



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)**

**CRIMINAL APPEAL NO. 161 OF 2010**

**BETWEEN**

**DANIUM OLUOCH Alias MZEE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction, judgment, decree, order, or as the case may be)*

*of the High Court of Kenya at KAKAMEGA (Justice CHITEMBWE, J.)*

*dated 24th March, 2010*

in

(HCCRA NO. 53 OF 2006)

\*\*\*\*\*

**JUDGEMENT OF THE COURT**

The appellant, **Danium Oluoch**, together with five others, were charged in the Chief Magistrate's court at Kakamega with eleven counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. They all denied committing the offences, but before any witness took the witness stand, the 1<sup>st</sup> accused escaped from custody. The trial then proceeded with the prosecution calling no less than twenty (20) witnesses.

At the close of the prosecution's case, the trial court found that all the accused persons had a case to answer and put them on their defence. At the end of the trial however, the trial Magistrate (**E.O. Obaga SRM**) found that the prosecution had not proved, beyond any reasonable doubt, any of the offences against the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> accused persons. He therefore acquitted them and set them at liberty unless otherwise lawfully held but he found that the prosecution had proved, beyond reasonable doubt, counts **1, 2, 3, 4, 5, 6, 8, 9 and 11** against the appellant who was the 3<sup>rd</sup> accused and also against the then 2<sup>nd</sup> accused and sentenced them to death.

The appellant and the then 2<sup>nd</sup> accused, **Leonard Irungu**, were aggrieved and therefore moved to the High Court vide High Court **Criminal Appeal No. 53 of 2004**. The Appeal was heard by **Said**

**Chitembwe** and **F.N. Muchemi JJ.**, who, after hearing it, allowed the appeal of the then 2<sup>nd</sup> accused person who at the High Court was the 2<sup>nd</sup> appellant. The learned Judges of the High Court however, dismissed the appellant's appeal against conviction and sentence with respect to only one count (**count v**) but allowed his appeal with respect to the rest of the counts.

The appellant still felt aggrieved and has moved to this court on a second appeal. Since the prosecution has not preferred any appeal against the appellant's acquittal in respect of the rest of the counts, we shall confine ourselves to the appellant's appeal against his conviction on the said count five. The count carried the particulars that:-

1. **Rashid Makokha**
2. **Leonard Irungu**
3. **Danium Oluoch Alias Mzee**
4. **John Damugo Matoka**
5. **Fredrick K. Olato Muguti**
6. **Stephen Boro:-** “ on the 30<sup>th</sup> day of May, 2004 at Standkisa stage in Vihiga District within Western province, jointly, with others not before court while armed with dangerous weapon (sic) namely Pistols robbed Anderson Rakama Mobile phone make Nokia 3510, cash 1,200/= a bicycle, one bag containing clothes and wrist watch all valued at Kshs. 16,000/= and immediately before or immediately after such robbery threatened to use actual violence to the said Anderson Rakama”

As we have already stated, the appellant pleaded not guilty but after a full hearing the learned Senior Resident Magistrate (**E.O. Obaga**) found him guilty, convicted him and sentenced him to death. His appeal was dismissed by the High Court as already stated and hence this second appeal premised upon nine (9) grounds. Those grounds, in our view, raise only two issues of law namely; failure of the learned Judges of the High Court to re-evaluate the evidence presented before the trial court and confirming the conviction of the appellant on evidence of identification which identification was not positive.

**Mr. Anyumba**, learned counsel for the appellant, addressed us at length and referred us to various discrepancies in evidence of prosecution witnesses which, in his view, discredited the identification of the appellant and which were not discussed by the judges of the High Court in their judgment.

For the respondent, **Mr Abele**, the Learned Assistant Director of Public Prosecutions, conceded the Appeal on the ground that the basis of confirming the conviction of the Appellant by the learned Judges of the High Court was improper. In counsel's view, the learned Judges of the High Court incorrectly found that the appellant had been positively identified at an identification parade when the relevant parade evidence was not availed.

Before considering the twin issues raised in this appeal, we think a brief account of the background facts will suffice.

On the night of 29<sup>th</sup> May, 2004 **Daniel Muli Kingoo (PW13) (Muli)**, who is a driver by profession, was assigned bus number KAR 893 L by his employer to ferry passengers from Nairobi to Kakamega. The bus was christened “**Easy Coach.**” He set off at about 8.00 p.m. Among his passengers were the complainants in this case namely: **Mary Musambi (PWI) (Mary)**, **(Joseph Shamalla (PW2) (Shamalla)**, **Julia Ashiundu (PW3) (Julia)**, **Margaret Lunani (PW4) (Margaret)**, **Everlyne Jiandi (PW5) (Everlyne)**, **Judith Njeri Andole (PW 6) (Judith)**, **Joseph Kipketer Ruto (PW7) (Ruto)**, **Silvanus Wabomba (PW8) (Wabomba)**, **Abdul Kadir Bakari (PW9) (Bakari)**, **Eda Wendo (PW11) (Eda)** and **Anderson Mavisi Rakama (PW12) (Rakama)**. The journey was uneventful for most of the night until the bus reached Standkisa after 3.00 a.m. One passenger indicated to Muli that he wished to alight and Muli stopped the bus. The passenger did not alight but instead ordered Muli to drive towards Kilingili which was off the main Kisumu/Kakamega highway, but before he turned the passenger ordered him to let in some people from outside. He obeyed and the people entered the bus. The bus set off on the Kilingili route. In the interim and as Muli drove the bus towards Kilingili, the new entrants and about three people who had travelled as passengers in the bus from Nairobi, commanded passengers to look down, frisked

them and robbed them of valuables. Mary lost Kshs. 3,000/= and a box containing clothes; Shamalla lost a brief case which contained personal documents, a cash sum of Kshs.2,000/= and a jacket; Julia lost a watch and Kshs. 400/=; Margaret lost Kshs. 300/=, a mobile phone and a wrist watch; Everlyne lost a wrist watch and a wallet in which was her ID and cash sum of Kshs. 800/=; Judith lost clothes and a wrist watch; Ruto lost a wrist watch and cash sum of Kshs. 12,500/=; Wabomba lost a mobile phone, Bakari lost a wrist watch, a cap and cash sum of Kshs. 5000/=; Eda lost 3 dresses a pair of shoes, spectacles and cash sum of Kshs. 800/= and Rakama lost a wrist watch, a mobile phone, a bicycle and clothes all valued at Kshs. 18,000/=. According to all complainants the thugs were armed; some of them even had pistols and guns and threatened violence on them. Some passengers were indeed beaten. When the thugs were satisfied with their loot they commanded Muli to drive back and report to the police if he felt like it. As Muli drove back to the police as he felt like it. The thugs remained behind. As Muli drove back, Mary, whose mobile phone had escaped the eyes of the thugs, telephoned Kakamega Police. Muli drove to Mbale Police Station where a report of the robbery was made and witness statements were recorded. The bus was then released and the passengers went to their respective destinations.

On 1<sup>st</sup> June, 2004, **C.I Kahiga Wagura (PW14)** was the duty officer at Busia Police Station when he was informed that there was bus registration Number **KAQ 696 P** with suspicious characters and because of the suspicion, the bus had been driven to the police station. Chief Inspector Wagura mobilized police officers within the station to carry out an inspection of the bus and the passengers. The team entered the bus and Chief Inspector Wagura, alerted the passengers of police suspicion and ordered all passengers to raise their hands and keep still. Cpl Wagura claimed he then saw the passenger on seat No. 8 bend down upon which he bounced on him and on checking, found a pistol and a knife beneath seat No. 7 and seat No. 9. The team then arrested the passengers of seat Nos.7 and 8 who were charged at Busia Magistrate's Court with being in possession of the pistol and the knife. The record does not have the results of that case. C.I .Wagura testified that the passengers who were in the said seats were the appellant and the then 2<sup>nd</sup> accused respectively. It is not clear, from the record, how, the appellant and the 2<sup>nd</sup> accused were then taken to Kakamega police station but from the testimony of Chief Inspector **Josephat Rotich (PW20) (“the Investigating officer”)**, police officers from Busia police station on 1<sup>st</sup> June, 2004 informed Kakamega police officers of the arrest of the appellants and an identification parade was mounted by Inspector Kemboi on 3<sup>rd</sup> June, 2004 at which, according to the investigating officer, the appellant was identified. The appellant was then charged as already stated.

In his defence, given on oath, the appellant contended that on 31<sup>st</sup> May, 2004, he travelled from Nairobi to his Siaya home to visit his ailing brother but found that he had been admitted to Tanaka Hospital in Busia. On 1<sup>st</sup> June, 2004, in the company of his mother he visited his brother at the said hospital and then booked the night bus for Nairobi that evening. At about 7.00 p.m the bus set off, but instead of driving to Nairobi drove to Busia Police station. According to the appellant, a search was carried out in the bus but no weapon was recovered therefrom. Later however, the police officers ordered passengers who were occupying seats numbers 5, 6 ,7 and 8 to rise up. They took the appellant to Busia police station where they interrogated him about a pistol. He denied ever owning a pistol. Despite his denials, he was arrested and later transferred to Kakamega police station where an identification parade was mounted at which six witnesses identified him. He protested at the identification parade because, he claimed, the witnesses had seen him prior to the identification parade. He denied involvement in any robbery.

The learned trial Magistrate, in his judgment dated 18<sup>th</sup> May, 2004 found the appellant guilty as already stated and sentenced him to death on the first count but left the sentences on the other counts in abeyance. In convicting the appellant the learned Senior Resident Magistrate rendered himself as follows:-

**“ The 3<sup>rd</sup> accused was picked by 10 witnesses at a parade conducted by PW 10 Inspector Benedict Kemboi.**

**All the ten witnesses who picked out the 2<sup>nd</sup> accused as listed hereinabove, are the ones who also picked out the 3<sup>rd</sup> accused.**

*The identification parade conducted in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> accused was properly conducted in accordance to (sic) chapter 46 of the Force Standing orders. The 2<sup>nd</sup> and 3<sup>rd</sup> accused did not make any comments as shown in exhibits 2 (a) and*

*2 (b) .....*

*.....*

*.....*

*The defence of the 2<sup>nd</sup> and 3<sup>rd</sup> accused amounts to an alibi  
.....*

*The 2<sup>nd</sup> and 3<sup>rd</sup> accused did not give their alibi defence at the earliest opportunity.*

*I find the 3<sup>rd</sup> accused not truthful in his defence”*

The learned Judges of the High Court (**Chitembwe and Muchemi, JJ.**) in dismissing the appellant's appeal, stated:-

*“ PW 20 testified that other parades were conducted by IP Kemboi and IP Naomi of Kakamega Police Station.*

*However these officers were not called to testify and produce the parade forms. In the absence of parade identification, a charge of robbery with violence cannot stand. This is a case where the witnesses did not know the suspect before the incident.....*

*The magistrate convicted the two Appellants in counts I, II, III, IV, VIII, IX, and XI in absence of this crucial evidence.....*

*For this reason we find that the said convictions cannot stand.....*

*We hereby quash the convictions against both Appellants in respect of counts I, II, III, IV, V, VI, VIII, IX, and XI.*

*As for count V, the parade officer (PW 18) testified and produced the parade form. The parade was done in accordance with **section 46** of the Police Standing Orders.*

*Identification in respect of this charge was positively done in regard to the first appellant.*

*The first appellant was rightly convicted on count V and we hereby uphold the conviction. The 1<sup>st</sup> appellant is accordingly sentenced to death.”*

The bits and pieces of the judgment delivered by the two courts below reproduced above clearly show that the appellant was convicted mainly because he was identified at an identification parade properly conducted by **IP Kemboi**. We have perused the record and observe that the said officer testified as PW 10. He indeed mounted an identification parade in which the appellant participated. However, the witnesses who identified him at the parade were **Shamalla, Judith, Muli Bakari, Mary, Jenifer, Julia, Margaret, Ruto, and Allan**. Save for Allan the witnesses were complainants in counts **2, 6, 4, 3, 7, 8, 11, and 9** respectively. It will be noted that those were the counts in respect of which the convictions of the appellant were quashed by the High Court Judges as the above citation from their judgment shows. The trial court had already acquitted the Appellant of counts 7 and 10.

The only count upon which the appellant was convicted by the High Court was count 5 in which the

complainant was **Anderson Mavisi Rakama (PW12)**. This witness claimed he participated in an identification parade where he identified the 3<sup>rd</sup> and 6<sup>th</sup> accused persons at the trial. It is undisputed that the 3<sup>rd</sup> accused was the appellant herein and the 6<sup>th</sup> accused was **Stephen Boro**. The complainant Anderson was however not one of the witnesses identified by any of the parade officers who testified at the trial as having identified the appellant at any of the identification parades, certainly not **Chief Inspector Naomi Echam (PW 18)**. That witness, according to the record, mounted an identification parade in respect of **Leonard Irungu**, the 2<sup>nd</sup> accused person at the trial and the 2<sup>nd</sup> appellant in the appeal before the High Court. The parade was not in respect of the appellant herein as the High Court Judges erroneously found.

The basis upon which the High Court confirmed the conviction of the appellant was therefore erroneous. This would suggest that the learned Judges of the High Court may not have been alert to their cardinal duty to re-analyse and re-evaluate the evidence which was adduced before the learned trial magistrate. The identification of the appellant as one of the robbers was in the circumstances not without error. The twin issues raised by the appellant therefore have substance. Mr. Abele therefore, in our view, rightly conceded this appeal. We allow the appeal, set aside the order of the High Court dismissing the appellant's appeal, quash the conviction and set aside the sentence by the trial magistrate. The appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2014.**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**