



JAMES MUTUGI MURAGE .....1<sup>ST</sup> APPELLANT

BENSON WACHIRA MURAGE .....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

*From original conviction and sentence in Cr. case No. 255 of 2008 at the Senior Principal Magistrate's Court at Kerugoya*

## J U D G M E N T

The appellant JAMES MUTUGI MURAGE and BENSON WACHIRA MURAGE hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellant respectively were charged before the Senior Resident Magistrate's Court Baricho with 3 offences namely;

### 1<sup>ST</sup> COUNT

#### ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

The particulars as indicated in the charge sheet were as follows;

#### *JAMES MUTUGI MURAGE (2) BENSON WACHIRA MURAGE.*

*On the 19<sup>th</sup> day of January 2007 at about 0.30 hours, at Gathaka Village in Kirinyaga District within Central Province jointly with others not before Court armed with dangerous weapons namely axes, pangas and runqus robbed Cecilia Wambui cash Ksh.300/= and immediately before or immediately after the time of such robbery used actual violence to the said Cecilia Wambui.*

### 2<sup>ND</sup> COUNT

#### ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE.

The particulars as indicated in the charge sheet were as follows;

*JAMES MUTUGI MURAGE: On the 19<sup>th</sup> day of January 2007 at 00.30 hours at Gathaka village in Kirinyaga District within Central Province assaulted Jackline Nyawira thereby occasioning her actual bodily harm.*

### 3<sup>rd</sup> count

#### INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 144(1) OF THE PENAL CODE.

The particulars as indicated in the charge sheet were as follows;

**JAMES MUTUGI MURAGE: On the 19<sup>th</sup> day of January 2007 at 00.30 hours in Kirinyaga District within Central Province indecently assaulted JN a girl of 16 years by touching her private parts.**

They pleaded not guilty and the matter proceeded to full hearing and they were convicted on all Counts as charged. They were sentenced to death on the 1<sup>st</sup> Count. The sentences for 2<sup>nd</sup> and 3<sup>rd</sup> Counts were held in abeyance.

And being aggrieved with the sentence they have appealed raising common grounds namely;

1. *The matter was before two different trial magistrates*
2. *The Senior Resident Magistrate's Court erred in law and fact by not finding that the Appellants were not positively identified or recognized as perpetrators of the alleged robbery if any as the complainants never mentioned them to the police as at the time of reporting the alleged offence.*
3. *The Senior Resident Magistrate's court erred in law and fact by holding that Appellants were identified by their voices during the alleged offence whereas no voice identification parade was carried out at any police station to prove the same.*
4. *The Senior Resident Magistrate's Court erred in law and fact by failing to consider that the prosecution did not avail OB No.2/19/1/07 which was the source of charge on the matter in question. The Appellants had applied to rely in their defence evidence and failure to do so was fatal to the prosecution. They prayed the OB No.2/19/1/2007 to be present on the hearing date.*
5. *The Senior Resident Magistrate's Court erred in law and fact by failing to consider the defence exhibits produced by the Appellants in their defence evidence i.e Defence exhibit, the statement of P.W.2 and D. Exhibit 2, the statement of P.W.2 and D. Exhibit 2, the statement of P.W.3.*
6. *That the Senior Resident Magistrate's Court erred in law and fact by not finding that the evidence tendered by the nuclear family was not supported by any other independent witness.*
7. *The Senior Resident Magistrate's Court erred in law and fact by holding that the 1<sup>st</sup> Appellant was the one who indecently assaulted and caused actual bodily harm to P.W.4 during the commission of the alleged offence whereas no sufficient evidence was tendered to make that finding.*
8. *The Senior Resident Magistrate's Court erred in law and fact by not finding that the Appellants constitutional rights were violated by being held in police cells beyond the mandatory 14 days.*
9. *That the Senior Resident Magistrate's Court erred in law and fact by failing to find that the alleged offence was never investigated at Baricho police station and the failure to testify by police investigating officer AP.C. Biwott was fatal to the prosecution case.*
11. *The Senior Resident Magistrate's Court erred in law and fact by failing to consider the Appellants defence and submissions of which was not shaken by the prosecution case with no sufficient reasons.*
12. *That on the Judgment day the Appellants heard information that they never heard during the trial*

When the appeal came before us for hearing both Appellants presented us with written submissions. They have raised the issue of identification. The police were not given their names. Secondly they say the matter was heard by two Honourable Magistrates. And that there was no way the 2<sup>nd</sup> Magistrate would talk about the credibility of witnesses he never saw and the 1<sup>st</sup> trial magistrate never made notes to that effect. The rest of the submissions are repetitive.

The State through the learned State Counsel opposed the appeals. She submitted that provisions of section 200 Criminal Procedure Code were complied with and the Appellants made an election to proceed. She further added that the identification was without error as the witnesses and Appellants are neighbours.

This being a 1<sup>st</sup> appeal we have a duty re-evaluate and reconsider the evidence afresh and come to our own conclusion. We are also alive to the fact that we did not see nor hear the witnesses. This was the holding in the cases of;

**1. OKENO -V- REPUBLIC [1972] EA 32**

**2. SIMIYU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 192**

The evidence is that P.W.1 and P.W.4 are mother and daughter.

On the material night they were in their house each in her room. P.W.1 heard voices at her window and immediately identified the voices as those of Mutugi and Wachira (1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively).

The door was then hit and it gave way and three men entered. They heard torches which were on. They demanded for money and were only able to get shs.300/=. As they looked for more money they were beating P.W.1. P.W.4 who had been brought from her room to P.W.1's room was also beaten. She ran out of the house screaming and was followed by 1<sup>st</sup> Appellant who sexually assaulted her using his fingers. Neighbours were attracted by the screams and came to their rescue. Police also arrived at the scene and started looking for P.W.4. When she was finally found they were taken to Hospital. They gave the names of their attackers to the police who arrested them.

The 1st Appellant gave a sworn statement denying the charges. He stated that he was fixed by P.C. Biwott because of a brawl they had had in the bar. He was immediately arrested, after the said brawl.

Accused 2 gave an unsworn statement in which he said the chief arrested him for not paying him the weekly protection fee of ksh.500/=. He denied the charges.

This Court has to first of all establish that a case of robbery with violence had occurred. P.W.1 saw three men enter her house with torches. At one point she said she was slapped with a panga. These people took her shs.300/=. It was P.W.4's evidence that one man was armed with a panga and rungu. Another one had a rungu. Both had torches.

It is therefore the prosecution case that the attackers were more than one (1), they were armed; they used violence and they stole from P.W.1. The offence of robbery with violence was therefore established.

Now the next issue is to confirm if the Appellants were properly identified. The time of this incident was about midnight. There was no light in the house. The intruders had torches and they were people well known to the complainants.

The next question is whether the conditions were favourable for a positive identification. In the case of **MWAURA -VS- REPUBLIC 1987 KLR 645** it was held that when a case depends entirely on visual identification the Court must be keen to ensure that the identification was free from any error. Some

questions that should be asked include;

1. *The length of time the witness had with the attackers.*
2. *The kind of light used for identification*
3. *For how long the attacker was under the eye of the witness.*
4. *If torches provided the light how bright were they?*

In her evidence P.W.1 says the incident lasted for 15-20 minutes. Neighbours responded and the police came shortly thereafter.

P.W.1 and P.W.4 say they were able to see these people with the help of light from the torches. Even P.W.1 had already identified the voice of Wachira before the people entered the house.

We shall first deal with the voice identification. P.W.1 stated that she heard Wachira (2<sup>nd</sup> Appellant) say she was awake. It is not indicated what he exactly said and in which language. The conversation was between the said Wachira and another outside P.W.1's bedroom near her window. She was inside the house. Were these people speaking loudly or in low tones? How close were they?. She woke up and just heard them and identified 2<sup>nd</sup> Appellant's voice. Besides saying P.W.1 was awake he did not say anything else. In the case of **CHOGE -VS- REPUBLIC [1985] KLR 1** it was thus held;

*“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it”.*

In the instant case care was not taken to know how far the attackers were from the window of the witness and if they were speaking in low tones or so.

We therefore find that this evidence of voice identification can not stand on its own to found a conviction. It requires corroboration. We now move to ascertain if the identification by the light from the torches was positive. We are not losing sight of the fact the witnesses indicated that the attackers were neighbours and people well known to them.

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the Court should be reminded that mistakes in recognition of close relatives and friends are sometimes made (**WAMUNGA -VS- REPUBLIC [1989] KLR 424**).

The only evidence remaining which links the Appellants to this offence is that of the visual identification by P.W.1 and P.W.4. Where the only evidence against an accused is, as here, evidence of identification a trial court must examine such evidence carefully to be satisfied that the circumstances of the identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. (**OSIWA -VS- REPUBLIC [1989] KLR 469**).

We have noted from the record that the learned trial magistrate did not make any inquiry as to the nature of the alleged torches or their brightness or otherwise. In the absence of such inquiry evidence of recognition may not be held to be free from error. We have also looked at the steps taken by the complainants after the incident.

P.W.4 took refuge in the house of a neighbour (P.W.3). It is P.W.3's evidence that P.W.4 did not tell her who had done these things to them. The next morning she went to P.W.1's house to check on her. She found P.W.1 and P.W.4 at home. P.W.4 was asleep but still P.W.1 did not tell her who had attacked

them. P.W.2 P.C. Wahome who was among the first officers who visited the scene indicated in his evidence that he was with P.C. Gitobu and P.C. Muthama when they went to the scene. And in their presence plus 20 others who were at P.W.1's home the latter told them she had identified 2 of her attackers. And that these were **Mutugi (Accused 1) and his brother** and that P.C. Gitobu (P.W.7) knew the suspects and he arrested them.

The evidence of P.W.7 does not confirm this. He says in the course of enquiry they learnt that the 2 Appellants were involved in this incident. Using informers they tracked the 2 Appellants and arrested them. He **NOWHERE** states that P.W.1 told him who she had identified. Secondly the Appellants and complainants were not known to him prior to this incident.

This offence occurred on 19/1/2007. P.W.1 recorded her statement on 29/1/2007 and on 6/2/2007, while P.W.4 recorded hers on 6/2/2007. Part of these statements were read out in Court and it was nowhere indicated that P.W.1 gave the names of the Appellants to the police or in her statement. She even stated in her statement which was read in court as follows;

*“My daughter was with IRUNGU In the maize plantation”.*

None of the Appellants is called IRUNGU. It has come out clearly that the complainants did not mention to the police and neighbours who came to their home that the 2 Appellants were part of the gang that attacked them.

In the case of **SIMIYU & ANOTHER -VS- REPUBLIC (Supra)** the Court of Appeal held that;

*“The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of their attackers identity.”*

Nothing stopped them from informing the police.

We are not shown why statements were not recorded soon after the incident. Its also not indicated when the Appellants were arrested. The charge sheet shows it was on 10/1/2007 which cannot be true as the offence was committed on 19/1/2007. The investigating officer P.C. Biwott did not testify. He is the one who did all the investigations and recommended that the Appellants be charged. He could have explained some of these issues arising to the Court.

The 1<sup>st</sup> Appellant had blamed a brawl between him and P.C. Biwott for his arrest. As we stated earlier P.C. Biwott did not testify.

The 2<sup>nd</sup> Appellant blamed his woes on the chief whom he used to bribe with shs.500/= weekly as protection fee since he was a brewer.

We fault the recognition of P.W.1 and P.W.4 for the following reasons;

1. *The conditions and circumstances for voice identification were not favourable*
2. *The nature and intensity of the light from torches was not inquired into.*
3. *There is no confirmed evidence that P.W.1 and P.W.4 gave out the names of the attackers to the police officers, P.W.3 and/or any of the neighbours who visited them.*

Since the same attackers are the ones who assaulted P.W.4 the convictions on those counts cannot be left to stand. All in all we are saying its true the offences were committed but there isn't sufficient evidence to confirm that the Appellants were the culprits. The upshot of the discourse above is that we allow the appeal. All the three convictions are quashed. The sentence of death is set aside. Both Appellants to be set free unless otherwise lawfully held under a separate warrant.

**DATED AND DELIVERED AT EMBU THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2012.**

**LESIIT J.**

**H.I. ONG'UDI**

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