



**REPUBLIC OF KENYA**

**COURT OF APPEAL**

**AT MALINDI**

**CRIMINAL APPEAL 82 OF 2010**

**BETWEEN**

**ELIUD KAMAU NJUGUNA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a conviction, judgment, of the High Court of Kenya at Malindi (Omondi, Odero, JJ.)  
dated 17<sup>th</sup> March 2010*

*in*

***HCCRA NO. 21 OF 2009)***

**JUDGMENT OF THE COURT**

The appellant was convicted by Senior Resident Magistrate Malindi of seven counts of robbery with violence contrary to **section 296 (2)** of the penal code. He was sentenced to death in the first count. The sentences in the other counts were left in abeyance. His appeal to the High Court against conviction in six counts was dismissed. However the appeal against conviction in the second count was allowed. This is the second appeal.

The evidence relied on by the prosecution was straight forward. On 29<sup>th</sup> of October Swaleh Mbarak Said (PW1), (Swaleh) the complainant in the first count, was transporting ballast in his lorry registration NO. KAG 611Z from Garsen to Mnazini. He had been contracted by one Ahmed to supply the ballast at a building site. Swaleh was accompanied by the said Ahmed; Mohamed Gaffa (PW3) – complainant in count V who were in the cabin and Abdalla Komora Hiribae (PW2) complainant in count III, Juma Abio Galama (PW4) complainant in Count IV. Mohammed, complainant in count VII all seated on the ballast at the back on the lorry. Swaleh started the journey at about 7 p.m. The road was a murram road with potholes. On the way he saw a torch light coming from the bush about eight metres ahead. The torch light was then directed at the vehicle and Swaleh saw a person with a gun and stopped the lorry. The person with the gun proceeded to the driver's side and ordered Swaleh to switch off the light which he did. The occupants were then ordered to alight, lie down and drop down all what they had. They all obeyed the order. The gunman was accompanied by another person who was searching the victims.

The gunman after robbing the victims of all their properties ordered the victims to board the lorry and drive off. Swaleh was robbed of Shs. 17,950 and a driving licence. The other complainants were robbed

of various amounts of money. The robbery was immediately reported to Administration Police officers at a roadblock. On the following day the robbery was reported at Garsen Police Station. Later on the same day Mohamed Gaffa saw the appellant at Garsen seated outside Happy Family hotel and recognized him as the gunman who had robbed them on the previous night. He informed Swaleh and others and all of them confronted the appellant but the appellant, sensing danger, ran into the police station where he was arrested.

The case was investigated by I.P. Said Mwadzombo (PW2) the then Hola Acting District Criminal Investigating Officer. I.P Said Mwadzombo went to Garsen Police Station on 1<sup>st</sup> November 2006. He found the appellant already in police cells and interrogated him. Thereafter he sent for the complainants including Swaleh and caused their statements to be recorded.

On 2<sup>nd</sup> November 2006, an identification parade was conducted by Inspector Richard Mogire at Garsen Police Station where the appellant was allegedly identified by the witnesses. However IP Richard Mogire did not give evidence at the trial. The parade forms used by him were produced by I.P Said Madzombo at the trial.

The appellant gave sworn testimony at the trial denying the offence. He testified, among other things, as follows. He used to operate a kiosk at Muazini and that on the day he was arrested he had gone to Garsen to buy fresh stock of cassava. The supplier had no stock and told him to wait as he was expecting supply. As he was waiting at the Verandah of Happy Family Hotel one Ahmed Mohamed who was a neighbour at his business premises went to the premises but he did not speak to him. The appellant testified that the said Ahmed Mohammed had told him earlier that he would make sure that he closes his business as he used to sell food to Muslims during Ramadhan.

Later at about 4 p.m. a young man went to where the appellant was, sat near the appellant and accused the appellant of robbing him and others on the previous night. An argument arose and as they were both going to the police station six men armed with spades charged at the appellant and he ran into the police station.

The trial magistrate believed the evidence that the appellant was identified through headlights of the lorry at the time of the robbery. Regarding the defence of the appellant the trial Magistrate said in part.

*“His evidence was that he had differed with Ahmed Mohamed. The said Ahmed Mohamed is not a witness. The accused did not give an explanation as to why PW1, PW2, PW3, PW4, PW5 and PW6 would claim that he had robbed them if he had not and yet he had no grudges against them.”*

The High Court reconsidered the evidence and concluded:-

*“The appellant was placed at the scene by not one, not two but six (6) witnesses all of whom were able to Orecognize him as he was a person whom they had all known before. The circumstances, the full headlights from a vehicle which vehicle was moving slowly were in our view conducive for positive identification .....*”

Regarding the identification parade the High Court disregarded the evidence saying that it was superfluous since the witnesses knew the appellant before.

In the first ground of appeal the appellant complaint that the High Court failed to consider that the trial Magistrate had overlooked the first report made by complainants at Garsen Police Station which reports had not identified the appellant nor given his description. The appellant also complains, in essence, of the failure by the High Court to consider the circumstances of the identification.

In addition, Mr. Kitheka learned counsel for the appellant submitted that the witnesses were all coached and that investigations were done when the appellant had already been arrested. On his part Mr. Kemo, the learned Senior Principal State Counsel supported the conviction and sentence.

The prosecution case was dependent on the identification of the appellant. In considering whether or not the appellant was positively identified or recognized, it is the quality, rather than the quantity, of the evidence that counts.

The highway robberies were committed at night. The only source of light was from the headlights of the lorry in which the victims were travelling. Two of the six witnesses Swaleh and Mohamed Gaffa were seated at the cabin while the other four witnesses were sitting on the ballast at the back of the lorry. Swaleh who was driving switched off the lights immediately he stopped. He claimed that he had seen the appellant at Mnazini selling roast cassava on several occasions. In his evidence in cross-examination by the appellant the witness testified that he did not say in his statement that he had recognized the appellant and testified that he saw the appellant when he switched on the lights. On his part, Mohamed Gaffa who was also seated in the cabin testified that he used to see the appellant at Mnazini where appellant used to sell bread and that he even knew the appellant's name - Eliud. However, when crossed by the appellant he testified that he reported to police that they were robbed by an armed *shifita*; that he never told the police that he recognized the appellant, and that he did not mention the name of the appellant in his statement nor give his description.

Regarding the evidence of the other four witnesses who were at the back of the lorry, Abdalla Komora (PW2) testified, among other things, that the robbery took place at 8.30 p.m. and that the appellant was a bit far when he directed the torch light at the lorry. On his part, Juma Abio Galana (PW4) testified that when the vehicle slowed down the appellant jumped from the bush into the road and stopped the lorry. The evidence of Jamhuri Abaya (PW3) was materially inconsistent with the rest of the evidence in that he claimed to have heard a gunshot before he saw torch lights from the bush. He also testified that he saw the appellant when the lights were switched on. Lastly, Ali Mohamed (PW6) testified that the robbers appeared from the driver's side.

It is apparent from the evidence of the material witnesses that the circumstances of the robbery were not conducive to proper identification or recognition. It was at night. All the witnesses were inside a moving lorry in a bushy area and on rough road. Some witnesses say they saw the appellant at the middle of the road. Other witnesses said that the appellant emerged from the bush, jumped into the road, stopped the vehicle and told the driver to switch off the lights. One witness said that there was even a gunshot. Some other witnesses said that they recognized the appellant after the lorry lights were switched on. The witnesses who claimed to have recognized the appellant did not say so in their respective statements to police. One witness who claimed to have known the appellant by name did not mention his name in his statement to police.

The evidence relating to identification at the identification parade was properly rejected by the High Court. IP Richard Bosire who conducted the identification parades did not give evidence at the trial and in the absence of his evidence the parade forms produced by I.P Said Mwadzombo had no evidential value.

The witnesses who claimed to have recognized the appellant had seen and charged at the appellant before he fled to the police station. The statements of the witnesses were recorded a day after the appellant had been arrested.

Lastly, the High Court failed to appreciate that the trial magistrate had shifted the burden of proof by requiring the appellant to explain why the witnesses who had no grudge with him should implicate him in the offence.

All in all the High Court failed to evaluate the evidence sufficiently. Had it done so it would have appreciated that the circumstances for identification of the appellant were unfavourable; that quality of the evidence of recognition was poor, that there was no credible investigation as witnesses recorded statements after arrest of the appellant and that this was solely a case of dock identification of the appellant by witnesses who had seen him before arrest which evidence was wholly unreliable.

In the circumstances, we have come to the conclusion that the conviction of the appellant was unsafe. Accordingly, we quash the conviction in all the counts and set aside the sentence of death. The

appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 15<sup>th</sup> day of March 2012

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**