



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 241 of 2007

Joseph Chayuka Amakore.....APPLICANT

Versus

Republic.....DEFENDANT

JUDGMENT

The appellant was charged jointly with two others with two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The appellant was also charged separately with being in possession of a home-made gun without a firearm certificate contrary to **section 21(1)(2)** of the **Firearm Act**.

The two counts of robbery are alleged to have been committed on the night of 27th/28th May, 2005 at K.C.C. Estate Molo, while the home-made gun was recovered on 3rd June, 2005.

The appellant's 1st co-accused person died before the lower court delivered the judgment, and the 3rd co-accused person was acquitted of all the charges. The appellant was however found guilty and upon conviction sentenced to suffer death in the two counts, which were ordered to run concurrently but was acquitted of the offence of being in possession of a home-made gun.

We observe right away that the sentence to death on the two counts of robbery with violence was irregular and the sentence on one count ought to have been ordered to be held in abeyance.

The brief facts giving rise to this appeal can be stated as follows:

On the night of 27th/28th May, 2005, P.W.1, Joseph Bii (Bii) and his wife P.W.2, Leah Chepkurui Bii (Leah) were in their house at K.C.C. Estate Molo when the door to the house was knocked. Their houseboy, Hillary, opened and four people entered. The four were armed with pangas, pieces of metal and swords. They robbed the couple in total Kshs.3,300.00, a television set, its remote control and a radio cassette. The robbers fled after this. One week later, Bii and Leah were called to an identification parade where they were able to pick out the appellant. The stolen items were also recovered from the appellant's co-accused persons.

In respect of the appellant, **P.W.6, Inspector Boniface Gachoka** conducted an identification parade. In the course of his investigations, **P.W.7, P.C. Richard Muthoge** went to the appellant's house and arrested him. He also recovered a toy pistol.

In his defence, the appellant denied involvement in the robbery and attributed his arrest to bad blood between him and the arresting officer who had also arrested him in 2003. He maintained that on 27th May, 2005 he was ill and stayed at home.

We have considered the evidence presented by both the prosecution witnesses and the appellant. Being the first appellate court, we are alive to our duty to re-evaluate that evidence in order to draw our own independent conclusion. The learned trial magistrate was persuaded that the prosecution had proved the

charges of robbery with violence beyond any reasonable doubt. He found no merit in his defence and dismissed it.

In a document erroneously headed Memorandum of Appeal (instead of Petition of Appeal), the appellant has raised five (5) grounds which may be condensed and summarized as follows:

1. that there was no sufficient evidence to find a conviction
2. that the learned magistrate erred in relying on the evidence of family members
3. that the witnesses failed to give a description of the attackers to the police.

The appellant has raised additional grounds in his written submissions. These relate to the failure of the learned trial magistrate to comply with **section 211** of the **Criminal Procedure Code** and failure to find that the charge sheet was defective.

These new grounds, by dint of the provisions of **section 350(2)** of the **Criminal Procedure Code**, have been raised too late in the day and we are not bound to consider them.

First and foremost, we are satisfied that the following facts were proved:

- i) that Bii and Leah were robbed of their household goods and cash
- ii) that the robbers were six (6) in number
- iii) that the robbers were armed with dangerous or offensive weapons
- iv) that they threatened Bii and Leah
- v) that the robbery took place at night (7.30-8pm)
- vi) that it was raining heavily

It is clear to us that the only issue raised in the grounds of appeal is that of identification. Was the appellant part of the gang that robbed Bii and Leah on the night of 27th/28th May, 2005? The courts have dealt with the matter of identification in many cases. We can only reproduce, to emphasise the importance of proper identification, what the Court of Appeal said in **Francis Kariuki Njiru & Others Vs. Republic**, Criminal Appeal No.6 of 2001

“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

In view of the circumstances of this case, namely that there were six robbers; that the robbery took place at night and that it was raining heavily, we have accordingly warned ourselves of the need to scrutinize carefully the evidence of identification.

The prosecution is relying on Bii’s evidence of identification, Leah’s evidence of recognition and the identification parade. Bii stated as follow with regard to the identification of the appellant;

“The incident took 10 minutes. All along, all the electricity light bulbs were on. They never covered their faces until they left..... I identified the people who robbed us as the lights were on..... The 2nd accused is the one who picked the radio cassette from the bedroom. Thereafter he was assisted by the 3rd accused to remove the TV set. The 2nd accused is also the one who took our money from us. After they were arrested, I was called to Molo Police Station where I identified all these three accused in identification parade. I did not know them before. The incident took about 10 minutes and there were powerful lights on.”

In cross examination, he reiterated the above evidence and stated:

“I recorded with the police that I would recognize the persons who robbed us if I saw them.....The 1st and

2nd accused entered first and the 1st went to the left while the 2nd went to the bedroom”

We clarify that the appellant was the 2nd accused at the trial.

Leah on her part testified that;

“There was enough electricity light and we saw them clearly The robbers took about 10 minutes in our house. The 2nd accused removed the TV set with the others’ assistance. The 2nd accused used a panga to cut the TV cable. There was enough light in the house. I later identified all the three in an identification parade. I used to know them by appearance.”

In cross-examination by the appellant, she stated that:

“I know you as I used to see you in the area. I have met you severally in that area. I have met you severally at the junction where I normally board and alight from vehicles.”

We are persuaded from the testimony of these two witnesses that the appellant was among the gang members who robbed them on the night of 27/28th May, 2005. The lower court found the witness credible and that cannot be taken away by the mere fact that they are husband and wife. There is no law that prohibits relatives from being witnesses. Further more we find no reason why the two would have falsely testified against the appellant.

For these reasons, we find that the appellant was identified and recognized. He was also picked out at the identification parade. The appellant’s defence was considered and rejected by the trial court.

This appeal is dismissed.

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

**D. K. MARAGA
JUDGE**

**W. OUKO
JUDGE**