



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, BOSIRE & O'KUBASU JJ.A)
CRIMINAL APPEAL NO.6 OF 2001**

BETWEEN

1. FRANCIS KARIUKI NJIRU 1ST APPELLANT
2. AYUB KARIUKI WAMAE 2ND APPELLANT
3. DANIEL KARIUKI IRUNGU 3RD APPELLANT
4. GERALD KUBAI KIMURIA 4TH APPELLANT
5. PETER KINYUA RUKUNGA 5TH APPELLANT
6. PAUL KIMATHI M'ITONGA 6TH APPELLANT
7. JOSEPH KANYITHIA BAARIU 7TH APPELLANT
8. JOSEPH KITHEKA MUINDI 8TH APPELLANT

AND

REPUBLIC RESPONDENT

An appeal from a conviction, judgement or as the case may
be of the High Court of Kenya at Meru (Mr. Justice
A.G.A. ETYANG J.) dated 27th November, 1998

in

H.C.CR.APPEALS NOS.87, 88, 89, 90, 92, 93, 94 & 174/96)

JUDGMENT OF THE COURT

Following the dismissal of their respective first appeals to the superior court against conviction and sentence on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code, the appellants: Francis Kariuki Njiru (1st appellant), Ayub Kariuki Wamae (2nd appellant), Daniel Kariuki Irungu (3rd appellant), Gerald Kubai Kimuria (4th appellant), Peter Kinyua Rukunga (5th appellant), Paul Kimathi M'Itonga (6th appellant), Joseph Kanyithia Baariu (7th appellant), and Joseph Kitheka Muindi (8th appellant) lodged the present consolidated appeals. The 2nd appellant has since the filing of the appeals died with the result that his appeal abates in terms of the provisions of **rule 68(1)(a)** of the Court of Appeal Rules. These being second appeals the provisions of **section 36 1(1)** of the Criminal Procedure Code apply. That section, in pertinent part, provides that:

"361(1) A party to an appeal from a subordinate court may, subject to sub-section (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, ..."

Although each of the appellants filed a separate memorandum of appeal the grounds of appeal when looked at closely raise the same issues of law. These are:

(a) the first appellate court erred in law in holding that each of the appellants was positively identified at the scene of the robbery,

(b) the first appellate court erred in principle in holding that the identification parades for those appellants who were picked at those parades, were properly conducted,

(c) that the court erred in relying on repudiated and, or retracted confession statements against the appellants;

(d) that court erred in failing to deal with alibi defences which were proffered by some of the appellants, and

(e) that the first appellate court analysed the evidence in a perfunctory manner and thus failed to scrutinize it as was expected of the court.

The appellants, with eleven others, were jointly charged before the Chief Magistrate's Court, in Meru with one count of robbery with violence contrary to **section 296(2)** of the Penal Code. The 8th appellant was also charged in the alternative with handling stolen property contrary to **section 322(1)** of the Penal Code. Since all the appellants were convicted on the main count no finding was made on the alternative count.

In the main count it was alleged that on 27th November, 1993 at Ntima Location, Kaaga area, in Meru Township, jointly with others not before the court, while armed with dangerous or offensive weapons, viz. Pangas, "rungus" and axes the appellants robbed Dr. Joel Muthuri of Kshs.245,000/= in cash, two wrist watches, a pair of shoes, a spear, two Somali swords, a Masai knife, two bows, 10 arrows in a quiver and a motor vehicle registration No. KLG 130, and immediately before or immediately after the time of the robbery wounded Dr. Joel Muthuri and his wife Martha Kiende Muthuri.

The appellants were tried jointly with eleven others by a Senior Resident Magistrate, Mrs. H.I. Ong'udi, who at the close of the prosecution case acquitted ten of the accused persons under **section 210** of the Criminal Procedure Code, and one other accused person at the conclusion of the trial. She convicted these appellants as charged. As we stated earlier, the appellants' respective first appeals to the superior court were dismissed and hence the present appeals.

The appellants' conviction was based principally on visual identification evidence of two eye witnesses, confession statements of some of the appellants and the alleged recovery of some of the stolen property from some of them. In convicting the appellants the trial magistrate found as fact that the robbery complained of took place at 2 a.m, that the locus in quo had ample lighting from electric lights, that the eye witnesses were able to observe sufficiently, their attackers initially using that light and later by torch light as to be able to identify some of those attackers and that although those witnesses did not give to the police a description of the robbers who they said they had identified she held that their subsequent identification in identification parades which the police mounted was clear evidence that their identification of the appellants was unmistakable; and that the said identification parades had been well conducted. Apart from that the trial magistrate held that the confession statements which some of the appellants had given, although the same had either been retracted or repudiated, in her view they were true in view of the fact that they contained graphic details of the planning and execution of the robbery. On the basis of her findings she held that the alibi defences of some of the appellants could not be believed and accordingly rejected them.

The superior court on first appeal upheld those findings and dismissed the appellants appeals.

Both courts below made concurrent findings of fact as to the time of the robbery and the nature of the lighting at the scene of the robbery complained of. Before us Mr. Kariuki for the 1st, 3rd and 4th appellants, and Mrs Ntharangwi for 5th, 6th, 7th and 8th appellants, submitted that the circumstances at the scene of the robbery as recounted by witnesses were difficult and did not favour a correct identification.

Although the correctness or otherwise of identification of a suspect in a criminal matter entails the examination of evidence, this Court has from time to time held that the issue of identification is a matter of law. Bearing that in mind we consider it imperative to re-examine the circumstances under which the complainant and his wife said they identified the appellants in order to discover whether or not both the courts below erred in principle.

Dr. Muthuri and his wife Martha were asleep in their house situated within Meru Township on the material night of the robbery. The attack on them took place at about 2 a.m. They were woken up by shouts and cries from outside. Dr. Muthuri was first to wake up, and on realizing that their home had been invaded by robbers woke up his wife. Both of them looked outside through a glass window. It was their evidence that they had powerful security lights which brightly lit their compound. Dr. Muthuri testified that from that position he was able to see a group of people outside who were beating his watchman and gardener. He was able to identify the watchman and the gardener because they were close to the window. He estimated that they were about 5 metres from his window. He also estimated that those who were beating his employees were 8 to 10 in number, and each of them was armed with some weapon. His observation of these people, he said, was not momentary. It lasted for at least five minutes. These people had hats on, but the hats, he said, did not cover their faces. He was therefore able to observe them closely. He further testified that when these robbers eventually broke into his house he was able to observe them further.

Evidence was given at the trial to the effect that before the robbers broke into Dr. Muthuri's house they smashed the main electric switch and thereby cut the power supply into the building. The whole house was therefore dark. But Dr. Muthuri testified that he had a powerful electrically charged torch which he used to flash on the faces of the robbers as soon as they entered his house. Besides, he said the robbers too had powerful torches which they flashed randomly inside the house as they opened drawers, cupboards and other places in search of money and other valuables. Martha testified to the same effect. It is also in evidence that the robbers beat and wounded both Dr. Muthuri and his wife, and forced them to lie down. They were lying down while the robbers ransacked their house looking for money. Dr. Muthuri testified, and his wife corroborated his evidence, that the robbers beat them badly to force them to produce some money. One of the robbers spoke to them and that he was able to register his voice in his mind.

Mr. Kariuki and Mrs Ntharangwi, submitted before us that in those circumstances it was not possible for Dr. Muthuri and Martha to correctly identify their attackers. The superior court on first appeal addressed the issue in the following manner

"It is our considered view that the complainant and his wife were able to see the faces of those robbers pretty well. The entire episode took between 20 - 30 minutes. In our view that was adequate time to enable the complainant and his wife to see the faces of their attackers. We therefore hold that the circumstances prevailing at the time of the robbery were favourable for a positive and correct identification of those robbers by the complainants."

Both counsel do not agree and urged the view that had the conditions been favourable the complainants would have but did not give any description of robbers to the police.

The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding

circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in **Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that**

: "... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence.

Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal - this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

In the present case it was common ground that both Dr. Muthuri and his wife did not give to anyone a description of any of the robbers. All they said was that if they saw the robbers they would be able to identify some of them. The failure to elicit a description of the robbers from them appears to us to have been a lapse on the part of the investigating officer or officers. But can it be said that in the circumstances of this case the lapse is fatal? The circumstances of this case are peculiar. The robbers do not seem to have been in any hurry to leave Dr. Muthuri's house. They took time to search for money and other valuables. The eye witnesses did not have just a fleeting glance at the robbers. They observed them at close range under security lights which were said to have been bright.

The circumstances in the house were difficult alright. But considering the length of time the robbers remained inside searching for money the eye witnesses had ample time and opportunity to observe the said robbers. True, the robbers beat and wounded the two witnesses. However, mere wounding could not prevent or impede their observation of their attackers.

Apart from the foregoing Dr. Muthuri and his wife later identified some of their attackers in identification parades the police mounted. As only some of the appellants participated in the parades, we will consider each appellant's case on the issue separately.

The first appellant was identified by Dr. Muthuri. Mr. Kariuki submitted that in absence of a prior description of the 1st appellant by the witness his identification parade evidence should not be believed. Besides, said counsel, the appellant had a swelling on the side of his face which the witness saw for the first time at the parade. In his view had the witness identified the first appellant during the robbery he would have not failed to notice the swelling. At the trial the witness was cross-examined on this aspect. His response was that the 1st appellant did not have the swelling on the date of the robbery. The 1st appellant surprisingly said nothing about this swelling when he testified at his trial. So Dr. Muthuri's statement was uncontroverted. Apart from that Mr. Kariuki attacked the manner the identification parade was conducted. In his view people with similar swellings should have been looked for to participate with the 1st appellant in the identification parade. If that were possible it would have been the most commendable thing to do. But is it practicable to get at least eight people with such swellings? We think that learned counsel by so suggesting is in effect trying to make nonsense the need for identification parades. The requirement as to the parade members is that they should be:

"... as far as possible of similar age, height, general appearance and class of life ..."

as the suspect and not that they should be identical. Mere absence of such swelling from the parade members could not and did not vitiate the importance of the parade evidence.

As regards the 5th appellant (Peter Kinyua Rukunga), her counsel, Mrs. Ntharangwi, submitted before us that the circumstances we set out earlier could not possibly permit Dr. Muthuri and his wife Martha to closely observe the robbers. It was also her submission that the prosecution did not tender in evidence the

parade forms concerning the 5th appellant. We earlier held that conditions favouring a correct identification of the complainant's attackers were good. But where as here the only evidence linking the 5th appellant is visual identification at night time, this Court has from time to time emphasized that identification parade evidence or other evidence is essential to test the correctness of the identification by the eye witnesses.

In the instant case two witnesses testified that they picked the 5th appellant in an identification parade at a police station. The officer who might have conducted the parade was not called as a witness for the prosecution and no explanation was offered for not calling him. In view of the authorities on dock identification the evidence of Dr. Muthuri and his wife Martha is barely sufficient to sustain the 5th appellant's conviction. On the authority of **Bukenya v. Uganda**[1967]EA 341 a rebuttable presumption is raised that had the prosecution called the officer who conducted the identification parade in which the 5th appellant was the suspect his evidence would have been adverse to the prosecution case.

Neither the trial nor the first appellate court adverted to that aspect of the matter. We therefore agree with the 5th appellant's counsel that the first appellate court did not fully scrutinize the evidence concerning him. Accordingly we hold the view that Mr. Oluoch properly conceded his appeal.

As regards the sixth appellant Dr. Muthuri picked him at an identification parade. Before he did so he asked that the parade members shout "Fanya Haraka Meja" These are words the witness said had been uttered in the course of the robbery by the 6th appellant. Mrs Ntharangwi submitted that Dr. Muthuri's evidence on this score should have been ignored as having no probative value. The witness participated in other parades but in those other parades he did not ask the parade members to shout. His evidence was clear that he identified the 6th appellant not merely visually but also by voice. We find nothing objectionable if a witness requests that parade members should shout for him to satisfy himself that he did not make any mistake in his identification of a particular suspect. The whole essence of an identification parade is to test a witness's alleged visual identification of a suspect during the commission of a crime . If the witness says that apart from visual identification he also identified the suspect by his voice he should be allowed to confirm that.

Apart from the evidence of identification the 6th appellant made a statement under inquiry in which he made a clean breast of the robbery. He retracted the statement.

There were concurrent findings by both courts below that the statement was voluntary. The 6th appellant challenges that finding on the ground that the first appellate court applied the decision in the case of **Tuwamoi v. Uganda** without weighing all the circumstances which the court in that case said should first be considered before acting on a retracted confession. This complaint has no basis. We are satisfied that both the trial and first appellate courts took into account all relevant circumstances. The confession statement gives graphic details regarding the planning and execution of the robbery. Some of the details therein contained are matters which ordinarily would not have been within the knowledge of the police or any other person except those who were involved.

The identification parade evidence and the confession statement support the visual identification of the 6th appellant by Dr. Muthuri. The totality of the evidence places the 6th appellant at the scene of the robbery complained of. In view of that his alibi was properly rejected.

The 7th appellant is Joseph Kanyithya Baariu. We have already held that the conditions under which eye witnesses said they identified him amongst others were favourable. The only issue which merits consideration on the issue as pertains to this appellant is that he alleged that Dr. Muthuri who picked him in an identification parade might have seen him before in the course of his work as a medical doctor. Dr. Muthuri, in answer to a question by this appellant, said that he visits several hospitals in Meru in the course of his work as a doctor. He denied a suggestion by the appellant that he went to see him in some hospital accompanied by a police officer called sergeant Mutemi. In his defence the appellant had this to say on the matter:

"As I walked away 200 metres from the bar, I heard a gun shot and I fell down. I was

bleeding ... Later I was taken to hospital the next day. I was admitted. While there I saw P.C. Mwangangi, Mutemi and Kamathi and doctors. They came to visit me. ..." ... I was taken to a parade. PW1 came and picked me from the parade. I was not satisfied with the parade. I had seen PW1 with Mutemi at the hospital. I thumbprinted the I.D forms. The next day I was taken to C.I.D. offices. I thumbprinted so many papers."

But in the parade forms the appellant did not indicate he was dissatisfied with the conduct of the parade. Nor did he say Dr. Muthuri had seen him in hospital in the course of his work as a doctor. With due respect to the appellant nothing turns on his complaint. Whether or not Dr. Muthuri and Sergeant Mutemi visited the appellant in hospital is a matter of fact, which both courts below dealt with. The trial Magistrate made the following observation on the matter:

"The defence have raised an issue that they were either shown to PW1 or he saw them before they were paraded ... The accused had every reason to refuse to participate in the parade if they knew the witness had seen them before. There was time for this before the witness picked on them ... I find their claim to be an afterthought which I dismiss. Accused 14 says he was the only one in plaster on 16/3/94. There is no evidence to show that on that date accused 14 was in plaster though the court is aware he was discharged from hospital on 10/3/94 after admission for a gun shot."

The first appellate court agreed with the trial magistrate that the identification parade for this appellant was properly conducted.

In the result on the basis of the evidence on identification we hold that both courts below were entitled to come to the conclusion they did that the 7th appellant was properly identified as one of the people who robbed Dr. Muthuri and his wife Martha.

There is, however, one aspect which merits consideration. Both courts below relied on the 7th appellant's confession statement to support his conviction. Japheth Muniwoki recorded his charge and caution statement. It was said that the witness also recorded confession statements of other suspects in the same matter, and by reason of the decision in the case of **Njuguna s/o Kimani & 3 others v. Reginam [1954] EACA 316** he was not competent to record any other statement from the same or other suspect in the same case.

A police officer who records a cautioned statement from one suspect in practical terms gets to know the facts of the case being investigated and his position therefore becomes analogous to that of an investigating officer unless of course the suspect in the first statement he records makes a general denial of the offence being investigated. In that event he would not have any knowledge of the facts of the case. But in our case C.I. Japheth Muniwoki recorded a charge and caution statement from the 7th appellant on 22nd March, 1994, and yet he had earlier, on 21st February, 1994, recorded, a similar statement from Paul Kimathi M'itonga, who was charged jointly with 7th appellant. In those circumstances the probative value of that statement was eroded completely. Although the 7th appellant complained about this, neither the trial nor first appellate court considered the issue. The 7th appellant's confession statement was improperly admitted. However, even if the statement is excluded we are satisfied that the 7th appellant's conviction is supportable by other evidence on record.

With regard to the 8th appellant, Joseph Kithaka Muindi, apart from visual identification evidence, a wrist watch, which Dr. Muthuri positively identified as having been stolen from his house, was found with this appellant. Both courts below made concurrent findings of fact that the wrist watch belonged to Dr. Muthuri's wife and we have no reason to differ. It is true as said by Mrs. Ntharangwi that the superior court did not specifically allude to the 8th appellant's claim of ownership of the wrist watch. That omission did not in any way prejudice the appellant as the trial court dealt with it and rejected the appellant's claim. The omission is curable under section 382 of the Criminal Procedure Code.

Mr. Oluoch conceded the appeals of Daniel Irungu Kariuki (3rd appellant) and Gerald Kubai Kimuria (4th appellant). These two appellants were convicted principally on dock identification evidence and co-accused's statements naming them. While we have very strong suspicion based on the evidence on record, that these two appellants participated in the robbery complained of, the evidence falls short of that required in criminal cases to establish guilt. We have no doubt in our minds that had the case against them been properly investigated and prosecuted, they would have had no chance of escaping conviction. The money recovered from them could well have been part of the money which was stolen from Dr. Muthuri and his wife Martha.

In the result, we allow the appeals of the 3rd, 4th and 5th appellants, quash their respective convictions and set aside the sentence of death meted out to each of them. They should be set at liberty forthwith unless otherwise lawfully held. As for the 1st, 6th, 7th and 8th appellants, we dismiss their respective appeals in their entirety. It is so ordered.

Dated and delivered at Nairobi this 30th day of November, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR