



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 59 OF 2015

JOHN NDERITU IRUNGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 60 OF 2015

KENNETH KIRIMI APPELLANT

VERSUS

REPUBLIC RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 61 OF 2015

PETER KIMATHI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 957 of 2014 by Hon. E. Bett Senior Resident Magistrate on 24th June 2015).

J U D G M E N T

[1] **JOHN NDERITU IRUNGU (Nderitu)** the first appellant, **KENNETH KIRIMI (Kirimi)** the second appellant and **PETER KIMATHI (Kimathi)** the third appellant were jointly charged before the Nanyuki Chief Magistrate's Court with **two counts of offences of robbery with violence contrary to Section 296(2) of the Penal Code**. At the trial before the said court there were in total six accused persons but after the trial the trial court acquitted three (3) of those accused persons but proceeded to convict the 3 appellants in this appeal. The three appellants on being convicted on the two counts of robbery with violence were sentenced to suffer death in accordance with the provisions of the law. They have filed their present appeal against both convictions and sentence by the trial court.

[2] The duty of this court as the first appellate court has been reinstated often by the courts. In the case of **SIMIYU AND ANOTHER VS REPUBLIC (2005) 1KLR at Page 192** the Court of Appeal stated thus:-

“It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions.”

[3] **SALOME MUTHONI (PW 1)** was the proprietor of a bar and restaurant called Camp George (the bar) which was within the Nanyuki town. On 13th October 2014 at 9.45pm there were customers at the bar. In particular **Daniel Irungu Njoki (PW 2)** his wife Nyaguthii and his friend a boda boda (motor cycle taxi) operator were seated at the counter of the bar. A group of 10 people entered the bar from the back door armed with swords and pangas (*simis*). PW 1 said that there was a lot of light both inside and outside the bar. She was able to see that Kimathi was leading the group of this people. Kimathi ordered everyone to lie down. PW 1 noted that Kimathi was armed with a simi(panga) while PW 1 was lying down Nderitu ordered her to give him money. By then Nderitu was at the counter of the bar. PW 1 directed Nderitu to remove the money from the counter. Nderitu took Kshs. 13,000 in cash and also took PW 1’s Samsung mobile phone which was also on the counter. PW 1 noted that the rest of the group was robbing her customers.

[4] PW 2 said that on the night in question he was at the bar and as stated earlier he was in the company of his wife Nyaguthii. They were seated facing the front door. He estimated it to have been about 9.10 pm when a man entered and ordered them to lie down. In his view that man was not amongst the accused before the court. He noted that the group of men was about seven (7) in number. He said that Nderitu hit him on the head with a panga and also robbed him of documents and cash of Kshs. 10,000 from his back pocket and kshs. 5,000 from his shirt pocket.

[5] PW 1 in her testimony stated that the lights at the bar enabled her to identify Nderitu and Kimathi as the robbery proceeded. She was also categorical that as the robbers entered the bar she was able to see them. In respect to Nderitu she noted that he had *rasta* hair style and that he had a facial injury. As she lay down at the counter Nderitu jumped over her in order to take the cash. In respect to Kimathi PW 1 said that she identified him at the scene of the robbery because the distance between her and him was very short. She saw him enter the bar and stand behind a customer before ordering everyone to lie down. She noted that he had a beard and that he was wearing a coat of a suit and had partly covered his head with a scarf. She therefore confirmed that she was able to note his appearance. She further stated that although she was frightened during the robbery she kept her eyes open and she was able to clearly see the robbers. She gave the police the description of Kimathi whom she described as being black in colour short with small eyes. PW 1 stated that while being cross examined by Kimathi; **“I identified your face and eyes.”**

[6] PW 2 noted that when the robbers entered the bar and ordered its patrons to lie down Nderitu hit him on the head with a panga. It was also Nderitu who robbed him of his money and documents from his pockets. He said that he was able to see Nderitu with the aid of lights at the counter. On being cross examined by Nderitu this is what PW 2 stated:

“even if we meet (sic) after 10 years I can identify you.”

In respect to his P3 form PW 2 responded to Nderitu’s cross examination thus:-

“it says that I do not know my attackers but I could identify him.....”

[7] While the robbery was on-going **Kelvin Waweru Njoroje (PW3)** the son of PW 1 was in the company of his friend **Kelvin Murimi PW 4**. On the material night both PW 3 and 4 were on the way driving to the bar with a view to take PW 1 home. It was PW 3 who was driving. As he parked the car outside the bar, PW 3 noted that there were also two motorcycles parked there. PW 3 alighted from his

vehicle and walked towards the bar. While still outside the bar he noted that there was some commotion at the counter of the bar. PW 4 informed him that it was a robbery in progress. Indeed PW 4 noted that the robbers were armed with pangas. They both were able to witness that robbery because of the lights that were in the bar. PW 3 and 4 returned to the car and drove away hooting the car. As they did so PW 4 telephoned the community patrol personnel. PW 3 and 4 then drove back to the bar. They noted that about ten (10) men were running away. They both heard the noise of motorcycle engine but that motorcycle did not have its lights on. That motorcycle was being driven away. They followed it while driving their car and hooting. They chased the motorcycle which continued to be ridden without its lights. As they chased it they said that their car was about 20 metres away from the motorcycle. They were therefore categorical that they did not lose track of the motorcycle. The motorcycle stalled at Likii area in Nanyuki. PW 3 and 4 approached the stalled motorcycle and asked its rider Kirimi for his national identity card. He did not have it. Soon there were other motorcycle riders known as boda boda riders who gathered around PW 3 and 4. PW 3 and 4 stated that they feared that they will be harmed by these boda boda riders. PW 4 photographed the motorcycle they had been trailing from the back which photograph was exhibited before the court. It was motorcycle registration no. **KMDH 694 N**. That registration number can clearly be seen in the photograph taken by PW 4.

[8] PW 3 on being cross examined by Kirimi said **“I remember your appearance well”** PW 4 also in response to cross examination by Kirimi stated:-

“You (Kirimi) were shaking. Had the motorcycle not stopped you could have continued to run away. You were shocked and confused. You had tears rolling.”

[9] **PW 10 Hassan Thurania** was duty on the material night as a watchman opposite the bar at a place called Shika Adabu. While on duty using his torch he saw someone lying down inside the barbed wired fence of the compound of someone called Mogaka. He said that this compound is about 5 minutes' walk from the bar. PW 10 on asking that person lying down what he wanted that person informed him that he was hiding to avoid arrest by police. PW 10 noted that that person had a sword. He alerted Mogaka and on coming Mogaka began to beat that person who was lying down. PW 10 identified the person lying down as Nderitu.

[10] Later on that night and after the police had gone away from the bar PW1, 3 and 4 heard screams coming from that direction of the residence of Mogaka. When they went there they found that it was Nderitu who was being beaten. They also noted that Nderitu had a sword. On telephoning the police who by then had returned to the police station they were requested to take Nderitu to the police station. They took Nderitu to the police station where upon he was arrested.

[11] **PC Henry Githige** stated that he was aware that motorcycle registration number KMDH 694 N was operated by Martin Mwangi who was a co-accused of the appellants. PC Githige together with other officers went to arrest Martin Mwangi. Martin Mwangi informed them that he had assigned the subject motorcycle to Kirimi. That it was Kirimi who was operating that motorcycle but has since returned the motorcycle to him and he in turn had returned to his uncle in Nyeri.

[12] **PW 11 PC woman Salome Nzilani** was the investigating officer of the case. She stated that Kimathi was arrested and taken to the Nanyuki Police Station on a different offence. Whilst he was at the police station she noted that he fitted the description given by the complainant PW 1.

[13] **PC Moses Ochieng** was assigned the duty to prepare Kirimi and Kimathi alongside their other co-accused for identification parade. PW 1 and 2 attended the police station with a view to participate in that identification parade. PC Ochieng informed the court that Kirimi and Kimathi declined to attend the identification parade giving the reason that the persons who were to identify the people had seen them attend prior court sessions.

[14] **Nderitu** in his sworn defence stated that he was a seller of miraa (khat) and wood carvings. On the material night he said that he left his place of work at 10 p.m. He was on his way home at Shika Adabu when he met someone holding a torch and a panga. This person shone the torch to him and in attempt to

avoid him Nderitu changed his route. He however noted that the person continued to follow him. He said that because he was unarmed and could therefore not protect himself he decided to find refuge over a wall of a house whose lights were on. When the owner of that house came out Nderitu said that he noted he seemed to know the person pursuing him with a torch. It was then that the owner of the house together with the person with the torch began to beat him. He screamed and other people came on the scene and also began to assault him. When he was taken to the police station he said that he was booked for the offence of trespass into someone's homestead. It was later that he was surprised to be charged with the offence of robbery with violence. He stated that he did not know where the people who arrested him got the sword and an axe which was produced before court.

[15] **Kirimi** gave unsworn defence. He said that he was a bodaboda operator within Nanyuki. He said that he took possession of the motorcycle registration number **KMDH 694 N** from Martin Mwangi on 3rd October 2014. He had been given the motorcycle to carry out the boda boda business. He became unwell within a week and was unable to continue remitting money to Martin Mwangi as agreed. On the night in question at 10.00 p.m. he said he received a call from his customer in Likii and the customer informed him that he wanted Kirimi to pick him up. Kirimi said he was on the way to pick that customer when he went past another motor vehicle which was being driven in high speed and was hooting. He stopped to pick up his customer and it is then a vehicle stopped in front of him and its occupants demanded to see his national identify card which he did not have. The occupants asked him to remove his helmet as they continued to search him. It was then people gathered around them.

[16] **Kimathi** in his sworn defence stated that he was tricked to board a vehicle by somebody called Mathenge. The vehicle was driven to the police station and he was arrested on arrival at the police station on the allegation that he had sold meat without a permit. It later transpired that he was facing the offence of robbery with violence. He then narrated his movements of the day but not the night when the robbery occurred.

[17] All the appellants relied on the grounds of the appeal which were in their written submissions. Those grounds challenged the trial court finding:

(a) On identification;

(b) That the prosecution had proved its case;

(c) That the appellants had not raised defence that challenged the prosecution's evidence.

[18] The learned Principal Prosecution Counsel Mr. Tanui opposed the appeal. In his submissions learned counsel restated the prosecution's evidence and referred to the learned trial magistrate's judgement and concluded that the conviction of all the appellants was safe.

COURT ANALYSIS AND DETERMINATION

[19] I have considered the appellants' submissions both oral and written. I will bear in mind those submissions in my analysis of the appellants' appeal.

IDENTIFICATION

[20] Nderitu the first appellant was identified by PW 1 and 2. PW 1 was very emphatic that there was sufficient light in the bar to enable proper identification. Although Nderitu submitted that the prosecution failed to state the source of light at the bar it will be noted that when PW 1 was cross-examined by Kimathi she stated thus:-

“my pub had outside security lights and electricity lights inside the bar.”

That in my view sufficiently responds to Nderitu's submissions. The argument by Nderitu in his written submissions that upcountry bars have decorated lights was not in evidence either during prosecution's

case or the defence evidence. It is therefore rejected. Nderitu approached the counter of the bar where PW 1 was lying down and indeed according to PW 1's evidence he stepped over her in order to reach where the cash was kept. PW 1 was able to see that Nderitu had *rasta* hairstyle and had a healing wound. It was imperative to note what the learned trial magistrate had to say about those identifying marks in Nderitu in his considered judgement. The trial magistrate stated:-

“Important to note that even as at the time of hearing the first accused (Nderitu) had the same hairstyle (*rasta*) and a prominent scar on his face.”

[21] The learned trial magistrate unlike this court had the opportunity to see the witnesses and more importantly saw Nderitu when he was before the court. I have no reason to differ with the learned trial magistrate's observation. It follows that the identifying marks noted by PW 1 and having been seen by the trial court are safe to rely upon in this appeal in respect of the identification of Nderitu.

[22] Nderitu in his submissions argued that PW 1 failed to give information to the police about his hairstyle when the police first attended her bar. PW 1 confirmed in her evidence that when the robbers ran away as a result of PW 3 hooting his car outside the bar the police arrived at the scene and made what can be called preliminary inquiry of the incident. The investigating officer when being cross-examined by Nderitu stated that when she went to the scene of the robbery before Nderitu was found hiding at a compound PW 1 described Nderitu as person with *rasta* hairstyle. Later on Nderitu was arrested hiding in the compound of a house which was said to be 30 minutes away from the bar. On being arrested at that compound PW 1 confirmed that Nderitu was part of the robbers. Since Nderitu was identified at the scene it follows that Nderitu reliance of the case of **MAITANYI VS REPUBLIC (1986) KLR 198**, is misguided. It does not assist him because this is not a case where PW 1 gave a first report to the police of Nderitu's identity and was later required to take part in identifying Nderitu at an identification parade. The Court of Appeal in the **Maitanyi case (supra)** stated thus:-

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made If a witness received a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained.”

[23] Furthermore PW2 who was not present when Nderitu was arrested while hiding in the compound of a house stated that he recorded his statement with the police and in that statement he described Nderitu as a person with *rasta* hairstyle.

[24] On that basis Nderitu's argument on the allegation of initial report of misidentification is rejected.

[25] Kirimi the second appellant as it will be recalled was identified by PW 3 and 4. They stated that they followed a motorcycle which was driven by Kirimi from the scene of the robbery up to Likii area. The motorcycle stalled and PW 3 and 4 were able to see the rider whom they stated was Kirimi. This court in considering identification of Kirimi will be guided by the often quoted case of **REPUBLIC V. TURNBULL AND OTHER (1976) 3 ALL ER 549** as follows:-

“.....the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Finally, he should remind the jury of any specific weakness which had

appeared in the 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 relative are sometimes made.”

[26] Although the prosecution failed to lead evidence of the light at the place where PW 3 and 4 found Kirimi it is important to note that PW 3 and 4 were at a very close proximity with Kirimi. They were so close that they were able to photograph the motorcycle he was riding. They were close enough to be able to engage Kirimi in conversation when he told them that he did not have his national identity card. They were close enough to note that he was very nervous and had tears rolling down. They were close enough to boldly search him. In my view as was the finding of the trial court the identification of Kirimi was safe. Kirimi alongside Kimathi the 3rd appellant refused to participate in the identification parade. Having refused they cannot use that refusal to their advantage to claim that they were not properly identified.

[27] Further I reject the argument by Kirimi that his was a case of mistaken identity because as he alleged PW 3 and 4 lost their trail of the motorcycle they were trailing and instead trailed him. The learned trial magistrate in my view quite likely found that such mistaken identity could not have occurred because PW 3 and 4 were trailing Kirimi at a distance of 20 metres between the motor vehicle and the motorcycle. The trial court also confirmed that PW 3 and 4 did not encounter another motorcycle as they trailed Kirimi. I concur.

[28] PW 3 in answer to cross-examination by Kirimi was clear that he identified Kirimi at the scene. He stated:-

“..... I remember your appearance well and then went (sic) and reported to the police.”

Kirimi’s identification was given to the police by PW 3 when he recorded his statement at the police station.

[29] Kirimi submitted that the evidence tendered by prosecution relating to the recovery of the motorcycle was purely circumstantial and did not prove his guilty. The Court of Appeal in the case of **MUSILI TULO V REPUBLIC (2014)eKLR** in discussing circumstantial evidence had this to say:-

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfied the following requirements:-

- **The circumstance from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- **Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- **The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

Those principles were set out in the case of **GMI vs. REPUBLIC (2013)eKLR** which echoes the *locus classicus* case of **R. vs. KIPKERING ARAP KOSKE & ANOTHER, 16 EACA 135.**

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke v. R (1958) EA 715** citing with approval **Teper v. R (1952) AL 480**, thus:

It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or

destroy the inference.”

[30] Following the above requirements in the above case the trial court well met the required tests to convict Kirimi. Firstly Kirimi confirmed that on 13th October 2014 when the robbery occurred he was the one in possession of the subject motorcycle. The motorcycle was photographed by PW 4 when it stalled after the chase. PW 3 and 4 interrogated Kirimi and were close enough to identify him. Indeed they would have apprehended Kirimi were it not that they feared for their well-being due to the boda boda operators who congregated around him. Further Martin Mwangi Kirimi's co-accused confirmed in his defence that he had given the subject motorcycle to Kirimi to run the business of boda boda. All the above circumstantial evidence in my view cogently and firmly established the guilty of Kirimi. Indeed cumulatively they form a chain so complete which can only lead to one conclusion that Kirimi was the person who was part of the group that robbed people from the bar and was the person chased and caught by PW 3 and 4.

[31] Kimathi the third appellant as stated before he together with Kirimi refused to participate in the identification parade. Kimathi argued that his was a case of mistaken identity. He submitted that he was not arrested at the scene and that nor was he arrested with the items that were the subject of the robbery. He also drew the court's attention that the fact that he was first arrested for another offence before he was charged with the offence of robbery with violence. The fact that he was arrested of another offence he was confirmed by the investigating officer.

[32] On identification PW 1 said that she saw Kimathi as the one leading the group of robbers. He heard him shout 'lalani' (lie down). She saw him holding a panga. PW 1 on being cross-examined by Kimathi said:-

“I was able to identify the attackers you Kimathi included. You (Kimathi) were wearing a suit coat and had partly covered your head with a scarf. I saw your appearance.I saw you coming in and you came and stood behind a customer and told us to lie down.”

PW 1 proceeded to confirm that before Kimathi's arrest she described him to the police as a short person with small eyes and black in colour. It was because of that description that Kimathi on being arrested for another offence was identified by the investigating officer and charged with the present offence.

CRIMINAL STANDARD OF PROOF

[33] Re-evaluating the evidence adduced by the prosecution this court finds that the prosecution met the required criminal standard of proof in respect of all the 3 appellants. I am guided by the decision in the case **MILLER vs. MINISTER OF PENSION (1947)** where in discussing criminal standard of proof of proof Denning J. stated:-

“it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence *“of course it is possible, but not in the least probable,”* the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

That standard was met by the prosecution.

[34]The appellants erred to have argued that the trial court rejected their defences. Far from it, the trial court adequately discussed and analysed the appellants' defences.

[35] The defence offered by Nderitu was that he was wrongly arrested. That defence is rejected because of the identification evidence offered by PW 1 and 2 and the fact that as confirmed by PW 10 he was arrested on the same night of the robbery about 5minutes away from the bar.

[36] Kirimi's defence was also one of mistaken identity. In this court's view bearing in mind the evidence offered by the prosecution that defence is for rejection. To reiterate Kirimi was chased without a break by PW 3 and 4. He was interrogated by them and his motorcycle was photographed by PW 4.

[37] Kimathi was identified by PW 1. She saw him as the leader of the robbers. PW 1 described him to the police before he was arrested.

[38] The appellants have tried to highlight a few discrepancies in the prosecution's case touching on the registration of the motorcycle given by some prosecution witnesses touching on the number of robbers in the bar and touching on the time the robbery occurred. In this court's view those discrepancies are curable under **section 382** of the Criminal Procedure Code. In this regard and in reference to the case of **JOSPHAT WAGURA MACHARIA V REPUBLIC (2013) eKLR** as follows:-

“This court has also held that such a discrepancy is curable under section 382 of the Criminal Procedure Code, Chapter 75, Laws of Kenya. In Joseph Maina Mwangi –vs- Republic – Criminal Appeal No. 73 of 1993 this court held:-

“In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.”

We are of the considered view that the discrepancy on the date and time when the incident was reported is curable under section 382 of Criminal Procedure Code and the said discrepancy did not in any way prejudice the appellant.”

[39] Nderitu in his submissions faulted the trial court for incorrectly recording his name during his defence. Even if that was the case such an error would be curable as stated in the previous paragraph. I can however confirm that I looked at the hand written proceedings of the learned trial magistrate and I can confirm that the error in Nderitu's name during his defence occurred during the typing of the proceedings. What I am able to make out from the trial magistrate's proceedings is that he recorded Nderitu's name as **'JOHN NDERIT IRUNGU'**. It follows that nothing turns on that submission by Nderitu.

[40] The prosecution of the appellant before the trial court was by Cpl Nzemya. Appellants have argued that the said prosecution was not qualified to prosecute their case and that accordingly their conviction by the trial court was a nullity. Nderitu in raising the issue submitted that **section 87 and 88** of the Criminal Procedure Code was violated. This court's simple answer to that submissions is that under **Section 85** of that Act the Director of Public Prosecution is empowered to appoint prosecutors. That section provides as follows:-

“Power to appoint public prosecutors

(1) The Director of Public Prosecutions, by notice in the Gazette may appoint public prosecutors of Kenya or for any specified area thereof and either generally or for any specified case or class of cases.

(2) The Director of Public Prosecution, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service to be a public prosecutor for the purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.”

[41] The appellants should have raised the issue of qualification of the prosecutor during the trial. Had they done so the prosecutor would have been given an opportunity to provide proof of having being

appointed as per section 85. The appellants having failed to raise that issue during trial they are precluded from raising it in this appeal.

[42] On the whole this court finds that there is no merit in the appellant's appeal. All the appellants' appeals are dismissed and the trial court's conviction is upheld and the sentence is confirmed.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellants: 1. John Nderitu Irungu

2. Kenneth Kirimi

3. Peter Kimathi

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE