**Huka and others v Republic**

**Division:** Court of Appeal of Kenya at Nyeri

**Date of Judgment:** 7 May 2004

**Case Number:** 114/03,117/03 and 135/03

**Before:** Tunoi, O’kubasu JJA and Onyango Otieno AJA

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**Summarised by:** C Kanjama

*[1] Crime – Robbery with violence – Accused persons identified – Whether evidence of identification*

*had been properly scrutinised by trial and first appellate courts – Whether first appellate court was*

*justified in taking judicial notice at the time of dawn in that part of the country – Whether other*

*contradictions in the case had been properly analysed.*

*[2] Criminal Procedure – Appeal – Whether first appellate court had properly scrutinised the evidence*

*– Whether contradictions in the prosecution case had been adequately considered by the first appellate*

*court.*

*[3] Evidence – Judicial notice – Judicial notice taken as to the time when dawn breaks in a particular*

*season in the* locus in quo *– Whether the judicial notice taken as an element necessary for discharge of*

*the burden of proof was appropriate in a criminal case.*

**JUDGMENT**

**TUNOI, O’KUBASU JJA AND ONYANGO-OTIENO AJA:** These three appeals were heard together. The three appellants, Ahmed Dima Huka, Nuno Ali Jaldesa and Hassan Jatani abdi (we shall refer to all of them in this judgment as “the appellants”) were charged in the Senior Resident Magistrate’s Court at Nanyuki with the offence of robbery with violence contrary to section 296(2) of the Penal Code. In the subordinate court, Nuno Ali Jaldesa was the first accused. The particulars of the charged were that on the night of 16 and 17 February 2000 at Nanyuki town in Laikipia District within Rift Valley Province jointly with others not before the Court, being armed with an offensive weapon namely a knife robbed Sheikh Abdullahi Mohamed of cash KShs 21 000-00 a jacket, ID card, a plot letter, an Islamic hat and a walking stick all valued at KShs 21 450-00 and at or immediately before or immediately after the time of such robbery with violence wounded the said Sheikh Abdullahi. The learned Senior Resident Magistrate after hearing the case found the three appellants guilty, convicted them and sentenced each of them to death. In so convicting them, the learned Magistrate stated *inter alia* as follows: “From the foregoing therefore, I am satisfied that the prosecution has established beyond a reasonable doubt that the accused in the dock and three others in the dock (*sic*) while armed with a knife which I found to be a dangerous weapon did rob PW6 on 16 February 2000 at about 5:30am of the listed items and during the said robbery his left leg hence sustaining maim as per P3 form produced by PW1. This amounts to an offence under section 296(2) which accused are charged with and I find each of the accused guilty on that offence as charged”. The appellants, being dissatisfied with that decision and of course being dissatisfied with the death sentence, lodged appeals in the superior court, being High Court criminal appeal numbers 330, 301 and 322 of 2003 respectively. Those appeals came up before Juma and Mitey JJ who after hearing the same appeals (which were consolidated and heard together) dismissed the appeals stating in conclusion that: “The appellants contended that 5:30am was early in the morning for them to have been identified properly. We take judicial notice that in the month of February and March the sun rises very early in this part of Kenya and we are satisfied that PW2 and PW6 positively identified the appellants. The learned Senior Resident Magistrate clearly analysed the evidence before him and directed himself on the issue of the law and we are satisfied that he came to the correct conclusion in convicting the appellants. We therefore dismiss the appeals of the appellants.” The appellants were still dissatisfied and have brought this second appeal. Although at the time the appeals were heard all the appellants were represented by their learned counsel, Mr *Mukunya*, the three petitions of appeal filed were all filed by the appellants in person and in all of them, the main complaints were that the appellants were not properly identified; that there were serious contradictions in evidence of the prosecution witnesses as to the time when the offence was alleged to have taken place; whether there was enough light for purposes of proper identification and whether a knife exhibit 2 was the knife used by the third appellant against the complainant, Sheikh Abdullahi (PW6) during the robbery. In brief facts of the case were that the complainant, Sheikh Abdullahi (referred to in this judgment as Abdullahi), operates a butchery in Laikipia town. On 15 February 2000 he was with the accused persons until evening. On 16 February 2000, he left his house at 5:30am. He had KShs 2 000-00 in his coat. As he left the house, Ahmed Dima Huka held him up. Nuno Ali Jaldesa pulled off his coat and he saw Hassan Jatai go towards him with a knife. There were three other robbers with the appellants. As he was held, the others including one Hassan Nguyo (still at large) joined the three in attacking him. Nguyo squeezed his neck and Hassan Jatani stabbed him with a knife on the left leg at the thigh. The six people (the three appellants plus three others) took whatever they wanted and went away. Abdulahi raised alarm and members of the public responded. He was taken to the hospital. Hussein Nguyo Abdi (PW2) (referred to hereinafter as Abdi) who was earlier on with Abdullahi but had passed through the butchery and was therefore not with Abdullahi at the time of the robbery heard his screams, closed the butchery and ran towards the source of the screams. As he took a corner, he met with six people running away. He knew the same people who included the three appellants. They were in the same dresses they had in court during the trial when Abdi gave evidence. Abdi took the complainant, Abdullahi to the hospital. Francis Mwangi (PW3), a watchman in the vicinity, also responded to the alarm. He met with six people and saw their face but he did not know their names. Later, each appellant was arrested at a different place on different dates after the robbery. Fatuma Mohamed (PW7) identified the knife allegedly used in the robbery as a knife taken from her butchery by the third appellant. The above were the brief facts of this case. It will be noted from the same facts that only Abdullahi, the complainant, witnessed the robbery on him. Abdi said he met people running. That was at 5:30am and they were six people. Francis Mwangi also met six people at that time. Fatuma Mohamed says the knife she was shown in court was from her butchery and was usually carried by the third appellant. It will also be noted, that none of the appellants were found in possession of any stolen items. All these meant that in law, the subordinate court had to properly analyse the evidence before it and decide on whether each or any of the appellants was properly identified before a conviction could be entered. This is trite law and whether the Court is dealing with a case of recognition, as Abdullahi and Abdi seem to imply by their evidence on record, still the Court has to examine the evidence of visual identification in a criminal case very carefully to ensure that any possibility of error is eliminated. In the case of *Wamunga v Republic* criminal appeal number 20 of 1989 at Kisumu, this Court stated as follows: “We now turn to the more troublesome part of this appeal namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW13). Both these witnesses testified that they recognised the appellant among other robbers who attacked and robbed them what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ in the well known case of *R v Turnbull* [1976] 3 All ER 549 at 552 where he said: ‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made’”. In the same way the superior court, on hearing the appeal as a first appellate court had a duty to analyse the evidence that was before it, evaluate it and draw its own conclusion always bearing in mind that it did not have the opportunity to see the demeanour of the witnesses and giving allowance for the same. In the case of *Okeno v Republic* [1972] EA this Court held *inter alia* as follows: “(vi) It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of trial court should be upheld”. In this case the robbery is alleged to have taken place at 5:30am. In fact, even this evidence as to time is also contradicted as Mirichu Ndonga (PW1) clinical officer Nanyuki Hospital who examined Abdullahi said in cross-examination by third appellant. “I attended the patient at 5:30am”. That in effect means that if Mirichu Ndonga’s evidence is accepted then the robbery could have taken place much earlier than 5:30am. However, assuming it was at 5:30am it was according to Abdullahi still dark and electric light was being used. The appellants maintain it was still dark. The superior court did not resolve that contradiction. Instead it added to it by advancing its own theory so that there was sufficient light at 5:30am. In our view, this robbery offended the settled law found in the case of *Okale and others v Republic* [1965] EA 55 which discourages courts from putting forward theories not canvassed in evidence or in counsels’ speeches. The superior court had to analyse the evidence adduced in the subordinate court and make a finding on its own as to the time when the robbery took place and further make a finding whether in its opinion the circumstances were favourable for proper identification. To do so it had to find whether Abdi was correct when he maintained that there was enough light at the time of the robbery or whether Abullahi was right that at the time it was so dark that electric light had to be on for proper visibility. This was important as the complainant, Abdullahi and Abdi, are the only two witnesses who claimed to have recognised the appellants that early morning. Secondly, there were also contradictions in evidence in dresses which the robbers wore at the time of the robbery. Abdi said. “The accused were dressed as they are now (first accused with a green jacket, checked shirt, second accused greenish short sleeved jacket and third accused a T-shirt)”. And Francis Mwangi said in answer to cross-examination by the third accused. “You are not dressed in the clothes you had that day as that day you had a jacket and you now have only a long sleeved T-shirt”. The third contradiction in the prosecution case was on whether or not an identification parade was organised for any of the appellants. Abdullahi said in cross-examination by Nuno Ali Jaldesa as follows on this aspect: “The second accused and third accused declined to participate in the parade but you did and I picked you out”. Whereas number 42741 PC Wekesa (PW11) who investigated the case stated in answer to Ahmed Dima Huka as follows: “The three of you declined to participate in a parade which was to be conducted by Deputy OCS IP Musenye claiming PW6 already knew you”. The above is just some of the contradictory evidence in this case as concerns identification which the superior court had a duty to analyse and resolve but which in our humble opinion it did not. As this is a second appeal, we cannot undertake the same exercise here as ours is to consider only matters of law and not matters of fact. We feel, however, that if the superior court had analysed the same, it may very well have come to a different conclusion on the entire case. In any case the appellants were prejudiced by the failure of the superior court to resolve the same contradictions on appeal. Before we conclude this judgment, there is another matter which we need to consider also which though not on identification as such, but is connected to it as it helped the subordinate court decide on the veracity of the prosecution witnesses. This was the handling of the knife Exhibit 2. As we have stated, Fatuma Mohamed identified the knife to be a knife from her butchery which the third appellant used to have. However, Abdullahi says he took the knife to the police station after coming from hospital without stating where he got the knife from. Whereas the superior court dismissed the appeal on the ground among others that the knife was found at the scene of the robbery, Abdi in answer to the third appellant stated: “The knife which had been left behind was collected by the watchman whose name I do not know and is the one who also handed it to the police”. The only watchman called as a witness was Francis Mwangi and he never talked of having taken the knife to the police. This contradictory evidence was also not subject to proper analysis by the superior court so as to establish whether the knife in question could be connected to the third appellant or not. As we have stated, we cannot undertake the same exercise here but we do feel, if evidence about the knife exhibit 2 was analysed by the superior court as is required in law, that court may have come to different conclusion. The Learned State Counsel, Mr *Orinda*, did not oppose this appeal, and with respect, we agree with him. In the result, this appeal is allowed, conviction in each is quashed and sentences set aside. The appellants are set free forthwith unless otherwise lawfully held. For the appellants: *Mr SN Mukunya* instructed by *Kagondu & Mukunya Adv*

For the State:

*Mr Orinda* State Counsel instructed by Attorney-General