IN THE COURT OF APPEAL
AT NAIROBI

CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.

CRIMINAL APPEAL NO. 108 OF 1999

BETWEEN

JOSEPH K. KIGONDU

FRANCIS M. GATHUNGU ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENTS

(Appeal from a judgment of the High Court of Kenya atNairobi (Ang'awa J) dated 11th November, 1998

in

H.C.CR.A. NOS. 1383 & 1384 OF 1997)

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JUDGMENT OF THE COURT

This is an appeal by Joseph Kairu Kigondu the 1st appellant, and Francis Mukei Gathungu , the 2nd appellant, who were jointly arraigned before, tried and convicted by the Chief Magistrate's Court at Nairobi of robbery with violence contrary to Section 296 (2) of the Penal Code , particulars of the offence being that:

> *"On the 28th day of August, 1995 at BP Petrol Station along Limuru Road, Nairobi within the Nairobi area jointly with others not before cou rt being armed with dangerous offensive weapon namely rifle AK47 and pistols robbed BETTY MAINA of her motor vehicle registration number KAB 463S Isuzu pick up white in colour valued at K.Shs.1.3 million and cash K.Shs.160,800/ - all valued at K.Shs.1,460,8 00/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said BETTY MAINA."*

During the trial the prosecution called eight witnesses to testify against the appellants. The prosecution case was based on the evidence of identification and/or recognition. Sefa Odero (PW3) testified to the effect that on the material day (28th August, 1995) he was working at BP Petrol Station along Limuru Road at about 10.30 a.m. when robbers raided the petrol station. During this robbery PW3 was able to identity the 1st appellant whom he knew before. On being cross-examined by counsel for the 1st appellant, PW3 said:

> *"I saw him very well before lying down and as they left I saw them even more clearly."*

Livingstone Ng'ang'a (PW4) was on duty at the petrol station at about 10.10 a.m. when the robbers attacked and he too was able to identify the 1st appellant as one of the robbers. In his evidence in chief, PW4 stated inter alia , as follows:

> *"On 4.9.95, I was called to Pangani Police Station. I was asked if I could identify any of the robbers. A parade was done. I was able to identify Joseph Kairu in that parade. He is the 1st accused before court (pointed out). He is the one who ordered m e to lie down and he is the one who ordered me to start the motor vehicle and he also was the one at the rear of the pick up and pointed a big gun to us. He had a mark on the head (scar). He still has it on the face. I was able to identify him very well. "*

The evidence of PC Benjamin Kupron Samoe (PW7) was to the effect that on the material day (28th August, 1995) at about 9.45 a.m. he was at a kiosk near the BP Petrol Station and that he met five men seated at a bus stage. Out of the five men he knew the 2nd appellant who actually bought him some tea at the kiosk. PW7 was suspicious of these five men and he proceeded to Gigiri Police Station to report about these suspicious five people. A robbery then took place at the BP Petrol Station soon after PW7 had seen the five men. Later PW7 was called to an identification parade where he identified the 2nd appellant as the person who had bought him tea on the day of the robbery. PW7 also identified the 1st appellant as one of the people who was in that group of five.

Having considered all the evidence before her and relying on the evidence of PW3, PW4 and PW7, the learned trial magistrate found that there was sufficient evidence to connect the two appellants with the offence of robbery that took place at the BP Petrol Station along Limuru Road on the morning of 28th August, 1995. In concluding her judgment, the learned trial magistrate (Miss C.W. Mwangi) said:

> *"... I believe the two accused persons together with others not before court robbed the complainant as charged and I convict them. However, due to their age factor - they are young men of below 30 years, I do sympathise with them and find them guilty under section 296(1) P.C. I do therefore convict them accordingly."*

As a result of the above, each appellant was sentenced to serve ten years in jail with an order of police supervision for 5 years upon completion of the prison sentence.

The two appellants then appealed against both conviction and sentence. Their appeal in the superior court was heard by Ang'awa, J. who came to the same conclusion as the learned trial magistrate, that both appellants had been properly identified as being among those who staged the robbery at the BP Petrol Station along Limuru Road on 28th August, 1995. The learned Judge of the superior court noted that the appellants had been charged with robbery with violence contrary to ***section 296 (2) of the Penal Code*** and found guilty but then the trial court "out of sympathy" reduced the charge to ***section 296 (1) of the Penal Code*** . The learned Judge was of the view that there was an error here and hence substituted the charge under ***section 296(2) of the Penal Code*** and sentenced the appellants to suffer death as prescribed by law.

The two appellants have finally come to this Court appealing against the orders of the superior court which orders have condemned both appellants to suffer death penalty.

In this appeal, there are two concurrent findings by the courts below to the effect that the two appellants were part of the gang that was involved in the robbery of 28th August, 1995. As already observed elsewhere in this judgment, the evidence connecting the appellants with the offence is that of identification. We have already set out the relevant particulars of the evidence that connected the appellants with the offence. The incident took place at about 10.30 a.m. but even then that evidence must be closely examined before basing a conviction on it. In the well known case of ***ABDALLA BIN WENDO & ANOTHER V R (1953) 20 EACA 166 at p. 168***, the predecessor of this Court made the following observation:

> *"Subject to certain well -known exceptions it is trite law that a fact may be proved by the testimony*

of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especial ly when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."

The above was cited with approval in the later case of RORIA V R [1967] E.A. 585 in which the issue of identification was taken a step further when the same Court stated that:

"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Cri minal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

`There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cas es out of ten - if there are as many as ten - it is in a question of identity.'"

In **JOSEPH NGUMBAO NZARO V R [1988-92] 2 KAR 212** this Court held that the guidelines laid down in the English decision of **R V TURNBULL [1976] 2 ALL ER 549** were appropriate to the circumstances and inhabitants of Kenya. The guidelines given in Turnbull's case (supra) were as follows:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the r eason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have this accused under observation? At what distance? In wh at light? Was the observation impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

The evidence against the appellants should be examined bearing in mind what the courts have stated earlier as regards evidence of identification as we have endeavoured to illustrate by the few cases that we have cited above.

Coming to the facts of this appeal we must begin with the appeal relating to the conviction and sentence of the 2nd appellant. Mr Kiage for both appellants submitted that both courts below were wrong in basing a conviction on what he called "evidence which was manifestly unsafe" . He pointed out that the only evidence against the 2nd appellant was that of PC Samoe (PW7) but in Mr Kiage's view this evidence by PW7 raised mere suspicion. He reminded us that the learned State Counsel had conceded the appeal in the superior court. When we drew Mr Okumu's attention to this point, he pointed out that had he appeared for the State in the superior court he would not have conceded the appeal. He, however, decided to leave the matter to us to decide. We wish to state here that even if a state counsel concedes an appeal, that is not binding on the court hearing the appeal.

The evidence against the 2nd appellant was that of PC Benjamin Samoe (PW7). This witness told the trial court that he saw the 2nd appellant in a group of five people near the BP Petrol Station just prior to

the robbery. That evidence taken together with the rest of the evidence only raises suspicion that the 2nd appellant might have been one of the robbers. There was no other evidence against the 2nd appellant which would connect him with the offence. We have given this matter due consideration and in the end come to the conclusion that mere suspicion would not do. The 2nd appellant's appeal is, therefore, allowed the conviction quashed and death sentence set aside. The 2nd appellant is to be set free forthwith unless otherwise lawfully held.

This leaves us with the appeal as it relates to the 1st appellant. The evidence against him is that of Sefa Odero (PW3), Livingstone Ng'ang'a (PW4) and PC Benjamin Samoe (PW7). As already stated elsewhere in this judgment the robbery took place in broad daylight. Mr Kiage put up a strong argument on behalf of this appellant in a bid to show that the evidence of PW3 could not be relied on as he was already terrified and lying down when he allegedly identified the 1st appellant during the robbery.

We have considered the very able submissions by Mr Kiage but in the end come to the conclusion that the concurrent findings by the two courts below to the effect that the 1st appellant was properly identified as one of the robbers cannot be faulted.

We have endeavoured to give a resume of the long journey that the 1st appellant has travelled until he reached this Court. His long journey started in the Chief Magistrate's court where he was arraigned on a charge of robbery with violence contrary to section 296 (2) of the Penal Code . He was tried and convicted on a reduced charge of simple robbery contrary to section 296(1) of the Penal Code. This meant the 1st appellant (together with his co-accused who has just been set free in this appeal) escaped a mandatory death penalty and instead got a sentence of 10 years imprisonment together with police supervision of five years upon completion of the prison sentence. The 1st appellant then decided to exercise his statutory right of appeal and hence appealed to the High Court where his appeal was determined by Ang'awa, J., who while confirming the findings of the trial court as to the appellant's guilt discovered an error in law in respect of conviction. The learned Judge then decided to rectify the error by the trial court by substituting the conviction under section 296 (1) with that under section 296 (2) of the Pen al Code. It followed that the only sentence permitted by law was death and hence the learned Judge proceeded to pronounce that sentence upon the 1st appellant and his companion. In so doing the learned Judge of the superior court was relying on this Court's decision in ***JOHANA NDUNGU V REP*** **Criminal Appeal No. 116 of 1995 (unreported)** in which it was stated inter alia :

> "In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after to further in any manner the act of stealing. Therefore the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296(2) which we give below and any one of which if proved will constitute that offence under the sub-section:

(1)If the offender is armed with any dangerous or offensive weapon or instrument, or

(2)If he is in company with one or more other person or persons, or

(3)If, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.

> Analysing the first set of circumstances the essential ingredient, apart from the ingredient including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in s.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and is mandatory for the court to so convict him."

In our view, the learned Judge of the superior court was perfectly entitled, nay, duty bound, to correct the

error of the trial court by entering a conviction under **section 296 (2) of the Penal Code** - and this was the charge upon which the 1st appellant and his co-accused were brought to court, tried and convicted. Once the ingredients of robbery with violence are proved the trial court has no discretion (or room for sympathy) but to convict and pass the death sentence as prescribed by law. The 1st appellant's journey has now come to an end.

Having considered all the relevant issues raised in this appeal we have no alternative but dismiss the appeal by the 1st appellant. It is so ordered.

Dated and delivered at Nairobi this 20th day of December, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR