



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO 137 OF 1986

Between

ISAACK NJENGA ALIAS KANIU1ST APPELLANT

ARMSTRONG NDUNGU KAMINDA2ND APPELLANT

WAHINDU GATUNE ALIAS MWABANGI.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Mr Justice Schofield & Lady Justice Owour) dated 9th October 1985,

in

HCCRA Nos 388-547 of 1985)

JUDGMENT

There were originally 12 appellants in this appeal. Two died in prison and another seven have been released from prison having served their custodial sentences. The appeal by these nine appellants has therefore abated under rules 68 and 70 (7) of the Rules of this Court. That leaves only three appellants namely, Isaack Njenga alias Kaniu (the first appellant), Armstrong Ndungu Kaminda (the second appellant) and Wahindu Gatune alias Mwabangi (the third appellant).

These three appellants were convicted by the Senior Resident Magistrate Kiambu, on 3 counts of robbery contrary to section 296 (1) of the Penal Code and one count of robbery with violence contrary to section 296 (2) of the Penal Code. On the first three counts each of these appellants was sentenced to 10 years imprisonment with three strokes of the cane on each count. On the fourth count of robbery with violence each one of the appellants was sentenced to death. Their appeals to the High Court against both convictions and sentences were dismissed on 9th October, 1985. They now appeal to this Court.

The four charges arose out of four separate incidents, which occurred in Gathanji, Ikinu and Kiaibabu villages in Kiambu district in the very early hours of 13th April, 1984.

The first incident occurred in the house of Muchai Gathogo (PWI) who was asleep when his door was smashed open and a group of people entered. He was attacked on the shoulder and on the mouth and he

lost a tooth. His wife gave the robbers Shs 500/= and two wrist watches and they also took some *pangas*, a camera and some clothes. Gathogo's son, Edward Muchai, and his wife who were in a separate room were also attacked. None of these three witnesses could identify the attackers.

The second incident took place at the home of Isaac Gitau Muchai (PW4). Gitau was awakened by dogs barking and he saw torch-light on his house. He got up, got his torch, whistle, bow and arrows. Before his door was broken down and the robbers entered, he climbed into the ceiling. He said that while in the roof he flashed his torch and saw five people who had entered the house. The attackers flushed him out of the ceiling and he ran outside where he met another group, armed with *pangas*. He recognised among the group the second appellant, who cut him with a *panga*. He was cut several times and then dragged back into the house where he showed the attackers Shs 2000/= in a wardrobe. Gitau's wife, Damaris (PW5), was also attacked and had her wristwatch taken. Damaris claimed to have identified the voice of the second appellant. Apart from household items, the gang also took Gitau's bow and arrows. The bow and arrows were later recovered at the home of George Gakuru (PW8) who was also attacked and robbed the same night.

The third incident took place at the house of Albert Ndichu (PW6). He was asleep in the house with his wife, Alice Wamboi (PW7), and his two children, one of whom was Irene Wanjuna (PW11). He heard a bang on the door and when he got up he saw people outside with torches. One of them called out his name and demanded money. They took Shs 100/= from his shirt pocket which was hanging on a rope. They also took his watch and his wife's watch and a bottle of hot drink. One of the attackers was armed with a bow and arrows. They took household goods including a record player later recovered in George Gakuru's house. Albert Ndichu said that among the persons he recognised was the third appellant. Alice Wamboi (PW7) said she recognised the first appellant, so did her daughter Irene Wanjuna.

The fourth incident took place at the house of George Gakuru (PW8). At about 4 am Gakuru heard footsteps outside and saw a group of ten to fifteen people standing at his door. He woke his wife, Mary Gakuru (PW10). The group smashed the door open and entered. Gakuru armed himself with a *simi* but was overpowered and his hands were cut with a *panga*. An arrow was shot into his back. He escaped into his daughter's bedroom and locked the door. He recognised among his attackers the first, second and third appellants and described the part played by each one of them. His wife Mary identified the second and third appellants and someone else not the first appellant. She said the gang made away with Shs 3000/= and a watch and left behind some *pangas*, a bow and arrows. Gakuru's three sons, who were in different houses at the material time, also gave evidence.

William Gakuru (PW12) heard noises outside and saw people guarding his house. He recognised eight of them including the second appellant. He saw the second appellant and another person breaking down his father's door. He got out of his house, was joined by another brother and they threw stones at the assailants.

Charles Mburu (PW13) heard noises and went to his father's house. He was attacked and he threw stones at the attackers. He saw the third appellant who had entered Gakuru's house. He also saw two others as they were running away.

Gakuru's third son, James Njunguna (PW14), heard noises and looked out of his window. He saw the first and second appellants and a third person breaking his father's door. He also saw two others standing outside his house, armed with *simis*. Gakuru was taken to hospital and was found to have suffered injuries of utmost severity. He had injuries on various parts of his body and the tendons on one arm were cut, causing the hand to droop.

The appellants challenge their convictions on a number of grounds but the main ground is that the evidence of identification upon which the conviction of each one of them is based is unsatisfactory as it is not free from possibility of error.

Mr Okumu, learned senior state counsel, who appeared for the Republic in this appeal, originally supported the convictions of these appellants but in the course of his address to us, and having drawn his

attention to certain parts of the evidence, he conceded the appeals of all the three appellants. There were other peripheral grounds raised by counsel for the appellants including the defence of alibi, but we do not propose to deal with these as the appeal can be disposed of on the single issue of identification.

As each of these appellants was identified by more than one witness, it is not a case of convictions based on identification by a single witness where the trial court is required to direct itself in a particular way, and to warn itself of the danger of convicting on the evidence of identification by a single witness.

We now consider the evidence against each appellant in turn and we start with Isaac Njenga Kaniu, the first appellant. This appellant was identified by two witnesses namely George Gakuru (PW8) and one of his sons, James Njuguna (PW14). Mr Githu Mugai, for the first appellant, submitted that in view of the fact that the attack on Gakuru was sudden and violent, the possibility that his identification of the first appellant as his attacker was mistaken cannot be ruled out. He also argued that Gakuru's identification of this appellant was an afterthought as it came only after the witness had been prompted by the magistrate to give the names and identify the persons who had attacked him. He also submits that Gakuru's wife, Mary Gakuru (PW10), who was also present and was better placed than her husband to identify the first appellant, did not do so. Nor did Charles Mburu (PW13), one of Gakuru's sons who witnessed the attack and identified some of the attackers. As to the identification of the first appellant by James Njuguna (PW14), Mr Mugai points out that although the police arrived at the scene within an hour after the robbery, this witness did not give them the name of anyone let alone the first appellant. The excuse he gave during cross-examination at the trial was that the police did not ask him if he could recognise anybody. He also confesses that he could not see the faces of the attackers. Here we have a situation where five members of the same family are split literally in half between those who claim to have recognised the first appellant and those who did not. This conflict or confusion casts doubt on the reliability of that evidence the benefit of which should have been given to this appellant. There is also no sufficient evidence on the type, strength and location of the lighting under which the first appellant is alleged to have been identified.

We now turn to the second appellant, Armstrong Ndungu Kaminda, represented by Mr Onyango Otieno. Eight witnesses altogether gave evidence at the trial that they recognised the second appellant. These were Isaac Gitau Muchai (PW4), Damaris Gitau (PW5), Alice Wambui (PW7), George Gakuru (PW8), Mary Gakuru (PW10), Irene Wanjuna (PW11), William Gakuru (PW14), and James Njuguna (PW14).

Isaac Gitau Muchai had climbed into the ceiling when the attackers arrived. The attackers pulled him down and he fell on the floor and as he was running out he was cut at the hand with a *panga*. It was at this point in time that he said he recognised the second appellant in torch light. But he also says that there was darkness and there was no light in his house. We do not think these conditions were favourable for the positive identification of the second appellant by this witness.

Damaris Gitau (PW5), the wife of Isaac Gitau Muchai (PW4), on the other hand, does not say that she saw the second appellant, but says that she identified him by his voice. The reason she gave for identifying the second appellant was that the second appellant was a local butcher and that she heard his voice before the attackers entered the house. As between Isaac Gitau Muchai and his wife Damaris Gitau, the latter would have been better placed than the former to see the second appellant if the second appellant was indeed among the robbers.

Alice Wambui (PW7) also claims to have identified the second appellant. She says it was 2:45 am but says nothing about the type and source of light that enabled her to identify the second appellant.

George Gakuru (PW8), his wife Mary Gakuru (PW10) and his two sons William Gakuru (PW14) also claim to have recognised the second appellant. We have already commented on the evidence of George Gakuru and James Njuguna in relation to the alleged identification by them of the first appellant and we do not need to repeat it. William Gakuru talks about security lights in his father's house but does not say where these lights were in relation to the point of activity. As for Irene Wanjuna (PW11) her evidence was that she identified the second appellant in the light provided by one of the torches carried by the attackers.

Because of all these apparent contradictions and the failure of the prosecution to lead evidence on the nature, intensity and location of lights, it was Mr Onyango Otieno's submission that the second appellant had not been positively identified. He cited the case of *Cleophas Otieno Wamunga v Republic* (Criminal Appeal No 20 of 1989) where this Court said:

“ It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction.”

That case, like the present one, also concerned a number of robberies committed by a gang on the same night in Siaya district.

We now turn to the appeal of Wahindu Gature alias Mwabangi, the third appellant, represented by Mr Mogikonyo. The third appellant was identified by four witnesses namely Albert Ndichu (PW6), George Gakuru (PW 8), Mary Gakuru (PW10) and Charles Mburu (PW13). It was Mr Mogikonyo's submission before us that the evidence of the alleged identification of the third appellant was unsatisfactory. He submitted that although these witnesses claimed to have identified the third appellant, they did not say in what sort of light they had seen him. There was no evidence on the brightness of the torches nor their positions. Mr Mogikonyo referred us to the case of *Charles Maitanyi v Republic* (Criminal Appeal No 6 of 1986) but that was a case of identification by a single witness.

Another feature of these appeals which we find most disturbing is that although some of the identifying witnesses claim to have identified the appellants, they do not seem to have given their names to the police at the earliest possible opportunity.

Looking at the evidence of identification as a whole, we are of the view that it is wholly unsatisfactory and consequently not free from the possibility of error. If the trial magistrate and the Judges of the High Court had analysed this evidence in depth, they would most probably have come to the same conclusion as we have. As a result of this, we consider the convictions of these three appellants to be unsafe and should not be allowed to stand. We therefore allow their appeals, quash the convictions of all the three appellants, set aside the sentences and order that they be immediately released unless otherwise lawfully held.

Dated and delivered at Nairobi this February 3, 1992.

J.M GACHUHI

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

R.S.COMOLO

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Ag JUDGE OF APPEAL

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

DEPUTY REGISTRAR