



REPUBLIC OF KENYA
 IN THE COURT OF APPEAL OF KENYA
 AT NAKURU

Criminal Appeal 5 of 1994

1. SOLOMON MURIITHI KANUNYA
 2. JOSEPH NGUGI MWANGI
 3. JOHNSON BIRIKA MWALE
 4. EDWARD KAMANDE.....
- APPELLANTS

AND

REPUBLIC.....
RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Rimita J) dated 10/12/93

IN

H.C.CR.A. NOS. 279, 289, 290 AND 291 OF 1993)

JUDGMENT OF THE COURT

The issue of law raised in this second appeal is that of identification.

It is not in dispute that on the evening of 18th April, 1991 between 8.00 p.m. and 10.00 p.m. at Sakaitim and Mokorombosi farms in Molo Division of the Nakuru District three persons at various stages during that evening presented themselves to Daniel Momanyi Gesura (P.W.2), Evans Mutua Joel (P.W.1), Peter Githua Macharia (P.W.6) and Njoroge Kamau (P.W.7) to be persons employed in the Public Service, to wit police officers, and purported to arrest them. It is also not in dispute that these three persons together with another during the same time and at the same stages demanded with menaces KShs.1,000/- from P.W.2, KShs.1,400/- from P.W.1 and KShs.100/- from P.W.7. What is in dispute, however, is who these persons were. According to P.W.1 these people were the 1st, 3rd and 4th appellants whom he was able to identify in the light of his pressure lamp which was on in his food kiosk. P.W.2 was able to identify the 1st appellant through the light from his hurricane lamp that was on in his shop. P.W.6 and P.W.7 identified the 1st appellant through the light of the pressure lamp in P.W.1's food kiosk.

Just before 7.00 p.m. on the material date, David Gakoyi Njuguna (P.W.8) was hired at KShs.200/- by the 4th appellant who was then accompanied by the 3rd appellant. The latter two were then K.A.N.U youthwingers operating at Molo Town Bus Stand. P.W.8 was to take them together with three others for

some work at Turi in his red Subaru Saloon car registration number KNB 920. After fueling the car, P.W.8 left Molo Town with the 1st appellant whom he learnt was an Administration Police Constable, the 2nd appellant whom he knew as an employee of Molo Town Council, the 3rd and 4th appellants. At Turi, P.W.8 was directed by the 4th appellant towards Sakaitim farm and stopped his car a short distance from that farm's Shopping Centre. The appellants left him in the car and walked to the Shopping Centre where the 2nd, 3rd and 4th appellants represented themselves to be police officers to P.W.2 and together with the 1st appellant demanded and received KShs.1,000/- from him on the threat of being arrested for trading without the requisite licence. Thereafter, the appellants returned to where P.W.8 was in his car and directed him to drive back to Molo Town but after driving for about two Kilometers he was told to stop by the side of the road which he did and the appellants walked to a nearby trading centre at Mokorombosi farm where they arrested P.W.1, P.W.6 and P.W.7 and thereafter demanded and received KShs.1,400/- from P.W.1 and KShs.100/- from P.W.7. The appellants were then driven back to Molo Town by P.W.8 and arrived there at about 10.00 p.m.

P.W.8 swore that the appellants did not tell him the nature of the work they had gone to do at the two places to which he had driven them.

The appellants were subsequently arrested and the 2nd, 3rd and 4th appellants were charged on for counts of the offence of personating a public officer contrary to section 105(b) of the Penal Code and together with the 1st appellant they were charged on three counts of the offence of demanding property with menaces contrary to section 302 of the Penal Code before the Senior Resident Magistrate's Court at Molo. For these offenses and counts, they were each convicted and sentenced to 21/2 years imprisonment with the sentences being ordered to run concurrently. There appeals to the High Court of Kenya at Nakuru were dismissed and have now come to this Court on second appeal.

Evidently, the conditions favouring positive identification of the appellants by their victims were difficult and in such circumstances, the law requires a special need for caution and the exercise of care which not only contains a warning but also exposes the weakness and dangers of such evidence both in general and in the circumstances of the particular case before convicting in reliance on the correctness of such identification. Nevertheless, their evidence of visual identification as is set out above together with that of P.W.8 who was hired by the appellants and was with them as is outlined above left no doubt of their correct identification as the perpetrators of the offenses for which they were charged, convicted and sentenced as is mentioned above. In the result, we think that the appellants were properly convicted and their appeal to this Court must fail. The same is therefore dismissed.

Dated and delivered at Nakuru this 30th day of September, 1994.

J.E. GICHERU

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR