IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (P), OUKO & J. MOHAMMED JJ.A)

CRIMINAL APPEAL NO. 73 OF 2007

BETWEEN

DOUGLAS SILA MUTUKU ……. ……1ST APPELLANT

JOHN MUTUA MUTUKU …… 2ND APPELLANT

NZOMO KYANGE MUINDE ……... 3RD APPELLANT

AND

REPUBLIC …… RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Machakos of Kenya at Machakos (Ojwang' & Sitati JJ) dated 18th day of May 2007

in

HCCRA NO. 99 OF 2003)

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JUDGMENT OF COURT

The three appellants, Douglas Sila Mutuku (Mutuku) Nzomo Kyangi Muinde (Nzomo) and John Mutua Mutuku (John) were charged jointly with two others, Aslam Maingi Mulu (Aslam) and Mutua Ndunda (Ndunda) with six counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code and one count of malicious damage to property contrary to **Section 339 (2) (b)** of the Penal Code. John and Mutuku separately faced alternative charges of handling stolen goods contrary to **Section 322 (2)** of the Penal Code, while Nzomo was also charged alone with the offence of preparation to commit a felony contrary to **Section 308 (2)** of the Penal Code. There is information on record that both Aslam and Ndunda died at some point before the High Court rendered its decision.

It was the prosecution case at the trial that on 4th April 1999 a gang of 10 robbers struck a party that was travelling to Mombasa after a burial in Nyanza and whose motor vehicle had broken down near Athi River in the middle of the night. The gang, armed with *pangas*, *rungus*, knives and stones broke into the motor vehicle and robbed the passengers of their personal effects including cash, shoes, clothes and watches. It is further alleged the appellants used actual violence on their victims during the robbery.

At the scene of the robbery, only two prosecution witnesses, Margaret Aoko Ogutu, (PW1) and Daniel Okumu Oyaya (PW2) testified that they were able to identify some of the robbers. Margaret PW1 maintained that she was able to identify Aslam and Ndunda while PW1 testified that he clearly saw Mutuku and was able to pick him out at a police – mounted identification parade. The evidence linking the 2nd appellant (Nzomo) with the robbery was presented by PW3 and PW4, both of whom were night watchmen guarding Daystar University. They heard noises from the main road and shortly saw Nzomo carrying a brief case and upon seeing them he took to his heels. They gave chase and caught up with Nzomo who they arrested and took possession of the brief case. In the brief case were sharp chisels which are used by highway robbers to puncture vehicles in order to rob travelers.

The other piece of evidence incriminating Nzomo is the statement under inquiry recorded by I.P. Peter E. Sitini (PW8) to the effect that Nzomo admitted taking part in the robbery. There is yet the evidence of P.C. Benjamin Muli (PW6). PC Muli testified that on 5th April 1999 (the next day) at 6am following the robbery as he travelled in a police land rover towards his place of work at the Toll Station along the highway he noticed two suspicious-looking men standing by the roadside carrying a bag and briefcase. But before he could do anything the two boarded a Kenya Bus Service a (KBS) vehicle. P.C. Muli stopped the bus, searched and arrested the two men who he identified as Mutuku (1st appellant) and John (the 3rd appellant). All the appellants denied involvement in the robbery in their defence.

While both the 1st and 3rd appellants confirmed that they were arrested for no apparent reason while travelling in a KBS bus in Athi River, the 2nd appellant, on his part reiterated the evidence of the two Daystar University watchmen on the manner of his arrest.

The learned trial magistrate (P.C. Tororey, SRM) after considering the evidence presented before her held that:-

> **"Accused 1 and accused 3 were found with stolen goods identified by PW1 and PW2. Accused 2 identify (sic) was recovered from the bus attacked (sic) and he was arrested with tools used in continuing (sic) highway robbers. He admitted having been involved with others among them accused 3 whose name was given in his statement under inquiry. PW1 and PW2 identified some of the persons in court as having participated in the robbery. No evidence of an identification parade was however held (sic) by the prosecution. Thus looking at the circumstances under which the accused persons were arrested, the exhibits they were found with, identification by the witnesses of the same as theirs and identification of the accused persons as having committed the offence, I find that the prosecution have proved their case beyond all reasonable doubt and do convict each of the accused as charged in count 1 – count VI."**

With that, the learned magistrate proceeded to sentence the appellants and the 5th accused person to death. She however found no evidence to support the charge in count VII – malicious damage to property, as the driver of the damaged motor vehicle was not called. She, however found the 2nd appellant guilty and convicted him of the offence charged in count VIII – preparation to convict a felony.

The appellants' appeal to the High Court was dismissed, the Court (Ojwang' J. as he then was and Sitati, J) finding that:-

> **"……from the foregoing analysis of the trial court's decision and from the lines of thought we have already expressed, we have no doubt at all that each of the appellants was properly identified as the robbers who attacked the complainants and their fellow passengers on the night of 4th April 1999 along the Nairobi – Mombasa Road, robbing them of their belongings while acting as a dangerously-armed gang contrary to Section 296 (2) of the Penal Code (Cap 63). We therefore dismiss the appeals by the three appellants…….but set aside the conviction in respect of the 8th count, as it is apparent to us that the third appellant when arrested, had**

already gone past the stage of preparation to commit an offence."

The appellants now come to us by way of a second appeal praying in their Memorandum of Appeal filed by Ondieki & Ondieki Advocates that the decision of the High Court be set aside, conviction quashed and death sentence imposed be set aside. The appeal is brought on 13 grounds which Mr. Ondieki, learned counsel for the appellants clustered into seven grounds and submitted as follows:-

i. That the evidence of identification was unsafe as the light in the motor vehicle was not sufficient being night time the robbers being strangers to the victims.

ii. The statements by the two watchmen purporting to be a confession by the 2nd appellant and the statement under inquiry were improperly admitted; that I.P. Peter Sitini who recorded the statement also investigated the crime contrary to well-settled practice . Citing **Njuguna s/o Kanyuru V. Republic** [1921] EACA Vol. 16 counsel submitted that this was highly prejudicial to the 2nd appellant.

iii. That the arrest, trial and conviction were based on mere suspicion; that nothing was recovered from the appellants which belonged to the victims of the robbery; that it was therefore erroneous to rely on the doctrine of recent possession.

iv. That the trial court shifted the burden of proof to the appellants.

v. That the High Court failed to re-evaluate the evidence on record especially the evidence of identification.

vi. That the appellants were not given opportunity to offer mitigation, and

vii. That their defence were not considered.

Mr. Kivihya learned counsel for the respondent in opposing the appeal submitted that although the attack was at night, the lights in the bus enabled the two key witnesses PW1 and PW2 to identify the appellants as their assailants; that as a rule of prudence it is unwise for a police officer who is involved in investigations to record statements under caution. On the facts of this case, learned counsel submitted that no prejudice was occasioned.

We have said before and it bears repeating, that the jurisdiction of this court on second appeal, in terms of **Section 361 (1)** of the Criminal Procedure Code is confined to consideration of issues of law and it is not the function of this Court to go into a fresh re-evaluation and re-assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was infact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence. See **Hassan Odhiambo Kalameni V. Republic** Criminal Appeal No. 228 of 2002.

The issue of identification is central to this appeal as it was at the trial, in view of the appellants' respective *alibi* defences and on the evidence that the attack took place at night. Of the two eye witnesses, PW1 was only able to identify the 4th and 5th accused persons both of whom are deceased. PW5 was candid that he was not able to identify any of the attackers. That leaves the evidence of PW2. As we approach this question, we remind ourselves of the rule of practice enunciated firmly now that such evidence must be tested with the greatest care especially where, like here, the conditions favouring a correct identification may be difficult, in which some other independent evidence will be necessary to corroborate the evidence of a single witness. See **Abdalla Bin Wendo V. Republic** 20EACA 166. With the help of the light in the cabin of the vehicle, 10 strangers enter the vehicle. Out of the 10 he was able to identify the 1st appellant because, in his own words, he "*stood out*". The witness described the 1st appellant as follows:-

> **"He wore a sweater that appeared black and had a patch in the front. He was standing outside demanding money from people inside the bus. I can identify him before court. It is the 1st accused…….. This whole episode took about 5 – 10 minutes."**

In cross-examination he went on to explain that:-

> **"I was able to see you from the lights coming in the bus (sic). You were standing next to the mini-bus…….I was in the dark and I could see you clearly because of the lights from the bus……. As you stood in one place making it easier for me to study you."**

Subsequent to the robbery, PW2 was able to pick out the 1st appellant in an identification parade. In addition, there is evidence that on the morning following the robbery PW6 arrested the 1st appellant together with the 3rd appellant carrying a brief case, a bag and a camera which were identified by the victims as having been stolen from them that very morning. The two appellants were unable to give an account of these items. They did not even mention them in their defence.

Applying the holding in **Abdallah Bin Wendo** (supra) and the doctrine of recent possession to the facts in this appeal, we find that there was sufficient corroborative evidence lending support and credence to the evidence of PW2. Although none of the witnesses identified the 3rd appellant, the fact that shortly after the robbery, he was found in possession of some of the items stolen from the victims there is a rebuttable presumption of fact under **Section 119** of the Evidence Act, that he was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of those items.

From all these, we are ourselves satisfied that both courts below correctly found no evidence that the 1st and 3rd appellants participated in the robbery. We, however, find that both courts committed the following errors. The appellants were jointly charged as we have said with six counts of robbery with violence. The trial court found them guilty and convicted each one of them on all the six counts. The learned trial magistrate then proceeded to impose the death sentence.

The High Court on its part dismissed the appeal and reaffirmed the sentence of death as pronounced by the trial court. Of the six complainants allegedly robbed in the six counts, only three testified. PW1 Margaret Aoko Ogutu testified in respect of the charges in count VI, PW2 Apollo Omondi Adara in count V. No evidence was led with regard to counts I, II, and III. This goes to show that had the learned Judges of the High Court subjected the evidence to fresh analysis they would have found no basis to confirm conviction on the three counts.

Secondly, it is now a settled practice that it is inappropriate and clearly impracticable to sentence a person to suffer death more than once. Both courts below ought to have ordered the sentences on the other counts to be held in abeyance and only be given effect if the first death sentence is, for whatever reason set aside on appeal.

We now turn to consider the evidence against the 2nd appellant. The only evidence against the 2nd appellant is that of the two watchmen and the statement under inquiry. The two watchmen arrested the 2nd appellant on suspicion that he was involved in the theft of gauge valve of the water pipes for Daystar University which they were guarding. When he was arrested, it is alleged that he was found with a brief case whose contents were sharp chisel that he *"confessed"* that the chisel is used in causing punctures to motor vehicles on the highway. Also in the brief case was a sweater.

We observe that the motor vehicle in which the complainants were travelling in had a mechanical breakdown and not a puncture. Secondly, none of the complainants claimed ownership of the brief case or the sweater hence the doctrine of recent possession was inapplicable. On the statement under inquiry the common position is that PW8 I.P. Peter Sitini who took the statement from the 2nd appellant was also involved in the investigations of the crime charged.

A statement under inquiry must be distinguished from a statement under charge and caution. The latter is recorded when the police have enough evidence and have decided to charge the suspect with the offence. Statement under inquiry on the other hand is in form of inquiry into an alleged crime where the police believe that the suspect may be connected with the crime or has useful information regarding it. It follows that a statement under inquiry precedes the taking of a statement under charge and caution.

But whether a statement is taken under charge and caution or under inquiry, the Judges Rules must be complied with. Although it has long been held (in **Anyangu & Others V. Republic** [1968] EA 239 and **Israel Kamukolse & Another V. Republic** [1956] that it is undesirable for the investigating officer to record a statement under charge and caution but not a statement under inquiry in order to avoid the danger in the officer including in the statement matters he may have gathered in the course of his investigations, it is for precisely those very reasons that we ourselves think that that rule should extend to statements obtained under inquiry.

For the reasons that the High Court did not re-evaluate the evidence against the 2nd appellant, which falls below the threshold of a criminal trial, we allow the 2nd appellant's appeal and order that he be set at liberty forthwith unless lawfully detained.

The appeal by the 1st and 3rd appellants respectively is dismissed.

Dated at Nairobi this 24th day of January 2014.

P. KIHARA KARIUKI

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PRESIDENT,

COURT OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

/mgkm