



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, BOSIRE & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 298 OF 2009

**BETWEEN
IBRAHIM KIGAME AGEVI**

JACKSON MAFWABI MAKOYEAPPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Bungoma (Mbogholi & Ochieng, JJ.) dated 19th February, 2009

in

H.C.C.R.A. NOS. 55 OF 56 OF 2009)

JUDGMENT OF THE COURT

This is a second appeal. The two appellants before us, ***Ibrahim Kigame Agevi*** and ***Jackson Mafwabi Makoye***, were, together with two others, charged in the Chief Magistrate's Court at Bungoma with two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. Jackson Mafwabi Makoye was further charged with another offence of handling suspected stolen property contrary to ***section 322 (2)*** of the Penal Code. In that court, Jackson Mafwabi Makoye was the first accused whereas Ibrahim Kigame Agevi was the third accused. The record shows that the fourth accused Onesmus Mbugi alias Njiru absconded before the trial proper started, leaving the two together with one Pius Ngutuku Khaemba, who was the second accused to face the full trial. The particulars of the first count were that:

“On the 25th day of November, 1999 at Bungoma Township in Bungoma District within Western Province, jointly with others not before court, while armed with a dangerous weapon namely AK 47 assault rifle, robbed Joseph Nderitu his motor vehicle registration number KAL 551X make Toyota Surf maroon in colour valued Kshs.2 million and at or immediately before or immediately after the time of such robbery used physical violence against Joseph Nderitu”.

In respect of the second robbery charge, the particulars were that:-

“On the 26th day of November, 1999 at Bungoma Township in Bungoma District within Western Province, jointly with others not before court, while being armed with a dangerous weapon namely AK assault rifle, robbed Jannefer Nderitu two blouses, twenty kilogrammes of sugar, one watch make Seiko 5, one clear tone lotion, one black long trouser, four compact cassettes and cash money Kshs.20,000/= the property of Jannefer Nderitu and at or immediately before or immediately after the

time of such robbery used physical violence to the said Jannefer Nderitu”.

After full trial, the court found the appellants guilty of the two robbery charges, convicted each of them and sentenced them to death. No comment was made on the count for handling suspected stolen property contrary to **section 322 (2)** of the Penal Code against Jackson Mafwabi Makoye and that explains why we have not set it out in this judgment. However, as it was an alternative court there was no necessity of making any finding on it. The appellants felt dissatisfied with the conviction and sentence entered against them. They each appealed to the superior court. Ibrahim Kigame Agevi was treated as the first appellant whereas Jackson Mafwabi Makoye was the second appellant. The appeals were consolidated and heard together. One of the grounds of the appeals before the superior court was that:-

“There was no proper identification parade as required by the Forces Standing Orders”.

In a judgment dated and delivered on 19th February, 2009 the superior court (Mbogholi Msagha and Ochieng, JJ.) dismissed the appeals stating on the issue of identification as follows:

“As the appellants were identified at identification parades, the appellants were not right to have asserted, as they did, that theirs was only dock identification.

We also find absolutely no grounds for the appellants’ contention that there were no proper identification parades. The appellants failed to demonstrate the manner, if any, in which the respective parades were improper”.

The two appellants still felt dissatisfied with the dismissal of their appeals, hence this appeal before us premised on supplementary memorandums of appeal filed on 17th February, 2010 by their advocate Gad K. Chemoiyai together with one ground amongst the home-made grounds of appeal filed by Jackson Mafwabi Makoye. Four grounds are raised in the supplementary memorandum of appeal filed on 17th February, 2010 and these are:

- “1. That the appellate Judges erred in law and in fact that the contents of the charge sheet with regard to the court file number and the proceedings court file number are different.***
- 2. That the appellate Judges erred in law and in fact in the charge sheet the date when the appellants were brought to court to answer the charges and the date stated in the proceedings that the appellants were brought to court to answer to their charges are different.***
- 3. That the appellate Judges erred in law and in fact by failing to consider that the police officer who conducted the identification parade did not testify and no identification parade report was adduced as evidence.***
- 4. That the appellate Judges erred in law and in fact by failing to consider that an identification parade was conducted when I (sic) had a plaster on my right hand which contradicts the provisions of the identification parade force Standing Orders”.***

The one ground relied on by Mr. Chemoiyai, the learned counsel for the appellants from the home-made grounds filed by Jackson Mafwabi Makoye was ground 6 and it stated:-

“That, the two courts below misdirected themselves in law and fact by failing to warn themselves adequately as to the risks of aims (sic) taken identification by the prosecution side”.

A brief summary of the facts giving rise to the appeal before us may be stated:

Joseph Nderitu (PW1) was at the relevant time operating a saw mill at Nyeri and Karatina towns while at the same time running a transport business. He had bought a tractor from Mumias Sugar Factory. On 25th November, 1999 at around 7.30 p.m., he was at Bungoma and had gone there to load that tractor onto a lorry which was near Marell Academy. He was with his sister Rose Nyawira (PW3) and their friend

Jennifer Nderitu also known as Jennifer Nyawai (PW2). They had gone there in Nderitu's vehicle registration number KAL 551X Toyota Surf. It was not possible to load the tractor on to the lorry at that spot near Marell Academy, so he moved the exercise to Total Petrol Station at Kanduyi. He got into his vehicle. Rose and Jennifer were in his vehicle. Before he started to go, he saw the tractor driver struggling. He left Rose and Jennifer in his vehicle to go and check what was happening. Before he reached the tractor it took off and followed the lorry to the Petrol Station. On returning to his vehicle, he found two people standing on each side of his vehicle. He checked those people and noted that one had a long coat, the second one had a jacket while the other two were casually dressed with one having a muslim cap. The person with a long coat produced a gun – an AK47. PW1 realized those men were robbers. He ran away leaving Rose and Jennifer in the vehicle of which door he left open. One of those men who had a gun chased him but only for a short distance. He ran to Bungoma Police Station where police officers in their car together with him tried to trace the vehicle in an attempt to intercept it and the thieves but in vain. Meanwhile, those men went into the vehicle, one, who Jennifer and Rose identified in court as Ibrahim Kigame, sat on the driver's seat. Rose who had been seated in the passenger's seat was forced to move to the back seat. They drove away with the two women. There is evidence that while in the vehicle, they talked to the two women and at one time they assured the two women that they would not injure them. They drove the vehicle along back roads and picked another person from one of the houses. That man was wearing a muslim cap. Thus, there were four attackers in the vehicle and two women Jennifer and Rose. After driving the motor vehicle for over one hour, they came to a bridge and stopped the vehicle as the vehicle had had an engine knock due to over heating. The men searched Rose and Jennifer. They took from them, Kshs.20,000/=, two leather jackets, one belonging to Jennifer and one to Rose. They also took three trousers, one blouse, skirt and sugar, motor vehicle radio cassette and thereafter abandoned the motor vehicle and the two women inside it. At about 6.00 a.m. a cyclist came by them. They asked him to go and call police for them. He agreed, went and called police. Police went to the scene and towed the vehicle to Kimilili Police Station where they made a report. Joseph was told the vehicle had been recovered and was at Kimilili Police Station. He went to Kimilili Police Station where he found the vehicle and the two women. Five days later, on 30th November, 1999, Cpl. Robert Nduruta (PW4) then of CID Bungoma together with other police officers acting on information, went to a kiosk built of mud which was about 1½ kilometers from Kimilili. They raided it at about 10.00 a.m. The kiosk had two rooms. In the first room, they found Jackson Mafwabi Makoye, the second appellant in this appeal. He was with his wife. In that room, the police officers found a black jacket. In the next room they found the first appellant, Ibrahim Kigame and Onesmas Mbugi who absconded at the commencement of the trial. First and second appellants led the police officers to Pius Ngutuku Khaemba, who died after lodging his appeal in the superior court but before the hearing of that appeal. All were arrested and taken to Bungoma Police Station. We note that Cpl. Robert said in evidence that when he went for the appellants and their colleagues, he knew that they had been involved in several cases of robbery including the relevant one. The police officers took the black jacket, the cap worn by the first appellant at the time he was arrested and other items, some of which were not relevant to the matter before us. Later, it would appear from the record that identification parades were organized for Joseph, Jennifer and Rose to see if they could identify their assailants. Each of the appellants was allegedly identified at that parade. One of those arrested, Ngutuku, is alleged to have given an inquiry statement to the police but that statement was not admitted by the trial court and is thus of no consequence here. They were thereafter taken to court and charged as aforesaid.

In their defence, the first appellant denied the offence saying he was framed up by Cpl Robert on grounds that on 23rd November 1999, he had refused to carry some items for him from Ndengelwa. The second appellant stated that he came from Mbale in Uganda to Bungoma to look for his estranged wife. Her mother told him the wife was at Kimilili. He went to Kimilili, found his wife selling items in her uncle's shop. Later at night as he was asleep police officers came and arrested him for the offence of being in Kenya illegally. They took him to Kimilili Police Station and was later taken to Bungoma Police Station and was charged with the aforesaid offences. He denied the offences.

We have reproduced the grounds upon which the appellants rely in this appeal. Mr. Chemoiyai, the learned counsel for both appellants highlighted those grounds whereas Mr. Oluoch, Senior Deputy Prosecution Counsel submitted that the convictions were proper in the circumstances of this case notwithstanding that the police officer who conducted the alleged identification parades at which both

appellants were identified by Joseph, Jennifer and Rose was not called as a witness and the parade forms were not produced as exhibits.

The grounds advanced in support of this appeal fall into two categories - namely that the entries in the charge sheet in respect of the case number and the date the appellants were taken to court are not the same as those in the proceedings. Secondly, that the evidence adduced at the hearing to support identification of the appellants as the perpetrators of the offences with which they were charged fell short of what is required to sustain a conviction, particularly as there were allegations of the appellants having been identified at identification parades whereas the officer who conducted the parades was not called as a witness and identification parade forms for such parades were not produced at the hearing of the case. We think, however, that connected to the issue of identification, there is also the issue of whether or not the appellants or any of them was found in recent possession of any property allegedly stolen from the victims.

In our view, the complaint based on the first category above cannot stand. The record shows clearly that *Criminal Case No. 2542 of 1999* was consolidated with *Criminal Case No. 163 of 2000* and that must have resulted in the difference between the number of the case in the charge sheet and that in the proceedings. This is clearly demonstrated by the fact that in the charge sheet before us there are three accused persons whereas in the proceedings there are four accused persons – Onesmus Mbugi alias Njiru is not featuring in the charge sheet whereas he is the fourth accused in proceedings. He may have been charged separately in the first instance. At page 7 of the record, the prosecution told the court:-

“We will consolidate this case with another already before the Court”.

Equally the difference in respect of the date when the appellants were taken to court as appears in the charge sheet and in the proceedings finds its explanation on the same scenario. We do not attach any importance to those differences as in any event, the appellants suffered no prejudice as a result of such differences. Whether the case was having a different number in the charge from that in the proceedings, the charges that were read to the appellants and to which they pleaded and upon which they were tried remained the same. Again, whether they were taken to court as per the date in the charge sheet or the date in the proceedings did not matter. What mattered was that they were taken to court and their trial proceeded as is recorded in the proceedings. These complaints were frivolous and ought not to have been raised.

We think the issue of identification is the main issue of law in this appeal. As Joseph, Jennifer and Rose, all stated that they had not seen the appellants prior to the incident, the appellants were thus strangers to them when the incident happened. Joseph said the robbery took place at 7.30 p.m. whereas Jennifer and Rose said they were attacked at about 7.00 p.m. Joseph’s evidence on identification was rejected by both courts and we think properly so. They were thus convicted on the evidence of identification by only Jennifer and Rose. These two women were with the appellants for a fairly long time, but still the police rightly found it necessary to have identification parades conducted to enable them point out their assailants. As we have said, that was the proper thing to do for otherwise, their evidence of identification would have remained that of dock identification only. The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless. In the case of *Njoroge v. Republic (1987) KLR 19*, this Court stated:-

“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade”.

In this case, it would appear that identification parades were conducted for Joseph, Jennifer and Rose to point out their assailants and they allegedly pointed out the appellants. Unfortunately, the police officer who conducted such parades was not called as a witness at the hearing and the parade forms were not

produced at the hearing. Thus it cannot be possible for a court of law seriously directing its mind to the issues before it, to, safely conclude that such parades met the standards of “*a fair parade*”. Indeed, in the record before us, Joseph said he saw eight people in the parade whereas Rose said the other participants in the parade were seven, meaning they were altogether eight after a suspect was added; if that were so then the requirement of a suspect to be placed among eight members of the parade was not met. Looking at the record, many aspects of the evidence on these parades could only be answered by the officer who conducted the parades and the parade forms. Thus that officer was a necessary witness for the prosecution in the entire case, for without him and the forms it could not be established as to whether the identification parades were fairly conducted. He was a witness that the prosecution needed to establish their case on identification beyond reasonable doubt. He was not called; with the consequence, that in our view, the evidence establishing identification of the appellants was not before the court. In the case of ***Bukenya & Others vs. Uganda (1972) EA 549***, the Court of Appeal for East Africa stated:-

“It is well established that the Director has discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

We, with respect do not share the view of the superior court that the identification of the appellants was otherwise than mere dock identification. In the absence of the officer who conducted the identification parade and the parade forms, nothing remained before court other than dock identification which is worthless. Conviction could not therefore proceed on that evidence alone.

First appellant was convicted on the evidence of that identification which we have held was no more than dock identification, together with evidence that a muslim cap that one of the attackers wore, was found in the house of Pius Ngutuku Khaemba. Indeed Jennifer said in evidence:-

“The motor vehicle moved following the back roads. A₂ (identified) was produced from a house. He was wearing a muslim cap.”

Rose also said the same on being cross-examined by Khaemba who was second accused in the trial court. Khaemba was arrested with that cap at a different place altogether and there is no evidence connecting that cap to the first appellant. It is therefore clear to us, that as to first appellant, the only evidence that was advanced against him was that of dock identification. As we have discredited that identification, the first appellant’s conviction cannot stand as it was not safe.

That however, is not the case with the second appellant Jackson Mafwabi Makoye. Against him there was added evidence and that was that the robbery took place on 25th November 1999. One of the items that Jennifer lost was a black jacket which she identified in court vividly as her jacket. On 30th November 1999, Cpl Robert stormed the first room of the Kiosk where he found the second appellant and in that room Jennifer’s black jacket was found. Second appellant was in that room with his wife only. The finding of a black jacket stolen from Jennifer during robbery gave an added dimension to the case against the second appellant. He was thus found in possession of recently stolen property. He never gave any explanation as to his possession of the property and thus he was the thief. In dealing with this aspect of the case, we are aware that though the trial court alluded to it and treated it as corroboration of the complaint’s evidence, the superior court made no reference to it at all. We are however, in law entitled to revisit it in cases where we find the first appellate court failed in its duty to fully analyse and evaluate the case afresh as is apparent here. In the case of ***Njoroge vs. Republic*** (supra) this Court stated:-

“1. It is the duty of the first appellate court to remember that the parties are entitled, as well on the questions of fact as on the questions of law, to demand a decision of the court and that court cannot

excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and it should make due allowance in that respect.

2. *If the first appellate court fails to carry out that duty, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Misdirections and non-directions on material points are matters of law.*

In this case, it was clear that the second appellant was found in possession of recently stolen property as we have stated. His conviction, was in our view proper and must stand.

In conclusion, the appeal lodged by the first appellant Ibrahim Kigame Agevi is allowed, conviction quashed and sentence set aside. He is set at liberty forthwith unless otherwise lawfully held. The appeal lodged by the second appellant Jackson Mafwambi Makoye is dismissed. Judgment accordingly.

Dated and delivered at Eldoret this 25th day of March, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR