



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 222 OF 2009**

**SIMON GICHOHI KARIUKI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Appeal from the original conviction and sentence of L. Mbugua Ag. Principal Magistrate in the Principal Magistrate’s Court Criminal Case No. 136 of 2006 dated 21<sup>st</sup> August 2008 at Karatina)*

**CONSOLIDATED WITH**

**CRIMINAL APPEAL CASE NO. 226 OF 2009**

**EDWARD KARIUKI**

**RUTHUTHI..... APPELLANT**

**VERSUS**

**REPUBLIC.....  
..... RESPONDENT**

*(Appeal from the original conviction and sentence of L. Mbugua Ag. Principal Magistrate in the Principal Magistrate’s Court Criminal Case No. 136 of 2006 dated 21<sup>st</sup> August 2008 at Karatina)*

**AND**

**CRIMINAL APPEAL CASE NO. 227 OF 2009**

**BENSON KIMATHI RUGENDO.....  
APPELLANT**

**VERSUS**

**REPUBLIC.....  
RESPONDENT**

*(Appeal from the original conviction and sentence of L. Mbugua Ag. Principal Magistrate in the*

**JUDGMENT**

Benson Kimathi Rugendo, Simon Gichobi Kariuki and Edward Muriuki Ruthuthi hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively together with Anthony Kinyua Ruthuthi were jointly tried on a charge of attempted robbery with violence contrary to section 297(2) of the Penal Code. At the conclusion of the trial, Anthony Kinyua Ruthuthi was acquitted but the appellants were convicted and sentenced to suffer death. Being aggrieved, each appellant filed an appeal to challenge the decision. Those appeals were consolidated suo moto by this court.

On appeal, the appellants each put forward separate grounds in their respective petitions as follows:-

Benson Kimathi Rugendo, the 1<sup>st</sup> appellant listed the following grounds in his petition.

- 1. That the learned trial magistrate greatly erred in both points of law and facts by not considering that the evidence adduced before the court was conflicting, contradicting and inconsistent and yet the court failed to resolve the same in favour of I the appellant.**
- 2. That the learned trial magistrate greatly erred in both points of law and facts in convicting me without observing that the alleged attempt robbery was at night and identification was not free from errors/mistakes.**
- 3. That the learned trial magistrate greatly erred in both points of law and facts by not finding that recognition was not well proved to warrant a lawful conviction. Parades conducted were worthless and unlawful since they alleged to have known me for a period.**
- 4. That the learned trial magistrate greatly erred in both points of law and facts by not observing that my constitutional right was violated contrary to section 72(3).**
- 5. That the learned trial magistrate failed in both points of law and facts by not putting into evidence the first report to the police; and even no P3 form was produced before the court to support the alleged crime.**
- 6. That the learned trial magistrate failed in both points of law and facts by convicting me in a case where no exhibits or weapons were recovered on my behalf. Thus the case was not proven beyond reasonable doubts.**
- 7. That the learned trial magistrate failed in both points of law and facts by rejecting my defence without citing cogent reasons. I urge this honourable court uphold it.**
- 8. And that I pray for a certified true copy of law court proceedings and judgments; and I wish to be present during the hearing of this appeal.**

On his part, Simon Gichobi Kariuki, the 2<sup>nd</sup> appellant, put forward the following grounds in his petition.

- 1. That the learned trial magistrate greatly erred in both points of law and facts by not considering that the evidence adduced before the court was conflicting, contradicting and inconsistent and yet the court failed to resolve the same in favour of I the appellant.**
- 2. That the learned trial magistrate greatly erred in both points of law and facts in convicting me without observing that the alleged attempt robbery was at night and identification was not free from errors/mistakes.**

**3. That the learned trial magistrate greatly erred in both points of law and facts by not finding that recognition was not well proved to warrant a lawful conviction. Parades conducted were worthless and unlawful since they alleged to have known me for a period.**

**4. That the learned trial magistrate greatly erred in both points of law and facts by not observing that my constitutional right was violated contrary to section 72(3).**

**5. That the learned trial magistrate failed in both points of law and facts by not putting into evidence the first report to the police; and even no P3 form was produced before the court to support the alleged crime.**

**6. That the learned trial magistrate failed in both points of law and facts by convicting me in a case where no exhibits or weapons were recovered on my behalf. Thus the case was not proven beyond reasonable doubts.**

**7. That the learned trial magistrate failed in both points of law and facts by rejecting my defence without citing cogent reasons. I urge this honourable court uphold it.**

**8. And that I pray for a certified true copy of law court proceedings and judgments; and I wish to be present during the hearing of this appeal.**

On the other hand, Edward Muriuki Ruthuthi, the 3<sup>rd</sup> appellant, put forward the following grounds in his petition.

**1. That the learned trial magistrate greatly erred in both points of law and facts by convicting me relying on single evidence and yet the essential elements to prove a charge of attempt robbery with violence lacks.**

**2. That the learned trial magistrate failed in both points of law and facts by not observing that the prevailing circumstances at the scene of crime were not conclusive for a positive identification.**

**3. That the learned trial magistrate failed in both points of law and facts by not considering that the evidence adduced before the court was conflicting and uncorroborative and yet the court failed to resolve the same in favour of I the appellant.**

**4. That the learned trial magistrate erred in both points of law and facts by not finding that the case was not properly investigated to justify a lawful conviction.**

**5. That the learned trial magistrate greatly erred in both points of law and facts by being impressed by my mode of arrest.**

**6. That the learned trial magistrate failed in both points of law and facts by not considering the existence of a grudge between me and the arresting officer.**

**7. That the learned trial magistrate failed in both points of law and facts when convicted me relying on irregularly conducted identification parade.**

**8. That the learned trial magistrate greatly failed in both points of law and facts by peremptorily dismissing my alibi defence which remains true and cogent. I humbly urge this honourable court to uphold it.**

**9. And that I pray for a true certified copy of law court proceedings and judgment, and that I wish to be present during the hearing of my appeal.**

When the appeals came up for hearing, the appellants were each permitted to file and rely on written submissions. Miss Maundu, learned state counsel strenuously opposed these appeals. Before considering

the merits or otherwise of the appeal we wish to set out in brief the case that was before the trial court. The recorded proceedings show that the prosecution's case was supported by the evidence of eight (8) witnesses while the appellants each gave unsworn testimony

without summoning independent witnesses. It is the evidence of Beatrice Wanja Mukangu (PW2) that on 2.1.2006 at around 10.30 p.m. she was operating *check point bar* in *Karindundu* village when she called her husband, Peter Mukangu Muriuki (PW 1) to come and pick her since it was time to close the bar. PW 1 boarded taxi registration No. KAE 025E. The aforesaid taxi is owned by James Mathenge (P.W.6) who was in company of one James Nderitu. The two went to *check point bar*. They knocked the door and P.W.2 promptly opened the door for them. It is said Francis Wariguine Mwangi (PW3) and one George Gichuki were in the bar but left as P.W.2 waited for the arrival of PW 1.

On the way P.W.3 said they met motor vehicle registration KAE 025E which they boarded back to the bar. PW 1 decided to walk out of the bar and that is when he spotted some people outside. He became suspicious hence he rushed back to the bar to inform P.W.2, P.W.3 and P.W.6 of the suspicious characters. P.W.1, P.W.2, P.W.3 and P.W.6 went out to check and that is when they were confronted by the people PW 1 had earlier seen. Those people ordered the quartet to go back into the bar. One is said to have struck P.W.3 on the head with an axe. Those people locked the bar doors from outside and went ahead to damage the taxi. At this juncture P.W.1 called the police using his mobile phone. P.C. Joseph Kariuki (P.W.7) confirmed having visited the bar upon receiving a phone call. P.W.7 said he found the doors of the bar locked from outside. P.W.7 said that P.W.1 and P.W.2 mentioned the name of Kimathi, Kayana and Mukii to be amongst the people who attempted to rob them. The police patrolled the area but did not arrest anyone until 30.1.2006 when Benson Kimathi, 1<sup>st</sup> appellant was arrested at Ragati. He was identified in an I.D. parade. On 25.2.2006, the police acting on a tip off arrested the 2<sup>nd</sup> appellant in Kerugoya. The 2<sup>nd</sup> appellant i.e. Simon Gichobi Kariuki, was also picked out at an identification parade.

On 5.3.2006, acting on a tip off, P.W.7 together with another police officer arrested Edward Muriuki, the 3<sup>rd</sup> appellant. He was also picked out in an identification parade.

When placed on his defence, the 1<sup>st</sup> appellant, denied committing the offence. He claimed that P.W.1 had a grudge against him because he had refused to assist him in operating *check point bar*. The 2<sup>nd</sup> appellant on his part also denied committing the offence. He raised the defence of alibi, claiming he was at Kenyatta National Hospital for treatment while the 3<sup>rd</sup> appellant stated that he was arrested on the allegation that he was suspected to be trafficking cannabis sativa.

We now turn back to the merits of the appeal. Though the appellants put forward several grounds of appeal, those grounds may be summarized to one main ground, that is to say that there was no credible evidence to place each of the accused persons at the scene of crime. It is the submission of Miss Maundu that, P.W.1 recognized the 1<sup>st</sup> appellant during that night with the assistance of security lights. It is also argued that P.W.2 managed to recognize the 2<sup>nd</sup> appellant as the person who used to visit the 1<sup>st</sup> appellant's wife who lived with P.W.2 in the same neighbourhood. It is alleged that P.W.2 gave out the names of the appellants to P.W.7. It is further alleged that P.W.6 saw the 2<sup>nd</sup> appellant as the person who stood next to the door. We have on our part critically examined the evidence of identification against each appellant. We have looked at the evidence of PW 1 and P.W.2. It is the evidence of P.W.1 that security lights assisted him to recognize the 1<sup>st</sup> appellant that night. He stated that he was somebody well known to him. P.W.2, a wife to P.W.1 gave a near similar story as that of P.W.1. She said she knew the 1<sup>st</sup> appellant prior to the incident. If P.W.1 and P.W.2 knew the 1<sup>st</sup> appellant, then, was it necessary for them to attend an identification parade to identify the 1<sup>st</sup> appellant? What is interesting is that P.W.1 did not mention the name of the Appellant to the police. It is also curious that P.W.2 did not mention the name of the 1<sup>st</sup> appellant to the police yet she claimed he was somebody well known to her. We think the evidence of recognition is not free from error. We shall give the 1<sup>st</sup> appellant the benefit of doubt. The evidence of identification of the 2<sup>nd</sup> appellant are those of P.W.1 and P.W.2. The duo avers that there was sufficient light from inside and outside the bar. They claimed that the 2<sup>nd</sup> appellant used to visit the home of the 1<sup>st</sup>

appellant whom they lived in the same plot. It is apparent from the evidence tendered that neither P.W.1 nor P.W.2 mentioned the names of the 2<sup>nd</sup> appellant. They did not give to the police or P.W.3 the description of both the 1<sup>st</sup> and 2<sup>nd</sup> appellant. In the circumstances of this case it was necessary for the name and physical description of the appellants to be disclosed to the police. In the case of **Charles O. Maitanyi vs Republic [1986] 2 K.A.R** the court of Appeal held inter alia:

*“That there ought also to have been a further enquiry whether the complainant was able to give some description on identification of the assailants to those who came to her aid or to the police”*

In our humble opinion, we shall give the 2<sup>nd</sup> appellant the benefit of doubt. We have examined the manner the trial magistrate treated the 2<sup>nd</sup> appellant’s defence of alibi. In order to appreciate how the trial magistrate erred, it is important to reproduce the relevant portion as follows:-

**“The 2<sup>nd</sup> accused has purported to give an alibi averring that:**

**“I had been taken to Kenyatta Hospital.”**

**He even produced a medical treatment card to that effect. If that was true what better way to affirm this then to call this person who took him to hospital as his witness.”**

It is clear from the above excerpt that the learned Principal Magistrate shifted the burden of prove to the 2<sup>nd</sup> appellant. That is a great misdirection on her part. It is not for the accused to prove where he was but it is sufficient for him to simply set up the defence of alibi without much detail. It is for the prosecution to tender credible evidence to prove otherwise hence displace the defence.

The evidence of identification of the 3<sup>rd</sup> appellant is that of P.W.1 who stated that he noticed him raise the axe to cut P.W.3: P.W.2 said she recognized the 3<sup>rd</sup> appellant along with the 2<sup>nd</sup> appellant who used to visit the 1<sup>st</sup> appellant’s wife in their estate. We have already stated that the evidence of identification by P.W.1 and P.W.3 is unreliable. P.W.2 did not give the 3<sup>rd</sup> appellant’s name or physical description to the police or P.W.3. We have entertained doubts whether there was sufficient light as claimed. In sum, we shall give the 3<sup>rd</sup> appellant, too, the benefit of doubt.

We allow the appeals. We quash the convictions and set aside the sentences of death. The appellants are hereby set free forthwith unless lawfully held.

**Dated and delivered this 10<sup>th</sup> day of February, 2012.**

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**J. K. SERGON**

**JUDGE**

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**J. WAKIAGA**

**JUDGE**