



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 222 OF 2004

BERNARD MUTUKU MUNYAO 1ST APPELLANT

KING'AU MASILA 2ND APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at

Machakos (Wendoh & Ochieng, JJ.) dated 21st September, 2004

in

H.C.C.R.A. NO. 112 CONSOLIDATED WITH 114 OF 2002)

JUDGMENT OF THE COURT

The two appellants, **King'au Masila** (King'au) and **Bernard Mutuku Munyao** (Mutuku) were tried and convicted before Machakos Senior Resident Magistrate (J.N. Nyagah Esq.) on two counts for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. Upon their conviction they were sentenced to death, which is the only punishment, but they appealed to the superior court (Wendoh & Ochieng, JJ.) which upheld the conviction. They now come before us in their second and final appeal which we shall examine presently.

The concurrent findings of fact made by courts below were fairly straight forward. **Reuben Kariuki** (PW1) and his wife **Susan Mwelu Kariuki** (PW2) were shopkeepers. They had two shops in Sophia and Kithimani markets in Yatta, but they lived in Sophia market. On the night of 8th/9th June, 2001 they were asleep in their house when, at about 2 a.m., they were rudely awakened by a gang of about eight people armed with rungun, axes, iron bars and stones. As the robbers banged the windows demanding money, Kariuki switched on the electricity lights, powered by solar panels. They lighted the house inside and outside and he handed over some money to the robbers through the window. The robbers took it and demanded more which Kariuki said he did not have. One of them, identified by both witnesses as **King'au**, used a big hammer to break the main door through which five of the robbers gained entry into the house. They beat up the two and ransacked the house collecting various household items, clothing and more cash. Both witnesses identified **Mutuku** as the person who took cash, Shs.40,000, from their bedroom wardrobe as they watched. One of the robbers took the keys for a motor vehicle parked outside

the house but he was unable to start it. It was a pickup converted into a matatu. Kariuki was then escorted out to start the vehicle for them. He found three people at the rear cabin loading some goods. As soon as he started the vehicle, Kariuki took off with the three robbers. His intention was to drive to the police station but on reaching the tarmac, the robbers jumped off the moving vehicle. He drove to a chief's camp nearby where he reported the incident to the Administration Policemen there before proceeding to Kithimani Police Station. He found **Pc John Bii** (PW3) at the station at 4 a.m. and made his report. Pc. Bii together with other officers visited the scene of the robbery at 6 a.m. and confirmed the robbery. A few hours later that morning, about 9 a.m. Kariuki saw the unique tyre marks of his stolen bicycle and he called the police who traced the marks to a house in Sinai village, about 10 kilometres away. It was King'au's home. They found his niece, **Kamene Ndunda** (PW4) a school-going pupil who testified she was 17 years old (erroneously recorded by the superior court as 15). A search was carried out in the homestead and the bicycle, a radio cassette and a jacket, all identified by Kariuki as part of his stolen property were found. The radio cassette and the jacket were in King'au's house. Kamene further testified that she had been woken up by King'au early that morning, at 5 a.m. and told to milk the cows and make tea. She said it was too early and was allowed to go to sleep. She was woken up again at about 7 a.m. and found King'au boiling some water which he put in a basin and added salt in it. He took it behind the house of **Kavoi**, Kingau's brother, as Kamene continued to make tea. She then saw someone with injuries on his head going towards the basin. She concluded that the water was for washing the injured man and true enough, the blood-stained water basin was found in King'au's house when the police arrived. Kamene also testified that at 8 a.m. King'au took a bicycle which was in his house and kept it in her grandfather's house. He locked the house and left with the injured person. She also saw Kavoi, her uncle, whom she did not see the previous evening as he was not usually at home.

King'au worked as a matatu tout in Matuu market. The police headed there and arrested him. From the information he volunteered, the police went to Nairobi the following day, 10th June, 2007, and arrested Mutuku who was found in possession of a jacket identified by Kariuki as one of his stolen items. King'au's brother, Kavoi, was also arrested but managed to escape from police custody. There were two other persons arrested with him and charged jointly with King'au and Mutuku but were released at the close of the prosecution case for lack of evidence. Mutuku was taken for medical examination before **Mrs. Veronica Nzuki** (PW5), a Clinical Officer who completed a P3 form confirming "*redness of eyes, abrasions all over the face and severe abrasions behind the head. The upper limbs were soft and tender.*" She classified the cause of injury as "*frictional injuries*" and prescribed treatment for them. The robbery charges were then preferred against the two appellants.

King'au's defence was that he was asleep in his house when his brother, Kavoi, woke him up at 5 a.m. on the material night. Kavoi was accompanied by another person who was injured. Kavoi told him to boil water which he did and took to Kavoi's house. Kavoi also told him to take a bicycle he had come with and keep it in their mother's house, which he did. He was then instructed to escort the injured person to the bus stage, which he did, before heading to his work station at Matuu. That is where the police found him and he told them the items found at home were brought by his brother Kavoi. He accompanied the police to Nairobi to look for the culprits and they made their arrests. He was, however, charged with the commission of the offence which he knew nothing about. For his part, Mutuku stated that he sustained his injuries when he fell off a bicycle on 5th June, 2001. The police found him nursing the injuries in his house in Nairobi on 10th June, 2001 and arrested him saying they were looking for an injured person called Mutuku. He denied the offence.

The two courts below relied on the evidence of Kariuki (PW1) and his wife (PW2) that they visually identified King'au and Mutuku at the scene of the robbery. They held that it did not matter, therefore, that there was no identification parade organized to confirm such identification. They further found that the circumstantial evidence connecting the two appellants to the crime was so consistent and solid, that it was incompatible with the innocence of the two appellants.

As this is a second appeal, only issues of law may be raised – see **section 361 (1)** Criminal Procedure Code. Learned counsel for both appellants, Mrs. Betty Rashid, summarized the grounds listed in the original memorandum of appeal and the supplementary memorandum of appeal and argued them as four. The first issue raised by Mrs. Rashid was on identification, which she submitted was not free from the

possibility of error. The prevailing circumstances were strenuous and were not conducive to proper identification; none of the two complainants described any of the assailants in their first report; and the nature of light was not described. Furthermore, she submitted, there was no identification parade organised to test the veracity of the contention by the witnesses that they identified the appellants. In the circumstances, the identification relied on by the two courts was dock identification and was therefore worthless.

As stated earlier, the two courts below believed Kariuki (PW1) and his wife (PW2) that they were able to identify King'au as the person who broke down the main door with a big hammer and assaulted Kariuki with a panga. They also identified Mutuku as the person who collected money from their bedroom. The robbery took 10 – 30 minutes and electric lights powered by solar panels were on throughout. The two courts stated that they did not require an identification parade to believe that evidence, and that the lack of an identification parade was not fatal to the evidence on visual identification. Although Mr. Kivihya, learned State Counsel, supported the two courts below on the issue, the State was prepared to concede it before the superior court on the basis that there was no identification parade to place the issue beyond the realm of doubt. The superior court stated: -

“On its part, the state does not contest evidence on identification, as no identification parade was conducted by the police. Learned State Counsel, Mr. Omirera was definitely entitled to take that position, although we think that the failure to conduct an identification parade would not by, itself, have been fatal to the identification by the witnesses. That precisely is the point made at page 133 of the text “Evidence for Magistrates”, by Philip P. Durand.”

We think the issue of law that arises for our decision is whether, in the absence of an identification parade, evidence of visual identification, whatever its strength, becomes dock identification and therefore of no probative value. The statement of law relied on by the two courts which appears in Durand's book is derived from **R v Kariuki s/o Rushashio and Anor. [1948] 23 KLR (1) 21**. It was not merely the opinion of the author as boldly submitted by Mrs. Rashid. The author states:

“Failure to make identification at a parade is not necessarily fatal, as in Kariuki's case, where identification was not made at the parade, but only in court but the Court held that the evidence was in the circumstances, sufficient to establish beyond all reasonable doubt that the accused was one of the group present at the relevant time and a participant in the crime.”

In the *Kariuki case* the Court stated:

“Now if failure to identify a suspected person upon an identification parade is of itself sufficient to ensure to that person ultimate acquittal of an offence with which he is charged then No. 1 accused would be entitled to be acquitted on all the charges preferred against him in this Court, for none of the Crown witnesses identified him in the parade at the exercise yard of Nairobi Prison on 22nd January, 1948. That is a fact to which I have given the gravest consideration in this case and I have borne in mind the consideration given by this Court in its appellate jurisdiction in the case of *Rex v. Kipwenei arap Masonik and 20 others* (Law Reports, Vol. XII, pg. 153) on the question of identification.”

The court then went ahead and accepted the evidence of three prosecution witnesses on visual identification at the scene which he believed fully and convicted the appellant. It is noteworthy that in that case, there was an identification parade although it was described by the court as *“a very severe test no less than 112 men being on parade all dressed in precisely similar manner in prison blankets draped from neck to feet”*. In the case before us, there was no attempt to organize any parade, and the issue is whether the principle of law stated above is applicable. We think it makes no difference, since the end result is that the evidence on visual identification at the scene, unsupported by any other evidence on such identification, was relied on to convict. It follows therefore that there was no error in law or in principle made by the two courts in relying on the evidence of the two complainants in this case despite the absence of an identification parade. Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in **R v**

Turnbull [1976] 63 Cr. App. R. 132. The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One may think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification. Fortunately that evidence does not stand alone as there was further circumstantial evidence which, on its own, could sustain the conviction. We reject the first ground of appeal.

The second ground argued by Mrs. Rashid was that the evidence of **Kamene Ndunda** (PW4) should not have been relied on since it was recorded in contravention of the express provisions of **section 124** of the **Evidence Act (Cap 80)** and **section 19** of the **Oaths and Statutory Declarations Act (Cap 15)**. In her view, the witness was aged 15 and therefore, the *voire dire* should have been conducted before her evidence was taken and also that the evidence required corroboration.

We have looked at both sections of the law and they refer to “*a child of tender years.*” PW4 stated on oath that she was aged 17 years and was not challenged on that evidence. It is not clear where the superior court found the evidence that she was aged 15. Even if she was aged 15, we think the sections are not relevant to the evidence as she was not a child of tender years. In **Yaga v Republic [2001] 1 EA 318**, this Court held:

“Under Kenyan law, in the absence of any statutory definition in the Oaths and Statutory Declarations Act the expression a “child of tender years” meant any child of under 14 years of age; Kibangeny Arap Kolil v R [1959] EA 92 APPLIED. M’s evidence, if truthful, therefore required no corroboration.”

We find no merit in that ground of appeal either.

The third ground of appeal was that the defence of the appellant King’au was not properly evaluated, although it was plausible. King’au denied that he was in possession of the stolen goods and asserted that they were brought home by his brother, Kavoi, who escaped from police custody. At any rate, Mrs. Rashid submitted, there were many people in the homestead where the goods were found and it could not be said that King’au had possession of them.

The same issue arose before the superior court which stated, correctly in our view, that the appellant’s defence would have sufficed but only if the evidence of Kamene (PW4) was not considered. We quote the finding:

“At the time of recovery, the 1st appellant was not present. He was traced by the complainant and some policemen later at a Hotel, located at the stage, at Matuu market. When confronted with the items, the 1st appellant did not deny that they belonged to the complainant. To our mind, the doctrine of recent possession comes into play in the said circumstances. The complainant’s radio was recovered from his house. That would ordinarily have placed him squarely at the scene of crime. However, the 1st appellant said in his defence that it was his brother who had brought home the stolen items. That explanation would, in our considered view, provide a defence to the doctrine of recent possession, as the 1st appellant had explained how the radio, jacket and bicycle had reached his father’s homestead. However that explanation could only hold true if PW4 had not testified, as she did.”

The evidence of Kamene has been reproduced above. We have held that she was not a child of tender years. She testified on oath and the trial court, which had the advantage of seeing her in the witness box, believed her as a truthful witness. We have no reason to find otherwise on her credibility. Her evidence on the conduct of her uncle, only three hours after the robbery, negates any innocent association between the appellant and the persons who committed the robbery. He was part of the gang and indeed was instrumental in the arrest of some of the members of the gang in Nairobi. There was no merit in his

defence and it was properly rejected.

As for the appellant Mutuku, Mrs. Rashid submitted that there was no reason given for rejection of the defence that the appellant's injuries were sustained in a fall from a bicycle. We have examined the record and we find the submission misconceived. There was indeed a consideration of the appellant's defence and a rejection of it in view of the prosecution evidence which was believed. The superior court stated:

“PW3 also testified that the 1st appellant led policemen to his brother's house, in Nairobi. Although his brother escaped, the policeman arrested the 2nd appellant. The said appellant's head was bandaged, a factor which was consistent with PW1's testimony to the effect that the appellant jumped off the moving vehicle when PW1 was driving off towards the police station. Secondly, the 2nd appellant was found with a leather jacket, which belonged to the complainant.”

There was no explanation offered for possession of the complainant's jacket. Taken together with the injuries and the evidence of PW1 and PW5, there can be no doubt that the injuries were consistent with a fall from a moving vehicle as contended by the prosecution.

Finally, Mrs. Rashid attacked the finding that there was any theft in law since, in her view, if the stolen goods had been loaded onto the motor vehicle which Kariuki (PW1) drove off with as the assailants jumped out, then there could not have been any theft and possession of the goods to constitute the offence charged.

We are not certain what the import of that submission is. But the evidence is clear that some goods were removed from their usual place in the house and placed in the motor vehicle. Others were found later at King'au's home some 10 kilometres away, while a jacket was in Nairobi with the appellant, Mutuku. There was evidence of stolen money but no evidence of recovery of it in the complainant's house. All ingredients of theft and possession were present in this case and we reject the argument to the contrary.

On the whole, this appeal is lacking in merit and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 14th day of March, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR