REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 220 of 2006

JOHN KANYI MACHARIA………..…………1st APPELLANT

JAMES IRUNGU NYAMBURA……………..2ND APPELLANT

VERSUS

REPUBLIC……………………………………..RESPONDENT

(An Appeal from original conviction and sentence in NAIVASHA S.P.M.CR.C.NO.910/2001 by Hon M. M. Muya, Senior Principal Magistrate, dated 3rd August, 2001)

JUDGMENT

The appellants were charged with a third person jointly with five counts of robbery with violence contrary to **section 296(2)** of the **Penal code**, one count of being in possession of imitated fire arm contrary to **section 34(1)** of the **Firearm Act** and an alternative count of handling stolen goods contrary to **section 322(2)** of the **Penal Code.**

The facts giving rise to these charges are that on the night of 25th April, 2001 as **P.W.1 Patrick Maina Mburu** (named in the charge sheet as Patrick Maina Thuo) (Maina) drove into his compound, he was ambushed by a gang of six robbers who robbed him of his motor vehicle No. KAL (recorded as KAM in the charge sheet) 986 R, Kshs.5,000.00 and a mobile phone.

According to him, he was able to identify the 2nd appellant as it was him who took the mobile phone from his pocket. He added that he was able to identify the 2nd appellant from security light in his compound. His son, **P.W.10 – John George Mburu Maina** saw 1st appellant in his father's car, from his room. **Isaiah Gichimu Waweru, P.W.2** (Waweru), the complainant in count 2 testified of how his lorry had broken down on the night of 26th April, 2001 at Kinamba at about 3a.m. A motor vehicle came by and the occupants robbed

him and those who were with him namely, **P.W.3 Daniel Ngotho Waweru**, the complainant in count five (5), **P.W.4 Isaac Kiruri Ngugi**, the complainant in count three (3) and **P.W.5, Sammy Kirathi Gichimu**, the complainant in count six (6). They were robbed of a bicycle, raincoat, spanners and a motor vehicle starter. Of all the witnesses, only P.W.5 gave the registration number of the motor vehicle which their attackers had as KAL 986R. But none of the witnesses was able to identify any of the attackers. The robbery was reported to the police and **P.C. John Gitahi (P.W.7)** recovered Maina's stolen motor vehicle.

That very night, P.C. Gitahi received a report of another robbery in Karai area. He also received information of a group of people in the area who had the habit of sleeping during the day and were never seen at night.

Using this information, the police raided a house occupied by five men. They all escaped except the 1st appellant who was arrested. From the house were recovered a bicycle, identified by P.W.4 and P.W.6 as the formers, home made guns, spanners and jackets. The 2nd appellant and the 3rd accused person (at the trial) were arrested later. It was the evidence of **P.W.11, Godfrey Lewis Njogu** (Njogu), the village elder that it was him who reported to the police about this strange group of men; that he was involved in the raid and recovery of the exhibits from the house in question; that only the 1st appellant, who was known to him was arrested; that the house in question belonged to his (Njogu's) relative who had leased it to a man by the name Ngugi who escaped during the raid and has never been seen since.

Two identification parades were conducted by **P.W.8, Inspector Morice Nzioka**, in respect of the 1st appellant and another by **P.W.9, Chief Inspector Clement Gituku** in respect of 2nd appellant. With regard to the first parade, Inspector Nzioka confirmed the first witness whose name he gave as Patrick Thuo, was unable to identify the 1st appellant. However his second witness whose name he did not give was able to identify the 1st appellant.

In respect of the 2nd appellant, P.C. Githuku testified that Patrick Maina Thuo was able to identify the 2nd appellant, while the

second witness, whose name was once again not given was unable to identify the 2nd appellant.

In their defence, the appellants denied involvement in any robbery on the nights in question. The 1st appellant stated how he was arrested while running errands for his parents who had sent him to Karai, while the 2nd appellant maintained that he was arrested while sleeping in his house. Learned counsel for the respondent supported the conviction arguing that the appellants were positively identified.

We have carefully considered the evidence presented by the prosecution witnesses and the appellants at the trial. It is the duty of this court, being the first appellate court, to re-evaluate that evidence afresh and draw its own conclusions on the same.

After the trial of the two appellants and the third accused person, the learned trial magistrate found the first two guilty in all the counts, except count 4. The 3rd accused person was acquitted for lack of evidence. The appellants were, upon conviction sentenced to death in accordance with the law on all the counts. This sentences were ordered to run concurrently. This sentence was irregular and the learned trial magistrate ought to have held the rest in abeyance having convicted and sentenced the appellants in one count.

From the evidence, there is evidence that the victims in this appeal were indeed robbed of their belongings; that the robbers were

armed with home made guns; and that the gang comprised six members. On the basis of this, the offence of robbery with violence was proved. The appellants have raised several grounds in this appeal, but the sole question that was to be determined by trial court and must similarly be decided in this appeal is whether the appellants were part of the robbery gang; that is whether they were positively identified.

No doubt the robbery against the first victim (Maina) took place at about 11p.m. He maintained that he was able to identify 2nd appellant for two reasons; that there was security light in the compound and that it was the 2nd appellant who took the mobile phone from his pocket. In other words there was a good opportunity for positive identification presented by the security light and proximity with the 2nd appellant. His son (John Mburu) also peeped through the window to his room and saw the 1st appellant on the steering wheel of Maina's car. He too was assisted by the security lights and closeness to the car. Then there is the evidence of identification parade in which it is alleged that both the appellants were identified.

This evidence is only in respect of count 1. The victims in the other count were not able to identify the robbers and were also not called to the identification parade. It is therefore not clear on what evidence the appellants were found guilty, convicted and sentenced in

respect of counts 2, 3, 5 and 6. This was clearly due to the failure by the learned trial magistrate to analyze the evidence before
him.

Turning to the evidence relied on to convict the appellants in court 1 it is trite law that a case involving visual identification must be examined very carefully to ensure that any possibility of error is eliminated.

The Court of Appeal in **Cleaphas Otieno Wamunga** Vs. **Republic**, Criminal Appeal No.20 of 1989 at Kisumu stated this position as follows:

> **"What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger."**

We have stated that the prosecution case is grounded on the evidence of Maina and his son who alleged that they saw the appellants with the aid of security lights in the compound and from their proximity to them. Two issues arise from their testimony. The two robbers were together with others. According to Maina, there were six robbers. How was it that the son saw only two and was specifically able to identify only the 1st appellant? The same question

may be asked of the Maina's evidence, why was he only able to see the 2nd appellant, yet it is the 1st appellant who ought to have attracted his attention as he is alleged to have had a gun?

The second and more fundamental question is to do with the security light. In the case of **Kennedy Maina** Vs. **Republic**, Criminal Appeal No.14 of 2005, where the eye witnesses merely stated that they were able to identify the robbers with the aid of light, the Court of Appeal held that that was not sufficient. Evidence of the nature and intensity of lighting must be led. It is also important to state the distance of the source of light to the scene or the size of the compound and the number of lighting points.

Without such evidence in this matter, it is doubtful that Maina or his son were able to positively identify the robbers. Such doubt is resolved in favour of the appellants. Similar doubt is raised in the identification parade. If Maina and his son were not able to positively identify the appellants at the scene, it is doubtful that they were able to identify them at the parade. After all, it is not clear from the testimony of Inspector Nzioka who identified the 1st appellant at the parade. He simply stated that:

> **"I called Patrick Thuo and he was unable to identify the suspect. I called the second witness and he identified the accused by touching"**

The second witness in the trial was Isaiah Gichimu Waweru, who was categorical that he was not able to identify the robbers at the scene and also did not participate in the identification parade.

There was the evidence that the exhibits were recovered from a certain house where the appellants and three others fled from. That house was proved to belong to a relative of the village elder (Godfrey Lewis Njogu) and that it was leased to one Ngugi who also fled and has never been traced. If indeed the appellants were in that house, the recovered exhibits have not been linked to them. Ngugi has not been apprehended to explain how the items came to be in his house.

For these reasons we are convinced that the standard of proof expected of the prosecution was not attained hence we allow this appeal, quash the conviction and set aside the sentence of death. We order that the appellants shall be set at liberty forthwith unless they are lawfully held.

Dated, Signed and Delivered at Nakuru this 19th day of February, 2010.

D. K. MARAGA

JUDGE

W. OUKO

JUDGE