



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 397 OF 2008**

*(Appeal from the judgment of S. Andriessen (Mrs) [Senior Resident Magistrate, Kibera])*

**ARTHUR KIMANI IRUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appellant was convicted by Kibera Senior Resident Magistrate of the of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. Being aggrieved by the judgment, the appellant lodged this appeal.

The main grounds of appeal are: that identification by the two prosecution witnesses was not positive, the trial magistrate did not properly evaluate the evidence; that the prosecution did not discharge the burden of proof; that the prosecution's evidence was full of inconsistencies and contradictions thus rendering the conviction unsafe.

The brief facts of this appeal are that in the night of 21st and 22nd April 2007 at Lower Kabete in Nairobi, the complainant PW1 and his wife PW2 were asleep in their house at around 2.00 a.m. when they were attacked by a gang of about six (6) people. Before the gang entered the house they splashed it with petrol threatening to burn it if the door was not opened for them. PW1 was forced to open the door. He and his wife were injured and several items taken from the house. During the attack PW1 and PW2 said they were able to identify the appellant who was their former farm worker before he left to work for a neighbour. The following day PW1 and his son led neighbours to arrest the appellant and his two friends who also worked as farm hands in the neighbourhood. The suspects were jointly charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The appellant was convicted of the offence while the two accused were acquitted for lack of evidence.

The evidence of PW1 is that he lived with his wife in the house at the material time. He heard people bang the door and breaking window glasses demand that the door be opened. PW1 was reluctant until the gang threatened to set the house on fire. Before he allowed them access, he switched on the security lights and was able to see the appellant standing outside the house. The appellant did not enter the house but remained outside. PW2 also said that she looked outside through the window and with the aid of the security lights, saw the appellant who had left their employment as a farm worker only four months before the incident. The following day, PW1 made a report to King'eero police post. PW3 is the officer who received the suspects at the police station after they were arrested by the members of public. This was one day after the robbery was reported by the complainant. PW3 said the appellant and the other two suspects suffered injuries during the arrest and the same was indicated in the Occurrence Book. He testified that when the robbery was reported at the police post, there was no indication from PW1 that he

and his wife had identified anyone.

PW4 the investigating officer visited the scene and confirmed there was evidence of breaking of window glasses of the house. He confirmed that the appellant had bruises on the face on arrest. PW4 said that the first robbery report of 21st April 2007 did not indicate that the complainant had identified anyone.

The appellant in his defence admitted he was an employee of PW1 in his farm about four (4) months before the incident. He disagreed with the complainant and went to work for a neighbour. The appellant said that the complainant owed him Kshs.2500/= as salary arrears and that he refused to pay him. PW1 had tried to woo the appellant to return to his employment but in vain. The appellant said that on 22nd April 2007, he was working in his employer's farm when he saw PW1 and his son approach him followed by neighbours. PW1 pointed at the appellant saying he is the one they were looking for. The appellant was beaten up and asked who his friends in the neighbourhood were. He gave the names of one Maina and Karoko who were also farm workers. The appellant was dragged to where the other Maina was and he was arrested while the 3rd suspect John Kamoka Maina was also arrested.

The three suspects were beaten up, tied with ropes before being taken to the police station where they were subsequently charged. The appellant testified that he spent the material night in his employer's home and denied committing the offence.

The defence argued that the conviction was unsafe for it was based on the shaky identification evidence of PW1 and PW2. The State opposed the appeal submitting that the evidence on identification was watertight.

The prosecution witnesses contradicted each other and brought out glaring inconsistencies in their evidence. PW3 said that the appellant confessed to him and the complainant that he was involved when he was arrested. This was only hearsy since the investigating officer failed to facilitate the recording of a confession during investigations. PW3 referred to the appellant as one "Maina" while his name was Arthur Kimani Irungu. John Kamako Maina was the 3rd accused before the trial court while the appellant was the first accused. PW1 and PW2 gave the name of the appellant as "Kimani." All these witnesses referred to the appellant as the man who was a former worker of PW1. PW3 denied that the suspects were assaulted during arrest. This was later proved to be untrue from the evidence of the investigating officer and the O.B. Report which stated that the suspects had injuries on admission at the police post. PW4 also kept shifting on the issue of whether the suspects were injured or not until he was asked to read the O.B. Report that he admitted the assault. His conduct erodes his credibility. The magistrate found that the assault took place. ***"Indeed the accused were assaulted as severely as alleged. I do believe at the time of taking plea they would have notified the magistrate who took their plea, but they did not from the record. For the foregoing reasons I find the 1st accused guilty as charged and shall convict him accordingly."***

The trial court did not address these incidents of contradictions in its judgment which is in our view an omission of pertinent issues in the case.

It is not in dispute that PW1 and his wife PW2 knew the appellant well for he had worked for them a few months before the incident. The robbery took place at 2.00 a.m. in the night of the 21st April 2007 and the report was made at 3.55 a.m. at Kingeero police post. During the report PW1 did not tell the police that he had identified any of his assailants. PW3 and PW4 were police officers attached to the police post. They confirmed that the complainant did not give any name or description of any suspect. If PW1 and PW2 had seen and recognized the appellant, it would have followed that during the time of reporting the incident, PW1 would have given the name of the appellant as one of the suspects. It was one day after the report was made that PW1 and his son led neighbours to arrest the appellant and the other suspects. It appears that the involvement of the appellant and his friends in the robbery was an afterthought on part of PW1. It came after the first report had been made. It was the evidence of PW2 that when the attackers entered the house, they put on the lights in the house and that they had not covered their faces. It does not make sense that in the circumstances PW1 and PW2 were not able to identify any of the men inside the house so as to give descriptions of at least one of them to the police. Yet, PW1 and PW2 say they were

able to identify the appellant as he stood outside the house with the aid of the security light.

It is important to note that the distance between PW1 and PW2 on one hand and the appellant was not given in order to assist the court to probe into the issue of positive identification. The witnesses were not able to identify the role played by each of the attackers and what weapon each had. PW2 made a general statement that the assailants were armed with a rungu, a gun and a rake. With full lights on in the house, the witnesses ought to have given more details on what they saw.

The magistrate said in her judgement:

***“In the first instance, I am satisfied given the well corroborated prosecution evidence that indeed on the night of 21st April 2007 the complainant was attacked by a gang of six robbers and violently robbed of a total gas meko, sewing machine and mobile phone. The robbers were armed with a club, rake and gun like object and injured the complainant in the process. The ingredients of the offence of robbery contrary to Section 296(2) are satisfactorily proven to that extent.”***

The trial magistrate reached a conclusion that the case had been proved against the accused by the **“well corroborated prosecution evidence”** without critically analyzing the evidence on identification. The evidence of PW1 and PW2 cannot be said to be well corroborated. The issue of the name of the appellant missing from the first report was not considered in the judgment. The defence of the appellant and how he was arrested was rejected without due consideration.

The magistrate said in respect to the appellant's defence:

***“His defence is not persuasive indeed he alleged he had slept previous night at home but the same was not corroborated. I am satisfied that on the 21st April 2007 the 1st accused was positively identified by two prosecution witnesses at the scene of the robbery and the following day on being asked conceded to the same.”***

In our view, the trial court failed to carefully scrutinize the evidence of the key witnesses regarding identification, the manner of arrest. Had the court done its duty, it would have come to the conclusion that the evidence of identification and recognition was not entirely reliable and would have given the appellant the benefit of the doubt.

We reach a conclusion that the trial court erred in finding that the case against the appellant was proved to the standards required in criminal cases.

On perusal of the proceedings it is clear that this case was handled by three different magistrates. Hon. E. Ominde heard the prosecution case while Hon. S. Karani heard the defence case. The judgment was prepared and delivered by S. Andriessen. The record shows that none of the two succeeding magistrates complied with **Section 200** of the **Criminal Procedure Code**. The relevant provision provides:

*“200(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.*

*200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”*

**Section 200(3)** gives the accused the discretion to demand a retrial, to have any witness resummoned and reheard. The court upon explaining to the accused his rights under **Section 200(3)** will give directions as to whether the case will start *de novo* or whether any witnesses or witnesses shall be recalled.

The other issue to consider is whether the accused person suffered prejudice by non-compliance with **Section 200**. The appellants in this case were represented by a counsel during the trial and did not complain or make any application for compliance in the course of the trial. In this appeal, the appellant

was represented and the issue of non-compliance was not raised. For these reasons we come to conclusion that the appellant did not suffer any prejudice as a result of the non-compliance with **Section 200** of the **Criminal Procedure Code**.

For the foregoing reasons, we find the conviction unsafe, quash it and set the appellant at liberty unless otherwise lawfully held.

**F. N. MUCHEMI**

**G. ODUNGA**

**JUDGE**

**JUDGE**

**Judgment** dated and delivered on the **4th** day of **December 2013** in the presence of the appellants, the State counsel Ms. Gichohi and Mr. Mwangi for the appellants.

**F. N. MUCHEMI**

**JUDGE**