



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Masime, Gicheru & Cockar JJ A)

CRIMINAL APPEAL NO 51 OF 1989

GIBSON NJAU

PETER KAMANDE APPELLANTS

VERSUS

REPUBLIC.....RESPONDENTS

(Appeal from a Conviction and Sentence of the High Court of Kenya

at Nairobi (Mr Justice Aragon & Tank) dated 26th April, 1989,

in HCCRA Nos 914 and 915 of 1987)

JUDGMENT

The appellants were found guilty and convicted on two counts of robbery with violence contrary to section 296 (2) of the Penal Code by the then Senior Resident Magistrate, Mr Osiemo and sentenced to death. Their appeals to the Superior Court against conviction and sentence have been dismissed. Mr Timan Njugi who represented the appellants both during the trial and their appeals in the Superior Court, conducted their appeals before us.

Briefly the facts are that on the night of 15th January, 1987, at about 8:00 pm Mrs Margaret Namwaki Musungu (complainant in count 2, PW 1) was waiting at the bus stage near the junction of Madaraka - Langata road near Wilson Airport for bus No 15 to take her home in Southlands Estate near Langata Police Station. At that time the deceased, Hon Mr Stephen Achiya Echakara (complainant in count 1) an Assistant Minister in the Government of Kenya, whom Mrs Musungu knew and who had been instrumental in getting her employment, passed by in his Peugeot 404 Pick-up registration number KSD 090 on way to Carnivore Hotel. She got a lift from him and they proceeded to the Carnivore where the deceased had to keep an appointment after which he was to take her home. On the way near the Carnivore Restaurant sign board they were violently attacked and robbed by a group of 3 to 4 gangsters during the course of which the deceased was very severely injured and Mrs Musungu had to fight off an attempt to rape her inside the pick-up by two of the gangsters and then outside the pick-up by one of them. In the struggle one of the gangsters held her by her hair and she lost part of it. The gangsters then made off with the pick-up, PW1's Seiko Quartz wrist watch and her leather belt. She also lost her panties at the scene.

Mrs Musungu then helped the deceased who was badly injured and bleeding to walk up to Carnivore Hotel. The deceased strenuously opposed the idea of her contacting the police or his wife. He did not want her to be involved in any police investigations. He was immediately taken to hospital where he died on 26th January, 1987. From the above facts there is no doubt that each member of that gang which attacked the deceased and Mrs Musungu that night had robbed both of them while armed with a pipe and tyre - lever which were later recovered at the scene, and in the process had used physical violence to both the complaints. Each member of that gang is guilty of robbery with violence contrary to section 296 (2) of the Penal Code.

The grounds of appeal are more or less the same as were filed in the 1st appellate court. Briefly the grounds claimed that the 1st appellate judges had erred in the following respects:

1. In accepting identification by a single witness who had demonstrated that she was not trustworthy, straightforward, or morally upright. (grounds 1, 2, 3 and 4)
2. In finding that circumstances at the scene favoured positive identification. (ground 2)
3. In acceptance of Government Analyst's evidence which was inconclusive and full of loop - holes (ground 5)
4. In finding that identification parades were properly conducted. (ground 6)
5. In re- evaluating prosecution evidence in isolation and not the evidence as a whole and further not making independent findings of fact. (ground 7)

As the prosecution case rests on the evidence of a single witness, we shall first deal with the question of circumstances favouring positive identification (ground No 2). The incident took place at night. So a critical investigation into and consideration of the type and amount of light, if any, that was available naturally assumes paramount importance. The trial magistrate and 1st appellate judges, we observe, appear to have had this critical issue very much in their minds. The trial Court in fact visited the scene at night to observe the illumination at first hand. Both courts were satisfied that there was adequate light to enable positive identification from close quarters. But this issue, in the circumstances of this case, being of a decisive importance we feel that we have a duty to re-evaluate the evidence relating to the question of light in all its aspects, particularly the strength of illumination cast from airport lights at ground level as the 1st appellate judges do not appear to have gone into this aspect.

According to the prosecution evidence, there were four sources of light viz: head lights of the pickup, the three landing lights of the system at the airport, the electric light at the precincts and the moonlight. With regard to the lights at the airport, evidence was given by the Air Traffic Controller Mr Kiondo (PW12) who said that after sunset they had lighting systems working upto 8:30 pm to enable aircraft to locate the arodrome and land safely. There are run-away edge lights which are lifted on both edges of the run-way tarmac. There are two physical run-ways crossing each other somewhere about the centre.

From the beginning of a run-way there are threefold lights which run up to the beginning of a tarmac from where the edge lights start. In addition there are simple approach lights along the extended centre line of the run- way in the direction of approach to land. On the grass on either side of the runway there are 4 types of VASIS lights. The runway running from west to east is closer to Uhuru Garden and monument and had all the above described types of lighting systems. It is to be noted that the Uhuru Garden and monument are in the same general direction as the scene of the robbery and not far from it.

According to Mr Kiondo, although they were concerned about their visibility from air from a distance of 4 miles only but they could in fact be seen from very far away. That is not of any help when the spread and intensity of illumination from this source of light at ground level is to be adjudged. However, there is evidence on the issue to which we shall revert in a moment. In addition to this source of light there were other surces of electric light in the vicinity of the scene. During the visit to the scene PWI pointed out the spot where the pick-up was stopped. This was at a distance of about 30 meters from the electric lights.

The nearest light to the road was about 10 meters away. The pick up was stopped near the sign-board warning of a "No Through Road Mot & C Yard only". Superintendent Muinde (PW26) who visited the scene at night referred to this yard and said that the security lights all around it. According to PW1 the pick-up was stopped and deceased was pushed from the pick up at a distance of about 70 yards from this particular source of light - that is from the security lights all around MOT & C store.

We now come to the question of spread and intensity of illumination at ground level provided by all these sources of light. Apart from the evidence of Mrs Musungu on this issue there is the evidence of Superintendent Muinde who, we pointed out earlier, visited the scene at night. He testified that there was illumination all around there: there were bright lights both at the spot of the initial attack and a little further on.

(PW1's evidence - about 15 metres from the spot where the gangsters hijacked the pick- up). Mr Kiondo had said that on the night of 15th January, 1987, the airport lights were, operating between 1% up to 15% intensity. Whereas 1% will show the light at the lowest intensity under normal circumstances they would operate at 3% intensity which meant that the lights would be brighter.

On 16th July, 1987, the trial Court at the request of the defence counsel re-visited the scene, but on this occasion the visit was during the night time. We reproduce below the observations made by that Court on that occasion:

"Revisit to Locus in Quo

Time 8.25 pm

Lighting system:

Court observations

At the initial attack:

Lights are very bright.

At the spot where assailants tried to rape victim:

Lights were clear from close range."

With that background relating to the source, quantity and quality of light available we will now proceed to examine the same issue from the point of view of Mrs Musungu.

According to her, while on their way in the pick-up to the Carnivore Restaurant near the Carnivore Restaurant sign -board along the Langata- MOTC road before the murrum junction to Carnivore Restaurant, 3 to 4 men emerged from the right side on the road forcing the pick-up to stop. These men were now directly in the beams of the car's headlights and at a distance of only 3 to 4 metres. The area was well illuminated by the head light (and the light from the airport the extent of illumination of which PW1 had not realised by then). Two of these men jumped into the pick-up through the passenger's door. One of them sat on the witness while the other sat next to her and, stretching his arm behind her, held the deceased by the collar. The third man (whom she identified as the 2nd appellant) stood at the door on the driver's side and leaning on the door he held the deceased's hands and walked with the pick-up which was now being driven by the man who was sitting on the witness. The deceased asked them what they wanted but they directed the pick-up to the junction of the murrum road which led towards the area behind Wilson airport. After the pick-up had been thus led for a distance of about 15 metres it was stopped and the 2nd appellant who was at the driver's side then pulled the deceased from the vehicle. The witness said that outside the deceased repeatedly asked them what they really wanted but no one relplied. In the meantime the two who were left inside the pick-up first asked her for money and then tried to rape her. When they tried to undress her she resisted by kicking them vigorously. She also heard the deceased

screaming and shouting in general terms. Failing in their attempt to rape her the man who had sat on her left to join his companions who were beating the deceased while the other one who had sat next to her (PW1 identified this gangster as the 1st appellant) now pulled her out from the vehicle. Outside he first removed her wrist-watch. As she tried to move away he rushed at her and seized her neck in his attempt to rape her. A vigorous rough and tumble ensued between the two during which the 1st appellant in addition to pulling out a part of the plaited hair of Mrs Musungu, also attempted to strangle her. They fell down together and at one stage she was on top of him face to face. The 1st appellant continued his attempt to strangle her until the witness heard the engine of the pick-up start. The 1st appellant then left her, joined his colleagues in the pick-up and they drove away.

Mrs Musungu estimated that the whole incident from the time the men had appeared on the road to the time when they drove off in the pick-up took 25 minutes or so. She said that when the men first appeared on the road they were facing the car. At that time in the light from the headlights she noticed that one of them was shortish and slender was wearing a blue or black jacket. But the man who later walked towards the window of the deceased's side was the biggest of them all. This man (the 2nd appellant) was wearing a woolen head cap on his head and 'T' shirt which looked bluish or greenish. She specifically stated that she saw this man and observed these particulars when he went through the headlights towards the window on the side of the deceased. This man had leant on the door of the car on the deceased's side, held the deceased's hands (which he must have done after pushing his arms into the car when he was leaning on the door), had ordered the deceased to drive on (the actual driving was then taken over by the one who was seating on Mrs Musungu) and had moved with the car holding the deceased's hand and preventing him to get out. Eventually he was the one who later pulled the deceased out of the car.

During all this time the 2nd appellant had been in her view at a distance of not more than two metres. We have already referred to the evidence of Superintendent Muinde (PW26) who visited the scene at night and had found that there were bright lights in the area- at the spot of the initial attack and at the scene where the "attack struggle" took place. He added that one could see clearly. However, Mrs Musungu was not aware at the time that the whole of the area was in a state of illumination from the airport lights. Keeping in mind the amount and quality of light that was available and the existence of opportunity to observe clearly particularly from close quarters we are satisfied on our own evaluation of evidence relating to identification of the 2nd appellant that conditions favoured error-free identification.

With regard to the 1st appellant the evidence of PW 1 was that this man had sat next to the window on her side. He passed his hand behind her and held the deceased by his collar. The other man who had entered the car from her side had sat on her and had taken over the driving of the car. After the deceased was pulled out of the pick-up by the 2nd appellant the two inside the pick-up set on her, demanding money and then attempted to rape her during the course of which she lost her panty. Due to the vigorous struggle that she put up or perhaps for some other reason the gangster who had sat on her during the hijacking appeared to give up and left her to join his colleagues. The 1st appellant who had been sitting next to the window now pulled her out. In his bid to rape her he tried to strangle her and a rough and tumble ensued between the two and it lasted until his companions called the 1st appellant who then left and they all drove off. It is clear that the whole of the period of about half an hour or so that was taken up by the hijacking and robbery the first appellant had been physically next to the witness both inside the pick-up and outside. Infact they had been face to face at one time when she was on top of him on the ground. PW 1 said that she was able to see him well because of illumination from the lights of the airport. There was moonlight also. She gave his description to the police as being a slim man with shaggy hair. Some of his front upper teeth were missing. In view of the light that was available and the time and opportunity to observe the first appellant from close quarters the witness had, we think that the possibility of any error in identification on her part of the first appellant was virtually ruled out. That still leaves for consideration as to whether the reliability that can be placed on Mrs Musungu's identification of the two appellants is of that degree as to sustain conviction on a capital charge.

We now come to the submissions relating to the credibility of Mrs Musungu. The learned Principal Magistrate was fully alive to the fact that the prosecution case rested on the evidence of a single witness and that he therefore had to feel satisfied that in all the circumstances of the case it was safe to act upon the testimony of the single witness, Mrs Musungu and also as to the degree of reliance that he could place

on her evidence. Quite properly he had sought guidance from *Abdalla Bin Wendo & Another v Regina*, (1953) 20 EACA 166. Likewise the first appellate judges who also critically analysed the evidence Mrs Musungu had found her a witness of credibility.

On perusing the evidence of Mrs Musungu what has impressed us most is the clarity of her recollection of all the details of the tragic event. She was able to describe clearly what each of the three gangsters did from the time they got to the pick-up. We have already dealt with the opportunities she had of observing both the appellants from close quarters - the 1st appellant from much closer quarters during the whole of the incident. When she first reported to the police (Supt Muinde PW 26) she told Supt Muinde that she had noticed that one man was in a red shirt and had a gap in the front teeth on the upper jaw which indicated to her that one or two teeth were missing. She had told him that this man was slim and black. About the other man she told him that she had noticed that he was wearing a black or green 'T' shirt and a head cover of woollen material. The third man she had noticed was in a white shirt and a black blue jacket. The same description she had given of the two appellants in her testimony in court before she identified the one in the red shirt as the first appellant and the other in the blue or green 'T' shirt and wearing a woollen cap or head cover as the 2nd appellant. The accuracy of her observation and memory of the gangsters and the consistency of her evidence are well established from the fact that two days after the incident on 1 January, 1987, when the 1st appellant was arrested he was found wearing a red shirt (Ex 5) and 13 days after the incident 28th January, 1987, when the second appellant was arrested he was found to be wearing a flowered woollen cap (Ex 2) and a black 'T' shirt (Ex 4) under which he was wearing a green 'T' shirt (Ex 3). At the first identification parade held on 29th January, 1987 when Mrs Musungu reached the 1st appellant when he was standing in the line she stopped and asked him to open his mouth. Inspector Wachira (PW13) who was conducting the parade said that he, thereupon, asked everyone on the parade to open their mouths. The witness then touched the first appellant. Inspector Wachira said that the suspect (the 1st appellant) had a gap on his upper jaw.

Having dealt with the consistency of her evidence we come to the other ground on which the credibility of Mrs Musungu as a witness was attacked. The reason for this attack are the fact that the first account that she had given of the incident was to Mr Josephat Angoli (PW 7) as an assistant manager at Carnivore Hotel. Her account given to PW 7 was different from the account she had given in court. She had told him while waiting for a bus at Wilson Airport bus stop she had seen some 5 people stop a car, pull out the driver and assault him. After that they drove off in that car and she had walked the injured driver to the Carnivore. She reluctantly had agreed to accompany the deceased with PW 7 to the hospital. Likewise she was reluctant to give her name to PW 7 and eventually gave him a false name as being hers. It transpired that she did not even report to the police and might perhaps have remained untraceable but for the fact that the deceased's wife, Dr Grace Adira Achiya Echakara (PW 8), on 23rd January, 1987, while in the deceased's office, happened to come across the name of PW 2, Christine Nyabera, Secretarial "Pitman" C/o Margaret Musungu, Hotel Excelsoir, written on the deceased's complimentary slip. That helped the police to trace Mrs Musungu.

Mr Njugi, for the appellants, had very rightly and properly been critical of the above suspicious behaviour of the prime prosecution witness. He also drew attention to the circumstances under which the robbery had taken place which appeared strongly to compromise the position of both the witness and the deceased. He made his submissions on this issue both to the Principal Magistrate and the first appellate judges. Both had carefully gone into this aspect of the evidence of the single witness and had accepted the explanation given by Mrs Musungu that it was the deceased who had told her as they walked to the Carnivore Hotel not to involve herself with the police by calling them. He had also told her not to phone his wife. It was his warning to her to keep, if we might be permitted to use the appropriate expression, a low profile in the matter, that she had acted in that manner. That is why she had given an account of the incident which was different from what had actually happened. For the same reason she gave a false name to PW7 Josephat Angoli. She had not reported to the police and she had kept out of their way because she thought that the deceased, after he had recovered fitness, would be able to take over and deal with the matter appropriately. It had not occurred to her that he would die. During cross-examination she said that when the deceased told her not to involve herself in the matter by reporting and making herself known because it could be dangerous for her, she knew that it would be dangerous because the attackers in that case might later come to kill her.

We note that on 23rd January, 1987, when she was eventually contacted by the police Mrs Musungu immediately told Superintendent Muinde all the details of the robbery. There is also the evidence of Mr David Tiroto (PW4), a night watchman at the Carnivore Hotel who was the first person to meet with the deceased and Mrs Musungu at the Carnivore Hotel. He said that when he asked the deceased where had he been attacked the man had replied that they were attacked near the bumps along Langata road near GK prison. But the woman immediately corrected saying that the attack took place near Wilson airport at the murrum junction to Carnivore Hotel near the Carnivore sign-board. This first report of the incident by Mrs Musungu is the type of evidence that immediately lends a reassuring degree of credibility to the reason stated by her for the false account of the incident that she gave soon after, her failure to report immediately to the police, and her attempt to make herself incognito. We have already made a favourable comment on her memory of events and the clarity of her evidence.

Having so far dealt with the 1st and 2nd grounds of appeal both of which we find are without substance we now come to the 4th ground of appeal to be considered thereafter. The 4th ground of appeal complains that the identification parades were not conducted properly. However, Mr Njugi did not make any submissions relating to this particular ground. We observe that the learned trial magistrate considered the question of identification parades at length and all relevant aspects. He was satisfied and so were the 1st appellate judges, that the identification parades were carried out in a proper manner. On this issue we entirely concur with the views of the lower Courts.

The 3rd ground of appeal, as summarised earlier, alleges that the Government analyst's report which was accepted by the trial Court and the 1st appellate Court was inconclusive and full of loopholes. It will be recalled that Mrs Musungu had said that the 2nd appellant was wearing a 'T' shirt which looked bluish or greenish in colour. Thirteen days later when the 2nd appellant was arrested he was wearing a green 'T' shirt under a black 'T' shirt. Mr Wilson Kibet arap Sogomo (PW25) a senior analyst at the Government Chemist Department, Nairobi, with 13 years' experience in fibre analysis (cross-examination) carried out a fibre analysis of the exhibits submitted to him which included the deceased's coat and the 2nd appellant's green 'T' shirt. His findings were that green cotton fibre similar to those of the 'T' shirt of the 2nd appellant were found on the surface of the coat of the deceased. Later he clarified that these were found at the back area of the coat of the deceased. We concur with the 1st appellate judges that Mr Sogomo was an experienced and competent analyst of fibre materials.

Mr Njugi has strongly maintained through out his submissions both before the two lower Courts and before us, and perhaps justifiably so, that the prosecution had failed to eliminate the possibility of anyone else wearing green cotton material similar to the 'T' shirt worn by the 2nd appellant having come in contact with the deceased. The trial magistrate seems to have over-looked this issue. The 1st appellate judges, we note, have merely gone into conjectures on what those who handled the deceased must have been wearing at the time. Such simple omissions relating to vital evidence on the part of the prosecution cannot be rectified by conjectures.

On this issue the evidence is that at the Carnivore the deceased was physically handled by at least two to three persons, if not more, until he was put in the car of the manager, Mr Angoli (PW7) who then drove him to the Nairobi Hospital. There were the two watchmen Mr David Tiroto (PW4) and Mr Magera (who was not a witness), and Mr Angoli (PW7), the manager. No evidence was elicited from either Mr Tiroto or Mr Magera that either on account of the the clothes they were wearing or the manner in which either or both had physically handled the deceased, it was not possible for either of them to have left any green cotton fibre on the back side of the deceased's jacket. Mr Magera unfortunately was not called to give evidence. So the possibility of the green cotton fibre found on the back side of the deceased's jacket to have come from a contact with the personnel at the Carnivore is not ruled out. Likewise a mere statement by Mr Sogomo, the Government Analyst (PW 25), that he had never seen nurses at the Nairobi Hospital in green cotton clothes is not sufficient to rule out the possibility that the green cotton was left on the deceased's jacket through contact with one of the hospital staff. This was a vital piece of evidence, and particularly keeping in mind that this evidence was needed in a murder trial, one would have expected the police to have made a positive effort to eliminate the possibility of the existence of some other source for the green cotton fibre. That not having been done, we are not satisfied that the source of the green cotton fibre in question was the 2nd appellant's green T-shirt only. Its presence on the deceased's jacket has, in

our view, no evidential value. As a corroborative evidence it must be rejected.

With regard to the final ground of appeal complaining about re-evaluation of prosecution evidence in isolation and not of the evidence as a whole and further not making independent findings of fact Mr Njugi did not make any submissions. However, we note that having dealt with the two basic issues raised in the appeal relating to the credibility of the single witness and to the cogency of the testimony of the single witness the learned 1st appellate judges near the end of their judgment stressed that as a first appellate court they had re-evaluated the whole of the evidence and had made their own decisions on the issues.

That brings us back to what happened at the identification parades held separately in respect of each of the appellants. At an earlier stage we expressed our satisfaction at the manner in which the two identification parades had been carried out. Before he agreed to take part in the identification parade the 1st appellant had demanded the red shirt he was wearing to be changed, that he be given shoes to wear, and for some prisoners to be included in the parade. All the three demands were met. Mrs Musungu went round the parade and stood next to the 1st appellant. She asked him to open his mouth. The officer conducting the parade, thereupon, asked all the members of the parade to open their mouths. In her evidence Mrs Musungu said that she identified the 1st appellant from his size, his hair and missing teeth. The Senior Resident Magistrate was completely satisfied by the identification of the 1st appellant by Mrs Musungu and so were the 1st appellate judges. We fully concur with the views of the two lower Courts. Both the lower Courts had considered the defence of alibi raised by the 1st appellant and had rejected it and we likewise do. We note that efforts by the investigating officer to trace the persons mentioned by the 1st appellant by way of raising a defence of alibi in his cautionary statement were fruitless. The 1st appellant neither gave their address to the investigating officer nor did he seek to call any of them as witnesses. We are satisfied that the conviction of the 1st appellant was safe.

With regard to the 2nd appellant the evidence is that before joining the identification parade he changed the green 'T' shirt that he was wearing with a brown shirt which he borrowed from a fellow prisoner. He was not wearing the flowered woollen cap with which he was arrested. Insp Mulinge (PW14) who conducted the parade said in evidence that the witness took her time and eventually she identified the suspect. During cross-examination he said that he had written on the Identification Parade Form that the witness was not sure but she eventually identified the suspect by touching him.

Mrs Musungu had this to say on her identification of the 2nd appellant at the parade:

“He looked like the one who put on the woollen cap. I touched him.”

During cross-examination she said:

“When I went to the parade at Kilimani Police Station I said I was not sure but he looked like one who attacked me. I repeated the same words to the police officer who was conducting the parade.”

On the identification parade form Insp Mulinge has recorded as follows:

“The witness was not very sure but she eventually identified the suspect by touching.”

According to Insp Mulinge the 2nd appellant's comment on being asked if he was satisfied with the way the parade was conducted was that he was satisfied but that the witness had not been sure whether he was the one or not.

Both the lower Courts had the above evidence before them when they dealt with the identification of the 2nd appellant at the identification parade. The trial magistrate, who of course heard and observed the witnesses, was satisfied by the identification. The 1st appellate judges were concerned with the hesitation that Mrs Musungu had displayed at the time she identified the 2nd appellant. But with the corroboration that they sought from the Government's analyst's report relating to the presence of green cotton fibre on the back side of the coat of the deceased, they accepted Mrs Musungu's identification as sound.

To us it is at once apparent from the above passages that we have quoted from the evidence that Mrs Musungu was not sure if the 2nd appellant was one of the gangsters. Her honest admission of uncertainty of identification at this identification parade, both during examination in chief and during cross-examination, was at the time of the identification parade also noted by Inspector Mulinge who conducted the parade and also by the 2nd appellant. We have already observed that the 1st appellate judges were also somewhat disturbed by the hesitation that Mrs Musungu had displayed at the time she identified the 2nd appellant at the parade. But they sought corroboration from the presence of green cotton fibre on the back side of the deceased's coat which in our view, for reasons we have already given, is of no evidential value and therefore, cannot supply any corroboration. In the premises we find that the conviction of the 2nd appellant cannot be sustained and his appeal must succeed. In the final analysis we dismiss the appeal of the 1st appellant, Gibson Njau, and allow the appeal of the 2nd appellant, Peter Kamande. We quash the conviction of the 2nd appellant, set aside the sentence, order that he be released forthwith unless otherwise lawfully held.

The Late Mr Justice Masime, judge of appeal who presided over this appeal having expired, this judgment is, therefore, delivered under rule 32(2) of the Court of Appeal Rules.

Dated at Nairobi this 5th day of May, 1993

J.R.O MASIME

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL