REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBERS 367 & 368 OF 2008

(From original conviction and sentence in Thika Chief Magistrate's Court Criminal Case No. 5282 of 2007, L W Gicheha, SRM on 17th October 2008)

PETER NGANGA & ANOTHER……..……APPELLANTS

VERSUS

REPUBLIC…….…….....…..……..….RESPONDENT

JUDGEMENT

The appellants in these appeals, **Anthony Njoroge Karanja and Peter Nganga Ngendo**, were charged in the Chief Magistrate's Court at Thika in Criminal Case No. 5282 of 2007 with three counts of Robbery with Violence contrary to section 296(2) of the ***Penal Code*** and one count of Attempted Robbery with Violence contrary to section 296(2) of the ***Penal Code*** and were convicted of the same and sentenced to suffer death. The particulars of the first count were that the appellants on the 28th day of November 2007 at Witeithie Village in Thika District of the Central Province jointly with others not before court while armed with dangerous weapons namely pangas robbed **Moses Wainaina Njeri** of his cash Kshs.1,000/= mobile phone make Nokia 3310 and a torch all valued at Kshs.4,100/- and at the time of such robbery threatened to use actual violence to the said **Moses Wainaina Njeri**. With respect to the second count the appellants were charged that on the 28th day of November 2007 at Witeithie Village in Thika District of the Central Province jointly with others not before Court while armed with dangerous weapons namely pangas robbed **Antony Kiragu Richard** of his case Kshs.120/= and at the time of such robbery threatened to use actual violence against, the said **Antony Kiragu Richard**. On the third count the appellants were charged that on the 28th day of November 2007 at Witeithie Village in Thika District of the Central Province jointly with others not before Court while armed with dangerous weapons namely pangas robbed **Justin Kinyua John** of his cash Kshs.1300/= mobile phone Nokia 1110 one Cap and a pair of Shoes all valued at Kshs.6,300/= and at the time of such robbery threatened to use actual violence against the said **Justin Kinyua John**. With respect to the last count the appellants were charged that on the 28th day f November 2007 at Witeithie Village in Thika District of the Central Province jointly with others not before Court while armed with dangerous weapons namely pangas attempted to rob **Mary Wanjiru Wainaina** and at the time of such attempted Robbery used actual Violence to the said **Mary Wanjiru Wainaina**.

Being dissatisfied with the conviction and sentence, the two appellants, **Anthony Njoroge Karanja and Peter Nganga Ngendo**, filed Criminal Appeal Nos. 367 of 2008 and 368 of 2013 respectively which appeals were consolidated under Criminal Appeal No. 367 of 2008 and were heard together with the two appellants being the 1st and 2nd appellants respectively.

The 1st appellant appealed against the same on the following grounds:

1. **That, the learned trial magistrate erred in law and fact by convicting me in reliance on the single identification evidence by pw2 without warning himself of the dangers of convicting in reliance on single evidence.**
2. **That, the learned trial magistrate erred in law and fact by failing to consider pw1's evidence, yet not declared hostile witness.**
3. **That, the learned trial magistrate erred in law and fact by failing to examine the nature of the said light at the scene, its size, its colour, its position in relating to the place of attack and all important issues to test the evidence with greatest care.**
4. **That, the learned trial magistrate erred in law and fact by convicting me in reliance on mere allegation by pw2 that a first report was made at the administration police officers whereas no such evidence was adduced in court to that effect to ascertain whether pw2 was able to identify her assailants.**
5. **That, the learned trial magistrate erred in law and fact by failing to consider that pw6's evidence in chief is silent on whether he identified me at the scene.**
6. **That, the learned trial magistrate erred in law and fact by failing to adequately consider my defence.**

On his part the 2nd appellant raised the following grounds:

1. **THAT the learned trial magistrate erred both in law and fact when she relied on the evidence of identification/recognition yet failed to find that the same wasn't free from the error or by cogent first report.**
2. **THAT the learned trial magistrate erred in law and in fact when she relied and acted on contradictory and inconsistent testimonies that weren't credible to base and sustain a conviction.**
3. **THAT the learned trial magistrate erred in law and in fact when she acted on a hearsay evidence yet failed to find that the same had no probative value in the instant case.**
4. **THAT the learned trial magistrate erred in law and in fact when she dismissed my plausible defence.**

The facts of the case were that on 28th November 2007 at 9.30, PW1, **Moses Wainaina Njeri** was coming from his mother in law's house in the company of his wife PW2, **Mary Wanjiru Wainaina** and another lady, **Janet Kiago** when due to drizzling they decided to take cover in a stall. When it stopped raining they continued with their journey home and after a few minutes they were confronted by four men who ordered them to lie down and they obliged. PW2 started running and was chased by two men while the rest of the victims were left with the other two men. PW1 was robbed of a Nokia 3310, Kshs 1,000/- and a torch. He then heard PW2 screaming and asking why **Gicheru** and **Blackie** were doing that to her. He was however unable to identify the person who robbed him. They later found PW2 at the police post nursing injuries on her fingers, shoulder and head. They then proceeded to Thika police station where they were issued with a P3 after which she was admitted in Hospital for treatment. According to PW1, the said **Gicheru** and **Blackie** were touts whom he knew and they are the appellants in this appeal. He however stated that where they were attacked it was dark and he did not identify anyone. PW2 confirmed that on the said date they were coming from her parent's home in the company of PW1 and one **Patrick Kiragu** when they were attacked by four men with pangas. According to her there was light from electricity and when he saw that they wanted to cut PW1 she screamed at which point she was cut on the head. She then asked the appellants whom she mentioned by their known names, **Gicheru** and **Blackie** why they were cutting her. She did not however identify the other two attackers. She then ran away but fell in a trench and the two caught up with her and cut her fingers and hand. When she came to, she went to the Police Post leaving the cut fingers in the trench. PW1 found her at the post after which they went to Thika Police Station and thereafter to the Hospital. According to her she informed the police that it was the appellants who had beaten her and she repeated this after being admitted to the Hospital. They however did not steal anything from her. According to her where she was cut there was light from a bulb two feet away. She confirmed that she knew the 2nd appellant well as the 2nd appellant had married the sister to the 1st appellant. She denied that there was any grudge between her and the 2nd appellant. She stated that she told the people who had attacked her and when she came from the hospital the appellants had already been arrested. PW3, **Anthony Kiragu**, confirmed that on the day of the incident at 9.30 they

were coming from PW2's home they were accosted by four people who ordered them to lie down. Whereas he obliged, PW2 ran away and two attackers went after her. According to him he saw a panga where they lay and there was light where they were. He was robbed of Kshs 120/-though he was not beaten. They eventually found PW2 at the AP post with her head and hands cut. He however did not identify anyone though he knew the appellants as neighbours.

PW4, **Justin Kinyua John**, a hawker was on the same day at Thika town with one **Stephen Thathi** but got late because they were waiting to be relieved. On his way home at Witeithie Stage he saw three people with torches who ordered him to stop and took his shoes, phone, hat and Kshs 1,600/-. He then went home where first aid was performed on him. Two days later he was informed by his friend, **Calvince Odhiambo**, PW6, that his attackers had been found. He relayed the information to the police and the appellants were arrested. According to him he knew the appellants before the incident as **Gicheru** and **Blackie**. He however confirmed that in his statement he stated that he did not identify the attackers during the incident.

PW5, **Dr John Njenga Kamau** examined PW2 on 30th April 2008 and confirmed the injuries she had sustained.

On the day of the incident PW6 was on his way home when he saw a person ahead of him. On reaching his gate he heard someone screaming. When he came out he saw someone being robbed and saw the robbers one of whom had a panga while the other had a torch climbing a gate which had security lights. He recognized one of them as the 2nd appellant. On 30th November 2006 (sic) he identified the appellants as the people who had attacked PW4. He had known the 2nd appellant since 2003 while he had known the 1st appellant for 5 years. He confirmed that he was able to identify the attackers from the security lights. As PW7, **PC Joseph Mwegu**, was investigating the incident, on 30th November 2007 PW6 reported that he had seen the people who attacked PW1 and he arrested the appellants and charged them with the offence.

In his unsworn statement, the 1st appellant stated that he was a mechanic and was arrested by police on 1st December 2007 and taken to Thika Police Station where he was charged with an offence he did not know. On the part of the 2nd appellant, he said he was a conductor and that on 2nd December 2007 when he went to check his driver at the police station, he was booked in the cells and subsequently charged with the offences he did not know of. He denied having committed the offences.

In her judgement the learned trial magistrate noted that there were two robberies with the first robbery involving PW1, PW2 and PW3 in which PW2 and PW3 were unable to identify their assailants. Whereas PW1 and PW3 obliged when they were ordered to lie down, PW2 remained standing screaming for help and two people came towards her and she was able to identify them and addressed them by name. That there was light was corroborated by PW3. The court therefore found that PW2 was able to identify the attackers.

In the second robbery the learned trial magistrate found that it was PW6 who allegedly identified the people who beat PW4. However, PW4 was unable to identify his attackers. The learned magistrate however found that PW6 saw the appellants beating someone who turned out to be PW4 hence the appellants were liable and convicted them as charged.

Being a first appeal this Court is legally bound to re-evaluate the evidence before the trial court and re-assess the same with a view to arriving at its own conclusion taking into account that it neither saw nor heard the witnesses testify and giving due allowance for the same. See **Okeno vs. R [1972] EA 32** and **Nguli vs. Republic [1984] KLR 729**.

It is clear from the evidence that with respect to the first robbery in which PW1, PW2 and PW3 were the victims, only PW2 identified the appellants. At the place where the initial attack took place, according to PW1 it was dark though PW2 and PW3 stated that there was light. Despite PW3's evidence that there was light where they were attacked, he was still unable to identify the attackers. According to PW1, he only

heard PW2 mention the appellants' names after PW2 ran away. Taking into account the conflicting evidence it is our view that the learned trial magistrate's finding that PW2 identified the attackers at that initial attack is shaky. That leaves the identification of the appellants by PW2 after they chased her. PW2 testified that there was light from security bulb and that it was the said light that assisted her identify the assailants. Her evidence was therefore not that of identification but recognition. There was no evidence that the assailants disguised or covered their faces. In **Ali Mlako Mwero vs. Republic [2011] eKLR** the Court of Appeal expressed itself as follows:

> **"The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken. So may a number of them; see Roria v R [1967] EA 583. There is nevertheless some measure of reassurance when the case rests on recognition as stated in the case of Ajononi & another v Republic [1980] KLR 59, thus:**
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> > ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. 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 Giteya v The Republic (unreported)."***

Although there was no indication how long the assailants took with PW2, there is evidence that PW2 called the appellants' names during the attack. Although the incident took place on 28th November 2007, PW2 wrote her statement on 22nd January 2008. She had however mentioned the names of her attackers. That she was seriously injured is not in doubt. We do not therefore agree that the mere fact that her formal statement was recorded after the arrest of the appellants was fatal to the prosecution case. Even if there was total failure to describe the appellants in the statement, the Court of Appeal held in **Nathan Kamau Mugwe vs. Republic [2009] eKLR:**

> **"As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness "SHOULD" be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected. On the failure to produce the car taken away from James, nothing can turn on that. The photographs of the car taken by the police were produced and there was no complaint by anyone that the photographs were not a true representation of the car. Other items such as money were stolen and were never**

recovered. We find no substance in the complaint with regard to the car. In our view, the charge against the appellant was proved beyond any doubt that is reasonable and that being the view we take of the matter, we must order, as we hereby do, that his appeal against the conviction be dismissed. The sentence imposed was the only one available in law and there can be no basis for interference by us. The appeal fails in its entirety and these shall be the orders of the Court."

With respect to count 3, it is clear from the evidence that the complainant in that count PW4 did not identify the 3 people who robbed him. As was correctly stated by the learned trial magistrate in her judgement the evidence in respect of the robbery of PW4 was circumstantial. It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence the court ought to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – **Teper vs. R [1952] AC 480**. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In **R vs. Taylor, Weaver and Donovan [1928] 21 Cr. App. 20 CA**, the court stated:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

The question is whether there could have been a possibility that the person who P6 saw being beaten was someone other than PW4. PW4's evidence was that he saw the 3 assailants when he reached Witeithie stage. However according to PW6, he had reached his gate when he heard someone screaming and came out to check. He saw someone on the ground and saw people robbing him by removing items from his pocket. The same people were climbing a gate which had security lights. He then saw them heading towards the stage. According to PW4 he did not identify his assailants because it was dark although he knew the appellants before the incident. The learned trial magistrate in her judgement found that apart from that of PW1,PW2 and PW3, the only other person whose report was made to the police was PW4 and that there was no evidence to show that anyone other than the PW4 was beaten outside PW6's compound. However the evidence of PW4 was that he was attacked at the stage where it was dark while according to PW6 the attack took place where there was light. The fact that there was no other report does not necessarily mean that it was only the complainants who were robbed the same night. Whereas it may be true that PW6 may have seen the appellants robbing someone we are not satisfied that the person he saw being robbed was necessarily PW4. The appellants could have been robbing someone else who may have chosen not to report while the people who attacked PW4 could have been the same or another group since from the evidence there were at least 4 robbers on prowl that night.

The appellants contended that their defences were never considered. We have looked and considered their defences which were mere denials. In **Isaac Njogu Gichiri vs. Republic [2010] eKLR**, the Court of Appeal expressed itself with respect to mere denial as follows:

'With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: "I find that the defence of the 5th accused is not true." We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances." We agree with this confirmation.

We therefore do not agree that the appellants' defences were never considered. In any case we have considered the same as we are duty bound to do and we likewise do not find any merit on this ground.

We are therefore not satisfied that the conviction of the appellants with respect to the robbery of PW4 was safe. We accordingly quash the conviction of the appellants on count 3. we are however satisfied that the

appellants were properly identified by recognition by PW2 and the conviction of the appellants on counts 1, 2 and 4 was safe.

We however uphold their conviction on counts 1, 2 and 4.

However, on sentence, in **John Kinyua Miriti V Republic [2011] eKLR,** the Court of Appeal stated:

> **"On sentence, this Court has said time without number that it is improper to sentence an accused person to death on more than one count. For the foregoing reasons, we dismiss the appeal with an order that the sentence of death in the second count relating to robbing, Simon Newesa Lei shall remain in abeyance."**

Similarly in **Fanuel Makenzie Akoyo vs. Republic – Criminal Appeal No. 45 of 2006** (unreported) the Court of Appeal said:-

> **"Regarding sentence the appellant was sentenced to death in respect of three counts of robbery with violence. That was in our view, erroneous as the appellant cannot logically suffer death twice or thrice. We accordingly correct the error by setting aside the sentences in counts 2 and 3. The result is that the appellant shall suffer the sentence of death in count 1 only."**

Accordingly, the appeals on conviction on counts 1, 2 and 4 are dismissed as well as the sentence on count 1 but we order that the sentence on counts 2 and 4 shall remain in abeyance.

Judgement accordingly

Judgement read, signed and delivered in open court this 28th day of November 2013.

F N MUCHEMI

JUDGE

G V ODUNGA

JUDGE

In the presence of:

The two appellants

Ms Mwaniki – State Counsel