



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G.B.M KARIUKI, AZANGALALA & SICHALE, JJ.A)**

**CRIMINAL APPEAL NO. 168 OF 2014**

**BETWEEN**

**JAMES MURIGU KARUMBA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi*

*(Mbogholi & Achode, JJ.) dated 25<sup>th</sup> July, 2013*

**in**

**H.C.CR. A No. 33 of 2007)**

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**JUDGMENT OF THE COURT**

1. This is a second appeal against the appellant's conviction and sentence for the offence of robbery with violence. As such we remind ourselves of the parameters of our jurisdiction as a second appellate Court by dint of **Section 361** of the **Criminal Procedure Code** is consideration of only matters of law. This Court restated as much in **Karingo -vs- R (1982) KLR 213** at p. 219;

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”***

2. The salient facts of this case are that Abdi Kanyero Aden (PW1) (Abdi) dealt with the sale and transport of sand. On 7<sup>th</sup> March, 2005 at around 1:00 p.m. he was approached by some people who made inquiries about the cost of sand; one of them requested for his mobile number and called him at around 7:00 p.m. informing him that he would pass by the following day to purchase sand. The following day at around 11:15 a.m. the said person called Abdi again and told him he was coming for the sand. However, 15 minutes later another man showed up and informed Abdi that he had been sent to collect the sand which was to be transported to Kiganjo.

3. Abdi instructed four turn boys, namely, Martin Maina Mwangi (PW2) (Martin), Simon Mwangi Kamau (PW3) (Simon), Peter Muasya Kanyamu (PW4) (Muasya) and Peter Mutua Kimeu (PW5) (Mutua) to load 28 tonnes of sand onto a lorry registration number KAP 860P. Abdi drove the said lorry to Kiganjo in the company of the said man and the four turn boys. The man directed Abdi to a construction site where there were about eight men. Abdi stopped the lorry and the said man alighted with Mutua in order to show him where to offload the sand. Immediately, Mutua was whisked by a man armed with a gun to the back of the construction site while two other armed men ordered Abdi, Martin, Simon and Muasya out of the lorry and also took them to the back of the construction site. They were tied up and ordered to lie facing down. They were later forced to ingest four tablets each which made them groggy and ultimately unconscious. Upon regaining consciousness they realized the robbers had made away with the lorry; Kshs. 28,000/= and a mobile phone make Nokia 3310 belonging to Abdi; Kshs. 3,800/= and a mobile phone make Sagem belonging to Mutua; Kshs. 400/= belonging to Muasya and Kshs. 500/= belonging to Martin.

4. They reported the incident to the police and subsequently, the appellant and three others were arrested. The appellant was identified as one of the robbers by Abdi, Mutua and Muasya from an identification parade conducted by IP Jennifer Kibunga (PW6). The appellant and his three co-accused were arraigned and jointly charged with four counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

5. The particulars of the charges were that on 8<sup>th</sup> March, 2005 at Kiganjo in Thika District within the then Central Province, the appellant and his co-accused jointly with others not before the court, while armed with dangerous and offensive weapons to wit pistols, robbed on the first count, Abdi Kanyere Aden a lorry registration number KAP 860P make Mercedes Benz, cash Kshs. 28,000/= and a mobile phone make Nokia 3310 all valued at Kshs. 3,734,500/= ; on the second count, robbed Peter Mutua Kimeu cash Kshs. 3,800/= and a mobile phone make Sagem 930 all valued at Kshs. 6,800/= ; on the third count, robbed Peter Muasya Kanyumu cash Kshs. 400/=; on the fourth count, robbed Martin Maina Mwangi cash Kshs. 500/= and at the time of such robbery used actual violence to the said Abdi Kanyere Aden, Peter Mutua Kimeu, Peter Muasya Kanyumu and Martin Maina Mwangi.

6. At the close of the prosecution case, the trial court found that only the appellant and one of his co-accused had a case to answer and acquitted the other two. In his defence the appellant gave a sworn statement denying the charges against him maintaining that he had been framed. He testified that there was a grudge between Abdi and himself over a certain lady known as Amina. He was arrested on 4<sup>th</sup> April, 2005 while in the company of the said lady and was kept in custody for three days without knowing the charges against him. He later participated in an identification parade where he was identified by Abdi, Mutua and Muasya allegedly as one of the robbers who robbed them. He challenged the manner in which the identification parade was conducted on ground that the three witnesses knew him well. He also testified that after his arrest Muasya visited him at Kamiti prison and told him to pay Kshs. 60,000/= so that Abdi would drop the case against him.

7. Faced with the foregoing evidence the trial court convicted the appellant on all four counts and acquitted the remaining co-accused. The appellant was sentenced to death. Aggrieved with both his conviction and sentence, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 25<sup>th</sup> July, 2013. Unrelenting, the appellant has filed the appeal before us complaining that the first appellate court erred in law by-

- ***Finding that the identification of the appellant was accurate and free from error.***
- ***Failing to properly re-evaluate the evidence.***
- ***Failing to consider the appellant's defence.***

8. Challenging the identification evidence, Mr. Paul M. Nyaga, learned counsel for the appellant, submitted that it was imperative for the prosecution to adduce evidence as to the mode of identification; in this case the prosecution was not clear on whether the identification of the appellant was through

identification of a stranger or recognition or whether there was need to conduct an identification parade. He argued that since the witnesses knew the appellant the identification parade was of no value. Further, the identification parade flouted the police standing orders in that Muasya (PW4) was informed by the police that the appellant had been arrested prior to him participating in the parade and the members of the parade were not of similar physical attributes. He faulted the first appellate court for failing to consider that the appellant had been seen by the witnesses prior to identification parade.

9. According to Mr. Nyaga, the prosecution's case was riddled with inconsistencies; initially Muasya was hesitant to admit that he had gone to Kamiti Prison despite the fact that the visitors' register produced by the prison officials indicated he had been there to visit the appellant. To him that piece of evidence gave credence to the appellant's defence. He urged us to allow the appeal.

10. Miss Maina, a Learned Senior Public Prosecution Counsel, in opposing the appeal submitted that the identification evidence against the appellant was safe and free from error. She argued that Abdi, Muasya and Mutua positively identified the appellant.

11. We have considered the record, submissions by counsel and the law. It is not in dispute that the stolen items were never recovered and the only substantial piece of evidence against the appellant was that of identification. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In *Wamunga –vs- R (1989) KLR 424*, this Court held at page 426 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 the basis of a conviction.”***

12. Both lower courts made concurrent findings that the appellant had been positively identified by Abdi, Muasya and Mutua as one of the robbers. The means by which the appellant was identified was through an identification parade. As was succinctly put by this Court in *Patrick Muriuki Kinyua & Another –vs- R (2015) eKLR*, the purpose of an identification parade is to test the accuracy of identification of a stranger by a witness. This Court in *Calvins Peter Omondi Owayo –vs- R [2010] eKLR* expressed;

***“This Court has had occasion to emphasise the utility of a properly organized identification parade, stating as follows:***

***„The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -***

***... it is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade,***

***it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who***

*perpetrated the alleged crime.*

*Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:*

*“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -*

.....

*(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;*

.....

*(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;...”*

13. Taking into account the evidence on record, on our part we doubt whether the identification evidence was safe to warrant the appellant’s conviction. We say so because firstly, we are unable to comprehend the basis upon which the identification parade was conducted since there was no evidence whether any description of the assailants was given by the witnesses in their initial report. P.C Cleopas Muteti (PW12), the investigating officer, testified that the officer who was first to arrive at the scene was one IP Joseph Torotich; the said officer never indicated in his statement whether the witnesses could identify the assailants. Furthermore, the said IP Torotich was never called as a witness by the prosecution. In *Kariuki Njiru and 7 others –vs-R (2001) eKLR*, this Court emphasizing on the need for careful scrutiny of identification evidence, stated:-

*“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See R. vs. Turnbull (1976) 63 Civil Appeal R.132). Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in *Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996 (unreported)* held that:-*

*„If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence?.”*

14. Secondly, the probative value of the parade was further compromised by the fact that Muasya, one of the identifying witness, testified that the appellant was the only tall person in the parade hence conspicuously dissimilar to the other members of the parade. See *Jatani –vs- R [1993] eKLR*. Thirdly, it appears from the record that it was suggested to both Muasya and Mutua prior to them taking part in the

identification parade that the appellant was one of the assailants’.

Muasya in cross examination stated,

***“In my statement I have said I was told by Abdi that accused 1 (appellant) was with the customer.....***

***Abdi recorded a statement earlier. I had seen him before I came to record a statement.”***

He also testified that,

***“I went to pangani police station for an ID parade. I went with the investigating officer. I was told you (appellant) were arrested.”***

On his part Mutua in his examination in chief testified that,

***“I was told that the customer is the 1<sup>st</sup> accused (appellant) in court.”***

In *Jackson Oluoch & another –vs- R [1984] eKLR*, this Court observed,

***“Besides, PW 5, one of the identifying witnesses was, according to his evidence, told: „to identify the people who robbed me on August 6, 1982? the witness could reasonably take that to mean that persons who robbed him were at the parade and that therefore all he had to do was to pick them. The value of the parade as evidence was therefore considerably depreciated. R v Mwangi s/o Manaa [1936] 3 EACA 29. It is dangerous to suggest to an identifying witness that the person to be identified is believed to be present on the parade Rex v Lulatikwa s/o Kabaile alias Rutahba s/o Kasese [1941]8 EACA 46.”***

15. Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value. See this Court’s decision in *Juma & Another –vs- R (2003) KLR 386*.

16. We also cannot help but note that there were inconsistencies in the prosecution’s case. These inconsistencies included the alleged role the appellant played in the robbery. Abdi testified that the person who posed as a customer was one of the appellant’s co-accused who was later acquitted while Mutua testified that he was informed that the appellant was the one who posed as a customer. During cross examination Muasya denied that he had visited Kamiti prison wherein the appellant had been detained and only admitted the same when the visitors register from the prison evidencing the same was availed. Further, Abdi vehemently denied that there existed a grudge between the appellant and himself, however, Mutua alluded to the said dispute in his cross examination by saying,

***“I heard there is a dispute between you and Abdi over a woman called Amina.”***

As to whether the inconsistencies were curable under **Section 382** of the **Criminal Procedure Code** depends on the circumstances of this case. With regard to the inconsistencies the trial court despite acknowledging that the prosecution witnesses had contradicted themselves in one manner or another found them to be truthful. We disagree with the findings of the trial court because, in our view, the inconsistencies went into the credibility of the prosecution’s witness and to the core of the case against the appellant, that is, whether he was positively identified.

We are guided by this Court’s decision in *John Nyaga Njuki & 4 others –vs-R[2002] eKLR* this Court held,

***“But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden***

***squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”***

17. All these factors we have mentioned above were not properly appreciated by the two courts below and show that reasonable doubts exist about the credibility of the prosecution case regarding the identification of the appellant. On the whole, we find that the case against the appellant was not proved beyond reasonable doubt and we can only agree with the sentiments of this Court in ***Suleiman Juma alias Tom – v- R (2003) eKLR***, that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight.

18. Consequently, we allow the appellant’s appeal, quash his conviction and set aside the sentence imposed on him. We direct that he be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nairobi this 29th day of July, 2016.***

***G.B.M. KARIUKI***

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***JUDGE OF APPEAL***

***F. AZANGALALA***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**