



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Criminal Appeal 117 of 2005

DAVID MWITA WANJA 1ST APPELLANT

PETER MUNGAI MUGURE 2ND APPELLANT

JOSEPH KAMAU WAIRIMU 3RD APPELLANT

AND

REPUBLICRESPONDENT

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

airobi (Lesiit & Ochieng, JJ.) dated 21st September, 2004

in

H.C.C.R.A. NO. 1038 – 39 & 1042 OF 2004)

JUDGMENT OF THE COURT

This is the second and last appeal against the conviction of the three appellants for the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. It had been alleged, in a charge sheet laid before Kibera Senior Resident Magistrate, that the three appellants, jointly with others not before court, on the 10th August, 2000 at Kibiko forest, Ngong, while armed with dangerous weapons, namely pangas and knives, robbed *Peter Lolo Siamanda* of ten head of cattle valued at Shs.150,000 and that they wounded the said Peter Lolo Siamanda in the course of the robbery. There was an alternative charge of handling stolen goods contrary to *section 322 (2)* of the Penal Code, but a finding thereon was left in abeyance after conviction of the appellants on the main count. Upon their conviction, the mandatory death sentence was imposed on them. Their first appeal to the superior court was dismissed on 21st September, 2004, hence the appeal now before us.

The facts put forward by the prosecution through twelve witnesses are fairly straightforward: -

In the morning of 10th August, 2000, young Peter Lolo Siamanda (*Lolo*) (PW1) was herding his employer's 10 head of cattle in Kibiko forest, Ngong. At about midday three strangers approached him and one of them asked him for his simi and a cigarette and started cutting some tree branches nearby. The others who were armed with pangas and rungas asked him whether he had seen any policemen and he said no. Then suddenly one of them grabbed him by the neck and started strangling him. They dragged

him into a bush and he was stabbed at the back of his head rendering him unconscious. He was covered with tree branches and left for dead. The cattle he was herding were driven away. At about 2 p.m. another herdsboy, **Janin Pasimani** (PW3) found and rescued Lolo. PW3 informed Lolo's employer, **Samanja Paarsin** (PW2) who took him to Kenyatta National Hospital for treatment. Later Lolo was examined by **Dr. Zephaniah Kamau** (PW11) who assessed the injury inflicted on him as harm.

Five of the stolen head of were found alive in Ngong forest that afternoon, but at 5.45 p.m. the other five were taken to Kikuyu slaughterhouse in Kikuyu township. The watchman at the slaughterhouse was **Njoroge Mbugua** (PW7) and he knew the first appellant, **David Mwita Wanja** (Mwita) who took the cattle there accompanied by two other people PW7 did not know. It was the fourth time Mwita had taken cattle there for slaughter and so he was a known customer. He instructed the watchman to look after the cattle which were locked up in a boma overnight. The following morning at 7 a.m, Mwita returned to the slaughterhouse and found the manager of the slaughterhouse, **Zacharia Kamau Ngugi** (PW6). At 7.30 a.m. Mwita gave authority to Ngugi (PW6) in the presence of Mbugua (PW7) for slaughter of the five cattle. Ngugi also knew Mwita as their customer who had brought cattle there for slaughter four times before. As the slaughtering was put underway, Mwita left for Dagorreti slaughterhouse to look for a meat transporter. He found **Nicholas Juma Chege** (PW4) who had transported meat for him before and therefore knew him well. Chege owned a pick-up for meat transportation and he was hired to go to Kikuyu for that purpose. Mwita also hired a loader at Dagoretti slaughterhouse in the person of **Nicholas Nderu Muga** (PW5), who had done the same job for Mwita before and therefore knew him. They left for Kikuyu arriving there at 9 a.m. They found the carcasses ready and Mwita checked to confirm they were properly prepared.

In the meantime, the cattle owner, Paarsin, had reported the theft at Ngong Police Station and a search was underway in various slaughterhouses. At about the time the carcasses were about to be loaded onto PW4's vehicle, Paarsin arrived with some policemen and he requested the slaughterhouse manager, Zacharia Ngugi, if he could check out the slaughterhouse for his stolen livestock. He managed to identify all five cattle through their hides which bore his brand mark, and also through the heads and hooves which were still covered with skin. He informed the policemen present and they arrested the slaughterhouse manger (PW6), the transporter, (PW4) and the loader (PW5). Although they were initially charged with stock theft, their cases were subsequently terminated. The scenes of crime personnel led by **Pc. Albert Kiarie** (PW12) were called in and took photographs of the carcasses and other remains.

Sensing danger when he saw Paarsin and the police that morning, Mwita sneaked out and disappeared from the scene. He was not found for the next two months until information was received by **Pc. Julius Karanja** (PW8) that he was hiding in Tanzania. Pc. Karanja with other officers proceeded to the border town of Isebania on 7th October, 2000 and found him. On seeing the policemen, Mwita took off, but Pc. Karanja fired gun-shots in the air as he and members of the public chased after him. They caught up with him as he hid in some thickets and he was arrested and taken to Ngong Police Station. It was there that he recorded a statement under Inquiry before **IP Fredrick Ndirangu** (PW10) on 11th October, 2000 and implicated the other two appellants, **Joseph Kamau Wairimu** (Joseph) and **Peter Mungai Mugure** (Peter). Upon the arrest of Joseph and Peter, identification parades were conducted on 12th October, 2000 by **IP Nelly Wachira** (PW9). Lolo (PW1) identified all three as the people who had assaulted him and stolen the cattle. They were charged accordingly with the offences as stated earlier.

During the trial, Mwita retracted the confessionary statement he had given to IP Ndirangu but it was admitted in evidence after trial within the trial. He also denied in his unsworn defence that he was involved in the crime stating that he had informed the police that he was being mistaken for one **George Mwita Marura** who had told him he had committed a crime in Ngong. He also denied that he knew the two other appellants. Both Peter and Joseph simply stated in their unsworn defences that they were separately arrested on 10th October, 2000 whilst sleeping in their homes and knew nothing about the alleged robbery.

Upon consideration of the entire evidence, the learned trial magistrate (Ms. Siganga, SRM) was persuaded that Lolo (PW1) positively identified all three appellants at the scene of the crime which was committed in broad day light, and was able to pick them out in identification parades two months later.

She also considered the retracted confessionary statement and found corroboration thereof in the evidence of the watchman (PW7), the transporter (PW4), the loader (PW5) and the slaughterhouse manager (PW6). In the end she rejected the respective defences of the appellants. The superior court (Lesiit and Ochieng, JJ.) upheld those findings, stating, on the issue of identification:-

“We have on our part, taken into consideration that this offence was committed at 8.00 a.m. (sic) in broad daylight. We have also considered that the appellants approached the complainant and even exchanged words. The 1st appellant asked for a cigarette, the 2nd appellant sought for mobile phone while the 3rd appellant borrowed his simi. Each of the appellants posed a question to the complainant, all this time the appellants had come peacefully. In those circumstances we are of the considered view that the circumstances of identification were good and conducive for identification by the complainant.....

We are aware that the evidence of a single identification witness needs to be tested with the greatest care, we have done so in this case. We find that the conditions favouring positive and correct identification were present in this case. We are also of the view that the complainant’s ability to identify all three appellants in an identification parade held 2 months after the incident lends credence and assurance to the positive identification of the appellants by the complainant.”

The learned Judges also considered the evidence of PW4, 5, 6 and 7 as supported by that of PW2 as circumstantial and found that on its own, the evidence was probative of the offence. They stated: -

“There are two sides to the circumstantial evidence against the 1st appellant. The first is the possession of recently stolen property. In MAINA vs. REPUBLIC C.A. NO. 11 OF 2003 (NYERI) OMOLO, TUNOI and GITHINJI JJ.A held thus: -

“Where there is evidence that the accused person is found in actual possession or has, shortly after a robbery, sold one of the items stolen during the robbery, he is deemed to be in recent possession of the stolen item.

Evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence.”

The appellant number 1 was found in actual possession of the 5 head of cattle the same day they were stolen. Cattle cannot change hands so fast and having had them on the same day they were stolen is sufficient to find that the 1st appellant had been in recent possession of the cattle.

The second aspect of the circumstantial evidence is the 1st appellant’s conduct one day after the robbery. The 1st appellant disappeared from the slaughter house where he had taken five of the stolen cattle moments after PW2 identified the hides, skins and carcasses of the five cattle as his. He was seen 2 months later at Isebania.”

As this is a second appeal, only issues of law may be raised and urged (**Section 361, Criminal Procedure Code**). All three appellants had drawn up and filed “*Petitions of appeal*” in person but at the hearing before us the appellant Mwita was represented by Mr. Nyaga Mutaumwari who filed a supplementary memorandum of appeal, while both Peter and Joseph were represented by Mr. Ogesa Onalo who urged the grounds raised by the two appellants in their homemade “*petitions*”. We shall first consider the appeals of the appellants Peter and Joseph.

The identical issue of law raised by both, and which Mr. Onalo urged most strenuously, relates to the identification of the two by PW1 in identification parades conducted two months after the commission of the alleged offence. He referred us to the exhibits relating to the parades conducted on 12th October, 2000 by IP Nelly Wachira. IP Wachira testified that she conducted the first parade at 11.30 a.m. to 11.45 a.m. on that day in respect of the appellant Mwita. The 8 persons who took part in the parade are listed in the parade form, Exhibit 3. Five minutes after that, at 11.50 a.m. to 12 noon, she conducted the next

parade in respect of the appellant Joseph. The 8 persons who took part in the parade however, were the same persons who were in the earlier parade except the positions they stood in both parades – Exhibit 4. The same 8 persons except one were also used in the parade conducted in respect of the appellant Peter and furthermore it appears to have been conducted simultaneously with the earlier parade between 11.48 a.m. to 11.50 p.m. (sic). The identifying witness on all three occasions was Lolo (PW1). In those circumstances, Mr. Onalo submitted, the evidential value of the identification parades was rendered meaningless since Lolo could readily tell by elimination that the two appellants were the only new faces in the parades. It was also not possible, he submitted, to comply with the requirement that the parade members be of similar age, weight and general appearance if the same group was used in the identification parades.

We did not understand Mr. Kaigai, learned Senior State Counsel, to defend the manner in which the two parades in respect of Peter and Joseph were conducted. Apart from contending that it was not prejudicial to the two appellants, he conceded in the end that in the absence of a properly conducted identification parade, the evidence against them would be tenuous.

The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See **R v Mwangi s/o Manaa (1936) 3 EACA 29**. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis **Njihia v Republic [1986] KLR 422** where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under **section 5** of the Police Act **Cap 5** Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, **Standing Order 6(iv) (d)** and **(n)** state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

The investigators of the crime in this matter found it necessary to conduct identification parade for the

appellants in order to lend credence and support for the visual identification made by PW1 at the scene of crime two months earlier. It was a proper decision considering that the robbers who accosted PW1 were strangers and it is not in evidence how long he took with them before he was stabbed unconscious. A complaint was made before the superior court about the conduct of the identification parade but the superior court did not consider the matter fully although the parade forms were part of the record before it. The court stated: -

“On the issue of the identification parades, we do believe that the allegation that they were pointed out to the complainant before the parade was an afterthought, without any basis and is unmerited. While cross-examining the complainant and the parade officer, PW9, no question was put to them to signify that the appellants were identified to them before the actual parade was conducted. The allegation was baseless.”

For our part we think the use of the same members of the parade in respect of the two appellants, Peter and Joseph and one identifying witness, Lolo, was extremely prejudicial to the appellants, thus rendering the parade worthless. On this we agree with Mr. Onalo. We further agree with Mr. Kaigai that in the absence of that reassuring evidence the evidence against the two would be tenuous and we must therefore extend the benefit of doubt to them. Accordingly, we allow the appeals of the 2nd appellant, **Peter Mungai Mugure** and the 3rd appellant, **Joseph Kamau Wairimu**. Their convictions are quashed and the sentence of death imposed on them is set aside. They shall be set at liberty unless they are otherwise lawfully held.

As for the 1st appellant, Mwita, six grounds of appeal were raised in the supplementary memorandum of appeal but were either quickly abandoned by Mr. Nyagah for lack of substance or were factual in nature and therefore contrary to **section 361** of the Criminal Procedure Code. Mr. Nyagah complained, for example, that there was contravention of **section 85** of the Criminal Procedure Code in that the matter was prosecuted by an unauthorised person, only to find that there was only one participation by a Corporal on a mention date, which, as we have held before, is not prosecution. He also complained that the appellant’s constitutional rights were violated in that he was not allowed to call a defence witness at the close of the prosecution case. The record however showed that the appellant was given the opportunity to call the one witness he indicated he would call and indeed the trial was adjourned for one week to allow him to do so. In the end, the appellant chose to close his case after informing the court that the witness was not available. The third complaint was that there was no interpretation of the language of the court but the original record was clear that an interpreter from English/Kiswahili/Kimaasai was present in court. It was the typed record which had left out “Kimaasai”. Similarly, the typed record had left out the “*coram*” on the first day when the plea was taken but this was readily found in the original record, and therefore Mr. Nyagah abandoned the complaint. As for the confessionary statement, it was Mr. Nyagah’s submission that it was not recorded in English although the two lower courts made a finding that it was so recorded. Whether or not the statement was in one language or the other was a question of fact which arose before those courts and there was a concurrent finding thereon which we are not at liberty to disturb and we see no cause to. In his penultimate complaint Mr. Nyagah submitted that there was no re-evaluation of evidence by the superior court and that, if there was any, it would have disclosed that there was no identification of the stolen animals. In his view, it was impossible for the owner, PW2, to identify a carcass once slaughtered. Again that was a question of fact properly dealt with by the two courts below. On the evidence, the hides were available and they bore the owner’s identification marks. The heads and hooves were also available and photographs were submitted in evidence. No one else, including the appellant laid any other claim to the remains of the animals. We see no substance in that contention. Finally, Mr. Nyagah complained about the identification parade contending that it was a nullity because the appellant had been shown to the identifying witness before the parade and because he was not allowed to call a friend to be present.

The appellant was the first to be identified by PW1 in the identification parade and there is no complaint about the members who took part in the parade. The piece of evidence latched onto by the appellant is the first sentence of the following paragraph: -

“When I heard of the arrest I went to the police station where police showed them to me behind a

building. There were many people. I went to the police station to identify the robbers. The people were behind the police station at a yard. I Identified three people and I told police that they were the robbers, they are in court – accused 1, 2 and 3 identified. It is accused 3 who grabbed me from behind and started strangling me. It is accused 1 who stabbed me with the knife on my neck.”
Emphasis added.

With respect the underlined sentence cannot be read in isolation as Mr. Nyagah purported to do. We are in no doubt that the whole paragraph relates to the day when the witness went to the police station to identify the suspects and not before. We also find no prejudice in the conduct of the parade when the appellant did not provide any name or address of any friend he wished to call despite his indication that he would desire to have one. The parade, in respect of the 1st appellant in our view, was conducted in accordance with the Police Force Standing orders.

On the whole the evidence against Mwita was overwhelming. There was direct and credible evidence of possession of the stolen livestock from four prosecution witnesses who also provided corroboration for the confessionary statement retracted in the course of the trial; the conduct of the appellant when the stolen and slaughtered animals were found by the owner; his conduct at the time of his arrest and positive identification at the scene which was confirmed at a properly organized identification parade all militate against any finding other than that the appellant was guilty as charged. We find no reason to interfere with the concurrent findings of the two courts below and we must therefore and do hereby, dismiss his appeal in its entirety.

Dated and delivered at Nairobi this 8th day of June, 2007.

R.S.C. OMOLO

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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