



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. 102 OF 2011**

**(Begin an appeal arising from conviction and sentence in Kitale Chief Magistrate's court Criminal Case No. 949 of 2010 delivered by T.A. Odera Senior Resident Magistrate on 01/08/2011)**

**SAMWEL MWATHI NDERITU.....1ST APPELLANT**

**JOSEPH KARUINGI NJENGA.....2ND APPELLANT**

**JOHN NGANGA MUNGAI..... 3RD APPELLANT**

**GEOFFREY KEMBOI MABIALE.....4TH APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The 4 Appellants were charged with 3 counts of Robbery with Violence as hereunder;

On first Count, they were charged with **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars were that **on the 20<sup>th</sup> day of March, 2010 at Muhuti farm in Trans Nzoia East district within the Rift valley province jointly with others not before court while armed with crude weapons namely Pangas and iron bars robbed Joshua Wambugu of cash Kshs 1,700/=, 6 bags of DAP fertilizer, 30 kg of certified maize seeds, one Sonitec radio , one Nokia 1210 mobile phone all valued at Kshs 49,500/= and at or immediately before or immediately after the time of such robbery used actual violence against the said Joshua Wambugu.**

2. They were charge with the second count namely **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that **on the 20<sup>th</sup> day of March, 2010 at Muhuti farm in Trans Nzoia East district within the Rift valley province jointly with others not before court while armed with crude weapons namely Pangas and iron bars robbed Mary Wanjiru Joshua one mobile phone Nokia 1660 and Kshs 700 all valued at cash Kshs 3,700/=, and at or immediately before or immediately after the time of such robbery used actual violence against the said Mary Wanjiru Joshua.**

3. They were also charged with the third count of **Robbery with violence contrary to section 296(2) of the penal Code**. The particulars of the offence were that **on the 20<sup>th</sup> day of March, 2010 at Muhuti farm in Trans Nzoia East district within the Rift valley province jointly with others not before court while armed with crude weapons namely Pangas and iron bars robbed Josephine Wambui Joshua of kshs 15,000/- and at or immediately before or immediately after the time of such robbery used actual violence against the said Josephine Wambui Joshua.**

4. After full trial they were all convicted and sentence to suffer death hence this appeal. Their separate appeals almost have similar grounds and before dealing with them it shall be worthwhile to summarise the proceedings at the trial court.

5. **PW1 Joshua Wambugu** testified that on 20/3/2010 at 6.00 pm he was with his 2 daughters, Wambui and Wanjiru who are all adults. At around 10.00 pm he found his house opened. He went back to the kitchen where his daughters were and while at the door a torch was shown at him and was beaten using a panga and he felt down. He screamed 3 times and he was tied using a rope and tied to the roof. Later and after the assailants had left his grandson Abel came and through the assistance of his employee he was rescued and taken to Kitale District hospital. He sustained serious injuries which are enumerated in the P3 form he identified in court. He however lost assorted items mentioned in the charge sheet. He did not recognise any of the robbers.

6. **PW2 Josephine Wambui** testified that she was with PW1 as well as his sister Mary Wanjiru who had come visiting. At 10 pm when his father went to sleep he came back and inquired whether they had locked the door to his house. She then heard commotion outside and his father screaming. A man came and pushed him on the Sofa set and told to lie down facing down.

7. The assailants then asked for money from her sister who had travelled from Nairobi. He took one of them round showing him the rooms which included they boys room. One of them came with the child and shone the torch in the room and she managed to see him and he recognised him as having worked in her home as casual labourer. She was tied with the rope in her hands and legs. She struggled to free herself but was however helped by her herdsman Reuben who had been called by Abel. Abel had apparently accessed outside through the window since the door was locked from outside.

8. They were then taken to the hospital by a KAG Church pastor. She realised that she had lost the assorted items enumerated in the charge sheet. She equally identified the P3 form filled at the hospital and which showed the extend of the injuries she had suffered.

9. On cross-examination by the 4<sup>th</sup> appellant she said that she had identified him at the identification parade at Cherengany police station.

10. **PW3 A N** aged 10 years gave unsworn evidence. He said that he was asleep in his room when PW2 woke him up. He opened the door and was pulled by a man to his grandfather's house and inquired where he kept the money. At that time he saw PW1 with the assistance of the hurricane lamp in the house. He testified that he beat him up as well as PW1. He was then locked inside a cupboard. He escaped through the window and called the herdsman who came and untied them. He further testified that he saw the 1<sup>st</sup> and the 2<sup>nd</sup> appellants that night. This he said was before the chimney lamp was kicked.

11. When cross-examined by the 1<sup>st</sup> appellant he said that he saw him before his face was tied and put inside the cupboard. As regards the 2<sup>nd</sup> appellant he said that he had seen him arranging timber at their home that material day.

12. **PW4 Chrisantus Masinde** a clinical officer from Kitale District Hospital produced the P3 form for PW1 as well as for Pw2 on behalf of Mr. Ligare who had examined PW2. The two P3s showed the extend of the injuries suffered by the complainants.

13. **PW5 Police Reservist Stephen Obonyo** from Sibanga Patrol base testified that on 22/3/2010 at pm while in patrol with his friend Geoffrey Martin they received a call from one Sergeant Wambugu to arrest some suspects within Sibanga location. They arrested 6 suspects and took them to the patrol base.

14. On cross-examination by the appellants he maintained that it was Kariuki who led them to arrest the appellants.

15. **PW6 Mary Wanjiru Joshua** testified that she was in her father's house (PW1) on 20/3/2010. PW1 decided to go and sleep but came back and asked if his door was not locked. Suddenly he was pushed back by someone. He screamed and he was beaten by 3 people. He pleaded with them not to beat him more because he was bleeding. They took his handbag which had assorted items enumerated in the charge sheet.

One of them kicked the lamp and they ordered her to lie down and had her hands and legs tied. They then took her to another house and raped her. After they left he called Abel, the young boy to go through the window and get assistance from the herdsman who came and untied them. She was taken to Kitale District hospital where she was treated. She identified the P3 form which showed also the extend of the injuries she had sustained. She managed to identify the 1<sup>st</sup> and the 3<sup>rd</sup> appellants who apparently raped her. She said that she knew the 1<sup>st</sup> appellant since the year 2003 as he was from the neighbourhood. He did not know the 3<sup>rd</sup> appellant but he identified him.

16. On cross-examination she said that she identified the 3<sup>rd</sup> appellant as he had long beard courtesy of the lamp which was 2 ½ feet from the ground and had lit the house.

17. **PW7 P.C. James Kahari** from Geta police post arrested the 3 suspects as well as visited the scene. He took them to the station for further investigations.

18. **PW8 Kirwa Labatt** the clinical officer from Kitale District hospital produced the P3 form in respect to PW6 which showed the extend of the injuries she had sustained. She found that her genitalia was normal.

19. **PW9 P.C. Joshua Nganga** carried out the investigations and preferred charges to the appellants. In his evidence in chief he reiterated that which the primary complainants had stated. He said that Inspector Arunga on 30/3/2010 carried out an identification parade where PW1 was identified by PW2, PW6 and PW3. The 4th appellant was equally identified by the same witnesses. The 2nd and 3<sup>rd</sup> appellants were identified by PW3, PW2 and PW6. He went ahead and produced the identification parade forms on behalf of Inspector Arunga.

20. On cross-examination by the 3<sup>rd</sup> appellant knew maintained that the complainants did not describe the assailants when they made the report but they said that they would be in a position to identify them if they see them. He further denied during cross-examination by the 4<sup>th</sup> Appellant that they had differed over a motorcycle and that he had threatened to fix him.

21. When put on their defence, the 1<sup>st</sup> Appellant gave unsworn defence reiterating that he was home on 21/3/2010 when he worked till 5.00 pm. As he slept he was awoken by a knock on the door by people who identified themselves as police officers. He was taken to Sibanga Patrol Base where he stayed for 7 days and later to Cherengany Police Station.

He denied the charge.

22. **The 2<sup>nd</sup> Appellant** lived in Sibanga and a water vendor. He said in his unsworn testimony that he was arrested at around 10.30 pm by people who claimed to be policemen. He was taken to Maili Nane Patrol Base and later to Kachibora Police station. He denied the offence.

23. **The 3<sup>rd</sup> Appellant** gave sworn testimony. He said that he was arrested on 21/3/2010 while in his house at 8.00 pm and taken to police station where he spent 10 days. On cross-examination he said that he was home on 20/3/2010.

24. **The 4<sup>th</sup> Appellant** said in his unsworn evidence that he was arrested by P.C. Nganga over fabricated charges as he had differed over his motorcycle in which he had refused to give him. He said that P.C. Nganga had threatened to fix him.

25. **DW5 Ambrose Wanjala** testified on behalf of the 4<sup>th</sup> Appellant. He said that he worked with him from 10/3/2010 to 22/3/2010 at Kapsara. He was surprised to learn that he was arrested the following day. On cross-examination he stated that he did not sleep with him on the night of 20/3/2010.

### **Analysis and Determination**

26. The entire spectra of the appellants grounds of appeal centres on the question of identification. It is their contention that given the quality of the light at that time there was a possibility of error and that had the trial court taken this into consideration, it would have not arrived at its verdict of convicting them.

27. The other grounds centres on the issue of identification parade. They content that the same was not done as required and that there was possibility of biasness.

28. I have had occasion to read the lengthy handwritten submissions by the appellants as well as that of the learned State Counsel. What is evidently undisputed is that a robbery occurred on 20/3/2010 at around 10.00 pm at the home of PW1. His 2 daughters as well as himself were injured. They lost each several assorted items. Apart from themselves PW3 was equally a star witness.

29. Although there were no recoveries it is equally not disputed that the items enumerated in the charge sheets were lost. The appellants were subsequently arrested separately and taken to the police station.

30. The question now is whether the 4 appellants were clearly identified by the witnesses that fateful night.

31. In the celebrated case of *Anjoni and others Vs Republic KLR at Page 60, the Court of Appeal* stated as follows:-

***“ The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable; this was however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another -----”***

32. In the present matter, PW1 did not recognise or identify any of the assailants. PW2 however stated as follows:

**“ Another man came with the child and shone his torch in the room where I was. I managed to see the face of the man who was interrogating me. I realised that he was Masimbi. I knew him before. He had worked for me in the home as a casual. His parents also worked for my father for long. He protested saying why are you shining the torch on me to enable shosho recognise me.”**

33. On cross-examination by the 4<sup>th</sup> Appellant PW2 said that she had known him for over 5 years.

34. In my view this was a case of recognition. Even in the absence of the parade identification I find that the 4<sup>th</sup> Appellant was clearly recognised by PW2. There was no evidence to suggest that the 4<sup>th</sup> appellant had covered his face or tried to evade identification. I believe that the only way to escape was to have the chimney lamp extinguished. It was however too late as the colleague had already shown the torch in the room. Needless to say I do not find any reason to doubt PW2 who had known the 4<sup>th</sup> Appellant for over 5 years a fact not shaken during cross-examination.

35. Although his name in the proceedings is not Masimbi, there was nothing to suggest that he denied that the same was not his name. He did not raise any objection during cross-examination or even during his defence.

36. PW3 testified in respect to the 1<sup>st</sup> Appellant in respect to identification. The minor stated that:

**“ ----- I saw Karunge at the material time. There was hurricane light in my grandmother's house. He is Karunge. I can see him in the dock today. Accused No.1 identified. I do not know where he lives. I saw him assaulting Guka (grandfather) Also Karunge beat me and pushed me to the cupboard. Someone came with a torch and shone it on Karunge and I saw him.”**

37. On cross-examination he said

**“ I saw you before my face was tied with the clothe and before I was put in the cupboard.”**

38. When cross-examined by the court, he said,

**“ I knew Karunge before he lived in a rented house near my home with his father Nganga was Karunge's friend they used to walk together.”**

38. PW6 in respect to the 1<sup>st</sup> Appellant stated that:

**“ Accused 1 followed accused 3 when he came to kick the lamp. Accused 1 said they should have put off the lamp earlier. Accused 1 and Accused 3 are the ones who raped me. Accused 1 is Karunge he was brought up in our neighbourhood. I knew him from the year 2003.”**

39. Again like in the Anjononi case (supra) this was a classic case of recognition. PW3 was even more elaborate despite his tender age.

40. The 2<sup>nd</sup> appellant was equally recognised by PW3. He said in his evidence in chief that:

**“ I saw 2 people that night i.e Karunge and Nganga. Nganga is accused 2. I saw accused 2 herein. I saw him before. I heard someone kick it. It was a chimney lamp.”**

41. On cross-examination he went on to state:

**“ I know you as Nganga. I have come to say how you assaulted us. I have come to case with you. I know you. I saw you and others arranging timber at my home on the material day at daytime. Its true you came.”**

42. When cross-examined by the court he said:

**“ Nganga was Karunge's friend. They used to walk together.”**

43. This was a person well known to the witness. I do not see any reason why the minor would lie. I find that he was emphatic and straight forward in his evidence.

44. As regards the 3<sup>rd</sup> Appellant PW6 is the one who identified him. She stated in her evidence that:

**“ Accused 1 followed accused 3 when he came to kick the lamp. Accused 1 said they should have put off the lamp earlier. Accused 1 and accused 3 are the ones who raped me ----- I did not know accused 3 before but I identified him. I saw him clearly, he had thick long beards on his cheeks. I saw them with the aid of a lantern lamp.”**

45. When cross-examined by the 3<sup>rd</sup> Appellant PW6 said:

**“ I saw you with aid of lamp which was on the table which was 2 ½ feet from the ground. The lamp lit the whole house. You people stepped on my father. You are the one I was pleading with and you were the harshest. I saw your face and your beard before you kicked the lamp. Your beards were shaggy.”**

46. This was a case of identification. There was nothing to suggest that the assailant attempted to hide his face or at all. The witness in my view had sufficient time to talk and plead with him before the lamp was kicked.

47. In the premises I do find that the 4 appellants were properly identified and or recognised. None of them covered their faces. Though the period before the lamp was kicked was not stated, I find that there was evidence that torches were used. In view of this I find that they were clearly identified.

48. There is of course no evidence to suggest that the report made to the police attempted to describe the assailants. This however did not oust the scene identification and recognition by the witness. Save for the 4<sup>th</sup> Appellant they all seemed to be people known to the witnesses.

49. Turning to the question of identification parade, I have examined the identification forms produced. None of the Appellants objected to their production. In my view they were professionally conducted and filled as per the Force Standing Orders. Needless to say even if there were any infractions, the same did not oust the strong case presented by the prosecution.

50. I find that there was sufficient light from the lantern lamp as well as torches from the assailants which enabled the witnesses recognise them. More importantly, they all appeared to be people known by the witnesses.

51. I therefore find that the ingredients of robbery were established namely, Stealing was effected although there were no recoveries, violence was used, as evidenced by the P3 forms and most importantly the appellants who were the main perpetrators were clearly identified.

52. This appeal lacks merit and the same is hereby dismissed.

Following however the decision of *Francis Muruatetu & Another Vs Republic, by the Supreme Court (petition No 15/2015)* I am inclined to grant the appellants each the opportunity to mitigate on the sentence and thereafter accord an appropriate sentence in the circumstances.

Delivered, signed and dated at Kitale this 27<sup>th</sup> day of September 2018.

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H.K. CHEMITEI

JUDGE

27/09/18

**In the presence of:**

**Mr. Kakoi for the Respondent**

**Appellants – present**

**Court Assistant - Kirong**

**Judgment read in open court.**