



REPUBLIC OF KENYA  
IN THE HIGH OF KENYA AT EMBU

Criminal Appeal 59 of 2009

PATRICK NJIRU NJUE .....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

*From original conviction and sentence in Cr. case No. 2159 of 2004 at the Chief Principal Magistrate's Court at EMBU*

**J U D G M E N T**

The Appellant was charged with the offence of Robbery with Violence contrary to section 296(2) Penal Code. The particulars as stated in the charge sheet were as follows;

***PATRICK NJIRU NJUE: On the 1<sup>st</sup> day of February 2004 at Runyenjes Town, Runyenjes township location in Embu District within Eastern Province jointly with others not before the court being armed with dangerous weapons namely pangas and rungus robbed JUSTA WANJA NTHIGA ksh.20,000/= and or immediately before or immediately after the time of such robbery killed JOEL NJIRU MANYUARI.***

The matter proceeded to full hearing and the appellant was convicted and sentenced to death. And being aggrieved by that Judgment he has appealed raising ten grounds of appeal.

1. *That the learned trial magistrate erred in both law and fact by putting reliance in single evidence adduced by P.W.1.*
2. *That the learned trial magistrate erred in both law and fact by failing to consider that the first report by the complainant did not support the alleged recognition by P.W.1.*
3. *That the learned trial magistrate erred in both points of law and fact in believing the evidence of light which was not conducive.*
4. *That the learned trial magistrate erred in law and in fact by putting reliance on the name NJIRU mentioned by P.W.1. Without putting due consideration that the same is common in Embu.*
5. *That the learned trial magistrate erred in both points of law and facts by failing to consider that no investigating officer came before court to testify.*
6. *The learned trial magistrate erred in law and fact when relying on the evidence of the statement*

which the complainant had made in the police station which differed to those of the court.

7. *The learned trial magistrate erred in law and fact by rejecting the appellant's defence without sufficient reasons.*

8. *That the learned trial magistrate erred in both points of law and fact by not considering the charges was duplex namely Robbery with violence contrary to section 296(2) and murder contrary to section 203 as read with section 204 in one charge sheet.*

9. *That the learned trial magistrate erred in both law and fact by putting reliance on evidence adduced by P.W.1 to P.W.4 without observing that the same was surrounded and tainted with serious discrepancies namely;*

- a) Contradiction*
- b) Uncorroboration*
- c) Inconsistence*

11. *That the learned trial magistrate erred in both points of law and facts by putting reliance on identification parade which not complied to the appellant.*

When the appellant appeared before us for hearing he presented the court with written submissions on which he relied entirely. In his submissions he consolidated all the grounds and argued them together. He submitted that the evidence of P.W.1 was full of contradictions. The evidence of P.W.1 and P.W.2 were contradictory. The court relied on the evidence of a single identifying witness which evidence was not corroborated. His defence was unchallenged he said.

The State through M/s Macharia opposed the appeal. She submitted that P.W.1 explained what had happened. She identified the Appellant by the light from torches which the attackers had. She heard her husband saying

***“Njiru why are you killing me?”***

She knew the appellant physically even though not by name. She also knew him because of a case where the appellant stabbed her husband and went into hiding. And that the Appellant's defence was a mere denial. The evidence on identification was overwhelming, she said.

The appellant referred the court to the occurrence book No.5 of 1/2/2004 of the first report where P.W.1 gave no names. Secondly there was no identification parade conducted. An occurrence book No. 7 of 1/2/2004 which was the report of the scene visit did not mention his name.

This being a first appeal we are enjoined to reconsider and reevaluate the evidence adduced and come to our own conclusion. We are alive to the fact that we did not see nor hear any of the witnesses. We stand guided by the case of ***GABRIEL KAMAU NJOROGE -VS- REPUBLIC [1982-1988] 1 KAR 1134.***

P.W.1 who is a wife of the deceased testified that on the night of 31/1/2004 – 1/2/2004 they were asleep in their one roomed house when at 3.00am they were woken up by people calling outside. The door was hit with a stone and it gave way. Four men entered and started demanding for money from her late husband. They were given ksh.20,000/= but wanted more. They dragged her husband outside. She heard him saying;

***“Njiru why are you killing me?”***

She had identified Patrick Njiru among the four attackers. The door was opened for her and she found the deceased groaning outside. Her husband had told her that he had disagreed with the appellant (Patrick Njiru). She was able to identify him because of the light from the torches. They took not more than ten

minutes in the house. She went to the station the same night and she recorded a statement telling the police who she had identified as Patrick Njiru Njue. The person who opened for her was Musee. She did not tell him who she had identified.

P.W.2 Dr. Alex Ombati confirmed that the deceased died as a result of severe multiple deep cuts with sever bleeding. P.W.3 confirmed that the Occurrence Book No.5 of 1/2/2004 which indicated that no one was recognized was not made by P.W.1.

P.W.4 referred to the Occurrence Book No.5 of 1/2/2004 report saying it was P.W.1 who had come to report. He did not however investigate the case.

In his defence the appellant gave an unsworn statement denying the charges. He demanded that Occurrence Book No.5 of 1/2/2004 be read to him which was done. He stated that he was arrested on 16/7/2004 from his shop at Manyatta by police who demanded for the trade licence. One officer said the appellant was not a good person and he should be charged for Robbery. He raised issue with his full names not being given by P.W.1 who claimed to know him.

From the evidence its clear that the first report NO.5 of 1/2/2004 was made by residents of Runyenjes town who did not include P.W.1. From this report it's shown that there were several people who had been attacked and robbed of various items the deceased included. Therefore the fact of the robbery having been committed is not disputed.

The issue is whether the appellant was among the four people who entered the house of the deceased. It's curious to note that even though several people were robbed in the same place, none was called to testify herein. There appears to have been no recovery made of the stolen items i.e. from the deceased or the neighbours. P.W.2 – P.W.4 were just formal witnesses. There is no investigation that they did. P.W.4 says P.W.1 told him that PATRICK NJIRU was one of robbers. P.W.1 herself wrote in her statement that it was NJIRU whom she identified.

P.W.3 was one of the officers who went to the scene and thereafter he recorded P.W.1's statement. She told him she was able to identify one of the accused persons. The person was later arrested. This witness was one of the investigating officers in this case. There is absolutely no investigation he did. What led him to arrest the appellant? He does not say.

The only evidence left is that of P.W.1. She has indicated that the four men who entered their small room which she shared with her husband and small children had torches which they flashed all over. She was therefore able to identify the appellant using that light. That night the thugs had locked their door from outside and it is Mr. Musee who opened the door for her. She did not tell him whoever it was she had identified.

She has also said she identified the appellant in the house and this was reaffirmed when she heard her husband say

***“Njiru why are you killng me?”***

Did P.W.1 know the appellant as Patrick Njiru or just Njiru? If it was as “Patrick Njiru” there is no evidence to support that. And if it was only “Njiru” then this required corroboration. This is because the name Njiru is a very common name in this region and one has to be specific. In spite of the fact that P.W.1 categorically says she attended an identification parade there is no evidence to support that. It's also tricky to wholly rely on her evidence of identification because she has mentioned that there was a case where the appellant had stabbed the deceased and disappeared. Could it be vendetta? The court required some independent evidence to support P.W.1's claims. None of the neighbours who had been equally robbed was called to give evidence. They may have had material evidence as concerns this matter.

P.W.1 may have been a truthful witness yet also mistaken. In the case of ***MURUBE & ANOTHER - V- REPUBLIC [1986] KLR 356***

the court of appeal held that the court must be careful with the evidence of single identifying witness before relying on his/her evidence..

This is a case where a person lost his life. There was no proper investigation carried out. P.W.3 and P.W.4 simply relied on what P.W.1 told them and went to arrest the appellant. P.W.1 did not even mention Patrick Njiru. She talked of Njiru only. An identification parade ought to have been conducted to confirm her identification. This callous manner of dealing with such a sensitive matter where a man lost his life is detestable and we lack the words with which to condemn it.

We therefore after re-evaluating this evidence find that it was unsafe for the learned trial magistrate to rely on the evidence of P.W.1 **only** to convict the appellant. We therefore allow the appeal. We quash conviction and set aside the sentence of death. The appellant to be set oat liberty unless lawfully held under a separate warrant.

**DATED AT EMBU THIS 27<sup>th</sup> DAY OF JULY 2012.**

**LESIT J.  
J U D G E**

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