



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU, J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 147 OF 2005

BETWEEN

STEPHEN NDUNGU MAINA APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng, J.) dated 3rd June, 2004

in

HC. CR. A. 1343, 1344 & 1345 of 1999)

JUDGMENT OF THE COURT

This appeal was readily conceded by the respondent through **Mr. Jacob Ondari**, Senior Assistant Deputy Public Prosecutor. That notwithstanding, this Court is not bound by such concession. It is duty bound to carefully evaluate the issues of law upon which the appeal is premised and arrive at its own decision.

The brief facts of the case that gave rise to this appeal were that the appellant, **Stephen Ndungu Maina**, together with 13 other accused persons, were charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 18th day of February, 1997 along Moi Avenue, Nairobi, the appellant jointly with others not before court, being armed with dangerous weapons namely, firearms, robbed Joseph Chepkurui Chepkinyeng of **Kshs.96 million** and at or immediately before or immediately after the time of the robbery threatened to use actual violence to the said Joseph Chepkurui Chepkinyeng. The appellant and his co-accused were tried for the said offence but only three of them, that is, the appellant who was the 2nd accused, the 1st and the 6th accused were convicted and sentenced to death as by law prescribed.

Being dissatisfied with that conviction and sentence, the appellant preferred an appeal to the High Court. The High Court dismissed the appeal and confirmed the conviction and sentence. The appellant made a second appeal to this Court and filed a memorandum of appeal by himself. Shortly before the hearing of this appeal, **Miss Betty Rashid** came on record for the appellant and filed a supplementary

memorandum of appeal which raised five grounds as follows:

- “1. That the learned judges of the superior court erred in law and fact in affirming the conviction and sentence of the appellant without subjecting the whole evidence to a fresh and exhaustive analysis as they are mandated to do.**
- 2. That the learned judges of the High Court erred in law and fact in affirming the appellant’s conviction and sentence when the provisions of Section 207, 200 and 214 of the Criminal Procedure Code had not been complied with.**
- 3. The learned judges of the High Court erred in law and fact in affirming the conviction and sentence on the evidence of a single identifying witness whose evidence was not credible.**
- 4. That the learned judges of the superior court erred in law in affirming conviction and sentence on the basis of extraneous issues introduced into judgment but not tendered in evidence.**
- 5. That the learned judges of the superior court erred in law in affirming conviction and sentence on the basis of among other issues on identification under difficult circumstances in the strong room and parade that failed to conform to non-provisions of the law and which had been discredited as regarded 5th accused person.”**

Although the prosecution called over forty witnesses, the conviction of the appellant was largely based on the evidence of a single identifying witness, **Esau Joseph Omedo, PW2.**

Joseph Kipkikeng Chepkerui, PW1, together with **PW2** were Central Cash Managers (Custodians), of the strong room, Standard Chartered Bank, Moi Avenue Branch. PW2 testified that on the material day, he reported for duty at about 7.15 a.m. The door to the bank was opened for him by some security officers. PW2 had bought a newspaper and sat down at his desk to read the same before beginning his day’s work. As he was reading his newspaper, one of the security officers walked into the bank and removed some padlocks from a drawer. The padlocks were wrapped in a piece of khaki type of paper and were to be used in the strong room. After the security officer removed the padlocks, PW2 heard him speaking on the telephone in Kalenjin language.

Suddenly, two people walked in. One of them went directly to PW1 and pointed a gun at him. The other one approached PW2 and ordered him to remove his gun. PW2 told him that he had no gun. The intruder then ordered PW2 to raise up his hands, remove his jacket and lie down with his face to the floor. The shaken banker promptly complied with the said orders. PW1 was also lying down in the same manner. The two were ordered to stand up and at gun point were pushed downstairs to the strong room and ordered to open the same lest they be shot dead. PW1 and PW2 complied. The two robbers, who had now been joined by others, proceeded to empty all the money that was in the strong room into several bags. All that time when the robbery at the strong room was going on, PW1 could not see properly what was going on and this is what he stated:

”I couldn’t see because the safe is on the side and I was being held facing the front with the head a bit tilted....the safe was next to me. I heard the sound of polythene bags (these sold on the streets of 5 or 10/=) being opened. A man was standing next to me at the side. He opened them. I then heard the sound of money being dropped in polythene bags.... I was in that position for about 30 seconds while the money was being removed from the safe and loaded to the sacks..... After they finished loading the money I was told not to lift my head from where it was lying. I heard their footsteps disappearing upstairs. I then heard Chepkurui saying let me see if they have gone. I remained lying down. PW1 checked out. He found they had gone. I stood up when while at the door Chepkurui told me that they had gone.”

Shortly after the robbers left, the bank’s security team together with the police walked in and PW1 and PW2 narrated what had taken place. On the following day PW1 and PW2 were interrogated by the

police and later released.

An identification parade was done on 30th April, 1997. The witness purported to have identified accused numbers 5 and 8 as well as the appellant. However, PW1 was unable to identify any of the robbers. PW2 said the entire robbery, that is, from the time the robbers entered the bank to the time they left, lasted about seven minutes.

The appellant was arrested on 17th April, 1997 at Voi. At the time of arrest, he had **Kshs. 36,000/=** in his pocket and his brief case contained **Kshs.130,231/=** and **Tanzanian Shillings 38,500**. He told the police that on 18th February, 1997 when the robbery was done he was in Taveta town. The appellant is a businessman and owned a lorry registration number **KVX 483 Isuzu DX** which he used for carrying cows from the border town of Taveta for sale in Mombasa. He also used to buy and deal in Tanzanian shillings. Regarding the aforesaid lorry, the appellant told the Court that although he had lawfully purchased the same from one Githenji, a brother to its former owner who had passed away, the family of the former owner had maliciously reported to the police at Voi and Nairobi that the lorry had been sold to him unlawfully. He was therefore arrested at Voi together with Mr. Githenji who had sold the lorry to him. The arrest was effected by the D.C.I.O, Voi, and the lorry towed to the police station. He was then ordered to surrender the lorry to the family of the late owner but he protested and produced all the documents to prove that the lorry was lawfully his. The police were not persuaded and warned him that if he did not co-operate he would be in bigger trouble.

The appellant also owned some residential properties at Voi from which he was collecting rent. The appellant also owned a shop at Eastleigh, Nairobi, and three rental rooms. He had employed his son and his sister in the said shop and they used to keep the daily sales overnight in one of the rooms before banking the same on the following day. After his arrest, the appellant was taken to Nairobi and when the police searched his shop and the residential rooms they found **Kshs.199,000/=** which he said was part of the sales.

Commenting on the money which he was found in possession of, the trial magistrate said that it could not by itself point to his participation in the robbery and that he could have easily earned it from the business he was doing. The learned magistrate categorically stated that:

“It is therefore only on the evidence of identification of accused 2 by PW2 that proves that accused 2 was at the scene. If he took part of the 96M, it is yet to be found where it is hidden. No foreign currency was recovered on him.”

What was the evidence on identification that was relied upon by the trial magistrate to convict the appellant? The trial magistrate stated that there were favourable circumstances that enabled PW2 to positively identify the appellant. The trial magistrate delivered herself thus:

“PW1 gave similar evidence to PW2 but PW1 said he was not able to identify any of the people. PW2 on the other hand said he identified accused number 2 as one of the robbers. He testified that accused 2 was the one who was getting the money from the safes in the strong room and stuffing the same in the gunny bags. That it was accused number 2 who held PW1 by the collar as they were led to the strong room. He was behind accused 2 as he was also held by the collar by a second man so that accused 2 was immediately in front of him. Would one say this was sufficient time to make a definite identification? Were these circumstances conducive to mistaken identification?

In my view I believe the circumstances were conducive to a perfect identification of the second accused. When one is being held by the collar from behind one may not easily see the person holding him/her from behind. But someone immediately ahead of the person is easily identifiable. It is not impossible for one to cast glances to the left and to the right and even to the back as he pushed the man he is holding. In those circumstances a perfect identification can be made but this was not the only time PW2 saw accused 2.”

Miss Betty Rashid, learned counsel for the appellant, submitted that the learned judges of the High Court failed to carefully analyze the evidence that had been tendered before the trial court and arrive at their own independent conclusion. If they had done so, she stated, they would have realized that the evidence of identification adduced by PW2 was totally inadequate to sustain the appellant's conviction. She added that the trial court did not warn itself of the danger of convicting on the evidence of a single identifying witness.

Regarding the appellant's identification by PW2, the appellant's counsel submitted that prior to the holding of the identification parade, PW2 had not given the police an appropriate description of the appellant. The only relevant evidence in that regard given by PW2 was in the following words:

“I don't remember the number of policemen who came. They were very many of them also other members came downstairs. They filled the corridors wanting to know what had happened to us. The policemen questioned us. They wanted to know how the people looked like and how many they were. We answered and were told not to tamper with any of the surfaces where the robbers could have touched so they could take fingerprints.”

That kind of evidence was very casual and it cannot be inferred that it amounted to sufficient description of any of the robbers. In any event, the identification parade was held long after the occurrence of the robbery and the parade forms were also not produced before the trial court, counsel stated.

Further, Miss Rashid submitted that the evidence of PW2 could not be relied upon because he was himself a suspect who had been arrested and interrogated and later released. The evidence therefore ought to have been corroborated but there was no corroboration at all.

Miss Rashid further submitted that the learned trial magistrate had rejected the evidence by PW2 regarding identification of some other accused persons, like accused numbers 5 and 8 who were acquitted, yet the same discredited evidence was relied upon to convict the appellant. This is what the learned trial magistrate said in respect of identification of accused number 5 by PW2:

“However as regards the circumstances surrounding his identification of accused number 5, I find that they were not as perfect as those in the earlier identification. This is because PW2 was busy reading his newspaper when suddenly strangers walked in and ordered them to lie down. In that split second of looking up from the newspapers to see a man wielding a gun and ordering one to lie down and one immediately complying, there is hardly sufficient time to take stock of the appearance of a person to be able to identify him later. Therefore PW2 may have made a mistaken identification of the 5th accused.”

Counsel stated that the same circumstances that prevailed with regard to PW2's identification of accused number 5 were the very same ones that existed when the witness allegedly saw the appellant. Miss Rashid lamented that the learned trial magistrate employed double standards with regard to her findings concerning accused 2 (the appellant herein) and accused number 5.

Counsel further submitted that the learned trial magistrate erred in law in postulating an imaginary theory as to how PW2 could have possibly seen and recognized the appellant. Evidence on record showed that PW2 had been held by the collar and was being pushed downstairs and was not therefore able to see the person behind him or in front of him who was pushing PW1. She pointed out that while they were in the strong room PW2 had stated that he could only hear what was going on but could not see. She cited the case of **OKETHI OKALE & OTHERS vs. REPUBLIC** [1965] E.A. 155, where the predecessor of this Court held that:

“In every criminal trial, a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a

theory not canvassed in evidence or in counsel's speeches."

There is no evidence at all by PW2 that when he was being pushed downstairs by the robbers, the one who was holding PW1 by the neck did turn and look around as stated by the trial court. But even if the robber had done so, counsel added, it is doubtful whether in that split second PW2 would have looked at him keenly as to be able to remember his face two and a half months thereafter.

As earlier stated, Mr. Ondari conceded the appeal on three grounds:

- i. ***Insufficient evidence of the appellant's identification.***
- ii. ***Trial court's failure to consider the alibi defence advanced by the appellant.***
- iii. ***Shifting of the burden of proof by the High Court.***

Mr. Ondari submitted that the record does not show how long PW2 had to look at the appellant so as to distinguish him from some of the other accused persons who were acquitted on the basis that they had not been properly identified by the said witness. Regarding the appellant's defence, Mr. Ondari stated that the appellant gave an alibi to the effect that on 18th February, 1997 he was in Taveta and had been arrested at Voi on a totally different complaint. That was confirmed by the police officers who went to pick him up yet the arresting officer was not called as a witness. The appellant was found in possession of Kenyan money and Tanzanian currency and he gave a plausible explanation regarding his possession of that money. No Tanzanian currency was reported to have been stolen during the said robbery. However, the trial court did not give the appellant's defence any serious consideration.

Lastly, Mr. Ondari submitted that the learned judges of the High Court erred in law in stating that the appellant failed to call witnesses in support of his alibi defence. By so doing, they shifted the burden of proof to the appellant, which is contrary to the law.

We have anxiously considered the submissions that were raised by both Miss Rashid and Mr. Ondari in this appeal. We agree with counsel that this appeal turns on the evidence of identification of the appellant by PW2. The trial magistrate correctly stated that:

"It is therefore only on the evidence of identification of the accused by PW2 that proves that accused 2 was at the scene."

We must therefore consider whether there existed favourable circumstances for positive identification of the appellant by the said witness.

In **MAITANYI v REPUBLIC, [1986] KLR 198**, this Court held that although it trite law that a fact may be proved by the testimony of single witness, that does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially where it is known that the conditions favouring the correct identification were difficult. The Court must also warn itself of the danger of relying on the evidence of a single identifying witness.

In this appeal, PW2 was reading a newspaper when he was suddenly startled by some gun wielding robbers who ordered him to lie down with his face to the floor. He promptly complied. Shortly thereafter the robbers held him and PW2 by their respective necks as they pushed them from behind downstairs to the strong room where they were forced to open the safe. The witness was facing the wall when the robbers were removing the money and stashing it in gunny bags. He could hear what was going on but could not see. The witness saw the robbers for just a few seconds and he was obviously in a state of panic, with a gun pointed at him. It is doubtful whether in such a state of mind he was able to observe the appellant clearly and be able to identify him nearly two and a half months later when an identification parade was held. In **ROBERT GITAU v. REPUBLIC, Criminal Appeal No. 63 of 1990 (unreported)**, this Court stated:

"... evidence of identification should be tested with great care especially when it is known that the conditions favouring correct identification were difficult. The witnesses

who testified that they could identify the appellant in the circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant's face in the manner described by the witness. We are doubtful how the witnesses were able to identify the appellant in the identification parade.”

The observations by the Court in the above appeal can equally be applied herein.

PW2 did not tell the trial court whether there was any special or particular feature of the appellant which made him stand out. It is also noteworthy that PW2 had not given to the police any description of the appellant before he purportedly identified him. In **MOHAMMED ELIBITE HIBUYA & ANOR. v. REPUBLIC**, Criminal Appeal No. 22 of 1996 (unreported), this Court held that:

“... it is for the prosecution to elicit 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 and particularly to the police at the first opportunity. Both the investigating officer and prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation 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.”

This Court has stated time and again that such identification which is not preceded by any advance description of the person sought to be identified is worthless and cannot form the basis of a conviction. See **GABRIEL KAMAU NJOROGE v. REPUBLIC** (1982 – 88) KAR 1134.

We are satisfied that the uncorroborated evidence of PW2 could not sustain a conviction, given that there existed no favourable circumstances for a positive identification of the appellant. The theory that was advanced by the trial magistrate as to how PW2 could have seen the appellant is not backed by evidence and the same must be rejected.

Turning to the appellant's defence, this Court held in **WANG'OMBE v. REPUBLIC**, [1980] KLR 149, that if an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proving his guilty remains on the prosecution.

Before the trial court, the appellant, in a sworn statement of defence, stated that on the day of the alleged robbery he was in Taita Taveta near the border of Kenya and Tanzania where he used to buy cows. He also stated that he used to buy Tanzanian currency at the said border post and would sell them to Kenyan businessmen. He added that he was arrested on 17th of April, 1997 and that was confirmed by two prosecution witnesses. The reason for his arrest was a dispute regarding ownership of a lorry he had purchased from someone. He gave the police all the particulars of the lorry. In the circumstances, it was upon the prosecution to adduce evidence to show that the defence of alibi was false.

We agree with both Miss Rashid and Mr. Ondari that the learned judges' contention that the appellant failed to call witnesses to back up his alibi amounted to shifting the burden of proof to the appellant whereas such burden is always on the prosecution.

We think Mr. Ondari was spot on when he expressed his disappointment that some accused persons who had been found in possession of very large sums of money whose source could not be verified were acquitted by the trial court on what he termed as “technicalities,” yet the appellant herein was convicted without sufficient evidence.

We have said enough to show that the appellant's conviction was unsafe and Mr. Ondari's concession of the same was well considered. Consequently, we allow this appeal, quash the conviction by the trial court and set aside the death sentence that had been pronounced against the appellant. The

appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 19th day of July, 2013.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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