



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.218 OF 2007**

ANTHONY MWANGI GITHAIGA.....1ST APPELLANT

JACKSON MUTUMA MWENDA.....2ND APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(Being an appeal from the conviction and sentence made by the learned Senior Resident Magistrate at Nyeri court (Hon. M. K. Serem) in Nyeri Chief Magistrate's court criminal case No.1684 of 2006 delivered on 09/08/2007)*

**JUDGMENT**

**ANTHONY MWANGI GITHAIGA** and **JACKSON MUTUMA MWENDA**, hereinafter referred to as the 1st and 2nd appellants, respectively together with one **JACKSON BUNDI KIRIMAINA** were jointly tried and convicted for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The trio were sentenced to death. Being aggrieved, the appellants herein each preferred an appeal which appeals were later consolidated by this court.

On appeal, the 1st appellant put forward the following grounds in his petition

1. **The learned trial Magistrate erred in law and fact in convicting the Appellant on the basis of one eye witness whose evidence was not corroborated or reliable.**
2. **The learned trial Magistrate erred in law and fact in convicting the Appellant notwithstanding that the issue of identification of the Appellant was not proved beyond reasonable doubt.**
3. **The learned trial Magistrate erred in law and fact in relying on evidence that was full of contradictions.**
4. **The learned trial Magistrate erred in law and fact in failing to appreciate that the circumstance of the incidence were not conducive to proper identification.**
5. **The learned trial Magistrate erred in law and fact in failing to give due weight to the Appellants defence.**

The second appellant on his part put forward the following grounds:

1. **That the learned trial Magistrate erred greatly in both points of law and fact by failing to observe that the circumstances prevailing at the scene were not conducive for a positive**

**identification in that:-**

**(i)The prevailing distance from the victim to the assailant.**

**(ii)Illumination- moon light**

- 2. That the learned trial Magistrate erred greatly in both law and fact by convicting the appellant in the evidence of a single identifying/eye witness (PW1).**
- 3. That the learned trial Magistrate erred in both points of law and fact by being impressed by my mode of arrest without observing that no recovery was made on my behalf.**
- 4. That the learned trial Magistrate erred in both points of law and facts by rejecting my defence without giving cogent reasons of so doing.**
- 5. That I pray to be served with a certified copy of the lower court proceedings to assist me to prepare a reasonable hypothesis to forward during the hearing date of this appeal as well as I wish to be present of the hearing of the same.**

When the appeal came up for hearing Mr. Kaigai, learned Principal State Counsel conceded the appeal on the basis that the evidence of identification was not corroborated and that the same was not free from error.

The case that was before the trial court appear to be short and straightforward. The prosecution's case is supported by the evidence of five (5) witnesses. The complainant, **Wilson Kinyua** (P.W.1) stated before the trial court that on 29th March 2006 at about 9.00pm he was attacked by three men while on his way home and in the process he lost Kshs. 6,000, a belt and a kilo of meat. P.W.1 claimed he positively identified them to be the appellants and their compatriot named herein-above. He said he was able to identify his attackers with the assistance of moonlight. P.W.1 further stated that as the attackers walked away he managed to recognize Jackson Mutuma Mwenda, the 2nd appellant by his voice and he said he even called him by his name Mwenda. This prompted the 2nd appellant to recall his colleagues to come back and beat him senselessly and leaving him for dead. It is said the 2nd appellant removed a knife and stabbed the complainant (P.W.1) on the head but fortunately he stabbed the ear when he missed the head. P.W.1 further averred that he saw Anthony Mwangi Githaiga, the 1st appellant when he attempted to strangle him since he was a person he had known prior to the incident. P.W.1 further stated that the 2nd appellant is a person he had known for many years as a village mate. **Alfred Kabugi** (P.W.2) an uncle to P.W.1, assisted P.W.1 by taking him to Naromoru Police Station and thereafter to Nanyuki District Hospital for treatment. **P.C Paul Kimani** (P.W.3) said that he arrested the 1st and 3rd accused persons from their homes upon receiving a report from the complainant (P.W.1) that they had attacked him, while the 2nd accused was arrested by the area Assistant Chief with the aid of Administration Police Officers. P.W.3 said P.W.1 had also given the police the names of the accused persons as Gaddafi, Mwangi (1st appellant) and Mwenda (2nd appellant). P.W.3 stated in his evidence that when the police gave the names of those people whom they had arrested to P.W.1, he identified them as the people who had robbed him. Anthony Mwangi Githaiga, the 1st appellant, when placed on his defence, denied committing the offence by giving sworn evidence. He stated that he did not know his co-accuseds. He admitted however, that (the complainant) P.W.1 is his neighbour and village mate and former classmate. He stated that he was at his place of work i.e Chestnut Farm irrigating at night hence he could not have been at the scene of crime. Jackson Mutuma Mwenda, the 2nd appellant, also gave sworn testimony in which he denied the offence. He emphatically stated that he did not know his co-accuseds. He admitted that the complainant was his village mate. He stated that on the material date he was at home and that he never ventured out hence he did not meet the complainant. He claimed that the area Assistant Chief framed him up by arresting him because they fought over a woman.

Upon considering the evidence from both sides the learned trial Senior Resident Magistrate formed the opinion that the complainant positively identified the appellants as the robbers who attacked him. The learned Magistrate further stated that since the complainant knew the appellants, the chances of mistaken

identity was remote. The learned Senior Resident Magistrate stated that the appellants did not summon evidence to prove their alibi defence hence he dismissed them as mere denials.

Having set out in brief the case that was before the trial court, we now consider the merits or otherwise of the appeal. Mr. Gatumuta, learned advocate for the 1st appellant urged this court to find that the evidence of identification was not free from error. The 2nd appellant in his written submissions argued the same point stating that the circumstances were not favourable for a reliable identification. Mr. Kaigai agreed with the appellants' on this point. On our part, we now wish to analyze the evidence of the appellants' identification. According to the complainant, he was walking back home alone from Kimbo Shopping Centre. It was at 9.00pm when he saw two people ahead of him. As he approached them another one emerged from behind grabbed him by the neck as those two who were approaching him came calling. They emptied the complainant's pockets taking away Kshs. 6,000. P.W.1 was unable to scream as he was held by the throat. The complainant stated that he managed to recognize one of them as they were leaving after robbing him. He said he recognized the voice and even called out his name as Mwenda. He said they came back and the 2nd appellant attempted to stab him. After a critical analysis, we are unable to be convinced that the appellant could in the circumstances be able to identify the 2nd appellant. To start with, he was attacked from behind and held by the neck. It is difficult to recognize someone in the circumstances. In most cases, people get terrified hence impairing their sight. The complainant has said he was able to recognize the 2nd appellant by his voice. We find that averment unbelievable because it is stated by the complainant that the robbers spoke at the first encounter. What emerges from the evidence is that the complainant claimed that he called the name of the 2nd appellant as they were leaving. It is at that juncture that P.W.1 stated that the robbers said that he had recognized them they should kill him. The complainant further claimed that there was bright moonlight which assisted him recognize the 1st appellant. We think, that was not sufficient to positively identify the first appellant. We have also taken time to analyze the evidence of P.W.3 who stated that the complainant gave the police a single name of each accused which names they used to trace and arrest the appellants and their co-accused. In his evidence in chief, P.W.3 stated that when they told him about the names of those they had arrested he identified them as the people who attacked him. This particular statement raises doubt as to whether the complainant gave the police the names of his attackers, because if he did so then what was the need of the police revealing the full names of the suspects. It would appear to us that there was need of an identification parade in the circumstances. For the above reasons, we commend Mr. Kaigai for rightly conceding this appeal.

In the end, we allow the appeal. The conviction is quashed and the sentence of death is set aside. The appellants namely **Anthony Mwangi Githaiga** and **Jackson Mutuma Mwenda** are hereby ordered set free forthwith unless lawfully held.

**Dated, Signed and delivered this 20<sup>th</sup> day of February 2014.**

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**J.K.SERGON**

**JUDGE**

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**J. WAKIAGA**

**JUDGE**

