



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 159 OF 2011**

*(consolidated with criminal appeal no.160 of 2011)*

SHADRACK MWANGI NDUNGA.....1ST APPELLANT

DAVID CHEGE MWANGI.....2ND APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

*(Being a consolidation of Criminal Appeals Nos. 159 and 160 of 2011 against conviction and sentence from Murang'a S.P.M.C.R.C. No. 2252 of 2010 delivered on 19/7/2011 by Hon. E.J.Osoro Senior Resident Magistrate.)*

**JUDGMENT**

**SHADRACK MWANGI NDUNGA** and **DAVID CHEGE MWANGI**, the 1st and 2nd appellants herein, together with **George Kimani Njuguna** were jointly tried on a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The trio also faced two alternative counts of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**. At the end of the trial, George Kimani Njuguna was acquitted while the appellants were convicted and sentenced to suffer death. The appellants each filed an appeal which appeals were consolidated by this court.

On appeal, the 1st appellant put forward the following grounds of appeal:

1. **That the learned trial Magistrate erred in law and facts in convicting me to suffer the mandatory death sentence without finding that the same violated Article 26(1) and (3) of the current constitution.**
2. **That she erred in law and facts in not finding that the awarded sentence was not consistent with my age as stipulated under Section 190(2) Act 8 of 2001 and Section 25(1) of the Children's Act.**
3. **That she erred in points of law and facts in not finding that the prosecution case was not conclusive.**
4. **That she erred in law and facts in being impressed with the evidence of the alleged recovery of the alleged mobile phone without finding that the same was fabricated evidence.**

On his part, the 2nd appellant too put forward the following grounds:-

1. **That the learned trial Magistrate erred in law and facts in convicting me to suffer the mandatory death sentence without finding that the same was nullified by the provisions of Article 26(1) and (3) read with Article 2(1) an (4) of the current constitution.**
2. **That she erred in law and facts in convicting in reliance of uncorroborated prosecution evidence.**
3. **That she erred in law and facts in not finding that the prevailing conditions at the locus in quo were not conducive for a clear and unprejudiced identification.**
4. **That she erred in law and facts in not finding that my arrest had no nexus to the alleged offences but upon suspicion and also disregarded the possibility of fabrications despite there being an instance of that sort.**

We think it is appropriate at this juncture to set out in brief the case that was before the trial court before considering the substance of the appeal. A total of four (4) witnesses testified in support of the prosecution's case. On 26th September, 2010 at about 11.30pm, **John Gachuki Kariuki** (P.W.1) and **Wilson Kimani Karugu** (P.W.2) walked back home from the place of work at Makuyu. P.W.2 branched for his home while P.W.1 proceeded ahead since his home was further. P.W.1 stated that before reaching home, he was called by name by the 1st appellant, P.W.1 stated that the 1st appellant told him there was something he wanted to tell him and in the process of walking he led him to a dark place. P.W.1 got frightened and sort of pulled backwards. At this juncture it is said the 1st appellant forcefully pulled to the dark place where a huge group of people emerged. P.W.1 said he managed to recognize David (2nd appellant) as amongst those people. The guard forcefully undressed P.W.1 and took away his jacket together with Kshs.5,000 which was inside his wallet. P.W.1 also lost his mobile phone make Motorola C 168. P.W.1 said the robbers immediately left the scene and he could not pursue them because they were many. P.W.2 said he safely reached home, stayed for a while before hearing P.W.1 scream. He rushed to the direction of the screams and found P.W.1 without his blue trouser. P.W.2 said P.W.1 told him he had been robbed of his mobile phone and money. P.W.1 and P.W.2 went back to the scene where they recovered P.W.1's torn trouser. P.W.1 reported the incident to Muranga Police Station. P.W.1 stated that he was not injured since he did not resist. P.W.2 stated that P.W.1 told him he had been robbed by Makaya. **CPL Charles Liru** (P.W.3), confirmed having recorded the complainant's complaint on 27/9/2010. P.W.3 stated he gave P.W.1 a P3 form and requested to come back to the police station the next day. P.W.3 said that on 28/9/2010, at around 9.00am P.W.1, P.W.2 with members of the public brought the 1st appellant having arrested him. P.W.3 said P.W.1 and P.W.2 told him that they arrested the 1st appellant near Aphabet Petrol Station in Makuyu. It is said the 1st appellant led to the arrest of George Kimani Njuguna at Rafiki Butchery where he worked as a cook. P.W.3 said George Kimani Njuguna was interrogated and he managed to fetch and hand over a phone from the counter. P.W.3 also averred that on further interrogation, the 1st appellant led them to the home of the 2nd appellant who was at large but was arrested after a week with the co-operation of his father who was P.W.3's friend. According to P.W.3, the complainant had told him that he was robbed by three people whom he knew very well whom he has been seeing at Makuyu.

When placed on their defence each appellant gave unsworn testimony. The 1st appellant stated that on 27/09/2010, he was at his place of work when three men came alleging they suspected he knew those people who robbed P.W.1 the previous night. Those people arrested him when he denied knowledge of those robbers and taken to Muranga Police Station. He denied knowledge of his co-accused. The 2nd appellant on his part denied the offence. He stated that he was arrested on 10/10/2010 while he was on his way home. He denied knowledge of his co-accused.

The trial Magistrate took into account the evidence from both sides and after warning herself of the dangers of convicting on the evidence of a single identifying witness she came to the conclusion that the evidence of identification of P.W.1 was positive and free from error. It is the trial Magistrate's finding that the appellants were recognized during the robbery hence they were linked to the offence.

Having set out in detail the case that was before the trial court, we now turn our attention to the substance

of the appeal. It is the submission of the 1st appellant that he was convicted on the evidence which were inconclusive and incredible. Mr. Kaigai, learned Principal State Counsel opposed the appeal arguing that there was overwhelming evidence the prosecuting presented to sustain a conviction. We have carefully re-evaluated the evidence which linked the appellants to the offence. Basically, it is the evidence of P.W.1, the complainant. It was at 11.30pm at night when P.W.1 said he was called by name by the 1st appellant. He alleged that the 1st appellant told him there was something he wanted to tell him. P.W.1 said he was lured by the 1st appellant to a dark place. When he became hesitant it is said the 1st appellant pulled him and shortly a gang emerged. P.W.1 said in the process he was able to recognize the 2nd appellant amongst the group. P.W.1 further averred that he was pulled further into a more dark place where he was unable to recognize the others. When inside the dark place the gang stripped him naked robbed him of his mobile phone and money. P.W.2 who was P.W.1's friend, said he was told by P.W.1 that he had been robbed by Makaya. P.W.3 said P.W.1 told him he was called by someone he recognized by appearance that material night. In cross-examination P.W.3 further stated that P.W.1 had recorded a statement with him claiming he was robbed by three men whom he knew very well and that he had been seeing them at Makuyu. It is our considered opinion that the evidence of identification and recognition by P.W.1 cannot be trusted nor relied upon. P.W.1 gave three different versions of his identification. He told this court the 1st appellant called him by name. He said the 1st appellant forcefully pulled him to a dark place where there were many people. Amongst those people was the 2nd appellant. For sure it was at night. To be precise at 11.30pm. There was no evidence as to what assisted him (P.W.1) recognize the appellants. P.W.1 did not give any physical description of how the appellants looked like that night. The complainant (P.W.1) told his friend (P.W.2) another version of the story. He told him that it is one Makaya who accosted him. There was no explanation as to who Makaya was. We doubt whether any of the appellants is known by that name. The third version of identification given by P.W.1 is that given to P.W.3. According to P.W.3, the complainant stated that he was attacked by three people whom he knew very well since he has been seeing them at Makuyu. This contradicted the earlier assertion by P.W.1 that he was attacked by many people and that he managed to recognize two of them (the appellants herein). The above analysis of how the complainant kept on changing his evidence of identification make us doubt the veracity of the complainant's evidence. His evidence is heavily discredited hence cannot sustain any conviction. We hold that the learned trial Magistrate fell into error when she concluded that the complainant's evidence of identification was certain, positive and free from mistake. Had she taken time to analyze the evidence she would not have come to that erroneous conclusion. We think this ground alone is enough to dispose of the entire appeal. Consequently, the appeal is allowed. The conviction is quashed and the sentence of death is set aside. The appellants namely **Shadrack Mwangi Ndonga** (1st appellant) and **David Chege Mwangi** (2nd appellant) are hereby 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**