



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gicheru, Muli & Omolo JJ A)

CRIMINAL APPEAL NO 68 OF 1993

JATANI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Nakuru (Lady Justice R Nambuye) dated 26th November, 1992

in HC CR A No 387 of 1992)

JUDGMENT

The entire case for the prosecution against the appellant hinged upon his identification by the complainants, Alphonse Matingi Kabera (PW3) and Laban Samuel Kariuki (PW7); and one Owino Godio (PW8). PW7 died before his cross – examination by the appellant was completed. Although the three counts of robbery with which the appellant was charged were alleged to have been committed in the light of day on 4th January, 1988 at about 11.45 am and PW3, PW7 and PW8 claimed to have identified him as the perpetrator of the offences in these three counts, his complaint before us in this second appeal is that the identification parade organized by the police at Parklands Police Station on 2nd March, 1988 was conducted in a manner that the identifying witnesses would easily pick on him. This was because when he appeared at that parade, he was handcuffed and most of the members of the parade were Asians. This distinctly isolated him as the only odd man in the said parade and was therefore prejudicial to him. It cast doubt on the identification evidence against him. Hence, the case against him was not proved beyond reasonable doubt.

As we have indicated above, PW7 died before he was cross-examined on his identification of the appellant. His evidence – in – chief having thus not been tested, cannot fairly be taken against the appellant. Although PW3 in his evidence said that nobody at the identification parade was in handcuffs and the police officer conducting the parade No 213649 IP Cleophas Wekesa (PW9) – also said so besides denying that during the parade the appellant was in handcuffs, PW8 when cross – examined by the appellant, admitted that one member of the parade was in handcuffs but that that person was not the appellant. He also admitted seeing Asian(s) at the parade. According to the appellant, that one member of the parade who was in handcuffs was himself.

The appellant's complaint that he appeared at the identification parade while handcuffed was a live issue both at his trial and on his first appeal. Neither of the two courts below dealt with it satisfactorily. Indeed, the said courts glossed over this issue, the trial court simply saying that it was satisfied that PW9 had conducted the identification parade in accordance with the force standing orders while the first appellate court erroneously observed that Samson Thomas (PW6) could have identified the appellant if the latter was in handcuffs at the identification parade. Of course PW6 was not one of the identifying witnesses at the parade. In view of the evidence of PW8 in this regard and the possibility of the members of the parade being conspicuously dissimilar to the appellant, the probative value of the appellant's identification at this parade was nil. This had the effect of rendering suspect the entire identification evidence against the appellant. It is for this reason, we think, that the appellant's plea before us is not without merit. In the circumstances therefore, we allow his appeal, quash his conviction on each of the three counts preferred against him and set aside the sentences in respect thereof. He will be set at liberty forthwith unless otherwise lawfully held in custody.

Dated and Delivered at Nakuru this 1st day of October, 1993

J.E. GICHERU

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL