Case Number:	Criminal Appeal 89 of 2007
Date Delivered:	07 Nov 2008
Case Class:	Criminal
Court:	Court of Appeal at Eldoret
Case Action:	Judgment
Judge:	Emmanuel Okello O'Kubasu, John walter Onyango Otieno, Joyce Adhiambo Aluoch
Citation:	Miller Wanjala Muchacha v Republic [2008] eKLR
Advocates:	Mr. Kigamwa for the appellant Mr. Omutelema, learned Senior Principal State Counsel
Case Summary:	Criminal law - robbery with violence - second appeal against conviction and sentence of death - evidence - identification - whether the evidence of the identification of the appellant was reliable - test to be applied to identification evidence before it can form the basis for a conviction - identification parade - where identifying witnesses had seen the suspect within the police station before the identification parade - defence of alibi - an accused person who raises an alibi does not assume the burden of proving it - Penal Code section 296(2) Sentencing - death sentence - where a person is convicted on more than one capital charge - proper practice is to sentence the person to death on only one count and to leave the others in abeyance, including any sentence of imprisonment on another charge.
Court Division:	Criminal
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-

History Docket Number:	54 OF 2006
Case Outcome:	Appeal allowed
History County:	Uasin Gishu
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL OF

KENYA AT ELDORET

CRIMINAL APPEAL 89 OF 2007

MILLER WANJALA MUCHACHA…… APPELLANT

AND

REPUBLIC……..……RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Eldoret (Ibrahim & Bauni, JJ) dated 21st February 2006

in

H.C.CR.A NO. 54 OF 2006

****

JUDGMENT OF THE COURT

Miller Wanjala Muchacha, the appellant herein was charged jointly with others not before the court, with four counts of robbery with violence, contrary to **section 296(2)** of the Penal Code. He was convicted on counts 2, 3 and 4 and sentenced to death in respect of each count by W. N. Njage, Principal Magistrate, Eldoret, on 30th June 2006. His appeal to the superior court was dismissed (Ibrahim, K. Bauni, JJ), on 21st February, 2008. He now appeals to this Court by way of a second appeal, and that being the position, **section 361(1)** of the Criminal Procedure Code, Chapter 75 Laws of Kenya, restricts the jurisdiction of the Court to dealing only with matters of law.

The evidence on which the appellant was convicted and sentenced, and which was accepted by both the trial court and the superior court was that **Geoffrey Situma Bakali (PW1)** (*hereinafter Geoffrey*) a bursar at Kivayia High School in Lumitete Division of Lugari District, owns a bar at Matete market. He recalled the 27th November, 2004 at about 9.00 p.m. whilst in the bar he saw about ten men enter the bar. They were dressed in police clothes, and he assumed they were on duty. He introduced them as the owner of the bar and asked the men what they wanted. They told him to wait and almost immediately, he was hit on the head with an iron bar. He fell down and was again hit on the hip and the right ear. He started bleeding and became unconscious. When he regained consciousness, he found himself at Lugulu Mission hospital where he was admitted for five days. He was robbed of an identification card, and a wallet containing Kshs.2,000/=. He was subsequently issued with a P3 form by the police. He did not recognize the appellant during the robbery, and later when the appellant was shown to him as one of those who had been arrested, he was unable to identify him as he had not known him before.

Elizabeth Nekesa Eliud (PW2) (*hereinafter Elizabeth*) was a bar attendant at Geoffrey's Furaha bar in Matete. She reported on duty at 10.00 a.m. on 27th November, 204 and worked upto 10.30 p.m. in the evening, when she went to the toilets at the rear of the bar, but within the same compound. Whilst there, she saw men dressed in jungle jackets, enter the bar. There was electricity light, so she could see the men whom she thought were police officers. As she was walking back to the bar, she saw five of them.

She noticed that the others had hats which looked like helmets. She was pushed to the back of the bar. She noticed that Geoffrey her boss got up and went to talk to the men who stood at the door, and a man came from behind and hit him on the right side of the head above the right ear. The other men ordered everybody to lie down as they demanded mobile phones and money.

The attackers led Elizabeth to the counter and ordered her to open it which she did and they took some money. She identified the appellant as the person who led her to the counter and took the money. The appellant was dressed in a jungle jacket and askari boots. She saw his face with the aid of light from electricity bulbs.

Elizabeth looked for a taxi which took Geoffrey to the hospital as he was bleeding. Later on 7th December, 2004, she picked the appellant at an identification parade where there were ten other suspects. She recalled that the appellant was armed with a club at the time of the robbery, and had a hat on, but she saw his face.

The appellant questioned Elizabeth at length during cross examination as the record of the trial court shows. About his identification Elizabeth said:-

"The robbers took sometime in the bar. I lay under a table on my stomach. The robbers did not remove their hats. I identified the accused in the parade. On 30.11.2005, I did not go to Lugari police station. I saw accused on 27.11.2004. I gave my statement on 27.11.2004. The accused had some police boots on. They (sic) had tacked the trousers in the boots. I did not see accused on 1.12.2004. I had never seen accused before. I saw his face before I was ordered to lie down…."

Zakayo Shikuku (PW3) (*hereinafter Zakayo*) was the manager of Furaha bar owned by Geoffrey. He was on duty in the bar on 27th November, 2004 at about 10.00 p.m. He was seated in the makuti shade at the rear of the bar. He saw the people he described as "officers", enter the bar. They were dressed in full jungle uniform. He went to welcome them. They stopped and ordered him to switch off the music, which he did. They further ordered him not to move from where he was standing. One of the attackers removed an object which looked like a pistol and placed it on his chest, as they pushed him to the back of the bar where he found Geoffrey who came out to talk to them, but was hit on the head with an iron bar. Geoffrey fell down bleeding and lay still on the ground. The attackers started beating the customers as they demanded wallets, money and mobile phones. Zakayo lost his wallet containing Kshs.13,300/= and an identification card. He suffered injuries on the left side of his abdomen. He was unable to identify any of the robbers.

Yvonne Nafula (PW4) (*hereinafter Yvonne*) an employee of Geoffrey at Furaha bar, was also in the bar on the night of the robbery. She saw men wearing jungle jackets enter the bar. They pushed her to the rear of the bar, together with other customers whom they ordered to lie down and robbed them of their valuables. Yvonne watched Elizabeth her co-worker being led to the counter by the robbers who ordered her to hand over the money which she did, and they left.

Yvonne later learnt that one of the robbers had been arrested. She identified him at an identification parade as the appellant because she claimed that she had seen his face with the aid of electric light during the robbery. She said that the appellant was wearing a jungle jacket and askari boots, and was armed with a whip.

Ali Alio Hassan (PW5) (*hereinafter Ali Alio*) recalled the night of 27th November 2004, at about 7.30 p.m. when he was stopped by robbers at the gate of his house. He said they introduced themselves as

police officers, and because the place was a bit dark, he tried to run to the nearest gate, but he found another gang stationed there, so he stopped. They too introduced themselves as police officers, and Ali Alio asked them why they wanted to arrest him. They tied his hands with a rope and ordered him to knock on the door of his house. He did so, and the door was opened and they entered the house with him and demanded money. He had Kshs.1,500/- which they took together with his mobile phone, but they still demanded to be given Kshs. 500,000/= or they would shoot him. They were armed with pangas, clubs and pistols. They ransacked the house and stayed there for about one hour, after which they ordered him to accompany them to his shop, which was across the road. He started screaming for help and the robbers cut him three times on the head with pangas. He fell down unconscious and later regained consciousness at Lugulu hospital.

Ali Alio later attended an identification parade at which he identified the appellant as the man who was seated next to him on the bed, and who appeared like the supervisor as he ordered the others around. He said that the appellant wore a jungle jacket and black trousers, and had a hat on his head. He saw the appellant with the aid of lights from a lantern which was lit in the house.

The appellant was arrested on 30th November, 2004 by **CIP Jackson Maalo (PW6)** (*hereinafter Chief Inspector Jackson*), and **Police Constable Andrew Omari (PW7)**, (*hereinafter P.C Andrew Omari*). They had the appellant's description from Elizabeth and Yvonne, who were both in the bar at the time of the robbery. They laid ambush at the appellant's house and arrested him on arrival. They searched the house and recovered a pair of black boots alleged to have been worn by the appellant during the robbery.

Harry Wasike (PW8), a Clinical officer (*hereinafter Harry*) examined Geoffrey on 28th November, 2004. Geoffrey was wearing blood stained clothes, and had cut wounds on his head. He was in pain, but conscious. He also had a swelling and a tender left hand. The degree of his injuries was assessed as harm.

Chief Inspector **William Koskei (PW9)** (*hereinafter William Koskei*) conducted an identification parade at Lumakanda police station on 7th December 2004, at which Elizabeth, Yvonne and Ali Alio, identified the appellant by touching him, and on being questioned about the parade, the appellant said he was satisfied with the manner in which it was conducted.

Finally was the evidence of the investigating officer, Police Constable **Joseph Ngumbi (PW10),** (*hereinafter Joseph*) who charged the appellant with the offences, after investigations.

The appellant made a sworn statement in defence and denied all the four counts of robbery with violence. He also denied having been anywhere near the scene of the robbery on 27.11.2004, and said that he was at Likuyani in Soy, from 25.11.2004 to 29.11.2004, after which he went home where he stayed upto 1.12.2004 when he was arrested from Likuyani, where he had gone to harvest maize. He said that he was accompanied by his wife and a brother and was taken to the D.O's office at Matete where he stayed from 7.30 a.m. and at about 10.50 a.m. two men and two women were brought and asked if they knew him, and they all answered in the negative.

The appellant said he nevertheless was arrested and placed in the cells upto 7.12.2004, when he was taken to an identification parade at Lumakanda police station. He said that the four people he had seen at the D.O's office were called to identify him, but he was not satisfied with the parade as the witnesses had seen him before the parade.

The appellant called 3 witnesses, **Samuel Wanyonyi Katila (DW2)** (*hereinafter Samuel*), his cousin

Isaya Kasambeli (DW3) (*hereinafter Isaya*) and his wife **Asha Mohamed Baro (DW4)** (*hereinafter Asha*). The three confirmed that the appellant went to Samuel's home to harvest maize on his rented farm on 25th November 2005, and stayed in Samuel's house till 29th November, 2005. Asha said that the police picked up her husband from the market where he works and brought him home on 1.12.2004. That they had a pair of boots with them. She said that her husband does not own any boots.

The learned Magistrate rejected the appellant's alibi defence when he said:-

"In his alibi defence, the accused alleged that he was at Soy centre from 25.11.2004 to 29.11.2004 harvesting his maize at the farm of one Samuel Katila Wanyonyi, which he had rented. He called Samuel Wanyonyi (DW2), Isaya Kasumbeli (DW3) and Asha Mohamed (DW4) as his witnesses. The court noted that all the three defence witnesses were witnesses of doubtful integrity who gravely contradicted themselves when subjected to cross-examination. I need not go into details of what each of the witnesses said. Sufficient to say I observed each of them in the witnesses box and they appeared to me to be blatant lairs (sic) who had been coached on what to come and say in court. I disbelieve the defence and reject it".

On identification of the appellant, the learned Magistrate said:-

"I am satisfied from the evidence that the accused was properly identified during the robbery at Matate bar as one of the robbers. There was sufficient light in the bar that enabled the witnesses to see and identify the accused".

On the identification parade conducted by William Koskei, the the learned Magistrate said:-

"An identification parade was properly conducted at Lumakanda police station on 7.12.2004 by PW8, William Koske the DCIO Lugari. The accused was picked out during the parade by three independent eye witnesses. His defence of Alibi is not tenable. He was adequately identified during the robbery of Furaha Bar Matete (sic). I reject the defence evidence".

The learned Magistrate then concluded:-

"I find the offences proved against the accused in counts No. 2,3 and 4 beyond reasonable doubt. The accused stands before the Court, convicted as charged in counts 2, 3 and 4".

The learned Judges of the superior court in dismissing the appellant's appeal said:-

"Having reconsidered the facts and evidence and made our own evaluation, we find and hold that the trial Magistrate reached a proper finding in convicting the accused on the basis of the evidence of PW2, PW4 and PW5, besides the other circumstantial evidence. We think that the evidence of PW3 ought to have been disregarded and excluded by the trial court. However, this does not diminish or affect the weight of evidence and the proof of identification – by PW2 and 4 and 5 in respect of counts 2,3 and 4 and PW5 in respect of count I. The possibility of a mistake by any of the said witnesses is removed due to the condusive conditions of the identification and recognition both at PW 5's house and Furaha bar.

We see no reason for interfering with the conviction and sentence passed by the trial Court. We do hereby dismiss the petition of appeal by the appellant".

On the appellant's alibi defence, the learned Judges said:-

"We have read testimonies of the accused and his two witnesses DW2 and DW3. We have considered his defence of alibi. They are not water-light (sic). The alleged incident took place on 27th November, 2004. None of the witnesses testified that they were with the accused throughout between 25.11.2004 and 29.11.2004 day and night. They did not say that they were with accused on the night of 27.11.2004 and in particular at about 10.00 p.m. and if so, where".

The appellant had initially filed his own memorandum of appeal to this Court, but this was abandoned by his counsel Mr. R. W. Kigamwa, who relied on a Supplementary Memorandum of Appeal he filed on 7th August 2008. It is dated 6th August, 2008 and contains 6 grounds of appeal namely:-

"1. THAT the learned Judges erred in law in failing to find that the magistrate had admitted the complaint under section 89 of the Criminal Procedure Code, Cap 75 while there was no prosecutor to present the same in Court on the date the appellant was first arraigned in court.

2. THAT the learned Judges erred in law in failing to find that no valid plea could be taken by the appellant in the absence of a competent prosecutor in terms of section 85 of the Criminal Procedure Code, Cap 75 being present in Court during the plea taking proceedings under section 207 of the Criminal Procedure Code, Cap 75.

3. THAT the learned Judges erred in law in failing to find that no valid plea taking proceedings could be conducted in the absence of the Court clerk and the interpreter.

4. THAT the learned Judges erred in law in failing to evaluate the evidence while sitting as a first appellant (sic) court.

5. THAT the learned Judges erred in law in failing to find that the appellant had no onus to prove an alibi raised.

6. THAT the learned Judges erred in law in failing to find that the appellant had been sentenced to death on count no. 1 while he had been acquitted of the same".

Mr. R. W. Kigamwa, learned counsel for the appellant combined and argued grounds 1, 2 and 3 of the supplementary memorandum of appeal together. He also argued grounds 4 and 5 together, and ground 6 separately.

According to Mr. Kigamwa, nobody presented the charges to the trial Magistrate on 10.12.2004, the day the appellant was called upon to plead to the charges. That there was no prosecutor as the records of that day show, and there was no court clerk either, which means that there was no translation of the proceedings to the appellant. That in these circumstances, **section 85** of the **Criminal Procedure Code** and **section 77(2)** of the Constitution were not complied with.

On the identification parade, Mr. Kigamwa submitted that the identification parade rules were not complied with. That seven people were invited to the parade and the appellant was not informed of his right to change positions in the parade.

Mr. Kigamwa also submitted that the witnesses were not clear on the date of the offence, for example William Koskei gave the date as 26.11.2005, whereas the medical examination report form gives the date of the offence as 27.11.2004.

Mr. Kigamwa said that the appellant's alibi defence was not dislodged, which means that the

prosecution did not prove the case beyond reasonable doubt.

In response to the submissions of the learned counsel for the appellant, Mr. Omutelema, learned Senior Principal State Counsel submitted that he was not supporting the conviction of the appellant and sentences imposed because whereas section 85 of the Criminal Procedure Code does not require the presence of a prosecutor at the time of the plea, in practice, a prosecutor ought to be in court, but his absence is an irregularity which can be cured. He denied that the appellant was acquitted on any count as there was no specific order to that effect. However, he submitted that his reasons for not supporting the conviction of the appellant were that both the trial Magistrate and the Judges of the superior court did not consider the appellant's complaint that the witnesses were shown to him before the parade. This was evident in the evidence of Elizabeth who said in part:-

"At police station I said I saw once (sic) of the robbers very clearly as accused in the dark. If he was not arrested, I could not identify him. I identified him after arrest. The boots here are similar to the ones the accused was wearing. The accused was wearing the boots. On 1.12.2004, I don't know what happened a D.O's office. I saw accused on 7/11/04 at Lumakanda D.O.'s office. I did not see him on 1/12/04. I identified the accused in a parade. The persons in the parade had no jungle jackets on. They had no boots on. They had no hats on. I picked out the accused as I saw his face."

Mr. Omutelema also pointed out the contradictions in the evidence of the prosecution witnesses and submitted further that one Elisha who was present as Ali Alio was being robbed was not called to confirm what happened in Ali Alio's house.

Identification of the appellant, according to Mr. Omutelema was by strangers – i.e. people who had not known him before the incident.

We have considered the submissions of the two learned counsel. We have also considered the conviction and sentence of the appellant by the trial Magistrate, and the confirmation of the same by the superior court. In our view the main issue in this appeal relates to the identification of the appellant. There was also the appellant's alibi defence. As was rightly pointed by Mr. Omutelema, identification of the appellant was by people who had never met him before. In fact they identified him after he had been arrested and was in police custody. They said they saw his face with the aid of electric lights in the case of the robbery in Geoffrey's house, yet Elizabeth one of the identifying witnesses said she ran and hid under a table, but still managed to see his face. In the case of the robbery in Ali Alio's house, identification was by Ali Alio himself a single witness, with the aid of a lantern. This therefore shows that identification of the appellant was under difficult circumstances. Because of that, there was need for caution as has been stated in many cases; for example **ABDALLA BIN WENDO AND ANOTHER v R [1953] 20 EACA** and **RORIA v REPUBLIC [1967] EA 583**, in which Sir Clement de Lestang V. P. said:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L. C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal 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 cases out of ten – if there are as many as ten – it is in a question of identity' ".

We respectfully agree with the foregoing which in our view applies to the facts of this appeal where the

identity of the appellant was in question.

We have anxiously considered the issue of identification of the appellant and it is our view that the courts below erred in not considering the fact that some witnesses who identified the appellant at the parade had seen him in an office before the parade. This made their evidence doubtful whether they really saw the appellant's face on the night of the robbery as alleged. We also note that the parade numbers were below eight as required of Forces Standing Order paragraph **6(iv)(d).**

As for the alibi defence, it is now well settled that an accused person who raises the defence of alibi does not have the burden of proving that defence – see **SEKI TOLEKO v UGANDA [1967] EA 531** and **KIARIE v REPUBLIC [1984] KLR 739.**

In this appeal, the trial Magistrate's finding that the appellant was picked up during the parade by three independent eye witnesses and his alibi defence was therefore not tenable as his witnesses were of doubtful character, was most unfortunate, because it shifted the burden of proving the alibi to the appellant. This was the same with the superior court's finding that the appellant's alibi was not "water-light (***sic***)". In fact this finding by the superior court amounted to a misdirection, which in our view occasioned a failure of justice given the fact that the prosecution evidence used to dislodge the appellant's alibi was both contradictory and doubtful.

The appellant complained in ground 6 of the Supplementary Memorandum of Appeal that he was, "**sentenced to death on count no. 1 while he had been acquitted of the same**". We do find this borne out by the learned Magistrate's record as he did not convict the appellant on count 1 though he sentenced him on that count. The learned Judges of the superior court failed in their duty as the first appellate court to point this out.

The only other matter that calls for our intervention is the sentences meted out by the two courts below. The trial Magistrate's record on sentence reads:-

"Accordingly, I pronounce the death sentence against the accused in each of the four counts as he is charged".

On this point this Court has said severally, and more particularly in **ABDUL DEBANO BOYE & ANOTHER vs REPUBLIC Cr. Appeal No. 19/2001 (UR)** as follows:

"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out" We can find no sense at all in such proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the Court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not

allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."

In the result, we allow the appeal, quash the conviction on counts no. 2, 3 and 4, and set aside the sentence of death imposed on the appellant on, "*each of the four counts as charged*". The appellant will be released forthwith, unless otherwise lawfully held.

Dated and delivered at Eldoret this 7th day of November 2008.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR