



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 92 OF 2013

(FORMERLY NYERI HC CRIMINAL APPEAL NO. 27 OF 2009)

CONSOLIDATED WITH

MURANG'A HC CRIMINAL APPEAL NO.83 OF 2013

**(Appeals from original Conviction and Sentence in Kigumo SPM Criminal Case No 3613 of 2007 – M
W Mutuku, SRM)**

PETER MUTURI MWANGI

JAMES KAMAU NJOROGE.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellants herein, **Peter Muturi Mwangi** (2nd accused before trial court) and **James Kamau Njoroge** (1st accused) were convicted after trial of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. It was alleged in the particulars of the charge that on 02/12/2007 at Gachocho Village in Murang'a South District of the Central Province, jointly with their co-accused (Richard Ndirangu Kamau – 3rd accused) who was acquitted and others not before the court, and being armed with dangerous weapons, namely pangas and runkus, they robbed one **Joseph Irungu Ng'ang'a** of cash KShs 4,000/00, and that at or immediately before or immediately after the time of the robbery, they used actual violence to the said complainant. They were each sentenced to death as required by law.
2. The Appellants have appealed against both conviction and sentence. The 1st Appellant was represented by Mr. Gacheru while the 2nd Appellant was not represented.
3. The Appellant's petitions of appeal disclose the following main complaints –
 - (i) That they were not positively identified, the prevailing conditions not being conducive to good and positive identification of the perpetrators.
 - (iii) That the charge against the Appellant was not proved beyond reasonable doubt.
4. The Republic opposes both appeals.

5. I have considered the submissions of the learned counsels and those of the 2nd Appellant. I have also read the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however borne in mind that I neither saw nor heard the witnesses, and I have given due allowance for that fact.

6. The complainant (PW1) and his wife (PW2) were attacked at their home at about 8.00 p.m. by a group of men (it is not clear how many). The thugs first accosted PW2 who was alone in a detached kitchen before they forcibly escorted her into the sitting room of the main house where PW1 was. They roughed up the couple and assaulted PW1 while demanding money in exchange for PW1's head. The couple was then escorted to their bedroom – first PW2 and subsequently PW1. There they were further roughed up and PW1 assaulted some more with pangas and runqus. PW1 subsequently gave the thugs KShs 4,000/00. Thereafter the couple had a chance to raise alarm and the thugs escaped. PW1 suffered injuries which were verified medically.

7. PW2 was the only identifying witness. She testified that she recognized the Appellants, and that she had known them, including their names, since their childhood. She said the thugs had not covered their faces and they were from the same village as PW1 and her. PW2 did not testify on any light that there may have been in the kitchen before she was accosted. But she said that the thugs had torches with which they hit her. In the sitting room however there was light from a "tin lamp".

8. In cases like this, the first report made to the police or to other persons in authority is crucial. It would be expected that PW2, if she gave such initial report, would have stated categorically that she recognized two young men who were from her village and whom she had known since their childhood, including their names. She would then have proceeded to give those names.

9. In this respect the testimony of PW4 (PC Dennis Odhiambo) is important. He was the investigating officer of the case. He stated in cross-examination that the Appellants' names had not been mentioned by PW2 in her initial report and that she mentioned the names only later when she was recording her statement. Why was this? If she had recognized the Appellants and had known their names, surely the most natural thing would have been for her to give the police those names in her initial report?

10. There is of course nothing wrong in a court convicting for robbery upon the identification evidence of a single witness if the court is satisfied that the circumstances prevailing were conducive to a good and positive identification (recognition of course is a form of identification), and that the identification by the witness was good and free from the possibility of error.

11. In the present case however, the failure by PW2 to give the names of the Appellants to the police in her initial report casts doubt about her claim that she recognized them, bearing in mind that the only good light by which she could have properly observed her attackers sufficient to recognize them would have been from the torches that the robbers had and were shining upon her! As for the tin lamp in the sitting room, this would normally be a little contraption that gives woefully bad light from a smoky wick dipped into paraffin at the bottom of the tin! Of that this court can take judicial notice from its own observation.

12. There is another problem. PW4 was the only police officer who testified (out of a total of 4 witnesses for the prosecution). He was not the one who arrested the Appellants. They were arrested by Administration Police officers who were never called to testify. Why were they not called? There is thus no evidence of how the Appellants were arrested or what or who led the police to them. It was not PW1 or PW2 who led the police to them: they were called to the AP post after the Appellants were arrested to go and identify them. It is to be noted that the Appellants were arrested about six (6) days after the robbery without anything incriminating.

13. In the circumstances I am not satisfied that the offence charged was proved against each Appellant beyond reasonable doubt. The convictions are not safe.

14. I will allow both these appeals. The convictions are quashed and the sentences of death imposed upon the Appellants set aside. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A ON THIS 9TH DAY OF JUNE 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 10TH DAY OF JUNE 2016