



## **CRIMINAL**

- **Need for identification parade when the accused are seen by the complainants**

### **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA**

### **AT MERU**

### **CRIMINAL APPEAL CASE NO. 84 OF 2009**

**MOSES KAREU ..... APPELLANT**

### **CONSOLIDATED WITH CRIMINAL APPEAL CASE NO. 82 OF 2009**

**PAUL KIAMBI M'ACECE ..... APPELLANT**

### **CONSOLIDATED WITH CRIMINAL APPEAL CASE NO. 83 OF 2009**

**KITILI MULONJA NGOMANGO ..... APPELLANT**

*(An appeal against the judgment of S.M. Githinji Principal Magistrate in Principal Magistrate's Court  
at Nkubu Criminal Case No. 365 of 2007)*

### **JUDGMENT**

The appellants were charged together in the lower court with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. They were also charged with one count of assault with intent to steal contrary to section 298 of the Penal Code. They were convicted as charged and now appeal against conviction and sentence before this court. This is the first appellate court. To that end, we are guided by the principles enunciated by the case of **Gabriel Njoroge Vrs. Republic (1982 – 88) 1KAR 1134** where it was held:-

*“As this court has constantly explained it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in*

***mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya Vrs. R. [1957] E.A. 336, Ruwala Vrs. Republic [1957] EA 570.)”***

The evidence of the prosecution should be appreciated in the light of the knowledge that according to the evidence of PW1 those that suffered the robbery reported to him that they did not recognize the appellants at the time of the robbery. It should also be appreciated in the light that those who said that they did identify the robbers they did not state how they knew them and no identification parade was mounted. PW1 in evidence stated that on 27<sup>th</sup> January 2007 at 2am he was sleeping in his home with his wife. He heard some people calling from outside. He did not recognize their voices. Those people begun to break the kitchen door. They surrounded the home. They broke the bedroom window and entered. PW1 and his wife hid in another room. The robbers stole from their bedroom Kshs. 500/= . The robbers eventually found them where they were hiding. He was hit with an ax and he fell. The robbers were many but he said he recognized three of them. According to him, it was the third appellant who hit him with an ax. He fell down and became unconscious. When he regained consciousness he found that his wife had been cut. He pleaded with them and offered them money. The 2<sup>nd</sup> appellant asked for money. The robbers asked for the money that was the proceeds of the sale of his car. He said that he had not sold the car. They went outside and he showed them the car. The robbers damaged the vehicle. He said the night had a bright moonlight. The robbers took him to his servants house about 10 metres away. There they got some more money. Those people were 8 in total but he only recognized the three appellants before court. On cross examination, he stated that he had told the police that the robbers had torches and that the moonlight was inside the house. He then stated in cross examination that he had heard the voice of the 2<sup>nd</sup> accused. He also said that he had seen the 1<sup>st</sup> accused who locally was called Mwangangi. It should be noted that PW1 in examination in chief had said that he did not recognize the voices of the robbers. PW2 recalled that on the night of 22<sup>nd</sup>/23<sup>rd</sup> January 2007 he was sleeping in his house. His door was violently hit and it fell down. He heard some voices and saw flashing torch light. When he screamed, those people threatened to burn the house. They hit him demanding for money. He did not have money and the robbers stole from him a sack of beans, five chicken and one axe amongst other things. He said that he recognized the 2<sup>nd</sup> appellant but he did not say how he recognized him. He said that he heard his voice when he asked for his money. The 2<sup>nd</sup> appellant is his neighbor. PW3 said that on the night, 2am she was asleep when she heard people going round the house. When she woke up she saw flashing torches inside the house. The people were standing near the window. She recognized the first appellant. According to her, there was moonlight and she was able to see him well. The people hit her bedroom door and because she was holding it she injured her hand. They demanded money. The 1<sup>st</sup> accused hit her and she fell down. She said that she heard the sound of the 1<sup>st</sup> accused. On being cross examined by the 1<sup>st</sup> accused she stated that she saw the 1<sup>st</sup> accused by the aid of moonlight. The next time when she saw the 1<sup>st</sup> accused he was under arrest. PW4 was an assistant chief of Makandune sub location. He recalled that on the night at 2pm, whilst he was sleeping at his home he was woken up and informed about the robbery of PW3. The wife of PW3 according to this witness said that she recognized the 1<sup>st</sup> appellant. The assistant chief went back to his home that night. The following day they followed the foot marks which led them to the first accused compound. PW5 was an employee of PW1. He stated that his employer was brought to his house by people who demanded money. He however got an opportunity to runaway. PW6 was at her home sleeping at 2am with her husband on that material date. She heard the dogs barking. Her husband was woken up by those people. She heard a voice that was familiar to her asking for Kshs. 100,000/= . Those people broke the window and attacked her husband. She was injured as she tried to stop a further attack on her husband. Police Inspector who was at Kiraini Police station on 28<sup>th</sup> January 2007 he received a report of the robbery at Makandune market. The police took a vehicle to the scene of robbery. When they went there they found the 1<sup>st</sup> appellant had been arrested. The assistant chief indicated that the victims of the robberies had identified the others. This officer however stated that they questioned the 1<sup>st</sup> appellant and he gave them the names of the 2<sup>nd</sup> and 3<sup>rd</sup> appellant. These other appellants were arrested later. In his home, they recovered an axe which had light blue colour. That colour resembled the colour of doors and walls of the houses where the robberies took place. PW9 was a police constable. His evidence when cross examined by the 1<sup>st</sup> appellant’s learned counsel was that the information given by the victims of the robberies was that the robbers were unknown by them. The appellants were put on their defence. The 1<sup>st</sup> appellant in his evidence under oath stated that he was

arrested at home on 28<sup>th</sup> January 2007 early in the morning. The night of 27<sup>th</sup> January 2007 he had been at his home after attending a funeral. On reaching home, he never went anywhere. It was the following morning that he was arrested. The 2<sup>nd</sup> appellant stated that on the 28<sup>th</sup> January 2007 he left his home and went to his place of work. He arrived at his place of work at 8.30 am. Later on in the company of the 3<sup>rd</sup> appellant they met two officers along the road. They were asked what they were carrying. They said they had charcoal. They were arrested and taken to Mitunguu police post. The 3<sup>rd</sup> appellant corroborated the defence of the 2<sup>nd</sup> appellant. The evidence that the prosecution relied on in the lower court was weak to say the least. As can be seen the victims of robberies were unable to state how they recognized the appellants at 2am. Although some talk about the moonlight they at times indicated that they recognized some of the appellants by their voice. It will be recalled that PW9 stated that the first information he got was that the victims did not recognize the robbers. Indeed the learned state counsel Mr. Kimathi conceded to this appeal on that basis alone. He also conceded to the appeal on the basis that there were inconsistencies in the evidence of the prosecution witnesses. He faulted the investigating officer for failing to mount an identification parade. We too fault the prosecution's case for the same reasons. As it will be recalled, one of the police officers indicated that on arresting the 1<sup>st</sup> appellant he was the one that gave the names of the other appellants. Does it mean the appellants were arrested only on the strength of that information by the 1<sup>st</sup> appellant? The evidence of the prosecution was tenuous and weak and it is for that reason we find that the appellant's appeal have merit. We order that the convictions against the appellants be quashed and the sentences be set aside. We order that all the appellants be set free unless they are otherwise lawfully held.

**Dated and delivered at Meru this 28<sup>th</sup> Jan 2011.**

**LESIT, J.**

**JUDGE**

**KASANGO, M.**

**JUDGE**

**Read, signed and delivered at Meru this .....2011.**

**In The Presence Of:**

**Kirimi/Mwonjaru ..... Court Clerks**

**Appellant ..... Present**

**Mr. Kimathi ..... For the State**

**LESIT, J.**

**JUDGE**

**KASANGO, M.**

**JUDGE**