



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 332 OF 2009**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 333 OF 2009**

*(From original conviction and sentence in Criminal Case No. 114 of 2007 of the Chief Magistrate's Court at Nakuru, D. K. Mikoyan, SRM)*

WILLIAM MUGO KINUTHIA.....1<sup>ST</sup>  
APPELLANT  
SIMON MAINA KARANJA.....2<sup>ND</sup>  
APPELLANT  
**VERSUS**  
REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellants were together with one Samuel Kariuki Mwangi, charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code (*Cap. 63, Laws of Kenya*). Samuel Kariuki Mwangi was acquitted and set free but the appellants were on the evidence convicted and sentenced to death. Aggrieved with both their conviction and death the appellants filed separate appeals (*Nakuru HCCr. Appeal No. 332 of 2009 and Nakuru HC Cr. Appeal No. 333 of 2009*). Because the appeals arose from the same conviction (*Nakuru CM Cr. Case No. 114 of 2007*), they were consolidated and heard as Nakuru HC Criminal Appeal No. 332 of 2007, with William Mugo Kinuthia as 1<sup>st</sup> Appellant, and Simon Maina Karanja as 2<sup>nd</sup> Appellant.

Both Appellants had originally filed Petitions of Appeal dated 15<sup>th</sup> December 2009, but both substituted their Petitions at the hearing of their appeals on 23<sup>rd</sup> March 2011 in terms of Section 350(v) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*). For the 1<sup>st</sup> Appellant the grounds of appeal were:-

**(1) that the learned trial magistrate erred in law and fact when he based and sustained conviction and sentence on the evidence of purported identification/recognition yet failed to find that the same was not supported by a prompt and lodged FIRST REPORT,**

**(2) that the learned trial magistrate erred both in law and fact when he admitted to the evidence of identification/recognition yet failed to find that the same was conducted contrary to the provisions of Chapter 46 of the Force Standing Orders.**

**(3) that the learned trial magistrate erred both in law and fact when he failed to find that the instant case lacked essential and vital witnesses.**

**(4) that the learned trial magistrate erred in law and fact when he convicted the appellant in the instant case and yet failed to find that he was deprived of his constitutional rights.**

**(5) that the learned trial magistrate erred both in law and fact when he rejected the appellant's plausible defence contrary to the provisions of Section 169(1) of the Criminal Procedure Code.**

And for those reasons, the 1<sup>st</sup> Appellant prayed that his appeal be allowed, his conviction be quashed, and sentence be set aside, and he be set free.

Though the 2<sup>nd</sup> Appellant's grounds of appeal were similar, it is necessary for the purpose of record to also set them out in full -

**(1) that the pundit trial magistrate erred both in law and fact when he wholly relied on the evidence of identification/recognition yet failed to find that the same was not proceeded by a lodged and prompt FIRST REPORT,**

**(2) that the pundit trial magistrate erred both in law and fact when he accepted the evidence of identification parade without observing that the same had no credence as it was conducted in contravention of the provisions of Chapter 46, of FORCE STANDING ORDERS.**

**(3) that the learned trial magistrate erred in law and fact when he convicted and sentenced the appellant to death without observing that the evidence adduced was meager and flimsy, and could not base and sustain a conviction.**

**(4) that the pundit magistrate erred in law and fact when he failed to observe that he was deprived of his constitutional rights under Section 72(3)(b) of the old Constitution and Section 49(f) of the new Constitution;**

**(5) that the pundit trial magistrate erred both in law and fact when he convicted him on the basis of the grudge between him and his father.**

**(6) that the learned trial magistrate erred in law and fact when he dismissed her defence contrary to Section 169(1) of the Criminal Procedure Code.**

We have considered the above grounds in respect of both appellants, and apart from the procedural constitutional issues under Section 72(3) (b) of the former and current constitution, raise basically one issue, whether there was evidence upon which the lower court based its decision to convict and subsequently sentence the appellants to death as prescribed under Section 296(2) of the Penal Code.

The appellants faulted the prosecution evidence on the grounds **firstly** that their names were not mentioned when the complaint was first reported to the Police by the complainants (*PW2 and PW1*). **Secondly**, that the purported identification parade was conducted in contravention of Chapter 46 of the Force Standing Orders. **Thirdly**, their defence was not considered by the learned trial magistrate contrary to the provisions of Section 169(1) of the Criminal Procedure Code. We will consider these three issues after disposing the procedural constitutional issue raised by the Appellants.

Section 72(3)(b) of the former Constitution provided that any person who is arrested on suspicion of having committed a crime punishable by death shall be brought to court within 14 days and in respect of any other offence within 24 hours.

Section 49(1) of the new Constitution makes no difference between a capital and non capital

offence. A person suspected of having committed any offence under the Penal Code or other law is required to be brought to court within 24 hours and there is no provision for an explanation of any delay by the prosecution authority to bring such a person to court.

According to the evidence of PW3, the 1<sup>st</sup> Appellant was arrested on 2<sup>nd</sup> January 2007, from Nithangani Village in Thika where he had fled into hiding after the robbery on PW1, his father. He was arraigned or brought to court on 12.01.2007, that is ten (10) days after his arrest. There was no contravention of his rights under Section 72(3)(b) of the former constitution.

The 2<sup>nd</sup> Appellant was likewise according to the evidence of PW3, arrested on 28<sup>th</sup> December 2006. He was not brought to court until 12<sup>th</sup> January 2007, that is to say, on the 14<sup>th</sup> day of his arrest. Taking into account that 1<sup>st</sup> January of every year is a Public Holiday, the 2<sup>nd</sup> appellant was brought to court on the 14<sup>th</sup> day following his arrest. There was therefore no contravention of his rights under Section 72(3) (b) of the Old Constitution.

The provisions of Section 49 (1) of the new Constitution that an arrested person must be informed of the reasons of his arrest *etc* is equivalent to Section 72(3) of the former Constitution. The appellants were arrested on suspicion of having committed a robbery. Again no rights of the appellants were contravened. These grounds of appeal therefore fail.

The substantive issues of identification by recognition, and identification at a Police Identification Parade are questions of evidence, and so is the other procedural question under Section 169(1) of the Criminal Procedure Code, whether the learned trial magistrate in his judgment took into account the evidence by the respective Appellants.

Contrary to the claims by the Appellants, it was the submission by State Counsel that the 1<sup>st</sup> Appellant is a son to PW1 and a brother of PW2. The incident lasted for a long time, and that the two (2) witnesses recognized the appellants. The 2<sup>nd</sup> Appellant was a neighbor who operated a kiosk nearby, and that PW1 the complainant was attacked viciously.

Counsel submitted that the 1<sup>st</sup> Appellant soon after relocated to Thika, and his defence was rightly rejected by the court that the conditions were conducive for identification. There were electric lights on. That PW2 even talked to the 2<sup>nd</sup> Appellant, and that sentence upon the appellants was proper.

As we often say in these matters of appeals, it is both our statutory duty, and a command of precedent, as the first appellate court, to review and re-evaluate the evidence before the lower court and to come to our own findings and conclusions.

The evidence is that of PW1. The date was 27/12/2006. The time was about 9.00 p.m. He had gone out to wash his hands. He saw two men, "*Mugo my son was amongst them.*" There was an electric bulb both inside and outside the shop. He was pushed from the back by someone towards his son. He was struck with a sharp object on the head and both hands, and also buttocks "*by those thugs in front of me.*"

PW1 raised an alarm. He was gagged. "*My son questioned me and said what was I pretending to be*". The thugs tried to push him into the toilet, but that did not work, they pushed him into the shop all the time pushing him from behind, and took Shs 35,000/= from shelf, and being dissatisfied with that they were searching for more, when electric bulb went off and he turned and saw the person demanding for money as one Maina Rasta whom while removing the money attempted to cover his face. "*Maina was well known to me as a person who passed by my shop every morning.*"

PW1 also testified that he had seen 1<sup>st</sup> Appellant before he was attacked, and also picked him and the 2<sup>nd</sup> Appellant at the Police Identification Parade.

In cross-examination by 1<sup>st</sup> Appellant, PW1 testified that he usually closes his shop between 8 -

9.00 p.m. when customers declined, that it was unusual to see his son Mugo, 1<sup>st</sup> Appellant behind the shop, but that this did not surprise him. He testified that both the Appellant and two other sons, Duncan and David were in the service of *free-masonry*, he denied he was framed in the robbery, and the appellant also disappeared from the home after the robbery, and went to Thika from where he was arrested and that he saw the appellants properly that night. He also identified the appellants at the Police Identification Parade.

Upon being cross-examined by Mrs Ndeda for the 2<sup>nd</sup> Appellant, and the 3<sup>rd</sup> Accused PW1 reiterated his evidence in-chief, and cross examination by the 1<sup>st</sup> Appellant, that he was pushed from behind, hit with a sharp object but could not see as he was on the point of falling, who had hit him with a sharp object. His vision was not blurred though he was bleeding from the injury on the face and back of the head.

PW1 testified that he saw Maina Rasta putting on the lights while removing Ksh 20,000/=. Rasta was in my view but shortly. He Rasta wore a jacket with a cap. On seeing Rasta he thought he had been attacked by Mungiki.

On the identification parade, ten men were on the parade. He picked the 2<sup>nd</sup> Appellant Maina Rasta.

PW2 was Daniel Gichuki. He is one of the sons of PW1 and brother to 1<sup>st</sup> Appellant. His evidence was that he was already asleep at about 9.30 p.m. When he woke he run towards his father's shop and met the 1<sup>st</sup> Appellant standing at the door with a panga at the back. As there was an electric light, he saw blood stains, and "*Mugo had his panga and was even unable to talk to me.*"

He saw Rasta 2<sup>nd</sup> Appellant searching through the shelves, and sensing danger he went back to get a torch and call his brother David. He saw the 3<sup>rd</sup> accused (*Mwangi*) who was eventually acquitted outside the shop in the dark where electric light did not reach/cover. He ran to towards his house upon hearing scraping of a metal on the wall. He and the brother screamed and attracted a crowd, and by then they had met their father PW1, bleeding from the head, hands and back.

While PW1 got treatment, he reported the matter to Bahati Police Station where he gave the names of Mwangi (A3) and Maina Rasta (A2), who were arrested on 28<sup>th</sup> December, 2006. He identified accused in the Parade, he had seen all of them at the scene of the robbery. He thought there were 20 men in the parade.

When cross-examined by the 1<sup>st</sup> Appellant PW2 expressed surprise to find the 1<sup>st</sup> Appellant armed with a panga. He feared for his own life. There could have been others hiding in the dark. He raised an alarm was followed by his brother and other villagers. He took his father for treatment, later had his statement recorded and mentioned the names of the accused as suspects. He testified that PW1 really loved 1<sup>st</sup> appellant and gave him many properties but he kept disposing them.

On being cross-examined by Mrs Ndeda for 2<sup>nd</sup> and 3<sup>rd</sup> accused, PW2 testified that he had woken up and instinctively ran towards the shop, in his pyjamas and met the 1<sup>st</sup> Appellant, but he caused him no fear because he was his brother. He also saw Rasta - the 2<sup>nd</sup> Appellant for about 10 seconds. He was wearing a yellow, green and brown stripped woolen cap. He saw his face well. I saw Rasta on the face well. I took details of how he tucked his hair. Maina Rasta is well known to me. He also picked them up at the Police Identification Parade where he said there were 10-20 people.

PW3 described the arrest of the accused including the appellants, and the recovery of a cap from a carrot plantation. The cap was suspected to belong to the 2<sup>nd</sup> Appellant. He confirmed that the appellants were identified by PW1 and PW2, at an Identification Parade done by CIP Nzomo. PW3 testified that PW1 named the suspects.

PW4, was CIP Nzomo who was a former OCS Bahati Police Station, and he conducted the Identification Parade about 50 metres away behind where the witnesses could not see from his office. An Identification Parade is governed by Chapter 46 of the Force Standing Orders, Section 6 thereof. There was compliance with the requirements of that procedure.

There were 8 persons in the parade, the accused being the 9<sup>th</sup> person. The accused took position in the parade, and were identified by PW1 and PW2. The rights of the suspects to call friends or relatives, were explained but they declined to exercise such rights. There was difficulty in getting person's who resembled Rasta, but the parade was conducted properly.

PW5, a Doctor described the injuries sustained by PW1.

On being put on their defence, the 1<sup>st</sup> Appellant gave sworn evidence and pleaded an alibi, that he was in Thika during the material day and time of the crime from where he was arrested and without being given any reason for his arrest. He had many disputes with his father PW1, but had no grudge with PW2 his brother.

The 2<sup>nd</sup> Appellant denied the offence. He was identified at the parade as being the only person with a Rasta. He denied the cap was his.

The 3<sup>rd</sup> accused denied taking part in the robbery and was only identified by PW2. The lower court gave him a benefit of doubt and acquitted him.

### **ANALYSIS OF ISSUES AND EVIDENCE**

The major points raised by the appeal is whether there was evidence upon which the lower court based its conviction and sentence upon the appellants.

We have examined and re-evaluated the prosecution evidence as well as the evidence of the appellants and are convinced beyond any shadow of doubt that the appellants were properly convicted of the offence of robbery with violence, and duly sentenced.

The evidence of PW1 was clear. He recognized the 1<sup>st</sup> Appellant, Mugo his son. He saw him clearly, and Mugo, 1<sup>st</sup> Appellant spoke to him and asked him what he (*the father*) thought he was. Although PW1 was not sure of who struck him with the sharp object, he was sure that he saw his son, the 1<sup>st</sup> Appellant who following the incident ran away to his sister in Thika where he was arrested.

PW2 too testified that he instinctively woke up at about 9.30 p.m. and run towards the shop where he saw his brother Mugo with a panga, and refused to talk to him. He saw the 2<sup>nd</sup> Appellant who was known to him as "*Rasta*".

Both PW1 and PW2 identified the appellants at an identification parade which was conducted by CIP Nzomo who testified that there were 8 people to the parade at three different identification parades, the 9<sup>th</sup> being the accused persons who all took positions which they chose. It is not correct as PW1 and PW2 suggested that there were between 10 - 20 people. The Force Standing Orders Chapter 46, 5-6 (a) refers to at least 8 people in the parade. No prejudice was done to the appellants if there were more than 8 persons in the parade. We therefore find and hold that the identification parade was conducted in accordance with the Force Standing Orders.

As to the defence of alibi, the evidence of PW1 and PW2, father and son, and brother to the 1<sup>st</sup> Appellant is clear that they recognized the 1<sup>st</sup> Appellant, a person whose identity was well known to PW1 as his son, and to PW2 as his brother. The chances of mistaken identification at the scene of the crime are remote.

The 2<sup>nd</sup> appellant was a neighbour who operated a kiosk in the same **Kwa Amos Trading Centre**, and passed by the home and the shop of PW1. The chances of mistaken identification by recognition at the scene of the crime were equally minimal and in this case non-existent.

The appellant's defence of alibi is entirely displaced by the evidence of the prosecution.

For those reasons we have no hesitation in finding that the learned trial magistrate analysed the evidence in terms of Section 169(1) of the Criminal Procedure Code came to the correct conclusion, in finding the appellants guilty and convicting them of the offence of robbery with violence. There is no challenge that the ingredients of the offence of robbery were not proved. But to repeat them, the appellants were armed with a panga - a dangerous weapon with which they inflicted injuries upon PW1 in the course of the robbery of Kshs 63,000/= from the complainant PW1. They were the prime suspects whose names were mentioned when the first complaint or report was made to the Police.

For those reasons, we find no merit in these appeals, we confirm the conviction and sentence upon the appellants and we dismiss the appellants appeals herein.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**

**W. OUKO**  
**JUDGE**