



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 69, 69B, 141 & 96 of 2009 & 100 & 94 of 2006

JEREMIAH ANYONA NYABUGA.....1ST APPELLANT

ZAPHANIA OBANDE NYABUGA.....2ND APPELLANT

JARED MOMANYI BOSIRE.....3RD APPELLANT

HENRY OYORI OBANDE.....4TH APPELLANT

LAMECK NYAGAKA.....5TH APPELLANT

GEORGE MAREGWA OMAE.....6TH APPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

The appellants were jointly convicted by the Senior Resident Magistrate's Court at Keroka of robbery with violence contrary to *section 296(2) of the Penal Code* on each of counts 1 and 2 and sentenced to death as is required by law. They were acquitted on count 3, also a charge of robbery with violence contrary to *section 296 (2) of the Penal Code*. The particulars of Count 1 were that on 13/4/2005 at Mekenene sub location in Nyamira District within Nyanza Province they robbed Nathaniel Nuguti (PW7) of one video, two watches, electric iron box and four radios all valued at Kshs. 35000/= and in the incident used personal violence on the complainant. In count 2, it was alleged that during the incident they robbed Elizaphan Nuguti (PW1) of two mobile phones and one power saw all valued at Kshs. 40,000/= and wounded him. In count 3, they allegedly robbed DN(PW6) of four blankets, four bed sheets and six cups and used violence against her in the same incident.

Some complainants were raped or defiled during the robberies. This is why in count 4, the 1 st Appellant was charged with defilement contrary to *section 145 (1) of the Penal Code* in respect of MM (PW4) aged under sixteen. He was acquitted. In count 5 the same appellant

was charged with rape *contrary to section 140 of the Penal Code* in which the complainant was EM(PW3). He was found guilty, convicted and sentenced to serve 10 years in jail. In count 6 the 2nd appellant was charged with defilement *contrary to section 145(1) of the Penal Code*. The complainant was M.M (PW4). He was acquitted. In count 7 the 2nd accused was charged with rape *contrary to section 140 of the Penal Code*. The complainant was E M (PW3). He was found not guilty and was acquitted.

The appellants were aggrieved by the convictions and sentences above and preferred these appeals. The appeals were consolidated. The 3rd appellant died in prison and his appeal abated.

The brief facts of the case were that PW7 and PW6, husband and wife, were in their house asleep at about 8 .30p.m when they were attacked by a group of robbers. In the home in a separate house were their son (PW1) and grandchildren who included PW3, PW4 and PW5. The attackers were armed with axe, hammer, pangas and torches. They broke into PW7's house. The couple ran out but the attackers caught up with them. PW7 was taken to the house of PW1 where he was used to call him out to open the door and they were all taken back to his house. The house was ransacked and each complainant was beaten and his /her hands tied. PW4 was taken to PW7's bathroom and defiled. PW3 was gang-raped after she was taken outside PW7's house.

PW1's Kshs. 20,000/= was taken. The attackers also took his clothes and power saw. PW6 lost Kshs. 500/=, clothes, Power saw and other items. PW7 lost power saw, clothes, utensils, video deck, iron box, briefcase, two mobile phones, shoes, blankets and socks.

The witnesses testified that both houses were lighted by electricity and outside there was security light. The attackers were strangers and PW1 said they were in police uniform. PW6 and PW7 did not identify their attackers. PW1 said he identified the 3rd and 4th appellants. PW3 identified the 1st , 2nd, 3rd and 6th appellants; PW4 the 1st and 4th appellants; and PW5 the 1st, 3rd , 4th , 5th and 6th appellants.

When the appellants were arrested they were each subjected to an identification parade conducted by Chief Inspector Alex Nga'nga(PW8) the OCS Keroka Police Station. His evidence was that the 1st appellant was identified by PW1, PW3, PW4 and PW5; the 2nd appellant was identified by PW1, PW3,PW4 and PW5; the 3rd appellant by PW1, PW3,PW4, and PW5; the 4th appellant by PW1, PW3 and PW6; the 5th appellant by PW5; and the 6th appellant by PW3 and PW5.

Medical evidence was produced by Jackson Murauni (Pw2), Clinical Officer at Kisii District Hospital to support the injuries, rape and defilement. The investigating officer P.C. Josephine Nyakara (PW9) of Keroka Police Station testified that following the attack some suspects were arrested. She arranged the identification parades in which the appellants were picked by the witnesses. The witnesses had, told her they could identify their attackers if they saw them again.

Each appellant denied he was in the attack. The 1st to 4th appellants each made unsworn defence while 5th and 6th gave sworn testimonies. The 5th appellant called his wife Janet Nyagaka (DW7) as witness.

It is upon in this evidence that the trial court convicted the appellants as above. The appellants' major concern was that there was insufficient evidence on which the trial court could base its finding that they had been positively identified. They also complained that the identification parades had not been properly conducted. The appellants pointed out that none of the complainants described his or her attacker to police, and therefore that nothing they told police helped in their arrest. Mr. Kemo for the State was of the view that the appellants had been convicted on sound evidence. He submitted that the attack had taken a long time and the houses and home of PW7 were sufficiently lit by electricity and therefore that the circumstances favoured a proper and correct identification; that each appellant was properly identified to have taken part in the commission of the respective offences.

This is the first appellate court. Its responsibility is to reconsider and re-evaluate all the evidence that was tendered before the trial court and come to its own conclusion as to whether such evidence supported the conviction, bearing in mind that the trial court was advantaged because it saw and heard the witnesses. (See *Okeno.V.Republic* [1972] EA 32).

It has been indicated in the foregoing that the houses and home of the witnesses were lit well and the attack took about 3 ½ hours, between about 8.30 p.m and midnight. The attackers were, however, not known to the complainants before the attack. This was therefore a case of identification at night. There is no indication in the judgment of the trial magistrate that the usual caution about such evidence was considered to make sure that the evidence was water-tight and safe to justify a conviction. (See *R.V.Eria Sebwato* [1969] EA 174). The trial court indicated it believed the prosecution witnesses as against the defence version. However, it did not bear in mind that a witness may be honest but mistaken (see *Roria .V.Republic* [1967] 583) and that a number of honest witnesses could all be mistaken (see *R.V. Turnbull and others* [1976] 3 ALL ER 549).

The trial court did not keenly test the evidence of the complainants regarding identification. For instance, PW4 told court that she identified only the 1st and 4th appellants in the attack. When she went to the parade conducted by PW8 she picked the 1st, 2nd and 3rd appellants as having been in the attack. The 4th appellant was in the parade and she did not pick him. She had not identified the 2nd and 3rd appellant in the attack and yet picked them in the parade as having been in the attack. PW3 testified that she identified the 1st, 2nd, 3rd, 4th and 6th appellants in the attack. When she went to the parade she picked the 1st, 2nd, 3rd and 6th appellants. The 4th appellant was in the parade but she was unable to pick him. PW5 said he identified the 1st, 3rd, 4th, 5th and 6th appellants in the incident. She went to the parade and picked those plus the 2nd appellant. If the trial court did not notice these discrepancies then it is difficult to find the convictions were safe.

It should have been pointed out, and it wasn't, that the appellants were arrested about five months after the attack. It was difficult for the complainants to recall the faces of their attackers after that length of time, especially when the complainants did not describe any for their attackers to police and would not know how the police were able to arrest the six appellants and they were all coincidentally identified by the complainants to have been in the attack. (see *Republic .V. Mohaed Bin Aloji (1942) EACA 72*).

Our own consideration of the recorded word has brought us to the conclusion that the appellants were not convicted on either sound or safe basis. The result is that we allow the appeals in their entirety. The convictions are quashed and sentences set aside. The appellants are ordered released from custody unless they are otherwise being lawfully held.

Dated, signed and delivered at Kisii this 3rd day of February, 2010.

D.MUSINGA

JUDGE

A.O.MUCHELULE

JUDGE

3/2/2010

Before A.O.Muchelule-J

Court clerk-Bibu

Mr. Mutai for State

Appellants-present

COURT: Judgment delivered in open court.

A.O.MUCHELULE

JUDGE

3/2/2010

