



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(From The Original Conviction And Sentence Of Chief Magistrate's Court At Nairobi In Criminal Case No.1488 Of 2008 – K. Bidali)

CRIMINAL APPEAL 132 OF 2011

CONSOLIDATED WITH

CRIMINAL APPEAL 130 OF 2011

AND

CRIMINAL APPEAL 137 OF 2011

ZACHARIA IRANGI MBABU 1ST APPELLANT

JOHN MUSHILA MUSUNGU 2ND APPELLANT

DICKSON LIKHANGA LIVONDO 3RD APPELLANT

VERSUS

REPUBLIC

Ms Nyauncho – State Counsel

Mr. Swaka – for the Appellants

JUDGEMENT OF THE COURT

1. The appellants, Zacharia Irangi Mbabu (1st appellant), John Mushila Musungu (2nd appellant) and Dickson Likhanga Livondo (3rd appellant) were charged with robbery with violence contrary to section 296(2) of the Penal Code. Particulars of the offence were that on the night of 8th and 9th September 2008, along Nandi Road Karen area in Langata within Nairobi area Province, the appellants Zacharia Irangi Mbaru, John Mushila Musungu and Dickson Likhanga Livondo, jointly with others not before court, while armed with offensive weapons namely strings robbed YVONE BLANCHE MURTON of 674 US Dollars and a golden chain and a or immediately before or immediately after the time of such robbery used actual violence which caused the death of the said YVONE BLANCHE MURTON. The appellants pleaded not guilty to the charge and after a full trial, they were found guilty as charged, they were convicted and sentenced to death. Being aggrieved by their conviction and sentence, each appellant has filed a separate appeal against his conviction and sentence. At the hearing of the appeals, the three separate appeals filed by the appellants were consolidated and heard as one.

2. the facts of the case are that Kingori Makutuu (PW1) a security guard with SGS security based at Racecourse road was on 8th september 2008 on duty stationed at the back up vehicle and was on duty at Karen shopping Centre when at about 11.30pm he got an alarm signal, the controller informed him to proceed to the residence of Yvone Murton along Nandi Road, and together with Dominic Muriithi (PW2) they proceeded to this residence. While at the residence, Dominic Muriithi, attempted to communicate with their client Yvone Burton using the intercom stationed at the gate but there was no response and a short while later, a guard WERE came to the gate and informed them that he heard Yvone screaming but the gate was locked from inside and he did not have access and equally PW1 and PW2 could not have access as there was a perimeter wall round the residence but they managed to get a ladder which they used to jump over this fence and get into the compound and gained access to the residence. Dominic could hear people inside the house talk in low tones and that they were demanding for money from a lady and she in return told them that she did not have any money. PW1 alerted the controller and requested for backup as they kept vigil and shortly thereafter police arrived and used the same ladder as PW1 and PW2 used to get into the residence which was still locked from inside. Shortly upon the arrival of the police, a relative of Yvone Murton also arrived and forced the gate open as well as the door to the main house. Inside, the police together with PW1, PW2 and the relative, they discovered the body of Yvone Burton (the deceased) lying about 5 metres from the main door facing upwards. The deceased was dressed in a nightgown and there was a visible injury on her hand. The police conducted a search inside the house in the ground floor but there was nothing suspicious. They proceeded upstairs and in one bedroom under the bed found two men who were arrested. These were identified as the 2nd and 3rd appellants being people found inside the deceased residence under a bed in the upstairs room. The police interrogated the two arrested persons on how they had accessed the residence but could not give a good account. The two persons were searched by Joakim Ochenge (PW6) and on the 3rd appellant he found USD 674 in a small pocket in his underpants and upon the search of the 2nd appellant, he was found in possession of a chain. Marc Mc Clay (PW3) the son of the deceased was on the night of 8th and 9th September 2008 called by his father who informed him that there was a problem at the residence of the deceased and together they proceeded to the Nandi Road at the residence. They found other guards had arrived and several police officers, they forced the gate open and drove inside the compound and the police told them that they had attempted to call the deceased who was inside but there was no response. PW3 broke a window and managed to force the door open and they discovered the deceased lying on the floor. He noted that the house was ransacked indicating a struggle. The police searched the house and in a room upstairs, two people were found under the bed and were arrested. The deceased body was later taken to the Lee funeral Home. The following morning, the police went back to the residence and together with PW3 discovered that at the external wall of the perimeter fence there was mud at the wall, they followed the foot prints which led up to the house in the upstairs window and they also discovered that some window levers were missing and they also noted that the burglar proof was not done properly and once the levers were removed, there was a huge gap which must have been used by the robbers. He also discovered that the window louvers at the top of the roof and from the positing of the window, it would have been possible to place the louvers on top of the roof from inside the house and thus concluded that the robbers must have removed those louvers from the roof prior to gaining access into the house.

3. Benson Lubusi Amalia (PW4) a security supervisor was on duty on the night of 8th September 2008 together with PW2 and around 11.40pm they got a signal alarm from a residence along Nandi road in Karen area. He had attended to another alarm before and the practice was to communicate via the intercom but there was no response and he thus called the other guards who proceeded to this residence. CIP John Makonge (PW5) then based at Karen Police Station was on early morning of 9th September 2008 called to attend to a case at a residence No. 40 in Karen on a report that there were suspected robbers inside the house. He called for reinforcement and proceeded to the residence but found it locked and inside was dark. PW3 came along at the same time and forced the gate open and then broke the window forcing the main door open and were all able to gain access to the house. PW5 switched on the lights when they saw the deceased body, he conducted a search in all the rooms and upstairs he found two men under a bed and since they already had information that there were people inside, the two were arrested as suspects. The two were interrogated and indicated that they were several but others had managed to escape. At this time several CID officers had arrived and PW5 handed over the case to them. Robert Mobera (PW9) who was then CID Langata also responded to the call at the residence of the

deceased on the night of 8th and 9th September and together with two other police officers Mungute and Ndemo, went to residence No. 40 Karen. He found two suspects who had already been arrested as among the robbers and he took over the investigations. The 3rd appellant informed him that 3 other people had escaped and he led them to the house of the 1st appellant who was identified by the 3rd appellant. Nothing was recovered from him as having been stolen from the deceased but his jacket and clothes were taken for forensic analysis. Evan Mose (PW10) also visited the scene of crime on the night of 8th and 9th September 2008, he took photographs at the scene, photos of the body of the deceased, blood stains found on the floor, in the bathroom and the general condition of the house. All these were produced in evidence in support of the charge against the appellants.

Grounds of appeal

4. Though the appellants were charged together in the lower court, their grounds of appeal are substantively different; the 1st appellant has filed 5 grounds of appeal that the learned trial magistrate erred in law and in fact by;

- i. *Putting reliance on unproved allegations to base a conviction*
- ii. *Reliance on incompetent witnesses to base a conviction*
- iii. *Allowing the production of exhibits contrary to section 33 of CPC and the Evidence Act*
- iv. *Denied the appellant a fundamental right of representation throughout the trial*
- v. *Rejected the defence that plausible to secure an acquittal.*

5. The 2nd appellant filed 5 grounds of appeal, which upon scrutiny are 3 grounds, stating that the learned trial magistrate erred in law and in fact by;

- i. *Denied him representation and relied on incompetent witnesses and rejected an otherwise good defence*
- ii. *The case was not proved under section 107(1) of the Evidence Act and Section 150 of the CPC*
- iii. *Relied on exhibits in breach of section 77 of the Evidence Act and section 33 of CPC*

6. The 3rd appellant filed 7 grounds of appeal and upon our scrutiny, these are reduced to 5 grounds, and stated that the learned trial magistrate erred in law and in fact by;

- i. *Relied on mistaken identity and a victim of circumstances*
- ii. *Relied on circumstantial evidence on the recovery of US Dollars without consideration that they were not in the possession of 3rd appellant*
- iii. *Relied on insufficient evidence as crucial witnesses were not summoned*
- iv. *Section 200 CPC was not complied with during the trial*
- v. *Rejecting the defence without giving reasons*

Submissions,

7. In submission, Mr. Swaka for the appellants stated that the ingredients of section 296(2) were not proved where there must be an aggravated stealing by deprivation of ownership which was not proved as nobody was deprived of any of the alleged stolen items. The US Dollars were not serialised to prove that the US Dollars found in the possession of the appellants belonged to the deceased who lived alone and nobody would say what actually belonged to her and the evidence is therefore at variance with the charge sheet. The items alleged to have been stolen should have been traced to the deceased which was not done in this case. that fair trial was contravened when the appellant, who were represented by an advocate, at one point when the advocate was absent, they were forced by the court to proceed unrepresented contrary to section 77(1) of the repealed Constitution. The appellants were faced with a capital offence with clear consequences, and there was miscarriage of justice when the court failed to accord them their right to representation.

8. That the evidence on exhibits falls below the threshold. PW10 who went to the scene and produced

photos but did not have the mandate and competence to take photos and produce them in court. PW11 also produced exhibits and post mortem report beyond his jurisdiction. Mr. Swaka further submitted that material witnesses were not called. There was a Mr. WERE, the guard at the premises who was not called and the police relied on him out of court and if he had been called to shed more light on the events with regard to the night of 8th and 9th September 2008, the outcome of trial would have been different. Some appellants said they were employees which WERE could have confirmed or refuted. That the defence of the appellants was treated as a sham yet it raised weighty issues.

9. He further submitted that there were material contradictions by the witnesses where one said the appellants were employed within the home and others said they were not and based on shoddy investigations with mix up of blood samples, the US Dollars were never serialised, fingerprints were washed by the morning dew, and the conviction herein was unsafe. The appeals should be allowed.

10. Ms Nyauncho for the State opposed the appeals and submitted that the robbery led to the death of Yvone Morton, 2nd and 3rd appellants were arrested on the same day at the scene and led to the arrest of 1st appellant. PW1 and PW2 were security guards with a system connected to the residence of the deceased, they were alerted of the robbery and proceeded to the scene where they heard a commotion inside the house and called the police who broke into the house and found the deceased on the floor and the 2nd and 3rd appellants hidden under a bed. Upon a search, 2nd appellant was found in possession of a golden chain belonging to the deceased and the 3rd appellant had USD 674 in his inner pockets.

11. That the body of the deceased was found full of wounds by the use of strings and there was proof of what weapons were used causing the injuries. PW5, Officer in charge, Karen said the body of the deceased had wounds, PW7 the Government Analyst collected blood samples, analysed the jacket and samples from the appellants and compared them with blood samples of the deceased and concluded the 1st appellant had the blood of the deceased. This evidence is corroborated by PW1, PW2, PW3, PW4 and PW5 who confirmed the 2nd and 3rd appellants were arrested at the scene of the crime. The appeals should therefore be rejected.

Issues for determination

12. As the first appellate court in criminal cases, this court is mandated to reconsider and re-evaluate afresh the evidence adduced by the witnesses before the trial court and reach its own independent determination whether or not to uphold the conviction of the appellants. In reaching this determination, this court is required to put into consideration the fact that it neither saw nor heard the witnesses as they testified. This court is further mandated to consider the grounds of appeal put forward by the appellants in this appeal as held in *Njoroge versus Republic [1987] KLR 19*.

13. From the onset we need to address an issue that arose immediately after the close of the hearing of the appeal. The 1st appellant, **Zacharia Irangi Mbabu**, was at the commencement of his appeal hearing registered as ZACHARIA IRUNGU MBARU. The practice of the court is to call out all the appellants before any proceedings take place to confirm that indeed the appellants produced before court are the persons correctly produced. This court being a court of record relied on the record of the lower court and noted that all the proceedings and judgement of the lower court relate to the 1st appellant as, ZACHARIA IRANGI MBARU and not ZACHARIA IRANGI MBABU. The Memorandum of Appeal and the Grounds of Appeal are correctly filed by the 1st appellant, ZACHARIA IRANGI MBABU. This is the correct name as under the charge sheet that describe the 1st appellant as, ZACHARIA IRANGI MBABU. For the State, Ms Nyauncho stated that this was a typographical error that can be cured with a correction of the names 'IRANGI MBABU' instead of 'IRUNGU MBARU' with regard to the 1st appellant.

14. We have reviewed this carefully, the record from the lower court was carefully evaluated, the charge against the 1st appellant meet the substantive requirements which sufficiently describes the place, thing, matter, act all necessary to the charge. The misapplication of the names which were not part of the grounds of appeal, does not affect the trial before the lower court of before this court. We have

highlighted this for clarity and reference of the 1st appellant for the record and proceedings herein where he should be referred to as, ZACHARIA IRANGI MBABU and not any other name. 1st appellant's appeal herein is outlined under the names, **ZACHARIA IRANGI MBABU**, which should be reflected on the body and heading of the judgement. We are guided by the decision of the Court of Appeal in ***Eunice Kalama Jabu versus Republic, Criminal Appeal 327 of 2008*** (seating at Mombasa).

15. All the issues outlined in the grounds of appeal by all the appellants, we take a holistic approach based on the submissions made for the State and for the appellants. With regard to non-compliance with section 200 of the Criminal Procedure Code, the learned trial Magistrate on 17/12/09 at Page 40 and 41 made provision for the application of section 200 CPC and directed that proceedings should commence *de novo* and when trial commenced after these directions on 22/1/10, hearing commenced with PW1 being Kinoru Makutuu and PW1 who had earlier on given evidence called in as PW2. We find the lower court warned itself and applied the provisions of section 200 CPC correctly.

16. On the right to fair trial and representation, we have perused through the entire record, we note the proceedings on 18/8/10, at page 69 on the record, all the accused were present, PW9 gave evidence and was cross examined by the 1st and 2nd appellant and court noted;

Cross-examination by Mr. Swaka for the 3 accused persons (who has just walked in)

The deceased had workers inside in the compound. The watchman stated he had never seen the accused prior. A1 was not at the scene. I was led to him by A3. I did not witness the thorough search.

17. With regard to these grounds, we note the issue of an appellant's defence, the Court of Appeal has gone into it in-depth in the case of **David Njoroge Macharia versus Republic, Criminal Appeal No.497 of 2007** on the application of section 77 of the repealed Constitution and Article 50 of the Constitution. Our understanding of the application of the same in this case is that under the repealed Constitution at section 77;

If a person charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent court established by law.

(2) Every person who is charged with a criminal offence-

(c) Shall be given adequate time and facilities for the preparation of his defence;

(d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice

18. Article 50 of the Constitution on the other hand provides;

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

(2) Every accused person has the right to a fair trial, which includes the right-

(c) To have adequate time and facilities to prepare a defence.

19. Hence there is no record that the appellant applied to have their advocate present and were denied this application and when their advocate arrived, he proceeded with cross-examination of PW6 without any application for more time or to be allowed to go through the file and note any anomalies in the cross-examination of PW6. The right to representation was not challenged to enable the lower court address it.

20. on the evidence relied upon by the lower court; we find the 2nd and 3rd appellants were arrested by PW5 while hidden upstairs under a bed in the house of the deceased Yvone Morton. The circumstances leading to this arrest are that there was an alert raised through the security link the deceased had at the house with the company where PW1, PW2 and PW4 worked and upon arrival at the home, they made access over the gate since it was locked and controlled by a remote and when they could not access the house, they called the police where PW3 and PW5 responded. PW3 broke a window with a rungu and forced the door open with the assistance of PW5. PW5 put on the lights in the house and near the kitchen saw the deceased who had injuries and decided to search the house and upstairs found 2nd and 3rd accused under the bed. PW3 talked to 2nd and 3rd appellant but prior to this he did not know them. PW4 witnessed these events and saw the two appellants being removed from the house. When PW6 arrived he conducted a search of the home and also searched the appellants, 2nd appellant was found in possession of a gold chain that PW3 said belonged to his mother and 3rd appellant was found in possession of \$674, and PW3 confirmed that his mother was due to travel to America and had about Kshs.30, 000/= in US Dollars. In defence the 2nd appellant gave his unsworn statement that he was a shamba boy along Nandi Road Karen and was arrested on 9/9/08 at 5.45am as he went to work while the 3rd appellant in his unsworn defence stated that he was a shamba boy at Yvone Murton home and on 9/9/08 at 5.45am when he reported on duty he was arrested.

21. It is on record that the deceased Yvone Burton resided in her house alone but had employees working for her, there was WERE as the guard and the 3rd appellant as the shamba boy. The home was secured by an alarm system with an intercom linked with SGS security service. The appellants are said to have been found inside this home after employees of SGS Security Limited PW1 and PW2 responded when the deceased alarm went off. They tried to communicate in the intercom but there was no response. They called WERE but the gate was locked and hence used a ladder to gain entry. They called for backup after hearing commotion inside the house which was locked from inside. At this point we refer to the case of ***Bukenya and others versus Uganda, [1972] EA 349***, where the court stated that at a criminal trial, the Director has a duty to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent and that while he is not required to call a superfluous number of witnesses, if he calls evidence which is barely adequate, the failure to call the other witnesses will entitle the court to draw an inference that the evidence of the uncalled witnesses would have tendered to be adverse to the prosecution's case, we think the prosecution did well to put before the court all evidence that was available both in support of its case and against its case. Having done so, the prosecution made it clear to the court what its case was.

22. The prosecution case was, the 2nd and 3rd appellants were arrested at the scene of crime and found to be in possession of a gold chain and \$794 respectively. They picked several items from the house for analysis and were also led by the 3rd appellant to the house of 1st appellant in Dagoretti where he was arrested and his jacket and trousers taken for analysis. The Government Analyst, Joseph Kimani (PW7) after analysing the samples received from Samuel B. Ogato of Langata Police Station formed a conclusion that;

I formed a conclusion that the DNA profile generated from blood stains on the jacket exb G and Partial DNA profile generated from jacket E2 matched the DNA profile generated from the blood sample of the deceased which could have come from her after the injuries. I did prepare a report on 11.3.10 which I signed and I wish to produce Mfi -10(a) and DNA profile Mfi-10(h) both produced as exh 10(a) and (b).

Page 62 – line 15

23. Exhibit “G” was a grey jacket in a Kaki envelope while exhibit “E2” was a jungle multi coloured sleeveless jacket in a kaki envelope.

24. To this evidence, the link to the 1st appellant is what Robert Mobera (PW9) stated that;

...I joined Mungute and Ndemo and we went to nandi road Karen to the house No. 40. Inside we found the OCPD, OCS, Police officers and ultimate security guards. In the house I saw the body of a white lady I was told that 2 suspects had already been arrested being among the robbers.

The body is as shown in the photos Mfi-2 M, N, O (identified). Two suspects were already there. I took over investigations. We got information from Livondo that 3 other people had escaped. The 2nd and 3rd accused was already arrested. The 3rd accused told me 3 suspects had escaped and he led me to a house in mutuini/Dagoretti where we found the 1st accused. He was identified by 3rd accused. We did not recover anything from him. We conducted investigations and there were charged. ...when they were taken to the police station at Karen a thorough search was conducted and Exb 4(a) – (d), 5 6(a) – (e) – 7(a) – (d) were recovered from the 3rd accused person. The accused clothes were also taken for forensic analysis. ...

25. So where did exhibits “G” and “2E” emanate from? Where did Samuel B. Okato of Langata Police Station get this exhibit from? These omissions and gaps break the logic as to why the 1st appellant was arrested and the connection to the crime by a fellow accused person as they were in the lower court raises serious doubts. We have considered this evidence and being aware of the law, a court is required to consider with great care the evidence of a co-suspect/co-accused and single witness as held in ***Abdala Bin Wendo and another versus Republic [1963], 20 EACA 166***, this case addressed identification is a good law in other cases as well such as the present case.

26. With regard to 2nd and 3rd appellants, the circumstances of their arrest and where they were found placed on the night of 8th and 9th September 2008 draw and inferences that they were aware and involved in a material way in the events leading to the assault and robbery at the residence of the deceased Yvone Murton. The unsworn defence that they were walking along Nandi road Karen at 5.45am on 9/9/08 cannot explicate them from the crime based on the evidence of Pw1, PW2, and PW3 and PW5 who were consistent and talked to the same and similar facts on the arrest of the two. The circumstantial evidence against the 2nd and 3rd appellants is overwhelming. The law in this respect was established way back in 1949 in the case of ***Republic versus Kipkering arap Koskei [1949] 16 EACA 135*** where the East Africa Court of Appeal held;

That in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts on the accused.

27. Having appreciated the evidence of PW1, PW2, PW3 and PW5 with regard to the arrest of the 2nd and 3rd appellants, the application of section 111(1) of the Evidence Act shifts the burden to an accused person to explain the circumstances that brought rise to them to the scene of crime and this is not to shift the burden of proof from the prosecution to themselves but rather section 111(1) is meant to ensure among other things that those committing offences such as this one should not go scot-free all because their victim is not available to state what happened that resulted in their demise or suffering for that matter.

This was clearly outlined in the case of ***Jacob Muthee and others versus Republic, Court of Appeal at Nairobi, and [2013] eKLR***.

28. Therefore, the 2nd and 3rd appellants were along Nandi road Karen at 5.45a.m around the relevant time when a crime happened at the deceased home on the same road and with an explanation that they were shamba boys along this road does not remove blame on them. At this hour of the morning, 5.45a.m, along Nandi road Karen, they cannot say they were busy walking to their places of work.

29. The sum total of all the above is that the appeal of the 1st appellant must succeed. The appeals of the

2nd appellant and the 3rd appellant fail and are hereby dismissed. The conviction of the 1st appellant is quashed and the sentence set aside and is set free unless otherwise lawfully held.

Dated and delivered at Nairobi this 20th Day of December 2013

M. Mbaru

J. Rika

Judge

Judge

In the presence of:

Court Clerks

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