sh.200/- which he had in his pocket. He also demanded the keys to his car and he gave him the same. At that stage, his wife Rosemary Njoki (PW2) who was inside the house heard of the commotion outside the house and switched on extra security lights as she looked outside through the glass window to ascertain what was happening.

The complainant was then shot on the stomach and a bullet was lodged therein while one of the gangsters who were armed with an axe cut him on the head as they ransacked his pockets looking for money. They only found his identity card and a driving licence which they took. As they led him towards his house to open the door, one of the said gangsters started cutting the two padlocks that were on the steel door. His wife (PW2) then switched an alarm that scared off the said gangsters but they did not go away till one of the gangsters fired a shot at her through the window which missed her. PW2 noticed the person who was

cutting the door locks was wearing a beige jacket while the other man also had a jacket.

Both PW1 and PW2 testified that because there was sufficient light at the scene, they were able to see well the said gangsters. PW1 stated that he was able to identify at the scene of crime the 2nd, 4th & 5th Appellants as his attackers. They were all strangers to them. He later identified all the three Appellants at separate identification parades conducted by IP Samuel Gathirwa (PW18) on the 27th of August, 1992 at Kiambu Police Station. He testified that he easily identified the 5th Appellant because of his beards while the 2nd & 4th Appellants he identified because of their physical appearance and the manner in which the 2nd Appellant was walking with a slight gait.

Njoki (PW2) testified that she was able to see quite well the 4th & 5th Appellants during the said robbery. She later identified them at an identification parade conducted by PW18. She testified that the 5th Appellant was the one who was trying to cut the door locks.

A report of the robbery was made to the Police by a phone call and several police officers rushed to the scene, among them was Sgt Daniel Nduati (PW5) of Kiambu Police Station. They found the complainant with serious injuries and he was rushed to Kiambu District Hospital where he was X-rayed and a bullet was seen lodged in his stomach. He was then transferred to M.P. Shah Hospital where the same was removed. Meanwhile PW5 went straight for a dog handler as other officers rushed PW1 to the hospital. Accompanied by a dog handler Jacob Ruto (PW11), they were led by the Police dog which had picked the scent up to a certain house 1 km away. They ordered the occupants to open the door but they refused. The Police officers forced the door open and on entering the house, they found the 4th Appellant therein. They found a blood stained jacket (ex.17) and an axe (ex.16). The blood stained jacket together with blood samples taken from the complainant (PW1) and the 4th Appellant were taken to the Government Analysis (PW13). He found that the said jacket (ex.17) was stained with human blood of group "0" which was the same blood group of the complainant (PW1) as well as the 4th Appellant. No injuries were found on the 4th Appellant when he was examined except on the complainant.

The complainant had been examined by Dr.Mwangi Kamau (PW14) who is a police surgeon. He testified that he had found the complainant with multiple cut wounds on the head. ACT scan showed that he had bled into the brain. From the X-ray taken at the Aqa Khan Hospital, he noticed that a bullet head had been imbedded in his stomach. The same had been removed but he was able to see the wound. He assessed the degree of injury of the complainant as grievous harm and completed the P3 form which he produced in evidence (ex.2) together with the hospital notes (ex.3).

After the arrest of the 4th Appellant with the assistance of the dog handler. He was taken to the police station with the recovered items. He was interrogated by the investigating officer, P.C John Kitheka (PW17). As a result of such interrogation, he gave information which led to the arrest of the 1st, 2nd and 5th Appellants among others.

A charge and caution statement was taken from the 2nd Appellant by I.P Alexander Kiptoo (PW21). It was repudiated at the trial but was admitted in evidence after a trial within trial was held (ex.9). I.P Michael Munya (PW20) also took a charge and cautionary statement from the 5th Appellant. The same was repudiated but was admitted in evidence after a trial within trial was held (ex.8). Similar statements were also recorded from the 1st Appellant by I.P Chege Macharia (PW19) which was also repudiated but was admitted in evidence after a trial within trial was held. In all these statements, the 1st, 2nd & 5th Appellants individually confessed to their participation in the robbery that occurred at the compound of the complainant (PW1).

All the Appellants have denied any involvement in the said robbery. In their respective defences, they only testified about the circumstances of the arrests. The 4th Appellant made no reference in his defence to the blood stained jacket and axe that were recovered in his house at the time of his arrest. They all claimed to have been innocently arrested.

The main point taken up by each of the Appellants on appeal was that the learned trial magistrate erred in law and fact in convicting each of them by relying on the evidence of visual identification at the scene of

crime which was un-reliable. As for the 1st Appellant he stated that his conviction was based on mere dock identification which was worthless. It is also their contention that their defences were not given adequate consideration.

It is not disputed that on the night of 15th of August, 1992, the complainant (PW1) was severely attacked by armed gangsters as he arrived in his compound at Ngegu Village in Kiambu. Although the attack was sudden and the complainant offered little resistance, we are satisfied that there was sufficient light at the scene coming from the security lights outside the house where the robbery was taking place which enabled the complainant (PW1) to accurately see his attackers. We are satisfied that he had opportunity to see them because having taken Shs. 200/- from him and his vehicle keys, the gangsters did not stop there but still demanded that he gives them more money in the house. As the said gangsters struggled to cut the door padlocks, the complainant and his wife (PW2) who had put on extra security lights had good opportunity to see them clearly. When the complainant's wife switched on the alarm inside in the house, the said gangsters got so much annoyed that they shot him on the stomach and even fired a shot at his wife through the window which she missed. He was then cut with an axe on the head before the gangsters fled from the scene leaving behind his car keys inside the vehicle. They only managed to get away with Shs. 200/- from the complainant, his identity card and a driving licence. They dropped the identity card not so far from the house of the complainant where it was recovered.

The conviction of the 2nd, 4th and 5th Appellants was mainly based on their identification at the scene of crime by the complainant (PW1). We have already stated that ideal circumstances existed for positive identification at the scene as there was sufficient light coming from the security lights in front of the house. The complainant testified that even though the said gangsters were strangers to him, he was able to see and identify the 2nd, 4th and 5th Appellants by their physical appearance and he subsequently identified all of them at the identification parade. His wife, Njoki (PW2) also identified the 4th and 5th Appellants at the scene of crime.

On the evidence therefore, the 4th and 5th Appellants were identified by two witnesses at the scene of crime, whereas the identification of the 2nd Appellant remained that of a single witness but he was subsequently identified by the complainant on an identification parade.

We have examined the circumstances under which the various identification parades were conducted and we are satisfied that they were properly held as required by law.

There was also further evidence that the 4th Appellant was arrested soon after the incident from his house about 1 km away from the scene of the robbery with the assistance of a trained police dog. The said dog picked the scent from the scene of robbery and led its handler {PW11) and other police officers upto the house of the 4th Appellant. He refused to open the door and after the police had forced the door open, he was found with a blood stained Jacket (ex.17) and an axe (ex.16). The complainant testified that he had been cut on the head with an axe and this has been corroborated by medical evidence. The said Jacket was taken to the Government Analyst together with samples of blood taken from both the complainant and the 4th Appellant. Although they were all of blood group O which was the same blood group found on the stains on the Jacket, the 4th Appellant had no injuries and therefore, it is not unreasonable to say that the blood stains found on his Jacket must have been stained by the complainant's blood at the time of his attack. Both the complainant and his wife testified that one of his attackers had a Jacket and this may well be the jacket that was recovered from he 4th Appellant. This therefore corroborates the testimony of PW1 and PW2 that they had indeed seen him at the scene of crime on the material night.

As for the 2nd and 5th Appellants, further corroboration of the testimony of the witness is to be found in their own retracted statements (exhs. 9 & 8) which amounted to a complete confession of their own involvement in the said robbery. Those statements were quite detailed and set out the role played by each of the two Appellants during the commission of the said crime.

As for the 1st Appellant, there was no evidence that he was ever seen at the scene of crime. He was never identified by any of the witnesses at any identification parade. The only evidence against him was based on his own repudiated statement, which, although amounts to a confession of his involvement in the said

crime, was not corroborated in any way. Although conviction may well be entered upon a retracted statement if the court is satisfied after due caution that in all circumstances it is true and therefore safe to act upon, we are not satisfied in the particular circumstances of this case that the conviction of the 1st Appellant was safe. We are prepared to give him the benefit of the doubt.

For reasons stated, we allow the 1st Appellant's appeal, quash his conviction and set aside the sentence that was imposed on him. We order that he shall be set at liberty and be released forthwith unless otherwise lawfully held.

As for the 2nd, 4th and 5th Appellants, we are satisfied upon.

To our own independent evaluation of the recorded evidence and their respective defences that there was sufficient evidence to prove beyond doubt that they had taken part in the said robbery. The complainant was injured in the course of the said robbery in which he was robbed of Shs. 200/- but he sufficiently recovered after he was operated upon and treated.

On the facts that we have found to have been proved, we are inclined to substitute the convictions of the 2nd, 4th and 5th Appellants with simple robbery contrary to section 296(1) of the Penal Code. We set aside the sentence of death that was imposed on each of them and sentence each of the 2nd, 4th and 5th Appellants to serve ten (10) years imprisonment with 4 strokes corporal punishment with effect from the 28th of December, 1992.

Dated and delivered at Nairobi this 30th day of September, 1998.

E OWUOR (MRS) JUDGE

S. O. OGUK

JUDGE