

REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEALS NOS 390 AND 379 OF 1979

JOHN KIMEE KIARIE.....APPELLANT

RAPHAEL WANYORO WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants John and Raphael were charged on five counts of simple robbery (although capital robbery could just as easily have been brought) and one count of malicious damage arising out of the breaking into four houses. What was alleged was that a gang broke into the houses during the course of the night of 18th January 1979. The first breaking occurring at about 2.00 am and the last about 3.45 am. The record is perhaps not entirely clear but the sequence of visits are not charged as they were made. I will deal with the case in the order in which the charges appear.

Count 1 related to a breaking into the house of Andrew Nganga at about 2.00 am; count 2 related to the breaking into the house of Wilson Mbari somewhere about 3.00 or 3.30 am; count 3 was related to this breaking, the complainant's vehicle being damaged as the gang went off; count 4 concerned a breaking into the house of Francis Kagori at about 2.40 am; and counts 5 and 6 related to robberies at the house of Nelson Githuka, the complainants being that man and his wife, Wambui. Evidence in support of count 1 was given by Andrew Nganga and his wife, Cicilia; in support of counts 2 and 3 by Wilson Mbari and his wife, Philomena; in support of count 4 by Francis Kagori; and in support of counts 5 and 6 by Nelson Githuka, his wife and his son, John Kariithi.

No property stolen in any of the robberies was recovered and the evidence against the two men consisted solely in visual observation. In respect of count 1, neither witness identified John; but both thought that Raphael might have been one of the gang. The magistrate must have thought Cicilia's evidence to be quite unacceptable as he did not even refer to it in his judgment; and he thought that Andrew Nganga's evidence was insufficient, unless there were some other evidence as well. In relation to counts 2 and 3 both witnesses identified Raphael as one of the gang. With respect to Mr Mwihi's arguments on behalf of Raphael, conditions favouring identification were not at all unsatisfactory and it was a case of recognition rather than identification. To prove count 4 only Francis Kagori was called, and he could identify no-one. Nor does he say how many actually came into his house as members of the gang. In respect of counts 5 and 6 also, in conditions not at all unfavourable to identification, Nelson Githuka and his wife both recognised John, and she also identified Raphael.

Identification parades were held in which John was prepared to, and did, take part; but Raphael refused to do so. I need say no more about the parades than that the witnesses who claimed to have seen John identified him at the parades but Nelson's wife also picked out someone who, as she put it, "is not in Court". As the identity of this other person was not resolved, she may have picked out a wrong person.

On what I have said convictions could not properly have been entered against either appellant in respect of counts 1 and 4; but they were entered because a hat and an arrow, which had been stolen during the raid on Andrew Nganga's house, were subsequently found; the hat in Wilson Mbari's house and the arrow in Francis Kagori's. This led the magistrate to comment:

Therefore the members of the gang who robbed the Andrew Nganga must be the same gang that stormed in the Nelson Githuka's and Wilson Mbari's houses.

It may or may not be so. Suspicion is great, but I do not think that I can associate the two appellants with every robbery.

I allow the appeals of both appellants in respect of counts 1 and 4; I allow John's appeal in respect of counts 2 and 3; and, having regard to the unresolved point relating to Nelson Githuka's wife, I allow Raphael's appeal in respect of counts 5 and 6. The convictions left are as follows: counts 2 and 3, Raphael; and counts 5 and 6, John. This means of course that the question of the joinder of charges needs to be thought about. But in the circumstances of the case no possible injustice or embarrassment could have been caused to either of the appellants. As for sentence, the trial magistrate having lumped counts 1, 2 and 3 together and counts 4, 5 and 6 together, each appellant will now serve five years' imprisonment.

The awards of strokes were incorrectly made. Omnibus sentences are not permitted: *R v Meyerowitz* (1947) 14 EACA 130 and *Mohamed Warsama, H T Musa Aboker, Bah Majelo v R* (1956) 23 EACA 576. The appellants were each ordered to "receive 15 strokes if medically fit". I set these orders aside; and in their place order that John will receive 6 strokes on count 2 and Raphael 6 strokes on each of counts 5 and 6, ie a total of 12 strokes. In so far as the order for police supervision is concerned, I direct that John's order be applied to count 2 and Raphael's to each of counts 5 and 6.

Appeals allowed in part.

Dated and delivered at Nairobi this 11th day of October 1979.

A.H SACHDEVA

JUDGE