REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 57,58 & 59 of 2008

EDWIN MOCHACHE OGERO……
1ST APPELLANT

-versus-

REPUBLIC……
RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.848 of 2005 by J.K. Ng'eno – Ag. S.P.M.

dated 5th March, 2008)

CONSOLIDATED WITH

CRIMINAL APPEAL NO.57 OF 2008

PATRICK MWANGI WAWERU……
2ND APPELLANT

-versus-

REPUBLIC……
RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.848 of 2005 by J.K. Ng'eno – Ag. S.P.M.

dated 5th March, 2008)

A N D

CRIMINAL APPEAL NO.59 OF 2008

JOSEPH IRUNGU MWANIKI……3RD
APPELLANT

-versus-

REPUBLIC……

RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.848 of 2005 by J.K. Ng'eno – Ag. S.P.M.

dated 5th March, 2008)

J U D G M E N T

Edwin Mochache Ogero, Patrick Mwangi Waweru and **Joseph Irungu Mwaniki**, hereinafter referred to as the 1st, 2nd and 3rd Appellants, were jointly tried on a charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence are that:

On the 18th day of February 2005 at Nyeri Township in Nyeri District within Central Province, jointly robbed Patrick Kamweti Kariuki of Ksh.500/= a mobile phone make Motorolla T190 and a wrist watch make Omax all valued at Ksh.7,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Patrick Kamweti Kariuki.

At the conclusion of the trial, the Appellants were convicted and each sentenced to suffer death. Each Appellant preferred an appeal. Those appeals were ordered consolidated.

The grounds of appeal put forward by each Appellant are enumerated as follows:

On appeal, the 1st Appellant put forward the following grounds in his Petition

"1. That the pundit Trial Magistrate erred in law and facts in convicting I the appellant without noting that the safeguards of Section 207 of the Criminal Procedure Code were violated and or article 50(2) (b) of Constitution.

2. That the pundit Trial Magistrate erred in law and facts in failing to note that Coram during the plea taking session was not complete.

3. That the pundit Trial Magistrate erred in law and facts in failing to strictly conform with the stipulations of Section 198(1) of the Criminal Procedure Code.

4. That the pundit Trial Magistrate erred in law and facts in not noting that the identification or recognition evidence was obtained under difficult circumstances and conditions that the same could not be conclusive.

5. That the pundit Trial Magistrate erred in law and facts by relying on the evidence of the exhibited recovery but failed to note that it could be true and I was arrested before the offence was perpetrated.

6. That the pundit Trial Magistrate erred in law and facts in failing to consider my defence statement contrary to section 169 (1) of the Criminal Procedure Code."

While, the 2nd Appellant put forward the following grounds in his Petition:

"1. The Learned Magistrate erred in both law and in facts by basing my conviction on the sole evidence of a single identifying witness without first of all ruling altogether as to the possibility for the existence of an error or mistake on the part of P.W.1 more so in view of the prevailing circumstances of the scene of crime by the time of attack.

2. That the Learned Magistrate made an error in both law and facts and misdirected himself by relying

on the allegations of P.W.1 that he recognized his attacker, yet according to the report he made to the police, P.W.1 never disclosed the name "BUKATI" or stated could identify his attacker(s), and this was the reason the Prosecution failed to avail the Occurrence Book of 18th February, 2005 as per the appellant's application. NB: I apply for the Occurrence Book of the aforesaid date from Nyeri Police Station to support my arguments. P.W.1 was not a trustworthy witness for he did not give the name(s) or descriptions to police upon reporting.

3. That the Learned Magistrate erred in both law and facts by failing to note and acknowledge that he could not be in a position to determine the credibility of the Prosecution Witnesses whom he had not seen nor heard during their testimonies thus contravened Section 200(3) of the Criminal Procedure Code causing gross miscarriage of justice upon me the appellant. I wish to rely on the case of ROBERT KIARIE NJENGA =vs= REP. CR. APP. NO.117 OF 1984; JOHN RARIDO AYUKA & FIVE OTHERS =vs= REP. CR. APP. NO.525 OF 1987 AND EUSTACE =vs= REP. (1970) E.A. 393 (C.A.T.) NB: I contend the third succeeding Magistrate (Hon. J. K. Ng'eno) had no jurisdiction to write the Judgment but to start the matter DENOVO."

The 3rd Appellant on his part put forward the following grounds in his Petition:

"1. The Learned Magistrate erred in law and in facts in convicting the appellant on recognition evidence by single witness P.W.1 where applied Occurrence Book report on 18th and 19th February, 2005 wasn't availed by the Prosecution as ordered, a reasonable doubt that they failed to avail it as nothing incriminating appellant as alleged. Page 39 line 12.

2. The Learned Magistrate erred in law and in facts in failing to inform the appellant his rights under Section 200 of the Criminal Procedure Code Cap 75 as the proceeding magistrate ceased to proceed after close of Prosecution case, that Appellant wished to start afresh or could call any other witnesses.

3. The Learned Magistrate erred in law in and in facts in not indicating those present in Coram – 1st date to court making it hard to know:

(a) Prosecutor was within Section 85 of the Criminal Procedure Code Cap 75.

(b) Language used whether was appellant's choice under Section 198 of the Criminal Procedure Code.

(c) Whether there was interpretation going on under Section 77 of the Constitution."

When the appeals came up for hearing, the Appellants were each permitted to file and rely on written submissions. Miss Maundu, Learned State Counsel made oral submissions to oppose those appeals.

We wish at this juncture to set out in brief the case that was before the trial court. The Prosecution's case was supported by the evidence of four (4) witnesses. It is alleged that on 18th February, 2005 at Nyeri Township at 11.30 P.M. the appellants jointly robbed Patrick Kamweti Kariuki (P.W.1) of Ksh.500/=, a mobile phone make Motorolla T190 and a wrist watch make Omax all valued at 7,800/= and immediately after or immediately before robbing P.W.1, used actual violence to the said complainant. P.W.1 stated that on the aforesaid date he was going home and upon reaching the Nyeri Bus Stage, three people whom he had earlier seen playing cards came and attacked him. These men who were said to be armed with knives, knocked down and injured P.W.1 and stole from him cash Kshs.500/=, a mobile phone and a wrist watch before fleeing into the Majengo Slums Nyeri. P.W.1 reported the incident to Nyeri Police Station who issued him with a P3 Form. P.W.1 claimed he recognized his attackers with the assistance of security lights. P.W.1 later spotted the 1st Appellant who was promptly arrested. The 1st Appellant led the police to Majengo where P.W.1's mobile was recovered. The 1st Appellant also assisted the police in arresting the 2nd and 3rd Appellants. It is the evidence of Francis Muchina Kirera (P.W.3) that on 19th February 2005 at around 9.30 A.M. the 1st Appellant went to him and deposited a mobile

phone as security for Ksh.1,500/=. The next day Police Officers accompanied by the 1st Appellant to visit P.W.3's premises where they took possession of the phone. Corporal Jackson Wanyeki (P.W.4) stated that on 19th February 2005, P.W.1 identified the 1st Appellant as one of his attackers. P.W.4 explained how he arrested the 1st Appellant who later led him to where the 2nd and 3rd Appellants were.

When placed on his defence, the 1st Appellant gave sworn testimony denying the offence. He claimed that the was arrested on 19th February 2005, at 11.00 P.M. and charged with an offence which took place at 11.30 P.M. by which time he was in police custody. The 2nd Appellant on his part gave unsworn testimony denying committing the offence. He stated that he was arrested while on his way home as a suspect for an offence he did not commit. The 3rd Appellant gave sworn testimony to deny the offence. He claimed he was arrested on 20th February 2005, when the complainant pointed him out to the police alleged he had robbed him. In the end, the Trial Magistrate found the complainant to be a truthful witness. The 2nd and 3rd Appellants were found to have had a common intention with the 1st Appellant to rob P.W.1. The defences given by the Appellants were treated as mere denials.

On appeal, the Appellants raised the following key grounds of appeals. First, it is argued that the provisions of **Section 200** of the **Criminal Procedure Code** were not complied with. Miss Maundu was of the view that **Section 200** of the **Criminal Procedure Code** was strictly complied with. We have carefully examined the recorded evidence and it is clear that the hearing of the case started before Hon. Norah Owino, the then Principal Magistrate. Two witnesses testified before she was transferred. The case started afresh before Hon. M. R. Gitonga, Learned Principal Magistrate. The prosecution witnesses all testified before M. R. Gitonga before she was transferred. Upon her transfer, Hon. J. K. Ng'eno took over the case and proceeded to hear from where Hon. M. R. Gitonga had left. It is the contention of the Appellants that Hon. J. K. Ng'eno proceeded to hear their defence without complying with the provisions of **Section 200** of the **Criminal Procedure Code**. It is clear from the record that Hon. Ng'eno simply took over the case by invoking the provisions **Section 200** of the **Criminal Procedure Code.** Under **Section 200 (3)** of the **Criminal Procedure Code**, the law enjoins a succeeding Magistrate to inform the accused person of his/her right to recall witnesses who had testified before his/her predecessor. It would appear the Learned Senior Principal Magistrate did not comply with the aforesaid provision. The Appellants are saying that prejudiced their case. We have carefully considered the submissions and we think the Appellants are right. The law enjoins us in the circumstances to quash the conviction. The question which we must grapple with is whether or not a fresh trial be ordered? The offence took place about 7 years ago. The possibility of a fresh and fair trial may not be feasible. We are of the view that we should not order for a fresh trial.

On this technical ground alone, we allow the appeal. We order the conviction quashed and the sentence set aside. The Appellants are hereby ordered set free forthwith unless lawfully held.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE

……
J. WAKIAGA
JUDGE