



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.81 OF 2006

CONSOLIDATED WITH CRIMINAL APPEAL NO. 82 OF 2006

JAMES TIWET EPUR.....1ST APPELLANT
JOHN LOCHUM LEPARIO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeals from original conviction and sentence in Nakuru C.M.CR.C.NO.2475/2001 by Hon H. M. NYAGA, Senior Resident Magistrate, dated 6th March, 2006]

JUDGMENT

A criminal trial must never take six years to finalize as was the case in this appeal. Adjournments in the court below were applied for and granted as a matter of course.

The two appellants were tried, convicted and sentenced to death in respect of the charges in count IV – **attempted robbery** contrary to **section 297(2)** of the **Penal Code**. They were however, acquitted of similar charges in counts I and II.

They faced a further charge of **wounding with intent** contrary to **section 231(a)** of the **Penal Code**. Contrary to the now settled practice, the learned trial magistrate having convicted the appellants and sentenced them to suffer death, it was pointless to also sentence them to seven years for unlawful wounding. The latter sentence ought to have been held in abeyance.

Having made those observations, we note that the appellants have challenged the decision of the learned trial magistrate on a total of 18 grounds which in our view may be distilled as follows:

- i) that there was no evidence of identification hence the offence was not proved beyond all reasonable doubt;
- ii) that the prosecution witnesses contradicted themselves;
- iii) that the learned trial magistrate failed to consider their defence;

iv) that **section 200** of the **Criminal Procedure Code** was not complied with.

The appellants also relied on their detailed written submissions. We shall revert to those arguments shortly. The facts of this case may be stated as follows:

On 23rd July, 2001 at about 6.45-7p.m., **P.W.1 David Ndungu Korumu (Ndungu)**, his wife, **P.W.2, Mary Wanjiku Ndungu (Mary)** and their son, **P.W.3 Peter Wambugu Ndungu (Peter)** were attacked by two armed men who clearly had gone to rob them.

According to Peter, while at home in the compound he saw two people walking towards him. He suspected they had lost their way. They exchanged greetings before he realized they were armed. They ordered Peter to take them to the main house where his parents were.

As they got close to the house, Peter grabbed the firearm from the 1st appellant and a struggle ensued. The second appellant hit Peter on the head with a stick, he felt dizzy and fainted. When he came to his senses, the robbers were still in the house. Peter once again grabbed the firearm and while struggling with the 1st appellant, the 2nd appellant drew a knife. At this stage, he noticed his mother, Mary, had been shot on the leg. It is the gunshot that alerted Ndungu. He too joined in the fray which lasted some 10/15 minutes before the assailants ran away. The assailants left behind a jacket which the 2nd appellant was wearing and a cap worn by the 1st appellant. The incident was reported to the police. One month after the robbery, Peter saw the 2nd appellant, went to the police station and reported that he had seen the 2nd appellant. Several suspects were arrested. Peter was later called to an identification parade conducted by **P.W.5, I.P. Jonathan Mogaka** where he was able to identify the 2nd appellant. **P.W.4, P.C. James Gichungu** confirmed that they arrested four(4) suspects.

The 1st appellant was arrested by **P.W.7, Sgt. Francis Njeru Namo**. In his defence, the 1st appellant denied the charges maintaining that he had never been to the village where the robbery took place; that on the day in question, he joined the chief and other villagers in looking for lost goats. After failing to trace the goats, they left the matter with Anti-stock Theft Police Unit and returned home. The 1st appellant got information on the second day that the goats had been recovered. He also heard that a police officer had been killed and his firearm stolen.

On 16th August, 2001, the 1st appellant along with others were arrested. Eighteen identification parades were conducted. He met the 2nd appellant in the police cells. Both were charged. The 2nd appellant testified that he has known the family of Ndungu for many years, being his neighbour. He denied involvement in the robbery on the night in question as he was with his family at home.

His witnesses, **D.W.III, Paulo Emunja** and **D.W.IV John Lareng** confirmed that the Wambugu family live in the same neighbourhood as the 2nd appellant.

Learned counsel for the respondent opposed the appeal submitting that the incident took place at 6.45p.m. before darkness; that Peter had ample time with the robbers and was able to identify them as the appellants; that Peter was also able to pick out the 1st appellant at a police identification parade. Before this, he had given the police the description of the 2nd appellant.

We have weighed these submissions as well as the appellants' arguments. We have no doubt that the Ndungu family was attacked on the night of 3rd July, 2001 by a gang of two robbers. It is also apparent that the attackers did not steal anything from them.

The appellants have denied any involvement. The only question falling for our determination is whether the appellants were accurately identified as the robbers who raided the Ndungu family.

The learned trial magistrate was persuaded that there was sufficient light at the scene of the attack to

enable the witnesses identify their attackers. Ndungu's evidence of identification was to the effect that they were attacked at 7p.m.; that there was bright light; that the attackers were strangers; that he saw them well; that he did not attend the identification parade. He has not, however, indicated the source of light, its intensity and proximity to the appellants. The attack, according to him was at 7p.m. and that it was not dark. If it was not dark, we ask, for what purpose was the light?

Secondly, in view of the fact that the incident was at 7p.m. and the attackers were strangers to Ndungu, it would have put beyond doubt the question of identification if Ndungu had participated in the identification parade. He did not and we entertain serious doubt that he was able to positively identify the robbers.

Mary on her part said she saw her son Peter struggle with the robbers for a long time; that they shot her as they struggled; that she did not know any of the robbers; that the robbery was at 6.45p.m.; that she was able to identify the robbers as the appellants and; that she did not go to the police identification parade.

Again for the same reasons we have given in discounting Ndungu's testimony, Mary's evidence of identification is not persuasive.

Finally, and the most dramatic account of the events of the evening in question came from Peter. It was a stranger than fiction story. Imagine this:

Peter saw the robbers come in the compound. They exchanged greetings. The robbers, who were armed sought to know from Peter how his father gets his money. He told them his father is a farmer. He then cheated them he was an employee of his father. One jumped over the fence and asked if there were many people in the house. Under the robbers' command, Peter walked them to the house where the father was. As they neared the main house, he grabbed the firearm from one of them. He struggled with one robber trying to wrestle the firearm from him. He was hit on the head by the second robber and lost consciousness. When he rose, he found the robbers still in their home. He resumed his attempt to disarm them and continued struggling with the one who had a firearm.

He finally disarmed the armed robber but fell down. One robber drew a knife and attempted to stab him, missed and stabbed the firearm's magazine. It is at this stage that Peter's father, Ndungu appeared and joined in fighting by hitting one robber with a piece of timber before taking a jacket belonging to a robber. Peter took from the robber the firearm and escaped towards the road with the robbers in pursuit. The robbers were pleading that he returns to them the firearm. He felt dizzy again and threw the firearm in the maize shamba. The robbers went, took it and disappeared.

That story is incredible. Who would dare do what Peter did with armed robbers, who had proved that the firearm was loaded when they shot Mary? We do not believe the story. It is fictitious and highly exaggerated.

Secondly, the 2nd appellant swore and even called evidence that he was a neighbour to Peter's family. Why did it take so long (1 month) to have the 2nd appellant arrested? It is Peter who met the 2nd appellant, one month after the incident and reported to the police. The identification parade which was conducted was meaningless. It was not different from a situation where a witness drags a suspect to the police station and then identifying him in a parade.

Thirdly, if Peter was able to identify the robbers, why did the police arrest 4 suspects? Clearly, the answer is that the robbers were not known. It is alleged that the complainants told the police that they could identify the robbers, the police denied this.

Finally, the circumstances leading to the arrest of the 1st appellant are not clear. **P.W.7 P.C. Francis Njeru Namu** was involved in security operation in Rumuruti area when he arrested the 1st appellant at his home. He did not recover anything from him.

For all these reasons, we come to the conclusion that the learned trial magistrate erred in finding that there was sufficient evidence to link the appellants with the robbery. We allow the appeal, quash the conviction and set aside the sentence of death. The appellants will be set at liberty forthwith unless lawfully detained.

Dated, Delivered and Signed at Nakuru this 11th day of February, 2011.

**R. V. P. WENDOH
JUDGE**

**W. OUKO
JUDGE**