REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEALS NOS 976 & 977 OF 1986 (CONSOLIDATED)

BETWEEN

KINYANJUI & 2 OTHERS..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from an original conviction and sentence of the Resident Magistrate's Court at Nyeri on 14th July, 1986

in

Criminal Case No 227 of 1984)

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August 11, 1989, the following judgement of the Court was delivered.

The appellants were convicted in the court below with others that they jointly robbed shs 2,492,403.60 from Nahashon Chege of Securicor Kenya Ltd contrary to section 296 (2) of the Penal Code. After conviction they were sentenced to death.

They now appeal against conviction and sentence.

In order to assist in referring to the record, we shall refer to the appellants by their numbers as accused in the court below, that is:-

1st Appellant 5th accused in person

2nd Appellant 1st accused Mr Muigai

3rd Appellant 2nd accused Mr Njore

There is no dispute that on 12.4.84 a Securicor vehicle left Nanyuki to go to Nairobi at about 2.00 pm. There was a driver and the crew commander in the front cabin, a radio operator and an escort in the back separate portion of the vehicle.

On the way at Kambiti a lorry coming from the opposite direction drove straight at them in the middle of the road, so the driver drove off the road. The lorry stopped and a gang of people got out and set about getting into the Securicor vehicle. In the process guns, *simis* and iron bars were used, and all of the Securicor team were injured with gunshot wounds.

According to the Securicor team, the whole operation took about 15 to 20 minutes, and the gang then loaded the 5 boxes they had in transit on the lorry, and drove off. Some of the crew claimed to identify some of the gang: we shall turn to that later.

The lorry involved had been hired in Nairobi from PW6 by two men purportedly to carry sugar cane from Makuyu at 12.30 pm on the day of the robbery. On the way they stopped at Juja Road for one of the hirers to get some cigarettes, and again at Kambiti where they picked up 2 men one of whom had an iron bar. Then they drove to the shops at Kambiti where a further three men came and joined them.

The lorry driver then said that he was forced at gun point to abandon the steering wheel, and made to climb into the back of the lorry where he joined his turnboy, and they were both made to lie face down and covered with a tarpaulin.

The lorry involved was seen in company with a *matatu* by PW 9, PW 10 and PW 34 who were selling fish by the side of the road near Sagana Bridge.

They saw 3 people in the cabin of the *matatu*, 3 in the cabin of the lorry, and 4 on top of the lorry at the back. The lorry and the *matatu* took their attention because they drove up and down along the road several times, and later the lorry drove off out of their sight. Then they heard bangs, and they ran in the direction of that to see what was going on. On the way they saw the lorry coming back and it stopped about 60 yards away from them. The rear doors of the lorry were flung open, and a man with a pistol shouted in Kikuyu “come out”. People got of the back of the lorry and ran to the *matatu* which had also returned and the *matatu* drove off. The lorry remained where it was.

We shall deal with the identification of the *matatu* in due course, but it is the case for the prosecution that the *matatu* was the same one which undoubtedly belonged to the 1st accused who admitted driving the vehicle on that day, although not in the circumstances alleged.

That vehicle was seen by the Assistant Chief of Kiriani at 6.00 pm on 12.4.84 being pushed. The vehicle was left overnight at the outside the Florida Nightclub in Kiriani according to PW16.

Police Officers went to the scene, and armed with information about the vehicle involved commenced enquiries, and then recovered the *matatu* of the 1st accused the next day. Enquries continued from there: that is a brief summary of the events which took place.

We now turn to a consideration of the particular evidence in the case of each appellant, bearing in mind as we do so the whole of the evidence. But in doing so we also have to look at the general situation, particularly in regard to warned and cautioned statements admitted in evidence, and we shall do that first.

Of the appellants before us, the 1st and 2nd accused made warned and cautioned statements which were admitted, whilst that of the 5th accused was excluded on the grounds that he had shown that he was injured in Police Custody.

There was the strongest *prima facie* evidence that one Stephen Irungu died as a result of interrogation techniques employed in this case by the Police,which the prosecution did little to dislodge. The learned Trial Magistrate excluded the statement of the 5th accused on the ground that he was beaten, relying on a medical report.

We therefore intend to look closely at the trials within trial. In doing so, what we have in mind is to see whether the statements should have been admitted at all, on the basis that they might not have been voluntary.

In doing so we would ignore the question put forward by learned State Counsel, that the statements are so detailed that they could not have been made up by the Police Officers concerned, for until the statements themselves are properly admitted, that question is irrelevant. It only becomes relevant when looking at the question of corroboration, and whether the statements "cannot but be true". Similarly the question of whether there is corroboration or consistency in the evidence is also totally irrelevant at this stage.

What we have to consider is whether the finding that the appellants made statements voluntarily without promise, inducement, coercion or threat. We find it convenient to tabulate some of the salient facts.

Accused	Date of Arrest	Date of Statement	Report to Court
1	13.4.84 30.4.84	(17 days)	nil
2	15.6.84 12.7.84	(27 days)	nil
5	21.7.84 3.8.84	(13 days)	nil

It is clear that 1st accused and 2nd accused were in Police Custody for an appreciable time before the statements were made, longer than 5th accused for instance, and that no reports were made in any case, contrary to section 37 of the Criminal Procedure Code. There is no real explanation for these periods of time, nor for failing to notify the court below of the position as required. This was long before the recent amendment to the Constitution.

In the case of the 1st accused the officer who took the statement at Nyeri was Chief Inspector Githitho. He took the statement at the request of IP Muthoka, of whom we shall hear more. IP Muthoka brought the 1st accused to the office where the statement was taken. That statement was written by the officer at the request of the 1st accused. CI Githitho did not make any enquiry as to the date of arrest and as to how long the 1st accused had been in custody, nor as to whether he had been beaten in the Police Station at Kilimani before he was brought to Nyeri.

On the subject of whether statements were to be taken or not in such cases he said:

> "It was not a must that a statement had to be taken from accused No 1 before being taken to court but <u>it was a routine procedure for accused persons in custody.</u>"

And

> "IP Muthoka informed me that there were seven suspects in Police Custody to be taken to court and that their statements <u>ought to be recorded.</u>"

We thought that the matter did not rest with the Police, but with the accused to elect or not to elect to make a statement, something which could hardly become a matter of routine. We do not like the approach obviously adopted by this senior officer revealed by the <u>underlined</u> portions of the above quotation: it is wrong.

CI Githitho did not comment on the physical state of the 1st accused.

IP Muthoka was also called and he confirmed that he took the 1st accused to make the statement: he said that he appeared normal with no physical injuries.

In cross-examination he agreed that the 1st accused was taken to at least 6 different Police Stations before he made the statement. He said that this was because he was helping in enquiries of his own volition, and there was a danger that he be seen by witnesses who were to identify him. It is interesting to note that he was not so concerned later about this danger, because the 1st accused was put on an identity parade after appearing in public in court. This makes nonsence of this explanation.

It is also a well known technique, coupled with failure to report to court as in this case, for disorientating the accused, for ensuring that he is unable to obtain legal representation and for making it difficult to check on his whereabouts or physical health. Both possibilities have to be borne in mind.

IP Muthoka denied that the 1st accused was held for torture purposes: he was asked if he had been detained in the same cells as Stephen Irungu, who died whilst in Police Custody, and he said that he did not know.

He was asked the details of interrogation of the 1st accused: the day after he was arrested he was apparently interrogated by 9 officers, by fewer the next day, and by 4,2 days after that. Some details of torture were put to him, and he denied them.

Some time late in the main trial, a trial within trial was conducted in respect of a statement made by the 5th accused. At the time the learned trial Magistrate conducted this trial within trial he had not yet heard the evidence in that case, but we cannot ignore the larger picture in this appeal.

The evidence of the 5th accused was that all was normal after his arrest: he was well treated and made a statement of denial to one IP Wambulwa: he was not threatened, given any inducement or promise.

Three days later all changed when IP Muthoka came on the scene. He gave a graphic description of what happened to him at the tender mercy of this officer, and the learned trial Magistrate grudgingly accepted that it might possibly be true because he complained to the court which had taken his plea, repeated those complaints at the Hospital, and was treated for wounds there.

The officer involved here was IP Muthoka. Even on the finding of the learned trial Magistrate it cannot be ruled out that this officer is capable of treating suspects in this sickening and degrading way in order to extract information from them. The credibility of this officer is put in doubt on this subject at least.

That is also a matter to be taken into consideration.

The case for the 1st accused was that he was beaten repeatedly at CID headquarters both with and without his clothes, and with others and on his own. At one time he was in cells with Stephen Irungu, and at another in what he called “the Disco Room” at CID headquarters when they were both beaten together. On a second occasion Irungu was in the Disco Room with him when he was beaten: Irungu was vomiting blood and a yellow substance. They were being taken to and from Kilimani Police station, and at the end he heard Irungu complaining that he was dying: and he was later next day told that he did indeed die and he made a statement as to what he knew of it. The fact that Irungu had died was used as a further threat against him. The 1st accused said that he made no other statement.

He was cross-examined to little effect, having made a sworn statement in the trial within trial. It was submitted to the learned trial Magistrate the effect of having been in custody with someone who had died in custody was quite enough to render any assessment of its voluntariness doubtful, but the learned trial Magistrate found the statement admissible, reserving reasoning until his judgment.

The officer at whose hands the 1st accused said he suffered, and Stephen Irungu died, was the same one, IP Muthoka. The only witness as to his treatment at his trial within trial was that officer, whose evidence on the point is suspect.

In the judgment the learned trial Magistrate said that all the 1st accused had said was that he was required to admit that he knew Stephen Irungu, and that he was not required to admit to the robbery: and that he did not say that there had been torture or intimidation during the taking of the statement.

The papers which the 1st accused never knew the contents of, and which he was beaten to sign according to his evidence were never referred to.

We do not think that the learned trial Magistrate addressed his mind to the issue in the trial within trial

properly, or indeed at all. On our own assessment of the record we are most concerned at the evidence given in this matter, and we cannot agree with the learned trial Magistrate that the statement allegedly made by the 1st accused was admissible at all, since the case for the prosecution in the trial within trial was based upon unreliable evidence.

As to the 2nd accused, his statement under caution was taken by IP Maina on 12.7.84 at 2.30 pm. The statement was taken at the request of IP Muthoka, in the office of IP Muthoka. The 2nd accused was taken there, and then IP Muthoka left the office.

The officer had recorded 3 other cautioned statements in this case by then, but said that he did not become conversant with the facts, which we doubt.

He said that he could see no injuries on the accused when he came to the office.

IP Muthoka was called again, and performed as before. It is interesting to note that his account of going to the office differs from that of IP Maina: once again IP Muthoka thought that the 2nd accused looked fit and healthy.

The 2nd accused said that he was arrested on 15.6.84 and moved from Police Station to Police Station. In fact officers were called by the defence to produce their OBs and Cells Registers, and a study of these shows that Pangani Police Station for one had its book entries quite wrong, according to the record.

It is not necessary to set out all the complaints he made: they vary only in detail and date from other complaints. The 2nd accused said that he finally signed papers which he had not had read to him. He was produced before the court on 13.7.84, and asked to be examined at the Hospital. Unfortunately when it came to the time for the hearing, the 2nd accused was not so lucky as the 5th accused. The doctors concerned were not available and it was not possible to get a medical report for the 2nd accused.

The only evidence at all about his physical condition was that when he was admitted to cells at Kileleshwa on 20.6.84 at 10.40 pm the register shows that he “appeared to be sick”. The register does not relate what was done about it, if anything, but the evidence in this case prompts us to think that one would have to be very sick indeed before the cells officer at Kileleshwa would record anything but “appears normal” in the register.

Once again the guiding spirit in the interrogation of the 2nd accused was said to be IP Muthoka.

The learned trial Magistrate, we think, by now was beginning to appreciate the degrading treatment being handed out to accused while in Police custody: he said.

> “This court also appreciates the alleged fear and torture while the 2nd accused was in the hands of CID, Nairobi”

and

> “It is also of importance that the statement was extracted several days after the arrest of the 2nd accused person.”

Terminology such as this makes us think that the learned trial Magistrate was not prepared to find that the 2nd accused had not been savagely beaten over a protracted period as he alleged. Certainly we on our own assessment of the record, on the basis of the tainted evidence of the officer concerned, could not make that finding.

The learned trial Magistrate seems to have been impressed by the fact that the statement was long and detailed, and could not have been invented by anyone else that the 2nd accused, unless, we add, that person had spent many months investigating the circumstances of the offence, and had decided what he wanted to hear. Nor are the contents of the statement relevant in deciding whether the statement is

voluntary or not (*Ongwenyo v Rep* CA 173 / 86 Nku), although they might be for other purposes as we have set out above.

We do not think that the prosecution proved its case in trial within trial in respect of the 2nd accused either, or that the warned and cautioned statement of the 2nd accused should have been admitted in evidence.

And so we will now turn to the evidence against the particular accused as counsel have done before us: we shall use as a reference the very helpful and full written submissions of learned State Counsel but we shall start with the 1st accused.

Mr Murgor quite rightly split the case against the 1st accused into four headings, and we shall follow that.

IDENTIFICATION

There are two sides to the identification here, first of the appellant himself, and second of the *matatu*.

Starting with the identification of the 1st accused himself, PW 9 appeared to the court to be of tender age. The record shows that the learned trial Magistrate conducted a *voire dire* examination, but does not record the terms of that examination. In our view the examination should be recorded so that on appeal the ability of the witness and his understanding may be clear for all to see.

But we see the evidence of the witness: there is no doubt that he was capable of understanding and of making himself understood. We are satisfied that if the learned trial Magistrate did conduct a *voire dire* examination he would have satisfied himself as to the ability of the witness in understanding the nature of an oath, or he would not have used the term *"voire dire"*. Although we would have preferred to see a full record, nevertheless we would accept that the learned trial Magistrate was right in his conclusion on the matter. This evidence needs corroboration as a matter of practice. Corroboration is available.

PW 9 was one of the fish sellers standing by the side of the road who watched the lorry and the *matatu* go up and down the road past him just before the robbery took place.

The time was about 4,00pm: there would have been good light. The lorry and the *matatu* were driving slowly on the road in such a manner as to attract attention, and the boys were selling fish: they would have been close to the road. There were good circumstances for identification, and reason for the witness to take notice.

The learned trial Magistrate did not consider the circumstances of identification in his judgment, but we think that they were satisfactory. This relates to PW 10 and PW34 also.

Now PW 9 says that at some time or another he was summoned to an identification parade, and that there he identified the driver of the *matatu*. It has always been the case for the prosecution that that was 1st accused. In court however, the boy pointed out the 3rd accused as the driver of the *matatu*, and he thereby caused great confusion.

According to the evidence of PW 35, he conducted a parade on 11.7.84 which had as its suspect the 3rd accused. PW 9 was one of the witnesses who attended at that parade, and he failed to identify the 3rd accused.

Long before, on 2.5.84, about 3 weeks after the event, PW 9 attended an identification parade conducted by PW 23, in which, as the learned trial Magistrate remarks, there were 7 suspects, paraded at the same time apparently, with 16 members of the parade. We agree with what the learned trial Magistrate has to say on this subject.

At that parade PW 9 identified the 1st accused according to the evidence of PW 23 and the parade form. The 1st accused said that he was the only one with a beard. Neither PW 9 nor PW 10 agree with that.

On 3.5.84 PW made a statement to the Police which was further to his statement of 30.4.84. In it he said that he had identified a man who had long hair and a halfcut beard as the driver of the *matatu*.

And finally on this point, it is clear that it is not possible that the man PW 9 identified at the parade of 2.5.84 was 3rd accused, because he was not arrested until 20th June 1984.

There is no doubt that the 1st accused was produced in court 2 days before the parade, but there is no evidence that PW 9 or PW 10 saw him there or at all before the parade, and the learned trial Magistrate clearly considers it unlikely that they did.

We take the view that if the learned trial Magistrate were to find the evidence of the PW 9 to be credible, then despite the fact that the learned trial Magistrate did not deal with the discrepancy we have pointed out, it is clear that although PW 9 at the trial identified the wrong person as the driver of the *matatu*, the mistake he made was at the trial, a year after the event, and not at the identification parade, 3 weeks after. On the basis that PW 9 was a credible witness, the identification could be accepted. We will deal with credibility in due course.

PW 10 is also said to have identified the 1st accused at the same parade on 2.5.84, and indeed on the parade form he appears as a witness who identified the 1st accused.

In the evidence of the officer no mention is made of PW 10 having attended the parade or identifying the 1st accused. There is no further statement apparently made by this witness as there was in the case of PW 9. PW 10 said in court that the man he had identified was not in court, although the 1st accused was recorded as being present.

This is not the standard of evidence identification which we think to be sufficient. We would disagree with the learned trial Magistrate who did not consider these matters: we would not rely on the identification of PW

10 on our own assessment of the record.

As to the vehicle concerned, PW 9 said that the *matatu* was yellowish with signs of blue and had drawings of an antelope being chased by a lion on the body. He also said that the registration number was KPX 090, a Datsun, but he said that he had just seen the vehicle outside the courtroom.

PW10 said that the *matatu* was yellowish and on the body was painted an eagle and an antelope being chased by a lion. He did not give the number.

PW 34 only said that it was the vehicle outside the court, and did not describe it.

The descriptions given of the vehicle match with the photographs which were produced in court of the vehicle of the 1st accused, and the descriptions were given to the Police soon after the event.

PW 9, PW 10 and PW 34 said to PW 60, the sergeant who attended the scene that they were unable to give the registered number of the Datsun *Matatu* and the number does not appear in their early statements.

And yet PW 9 was able to give the number in court, having just seen the vehicle outside the court. We think it most unwise to put the very vehicle the prosecution hold was involved right outside the court in full view of witnesses who are about to give evidence about it.

PW 9 for one was clearly an impressionable witness because soon after the event he was unable to give the number of vehicle but clearly picked it up from the number plates of the vehicle which was outside and gave it as direct evidence.

Learned State Counsel says in his submission that PW 7 was the one who attested to the involvement of a

motor vehicle which bore the registration aforesaid, but we do not think that that is right. PW 7 said it was a yellowish vehicle with a *matatu* body which had Private written on it. There was also written on it "Kaa Square", but he said nothing about the drawings the boys referred to. He also said that he was not able to read its registration marks.

It seems to us that this is not a positive identification which can be relied upon, but does show that the vehicle recovered by the Police from the 1st accused was not excluded by the evidence given from being the vehicle involved. Its description is at least consistent with that of the vehicle which the 1st accused said he was driving that day.

CONFESSIONS

We have dealt at length with this subject and determined not to rely on the warned and cautioned statements.

RECENT POSSESSION

After the robbery was over Police Officers went to the scene and interviewed the witnesses, and a search was made for the *matatu* getaway vehicle.

One matching the description was found outside a bar in Kiraini Trading Centre. Inside the vehicle were found in the cabin *rungus* and a sword. In the back were Bank Currency note labels MFI 10, 22 & 23 according to the Senior Sergeant and the Inspector who were there.

MFI 23 appears on the exhibit list as a specimen signature of PW 22 who says that MFI 22 was indeed his signature. There is some problem therefore over MFI 23, but there is still evidence about MFI 22, which PW 22 states clearly is a wrapper which he signed and stamped when he counted out and prepared a bundle of Shs 100 notes to a value of 10,000 and wrapped them in that wrapper, signed and stamped it. The wrapper clearly came from the bank.

Also there were cash analysis forms MFI 5 in the back of the vehicle which were identified by PW 24 as relating to the shipment in question.

The vehicle was opened with keys supplied by the 1st accused after the Police had been to his house.

The evidence was that at the house of the 1ast accused they recovered 2 bundles of money Shs 40,000 and Shs 41,000 in a small bag kept between the mattress and bed of a child. (MFI 44). There were 2 bundles of 40,000 each in Shs 100 notes in a *Kiondo* covered by beans and the 1st accused had Shs 6546.25 about his person. That is to say the money was hidden.

One of the bundle of Shs 41,000 had amongst it one note which was identified as having been in the shipment of money (MFI 44b). That was the only identifiable note, and according to witnesses from the Bank, only the number of the top note in only some of the bundles was recorded.

This was good evidence of recent possession, as the period involved was about 12 hours.

The 1st accused explained his possession in an unsworn statement by saying that he had been driving the vehicle in question as a *matatu* carrying passengers all day, and when he parked it, he looked in the back, and there was some luggage left behind by one of his customers. He collected it and noted it was money, and so he took it home.

He did not refer to the troubles he had had during the day with the vehicle, or having to leave it outside the bar in Kiriani.

Thus the evidence against the 1st accused came down to the sole acceptable identification by PW 9, the fact that a vehicle similar to his was seen at the scene driving the robbers away, a mess of bank wrappers

and cash analysis forms consistent with the split up of the money being done in the back of his *matatu*, and the fact that he had a great deal of money very soon after the robbery in his house, one note of which came from the robbery.

The court of Appeal in *Kamau v Rep* [1975] EA 139 at p 140 quoted from *Abdalla bin Wendo v R* (1953) 20 EACA 166:-

> "Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is know that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence or identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

The sort of questions to be answered are:

How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If occasionally had he any special reason for remembering the accused? How long had elapsed between the original observation and the subsequent identification to the Police? Was there any material discrepancy between the description of the accused given to the Police by the witness when first seen by them, and his actual appearance?

R-v-Turnbull [1976] 3 WLR 445, quoted with approval in *Reuben Taabu* and ors HCCA 480, 208 & 209/78 by Sachdeva J and Hancox J as they then were.

We bear the above in mind as an additional factor in our own consideration of the record.

The learned trial Magistrate was satisfied that the evidence called by the prosecution was sufficient to negative his explanation, and indeed the *alibi* he put forward, that he spent a normal day carrying passengers, and we on our own assessment of the record for slightly different reasons, and remembering that the learned trial Magistrate had the opportunity of seeing the witnesses give evidence and assessing their conduct in the witness box, come to the same conclusion as he did. The 1st accused was rightly convicted.

Turning now to the 2nd accused, once again we adopt the heads of evidence put forward by Mr Murgor.

IDENTIFICATION

There is one outstanding distinguishing feature of the 2nd accused. He has a pronounced divergent squint.

According to the evidence of PW 35 the parade which concerned the 2nd accused was held on 10.7.84, and this parade was very badly recorded by the parade officer.

The parade form (Exh 54) shows that 8 witnesses took part although they are numbered from 1 to 7: PW 9 was missed out in the numbering.

Reports on the witnesses refer only to three witnesses, numbers 1,2 & 3, which would indicate identifications by PW 7, PW 6 and PW 2 if the form is read literally. We can see no justification for guessing which witness did what, on the basis of the form.

The evidence of the parade officer is that 4 witnesses identified the 2nd accused on that occasion, they were PW 3, PW 9, PW 10 and PW 34.

PW 34 claims he identified the 2nd accused on 2.5.84, although it appears that the 2nd accused was arrested on 15.6.84.

The evidence in respect of that parade is totally irreconcilable. We have not the slightest idea who identified the 2nd accused on the basis of the record, and so we have no alternative than to ignore this parade.

The purpose of such a parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion. The record of this parade adds to the confusion.

We are left with dock identifications more than a year after the event, upon which we are reluctant to rely, particularly where the divergent squint singled the 2nd accused out from his coaccused.

The evidence against the 2nd accused comes form PW 3 the escort / radio operator in the rear compartment of the Securicor van. He said that the 2nd accused was one who shot him on his hands while he was trying to open the rear inside doors of the Securicor vehicle, and stood guard over him after he had pulled him from the vehicle. He saw him first from inside the vehicle when the 2nd accused was on the driver's side. He could not remember the colour of his clothes

He agreed that he was busy with the radio and making observations, but the robbery took about 20 minutes and he was not too busy to make observations outside the vehicle, he said. He was able to identify as he saw the people for a long time. The 2nd accused was wearing a beret of the type worn by the GSU, not a big hat.

He said that he identified the 2nd accused at the identity parade at Nyeri Police Station on 11.7.84, which was not the relevant date.

PW 9 said that the 2nd accused was one of the men on top of the lorry when it drove past him. He said he was able to recall him because his eyes were a little deformed, and he identified him in court. Such identification was of little value, we think.

He said that the 2nd accused was wearing a small cap.

PW 10 did not say anything about the 2nd accused in his evidence in court, although PW 35 said that he identified him on 10.7.84, as well as a member of the parade who was not a suspect.

PW 34 identified the 2nd accused in court: he said that he was the man who opened the rear door of the lorry when the lorry came back and those inside transferred to the *matatu*. He said he had a black coat and a white shirt, but could not remember if he had a hat or not. He came from the cabin of the lorry, and was armed with a pistol.

We do not think therefore that there is anything in the prosecution case with relation to identification of the 2nd accused upon which a conviction could be based.

CONFESSION

We have already dealt with this subject. Being itself inadmissible, the confession of the 1st accused is of no assistance to the prosecution case.

FINGERPRINTS

There is no doubt that the fingerprints of the 2nd accused were found on the outside surface of the rear left hand window of the Datsun *matatu* of the 1st accused. The prosecution clearly showed contact with the vehicle by the 2nd accused at some time. There is no evidence to show how long a fingerprint can be expected to remain on a public vehicle, and therefore when the fingerprint could be expected to have been

put on the vehicle. The best this evidence can show for the prosecution is consistency with their case, even where there is no explanation from the accused as to how the fingerprint got there. It could also be taken together with other evidence.

RECENT POSSESSION

PW 27 and PW 63 were taken by 1st accused after interrogation on 13.4.84, the day after the robbery, to a house at Karima Village. It is said in the evidence of these witnesses that it was the home of the 2nd accused, but, apart from a report of what the 1st accused said, there is no other evidence upon which to base that allegation, and that evidence is not admissible against the 2nd accused being neither sworn nor in a confession statement (see CA 82/83).

There was no evidence from the alleged wife of the 2nd accused to whom the officers said they talked, and what she said also is not admissible: nor did the officers report what she said. No investigations were apparently made in the area of the Chief, for instance. We therefore do not know to whose home the officers went. The allegation that it was the home of the 2nd accused is just that, a mere allegation, and the fact that the Police laid ambush for the 2nd accused at that place for some time and he did not come rather adds weight to the fact that it may possibly not have been the home of the 2nd accused. This was a matter above all for the prosecution to prove in the case of the 2nd accused. We do not think they did so.

In the home, in a goat *boma*, under a box on legs was some freshly dug soil. IP Muthoka directed this be dug up, and in an old *sufuria* which had the top folded over was found 7 bundles of shs 1000, and two labels from Barclays Bank Nanyuki MFI 6 and MFI 9.

PW 22 identified MFI 9 as bearing his signature and stamp of 21.3.84. For some extraordinary reason which has remained unexplained throughout this case, this wrapper also had a stamp on it dated 16.8.84. On that date PW 45 who was a cashier at the Bank was approached by IP Muthoka for impressions on a blank sheet of paper of a cashiers stamp. The officer wanted the stamp to show 21.3.84 and the date had to be changed to that. Prior to the alternation of the date, she stamped “on another piece of paper which the Police officer brought with him in error”. She said however that she “rubbed the impression using white ink”, and indeed that is what appears to have been done.

She said that IP Muthoka told her to do that.

But she said that she did not rubber stamp, but that her stamp only touched the paper and she rubbed it out with white ink. In fact the impression is of a major part of the stamp.

IP Muthoka said nothing about all this.

We consider that the possibility that this wrapper was included in the evidence by mistake (at the best) cannot be excluded. It is another area in which the evidence of IP Muthoka has been shown to be unreliable. If things happened as PW 22 said, we cannot understand why IP Muthoka did not tell the learned trial Magistrate all about it.

PW 25 identified MFI 6 as bearing his stamp and signature on 30.3.84, and the wrapper to have contained Shs 2,000.

We do not think that there is sufficient evidence of recent possession by the 2nd accused to require him to account for that possession.

The 2nd accused put forward an alibi, that he was in his *shamba* at Endarasha, Nyeri District all day on the 12th, and remained home on the 13th. He did not return to Nairobi area until 26.4.84 and was not arrested until 15.5.84.

We do not think that the prosecution put forward sufficient evidence to negative that alibi. We do not think that the conviction of the 2nd accused can be sustained.

Turning not to the 5th accused, and using once again Mr Murgor's headings.

IDENTIFICATION

As Mr Murgor points out, the evidence against the 5th accused is mainly that of identification by PW 6 and PW 7, who were the driver and turnboy of the lorry in which the robbers went to the scene.

According to PW 6 on the journey to Kambiti, PW 7 was on the back of the lorry, and his two customers were in the cab with him. He had every opportunity to see the people with whom he conducted business on quite a long journey in good light, and close proximity.

PW 7 said that when the vehicle finally stopped at the shopping center he started to climb over the high side of the lorry, and was told not to do so by 5th accused. This was at a time when, if the story of the two witnesses is true, the 5th accused attracted the attention of the witness, as in the circumstances it was an odd thing to do to stop the turnboy of a lorry getting out when the expected destination had been reached, and we think that PW 7 would have had good reason and opportunity to identify the 5th accused.

It was soon after that that PW 6 was brought onto the back of the lorry and they were both put under tarpaulin where they remained until after the robbery.

Just before that time PW 6 said that he had been told by the 5th accused to clear off the steering wheel and that he pulled out a pistol and threatened him with it. PW 6 said that one of the men who hired him spoke with an Embu accent, and PW 7 agreed and said that that applied to the 5th accused, and that his accent in court was not clearly Kikuyu in court. The learned trial Magistrate had the opportunity to assess this himself. PW 6 said that identification factors were that the 5th accused had thick lips and a moustache: his mouth was a little larger and there were distinct marks on his face.

PW 7 said that he had thick lips and a moustache.

Neither was able to remember if the 5th accused had socks on or not when they identified him, which was a point which concerned the 5th accused.

As to clothes, PW 6 said nothing about the clothes worn at the scene, while PW 7 said that the 5th accused was wearing a coat and he had a cap which was pinned on.

The 5th accused appeared on an ID parade at Nyeri on 10.8.84, conducted by PW 20. There were 6 witnesses,. 1 suspect, and 8 on the parade. When he was identified by PW 6 he said that they had been driving taxis together in Nairobi, although PW 6 said that he had never met the 5th accused before. He said nothing when PW 7 identified him.

We consider the recorded comment on the parade to be prejudicial to the 5th accused, and we ignore it.

As shown by the other identification parades which PW 6 and PW 7 attended, they were not given to identifying suspects wholesale for they did not identify anyone else.

One matter which the 5th accused draws to our attention is that he was the only one on the parade with thick lips: but every face has its own peculiarity, and although, for instance, the 2nd accused might have asked for steps to be taken to see that his divergent squint might not be made too apparent, we do not think that the Police can be expected to deal with a perfectly natural feature, as opposed to a disfigurement (see Force Standing order set out on the front of the id parade forms), upon which a witness might or might not fix for identification.

It seems to us that to identify a face is to recognize it as a whole. Not many people would be able to give a specific description of its features, and when asked to do so in court would seize with relief on something that was obvious to them.

As to other criticisms of the identity parade leveled by the 5th accused,

> (1) we do not think that the evidence shows that the witnesses were told who to identify by the Police before the parade;
>
> (2) PW 6 does in fact mention marks on the face of the 5th accused, contrary to what the 5th accused says;
>
> (3) We have already said that the recording of the parade of 10.7.84 was wrong: and as the 5th accused points out, it could not have been him who was identified as he was not then arrested. We are satisfied that PW 6 and PW 7 identified only one suspect, and that was the 5th accused.
>
> (4)Contrary to what the 5th accused says, PW 7 did not say that he had not exchanged words with the people who hired the lorry, as he said that the 5th accused told him to climb back into the lorry. In that regard, we do not consider this to have been an identification by voice, but by face: the witness was entitled to make assurance doubly sure by checking on the voice, but we do wish that the parade officer had recorded the fact that he wanted to do that.

Subject to the question of credibility and a matter of whether these two witnesses should have been treated as accomplices, we think that on the record, the circumstances of identification were good, and the learned trial Magistrate was entitled to rely on the id paraded.

Added to these factors the prosecution relied upon the fact that the 5th accused was identified by PW 29 running away from his house when he went there the day after the robbery, and that the 5th accused was found in possession of expensive items which were brand new, found in his house. We take the point that the 5th accused makes, that no one ever asked him to account for these things, and we are of the view that this evidence merely shows consistency, it is not probative of the offence in itself. It is a link, albeit a weak link, in the chain of circumstantial evidence, and required much more investigation than was presented in this case to lead to the irresistible inference we are invited to draw.

CONFESSION

We are not prepared to rely on the confessions of the other accused, as we have already said.

We add our own headings:

ACCOMPLICE EVIDENCE

The 5th accused puts forward the possibility which ought to be considered, that PW 6 and PW 7 were infact accomplices in the robbery. The main basis of this consideration, although not the only basis is that PW 6 agreed to depart on this hire without having been paid the money which was agreed for the hire, and the support of PW 7 for the evidence of PW 6 on the basis that he was working for PW6.

There is no need for a court to be hasty to dub a witness an accomplice (see CA 137/82), and there are circumstances in this case which indicate that they were not. For instance they were left behind by the gang, and did not emerge from the lorry until the *matatu* was on its way. Judging by the fast distribution of money, if they were accomplices, then they lost any chance of sharing in the proceeds. The suggestion that they were accomplices is untenable, and the learned trial Magistrate was right not to treat them as such.

DISCREPANCIES

The 5th accused has referred in his very long and helpful submissions to discrepancies between the evidence of PW 6 and PW 7 and on occasions to that of other witnesses.

We have anxiously considered his submissions one by one: they are too numerous to set out *seriatim*: but

having considered all of them, we put them into two classes.

(1) Discrepancies which do not exist, or only exist due to an incorrect and sometimes fanciful interpretation by the 5th accused.

And

(2) Discrepancies which, while present, are minor to be expected in the circumstances, and which do not affect the credit of these two witnesses.

The 5th accused made an unsworn statement, in which he said that on the day of the robbery and the day after he was about his usual business in his home area. He left for Busia on 14.4.84, and returned on 23.4.84 to find members of his family in custody. He went there to free them, and was released, but arrested again on 21.7.84 and taken to CID Headquarters.

He referred at length and in detail to a grudge between him and PW 29 who he said had slept with his previous wife. All of this was put to PW 29 who denied it.

The prosecution relied on the identification of the 5th accused by PW 6 and PW 7 to negative the alibi put forward, and to show that the grudge alleged was not the cause of the troubles of the 5th accused.

All this evidence was before the learned trial Magistrate. The learned trial Magistrate had the opportunity of seeing the witnesses give evidence which we have not had. This resolved to a question of credibility, and remembering that the learned trial Magistrate was in a position to assess the witnesses in the witness box, on our own assessment of the record we would agree with the conclusion reached and come to the same conclusion ourselves.

The 5th accused was properly convicted.

Accordingly we dismiss the appeals of the 1st and 5th accused. Sentence is mandatory and according to law.

We allow the appeal of the 2nd accused, quash the conviction and set aside the sentence.

Dated and Delivered at Nairobi this 11th day of August, 1989

D.C PORTER **J.A ALUOCH**

JUDGE **JUDGE**

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

DEPUTY REGISTRAR