



**IN THE COURT OF APPEAL**

**AT NAKURU**

**( Coram: Gachuhi, Cockar & Tunoi JJ A )**

**CRIMINAL APPEAL NO. 14 OF 1994**

**BETWEEN**

**1. PAUL MWAI GACHOKA..... 1ST APPELLANT**

**2. JOHN WAINAINA MBUGUA.....2 ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nakuru (Justice B K Tanui) dated 12th March, 1993**

**in**

**HCCRA No 425 of 1993)**

**\*\*\*\*\***

**JUDGMENT**

The 1st appellant, Paul Mwai Gachoka (accused 3 as per the charge sheet, hereafter referred to as Mwai) and the 2nd appellant, John Wainaina Mbugua (accused 2 as per the charge sheet, hereafter referred to as Wainaina) together with one Geoffrey Kamau Gichau (accused 1 as per the charge sheet) were jointly charged on two counts with the offence of robbery contrary to section 296(1) of the Penal Code. At the conclusion of the trial the Senior Resident Magistrate found the two appellants guilty as charged on both the counts of robbery and accordingly convicted them and sentenced each to 4 years imprisonment with 2 strokes and 5 years police supervision order after completing serving the sentence. The 1st accused was acquitted on both the counts. The two appellants appealed to the superior court but the 1st appellate judge, Tanui, J dismissed their appeals against both conviction and sentence.

On a second appeal to us no appeal lies against sentence nor on facts. The three issues which raised points of law in this appeal are corroboration, admissibility of evidence relating to the letter and identification. On the issue of corroboration the trial magistrate who after what appeared to be his attempt to distinguish between identification and recognition, and keeping in mind the fact that although it was night time and there was a lamp in the room, had proceeded thus:

“Perhaps one might add that the witnesses had not known the accused before so that one can say there (they) recognised them which is easier. Perhaps this evidence requires corroboration ..... The evidence of

the parade which as I have said was properly conducted provides this corroboration. PW2 and PW6 were able to pick out accused 2 and accused 3. This alone I believe provides enough corroboration”.

This was a grave misdirection on the part of the Senior Resident Magistrate. Identifying and picking out an accused person at an identification parade is not corroboration of the subsequent identification by the witness in Court. It merely enables identification in Court to be accepted as a proper identification of the accused person by that witness subject, of course, to other considerations which might detract from or add to the element of certainty in the identification. This point was not taken up before the 1st appellate judge who, perhaps therefore, completely over-looked this misdirection. We will deal with the effect of this misdirection on the judgment later after we have dealt with the other two points of law.

We now come to the admissibility of the letter which the prosecution had claimed had been written by the two appellants to PW2, complainant in count No 2 and wife of complainant in count No 1. In this letter they had offered to pay her Shs 10,000/= for her loss in return for her reconciliation with them. The evidence was that one Samuel Mbugua (PW4), who was related to PW2 through marriage and who lived at Mau Summit, was given a letter in October, 1989, by one Gerald Kinyua Mbugua (PW3), who lived with him. The letter was addressed to PW2 and is the one referred to earlier. Samuel Mbugua said that he knew nothing as to where the letter had come from nor had he asked Gerald Kinyua Mbugua as to the source of the letter. He did not read the letter and just gave it to PW2. Gerald Kinyua Mbugua (PW3) who ran the business of a hotel, said that in October, 1989, he went to Molo Police Station and met his brother James Maina Ng’ang’a who had been brought from Nakuru remand cells and was facing a theft charge. At Molo Police Station his brother gave him a letter telling him that it was Mwai who had given it to him. Mwai was also in police cells. His brother told him to take the letter to Mbugua to give it to mother Wamwea. He gave the letter to Mbugua. He did not know Mwai nor had his brother told him who Mwai was.

The prosecution did not call James Maina Ng’ang’a to give evidence, nor was any explanation offered for its failure to do so. Apart from the break in the chain of evidence in the attempt to relate the letter to the appellants,

what-ever James Maina Ng’ang’a told his brother PW3 is hearsay and must be ignored altogether. The magistrate, Mr Omolo, who had admitted the letter appears to have been told by the prosecutor at the time of the adjournment of the hearing that a witness in connection with the letter still remained to be called. However, Mr Omolo appears to have been no longer available when the hearing resumed and Mr Bett, Senior Resident Magistrate, continued the hearing from where Mr Omolo had left. James Maina Ng’ang’a who had given the letter to PW3 was, however, never called to give evidence.

The magistrate Mr Bett merely mentioned the letter when he analysed the prosecution evidence but he does not appear to have attached any value to it. He did not seek corroboration from it. Before the 1st appellate court Mr Omae for the two appellants had strongly argued against the admission of this letter. Mr Bwonwonga on behalf of the State had claimed a nexus because the letter was signed in the names of the two appellants. Incidentally before us also Mr Onyango, the state counsel, gave the same reason to show a nexus to justify the letter’s admission in evidence. This is what the learned 1st appellate judge said about the letter:

“..... It appears to me that the letter can be said to have formed part of the evidence and was connected to the crime which was being enquired into by the Court and as such it was relevant and admissible in evidence”.

The learned 1st appellate judge had then proceeded to treat the letter as corroboration of the rest of the evidence. With respect the judge gravely misdirected himself. He gave no reason why he had found the letter admissible. There was no evidence at all to connect the two appellants positively with that letter. It should have been rejected outrightly by the judge. The learned magistrate at last appears to have, quite properly, stopped short of making use of this letter, admitted by his predecessor in the circumstances explained earlier, by way of evidence in any manner. In this appeal we are, therefore, faced with a situation where the magistrate had erred in seeking corroboration of identification in Court from

identification by the witnesses at the identification parade. This misdirection appears to have escaped notice of the 1st appellate judge because he has not made any comment about it - perhaps because it was not taken up by Mr Omai either in his grounds of appeal or during his submissions before him. But, the learned judge went on to misdirect himself on the question of the letter. We, therefore, propose to re-evaluate the evidence relating to identification which of course is the essential basis of the prosecution case.

The robbery took place at the house of Samuel Njoroge Wamwea (PW1)

and then shifted to his *kiosk* about 20 metres away then back to the house and then again to the *kiosk* and then back again to the house at Milima Farm. Time was about 8.30 at night. It was not a question of witnesses being rudely awoken from sleep. They were eating and were fully awake. There was a hurricane lamp in the room which remained on shedding its light throughout the robbery. The son (PW6) who opened the door in answer to the knocks said that he stood face to face with the robbers. The light, he said, reached the door. He was able to see the appellants and the 1st accused well before Mwai pushed him under the table where he then remained.

Both the husband and wife (PW1 and PW2) respectively also gave evidence relating to the light in the room. PW1 was unable to identify any of the robbers because, immediately on entering the room, the robbers ordered him to lie down. They then blind-folded him with the table cloth, pushed his head under the "sofa-set" where he was guarded by three of the six robbers of whom two pressed knives against his back. However, both the wife (PW2) and the son (PW6) were able to see and identify the two appellants and the 1st accused (who was acquitted). The wife, (PW2), spent a considerable time with the robbers because it was she who was being threatened to produce the money and was forced to lead them twice to the *kiosk* and back to the room. She was with them all the time during the robbery and narrated how they ransacked the different rooms of the house and the *kiosk*. In the *kiosk* they shone the torches. It is significant that PW2 said that before leaving Mwai, who was one of the three guarding the husband (PW1), sent her to bring the radio. He then removed the batteries from it which the robbers put in their torches.

Identifying Mwai the son, PW6, said that Mwai was armed with a sword and was the one who forced him to get under the table. He said that he had seen his face and had described it to the police as a narrow face with black and long hair. PW2, the wife, said that Mwai appeared to be the leader because he would ask for the results of the ransacking whenever PW2 returned with the robbers from the *kiosk* and the children's room. She said that Mwai was one of the three guarding her husband. He was only one meter from the lamp on the table when he packed the weighing machine. It was when he ordered her to bring the radio that she noticed the gap in his lower teeth. As far as the identification of Mwai is concerned we find, on our own evaluation of the evidence, that conditions were favourable for a positive identification and that the possibility of either of the two witnesses being mistaken in his or her identification is virtually ruled out. There is also corroboration in the fact that each one of the three witnesses PW1, PW2 and PW6 had heard someone being addressed as Mwai by the

other robbers, Mwai is the name of the 1st appellant.

With regard to the identification of Wainaina he was identified by the same, PW6, as being one of the two (the other one being Mwai) who had quickly followed the 1st accused into the room after he had stood face to face with them on opening the door. According to the wife, PW2, it was Wainaina who accompanied her at all the times in the room, during the two visits to the *kiosk*, into the children's room and into their own bed-room. She said that the house had lights and in the *kiosk* the robbers were flashing torches. PW2, having spent so much time in company of Wainaina clearly had ample opportunity of observing him carefully and, in the amount of light that was available in the house, we on our evaluation are satisfied that conditions, which favoured a positive identification, ruled out any possibility of an error.

Both the trial magistrate and the learned judge, we observed, had also gone into this aspect of the evidence carefully, that is the question of light that was available and the opportunities that the witnesses had to see the faces of the appellants. Both the lower courts also considered the defences raised by the

two appellants which related only to the circumstances under which either was arrested. We are satisfied that despite the misdirections the identification of both the appellants was so convincing that the subordinate and the superior court could not have come to any other conclusion. Convictions of both the appellants are safe.

However, what has perturbed us greatly is the acquittal of the 1st accused. Both PW6 and PW2 had seen him. He was the first one who entered the room. According to both these witnesses he was the only one who had a gun - the others carried swords or *pangas*. Both the witnesses observed the scar which was so conspicuous on his left cheek and they described it to the police. The trial magistrate acquitted him because he said that the scar was so conspicuous that the identification parade would have been fair only if all the other members also carried scars on their faces - although he appreciated the difficulty of getting nine men with scars.

This was a wrong and an illogical approach to a consideration of an identification parade. One of the requirements to be complied with according to the instructions in Kenya Police Order 15/1926 is that "the accused is placed among at least 8 persons, as far as possible of similar age, height, general appearance and class of life as himself or herself." The trial magistrate's requirement that "members are all almost similar" far exceeds the precaution envisaged in the word "similar" which is the proper requirement. As to the "scar" if that was mentioned by the

witnesses in their reports to the police then in fact it would become the surest and strongest identifying feature irrespective of whether or not any other members in the parade had a scar as long as they all were as far as possible of similar age, height, general appearance and class of life as the 1st accused was. The identification of the 1st accused was as certain and strong as it was in respect of the two appellants. Yet he was acquitted and the Attorney General made no attempt to rectify the situation through an appeal.

We have already found that the convictions of the two appellants are sound and we, therefore, dismiss the appeals of both of them.

**Dated and Delivered at Nakuru this 22nd day of July 1994.**

**J.M.GACHUHI**

.....

**JUDGE OF APPEAL**

**A.M.COCKAR**

.....

**JUDGE OF APPEAL**

**P.K.TUNOI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy  
of the original.

**DEPUTY REGISTRAR**