REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 147 of 2008

JOHN KAMANGA KIMANI.....1ST APPELLANT

GEORGE MUNIU WACHU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the ruling in Criminal Case No. 179 of 2007 of the Senior Resident Magistrate's Court at Githunguri by L.K. Mutai – Senior Resident Magistrate)

JUDGMENT

JOHN KAMANGA KIMANI and **GEORGE MUNIU WACHU,** the appellants herein were convicted for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**. Each of them was then sentenced to death.

In their appeals to this court they have submitted that their alleged identification was doubtful.

They also asserted that the prosecution failed to prove the case against them, to the standard required by law.

As far as they were concerned, their alleged identification by **PW 1** and **PW 2** was only possible because the police officers, who had arrested them, exposed them to the two witnesses.

Finally, they faulted the learned trial magistrate for rejecting their defences, which had cast doubts on the case put forward by the prosecution.

When canvassing the appeal, the 1st appellant submitted that **PW 1** and **PW 2** only appeared to tell a consistent story because they were a mother and her daughter; and therefore they must have discussed the matter. Through the said discussions, the appellant believes that **PW 1** and **PW 2** fabricated the story against him.

He wondered why the prosecution failed to produce any independent witnesses.

Secondly, if **PW 1** and **PW 2** had identified him as one of the persons who had attacked them, the 1st appellant believes that the two witnesses would have disclosed his identity to **PW 3**.

It was his further submission that **PW 1** and **PW 2** were not consistent about the length of time that the robbery lasted. **PW 1** said it lasted about 15 minutes, whilst **PW 2** said that it lasted about 10 minutes.

In any event, those two witnesses are said to have failed to describe their assailants. If they had recognized the appellants, they should have given their names before the court. The failure by the two witnesses to give the appellants' names during the trial is said to be an indicator that the witnesses did not recognize the assailants.

The appellants also pointed out that their arrest was not effected on the strength of their alleged identification by **PW 1** and **PW 2.** They pointed out that **PW 4** arrested them because of information he obtained from an informer.

Another concern raised by the appellants was the failure to call some essential witnesses. One such witness is the husband of **PW 1**, who phoned the police. Another such person is the brother to the 1st appellant, who **PW 5** found at the said appellant's house.

Had **PW 1** and **PW 2** identified the appellants as the robbers, it is submitted that they would have, in their first report to **PW 4**, given their names. Instead, the appellants argued that **PW 1** and **PW 2** simply reported about "thugs."

PW 4, who had known the appellants prior to the incident giving rise to the case herein, is said to have been biased against them. He had prior knowledge even about the knitted hats that they used to wear.

Furthermore, as the 2nd appellant was arrested less than 4 hours after the robbery, he submitted that the police should have been able to recover the stolen money.

Finally, the defences were said to have cast doubts on the prosecution case. Therefore the appellants submitted that the trial court erred by dismissing the said defences.

Being the first appellate court, we have re-evaluated all the evidence on record, and have drawn our own conclusion therefrom. In the process of drawing our said conclusions, we have made an allowance for the fact that, unlike the learned trial magistrate, we did not have the benefit of observing the witnesses when they were testifying.

PW 1 was awoken from her sleep by the barking of her dogs. After drawing her bedroom curtain, she looked outside and saw 2 men.

Outside the house, there was powerful security lighting. That enabled **PW 1** to see the 2 men well. The faces of the men were not covered.

PW 1 saw the 1st appellant using the big stick which he had, to hit the security lighting. However, as the casing of the said security lighting was very hard, it took time before it was damaged.

After the security light was damaged, 2 men used a big stone to hit the door, which then gave

way. The 2 men entered.

The 1st appellant demanded money from **PW 1**. At that point, **PW 1** was inside the sitting room, and the electricity light was on.

PW 1 told the 1st appellant that she had no more. It was the testimony of **PW 1** that she and the 1st appellant spoke for a while.

PW 2, who is a daughter of **PW 1**, arrived at her mother's house when PW 1 was being confronted by the 1st appellant.

When the 1st appellant threatened to beat up **PW 1** with the big stick, **PW 1** led the said appellant and **PW 2** to the bedroom. **PW 1** put on the lights in the bedroom and then removed KShs.10,000/- from a drawer.

At that stage the 2nd appellant entered the bedroom and demanded that the money be counted. **PW 2** counted the said sum.

After getting the money, the 2 appellants left.

Immediately thereafter, **PW 1** and **PW 2** phoned **PW 1's** husband who then phoned **PW 4**.

PW 4 was an Administration Police Officer attached to the Gitiha AP Post. **PW 4** rushed to **PW 1's** house.

PW 1 said that she did tell **PW 4** about the identity of the 2 appellants. She had known them well, as they hailed from the same village as her.

PW 2 corroborated the evidence of **PW 1**.

She also said that when she phoned her father, to inform her about the robbery, she gave him the names of the appellants.

Both **PW 1** and **PW 2** testified that the incident lasted about 15 minutes.

PW 3 was a neighbour to **PW 1** and **PW 2**. She heard a commotion at **PW 1's** house. She got out of her house, to find out what was happening.

She suddenly saw 2 people walking towards her house. They caught up with her before she closed her door. They demanded money from her. But when she said that she had none, the 2 people walked away.

PW 3 did not identify the 2 men. She explained that she was new in that place.

PW 4 testified that he was given the names of the 2 appellants. He then proceeded to the house of the 2nd appellant.

PW 4, together with other officers, searched the house and recovered;

"a marvin cap which the complainant had mentioned had been worn by the 2nd accused...."

The 2nd accused then led **PW 4** to the house of the 1st accused, but he was not in.

PW 4 was directed to the house of the 3rd accused, where they found the 1st accused. On conducting

a search, **PW 4** found a torch belonging to **PW 1**, amongst other things.

PW 4 identified the torch because **PW 1** had explained to him that she had put batteries of different colours inside the torch. **PW 4** found that the said torch had batteries of the colours that **PW 1** had told him about.

PW 5 was a police officer attached to Githunguri Police Station. He was with **PW 4** at **PW 1's** house. From there, they went to the house of the 2nd appellant.

PW 5 corroborated the rest of the evidence tendered by **PW 4**.

After the prosecution closed its case, the 1st appellant denied committing the offence. He said that on the material night, he was asleep inside the house which he shared with his brother Peter.The people knocked on his door, alleging that he had committed an offence. They then led him to **PW 1's** homestead.

He knew the other 2 accused because they had worked together in January 2007.

He also said that he was not married.

The 2nd appellant said that he knew **PW 1**. They were neighbours.

He said that on the material night he was asleep in his house, when police arrested him.

He used to be a friend to **PW 1** and the two of them had never disagreed, he said.

DW 4 is a younger brother to the 1st appellant, whilst **DW 5** is the mother to the said appellant.

DW 4 said that he used to live with the 1st appellant. Meanwhile, the wife and child of the 1st appellant lived at Gitiha.

As the 1st appellant had told the court that he was not married, one would have expected his younger brother to confirm that fact. But the younger brother said that the 1st appellant was not only married, he also had a child!

DW 5 talked about the 1st appellant's "former wife".

The inconsistency in the evidence of the 3 defence witnesses led the trial court to conclude that the said witnesses were unreliable. We share that view.

By so doing, we are not suggesting that the appellant had an obligation to prove their innocence. They certainly had no such obligation. The burden of proof remained vested on the prosecution throughout the trial.

However, when an accused person chooses to lead evidence, and if such evidence was contradictory or inconsistent, the court is entitled to hold that such evidence was unreliable.

When evidence was unreliable, the same cannot cast doubt on other evidence.

In any event, **DW 5** confirmed that when the police arrived at her house;

> ***"They were specific on who they wanted – 1st accused."***

To our minds, that confirms the evidence of **PW 1, PW 2** and **PW 4** concerning the disclosure of the appellants' names to the police.

Not only were the police officers given the appellants names; the complainants had also described the marvins which each of the said appellants were wearing when the offence was being committed.

Furthermore, PW 1 had also described her torch, which the robbers had taken.

When the appellants were arrested, the marvins were in their respective houses, and the torch was also recovered.

Although the 3rd accused (who is not a party to this appeal) lay claim to the torch, his said claim was found to be baseless. He had said that his torch had a dent on its rear cover. However, when the torch was observed by the learned trial magistrate, it had no dent on its rear cover. Instead, the torch had other dents, which the 3rd accused was unable to explain.

It is clear that the appellants and the complainant knew one another even prior to the robbery. The complainant's daughter also knew the appellants.

PW 1 and **PW 2** saw the appellants inside **PW 1's** house, when the electricity lights were on. The appellants wore marvins on their heads, but they did not cover their faces. In the circumstances, there was nothing to stand in the way of the witnesses' positive identification of the appellants.

PW 1 and **PW 2** gave the appellants names to the police; and they also described the colour of the marvins which the appellants had been wearing.

As **PW 4** had known the appellants before the material day, he went straight to their residence.

We are satisfied that **PW 1** and **PW 2** did not simply point out the appellants after the appellants had been exposed to them by the police.

On the contrary, it is **PW 1** and **PW 2** who named the appellants to the police.

The length of the time which the appellants spent with **PW 1** and **PW 2** was considerable. As **PW 1** said, she did talk to the 1st appellant for a while.

Thereafter, **PW 1** handed over KShs.10,000/- to the 1st appellant. Thereafter, the 2nd appellant had the money counted by the **PW 2**. During that whole exercise, there was strong electricity lighting inside the bedroom.

The circumstances were thus ideal for positive identification.

On the question of the alleged need for "Independent Witnesses", we find that there is no legal requirement for the same, before an accused person can be convicted.

In instances where a robbery takes place at a residence, the likelihood is that the witnesses would all be members of the family living at that residence. They cannot be expected to look for somebody who was not their relative to come and testify, as a pre-condition for the conviction of the accused.

We are also satisfied that there were no essential witnesses who were not called by the prosecution. In our considered opinion, the witnesses who testified for the prosecution provided sufficient proof to sustain the conviction of the appellants.

The fact that the money was not recovered although the appellants were arrested within 4 hours of the robbery, does not imply that the appellants could not have been the robbers. That period of time was sufficient for the robbers to have hidden the money elsewhere. It would have been a plausible argument only if the appellants had been chased after, from the scene of crime, and had been arrested before the persons arresting them lost sight of them for even a short period of time.

In the result, the evidence tendered by the prosecution was overwhelming. It was not at all shaken by the appellants' defences. The convictions are therefore properly founded. We uphold the same. We also uphold the sentences. The appeal is dismissed.

Dated, Signed and Delivered at Nairobi, this 14th day of February, 2012.

..... **.....**

FRED A. OCHIENG **L.A. ACHODE**

JUDGE **JUDGE**