



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 128 OF 2011**

**BETWEEN**

**GEORGE MURIITHI NJUE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Embu Criminal Case 729 of 2009 by Hon. L.K. Mutai S.P.M on 29<sup>th</sup> July, 2011)*

**JUDGMENT**

1. The appellant, **George Muriithi Njue** *alias Saito* was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars were that on the 7<sup>th</sup> day of December 2002 at Kichunguri village, Kawanjala sub-location, Kagaari South location in, Embu District jointly with others not before the court and while armed with offensive weapons namely pangas, knives and rungun robbed Nancy Njura Njiru cash Ksh. 8,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nancy Njura Njiru.
2. The appellant also faced a second count of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence being that on the 27<sup>th</sup> day of February 2003, at Kichunguri village, Kawanjala sub-location Kagaari south location, Embu district jointly with others not before the court while armed with offensive weapons namely pangas, knives and rungun robbed Nancy Njura Njiru of cash Kshs 20,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nancy Njura Njiru.
3. This appeal comes to us after a re-trial following an order in **Embu HC Criminal Appeal No. 98 of 2006** (Khaminwa and Makhandia, JJ) which allowed his appeal on similar charges. The retrial was conducted and on 29<sup>th</sup> July 2011, the appellant was found guilty of both counts and was sentenced to death on the 1<sup>st</sup> count while the sentence for the 2<sup>nd</sup> count was left in abeyance. It is against this conviction and sentence that he now appeals.
4. The appellant hinges his appeal primarily on the issue of identification stating that the trial court failed to consider that there was a possibility that he was a victim of mistaken identity. He asks the court to dismiss the identification and recognition evidence against the appellant on grounds that; circumstances were not free of error, no names were given by PW1 or PW2 to the authority; that despite the fact that he was well known to the complainants, they nevertheless did not give his name to the police as per the OB entry 6/28/2/2003, complainants led to no arrest, report was

made after two years which was not a reasonable time and that there was no reasonable grounds of the appellant having committed an offence. He stated that he was remanded in custody for over 14 days before being charged in court contrary to **section 72(3)** of the then Constitution. The State on the other hand supports the conviction on the ground that the offence was proved beyond reasonable doubt.

5. The first complainant, PW1 testified that on 7<sup>th</sup> December 2002 at 1.15 am, she was in her house with her daughter Daisy Wanja, PW2, and her grand-daughter, Evelyne Nyawira when she heard dogs in her compound barking and human movements. She then saw very powerful flashes of torches on her ceiling coming through the bedroom window. She drew the curtains, opened the window and with the help of a torch could see two men walking towards her son's house about 20-30 metres away. They had torches. The two men faced her house and one of them shouted in Kiswahili language, "*Mama tunakuji pesa. Weka pesa tayari.*" ("*We are coming for the money. Keep the money ready*"). She called her daughter PW2 who told her she was watching what was unfolding from her bedroom window. She then called her and her daughter Evelyne to join her in her bedroom. PW1 then realized there were four more persons in her compound and she started to scream while her daughter blew a whistle. Within no time, the men were in her bed room and demanded for money. She pleaded with them she had no money. She then saw a panga lifted up towards her head and she lifted her left hand and she was cut. The torches from the two men were still on. The panga was raised again and it cut her on the left hand palm. Her daughter and granddaughter then stood behind her as she was being attacked. According to PW1, she was cut by a short man whom she did not recognize while the second man stood next to the bedroom door. The second man, the appellant then asked PW2 to escort them to the shop for money. He had a slasher with which she threatened her daughter with. The appellant then raised the slasher to cut her daughter's head and as PW1 raised her hand to stop it, her middle finger was chopped off. She saw PW2 being dragged out of the bedroom by the appellant and the short man. On reaching the sitting room, her daughter took her jacket and which had 8,000/= in the pocket and the short man received it. PW1 meanwhile stood about 2 meters away as she watched the happenings. They still demanded for more money with the appellant stating that they had to collect more money from the shop. It was then that somebody outside shouted that time was up and the two men rushed out. They warned that they would come back for more. PW1 stood at the door and watched as about 8 men left her compound. She was taken to Embu District Hospital and later to Kijabe Hospital. The matter was reported at CID headquarters Embu.
6. The second episode of attack was on 27<sup>th</sup> February 2003 at about 8.00pm when PW1 heard a dog bark. She asked a lady, Mama Gitonga who she was with to go see why there was barking. She could hear the lady conversing with some people outside the house. Through the kitchen window, PW1 could see across the sitting room and noticed a short man, the appellant and another person enter the house knocking mama Gitonga down. The short man then turned to PW1 and demanded for money raising a panga. The third person stood by the door. The appellant reminded PW1 that he had promised to return. It was her testimony that she was able to see the appellant very well as there was a lantern lamp in the kitchen and a lot of light from the pressure lamp in the sitting room. She opened the wardrobe and the short man searched for the money as the appellant stood next to the wall next to her bedroom door. He then went closer and cut her left hand while telling the short man to hurry up. The short man removed all the money which was about Kshs 20,000/= in an envelope. They then walked out of the bedroom. PW1 later realized that a relative of hers, her guard had been attacked by the robbers outside the house. She was treated at Embu District hospital and reported the incident at Runyenjes Police station. The relative died afterwards allegedly out of the injuries.
7. On 30<sup>th</sup> January 2004, PW1 was informed by police officers that the attackers had been arrested. On 3<sup>rd</sup> February 2004 at 4.00pm, she identified the appellant in an identification parade at the police station. There were about ten persons in the parade and she identified the appellant by tapping his shoulder.
8. PW2, Daisy Wanja Njiru is PW1's daughter. Her testimony corroborated PW1's testimony on the

first incident of attack on the night of 7<sup>th</sup> December 2002. She testified that she knew the appellant for many years before and pointed out that he hailed from Ena. Regarding the incident of 27<sup>th</sup> February 2003 at about 7.00pm, she closed her shop and headed home in the company of another person who escorted her. On the way she saw some torch lights ahead of them moving towards them. She removed her own torch and could see the appellant with three others. She sensed danger and ran away to a neighbour's house and reported the incident. They then headed back to the scene while screaming. On entering the compound, they discovered an old man had been attacked. Her mother had also been injured on the left hand.

9. PW3, Nyagah Njiru Kibutu is the person who escorted PW2 to her home. His evidence was that on the material day, he left the market with PW2. Before reaching her home, they met some people with torches. PW2 carried a torch which she torches the men who were now close to them. PW2 then ran away. The four men approached him and asked his name. One of them attempted to cut him but was stopped by another and he was left to go. He followed PW2 and together with the neighbours headed to the gate. He learnt that robbery had taken place and that PW1 and the watchman had been injured in the attack. He testified that he knew the appellant very well as he hails from his village, Ena.
10. PW4, PW5 and PW6 are Sergeant Ebrahim and Corporal Robert Ireri and Sergeant Paul Nthiga respectively who arrested the appellant. PW7 was Sergeant Benard Nthiga, formerly of CID Embu who testified that about 28<sup>th</sup>/29<sup>th</sup> February 2003, the complainant reported to Runyenjes Police station of a robbery with violence case. He did visit the scene and later recorded PW1's statement. The complainant had reported that she identified a suspect, one George alias Saito whom she knew very well before. That on 19<sup>th</sup> January 2004, the appellant was arrested around Mwea.
11. PW8 is Dr. Godfrey Njuki Njiru of Embu Provincial Hospital. He testified to PW1's injuries. On examining her she discovered she had a stab wound on the right shoulder joint, amputation/disarticulation of right middle finger with incision and stitch marks and a fracture on the left ulna bone where there was a sharp cut wound scar, cut wound on the palm of the same hand and fracture to the tibia fibula bone. His assessment was that a sharp object had been used to occasion the injuries and the degree of injuries as grievous. He completed the P3 form on 30<sup>th</sup> May 2008.
12. The last prosecution witness, PW9, Chief Inspector Shadrack Opiyo conducted the identification parade. In his testimony, he explained how he conducted the parade at the Embu police station as is required and produced the parade report. Eight members of similar looks were involved and the accused was asked to pick his preferred position. Both PW1 and PW2 identified the appellant by touching him. In both rounds, the appellant remarked that the witnesses had seen him recently.
13. In his sworn defence, the appellant gave an account of his whereabouts on the two material days. In December 2002, he was at home going about his daily duties. That on 23<sup>rd</sup> March 2003, he went to do some timber work in Mwea area but frequented his home over the weekends. In January 2004, he was arrested by some Administration police officers and escorted to Embu for interrogation. On 30<sup>th</sup> January 2004 at 7.30am, he was escorted to the complainant's home within Ena by Sergeant Nthiga but remained inside the police vehicle where he was even served tea. On 3<sup>rd</sup> February 2004, he was informed of an identification parade which he had no problem with but indicated that he had been to the complainant's home and had differed prior.
14. Our role as a first appellate Court was stated in the case of ***Okeno v Republic [1972] EA 32*** as follows, "*An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's*

*findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had advantage of hearing and seeing the witnesses.”*

15. This appeal centres primarily on identification of the appellant. As has been stated time again, the evidence of recognition of an accused by a complainant is more reliable as opposed to identification. As stated by the Court of Appeal in **Anjononi and Others v Republic [1980] KLR 59**, *“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.”* However, even in cases of recognition, some measure of caution is required as the court in **R v Turnbull [1976] 3 ALL ER 549** observed, *“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 relatives and friends are sometimes made.”*
16. We also take into account the holding by the Court of Appeal in **Maitanyi v Republic [1986] KLR 198**, where it stated, *“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description”*.
17. We are satisfied from our re-evaluation of the evidence before us that the appellant was properly recognized and identified. PW2 vividly narrated how the ordeal took place. In the first incident, the two attackers who included the appellant and the other assailants had powerful torch which enabled the complainants see their attackers well. Further, the period that it took for the robbery, from the bedroom where the complainants were tormented to the sitting room where money was given, and the distance between them provided ample time for proper recognition of the attackers. Upon cross-examination, PW1 regarding the first incident, stated that she could see the appellant's face well as on of the attackers directed his torch towards the appellant PW2 corroborated the evidence by stating that she was with the attackers for at least 30 minutes and was able to see the appellants face as the other attacker was using a bright torch in which circumstances she was able to see the appellants face clearly.
18. As regards the second incident PW1 was able to see the appellant in the company of two other men through the kitchen window where there was a lantern lamp. The presence of a pressure lamp in the sitting room further aided recognition of the appellant as one of the robbers. It is overwhelming evidence leads us to the conclusion that the appellant was properly recognized in not just one but in the two different occasions which any possibility of mistaken identity.
19. The appellant in his defence also flagged the issue that his name was not given to the police station after the first station. The complainants acceded to this explanation that they were fearful of what the appellant would do as he had threatened them with a comeback. The particulars were given to the CID Embu. While it may be strange that the appellants despite having knowledge of the appellant did not divulge it to the authorities at first, it is understandable that PW1 has been attacked, cut severely and left in a state where a threat of someone coming back particularly someone she knew cannot be lightly dismissed. Her explanation that she did not disclose the name of the appellant immediately is therefore accepted. What is critical though, is whether in both occasions the complainant was properly recognized as the assailant. We find that the lighting conditions in the first incident from the powerful torches held by the assailants and the light from PW1 own torch in the circumstances of the length of time of the robbery was sufficient to recognize the appellant. Likewise in the second incident, the recognition of the appellant was buttressed by the light from the lantern lamp and the pressure lamp. We are convinced that this was a case of recognition as opposed to identification of a stranger.
20. We therefore find that the identification parade was not crucial in the circumstances, the appellant having been known to the complainants and pointed out. We have however scrutinized the

manner in which the identification parade was carried out and we are satisfied that it was conducted in accordance with the guidelines set in **Republic v Mwangi s/o Manaa [1963] EACA 29**. The identification parade was conducted on 3<sup>rd</sup> February 2004 by Chief Inspector Shadrack Opiyo, PW10, who testified that the appellant confirmed that he was willing to attend the parade without counsel or a friend and that it involved 8 persons. Both PW1 and PW2 identified the appellant. PW10 stated that the appellant was satisfied by the manner in which the parade was conducted.

21. The appellant's defence was that the complainants' did not lead to his arrest does not affect the evidence as we have outlined. Further, the evidence that he was detained for more than fourteen days ought to have been raised at the trial court. Be that as it may, while it is now a well-guarded constitutional right that an accused person must be presented to court promptly after his arrest and while it is incumbent upon the authorities to strictly observe this provision, it is also true that breach of this right does not determine the trial on its merits. This was the holding by the court of appeal in **Julius Kamau Mbugua v Republic, Criminal Appeal 50 of 2008[2010] eKLR**.

22. In light of what we have stated, we uphold the appellant's conviction and sentence. The appeal is therefore dismissed.

**DATED and DELIVERED at EMBU this 16<sup>th</sup> December 2013.**

**D.S. MAJANJA**

**H.I. ONG'UNDI**

**JUDGE**

**JUDGE**