REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 193 of 2008

FRANCIS KINYUA IRERI.....1ST APPELLANT

BENROGERS MUTUI KIILU.....2ND APPELLANT

JOHN MUTUKU NGUMBI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of S.N. RIECHI Chief Magistrate Embu in Criminal Case No. 1429 & of 2006 on 10/12/2008)

J U D G M E N T

The appellants FRANCIS KINYUA IRERI, the 1st appellant, BENROGERS MUTUI KIILU, the 2nd appellant and JOHN MUTUKU NGUMBI the 3rd appellant were jointly charged with various counts of offences. In counts 1, 5, 6, 7, 8 and 9 they jointly faced charges of Robbery with Violence contrary to Section 296(2)of the Penal Code. In counts 2, 3, and 4 they each faced one count of Rape contrary to Section 3(1) of the Sexual Offences Act. After trial, the appellants were found guilty in counts 1, 5, 6, 7, 8 and 9, all charges of robbery with violence contrary to Section 296(2) of the Penal Code. Each appellant was sentenced to death. They were aggrieved by the conviction and sentence. They filed their respective appeals which we have consolidated as they arise out of the same trial.

The first appellant has raised 6 grounds of appeal in his amended grounds as follows:

1. ***The learned trial Magistrate erred in both law and in fact when he failed to consider that NO 1st report was made before the arresting took place.***
2. ***The learned trial Magistrate erred in both law and in fact when he relied on a defective charge sheet in convicting and sentencing him.***
3. ***The learned trial Magistrate still erred in both law and in fact when he failed to consider that he was charged in mistaken identity of another person since the names on the charge sheet does not match with the names mentioned by the complainants in their statement s.***
4. ***The learned trial Magistrate still failed to consider that NO exhibit was found in his possession.***
5. ***The learned trial Magistrate still erred in both law and in fact when he relied on a co-accused confession which was not proved before magistrate or judge to convict him.***
6. ***The learned trial Magistrate further rejected his defence on weak reason leaving Section 169(1) of the Criminal Procedure Code violated.***

The 2nd appellant raised 7 grounds of appeal as follows:-

1. ***The learned trial Magistrate erred in both law and fact without putting due consideration that he pleaded not guilty to the charge.***
2. ***The learned trial Magistrate erred in both law and facts in putting reliance on evidence of PW2 that he identified him through the light of the torch and the same was not conducive for identification as pertained by the evidence adduced.***
3. ***The learned trial Magistrate erred in both law and facts by convicting and sentencing him to death failing to consider that the parade was irrelevant to the rules of identification parade.***
4. ***The learned trial Magistrate erred in both points of law and facts in convicting and sentencing him to death putting reliance on evidence adduced by PW1, PW2, PW4, PW5 and PW7 which was not supported by any other witness.***
5. ***The learned trial Magistrate erred in both law and facts in convicting and sentencing him to death putting reliance using the evidence of recovery of the exhibits which was surrounded by a lot of doubts.***
6. ***The learned trial Magistrate erred in both law and in facts in failing to consider that nothing like exhibits or weapons were recovered in his possession that could reinforce the investigation by the prosecution.***
7. ***The learned trial Magistrate erred in both law and facts by rejecting his defence without giving sufficient reasons.***

The 3rd appellant raised 7 grounds of appeal as follows:-

1. ***The learned trial Magistrate erred in both law and facts to convict him without putting due consideration that he pleaded not guilty to the charge.***
2. ***The learned trial Magistrate erred in both law and facts in putting reliance on evidence of lights adduced by the complainants which was surrounded with a lot of doubts.***
3. ***The learned trial Magistrate erred in both law and facts in convicting and sentencing him to death putting reliance on evidence of an identification parade where by no parade officer testified hence the evidence of PW5, PW4 and PW8 remains dock identification.***
4. ***The learned trial Magistrate erred in both law and facts in putting reliance on evidence of confession which was not written.***
5. ***The learned trial Magistrate erred in both law and facts in failing to consider that no exhibit or weapons were recovered in his possession that could reinforce the investigations.***
6. ***The learned trial Magistrate erred in both law and facts in putting reliance on evidence adduced by PW1, PW4 PW5 and PW8 which was not supported by any other witness.***
7. ***The learned trial Magistrate erred in both law and facts by rejecting his defence without sufficient reasons.***

The facts of the prosecution case was that on the evening of 4th July 2006 there were a series of robberies committed within Kiarimui and Kangethiri villages affecting various complainants.

PW1 was at home with her two children when three people entered her house while armed with a gun, axe and sicule identified as Exb.11, 8 and 9 respectively. She claimed to have been raped by the three men in turns. However the appellants were acquitted of the counts of rape. They then stole a school bag, 2 blouses, one marvin hat, cardigan and jacket. These were recovered same night and identified in court as exhibits. PW1 identified the three appellants in identification parades conducted after their arrest.

Same evening PW7 was walking home along Embu/Runyenjes Road when she was stopped and commanded to walk towards a man who was seated. The man was armed with a sicule identified as Exb.9. She was held by 2 others and ordered to sit down which she did. She was robbed of her mobile phone. She escaped when a vehicle was approaching along that road. She said she was able to identify one person very well with light from approaching head lamps of a car. She identified that person in an identification parade as 1st appellant.

The complainant in count 6 was PW4. He was found seated outside his house with a lantern lamp in hand

by three men. He recognized one of them as a neighbour whose nickname he gave as Mnight. That was 1st appellant. They demanded money and he led them into his house where they took a motorolla phone T190 from a table and Shs.4,700 from his house. The moment the robbers left, he called the police and reported 1st appellant of the offence. He gathered together with other villagers to follow the robbers.

PW8 was having supper inside his house when 3 people knocked his door and identified themselves as police officers. He opened for them. They then told him that they were thugs and demanded money. They were armed with an axe, another with a sicule and the third with a pistol which PW8 identified in court as exhibits 8, 9 and 11. He also recognized one as a neighbour nicknamed Mnight and identified him as the 1st appellant. He testified that 2nd appellant was the one who removed 5,000/= from him and also the one who was armed with a pistol.

PW5 was complainant in count 8. He was seated on his bed with a lamp on the table next to him when three people entered and demanded for money saying they were thugs. He said he recognized one of them as a neighbour he had known since childbirth, who is nicknamed Mnight. He was robbed of a phone 3310 and another T190-07. The 1st appellant took his jeans jacket before the left.

PW2 was the complainant in count 9. He was walking home from his uncle's place when he met three people who stopped him. He was ordered to sit down which he did. He was ransacked by 2nd appellant and 800/= taken from his pocket. He said the three were armed with an axe, sicule and pistol. He said he recognized one as 1st appellant.

PW4 called the OCS after the robbery and informed him that he had recognized Mnight. PW5 called the Assistant Chief and also told him he had recognized Mnight. The villagers then gathered among them PW4, PW5 and PW8, together with the Assistant Chief PW6. They decided to go the 1st Appellant's home. He was not there. They heard commotion in a house 80ft from there and on going saw people escaping. Inside they recovered the weapons used in all the robberies that night, the axe, sickle and toy pistol exhibits 8, 9 and 11. They also recovered a school bag exhibit 16 with jacket exhibit 5, skirt exhibit 2, blouses exhibit 3, cardigan exhibit 5 and assorted items. These items were identified by PW1 as property stolen from her house that night. They then went to the road and stopped a matatu. Inside they found 2nd Appellant and from him recovered a phone exhibit 12. PW4 identified the phone as one stolen in his house same night belonging to his wife. PW4 activated the phone and rang it, as proof it was from his house. The 2nd Appellant also had a table clock and mavin hat exhibit 7 and 4 respectively later identified by PW1 as her property.

Identification parades were later conducted by PW9. In the parade PW1 identified the three Appellants as the ones who robbed and raped her. PW4 and 8 identified the 3rd Appellant as the one who robbed them.

The Appellants all denied the offences. The 1st Appellant gave an unsworn statement and gave account of how he was arrested, together with four other people by police officers as he walked to the stage where he works. That was on 20th July 2006. The 2nd Appellant in his unsworn statement put forward an *alibi* as his defence. He said that on 14th July 2006 he was at a market where he sells clothes and worked until late. He went home and slept. Next day he travelled to Nairobi and that the vehicle he was in was stopped and he was arrested.

The 3rd Appellant in his unsworn defence put forward an unsworn statement. He said that on 14th July 2006 he travelled to Machakos to visit his family and that he remained there until 18th July 2006 when he was arrested.

We are a first appellate Court and as expected we have subjected the entire evidence adduced before the Court to a fresh analyzes, evaluation and testing; while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We have drawn our own conclusions. We are guided by the Court of Appeal decisions of ***OKENO -V- REPUBLIC [1972] EA 32*** in which the Court held;

An Appellant on a 1st appeal is entitled to expect the evidence as a whole to be submitted to a fresh

and exhaustive examination (*PANDYA -VS- REPUBLIC [1957] EA 336)* and to the appellate Court's own decision on the evidence. The 1st appellate must itself way conflicting evidence and draw its own conclusions (*SHANTITAL M. RUWALA-VS- REPUBLIC [1957] EA 570).*

The Appellants were unrepresented in this appeal. The State was represented by Mr. Wanyonyi, learned State Counsel. We will deal with the issues raised by the Appellants systematically.

The first issue raised was that of identification and in respect of 1st Appellant, recognition. Mr. Wanyonyi for the State argued that the 1st Appellant was well known to the complainants, PW2, 4, 5 and 8 before the incident even by name. He said that PW1's property was found in his house. In respect of the 2nd Appellant, learned State Counsel argued that he was found with some of the stolen items, the table clothes, hat and wrist watch. In regard to 3rd Appellant Mr. Wanyonyi argued that he was found in possession of a watch belonging to PW4's wife. Counsel argued that reports were made to the chief and the police where the Appellants were implicated. He urged us to rely on the case of ***ANJONONI & OTHERS -V- REPUBLIC [1976-80] 1 KLR 1566*** where the Court of Appeal held;

This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in SIRO OLE TIGEYA -VS- THE REPUBLIC (unreported).

We consider that in the present case the recognition of the Appellants by WANYONI and JOICE to whom they were previously known personally, the first Appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly lit torches which two of the Appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three Appellants to the police as the robbers who had robbed him.

Counsel also urged us to rely on the case of ***WAITHAKA CHEGE -V- REPUBLIC [1979-1980]1 KLR 1428*** where the Court held;

"Although an issue of visual identification should always be approached with great care and caution, where the case against the accused depended entirely upon visual identification at night by torchlight, his conviction could be upheld where the trial Magistrate had kept the matter in mind and the accused had been identified beyond reasonable doubt by two persons who had known him previously".

We have perused the Judgment of the learned trial Magistrate and find that he dealt with the issues of identification, arrests and recoveries of exhibits clearly and correctly. This was his finding.

For Accused 1 Francis Kinyua Ireri, PW2, PW4 and PW8 all knew him before and had known him for a long time. This was a reality case of recognition rather than identification. For Accused 2 he was identified by the Prosecution witness and when arrested a few hours later some of the property which had been robbed of PW1 ie table clock, brownish lady's hat (maffin) and wrist watch were recovered from him; and for Accused 3 he was picked by some of the complainants at an identification parade.

After considering the whole evidence I am satisfied that Accused 1, Francis Kinyua Ireri was recognized by PW2, Jacob Njue, PW4 Joseph Nyaga Njeru, PW5 Jacob Munene Njeru and PW7 Elkanton Mutegi Betha. They knew Accused 1 before and were able to recognize him. In conditions I find favaurable to positive recognition and free from error.

Accused 2 BenRogers Matui was identified by the complainant as the person who was in the group that robbed them. He was also found in possession of some of the stolen property which were identified by the complainant as among those stolen. He was found with this property a few hours

after this robbery. He did not give a satisfactory explanation on how he came to this. I find he was one of the people who robbed the complainant. Accused 3 John Mutuku Ngumbi was positively identified by the complainant as being part of the group who together with Accused 1 and Accused 2 robbed the complainant. The conditions for identification were favourable, and I find the identification to be free from error.

On our part we did find that the evidence against the 1st Appellant was that of recognition by PW4, 5 and 8. They not only saw him in very close quarters but he even spoke to them. Each of these witnesses were attacked separately. The attacks took some minutes in which the attackers explained who they were and what they wanted from the victim. The two complainants PW4 and PW5 recognized the 1st Appellant and reported to the authorities straight away. PW8 also recognized him and joined PW4, 5 and 6 who had all gathered by then due to screams by victims of the robberies, to try and track them down. The fact that their first point of call was 1st Appellant's home is clear proof that each of these witnesses had recognized the 1st Appellant during the attack. The 1st Appellant was arrested by PW10 the investigating officer on 20th July 2006. According to PW10, PC Ruto he got the information of where to get the 1st Appellant from the 2nd Appellant. The 1st Appellant's claim that no one testified as to how he was arrested was not correct.

Another complainant identified the 1st Appellant in an identification parade. This was PW1. PW1 had been attacked at her house. She had her lamp on throughout the incident. The Appellants were all in her house. They took turns to rape her.

We are satisfied PW1 was able to see all the Appellants sufficiently to identify them. In regard to the 1st Appellant we are satisfied that PW1, 4, 5 and 8 identified him and that the evidence of identification by these witnesses was safe. As for PW2 and PW7 who were attacked along the road, we are not satisfied they were able to have a clear view of the attackers.

In regard to 2nd Appellant he was arrested at 3am on the same night of this incidents. He had in his possession a phone (Exhibit 12) stolen from PW4's house. The phone was sufficiently identified by PW4 as belonging to his wife. PW4 was able to activate and call the line in it at the scene where PW6, the Assistant Chief had pulled out the 2nd Appellant from a 'matatu' vehicle. We have no doubt the phone was properly identified as PW4's phone stolen from his house that same night.

The 2nd Appellant was found with a table clock and mavin hat exhibit 7 and 4, which had been stolen from PW1's house. She identified them as her property. PW1 also identified 2nd Appellant in an identification parade mounted within a week of the robberies. PW4, 5 and 8 also identified 2nd Appellant at the time of arrest as one of those who attacked them. PW4 described 2nd Appellant as the one who was armed with an axe exhibit 8. He saw him at close quarters with light from a lantern lamp inside his sitting room. The robbers were not in a hurry and were making no attempts to disguise themselves. PW5 also saw 2nd Appellant at close quarters inside his house where he had a lantern lamp on. PW8 was also able to see 2nd Appellant inside his house under light from a lamp. He noted he had the toy pistol exhibit 11. In the case of PW4, 5 and 8 they were able to see the 2nd Appellant at close quarters. They were not hurrying neither did they disguise themselves. There was a lantern lamp on in the house. They all conversed demanding money. We are satisfied that 2nd Appellant was well identified. We also considered that PW5 saw 2nd Appellant with a school bag full of items. The same school bag was later recovered in a house with property stolen from PW1. In addition evidence of identification against 2nd Appellant was strengthened by the fact that he was found with property stolen from PW1 and PW4.

As for the 3rd Appellant the evidence against him was that of identification by the complainants PW1, PW4 and PW8. In regard to PW1, we are satisfied that circumstances of identification were difficult it being at night. However the fact PW1 identified him in identification parades conducted within a week of the robbery adds credence and gives an assurance that PW1 had seen and recognized him. We noted that PW1 had been both robbed and raped and that the incident took long. PW1 was with the Appellants for a

long time. The lamp was on and in the bedroom which each Appellant took turns to rape her. Even though the learned trial Magistrate was not satisfied that the rape charges were proved, and for the wrong reasons in our view, that does not mean PW1 was never raped. We find PW1 had sufficient time to see her attackers and due to the nature of the attack against her, we find that their identity must have been imprinted on her mind permanently as to enable her see and recognize each of the attackers subsequently. The 2nd Appellant was properly identified, as was 1st and 3rd Appellant by PW1.

As for PW4, 5 and 8 they all said they saw the 3rd Appellant with help of lamp inside the houses. They all came out of their houses after the attack and met outside. It transpired that PW4 had called OCS Runyenjes while PW5 had called the area Assistant Chief PW6.

Since attack took place within minutes of each other, it would be safe to say that the 3rd Appellant was the third man in the Gang of three who harassed and robbed residents in the area that night. The identification by PW1 as against him was safe. We find that PW4 and PW8's identification of 3rd Appellant as the third robber in the group in the identification parades mounted later, and identification by PW5 in evidence were all sufficient and positive identification of the 3rd Appellant.

In regard to the identification by PW7 the complainant in count 5 and PW2 the complainant in count 9, we are not satisfied that the two identified the Appellants positively. The two held a fleeting glance at their attackers. It was dark and along the road. They gave no descriptions of their attackers to anyone. They were not called to any identification parades. We find counts 5 and 9 were not proved to the required standard.

Having carefully considered this appeal we find that the learned trial Magistrate arrived at the correct conclusion and that there was sufficient and positive identification against the three Appellants in respect of counts 1 , 6, 7 and 8.

In the result we allow Appellants' appeal in respect of counts 5 and 9, quash the convictions and set aside the sentences.

The appeals against convictions in counts 1, 6, 7 and 8 have no merits and are dismissed. The convictions are upheld and sentences confirmed.

Those are our orders.

SIGNED AND DATED THIS 31STDAY OF MAY 2013 AT EMBU.

LESIIT J.
J U D G E

H.I. ONG'UDI
J U D G E
Delivered in open Court in the presence of;

…..... for State

Appellants
Njue – C/c