REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 174 & 238 OF 1978(CONSOLODATED)

ALBERT BERNARD OKWARO WANJALA .....1ST APPELLANT

JOSEPH ALAKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

These two appeals have been consolidated. Both appellants were convicted by the Senior Resident Magistrate at Kisumu upon two charges of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. As it is manifest that a person cannot suffer death twice, we shall make a few comments regarding the joinder of capital charges subsequently. However, both charges were based on the same set of facts, namely a raid carried out by a gang on the house of Ojasi Otuma on the evening of 6th July 1977, the evidence in support of each charge was the same, and relevant to both; and we therefore proceed first to consider the evidence, the submissions of Mr Oraro, who represented the first appellant, and those of the second appellant who was unrepresented.

[His Lordship then reviewed the facts, and continued.] Again and again the Kenya Courts have emphasised the cases of *Abdallah bin Wendo v R* (1953) 20 EACA 166 and *Roria v The Republic* [1967] EA 583, and the necessity for trial courts to proceed with the greatest care when considering evidence of identification, particularly when the offence occurs at night and conditions for identification may be expected to be unfavourable.

Both the cases quoted involved identification by a single witness, which was not the case here, but even so the evidence of each witness must be carefully tested and examined, and, of course, it is relevant to Mr Oraro's final suggestion that if only one of the three identifying witnesses (all of whom were of the same family) suspected the appellants (whom they know well) the others would of necessity support him. Again it must be borne in mind that credibility is not the only issue here, and the possibility of mistaken identification must be satisfactorily excluded.

[Having reviewed the evidence as to identification, his Lordship continued.] The magistrate carefully considered the case of each appellant separately, as we have, and we are satisfied that the identifications of these two appellants as being members of the gang of robbers was not only truthful but free from error, and that their respective convictions were just and safe on the totality of the evidence.

As to the combined death sentences, there have been *dicta* in East African cases to the effect that additional charges should not be added to homicide (ie generally murder or manslaughter) charges for fear of embarrassment or prejudice to the accused persons and that the safer course is to leave the second charge on the file. And, recently, Trevelyan and Todd JJ in the High Court, in *Joel Kariuki Theuri v The Republic* (unreported) said that it was not satisfactory for accused persons in general to have to face noncapital charges along with a capital robbery charge, and that it is better if the others are left uncharged or untried. But Law JA in *Yowana Sebuzukira v Uganda* [1965] EA 684 (one capital charge and one non-capital charge) said that, if all the evidence to support one charge is relevant to the other, no possible prejudice can result. In our view this is the position in the instant case, and we have only touched on the matter because of the nature of the sentence.

As to more than one capital charge, in *Kariuki v The Republic* (unreported) Trevelyan and Todd JJ said that it was not desirable that more than one offence should be charged at the same time when the punishment is death.

The question of sentence on more than one capital charge was present to the mind of Trevelyan J in *Turon v The Republic* [1967] EA 789 (two charges of unlawful possession of firearms and ammunition in the Northern-Eastern Province, being capital offences, plus two non-capital charges of stealing by persons employed in the public service) when he said:

I confess that I cannot see why we have both counts 1 and 2 for the rifle and ammunition could have been made the subject matter of one charge. But there were two such counts in *Gatheru s/o Njagwara v R* and the accused was sentenced to death on each of them without comment by the Court of Appeal. In the present trial I direct that the accused shall suffer death in a manner provided by law on each of the first and second coun|s charged against him.

In that case separate death sentences were passed on each count. In a subsequent case, *Kariuki v The Republic,* Trevelyan and Todd JJ, after dealing with the grounds of appeal relating to amendments of the two charges in question to capital robbery, said:

In the present case we think that it was right that the two counts with which we are concerned should have been brought as capital robbery and the amendments caused no confusion, prejudice or injustice.

But, in the event, the appellants were only convicted upon one charge of capital robbery.

As we dismiss the appeals on the convictions, in order to exercise conformity with the above decisions, we alter the sentence passed by the magistrate so as to order that each of the accused shall suffer death in a manner authorised by law on each of the charges.

Appeals dismissed.

Dated and delivered at Nairobi this 13th day of June 1978.

A. R.WHANCOX **S.K SACHDEVA**

JUDGE **JUDGE**