REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 378 of 1995

(From Original Conviction and Sentence in Criminal Case No.883 of 1993 of the

Chief Magistrate's Court at Mombasa - G.Aburili, Esq.,P.M.)

FREDRICK KIBARA NYAGA…….1ST APPELLANT

(Original Accused No.l)

=VERSUS=

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.380 OF 1995

MUIRURI NDUTI..... 2ND APPELLANT

(Original Accused No.2)

=VERSUS=

REPUBLIC..... RESPONDENT

JUDGMENT

Appeal Nos.378/95 and 380/95 were on application by the State and without objection by the Appellants consolidated and heard together. The appeals arose from the same trial before the Mombasa Principal Magistrate Mr. Aburili, where the Appellant in 378/95 Fredrick Kibara Nyaqah (NYAGAH) was the 1st Accused and the Appellant in 380/95 Muiruri Nduti (NDUTI) was the 2nd Accused. Both were charged with aggravated Robbery under Section 296(2) of the Penal Code in that on 18.7.92, at Social Security House in

Mombasa, jointly with others not before court, armed with pistols robbed BIMAL GUDKA cash Kshs.200,000/- and Gemstones worth Kshs.800,000/- and at or immediately before or immediately after the time of such robbery used personal violence on the said Bimal Gudka.

Although the robbery was alleged to have taken place on 18.7.92 the arrest of Nyagah did not take place until 16.2.93 (7 months later) and that of Nduti on 19.3.93 (8 months later).

Their trial commenced on 26.2,93 but was not concluded until 25.7.95 when judgment was delivered.

They were found guilty of the charge as laid but for no explained reasons the learned trial Magistrate purported to reduce the charge to simple robbery and to sentence both Appellants to serve six years imprisonment and received 4 strokes of the cane. There was an order that they should be placed under Police supervision for 5 years.

In passing I must state that the purported reduction of the more serious offence to a lesser one when the offence charged was

found to have been proved was unlawful. That is the situation that the Court of Appeal strongly deprecated in Cr.A. 116/95 Johana Ndungu -v- R. (UR). In explaining the applicability of S.296 (2) of the Penal Code the Court of Appeal stated that the offence is constituted" upon proof of any of the three sets of circumstances stated in 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, stabs, or uses any other violence to any person."

The use of or threat to use actual violence against any person orproperty at, before or after to further the act of stealing issubsumed in those three circumstances. No other fact needtherefore be proved other than any of those stated in the sub-rule.

It would appear in this case that the learned trial Magistrate was satisfied that the, offence as stated in the particulars was proved in that the Appellants were in company with one or more other person or persons which is the second circumstance in the sub-rule. Indeed there are two persons who were convicted for that offence as having had a joint intention. The learned trial Magistrate also appears to have been satisfied that the Appellants were armed with pistols which satisfy the first circumstance under the sub-rule. He even seems to have gone further and found as a fact that the very fact of drawing guns was enough to constitute violence. That finding would fall under the third circumstance.

So, in essence, out of those findings any one of the three circumstances was, in the findings of the trial Magistrate proved and the offence under S.296 (2) was complete. In its admonition of the courts which reduce the charge as was done in this case, the Court of Appeal said:-

" unless strong directions are sent to

the subordinate trial courts and the judges of the 1st appellate court, they will continue at their whim to tamper with the strict application of law and thereby make a mockery of the purpose for which S.296(2) was introduced in Penal Code.

If proved facts show that robbery under S.296(2) has been committed then the trial Magistrate is obliged to convict the Accused under this section and impose the sentence of death".

Further clarification was made by the Court of Appeal in Cr .A. 34/97 AMOS ONDISO ORARO & 3 OTHERS -vs- R. (UR) where the High Court (Ang'awa & Waki, JJ) purported to enhance a sentence of imprisonment to one of death where the original charge was one under Section 296(1) of, the Penal Code but the facts showed that the more serious offence had been committed. They purported to apply the Ndungu case.

It was held however that the High Court's powers on Appeal were guided by Section 179 - 191 of the Criminal Procedure Code and there was no provision for convicting for a higher offence when a charge for a lower offence was laid. There was however a second count in the same case which had charged the offence under S.296(2) of the Penal Code but the trial Magistrate had purported to reduce it to the lesser offence although the facts showed the more serious offence was committed. The enhancement of the sentence by the High Court Court was not interfered with and the appeal was dismissed.

It would therefore mean that the trial court committed an error of law in reducing the charge despite the finding on the facts that the charge as laid was proved, and this court would be entitled to correct that error of law and mete out the sentence of death as by law provided.

The only issue to consider in this appeal is therefore whether the learned trial Magistrate was right in his findings on the facts of the case. It is the duty of the Appellate Court to test the evidence on record in the trial against and for the Appellants and make its own assessment of the facts. What are the facts on record"

Bimal Gudka, (GUDKA) a gemstone dealer, left his offices near Fort Jesus and headed for the NSSF building. It was at 9.15 a.m. on 18.7.92. He parked his car outside the building and came out to open the car boot where his brief-case was. He took it out and walked towards the entrance of the building. He then saw a tall man walking towards him from the building. He had his hands in the pocket. He pulled out a gun. Gudka looked again and saw two other men with jackets. One a black jacket the other a brown jacket. They too had guns.

The tall man stood about six feet away from Gudka. He was a bit old with a beard. The other two were shorter and stood behind him. The tall man told Gudka to put down the brief case. He took it and walked away slowly. They all entered into a white car and drove off. All that took about 30 seconds.

In a state of shock Gudka went back to his car. He asked those who were around whether they had witnessed what happened. He was told by guards at Express Kenya Ltd that there was a man who had done so. He took the man to Central Police Station where both recorded statements. The Police had no car so they used his to drive around looking for the get-away car, to no avail.

The man who accompanied Gudka to the Police Station was EMMANUEL OBWANA (OBWANA) (PW.2).

He works with Securicor (K) Ltd as a guard. At about 9.00 a.m. he was engaged in a conversation with a driver employed by M/s. Express (K) Ltd., one Samuel Mutua Kithome (KITHOME) (PW.3).

Obwana then noticed a white Toyota Corolla KZR 311, which had a driver inside who was switching the engine on and off. Then he saw an Indian standing with two men armed with a pistol. He saw them take the Indian's bag and he made to lift his whistle to blow it. The driver in the Corolla car yelled at him and he stopped. The two people he saw one had a long sleeved white shirt and the second had a white shirt and black coat. They entered the car and drove off. He and PW.3 then went to the Indian and told him to report to the Police. They went with him.

Kithome was still sitting in his employer's car talking to Obwana facing their offices while Obwana was facing the road. He heard shouts of people and turned to look. He saw three men one carrying a brief-case and two others on his side. The men entered into a Toyota Corolla car Reg. KZZ 311 and it took off. The onecarrying the brief case was a tall guy. He did not see the bag being snatched from the Indian.

It was not until 22.2.93, about seven months after the robbery that IP Samson Ndaragwe Munywa (IP Munywa) (PW.7) of Flying Squad Unit, Nairobi was requested to hold an identification parade in respect of Nyaga, on that day Gudka was the identifying witness and he picked out Nyaga.

On 23,2.93, another parade was held. There were three identifying witnesses including Kithome PW.3. Kithome was unable to identify Nyagah. But another person known as George Rapia who was not called as a witness in this case identified him.

Another identification parade was held in respect of Nduti on 27.3.93 (about 8 months after the commission of the offence) by IP Michael Wilson (IP Wilson) (PW.8). Gudka was the identifying witness and picked him out.

As to the manner of their arrest, on 16.2.93 Urban C.I.D. received a tip off from an unidentified Source that there was going to be a robbery along Haile Sellassie Avenue. An ambush was laid but the robbery did not take place. Instead, the Police Officers laying the ambush including Pc Saul Ingwela (PW.5), were shown four people who were proceeding towards Tononoka area heading for town. They arrested the four,people who included Nyagah and searched them. They found nothing on them. Nevertheless, only Nyagah was eventually charged with this offence after an identification parade was held on 22.2.93.

As for Nduti, another tip-off from an unidentified source wasreceived at C.I.D. Urban that some criminal suspects were escapingupcountry and one of them was on board a Nairobi-bound Bus. Thatwas on 19.3.93 at 9.00 p.m. P.c Thomas Onyisi (PW.4) with other officers headed for Mariakani where they set up a road block. They found Nduti sitting at the back seat of the bus and searched him. He had nothing on him. But he was arrested and handed over to the investigating officer IP Mohamed Dida (PW.9) on 20.3.93. After the identification parade stated above Nduti was charged with this offence.

In his defence Nyagah said he had gone to watch a film at Lotus Cinema near Central Police Station on 17.2.93 at 5.45 p.m. That was after completing his business of selling fruits at Kongowea Market for the day. While he was there some people came and identified themselves as, Police Officers. They were carrying his photograph which he had been taken with another friend who was a taxi-driver. The Policemen told him to accompany them to C.I.D. Urban. It was there that he was asked to tell the Policemen where his friend was as he was wanted for some robbery crimes. When he said he did not know where the person was, he was taken to Bamburi Police Station Where an identification parade was held two days later. It was a parade which was quickly organised by the Investigating officer IP Dida to have the Appellant picked out and was farcical. He denied having committed any offenceNduti in his defence said he was going to Nairobi to arrangfor the transfer of his Nissan Matatu KVN 480. At Mariakani some25 Police Officers stormed the Bus. They had his Photograph. Hewas handcuffed and taken out of the bus. He was later taken to CID Urban and paraded to be shown as the person who has been disturbing the whole town. He was taken to court and remanded in police custody where other, cases of robbery with violence were alleged against him. The police kept on beating him all the time and forcing him to sign some papers which he was resisting. Some identification parades were held.

On the alleged day of robbery 18.7.92 he was at his Bombolulu shop and did not leave his shop at all.

Nyagah posed 8 grounds of appeal to challenge his conviction but abandoned one while he combined two others. They may be paraphrased:-

1. Reliance was made on a single identifyingwitness whose evidence was not corroborated

even at the identification parade.

2. The evidence of the arresting officer (PW.4)was hearsay.

3. There was no investigation carried out by theinvestigating officer (PW.9).

4. The prosecution evidence was full ofcontradictory evidence.

5. The defence evidence of alibi was notchallenged but was not considered.

6. The sentence was harsh and excessive.

On his part Nduti laid three grounds of appeal:-

1. Identification of PW.l was not free from error.

2. Identification evidence of PW.2 & PW.3 was dock identifications only.

3. The alibi defence was not considered.

Both Appellants argued their appeals in person. Nyagah referred to the evidence on identification and submitted that his purported identification at the scene and at the identification parades was erroneous. Witnesses who did not even witness the offence were taken to the parade while those who said they did so were left out. The investigating officer was present at the identification parades.

His arrest was instigated by an undisclosed informer whose evidence can only be hearsay. No opportunity was given to the Appellant to cross-examine him.

He further referred to the evidence of PW.l, PW.2 and PW.3 and pointed out that there were contradictions which were not noted by

the trial Magistrate.

Finally his alibi that he was at Kongowea Market on the day of

the alleged robbery was not considered.

On his part the Appellant Nduti argued all the 3 grounds asone and submitted that the period of time the robbery took coupledwith the state of shock of PW.l who had to seek the assistance ofPW.l and PW.2, did not favour positive identification of therobbers. There was no first report of the robbers. The Policeonly relied on unnamed informers to effect the arrest of theAppellant.

As for the parade which was conducted 6-7 months later, it was of no probative value since human memories fade with time. The parades held in respect of him were meaningless because he had already been paraded around Police Stations for all and sundry to see him. The evidence on the parades was not tested with sufficient care. It was uncorroborated and was unlawfully obtained. It should be disregarded.

PW.2's evidence on identification was wanting. He could not even identify the driver of the car whom he said was near him and gave a different Registration number of the get away car from that seen by

PW.3. On the totality of their evidence, there is no consistency in the evidence of PW.l, PW.2 and PW.3 in respect of the identity of the robbers and the get away car. There was no positive identification in the, circumstances.

Finally, he submitted that his alibi was not displaced although he had told the police where he was when the alleged offence Was committed.

State Counsel Mr. Ng'eno supported the conviction and sentence. He was of the view that there was positive identification of the Appellants as some of the robbers. Descriptions were given by PW.l, PW.2 and PW.3 of the robbers and the get away car. Only the registration numbers of the car differ and can be ignored. Although only PW.l picked out the Appellantsat the identification parades there is no law preventing a trial Magistrate from relying on such evidence, so long as he warns himself.

On the identification parades Mr. Ng'eno submitted that they were held in accordance with the Judges Rules.

As for the contradictions pointed out in the evidence of PW. 2 and PW.3 he submitted that they were petty and could not make the court come to a different finding.

I have carefully considered these appeals as the offence charged is serious enough to carry the death sentence. Clearly the issues that merit close scrutiny are those of identification of the Appellants at the scene of the crime and during the identification parade. The crucial witnesses in both cases are Gudka, (PW.l), Obwana (PW.2) and Kithome (PW.3).

That Gudka was robbed of his brief case and its contents that Saturday morning may not give rise to much dispute. The trial Magistrate believed him in that regard and I have no reason to differr. The issue is whether the two Appellants were among the people alleged to have committed the robbery. And the only evidence that connects them therewith is that of the three witnesses above who testified that they identified them at the scene. The evidence must therefore be tested very carefully for veracity and consistency.

The robbery took 30-45 seconds. It is within that space of time that the witnesses identification has to be tested. What did they witness and describe"

Gudka (PW.l) saw three people. One was tall, a bit old and with a beard. He stood infront of the other two shorter ones whom he identified as the Appellants. One of them Nyagah wore a black jacket, and ordinary trousers. He did not notice the colour of the shirt; or trousers. His face was very sharp, and then again it was

a bit bent. Nduti the second shorter man also wore a jacket, a brown one. That was all he saw of the men. At first he said he gave that description to the Police when he recorded his statement straightaway. His memory then was fresh. But in cross-examination and re-examination, Gudka admitted that he was in a state of shock and did not give any description of the assailants to the Police. Production of the statement he recorded was demanded by the defence and was produced to confirm that he did not tell the Police how he recognised the two assailants who were arrested seven/eight months

later.

On his part Obwana (PW.2) saw only two men who took the Indian's bag. The person he calls Nyagah was wearing long sleeved white shirt and the one he calls Nduti was wearing a white shirt and a

black coat. He saw the two from the back as the Indian is the one who was facing him. He said he was only 3-4 metres away but made no mention of the third tall, oldish bearded man or the description of the driver of the get-away car which he said wasalso close to him. The registration number of the car itself he gave as KZR 311.

Then the third eye witness Kithome PW.3. He was facing away from the robbery scene as he spoke with Obwana and only turned round when he heard "a shout of people". At what point in time he heard this is not specified. But when he turned round he saw three men, one with a brief-case and two on his side. The get-away car they went into was KZZ 311. He saw the man carrying the brief-case was tall. He did not give the description of the two others in his examination-in-chief, but in cross-examination, he said the man he called Nyagah was wearing "a white shirt with short sleeves" and the man he called Nditu was wearing "a short sleeved, brown or white shirt".

None of the two, Obwana or Kithome testified to have given any description of the Appellants to the Police in the statements recorded soon after the robbery.

It is clear from the above summary that none of the three eye-witnesses is consistent with any other about what they witnessed, both as to the description of the assailants, two of whom they claimed were the Appellants, and the get-away car. The learned trial Magistrate did not refer to those contradictions and only surmised that there was "fair description" of the two Appellants. State Counsel Mr. Ng'eno submitted that the contradictions and inconsistencies, which were admittedly present in the evidence, were minor and immaterial and could therefore be ignored.

With respect, I do not agree. Particularly when sole reliance was made on the evidence of those three witnesses and it is on such evidence that the lives of the two Appellants hang. If the three witnesses saw the same incident at the same time, they must surely be able to, at least, agree on one or two aspects of the description of the assailants. All the descriptions by the three witnesses here are totally at variance with each other. It would perhaps have helped to give some credibility to their evidence if all the three had been invited to a properly convened identification parade soon after the robbery. There has been no attempt by the prosecution all along to explain why it had to take 7-8 months to apprehend the Appellants, if they had their descriptions all along and knew they resided in Mombasa. On the evidence it would appear the two had been kept under surveillance by the Police and were not arrested for this particular offence.

Be that as it may, only Gudka (PW.l) seems to have been invited to pick out the Appellants in the belated identification parades. Obwana was not invited and it is not stated why. Kithome denied that he was ever invited to make any identification but on this he is contradicted by the parade officer IP Munywa (PW.7) who testified that Kithome was one of three identifying witnesses called on 23.2.93 but was unable to identify anyone.

Identification parade evidence in this particular case was of crucial significance but the learned trial Magistrate appears to

have treated the flaws in the prosecution evidence casually. Hestated:-

"It is true none of the witnesses had seen the accused persons before. It was therefore important that all PW.l, PW.2 and PW.3 should have been called to an identification parade. PW.2 said he was called to such a parade but did not attend. PW.3 probably could not be called for the parade. But we have parade

Forms for PW.I..... the slight omission bythe prosecution to have PW.2 and PW.3 go through identification parades is not fatal to the case".Identification parades are opinion evidence. And their value is enhanced when the witness was able to give a descriptionof theaccused person in his first report.

It seems to me that both the evidence of identification at the scene and at the identification parades in this case were of the weakest kind and gave rise to reasonable doubts as to whether the two Appellants were the two persons accompanying the tall black bearded oldish man as the complainant was being robbed at 9.30 a.m. on 18.7.92. It may well be that the two Appellants were beingsought by the Police on other crimes and there is plenty of evidence, some of which was prejudicial but was allowed on record, before conviction, to show that the two were suspected or known criminals. But courts do not act on suspicions or suspicions upon suspicions, but on hard, credible and consistent evidence of the commission of an offence stated in the statute books of this country.

This particular case was not proved beyond reasonable doubts against the two Appellants and it was not safe to convict them on the evidence on record. I allow their appeals, quash the convictions and set aside the sentences. The Appellants shall be set at liberty unless they are otherwise lawfully held. Dated this 15th day of November 1998

P.N.WAKI

JUDGE