



IN THE COURT OF APPEAL OF KENYA

AT NYERI
CRIMINAL APPEAL 121 OF 2009

BETWEEN

JAMES MUNENE KANYIAPPELLANT

AND

REPUBLICRESPONDENT

(An Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 11th May, 2009
in

H.C.CR.APP. NO. 20 OF 2008)

JUDGMENT OF THE COURT

In the trial court the appellant *James Munene Kanyi* was charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. He was convicted as charged and sentenced to death.

He filed the first appeal in the superior court against conviction and sentence but the appeal was dismissed hence the second appeal to this Court. In a homemade amended Memorandum of Appeal which the court accepted as a supplementary Memorandum of Appeal at the hearing, the appellant raised the following grounds:

- “1. That the (sic) High Court made an error in both law and facts by failing to (sic) put into account that as the identification, parade was conducted three weeks after the arrest whereas (sic) I the appellant had by then appeared in court and (sic) possibly of having been seen by the identifying witnesses highly existed.
2. That the High Court made a crucial error by (sic) withholding that the identification parade was conducted, in accordance with the laid down rules whereas the same was conducted contrary to the rules governing identification parade
3. That the High Court made an error in both law and facts by failing to observe that (sic) I the appellant’s arrest was quite unsatisfactory in that:
 - (a) Those members of the public who arrested me the appellant knew not what was happening and therefore lack of summoning them proves the fact that the arrest was unsatisfactory and unfair and unjustified.
 - (b) That nobody pointed a finger on whom to be arrested.

- (c) *That those who originally alleged to have been in the chase amongst them PW3 lost sight of whoever they were chasing when he descended on the other side of the hill hence occasioning a broken chain of evidence.*
 - (d) *Failure to summon those who effected the arrest rendered the case for the prosecution detrimental.*
4. *That the High Court made (sic) a crucial error in law by holding in their judgment that the lower court had met the criminal standard of proof whereas the case for the prosecution was absolutely not proved to the required standard needed in cases of this nature.*
 5. *That the High Court made a crucial error in law by holding that the identification parade could not be faulted because of PW1's request to have me the appellant stretch out my hand failing to bear in mind that as per the parade rules everyone in the parade ought to have been requested to do likewise.*
 6. *That the High Court made crucial error in law by holding that there was no doubt arising out of the evidence adduced at the lower court regarding identification whereas errors of law were too apparent."*

The appellant was represented by learned counsel Mr. Mugambi and the State was represented by Mr. Kaigai Senior Principal State Counsel.

In his submissions Mr. Mugambi stated that as the identification parade was conducted three weeks after the arrest and as the appellant had by that time appeared in court it is possible that the identifying witnesses could have seen him in court or at the police station. He further submitted that since the parade members were not changed in respect of each of the accused persons the conduct of the identification parade was not done as per the relevant Force Standing Orders. The learned counsel added that the other weak links in the identification of the appellant were the inadequate time which the complainant had when she was attacked at her clinic; the witnesses who claim to have chased the appellant before his arrest did lose sight of him when he went over the brow of the hill; the people who allegedly arrested him and handed him over to the police were never called as witnesses; in the identification parade the appellant was the only person in the parade who had a hand with a missing finger and that no attempt was made by the person who conducted the parade to conceal the deformity. Furthermore, learned counsel submitted that in the course of the parade itself PW1 as complainant had improperly demanded to see the hand of the appellant apparently to confirm the deformity in the finger before touching him, and finally that the complainant did not have sufficient time to identify the appellant during the robbery. Counsel wound up his submissions by citing several authorities touching on the conduct of identification parades.

In his brief address Mr. Kaigai conceded the appeal on four principal grounds namely, that after his arrest the appellant was taken back to PW1 and thereby exposed him, thus making his identification unreliable. Additionally in the conduct of the parade the person conducting it did not look for persons who looked identical to the appellant which factors reduced the value of the identification parade; and that the people who arrested the appellant on the other side of the hill were never called as witnesses. Finally the evidence of those who chased the appellant were suspiciously inconsistent.

Thus the estimated distance of the chase was variously given as ten kilometres, five hundred metres, while the third witness said it was two kilometers, whereas the complainant herself talked of three to four kilometres.

We have considered the grounds and submissions as outlined above. On the issue of identification we do not accept the appellant counsel's submission that the complainant did not have an adequate opportunity to identify the appellant who pretended to be an ordinary and genuine patient and who for this reason was accorded the usual time for consultation and examination. Indeed we take judicial notice of the fact that medical specialists do allocate sufficient time to listen to the problem of their patients and also to examine them so as to diagnose the illness. It is also important to observe that after the robbery the complainant (PW1) was immediately able to give the chasers the description of the appellant and they in turn embarked on the chase. Again although the actual interception of the appellant was done by members of the public who came from the other ridge they became involved in the interception itself because of the noise the chasers made as they chased the five or so robbers towards the opposite direction. In this regard **Mr. Samuel Mwangi** (PW2) who was one of the chasers testified to the effect that he was able to recognize the appellant whom they were chasing because he had a jeans trouser. He was also able to describe the appellant as the one trailing behind the gang of five and he also had a black bag which he dropped. The witness further recalled that the complainant had described the appellant as a person with one finger missing from his hand and further gave the distance between him and the appellant as about thirty metres during the chase. In addition although **David Muraguri** (PW3) gave the distance between himself and the appellant as five hundred metres he testified that he never lost sight of the appellant because he was at the forefront and they chased him for about one kilometre and throughout the chase he never lost sight of the appellant. He further described him as the person who dropped the bag, the person who was dressed in a jeans trouser and as also the person without one index finger on his right hand. In our view even with the momentary loss of sight due to the hill this could not seriously have disrupted the chasers or identifications because all the above witnesses could still identify him by the mode of dress after regaining his sight of him.

From the evidence of PW2 and PW3 there are striking similarities in terms of the description of the appellant. Moreover the appellant was also identified by **Mary Wambui** (PW4) during the identification parade and she had prior to the parade described the appellant's features to the police.

Concerning the description or inconsistencies in the varying distances of the chase the identifying witnesses particularly those who took part in the chase, we do not consider that it in any way weakens the prosecution evidence because in real life situations people do often come up with varying estimates of the same distances depending on their background, education, intelligence and the ability to assess distances.

Again we find no substance in the attack directed at the conduct of the identification parade. According to the evidence of the officer who conducted it, it was done strictly in accordance with the Force Standing Orders for identification parades. While it is true that the appellant did complain that he had been seen earlier by the PW1, he raised the complaint

not before the parade but after he had been identified by the witnesses. When he raised the complaint the officer did quite rightly note his remarks in the identification parade form. Granted that no attempt was made to conceal the appellant's deformity and even if, for this reason, we were to disregard the identification parade evidence, still the prosecution evidence on identification was overwhelming.

In our view the direct evidence of identification of the appellant by PW1, PW2 and PW3 and PW4 placed the appellant at the scene of crime. Their description of the appellant and the long chase places the appellant at the scene of crime and also makes the visual identification by all the four witnesses watertight. Moreover the description of the appellant had been given to the chasers by PW1 and all the chasers consistently gave almost identical description of the appellant and they were also able to use the description in effecting both the chase and the arrest.

In our view the identification of the appellant was on all fours with the *ratio decidendi* in the case of **SIMIYU & ANOR. v REPUBLIC (2005) 1 KLR** at page 193 where the court held:

“In every case in which there is a question as to the identity of an accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of and by the person or persons to whom the description was given.”

With respect, and, for the reasons outlined above, we are unable to accept or to appreciate the concession made by the Senior Principal State Counsel Mr. Kagai when he stated that he was conceding the appeal. Like the superior court who similarly rejected Mr. Orinda the Principal State Counsel's concession at the superior court level, we too reject the State's concession and instead hereby uphold the well reasoned judgment of the superior court.

Accordingly this appeal is dismissed.

Dated and delivered at Nyeri this 25th day of June, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR