IN THE COURT OF APPEAL

AT NAIROBI

CORAM: AKIWUMI & SHAH, JJ.A. & BOSIRE, AG. J.A.

CRIMINAL APPEAL NO.81 OF 1988

BETWEEN

STEPHEN MATU KARIUKI

RAPHAEL M. KINGORI

SAMWEL S. KITHONGO .....APPELLANTS

AND

REPUBLIC .....RESPONDENT

(Appeal from a conviction of the High Court of Kenya at Nairobi (Justices Schofield & Gicheru) dated 3rd June, 1987 in H.C.CR.A. NOS 382 -384 OF 1986)

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JUDGMENT OF THE COURT

All the appellants were convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code, by the learned Principal Magistrate and sentenced to death. The evidence that was led against the appellants, and upon which the learned Principal Magistrate relied in convicting them, consists of that of eye witnesses to the commission of the offence and the confession statements of the first and third appellants.

Mohamed Ali, his wife Rashira and his shop assistant Dilo Kaingu, were in his spare parts shop on the afternoon of the fateful day when four persons came into the shop two at a time, pretending to be shoppers. When the other shoppers who were already in the shop left, one of the four, produced a pistol and ordered Mohamed Ali, his wife and Dilo Kaingu to lie down. There was not enough space for them to do this so Mohamed Ali and his wife squatted behind the counter. Dilo Kaingu, who had at the time, gone to look for the spare parts that the four had asked for, testified that he hid behind a box from where he could see what happened next. This was that the first appellant went behind the counter in the shop and

emptied the contents of a drawer from the counter into a brown cement paper bag which was kept in the shop. The contents of the drawer which were emptied into the brown cement paper bag, included currency notes and coins of various denominations which Mohamed Ali said was about Shs. 50,000 in all, notes made by him indicating how much his customers had paid for spare parts supplied to them, and watches one of which, of "Atlantic" make, belonged to his mother, and other watches which some of his customers had left with him as security for the payment of spare parts sold to them. Some visiting cards in the drawer were also emptied into the brown cement paper bag.

Evidence was further adduced that whilst the robbery was going on, the second appellant threatened to hit Rashira Ali with an empty soda bottle if she did not stop looking at him. He also asked her where her husband's other safe was. The third appellant also demanded from Rashira Ali the keys to her husband's car who, after he had been showed where they were lying, took the bunch of keys and went out. He was to return soon afterwards to accuse Rashira Ali of having given him the wrong keys. She then pointed out the right keys on the bunch to him. The first appellant pulled off Rashira Ali's watch. The four then left the shop with the second appellant carrying the brown cement paper bag and went off in Mohamed Ali's car which was being driven by the third appellant.

The robbery took place in the afternoon and lasted some eight to ten minutes. Mohamed Ali, his wife and his shop assistant, it would seem, had ample opportunity of having a good look at the four intruders. But it must not be forgotten that these were persons they had never met before and also that they must have been in a state of some fright because one of the intruders had a pistol. As Mohamed Ali himself, said in his evidence in examination in chief:

> **"... one of them pulled out a pistol from his pocket and immediately ordered us to lie down quickly. We had to obey as I had seen the pistol and I was afraid ... The man with the pistol ordered us not to raise our heads as I wanted to look at them".**

In their statements to the police soon after the robbery, Mohamed Ali and his wife gave no description of those who had carried out the robbery. No prior identification parades were also held but in their evidence at the trial, Mohamed Ali identified the first and second appellants from the dock as two of those who had robbed him, and relating what part they had played, whilst his wife identified all the appellants from the dock as three of the four who carried out the robbery and also relating what part they had played. Dilo Kaingu, like Mohamed Ali's wife, identified all the three appellants from the dock and related what part they had played in the robbery as already set out. He, however, had more to say, which is of great significance.

Dilo Kaingu said that after the robbery had taken place, he had upon hearing his employer's car being started dashed out of the shop only to see his employer's car being driven away by the third appellant with the other robbers in it. He ran after the car whilst raising the alarm. But shortly afterwards, and at about 50 to 60 yards from the shop, the car got involved in an accident and its occupants, which included the second appellant, got out and began running away in different directions. However, he and some people who had come to the scene, chased the second appellant who had the brown cement paper bag in his hand, and who was trying to confuse those who were then coming in the opposite direction, by himself, also shouting "thief! thief!". The second appellant, as he continued running, was tripped and fell down. He dropped the brown cement paper bag that he was carrying and as he tried again to run away, was again, tripped and arrested by a policeman who was coming from the opposite direction. Dilo Kaingu never lost sight of the second appellant from the time when he ran out of Mohamed Ali's smashed car with the brown cement paper bag in hand, until his arrest by the police

The policeman who tripped the second appellant was Sgt Mbwana who, off duty, was walking along Turkana Street when he saw the second appellant come running from the opposite direction carrying a brown cement paper bag and being chased by a group of persons which included two Administration Policemen. He saw the second appellant tripped and fall down, and getting up again, continued running leaving the brown cement paper bag behind. Sgt Mbwana said that suspecting that the second appellant was up to no good, he also tripped him when he got to where he was. The two Administration Policemen who had also been chasing the second appellant, helped in arresting him and taking him to where he had

dropped the brown paper bag which was then handed over to Sgt. Mbwana, by a member of the public. The brown cement paper bag was found to contain currency notes of various denominations, and Shs.70 in coins, all amounting to Shs.33,910, but packed in bundles with written notes attached to each bundle, five wrist watches, a thermometer, a casio calculator, two cheques and a box containing visiting cards. Mohamed Ali was later able to identify the bundles of money with his written notes attached to each bundle and indicating how much had been paid by his customer concerned; four of the wrist watches, one being the "Atlantic" watch of his mother and the other three of his customers; and the thermometer, all as having been taken out of his drawer when his shop was raided by the gang of four.

The evidence of Dilo Kaingu and Sgt Mbwana was substantially corroborated by the two Administration Policemen to the effect that they had also chased the second appellant who had dropped the brown cement paper bag upon falling down; that they had together with Sgt Mbwana arrested the second appellant and that the contents of the brown cement paper bag were as testified to by the Sergeant.

All the appellants had made written confessions to the police and although the learned Principal Magistrate rejected that of the second appellant on the grounds that it was not voluntary, he accepted those of the other appellants as having been made voluntarily.

With respect to the dock identification of the appellants, the learned Principal Magistrate was not oblivious of the related guidelines laid down in R v Turnbull (1976) 3 WLR 445 and which are applied in Kenya. He put it thus:

" On the question of identification, Lord Widgery, L.C. in the English case of Regina Vs TURNBULL (1976) 3 WLR 445 laid down some 9 guide lines to be used by the Judges and others in cases of identification. These guide lines were adopted in Kenya by Sachdeva J, and Hancox J, as he then was, in the case of REUBEN TAABU and others Vs Republic Nairobi Cr. App. 480, 208, and 209/78 (unreported).His Lordship posed the following queries:-

`How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people?

Had the witnesses ever seen the accused before? How often? If occasionally, had he any specific reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?

Was there any material discrepancy between the description of the accused givento the police by witnesses when first seen by them and his actual appearance?'".

But in his consideration of these guidelines and which of the evidence of the prosecution applied, the learned Principal Magistrate dwelt only on the guidelines that affected the prevailing conditions in the spare parts shop at the time when the robbery occurred. He did not in his judgment consider at all, the other equally important guidelines namely, whether the witnesses had ever seen the appellants before, and if so, how often, and if only occasionally, whether the witnesses had any specific reasons for remembering the appellants.

On the basis of the foregoing evidence, however, the learned Principal Magistrate convicted the appellants of robbery with violence as charged. The appellants appealed to the High Court. The learned judges of that court held that, having rejected the confession statement of the second appellant on the grounds that it had not been voluntarily obtained by the investigating police officer, the learned Principal Magistrate should also have on the same grounds, rejected the allegedly voluntary confession statements of the first and third appellants recorded by the same investigating police officer, which they had denied making voluntarily.

The learned judges of the High Court, who should upon hearing an appeal, appraise for themselves, the evidence given at the trial, accepted as the learned Principal Magistrate had done, that the appellants had been positively identified by persons who were in the shop and who had ample opportunity to note

their features "in good conditions", and applying the guidelines relating to identification as pronounced in Turnbull, the learned judges of the High Court, in their judgment of 3rd June, 1987, upheld the convictions of the appellants by the learned Principal Magistrate and dismissed their appeal. The learned judges had in coming to the conclusion that they did, borne in mind the fact that the identification of the appellants had been dock identifications and also the fact that Mohamed Ali and his wife who had not given any description of the appellants in their statements to the police which are contained in the record of appeal, had been to the police station on two occasions to attend identification parades which had not taken place through no fault of theirs. The direct evidence of the investigation officer, Inspector Musili, in this regard, is as follows:

"I could not conduct the identification parade but none of the accused persons refused to appear at the parade".

As regards the second appellant, there was in addition to the evidence of Mohamed Ali, his wife and Dilo Kaingu as to what had happened in the shop which the learned Principal Magistrate had accepted, and which the learned judges of the High Court also did, the evidence of Dilo Kaingu, the Sergeant and the two Administration Policemen to the effect that shortly after the robbery, the second appellant who was holding the brown cement paper bag, had been chased and caught, and that the brown cement paper bag contained some of the money, Mohamed Ali's notes, wrist watches and other articles which had been taken from the drawer in Mohammed Ali's shop.

Having rejected the alleged voluntary confession statements of the first and third appellants, the learned judges of the High Court were left, with respect to these appellants, with only the dock identifications. They realized this, but being only of the view that Mohammed Ali, his wife and his shop assistant had had ample opportunity to note the features of the appellants "in good conditions", misdirected themselves, not only, in not realising that the learned Principal Magistrate had not applied all the guidelines laid down in Turnbull as were appropriate in this case, but also, on their part, in limiting their consideration of the dock identifications to only some of those guidelines. Turnbull was again considered by this Court in Gabriel Njoroge v Republic (1982-88) 1 KAR 1134 at 1136 and in its judgment delivered by Platt JA, on 20th November, 1987, over four months after the delivery of the judgment of the learned judges of the High Court, the following observations with respect to dock identification which is reproduced hereunder in extenso, appear:

> **"... Dock identification is worthless [the court should not rely on a dock identification] unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.**

On many occasions this court has held that such identification is almost worthless without an earlier identification parade (See Owen Kimotho Kiarie v Republic, Criminal Appeal No. 93 of 1983 relying on Rachhodas and Thakore, The Law of Evidence, (The India n Evidence Act) (13th edn) p 151.) The operation of this rule may be observed in Gopa s/o Gidamebanya v R (1953) 20 EACA 318 at 322 et seq.

Dr. Macharia was a single identifying witness, whose evidence had to be tested with the greatest care, as the trial court fortunately remembered (Roria v R [1967] EA 583). That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade. (See R v Mohammed bin Allui (1942) 9 EACA 72, R v Shabani Bin Donaldi (1940) 7 EACA 60 and Owen Kimotho Kiarie (supra). If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in R v Turnbull [1976] 3 All ER 549 saw the examination. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance?

In what light? Was the observation impeded in any way, eg. by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally,had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent

identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance? As a result of public disquiet in England that there were mistakes of identification, the Attorney-General agreed that the Director of Public Prosecution would not invite a witness as to identity who has not previously identified the accused at an identification parade, to make a dock identification unless the witness's attendance at a parade was unnecessary or impractical or there were exceptional circumstances. (See Archbold, Criminal Pleading Evidence and Practice (40th edn) para 1348 et seq.) There is no evidence that there is any less disquiet in Kenya than in England, and as the authorities on this topic stretch back some 40 years, it is not asking too much that a witness is asked to give a description of the accused, and the prosecution to arrange for a fair identification parade.

Having these principles in mind, we would go a little further than the High Court and state that as a matter of law, the dock identification in this case was almost worthless. Certainly no conviction would be based upon it alone.".

Nearly four years later, Turnbull and Gabriel Njoroge were considered by this Court in Amolo v. Republic (1991) 2 KAR 254 where it was held that:

"Following Gabriel Njoroge v Republic (1987) 1 KAR 1134 visual identification must be treated with the greatest care and ordinarily a dock identification alone should not be accepted unless the witness has in advance:

(a) given a description of the assailant

(b) identified the suspect on a properly conducted parade.".

It is instructive, however, to set out more fully, the relevant passage of the judgment of this Court in Amolo at 256,delivered by Hancox CJ which is as follows:

"The narrative of the evidence in chief of each of the first four witnesses at this point was respectively as follows:

`PW1 "It was that first accused "[Identified]

PW2 "... [It] is that man" [lst accused identified]

PW3 "That man the very one whom I shot when he aimed to shoot me" [accused No.1 identified]

PW4 "He is that lst accused person" [lst accused identified]'

There can be very little doubt that the first two of these constituted dock identifications, as understood in many decisions, both here and in the United Kingdom, in the past two decades. By themselves they would very probably not satisfy the guidelines laid down in R v Turnbull [1976] 3 All ER 549 and applied in Kenya both in the High Court and, quite recently, by this court in Joseph Ngumbao Nzaro v Republic (1991) 2 KAR 212. In the earlier case of Gabriel Njoroge v Republic (1987) 1 KAR 1134, Platt JA, delivering the judgment of the court, said that the evidence of identification cannot, as it should, be tested with the greatest care unless the witness or witnesses had given a description of the accused in advance, and his or their ability to identify was tested on a properly conducted identification parade.

The reason for the courts' reluctance to accept a dock identification is part of the wider concept, or principle, of law that it is not permissible for a party to suggest answers to his own witness, or, as it is sometimes put, to lead his witness. Taking this a stage further, the reason for the rule against leading a witness is that to do so would clearly detract from the veracity of the evidence given and reduce its value. For it is manifest that in all criminal cases, save perhaps a few company, by-law or minor traffic prosecutions, the accused person stands in the dock of the court. Consequently, it is self-evident to the witness that the person standing in the dock is the one whom the prosecution desires to be identified. If,

however the procedure outlined in Gabriel Njoroge's case is followed, that danger is eliminated, or at least much reduced".

It is clear that in the judgments of the learned Principal Magistrate and the learned judges of the High Court, both had misdirected themselves by not considering the guidelines laid down in Turnbull and to see whether they had all as relevant in this case, been satisfied which we can say is not the case. They relied on dock identification which is described in Gabriel Njoroge as "almost worthless", particularly in this case, where the failure to hold a prior identification parade which cannot be said to have been unnecessary or impracticable or because of exceptional circumstances, cannot be blamed on the appellants and also where no description of the appellants is given in the statements made by Mohamed Ali and his wife to the police.It is no wonder that learned Senior Principal State Counsel, Mr. Horace Okumu, who appeared for the respondent in the present appeal, did not support the conviction of the first and third respondents. We think he was right in doing so and for the reasons that we have given hereinbefore, we allow the appeal of the first and third appellants, quash their conviction by the learned Principal Magistrate and set aside the sentence of death imposed upon them. They are to go free now unless otherwise, lawfully detained.

We must now revert to the appeal by the second appellant. Apart from his dock identification which we have discounted, there was direct evidence against him, which if believed, proved beyond reasonable doubt that he must have been one of those who carried out the armed robbery in Mohammed Ali's shop. This consisted of the unchallenged evidence of Mohammed Ali, his wife and Dilo Kaingu of the fact that robbery with violence had taken place on the afternoon of the material day in Mohammed Ali's shop, and the evidence of Dilo Kaingu as to what had happened after the robbery. This was to the effect that soon after the robbery which cannot be denied, had taken place, he had chased the second appellant who ran out of Mohammed Ali's car which was being used by the robbers as their get away car, after it had crashed into another not far away from Mohammed Ali's spare parts shop. The second appellant, as he was being chased by others as well as Dilo Kaingu, had been holding the brown cement paper bag into which the contents of Mohamed Ali's drawer in his shop had been emptied, and which he let fall only after he had been tripped the first time. They still chased the second appellant after he got up and as he continued to run away he was again tripped and then arrested by the Sergeant and the two Administration Policemen and taken back to where he had dropped the brown cement paper bag which by then had been picked up by a member of the public. There is uncontroverted evidence that Mohammed Ali's car was involved in a crash soon after his shop was raided and Dilo Kaingu never lost sight of the second appellant from the time that he rushed out of Mohammed Ali's damaged car until he was caught and arrested by the Sergeant and the two Administration Policemen and the brown cement paper bag recovered. All this took place in the afternoon. Dilo Kaingu also accompanied the three officers when they took the second appellant to the police station. He saw the contents of the brown cement paper bag which as already noted, contained currency notes and other articles which could not have found their way into the brown paper cement bag except, as stated by Mohammed Ali, his wife and Dilo Kaingu, from the robbery that had taken place in Mohammed Ali's spare parts shop and witnessed by them. The evidence of Dilo Kaingu was substantially, corroborated by the Sergeant and the two Administration Policemen. This state of affairs is similar to what had existed in the case of Peter M. Mwaru v Republic (1982-88) 1 KAR 1129 where it was held that:

"As the appellant was pursued and caught in a well lit area and remained in full view of his pursuers and did not at anytime elude their vigilance, the circumstances of his identification were favourable and free from the possibility of error.".

The evidence of all these four witnesses which was accepted by the learned Principal Magistrate and the learned judges of the High Court, establish beyond all reasonable doubt that the second appellant must have taken part in the robbery with violence that took place in Mohammed Ali's spare parts shop, as charged. The second appellant's defence that he had been mistakenly arrested in the street as he and others, were chasing some persons who had escaped from a car which had been involved in an accident, and that he, at no time, had in his possession the brown cement paper bag which was only brought to the police station sometime after he had been taken there, was in our view properly rejected by the learned Principal Magistrate. The learned judges of the High Court did the same. There being thus a concurrent

finding of facts based on the evidence of Mohammed Ali, his wife, Dilo Kaingu, the Sergeant and the two Administration Policemen which we have just reviewed, to the effect that the second appellant was one of those who carried out the robbery with violence in Mohammed Ali's spare parts shop, we cannot, even if we were inclined to do so, which we definitely are not, interfere with that finding.

In the result, the appeal of the second appellant fails and it is dismissed and the conviction and sentence of the second appellant by the learned Principal Magistrate, is hereby upheld.

Dated and delivered at Nairobi this 11th day of October, 1996.

A. M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

.....

AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.