IN THE COURT OF APPEAL

AT ELDORET

CRIMINAL APPEAL 258 OF 2003

1. PETER GIKONYO NYOIKE

2. DAVID IBARE

3. MICHAEL MWANGI KAMAU.....APPELLANTS

AND

REPUBLIC……..……..……RESPONDENT

JUDGMENT OF THE COURT

The three appellants were convicted by the Principal Magistrate Eldoret on two counts of robbery contrary to Section 296(2) of the Penal Code and were sentenced to death in each count. Their appeals to the superior court were dismissed. They now appeal to this Court on several grounds. The three appeals have been consolidated.

The particulars of the charge in the first count were that on 26/8/99 along Nakuru/Eldoret road near Mulango Moja, the three appellants while armed with dangerous or offensive weapons namely, home made gun, rungus and simis, robbed one GEDION NJAGU of cash Shs.1,500/=, one passport, one wrist watch, two shirts all valued at Shs.4,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Gedion Njagu. In the second count the appellants were alleged to have robbed one MURIGI MUIRURI of Shs.900/= on the same date and under the same circumstances.

The complainant in the first count GIDEON NJAGU (PW.1) and the complainant in the second count – MURIGI MUIRURI (PW.2) were employed by Multi Haulers East Africa Ltd as driver and turn boy respectively. On 26/8/99, they were transporting about 30 tons of rollers for making iron sheets from Nairobi to Kampala Uganda, in lorry Reg. NO. KRZ 530 Mercedes Benz with trailer Reg. No. ZB6785. At Mulango Moja past the Kericho junction, after the lorry negotiated a corner and started going uphill slowly, three people emerged from the bush on the left side at about 9.00 a.m. One of the three men who was armed with a gun signalled the driver to stop and park the lorry beside the road.

Upon parking the lorry at the road-side, the gunman pulled the driver out of the vehicle while the two others, one of whom was armed with a rungu, pulled the turn boy from the vehicle and took him into the bush about 15 meters from the road and robbed him of Shs.900/=. The driver was also taken to the bush and robbed of a wrist watch and Shs.1,500/=. Thereafter the gunmen went back to the lorry and took two bags containing clothes, a jacket and a jack. They disappeared. The driver and turn boy returned to the lorry. They reported the robbery at Ravine Police Post. P.C. Joel Chepkonga (PW.3) and P.C. Isaiaya

Ayapala (PW.4) went to the scene and searched the bush.

They recovered a club (Ex.1) which one of the highway robbers had. The complainants recorded statements after which they proceeded with their journey at about midday. The gunman was identified at the trial as Michael Mwangi Kamau (third appellant who was the 2nd accused at the trial). The other two people were identified as Peter Gikonyo (first appellant – who was the 1st accused at the trial) and David Ibare (2nd appellant who was the 3rd accused at the trial). On the same day at about 8 p.m. P.C. Joel Chepkonga, acting on information, went to a house at Makutano Trading Centre where he found the first appellant sleeping.

There was a bag containing clothes in the house, which P.C. Joel Chepkonga took. The first appellant upon interrogation led police to the bush at the scene of the robbery and pointed out the jack, which was hidden in a hole (Ex.2). On the night of 27/8/99 the first appellant led P.C. William Kangogo (PW.8) and other officers to a house in Langas, Eldoret to point out one of the three suspects. They found a woman inside the house who pointed out at a bag allegedly taken there by one Wario. There was a T-Shirt, a red shirt and a home-made gun (Ex.8) inside the bag. The first appellant led police to another house at Langas where they found Wario – the 2nd appellant asleep.

He was arrested. The first appellant then led the police to the home of one Alex Baiua where they found the third appellant asleep on a sofa set. He was also arrested. On 2/9/99, the first appellant made a statement before I.P. Ezekiel Nyakwara (PW.7) which he repudiated at the trial. It was admitted in evidence after trial-withintrial. On 9/9/99, the three appellants were identified by the two complainants at respective identification parades conducted by I.P. Justine Barmao.

The first appellant made an unsworn statement at the trial. He stated that he was a businessman – selling and buying maize and that he was arrested on 2/9/99 in connection with maize he had sold on the previous day. The second appellant also made an unsworn statement at the trial. He stated that he was arrested on 27/8/99 on allegation that the money he had paid to a customer for selling waste paper to him (he was in that business) was fake. Similarly, the third appellant gave unsworn statement at the trial. He stated that he was a barber and that he was arrested on 3/9/99 on an allegation that he had taken a customer's carton containing a radio, which the customer had forgotten in his shop.

The evidence was exhaustively reviewed by the trial magistrate who made several findings thus; the robbery was committed in broad daylight and the complainants saw and identified the three appellants; that the three appellants were identified by the complainants in properly conducted identification parades; that the first appellant was found in recent possession of the stolen bag and clothes of the first complainant; that first appellant led police to the recovery of a jack; home-made gun and to the arrest of 2nd and 3rd appellants; that first appellant confessed to the commission of the offence in his statement; that the appellants gave similar defences as to the circumstances of their arrest; and that the defences of the appellants were untrue and a sham.

The superior court reconsidered and reevaluated the evidence. It was satisfied that the appellants were identified by the two complainants at the time of the robbery and at the identification parades which were not flawed; that the first appellant was found in recent possession of goods stolen from the first complainant which led to the inference that he was a robber and that the first and second appellants gave detailed confessions which were corroborated by their identification by the two complainants and by recent possession of stolen goods.

Each appellant has filed a supplementary memorandum of appeal. There are two common grounds of appeal, namely that:- (i) The superior court failed to reconsider the evidence re-evaluate it and draw its own conclusions. (ii) The identification parades were fundamentally flawed. Mr. Otieno, learned counsel for the first appellant addressed us on the first ground on behalf of the first appellant and 2nd and 3rd appellants. Mr. Chepkony, learned counsel for the 2nd appellant addressed us on the second ground on behalf of the 2nd appellant and 1st and 3rd appellants.

Lastly, Mr. Obiero, learned counsel for the 3rd appellant addressed us on the irregularities in the conduct

of the trial on behalf of 3rd appellant and 1st and 2nd appellants. Mr. Otieno pointed out to several contradictions and inconsistencies in the evidence and the documents in order to show that the superior court failed to reconsider and re-evaluate the evidence and come to its own conclusions. It is true that the court has such a legal duty – (See OKENO V. REPUBLIC [1972] E.A. 32).

The contradictions referred to by Mr. Otieno are in the registration number of the vehicle; the identity of the accused who removed money from the first complainant, contradictions as to the time of robbery and the charging of some appellants with the theft of the lorry in the charge and cautionary statements. With respect, those contradictions and inconsistencies, if they exist, are minor and irrelevant to the main issue which should concern the appellants in this appeal, namely, whether there was evidence to support the findings of the two courts below that the appellants are the ones who robbed the two complainants and that they were positively identified by the complainants. The appellants were not charged with the offence of robbing the complainants of the lorry.

Nor has it been shown that those contradictions and inconsistencies have rendered the prosecution case wholly incredible. Mr. Otieno, further submitted that it was not shown that the first appellant was in the exclusive possession of the goods belonging to the first complainant. It is true that the two courts below relied partly on the evidence of recent possession of stolen goods of the first complainant by the first appellant. These goods included a bag, 2 shirts, 2 long trousers, a towel, torch and a cassette. However, the particulars of the charge in count one alleged that the first complainant was robbed of a wrist watch, 2 shirts and Shs.1,500/=.

The two shirts which were among the items recovered were not positively identified as belonging to the first complainant. Since those goods were not included in the charge sheet as having been stolen from the first complainant, their recovery is immaterial and the first appellant cannot legally have been in possession of recently stolen goods. Similarly, the charge sheet states that the second complainant was only robbed of Shs.900/=. So, the T-Shirt and the red shirt recovered in the Langas house and allegedly belonging to the second complainant were not among the stolen goods.

In our view, the two courts below erred in law in relying on the evidence of recent possession of stolen goods and in drawing an inference on such evidence. That evidence should have been discounted. Mr. Otieno further submitted that the unsworn statements of the appellants were not taken into account. The appellant did not in fact raise any substantive defence. They merely made similar statements explaining that each was not arrested in connection with the offences of robbery charged. The learned magistrate considered that defence alongside the prosecution case and rejected their respective defences as untrue. The superior court agreed with the findings of the trial magistrate. We are satisfied that the respective defences of the appellants were considered and rejected.

Mr. Chepkwony on his part dealt with the irregularities in the conduct of the identification parade and in the parade forms. He pointed out, among other things, that the officer conducting the parade did not show in the parade forms whether the investigating officer and a solicitor were present; that the officer who conducted the parade did not use the appellant’s actual words in answer to the question whether they were satisfied with the conduct of the parade.

In our view, those lapses in the execution of parade forms are minor and do not affect the quality of the evidence of the identification of the appellants at the identification parades. The lapses are irregularities curable under Section 382 of the Criminal Procedure Code. Lastly, Mr. Chepkwony referred to the evidence of the second complainant where he is recorded to have said that he could see the accused person before the parade and that the people in the parade were not alike and all were not black. I.P. Justine Barmao who conducted the identification parades gave detailed evidence which shows that she complied with Force Standing Orders on Identification Parades.

She specifically stated that the witnesses could not see the suspect before the parades and that the parades were held in an enclosed place. It is clear from the evidence in cross-examination by the second appellant that the members of the parade were picked from those people in police cells and that she allowed the second appellant to choose the parade members. The two courts below considered the evidence regarding

identification of the appellants at the identification parades and reached concurrent findings that the identification parades were not flawed and that the appellants were identified at the respective identification parades. There is no justification for interfering with those findings.

According to Mr. Obiero, the production of the Occurrence Book (O.B.) in court in the absence of the appellants was an irregularity in the conduct of the trial. Further according to Mr. Obiero, the reception of the evidence of Justine Barmao (PW.6) before a ruling on the admissibility or otherwise of a statement made by the second appellant was also an irregularity in the conduct of the trial. It is the second appellant who applied for the production of the O.B. to verify whether the first report by the second complainant described the robbers. The O.B. was produced and the whole report was reproduced by the court. It transpired from the O.B. that the second complainant had not described the robbers in his report and the appellants used the entry in the O.B. in their respective defences. The record does not specifically show that the O.B. was produced in the absence of the appellants. Thus, there was no irregularity in the production of the O.B. Such production did not cause any prejudice to the appellants. Rather it assisted them in their defences.

The reception of the evidence of I.P. Justine Barmao on the identification parades before the decision on the admissibility or otherwise of the 2nd appellants statement was not a procedural irregularity. An irregularity could only have arisen if the entire evidence of the officer who recorded the 2nd appellant's statement was received before the ruling was delivered. The prosecution case against each appellant was mainly based on the visual identification by the two complainants. Before the court can rely solely on the evidence of identification to implicate an accused person, such evidence must be absolutely watertight to justify a conviction (see KIARIE VS. REPUBLIC [1984] KLR 739.

This was not a case of a single identifying witness at night. It was a case of visual identification of each appellant by two witnesses in broad day light in favourable circumstances, which visual identification was given credence by the subsequent identification of each appellant at properly conducted identification parades within two weeks of the robbery. Even after rejecting the evidence that the first appellant was found in recent possession of stolen goods, we are nevertheless satisfied that the evidence of identification was watertight. There was however other evidence against the first appellant – that he led police to the recovery of a jack hidden near the scene and to the recovery of a home-made gun. That evidence was admissible at the time the appellants were tried under Section 31 of the Evidence Act before it was later repealed by Act No. 5 of 2003.

There was also the repudiated confession, which was sufficiently corroborated by the evidence of identification. In respect of the 3rd appellant Michael Mwangi Kamau, the superior court erred in finding that he had made an extra-judicial statement. He had not made any. It is the second appellant David Ibare who had made one but it was not produced in evidence. That leaves the evidence of visual identification as the only evidence against the 2nd and 3rd appellants. We are nevertheless satisfied that in the circumstances, the evidence of identification of the 2nd and 3rd appellants was free from possibility of error and was sufficient to justify a conviction. We are satisfied that the three appellants were properly convicted and that the appeals have no merit.

As regards the sentence, the proper procedure was to sentence the appellants to death in one count and leave the sentence in the second count in abeyance. We accordingly dismiss the respective appeals. The appellants shall suffer death in first count. The sentences of death imposed on the second count are set aside.

DATED and DELIVERED at ELDORET this 23rd day of September, 2005.

R.S.C. OMOLO

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

P.N. WAKI

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR