



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Appeal 228 & 238 of 2007**

**PETER GAITA NDERITU.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(arising from the judgment of Hon. E.J. Osoro Senior Resident*

*Magistrate at Nyeri in Criminal Case No. 4089 of 2004)*

**CONSOLIDATED WITH**

**DOMINIC KABURU MUHORO.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(arising from the judgment of Hon. E.J. Osoro Senior Resident*

*Magistrate at Nyeri in Criminal Case No. 4089 of 2004)*

**JUDGMENT**

The appellants herein were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the night of 17th October 2004 at Sangare Ranch village in Nyeri District within Central province jointly with others not before the court while armed with dangerous weapons namely pistol, pangas, rungas sword robbed one MICHAEL PRETTEE JOHN two mobile phones, four wrist watches, one Thuraya satellite phone, three pairs of binoculars, one gold money cup, one cannon camera, one skinner's horse sword, one silver clock, six rounds of ammunition of .357 millimeter calibers, 120 sterling pounds, 50 US Dollars and cash Ksh. 3,000/- all valued at Kshs. 1,000,000/- and at or immediately before or immediately after the time of such robbery injured the said Michale Prettee John.

In the second count they faced the offence of robbery with violence contrary to section 296(2) of the Penal code the particulars of which were that on the 17th night of October 2004 at Sangare Ranch village Nyeri District within Central Province jointly with others not before the court while armed with dangerous weapons namely pistols, pangas, swords robbed one John Ngare Kariuki one wrist watch make Oris valued at Ksh. 500/- and cash 1600/- and at or immediately before or immediately after the time of such robbery used personal violence against the said John Ngare Kariuki.

In count III they faced the offence of robbery with violence contrary to section 296(2) of the Penal code the particulars of which were that in the night of 17th night of October 2004 at Sangare Ranch

village Nyeri District within Central Province jointly with others not before the court while armed with dangerous weapons namely pistols, pangas, swords and rungas robbed one Joseph Ngunjiri Kimata one Icon VHF Radio call, one mobile phone make Siemens Nokia phone and one knife all valued at Ksh. 30,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said Joseph Ngunjiri Kimata.

They were both tried convicted and sentenced to suffer death on the three counts. We must at this stage point out that the 3rd and 4th accused were acquitted of the offence herein.

The two appellants being aggrieved and dissatisfied with the said conviction and sentence each filed an appeal against the same to the court.

When the matters came before us for the trial and determination we ordered the two appeals consolidated.

It must also be noted that the appellants herein also filed two other appeal through the firm of Ms Sichangi & Co. advocates being High court Criminal Appeal Nos. 203 and 204 of 2007 which appeals were marked as abandoned since the appellants expressed the desire to proceed with the appeals filed by themselves and without legal representation.

The appellants who were not represented placed before us amended grounds of appeal and written submissions which they relied upon at the hearing of the said appeal. From their aforesaid grounds of appeal the following issues can be identified for the purposes of this judgment:

1. ***Section 85(2), 198(1) and (4) of the Criminal Procedure Code were violated.***
2. ***Their constitutional right under this section 72(3) of the Constitution were violated.***
3. ***Their identification was not proper having been done in violation of section 137(d) of CPC section 105 of Evidence Act and Cap 46.***
4. ***Their defences were rejected without giving reason for the same.***
5. ***The trial magistrate did not pronounce the commencement of the sentence.***

This appeal was opposed by Miss Maundu for the state who submitted that P.W.1 & P.W.2 were attacked by armed robbers. P.W.1 resisted and the 2nd appellant stabbed him in the stomach. P.W.1 was able to see the 2nd appellant since generation lights were on. P.W.3 said that he saw six people enter into the compound and was able to identify the 1st appellant who was a Karate Trainer she further confirmed that the appellant were prosecuted by a gazetted officer she has therefore urged us to disallow the appeal.

This being a first appeal we are in law required to reevaluate the evidence tendered before the trial court so as to come to our own conclusion on the same though taking into account the fact that we did not have the advantage of hearing and seeing the witnesses as did the trial court.

Before going into the appellants submissions we need to analyse the evidence tendered before the trial court.

P.W.1 MICHAEL PRETTE JOHN testified that on 17th October 2004 at about 7.30 pm. he heard commotion. His cook came and told him that there were four men in the house that one of the attackers drew a pistol and demanded money and his firearm from him and that he was able to identify the 1st appellant who had a pistol. That the 2nd appellant removed his sword from the wall and pierced him on the abdomen. That at the stage his wife came and told them that if it was money they needed she could give them. That he subsequently went with them to the bedroom and to his office and was robbed of the items as per the charge sheet. That on 29/11/2004 he attended an identification parade and was able to

identify the 1st and 2nd appellants. He stated that he was able to identify them on the night of the robbery since all the 10 lights were on.

P.W.2 JOSEPH NGUNJIRI KIMATA stated that on 17th October 2004 he was in the kitchen with John Nderitu when he saw four people coming. That they were John Nderitu Macharia, John Ngare and two other people. That the two had small guns and he was able to see them well since there was electricity light. They were then ordered to put everything down they asked him for the store key which he did not have and was robbed of the items stated in the charge sheet. They entered in the main house where they attacked P.W.1. After three days he was called to the police station for identification and he was able to identify the 1st and 2nd appellants. He stated that he used to see the 1st appellant pass through the farm prior to the incident.

P.W.3 BONIFACE MBITI WAMBUA testified that on 17th October 2004 at 3 pm he left his place of work and passed through P.W.1's home and when he was 1 Km away he met the 1st appellant who he had known since 2002 with other five people that he just passed through the same route on his way to work he again met the 1st appellant with another man. That the 1st appellant was wearing a white wig and that on 18th October 2004 he heard on radio that P.W.1 had been attacked and that on 19th October 2004 he went to the said home and was told by the manager that they had been attacked and suspects arrested including 1st appellant and as he had seen him on the said date of attack he decided to record statement with the police.

P.W.4 JOHN NGARE KARIUKI testified that on 17th October 2004 at 7.30 pm he was in his house when about six people entered armed with pangas, axes, a pistol and iron bars. They asked him to tell them where P.W.1 keeps his guns. The attackers tied his hand and put a piece of cloth in his mouth. That they came to the house with Wanjiru also tied. They ordered them to take them to the main house and on the way they met Nderitu the cook. That during all this time the lights were on and he was able to identify the people. He was able to identify the 1st and 2nd appellants. He was able to recognize the 1st appellant since he used to come to the ranch to teach young men karate. He was also able to see the 2nd appellant well since he is the one who was giving orders to the rest of the group. He stated that the robbery took between 20-30 minutes. ON 29th October he was able to identify the 2nd appellant at an identification parade and the 1st appellant, he was also able to identify his items which were stolen.

P.W.5 DIANA PRETTE JOHN testified that she was able to see the faces of the attackers and was able to identify the first and 2nd appellants and that the robbery took place between 50 minutes to one hour.

P.W.6 GIDEON KIPNGEON ARAP TANUI stated that on 17th October 2004 at about 5.45 he had seen six men passing by and he was able to identify the 1st and 2nd appellants. He stated that the 1st appellant greeted him in Kikuyu and that he had known both the appellants before. That at 7 pm the watchman came to his house and told him that P.W.1 and P.W.5 he decided to go and check. He found the door closed so he peeped and saw the 1st appellant threatening P.W.1 and saw 2nd appellant with a sword and that he was able to identify the appellant herein during the said period. He stated that he knew the 1st appellant well and therefore only attended the identification parade for the 2nd appellant.

P.W.7 JOHN NGETICH police officer received the report of the robbery. That using police dogs his officers went upto Chaka and the dog led them to one house they broke into the same but did not find anyone.

P.W.11 JACKSON OTIENO testified that the 1st appellant had told him how he had robbed P.W.1 and that he had arranged the robbery involving six people.

P.W.12 AMON SIAGI who conducted the identification parade testified that the first appellant was identified at the parade and produced the identification parade forms.

When put on the defence the 1st appellant gave a sworn evidence and stated that on 17th – 19th October 2004 he stayed at home the whole day and that on 20th October 2004 Kenyatta day he decided to

visit Thika when he met the assistant chief who told him that P.W.1 had been robbed and that on 19th October 2004 he witnessed a fight between 5 (five) people who were said to had been trained Karate player and that when he came back from Thika he went to the assistant chief to find out the names of the young men and was taken to the OCS where he was subsequently locked up for 20 days. He stated that all the prosecution witnesses knew him and none of them gave his name to the police neither did they lead the police to his house. The 2nd appellant testified that on 17th October 2004 he was working as a farm mechanic with one Mwangi who was subsequently arrested for having a tractor which was not road worthy that thereafter a fight ensued between the said Mwangi and Sgt Kher that he was subsequently arrested on 24th October 2004 and locked up for 19 days.

Based on this evidence they were convicted and sentenced to death.

They have therefore submitted that their conviction was not safe and have asked us to allow the appeal herein.

We shall therefore deal with the issue of identification and recognition. We have looked at the proceedings before the trial court and not that the appellant herein were properly identified at the identification parade. P.W.6 stated in his evidence in chief that he had earlier seen the appellants herein and talked with them. That he was able to recognize them during the night of the robbery and that there was sufficient light in P.W.1's house to enable him properly see the appellants

P.W,1 and P.W.2 also stated that the robbery took place between 50 minutes to an hour and that was sufficient time for them to recognize the appellants. They were subsequently able to identify the appellants at an identification parade.

We are therefore satisfied that the appellants were properly recognized and identified. There was sufficient light at the time.

The appellants have also raised the issue of delay in taking them to court and have therefore urged us to allow the appeal on the basis that the constitutional right was violated. It should be noted that the issue is that of

unexplained delay. The appellants only raised this issue at the hearing of the appeal and therefore did not give the prosecution an opportunity to explain for this alleged delay. We take the view that if the appellants' constitutional rights were violated as alleged the same still have an alternative remedy of seeking compensation.

We have also noted that the trial court considered the defences of the appellants herein and had this to say.

***“D.W.5 did not appear to be a genuine witness. Accused was recognized and positively identified at the scene accused 1 and 2 were less candid in the evidence particularly on their arrest. Therefore the court is satisfied that there was sufficient time for positive identification and also recognition”***

We therefore find no fault with the trial magistrate's finding on facts and agree with the submission by the state that the appellants conviction was safe and that the sentence meted was lawful.

We therefore find no merit on the appellants' appeal herein and dismiss the same.

Dated and delivered at Nyeri this 18th day of October 2012.

**J.K. SERGON**

**JUDGE**

**J. WAKIAGA**

**JUDGE**

Miss Maundu for the state

Peter Gaita Nderitu - in person

Dominic Kaburu Muhoro - in person

Judgment read in open court in the presence of the above

**J.K. SERGON**

**JUDGE**

**J. WAKIAGA**

**JUDGE**