REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 179,177 & 178 OF 2009

FRANCIS NYAMU MUNENE ….....1ST APPELLANT

CONSOLIDATED WITH CRIMINAL APPEAL NO. 177 AND 178

DAVID MANEGENE ….....…….....….....…… 2ND APPELLANT

JOHN BUNDI MUNENE ….....3RD APPELLANT

VERSUS

REPUBLIC ……..... ……..…….....….....……PROSECUTOR

From original conviction and sentence in Cr. case No. 89 of 2009 at the Senior Principal Magistrate's Court at KERUGOYA

J U D G M E N T

FRANCIS NYAMU MUNENE, DAVID MANEGENE & JOHN BUNDI MUNENE hereinafter referred to as the 1st,, 2nd and 3rd appellants respectively were charged with the offence of Robbery with Violence contrary to section 296(2) Penal.

It is not clear what the particulars were as the consolidated charge sheet has not formed part of the record of appeal. It was not even in the original record in its original form. After a full trial the 1st, 2nd and 3rd appellants were found guilty and convicted. Each was sentenced to death. And being aggrieved by the said Judgment they have filed their appeals which have been consolidated into HCCRA NO. 179 OF 2009. They raised grounds that are common to all of them namely;

1. The learned trial magistrate erred in law and in fact by admitting the evidence of P.W.1 which was full of the inconsistencies. In that her initial report was that she did not know any of the accused person while her statement to court she said that she knew the accused persons from childhood raising doubts as to credibility of her statement and evidence.

2. The learned trial magistrate erred in law and in fact admitting the evidence of P.W.1, P.W.2 and P.W.3 who were blood relatives without taking into consideration that their evidence could have been a rehearsal. Initially P.W.1, P.W.2 and P.W.3 did not inform the members of the public who came to their rescue as to whom the perpetrators were even though the trio said that they knew the accused person from birth.

3. The learned trial magistrate erred in law and fact by convicting the appellants on an identification factors which was full of doubts of how the complainant managed to identify the perpetrators in total

darkness. The complainant testified before court that the assailants first hit the tin lamp and went off before attacking her.

4. The conviction is against the weight of the evidence adduced.

5. The trial magistrate erred in facts by convicting the appellants in a case where the circumstances and the evidence were tainted with doubts suspicion and uncertainties.

6. *The learned trial magistrate erred in law and in fact by rejecting the appellants\' evidence which was not shaken by the prosecution side without giving good reasons.*

When the matter came before us for hearing all the appellants presented written submissions to the court.

They submitted that there was an issue of the charge not having been read to them and even after consolidation it was not clear what charge they were facing. They further submit that the evidence of P.W.1 was not reliable. They thought that a retrial may have been appropriate but considering the evidence it would not be reasonable to have a retrial. The other submissions were an extension of their grounds of appeal.

The State through learned State Counsel M/s Macharia opposed the appeal saying P.W.1, P.W.2 and P.W.3 knew the appellants and gave their names to the police. It was a case of recognition. However after we pointed out a few anomalies on the recored M/s Macharia realized that P.W.1 testified before consolidation and was only halfway cross-examined by the 1st Appellant. P.W.2 also testified when the 1st Appellant was the accused. She was recalled five months later and was not sworn. In the circumstance P.W.1 and P.W.2 were never cross-examined by the 1 2nd and 3rd appellants. She submitted that the trial was defective and urged the court to consider a retrial.

The 1st, and 2nd appellants were not ready for a retrial while the 3rd appellant left it to the court to decide.

As a first appellate court we have a duty to reconsider and reevaluate the evidence before the trial court and come to our own independent conclusion. We are also alive to the fact that we did not see or hear the witnesses. We are guided by the case of ***GABRIEL KAMAU NJOROGE -V- REPUBLIC [1982-88] 1 KAR 1134.***

P.W.6 who had initially testified as P.W.1 stated that he identified the 3 appellants. Her children also gave evidence pointing out the appellants as part of the attackers that were in their house. P.W.2 first gave evidence on 30/3/2009 and was only half way cross examined by one accused person. An occurrence book was to be availed for him to cross examine her. After consolidation P.W.2 was recalled on 9/7/09 and straight away proceeded to cross examination. The witness was never sworn and further the 2nd and 3rd Appellant did not have the advantage of knowing her evidence in chief so what were they cross examining her on?

The occurrence book No. 4 of 10/11/08 marked as defence exhibit upon the request of the 3rd Appellant is not in the file and neither does it form part of the record of appeal. This omission is not just because all material must be brought before the court to enable the court reach a fair and just decision.

Finally we have realized that there was a consolidation done on 23/4/09, which brought on board 3 (three) more accused persons. The charge sheet to which the appellants were pleading does not form part of the record before us. And because of these anomalies the state has requested this court to consider a re-trial. It was held in the case of ***OTIENO vs R (1991) 2 KAR 251*** that a retrial will be ordered when the original trial was illegal or defective. The Otieno case followed the case of ***ZEDEKIAH OJUONDO MANYALA VS R (1980) CR APP 57***. In this present case the trial was defective for the reasons stated above. The Appellants were sentenced to death on 15th September 2009. They have not served that

sentence.

We find that it is only fair that a retrial be held so that a fresh charge sheet is drawn and all relevant witnesses are given an opportunity to be heard and cross-examined by the appellants to enable the court reach a fair and just decision based on merit.

We shall therefore set aside the convictions and sentences and order for a retrial. The appellants will be arraigned before the Senior Principal Magistrate Kerugoya court on 6/8/2012 for a fresh plea and for further directions on the hearing which ought to be concluded within the shortest time possible.

Meanwhile the appellants will be remanded in custody until they appear before the Kerugoya court.

It is so ordered.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

LESIIT J.
J U D G E

H.I. ONG'UDI
J U D G E