



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 13 OF 2016 [consolidated with Cr. App. No.14 of 206]

1. DANIEL NTUBIRI MAITIMA

2. GEORGE NKUBI ZACHARIA

3. WILSON MUREITHI MUTHOYA

4. JOSEPH KINOTI GITIRITHIAAPPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in criminal case NO. 968 of 2012 of the Chief Magistrate's Court at Maua by C.M. Maundu – Senior Principal Magistrate)

JUDGMENT

The four appellants namely **DANIEL NTUBIRI MAITIMA, GEORGE NKUBI ZACHARIA, WILSON MUREITHI MUTHOYA and JOSEPH KINOTI GITIRITHIA**, were convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on the 9th day of January 2007 at Nchaure sub location, in Meru Central District of Eastern Province, jointly with others not before court, while armed with axes and pangas robbed **JOSEPH KIRIMI RWITO** of cash Kshs. 10,050/= and two mobile phones valued at Kshs. 12000/= and assorted clothes and shoes valued at Kshs. 15000/= and at or immediately before or immediately after the time of the said robbery injured the said **JOSEPH KIRIMI RWITO**.

The appellants were tried and convicted for the offence. They were sentenced to suffer death. They now appeal against conviction and sentence.

The 1st and 3rd appellants were represented Mr. Mbaya, learned counsel. The 2nd and 4th were unrepresented. Each appellant had raised own grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by failing to find that the appellants were not properly identified.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.
3. That the learned trial magistrate erred in law and fact by not considering the appellants' defence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The complainant and his family were asleep when a gang of robbers struck. They were able to recognize some of the robbers.

The appellants denied any involvement in the offence.

This is a first appellate court, as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

The incident that gave rise to this case occurred at about 1 AM. This being at night, I will endeavour to establish how each of the appellants were recognized and whether the said recognition was free from error. In doing so I will be guided by the guidelines that were prescribed by Lord Widgery, CJ in the celebrated case of **REPUBLIC VS TURNBULL [1976] 3 ALL ER 549** when he said:

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.

Secondly, 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 a 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? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

The key witnesses in this case were Joseph Kirima Rwito (PW1) and his wife Veronica Kirima (PW2). The two were roused from sleep by the gang of robbers that struck their home at about 1 AM. The complainant said that he saw light from his gate's direction. This is when he woke up his wife. While in their bedroom, the complainant recognized one Mureithi Githingi alias Kiera. This man was not arrested. The two moved to their daughter's bedroom where they purported to see and recognized some of the appellants.

Joseph Kirima Rwito (PW1) said that when he peeped out of the window he recognized Kinoti (accused 2) and Mureithi (accused 4). These two were about 5 meters from the window. He did not see the first accused. He had not known him before.

The robbers started to break the windows to their bedroom and the two panicked and rushed back. Eventually the robbers gained entry into their bedroom. Four of them entered in. He said these people were all strangers to him. However, his wife said accused 1 (appellant 1) was one of them.

What did his wife testify to? When her husband woke her up, she saw torch lights outside. While the two were in their daughter's bedroom, she recognized accused 2, accused 3 and accused 4. When they went back to their bedroom, she recognized the first accused as one of the people who entered therein.

There are clear indications that the complainant and his wife were not in a position to recognize anyone. Though they testified that there was moonlight, the only deduction to make is that the light was not sufficient. That explains why the robbers had their spotlights on. It is common knowledge that thieves like operating under the cover of darkness and for them to use spotlights that may uncover them tells it all. That is the same reason Andrew Mureithi (PW3) said he used his spotlight to recognize the first appellant. Remember this witness was outside as opposed to the complainant and his wife who were indoors and who were only peeping out.

Andrew Mureithi (PW3) testified that when he went to answer an alarm at the complainant's home, he was able to recognize the first appellant by use of a flash light from his (Pw3's) spotlight. They were however stoned and they ran away. He noted that the appellant had a knife. He did not state how far he was when he recognized the appellant.

I am further disturbed by the fact that the complainant and his wife did not reveal the identity of the people they said they recognized to the area chief and the police officers who went to the scene that night. The first report is usually used to test the accuracy and credibility of a witness where conditions obtaining at the time of the alleged incident were not favourable for a positive identification or recognition. Given that the complainant and his wife were roused from sleep by the invasion of the robbers, it is apparent that they were in shock. They testified as much. It is also evident that they had very little time in very poor light to make the observations. The purported recognitions were not free from error and cannot pass the test prescribed by Lord Widgery, CJ in the above cited case.

From the analysis of the evidence on record, I find that the appeals are merited. I accordingly quash the conviction against each appellant and set aside the resultant sentence. Each appellant is set at liberty unless if otherwise lawfully held.

Dated at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE