REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEALS NO. 227 OF 2009

CONSOLIDATED WITH CRIMINAL APPEAL NO.228 OF 2009

BONIFACE KINYUA NJIRU..1st APPELLANT

JOSEPH GICHOVI NJERU..2ND APPELLANT

VERSUS

REPUBLIC...PROSECUTOR

From original conviction and sentence in Cr. case No. 340 of 2008 at the Chief Magistrate's Court at Embu

J U D G M E N T

BONIFACE KINYUA NJIRU and JOSEPH GICHOVI NJERU were charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. The particulars as stated in the charge sheet were as follows;

1. BONIFACE KINYUA (2) JOSEPH GICOVI NJERU: On the 26th day of January 2008 at Kairuri village, Kairuri sub-location in Embu district within the Eastern Province jointly while armed with dangerous weapons namely metal pipe, hammer and a rungu, robbed PETER GICOVI NJIRU of cash ksh.7,800/=, a pocket bible, mobile phone make Nokia 1110, 15 kgs of rice, two pairs of shoes, a dry cell battery and one radio make National Star all valued at ks.16,600/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PETER GICOVI NJIRU.

The matter proceeded to full hearing and the Appellants were convicted and sentenced to death. They were aggrieved by the Judgment and filed this appeal raising the following grounds;

BY 1ST APPELLANT

1. *The learned trial magistrate erred in law and fact in admitting evidence of identification/recognition by P.W.1 single witness whereas it was not free from possibility of errors as provided in law.*

2. *The learned trial magistrate erred in law and facts in accepting P.W.2 investigation officer P.C. MICHAEL ARUSEI and P.W.4 DAVID MUSILI as safe whereas the evidence was incredible.*

3. *The learned trial magistrate erred in law and facts in admitting P.W.3\'s evidence whereas the doctor who treated the complainant had not been heard.*

4. The learned trial magistrate erred in law and fact in that she failed to consider and take into account and or failed to give reasons why she disregarded the evidence of prosecution witness (v) that the complainant didn\'t tell him that he knew the attackers, or gave him names of robbers whereas it is alleged that P.W.1 knew the Appellant and P.W.5 was the first person he met thus doubtful.

5. The learned trial magistrate erred in law and fact in not appreciating that the evidence was frame up against the Appellant.

6. The learned trial magistrate erred in law and facts in not exercising the law of natural justice and especially in a grievous case as the one facing the Appellant and failed to appreciate that the natural thing a person would do when he had committed a serious crime as this one is to go underground.

7. The learned trial magistrate misdirected herself in law in that she shifted Onus of proof on the Appellant and the said misdirection occasioned a miscarriage of justice.

8. The learned trial magistrate erred in law and facts in that she failed to give inter alias points for determination, the decision thereon and reason for the decision contrary to the clear provision of section 169 of Criminal Procedure code.

9. *The learned trial magistrate erred in law and facts by failing to take into account the plausible defence given by the Appellant.*

2ND APPELLANT

1. The learned trial magistrate erred in law and facts in basing a conviction and sentence on identification relying on the same when the legal requirement in recognition had not been met.

2. The learned trial magistrate erred in law and facts in putting reliance on the prosecution witness evidence whereas the same were insufficient and incredible.

3. The learned trial magistrate erred in law and facts in not appreciating that the evidence was frame up against the Appellant.

4. The learned trial magistrate erred in law and facts in admitting the documentary evidence i.e. "Agreement EXB 4" alleged to have been written by the Appellant whereas the same hadn\'t been proved beyond reasonable doubt.

5. *The learned trial magistrate erred in law and facts in failing to take in account and or failed to consider and give reason why the Appellant defence was disregarded or failing to give cogent reason of dismissing the defence contrary to clear provision of section 169 of Criminal Procedure Code.*

When the matter came for hearing the Appellants presented to the Court written submissions. Their main issues are;

1. The conditions of identification

2. That P.W.1 claimed to know them yet he gave no names.

3. The alleged injuries inflicted on them by P.W.1

4. An agreement allegedly entered into between the 2nd Appellant and the complainant (P.W.1).

5. Their defences were not considered.

M/s Macharia State Counsel for the State opposed the appeals. She submitted that P.W.1 had injured her attackers as they struggled. P.W.2 confirmed that the Appellants when arrested had injuries. A hammer

was recovered at the scene and a metal bar at the 2nd Appellants home. P.W.1 confirmed this to have been used to injure him. She further submitted that the 2nd Appellant had entered into an agreement to pay the value of the stolen items. And he deserted his home after the robbery.

Its our duty as a 1st appellate Court to reconsider and reevaluate the evidence adduced inorder to come to our conclusion. We also remember that we did not see nor hear the witnesses. We are guided by the cases of;

1. NGUI -VS- REPUBLIC [1984] KLR 729

2. ***NJOROGE -V- REPUBLIC [1987] KLR 19***

We therefore proceed to analyse the evidence before the lower Court. P.W.1 was walking home on 26/1/2008 at 9pm after alighting at Manyatta. A few metres from the stage he heard people shouting behind him saying ***"****Wewe njinga, kwa nini unatembea na hausikii sauti ya police?*" He stopped as he thought they were police officers. He was ordered to sit down and his pockets were searched. They took from him the items mentioned in the charge sheet and they beat him as they did this, using a water pipe and hammer (EXB 1 and 2). He was injured on the head. No one came to rescue him inspite of his screams. During the struggle he bit the finger of one and knocked another one down. He went to the home of P.W.5 for help and his father was notified. He was treated. He then reported the matter. After the arrest of the 1st Appellant the 2nd Appellant came to him and confessed that its him who had attacked him and he paid him shs.8000/= leaving a balance of shs.10,000/=. This was at the cells and through a written agreement. He further says he identified the Appellants with the help of the light from the torches the Appellants had. P.W.4 was walking home when he met the Appellants. The 1st Appellant had a hammer while 2nd Appellant had a piece of water pipe and torch. They exchanged pleasantries and parted. The next day he went to visit them after learning of P.W.1\'s attack. He saw a scratch on 1st Appellant\'s face near the left eye and the 2nd Appellant had an injured finger. It was a bite wound. In cross-examination he said he met them at a bridge.

P.W.5 was the good samaritan who received P.W.1 at his home that night. P.W.1 took him to the scene that night. P.W.3 the doctor confirmed the injuries suffered by P.W.1 (EXB 3).

The investigating officer (P.W.2) received the 1st Appellant on 28/7/2008 from members of the public in relation to this offence. The complainant had been robbed on 24/7/2008. And on 4/2/2009 the 1st Appellant took him to the 2nd Appellant\'s home where he recovered a water pipe. The hammer was recovered from 2nd Appellant. And when 1st Appellant was arrested his left eye was swollen and was with a fresh scratch mark. He also saw the injury on 2nd Appellant\'s finger at the time of arrest. He produced the agreement (EXB 4).

From the evidence on record it is clear that P.W.1 was robbed. He lost the items mentioned in the charge sheet and he was injured as confirmed by the doctor (P.W.3).

We are consolidating all the grounds together and addressing two issues;

1. The admissibility of the alleged agreement

2. *The conditions for a favourable identification*

The alleged agreement (EXB 4) is between P.W.1 and 2nd Appellant. A reading through it does not show what the agreement was all about. It shows that Joseph Gichovi is paying for lost belongings worth shs.18,000/=. This has no relevance to this case of Robbery with Violence. Anybody looking at it would have no idea as to what lost belongings it refers to. The prosecution used this document to try to show that the 2nd Appellant admitted committing the robbery and accepted to pay. Apparently the investigating officer (P.W.5) was not aware of this development. Had he been aware we are sure he would have made

arrangements for the 2nd Appellant to record a confession as per the Law. The 2nd Appellant denied even taking part in the writing of that agreement. As we have stated above the contents of that agreement do not amount to anything besides saying Joseph Gicovi was paying Peter Gicovi shs.18,000/= for lost belongings. We shall therefore treat it as such.

This offence was committed at night. P.W.1 says he heard people shouting. He kept on talking of *"they, they"*. He does not say he was attacked by two people. He does not say how he was able to see these people. Was there any light at the scene? The learned trial magistrate ought to have inquired into this. In cross-examination P.W.1 stated that there was light from torches the attackers had. Since this was in cross-examination not much was said about it. The prosecution did not re-examine P.W.1 to clarify on this issue of torches. It was the duty of the Court to caution itself and inquire as to the brightness or otherwise of the torches. What was the intensity of these torches if any? ***(Ref: SIMIYU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 192).*** In the absence of such inquiry the evidence of recognition may not be held to be free from error. P.W.1 told the Court that he injured the attackers. P.W.2 also said the 2 Appellants had injuries when they were arrested. However even after knowing this was material evidence the investigating officer (P.W.2) did not bother to send the two Appellants for medical examination to confirm those allegations. The medical reports of the Appellants were as important to his case just as the one of the complainant. We see the learned trial magistrate in her Judgment at page 54 lines 4-9 she states;

"thus even if identity of accused persons would have been under difficult conditions, but the marks exposed them to positive identity. In addition the agreement produced by P.W.2, written between P.W.1 and accused 2 is further corroboration that accused persons owned upto having committed the robbery against P.W.1".

The learned trial magistrate therefore acknowledges that the conditions for positive identification were poor but she found corroboration in the agreement plus the marks.

We have already dealt with the issue of the agreement above. The alleged marks were not supported by any medical documents. P.W.1 is not sure whether he knew the Appellants or not. It\'s P.W.4 who told him the names of people he had met with a water pipe and torch. P.W.4 does not even say when he met these people to really connect them with this offence.

P.W.2 recovered the hammer (EXB 2) at the scene of the robbery. However did P.W.2 know that his hammer belonged to the 1st Appellant? He stated that the 1st Appellant had been seen with it as he used it at his place of work. No one came to testify to this fact.

The water pipe (EXB 1) was allegedly recovered by P.W.2 from the home of 2nd Appellant in his absence. What proof did P.W.2 have to confirm that the exhibit had been recovered from 2nd appellant\'s home? These recoveries had no evidential weight.

The Appellants gave sworn statements and denied any knowledge of the matters herein. It was the duty of the prosecution to prove their case beyond any reasonable doubt. We are convinced they did not. As a result this Court finds it unsafe to let the conviction stand. We do allow the appeal. The convictions are quashed and the sentence of death set aside.

The Appellants to be set free unless otherwise lawfully held under separate warrants.

DATED AND DELIVERED AT EMBU THIS 21ST DAY OF SEPTEMBER 2012.

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