



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CRIMINAL APPEAL NO 56 OF 1975

MWANGI MAHITA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted on 30th July 1971 of robbery. His appeal to the High Court was summarily dismissed on 3rd September 1971. He now appeals to this Court, time to do so having been extended. Mr Otieno for the appellant has argued a number of points. Firstly he submitted that the first appeal should not have been summarily dismissed, as the appeal was not brought on the sole ground that the conviction was against the weight of evidence, but raised specific grounds objecting to the fairness of the identification parade. We think that if the substance of the grounds of appeal, fairly looked at, amounted to no more than a submission that the conviction was against the weight of evidence, and that if the evidence was sufficient in the view of the first appellate judge, he was entitled to dismiss the appeal summarily: see *Osongo v Republic* [1972] EA 170. As to this, Mr Otieno for the appellant submitted that the identification parade was unsatisfactory and should not have been relied upon at all, because two suspects, of whom the appellant was one, were paraded at the same time with twelve other people. Mr Otieno, relying on *R v Mwangi* (1936) 3 EACA 29 and *Mboche v Republic* [1973] EA 95, submitted that the parade was irregular, and that the first appellate judge should have appreciated this and not dismissed the appeal summarily.

Whether or not a parade is so irregular as to necessitate being disregarded is, in our view, a question of degree which has to be decided in the light of the circumstances of each case. In *Mwangi's* case, the parade consisted of three persons including the accused. In *Mboche's* case there were seventeen people on the parade, including six suspects. In this case, there were fourteen people, two of whom were suspects. This was an irregularity, but not in our view one which caused prejudice or was such as to require the evidence as to the parade to be excluded. In all the circumstances, looking at the grounds of appeal as a whole, we think that they amounted to no more than a submission that the conviction was against the weight of the evidence and that the first appellate judge was entitled to reject the appeal summarily.

Looking at the case independently, we are satisfied that the evidence against the appellant was overwhelming. He had a fair and careful trial and there are no merits in the appeal against conviction.

Mr Otieno then submitted that the sentence of twenty years' imprisonment passed on the appellant was based on a wrong principle, on the ground that where an armed robbery is planned, involving the use of a

weapon, the weapon can only be carried by one of the gang whose responsibility in the matter is not greater than that of the others. This is an ingenious argument and one which we would feel inclined to accept had the firearm not been used, or if had duly been fired to cause fear. In this case, however, the appellant deliberately fired the weapon, aiming at the complainant's head, causing two serious wounds to the head. We cannot say that the magistrate was wrong or erred in principle when, in sentencing the appellant, he said that he bore an added responsibility by reason of having wounded the complainant in the head, and in sentencing him to a heavier period of imprisonment than his co-accused. The sentence of twenty years' imprisonment was undoubtedly severe, but the offence committed by the appellant was a very serious one, and we cannot say that the sentence was based on any wrong principle.

The appeal is dismissed, both as regards conviction and sentence.

Appeal dismissed.

Dated at Nairobi this 27th Day of May 1976

E.J.E LAW

.....

VICE - PRESIDENT

A. MUSTAFA

.....

JUDGE OF APPEAL

J.S. MUSOKE

.....

JUDGE OF APPEAL