REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A.)

CRIMINAL APPEAL 54 OF 2002

BETWEEN

SAMUEL MWANGI MUCHOKI ……...…… APPELLANT

AND

REPUBLIC ……...…….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Patel & Oguk, JJ) dated 5th February, 1997

in

H.C.CR.A. NO. 1392 OF 1991)

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JUDGMENT OF THE COURT

The appellant was convicted by the Senior Resident Magistrate, Nairobi of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death being the only sentence authorized by the law. His appeal to the superior court against conviction and sentence was dismissed. Thus, this is a second appeal.

The charge stated that the appellant jointly with others not before the court while being armed with simis, axes and pangas robbed *Lawrence Muthiani Maithya* of cash Shs.50,300/= a colour television, cassette deck, 50 video cassettes, radio, 5 men's suits, 40 pairs of shoes and other goods all valued at Shs.189,200/= and at or immediately before or immediately after the time of robbery used personal violence on *Hassan Kwoba* which resulted in his death.

The complainant Lawrence Muthiani Maithya (PW1) was at the material time – that is 25th September, 1990 living at Ridgeways, Nairobi with his wife Mary Muthiani and their four children including Doris Kalothi Muthiani (PW5). He had two watchmen, Hassan Kwoba and one Peter.

He was awakened at 2 a.m. by a cry from outside. He woke up and switched on the corridor lights. He went to the kitchen and looked through the window. The security lights were on. He saw a group of over 10 people running around in the compound. He returned to the bedroom and told his wife to call the police as their home had been raided. He returned to the kitchen and with the aid of security lights saw people armed with axes, pangas and rungus cutting the burglar proofing on the kitchen window. The people asked the complainant to open the door which he did. About 10 people entered in the house.

One of them took a bunch of keys and padlock from the complainant. He was pushed to the bedroom where they demanded money from the complainant and his wife threatening to kill them if they did not give them money. The complainant's wife had already switched on the lights in the bedroom. The complainant gave them a wallet which had Shs.1,000/= which they took. They also took money from the handbag belonging to complainant's wife after which they searched the house for more money. One of them removed a brief case from the wardrobe which they asked the complainant to open. He did so. The brief case had over Shs.40,000/= in different denominations which the robbers took. One of them took the complainant's wife to the sitting room and asked her to strip naked demanding more money. When she hesitated, she was slapped. When the robbers failed to get more money, they left carrying with them assorted household goods.

Thereafter, the complainant went out. He found that Hassan Kwoba had been cut with a panga on the head and killed while the other watchman was seriously injured. He drove to Muthaiga Police Station and reported the robbery.

Meanwhile, on the following morning, PC David Cheruiyot (PW4) and two other police officers all attached to Muthaiga Police Station were returning to the police station from night duty. They met the appellant at 6 a.m. near Mathare North Area 2 coming from G.S.U. direction. They asked him to stop but the appellant started running away.

He was chased and arrested. The police officers who were in civilian clothes introduced themselves to him and searched him. They recovered a bunch of keys (Ex. 3); a blood stained simi wrapped in Khaki paper and fastened to the back of his pair of trousers (Ex. 9); two wrist watches, one make Santron with blood stains, Shs.3,033.50 and a padlock – make tri-cycle (Ex.8) which was also blood stained. The appellant was wearing a blood stained coat. He was taken to Muthaiga Police station for further investigations. Later the complainant identified the bunch of 8 keys and the padlock as the ones stolen from him. The Santron wrist watch was identified by complainant's daughter Doris as belonging to the deceased watchman. The recovered keys were tested on the padlocks of the complainant's house. One opened the padlock recovered from the appellant. Two other padlocks opened the complainant's house. Further investigations revealed, among other things, that the appellant's blood group was "A"; that the blood group of the deceased watchman was "O" and that the simi and the Santron wrist watch had blood stains of group "O".

The appellant merely stated in his defence that he was arrested by youthwingers who took him to where police officers and a person who had been cut were. He asked for the production of the Police Occurrence Book (OB). After the relevant OB was produced and read to the appellant, he denied that he had the simi when he was arrested and stated that he was only in possession of 2 wrist watches, padlock, keys and money.

The conviction of the appellant was based on three strands of evidence, namely, the visual identification by the complainant, his wife and daughter; the recent possession of a bunch of 8 keys, padlock and Santron wrist watch stolen during the robbery and the possession of the simi which had blood stains of blood group "O" identical to the blood group of the deceased watchman. The trial magistrate said in part:

> ***"He has not just been positively identified by the three eye witnesses as one of the robbers but also had recent possession of things stolen from the complainant's house.***
>
> ***As for the simi, accused has denied having been in possession of it at the time of arrest. PW4 who arrested accused knew nothing about the case and is totally an independent witness … I find PW4 could not have fabricated the evidence.***
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> ***I find that the accused had possession of the simi exh. 9 on him at the time of arrest. The evidence of PW1, and 2 and 5 was that he had a simi among other weapons during the course of this incidence.***

However, the simi was found to have blood group "O" by the Government analyst PW3. The analyst said that the blood matched that of the deceased and could have been his.

On considering all the evidence which shows the accused must have been involved in this offence, I find that the simi must be one of the weapons he was armed with in this incidence. I find also that from circumstances of this case even the blood on the simi exh. 9 must have been the deceased's. It is not a coincidence that the simi had blood which matched that of deceased. In fact it does add up with the evidence and does go to show that it must be one, if not only the weapon used to fatally wound the deceased on the head. On considering this evidence, I find that inculpatory facts are incompatible with the innocence of the accused person and are incapable for explanation upon any other hyphothesis except that of guilt of the accused.

I find defence unacceptable in the circumstances".

In his first appeal to the superior court, the appellant in his memorandum of appeal and in a lengthy written submissions contended, mainly, that the evidence of identification being dock identification was unsatisfactory; that evidence of recent possession of stolen goods was similarly unsatisfactory and that his defence of alibi was not considered.

The superior court after re-considering and re-evaluating the evidence, said in part:

"The failure to hold any identification parade therefore reduces the identification of the appellant by the three prosecution witness to mere dock identification which on the light of decided cases has been held to be almost worthless. However, we have in mind the fact that those witnesses had plenty of time at the scene of the robbery properly see the appellant who was the gang leader and we are not prepared to ignore this important aspect of their case.

That PW1, PW2 and PW5 correctly saw the appellant at the scene of robbery has been corroborated by the fact of his possession of some of the items they had been robbed of barely with a period of 4 hours of the robbery …".

Mr. Kihara for the appellant filed a supplementary memorandum of appeal containing five grounds of appeal thus:

1. THAT the charge is defective.

2. THAT the proceedings in the trial court are a nullity.

3. THAT the prosecution evidence is marred with contradictions and inconsistencies. 4. THAT the identification of the appellant was not proper.

5. THAT the prosecution failed to call crucial witnesses to testify, thus leaving gaps in the prosecution case.

Those are the only grounds argued by Mr. Kihara.

In the first ground of appeal, it was submitted that the charge was defective because it does not state that the instruments that the appellant was allegedly armed with were "offensive or dangerous weapons". This with respect, is a frivolous ground. This Court has said on many occasions, as Section 296 (2) of the Penal Code itself states, that the offence of capital robbery is committed if during stealing any of the following three circumstance obtains:

(i) If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) Is in company with one or more other person; or

(iii) At or immediately after the time of the robbery he wounds, beats strikes or uses any other personal violence to any person.

The charge sheet in this case not only contained all those three elements but also the evidence established all the three elements. The charge sheet states that the appellant and others was "armed with simis, axes and pangas". The omission to indicate in the charge sheet that those instruments were dangerous or offensive weapons, does not in the circumstances render the charge defective.

It was further contended that the proceedings in the trial were a nullity because on three occasions the record does not show the name of presiding magistrate or the prosecutor but merely states "Coram as above". However on those three occasions the trial did not proceed. It is evident from the record that the trial was presided over by a qualified magistrate and that the prosecution was conducted by a qualified prosecutor.

There is no ambiguity. This ground of appeal has no merit.

In support of the 3rd ground of appeal, Mr. Kihara referred to the evidence of the witnesses particularly the evidence of the complainant and his wife and pointed out what he called contradictions and inconsistencies in the evidence regarding how much money there was in the brief case – whether Shs.10,000/= of Shs.40,000/=; whether or not the dogs were barking during the robbery; whether complainant and his wife identified the Santron wrist watch as that of the deceased watchman and so on. Again these inconsistencies and contradictions are minor and immaterial. They do not relate to the material evidence which is the visual identification of the appellant and the recent possession of stolen goods. Mr. Kihara did not address the court in respect of the identification of the appellant save to say that there was no evidence of how the identification parade was conducted. Mr. Kihara further submitted in respect of the 5th ground of appeal that the officer who conducted the identification parade – a crucial witness, was not called. It is evident from the evidence of the complainant and his wife that an identification parade were in fact conducted. However, the record shows that for unexplained reasons, the evidence of identification parade was not tendered in court. The superior court appreciated this omission and concluded, correctly in our view, that the result was to reduce the evidence of the three eye witnesses to mere dock identification.

Mr. Kihara also complained in support of the 5th ground of appeal that the doctor who performed the postmortem on the body of the deceased watchman and the boy who was found in possession of the complainant's dog which disappeared during the robbery were not called as witnesses. That evidence with respect was not necessary. There was ample evidence that the watchman was cut on the head and died instantly. His body was found in the complainant's compound. As for the failure to call evidence in connection with the recovery of the dog, the appellant was not charged with the theft of the dog.

Mr. Kihara did not address us on the material aspects of the appeal, that is on the visual identification of the appellant; on the evidence of recent possession of the goods stolen during the robbery and the other circumstantial evidence relating to possession of a simi with blood stains of the blood group of the slain watchman. Thus it has not been shown that the superior court made wrong findings of law on those aspects of the appeal.

Nevertheless, we are satisfied that the superior court discharged its legal duty as a first appellate court commendably well. It subjected the entire evidence to exhaustive scrutiny and arrived at its own independent findings. More importantly, the superior court cannot be faulted in the manner it handled the evidence of visual identification of the appellant by the three witnesses. The court was alive to the decisions of this Court to the effect that dock identification without an earlier identification parade is almost worthless (see ***Kiarie v Republic*** [1984] KLR 735; ***Njoroge v Republic*** [1987] KLR 19).

The superior court was however, convinced that the evidence of dock identification was reliable. That the superior court adapted the correct approach with regard to the evidence of dock identification is supported by a later decision of this Court in ***Muiruri & 2 Others*** v Republic [2002] KLR 274 where this Court in effect held that not all dock identifications are worthless, and further that, a court might base a conviction

on the evidence of dock identification if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification (see page 277 paragraphs 25 – 35).

In this case, the evidence of dock identification was considered together with other independent and strong circumstantial evidence which cumulatively rendered the evidence of identification safe and free from the possibility of error. We may add that even without the evidence of identification there was evidence of recent possession of property stolen during the robbery.

For those reasons, the appeal has no merit and is hereby dismissed.

Dated and delivered at Nairobi this 18th day of November, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR