REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 243 & 224 of 2007

PETER WANJOHI MBOGO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal arising from judgment of Chief Magistrate's Court at Nyeri criminal Case No.2203 of 2004)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 224 OF 2007

JAMES IRUNGU MAINA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal arising from judgment of Chief Magistrate's Court at Nyeri criminal Case No.2203 of 2004)

JUDGMENT

The appellants Peter Wanjohi Mbogo and James Irungu Maina were charged with four counts of robbery with violence contrary to section 296(2) of the Penal Code.

They both pleaded not guilty to the charges and were tried convicted and sentenced to death.

Being aggrieved by the said conviction and sentence they each filed an appeal which appeals during the hearing hereof we consolidated.

The appellants who were unrepresented each filed an amended grounds of appeal and written submission which they relied upon.

The state through Miss Maundu opposed the said appeals.

For the purpose of this judgment the appellant's grounds of appeal can be stated as follows:

0. ***The trial magistrate erred in law and in fact in finding a conviction failing to find that the evidence of identification was not without error or mistake.***

0. ***The case against the appellant was not proved beyond reasonable doubt.***

0. ***Appellant's constitutional rights were violated.***

0. ***The trial magistrate misinterpreted section 211 of CPC.***

0. ***No reason was given for the rejection of their defences.***

We have looked at the records of appeal the evidence tendered before the trial court, the appellants' written submissions and the submission by the state.

We shall start by looking at the appellants' ground of appeal to the effect that their constitutional right under sections 72(2)(b) and (f) of the then constitution right to fair trial was violated since the same can dispose off the appeal herein should we find for the appellants on these ground two of appeal.

The appellants have submitted that they were arrested on 23rd May 2004 and taken to court on 7th June 2004 a span of 15 days. We have noted that there was only a delay of one day in taking the appellants to court and to our mind a delay of one day can not be termed inordinate. We therefore find no merit on this ground of appeal and hold that the appellants were not prejudiced in any way.

The second appellant has also submitted that section 198(1) of CPC as read with section 77(2)(b) and (f) requires that an accused person has a right to have trial and in a language and or interpretation to a language of his choice and that he told the court that he only understands "Ndia dialect" and that he was accorded the services of an interpreter but the same was terminated without any explanation

From the record we have noted that the appellant was able to cross examine all the prosecution witnesses and therefore hold that he was not prejudiced in any manner that could have led to a mistrial.

The other issue which the appellants have raised is that of identification. They submitted that the incident took place at night where the conditions favouring positive identification were not conducive.

We have looked at the evidence tendered before the trial court. P.W.1 K.PG.N testified that the appellants had very bright torches and that he saw four people three (3) who were facing him. He was able to identify one who was wearing a red cap. P.W.1 stated that during all this time of the attack the lights were on. He was able to identify them in the dock. Under cross examination he stated that he clearly saw the appellants.

P.W.2 also testified that the house was lit and she could see clearly and that they were the same people who had robbed them in January 2004. She was able to identify the 1st appellant whom she had burnt with sulphuric acid and that the 2nd appellant jumped on top of the table and talked to her to go lie on the floor so that he could rape her. She was able to persuade him to go with her to the verandah away from the children. She was able to identify the 2nd appellant at an identification parade. She was also able to identify the scar on the neck of the 1st appellant.

We therefore find as a fact that the appellants were positively identified and therefore find no merit on

this ground of appeal. We have not found any defect with the identification parade as alleged by the appellants. P.W.9 inspector Jeremiah Dubai testified on how the identification parade was conducted and the appellant did not raise any issue with the same during the trial.

P.W.10 Joseph Kariuki testified on how the appellants were arrested following information which they had received that two people had rented a house at Kiamwangi and that one of them had injuries on the neck and how the stolen items were found at the same house.

On the issue of their defences we have noted that the 1st appellant chose to exercise his constitutional right to remain silent as he has rightly put it in ground four of his submission "***as away of submitting my defence***" and have noted that the trial court took this into account while for the second appellant the trial court had this to say

"***The second accused claimed to have been selling grains at the time of robbery I do not believe the defence by the 2nd accused it is far fetched and unrealistic. I find it evasive and dismiss it."***

We therefore find no reason to interfere with the trial courts holding on this. She had the advantage of seeing and hearing the appellant which we do not have.

We therefore find no merit on the appellants' appeal herein and therefore uphold the conviction and sentence herein.

Dated and delivered at Nyeri this 15th day of June 2012.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE