



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 170 OF 2014

BETWEEN

JOSPHAT ASHIUNDU.....1ST APPELLANT

OSCAR LIHANDA.....2ND APPELLANT

CHARLES MZEE.....3RD APPELLANT

SAMUEL OYONDI.....4TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal against Judgment, Conviction and Sentence of the High Court of Kenya at Kakamega (Muchemi & Chitembwe, JJ.) dated 3rd November, 2010

in

H.C.C.A. No. 115 of 2006)

JUDGMENT OF THE COURT

[1] This is an appeal by *Josphat Ashiundu* (1st Appellant); *Oscar Lihanda* (2nd appellant); *Charles Mzee* (3rd appellant) and *Samuel Oyondi* (4th appellant). The name of *Augustine Lihanda* appears on the cover of the record of appeal as one of the appellants. However, there is no memorandum of appeal filed by him and he did not attend the hearing of the appeal. Further, *Augustine Lihanda* was not one of the appellants in the High Court. The appellants in the High Court were the four appellants herein and in that order. It seems that the name of *Augustine Lianda* was inserted as an appellant by error.

[2] The four appellants were jointly charged with two others with eight counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. In addition, they were charged with one count of attempted robbery contrary **to section 297** of the **Penal Code**. The trial magistrate, *Hon. E. O. Obaga* (as he then was) summarised his decision thus:

“Count 1: - Accused one acquitted....

- Accused 2, 3, 4, and 6 convicted.

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Count 2: - Accused one acquitted

- Accused 2, 3, 5 and 6 convicted

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- Count 3:** - **Accused 1 acquitted**
- **Accused 2, 4, 5, and 6 convicted.**
- Count 4:** - **Accused 1, 2, 4, 5 and 6 acquitted**
- Count 5:** - **Accused one convicted**
- **Accused 2, 4, 5 and 6 acquitted.**
- Count 6** - **Accused one convicted**
- **Accused 2, 4 and 6 acquitted.**
- Count 7** - **All accused persona acquitted**
- Count 8** - **All accused persons acquitted**
- Count 9:** - **All accused persons acquitted.”**

The record does not show what happened to **Fredrick Anyika** – the 3rd accused at the trial. However, the record shows that he did not participate in the trial.

The 1st appellant herein was sentenced to death in count 5 and the sentence in count 6 was left in abeyance. The 2nd, 3rd and 4th appellants were sentenced to death in count 1 and the sentences in counts 2 and 3 left in abeyance. Upon appeal to the High Court, the appeal of all the appellants was dismissed. However, the appeal of the 1st appellant in respect of conviction for attempted robbery in count 6 was allowed.

[3] The following are the brief facts in respect of counts 1, 2, 3, 5 and 6 where convictions were entered.

On 10th November, 2004 **Javan Mukavale** (PW3) (complainant in count 1), (**Javan**) was in his house at Ilesi village. His wife **Lucy Mwanzi** (PW9) (complainant in count 2) and their children were in his house. The watchman **Kizito Ligono** was outside the house. At about 11.30 p.m., the couple heard their watchman scream. Then **Javan** heard a bang and people talking outside. They called his name and repeatedly told him to open the door. **Javan** who was in the bedroom took a torch and moved to the living room and opened the door. Seven people who were armed with pangas, iron bars, axes, rungas, whips and Somali swords entered into the house. One of them switched on electric lights in the sitting room. They demanded money from **Javan** and his wife. When **Javan** said he did not have money, he was taken to his bedroom which was searched. From the bedroom the robbers took Shs. 5,000/- from **Javan's** coat, shs 15,000/- from **Lucy's** purse and a mobile phone. After searching the bedroom, the robbers took **Javan** and **Lucy** to the living room where the fluorescent electricity tubes were still on. The robbers searched the rest of the rooms. They took a video deck. After about 30 minutes the robbers took **Javan** outside the house. The powerful security lights were on. The thugs led **Javan** to the neighbouring house of **Nathan Mukhwana (Shivega)** (PW2) (**Nathan**), the complainant in count 3. On arrival at his home, they forced **Javan** to call **Nathan** to open the door of the house. **Nathan** opened the door and **Javan** was pushed inside. **Nathan** was robbed of Shs. 2,000/-, a mobile phone, wrist watch and trousers.

[4] Thereafter, **Javan** and **Nathan** were led to a house of their neighbour, **Patrick Makanga**. The house had electricity and security lights at the gate. The robbers jumped over the gate but the owner refused to open the door. The robbers failed to break the door. After the robbers failed to gain access to the house, they whipped **Nathan** and broke his leg and they all ran away. **Javan** returned to his home and found his watchman lying unconscious with injuries on the head. The watchman was taken to hospital but he died while undergoing treatment.

[5] On 19th November 2004 at about 8.45 p.m., **Winslaus Indeche** (PW5) who was the complainant in count 5 went to close the gate of his home. As he was closing the gate, he was confronted by robbers who were armed with pangas, rungas and knives. They commanded him to go and call a neighbour **Peter Makotsi** to open his house. As he tried to resist, one of the robbers hit him with a panga below the nose and took his Kshs. 100 and a torch. Neighbours stated screaming and the robbers ran away. **Felix Chakava Wakukha** (PW4), a brother to **Indeche** confronted one of the thugs. The thug stabbed **Chakava** with a knife on the left shoulder near the neck. **Chakava** got hold of him and stabbed him on the eye and back. Members of the public went to the scene in answer to the screams and the robber was beaten by the members of the public and tied to a tree.

[6] On the following day, **APC Kennedy Kiverenge** (PW10) of Khaega Chief's camp and **P.C. John Koech** (PW15) of Divisional CID Kakamega went to the home of **Indeche** where they found the 1st appellant tied to a tree. The left eye of the 1st appellant was damaged and he had panga cuts on the head. He was taken to Kakamega District Hospital and the damaged left eye removed. The 1st appellant on interrogation mentioned the names of other accomplices including the 2nd, 3rd and 4th appellants and they were all arrested a few days later by **APC Kennedy Kiverenge** and other administration police officers.

[7] On 29th November, 2004, **IP Benedict Kemboi**, the Deputy DCIO Kakamega conducted several identification parades in respect of each of the appellants. The 2nd appellant (**Oscar Lianda**) was identified in the parades by **Javan Mukavale, Lucy Mukavale, Ramadhan Lodi** and **Nathan Mukhwana**. **Winslaus Indeche** was unable to identify him. The 3rd appellant **Charles Muzee** was identified by **Javan Mukavale, Lucy Mukavale, Felix Chakava, Winslaus Indeche** and **Ramadhan Rodi** were able to identify him. The 4th respondent **Samuel Oyondi** was

identified by *Javan Mukavale, Lucy Mukavale* and *Ramadhan Rodi*.

On 7th September 2005, *IP Benedict Kemboi* conducted identification parades in respect of *Josphat Ashiundu*, the 1st appellant. Those identification parades are not relevant as they do not relate to the counts in which the 1st appellant was convicted.

[8] The 1st appellant testified at the trial that on 19th November, 2004, at about 7 pm he was walking from Shinyalu to his home. At Likhobero, a man came running from the front and hit him and he became unconscious. He regained consciousness in hospital on the following day when his eye was removed. He denied that he mentioned any names to police and denied committing any offence.

The 2nd appellant testified at the trial that he was arrested on 20th November, 2004 and subjected to identification parades where four people whom he had seen earlier identified him. He stated that he protested but was forced to sign the identification parade forms; that *Ramadhan Rodi* knew him from childhood and if he had seen him at his home he could have reported to police; that he was later charged in court and joined with the co-accused who included his brother *Augustine Lihanda*.

The 3rd appellant stated that he was arrested on 20th November, 2004 and later identified at identification parades by two people who had seen him before. Lastly, the 4th appellant stated at the trial that he was arrested on 24th November, 2004 by an AP from Khayega AP's camp and taken to Kakamega police station; that after two days, identification parades were conducted where two people who had seen him at the police station on the previous day identified him and that *Ramadhan Rodi* who picked him knew him before.

[9] As already stated, the 1st appellant was convicted only on counts 5 and 6. In convicting the 1st appellant, the trial magistrate made a finding that he, the 1st appellant, was stabbed at the scene of robbery; that the police picked him from the scene of the robbery; that the clothes that the 1st appellant wore on the material night were produced as exhibits and were full of dry blood which must have come from the stab wounds he sustained and that the defence of the appellant was an afterthought and a lie.

The High Court dismissed the 1st appellant's appeal against the conviction and sentence in count 5 and made a finding that the 1st appellant's defence did not dislodge the prosecution evidence, particularly that he was arrested at the scene of the crime. As already stated, the conviction of the 1st appellant in count 6 was quashed.

[10] The 2nd, 3rd and 4th appellants were convicted only for robbery in count 1, II and III. As already stated, the complainants in those counts were *Javan, Lucy* and *Nathan* respectively. In respect of the robbery at *Javan's* house, the trial magistrate made a finding that there were electricity lights in *Javan's* house; that *Javan* and *Lucy* took time with the robbers as they exchanged words; that there were powerful security lights outside the house. As regards the robbery at *Nathan's* house, the trial magistrate made a finding that when the robbers took *Javan* and *Nathan* to *Patrick Makanga's* house; there was electricity in *Patrick's* house and security lights at the gate. The trial magistrate concluded:

"...I find that the conditions obtaining at the time of robbery in counts one, two and three were conclusive (*sic*). The 2nd, 4th, 5th and 6th accused were subsequently picked out in a properly conducted I.D. parade"

On appeal to the High Court, the High Court considered the prosecution evidence and the respective defences of the 2nd, 3rd and 4th appellants. In respect of the 2nd appellant, the High Court made findings thus:

"From the prosecution evidence, we are satisfied that the 2nd appellant was positively identified by the complainants. There was light from fluorescent light at PW2's house and both PW3 and PW9 identified the appellant at an identification parade. We do find that the identification was proper and the conviction is safe. The conditions for identification were positive. The witnesses had ample time to identify the appellant and there was enough light during the robbery"

As for the 2nd and 3rd appellants, the High Court concluded:

"Similarly, the 3rd and 4th appellants were positively identified by PW2, PW3 and PW9. The robbers took some time with PW2 and PW9 and there was enough light in their house. The two witnesses PW2 and PW9 also identified the appellants at an identification parades conducted by PW13, Inspector Benedict Kemboi. The evidence of PW2, PW3 and PW9 is sufficient to sustain the conviction. The appellants were identified by witnesses and we do find that the identification is free from error."

[11] The 1st appellant filed a memorandum of appeal containing six grounds. The 1st appellant complains in essence that the first appellate court failed to observe that the evidence of identification was not watertight and also failed to appreciate that the appellant's defence of alibi was never challenged by the prosecution evidence. Similarly, the 2nd, 3rd and 4th appellants each filed a memorandum of appeal. Later *Richard Onsongo*, an advocate filed a memorandum of appeal on behalf of the 2nd, 3rd and 4th appellants. He also filed written submission at the hearing of the appeal. *Ms. Onsongo* instructed by *Richard Onsongo* appeared for all the four appellants and stated that the written submissions also covers the appeal in respect of the 1st appellant.

[12] The grounds of appeal relied on by counsel for the appellants fault the High Court for failing to re-evaluate the evidence; failing to consider the serious contradiction in the prosecution case; relying on inadmissible evidence and failing to take into account the defence of each appellant.

The appeal of each appellant is opposed. *Mr. Kakoi* the Principal Prosecuting Counsel filed written submissions. In support of the ground

that the High Court failed to re-evaluate and re-analyse the evidence, counsel for the appellants submitted that the High Court did not consider the evidence of *APC Kennedy Kiverenge*; that the evidence that the 1st appellant mentioned his accomplices was a confession which was improperly admitted in evidence; that the identification parades were not conducted in accordance with **Force Standing Orders** as *IP Benedict Kemboi* did not testify as to where he got the members of the parades and whether the members were of similar age, height, general appearance, and class of life of the suspects; that other than *Javan*, none of the witnesses told the police that they could identify the suspects and that none of the prosecution witnesses identified any of the appellants for purposes of being arrested.

[13] We have considered the appeals. It is true that *APC Kennedy Kiverenge* testified that upon arrest, the 1st appellant mentioned the names of his accomplices. However, the trial magistrate made a finding thus:

“this evidence is not admissible against the 2nd, 4th, 5th and 6th appellants. Had the 1st accused repeated the same alleged confession in court, then it would have been a different case altogether.”

It is clear that this evidence was discounted by the trial magistrate. It was also not considered against the appellants by the High Court. It is evident from the analysis of the evidence by the two courts below and from their respective conclusions that the conviction of the appellants was based on the evidence of visual identification by the witnesses and not on the alleged confession.

[14] It is also true that *IP Benedict Kemboi* did not give detailed evidence of how he selected the members of the identification parades. However, he stated that he signed the parade forms “*as having complied with all the procedures*”. The identification parade forms used in the identification parades are in the prescribed police form 156. Paragraph of the prescribed form states:

“CERTIFICATE BY THE OFFICER CONDUCTING THE PARADE –

I conducted the whole of proceedings in connection with the parade and I certify that the instructions on identification parades were strictly complied with and that as far as possible, the persons taking part in the parade were of similar age height and general appearance as the suspect.”

This certificate is signed by *IP Benedict Kemboi*. The 2nd, 3rd and 4th appellants each signed the identification parade forms indicating that each was satisfied with the conduct of the parade. None of them raised any questions as to the membership of the identification parades.

None of the appellants stated as a matter of fact that any member did not qualify “for purposes of identification parade”. In the circumstances, we find that the unquestioned certificate by the officer conducting the parades was sufficient evidence that the persons taking part in the parade were of similar age, height and general appearance as each appellant.

[15] As to whether or not witnesses mentioned that they could identify the suspects, *Nathan* (PW2) said that he identified three suspects including the 2nd appellant (*Oscar Lianda*) and the 3rd appellant (*Charles Muzee*). *Javan* testified that he identified five of the robbers. These included the 2nd, 3rd and 4th appellants in this appeal. In his evidence, he described the role played in the robbery by the 2nd, 3rd and 4th appellants in this appeal. *Lucy* testified that she identified four robbers who include the 2nd, 3rd and 4th appellants in this appeal. She also described the role of some of them during the robbery.

Other than the 1st appellant who was arrested near the scene of the robbery, the 2nd, 3rd and 4th appellants were arrested by the police in the course of investigations and later subjected to identification parades where *Javan*, *Nathan* and *Lucy* identified them as some of the robbers.

[16] In conclusion, the conviction of the 1st appellant was dependent on credibility of the evidence of *Chakava Indeche*, *APC Kennedy Kiverenge* and *PC John Koech* that he was stabbed and arrested at the scene of one of the robberies and found by the police there tied to a tree on the following morning. His defence that he was stabbed while walking on the road at night was rejected. The conviction of the 2nd, 3rd and 4th appellants was dependent on visual identification by three witnesses. It is noteworthy that the evidence of identification or the circumstances of identification of each appellant by each of the three witnesses at the time of the robbery was not directly or specifically challenged in this appeal. However, there were concurrent findings of fact that the conditions for identification were favourable and each of them was positively identified at the time of robbery and also in properly conducted identification parades. The records of the proceedings show that the trial magistrate considered the evidence of visual identification carefully and in fact rejected the evidence in six counts.

The High Court re-evaluated the evidence and made a finding that the conditions for identification were favourable and that the 2nd, 3rd and 4th appellants were positively identified by the three complainants. The defences of the 2nd, 3rd and 4th appellants were considered and disbelieved. We find that the concurrent findings of fact were supported by credible and cogent evidence and that the appeals have no merit.

[17] The appellants also appeal against the sentence of death. This Court has applied the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2012] eKLR** in essence that the mandatory death sentence in **section 204** of the Penal Code is unconstitutional to mandatory death sentence for robbery with violence under **section 296(2)** of the Penal Code and attempted robbery with violence in **section 297(2)** of the Penal Code. The effect is that the death sentence for robbery with violence is a discretionary maximum punishment (see **William Okungu Kittiny v Republic, Court of Appeal Kisumu Criminal Appeal No. 56 of 2015 – [2018] eKLR; Daniel Gichimu Githinji & Another v Republic [2018] eKLR**).

However, the robberies in this appeal were aggravated. The robberies were committed by several people who were armed with various lethal weapons. A watchman was killed in a most cruel manner and *Nathan*, *Chakava* and *Indeche* were cut with pangas. In the circumstances, the sentence of death was the appropriate sentence.

For the foregoing reasons, the appeal of each appellant is dismissed in its entirety.

We so order.

Dated and Delivered at Kisumu this 27th day of June, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.