



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 28 OF 2006

JOHN KIBUNG'A NYAMBUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of R. N. Nyakundi Chief Magistrate in the Chief Magistrate's Criminal Case No.607 of 2005 dated 21st February 2006 at Nyeri)

JUDGMENT

John Kibunga Nyambugi, the appellant herein, was tried on a charge of three counts of robbery with violence contrary to *Section 296(2)* of the Penal Code. At the conclusion of the trial the Appellant was convicted and sentenced to suffer death. Being dissatisfied he preferred this appeal.

On appeal, the Appellant put forward the following grounds in his petition:

0. *That the trial court erred in law and facts in finding a death sentence upon the prosecution case whereas the same was surrounded by doubts.*
1. *That the trial court erred in law and facts in holding an inference on the identification whereas the same was not free from error or mistakes.*
0. *That the trial court erred in law and facts in finding section 296(2) p.c. established whilst significant elements were not satisfied.*
0. *That the trial court erred in law and facts in weighing the whole evidence on record in isolation of exculpatory fact of I the appellant.*
0. *That the trial court erred in law and facts in holding the scale partially on the prosecution side and thus became obliged to exclude the statement of the initial report.*
0. *That the trial court erred in law and fact in finding a death sentence whilst the charge sheet being defective in all material particulars.*
0. *That the trial court erred in law in finding a death whereas the professional conduct of the investigation wasn't shown.*
0. *That the learned trial magistrate erred in law in finding identification parade as well established while crucial rules were violated.*

0. I pray that I be served with a copy of the trial record for more grounds

The Appellant further put forward the following supplementary grounds of appeal:

- 1. That the learned trial magistrate erred in law and in facts by failing to hold prosecution evidence was inconsistent and uncorroborative.**
- 2. That the learned trial magistrate erred in law and in facts by failing to hold there was no light bright enough to enable the prosecution witnesses positively identify their claimed assailants.**
- 3. That the learned trial magistrate erred in law and in facts by failing to hold the whole prosecution case amounted to a mistaken identity.**
- 4. That the learned trial magistrate failed to observe my constitutional right was violated.**
- 5. That the learned trial magistrate erred in law and in facts by failing to hold I gave a very firm sworn defence.**

When the appeal came up for hearing, the Appellant was permitted to file and rely on written submissions while Miss Ngalyuka learned Senior State Counsel, made oral submissions to oppose the appeal. We think this is the appropriate juncture to set out in brief, the case that was before the trial court before considering the merits or otherwise of the appeal. The prosecution's case before the trial court was supported by the evidence of eight (8) witnesses. The particulars of the offences are that on 18th January 2005 at Bangoret Village in Nyeri District, the accused jointly with three (3) others not before Court, while armed with offensive weapons, namely knives and simis robbed Richard Muriuki Kangaru of his motor vehicle registration No. KAP 021X valued at Ksh.800,000/= and Ksh.4,330/= in form of cash. It is also alleged that the Appellant's three accomplices robbed John Gichohi of motor vehicle spares, a video cassette, a pair of shoes, a mobile phone make sagem and Ksh.2000/= in form of cash. The Appellant is further alleged to have robbed the material day Charles Ngatia Ritho one child bicycle, a mobile phone make Nokia 5510 and cash Ksh.35/=. It is alleged that the accused person immediately before and after the robbery threatened to use violence against the Complainant. According to the evidence tendered by the prosecution, it is alleged that on 18th January 2005 Charles Ngatia (P.W.3) boarded motor vehicle KAP 021X in Nairobi and headed for Nanyuki. The motor vehicle was driven by Richard Muriuki (P.W.8) and had 14 passengers on board. One passenger alighted in Nyeri leaving 13 passengers on board. Upon reaching Bantu Lodge, one passenger is said to have signalled the driver to stop because he had reached his destination. Shortly one of the passengers ordered the driver (P.W.8) and other passengers to close their eyes. The driver was pushed off his seat. One of the passengers took control of the motor vehicles and drove the motor vehicle off the tarmac towards Bangoret area. After a short distance the passengers were ordered out of the matatu and robbed of all their belongings. The hijackers drove off leaving the passengers on the ground. The Police stationed at Narumoru were informed via a Jamii telephone of the incident who promptly visited the scene. The motor vehicle was later found abandoned. Later the Police summoned P.W.8 to identify a suspect at Narumoru Police Station. P.W.8 was unable to positively identify the suspect. Charles Ngatia Ritho (P.W.4) said he was able to see four of the passengers who turned to be robbers run away. P.W.4 managed to attend an identification parade whereupon he identified the Appellant as one of those robbers who robbed them on 18th January 2005. He claimed he was the one who commandeered the motor vehicle after pushing off P.W.8 from the driver's seat. P.W.4 was robbed of his mobile phone make Nokia 5510 and Ksh.35/=. John Maina (P.W.5) one of the passengers, told the trial court that he was attacked with a blunt object on the head. P.W.8 said he was robbed of motor vehicle spare parts, video cassette, a pair of shoes, a mobile phone make sagem 3020 and cash Ksh.2000/=. Pauline Wanja (P.W.2) claimed the Appellant sat next to her in the matatu and that he was the person who robbed her of her clothes, jeans and Ksh.5000/=. P.W.2 said that as they travelled from Nairobi she was able to recognize him and that when they were told to close their eyes she partially closed hers. She claimed there was moonlight which assisted her to see. Festus Mutuku (P.W.3) stated that passengers on board motor vehicle registration KAP 021X were ordered to hold their mobiles and other valuables in their hands when they reached Bangoret area. P.W.3 claimed he tried to remove some money to hide in his socks but the Appellant hit him hard when he noticed what he was doing and robbed

him of the money he was attempting to hide. P.W.3 said the accused was armed with a knife which he used to hit him. P.W.3 said that he was able to recognize the Appellant since he noticed he had a mark on the cheek below the eye as they left Nairobi Tea Room stage and that he wore the same clothes he wore during the robbery at the time of arrest. P.W.3 said the Appellant sat next to him from Nairobi. John Maina (P.W.5) and Charles Ritho (P.W.4) attended an identification parade mounted by I.P. John Muru (P.W.7) whereupon the duo identified the Appellant as one of those robbers who robbed them on 18th January 2005. When placed on his defence, the Appellant denied the offence. He claimed on 19th January 2005 he was in Nanyuki following up matters relating to his livestock. He stated that P.W.4 had earlier given him Ksh.700 to purchase a cow which later went missing. He claimed that in 2004, P.W.4 had engaged him to purchase goats on his behalf. The Appellant was of the view that P.W.4 had a grudge against him arising out of the issue.

Having given the summary of the case before the trial court, we now wish to consider the merits or otherwise of the appeal. Although the appellant has put forward a total of 9 grounds in his original petition of appeal and five supplementary grounds, those grounds may be summarized to three namely:

First, that there were no favourable circumstances for positive identification from error.

Secondly, that the Appellant's constitutional rights were breached.

Thirdly, that the trial magistrate relied on inconsistent evidence which were not corroborated.

We wish to consider each of those grounds singularly in their chronological manner. The first question is whether the Appellant was positively identified? It is the argument of the Appellant that his identification may be that of mistaken identity. He argued that the clothes he wore could have been worn by another person. The Appellant further pointed out that the only light assisted the witnesses recognize him is that of moonlight. It is argued that the light was not sufficient enough to enable one passenger recognize the other. We have carefully examined the evidence of P.W.2, P.W.3 and P.W.4. According to P.W.2, she managed to recognize the appellant because he allegedly sat next to her. She claimed she partially closed her eyes when they were ordered to do so hence she was able to see the appellant. She further alleged that there was moonlight which helped her see. We have no doubt in our minds that P.W.2 and the other passengers were terrified when they were suddenly told to close their eyes and surrender their property to the robbers. The passengers were driven off the tarmac and taken on a rough road where they were ransacked of their property. We appreciate that P.W.2 may have left her eyes partially opened. There is no doubt that lights inside the matatu were put off and that is why P.W.2 said she only saw the Appellant with the help of moonlight. We think the conditions P.W.2 was in were not favourable for a positive identification. One cannot easily identify a person with the assistance of moonlight while inside a motor vehicle. The other person who claimed to have recognized the appellant is P.W.3. He claimed the appellant sat next to him from Nairobi and that he had a mark on the cheek below the eye. We have carefully re-evaluated his evidence. To begin with P.W.3 claimed that the Appellant did not face them throughout the journey. We are baffled he was able to notice a mark on his cheek below the eye yet the Appellant did not face them. P.W.3 told the trial court that he spotted the Appellant visit the hotel he was watching news in Nanyuki town on 26th January 2005. P.W.3 confronted him and managed to take him to Nanyuki Police Station where he was re-arrested. He claimed he identified him because of the facial features he had noticed earlier. He also claimed the accused wore the same clothes he wore during the robbery. P.W.3 admits that the robbery took place at 9.30 p.m and that it was dark. We have entertained some doubts in our minds that the Appellant could have been mistaken by P.W.3 for another. We say so because, the appellant did not have direct eye contact with the Appellant and secondly that it was dark at the time of the robbery. We shall give the Appellant the benefit of that doubt. P.W.4 claimed he was able to identify the Appellant because he sat at rear of the matatu. P.W.4 did not give any specific physical features of the Appellant. Again, we think his evidence of identification may not be safe to rely on.

In his second ground of appeal, the Appellant claimed his constitutional rights were breached. The Appellant pointed out that he was arrested on 26th January 2005 and kept in Police custody until 7th February 2006 when he was taken to court. The Appellant claimed that his constitutional rights under

Article 49(1)(f) of the Constitution were violated. With respect, we do not subscribe to the Appellant's argument. By the time of his arrest, the Police were permitted under *Section 72(3)* of the old Constitution to hold a suspect of a capital offence up to a maximum of 14 days before taking him to court. We have calculated the days the Appellant was held in Police custody and we find that he was held for 11 days hence the Appellant's Constitutional rights were not breached.

The last ground argued on appeal is to the effect that the Appellant was convicted on evidence which were inconsistent. It was pointed out that P.W.1 had stated the motor vehicle which had been robbed was KAP 021K but later stated that the same was KAP 021X. P.W.8 said the motor vehicle was KAP 021Y. It is also argued that there was no consistent evidence as to whether or not the robbers had put off the lights of the motor vehicle while driving off the tarmac. We have re-evaluated the evidence and we have noted the inconsistencies pointed out by the Appellant in respect of the registration number of the motor vehicle. In our view we find that those inconsistencies arose out of recording and typing errors which occur in our daily lives. Those inconsistencies are not fatal in view of the clear evidence proving that the subject matter of the robbery is motor vehicle registration No. KAP 021X. Noting turns out on the second inconsistency. In sum, we see no merit in this ground.

In the end, we will allow the appeal on the ground that the Appellant's identification was neither positive nor free from error. We give the Appellant that benefit of doubt. Consequently the Appellant's conviction is quashed and the sentence of death is set aside. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 10th day of February 2012.

J. K. SERGON
JUDGE

J. WAKIAGA
JUDGE