



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Criminal Appeal 23,20, 21& 22 of 2009**

SIMON MWANGI MWATHI.....1<sup>ST</sup> APPELLANT  
DAVID MOGAKA MAKORI.....2<sup>ND</sup> APPELLANT  
JAMES MUREITHI KIMOTHO.....3<sup>RD</sup> APPELLANT  
KEN GITHU WACHIRA.....4<sup>TH</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nyahururu  
S.P.M.CR.C.NO.3460 of 2007 by Hon T. M. Matheka, Ag. Principal  
Magistrate, dated 12<sup>th</sup> January, 2009)

**JUDGMENT**

The four appellants whose appeals were consolidated before the hearing were charged jointly with a 5<sup>th</sup> person before the court below with four counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. They were tried and convicted but the 5<sup>th</sup> suspect was acquitted for lack of evidence. The appellants were not lucky and were sentenced, upon conviction to the mandatory death sentence. They were aggrieved and preferred this appeal citing various grounds which may be summarized as follows:

- 1 that conditions for accurate identification were difficult
- 2 that the identification parade was flawed
- 3 that the prosecution evidence was inconsistent
- 4 that the case against the appellants was not proved beyond doubt
- 5 that failure to call Peter Kabiru as a witness was fatal
- 6 that failure to call arresting officer(s) in respect of some of the appellants was fatal
- 7 that the learned magistrate erred in failing to consider the defence of the appellants
- 8 that the 3<sup>rd</sup> appellant, James Mureithi Kimotho's constitutional rights under **section 72(3)** were violated

Learned counsel for the respondent supported the conviction on the ground that there was sufficient evidence of identification of the appellants.

Being the first appellate court, before we consider those grounds and submissions, we are enjoined to re-evaluate the evidence on record in order to arrive at our own independent conclusion bearing in mind that we did not see or hear the witnesses. See **Soki Vs. Republic** (2004) 2KLR 21.

The evidence presented before the trial court may be summarized as follows:

On the night of 25<sup>th</sup>/26<sup>th</sup> April, 2007 a gang of between four (4) and eight (8) member struck a family at Kahuruko Trading Centre, Nyandarua robbing them of cash and personal effect and also inflicting bodily injuries.

**P.W.1, Samuel Mitabo Muraguri (Samuel)** and his wife, **P.W.2, Pauline Ngina Wangondu** were in their house sleeping when at about 2a.m. they heard their dogs barking. Samuel took a torch, opened the door, flashed the torch light and saw eight (8) people. When he realized that the people were up to no good, he quickly retreated into the house and locked the door. Using stones, the robbers broke the door and 3 of them entered the house. Samuel and Pauline were beaten senselessly and robbed of mobile phones plus clothes and cash. Thereafter, the attackers left.

Another victim **P.W.3, Ruth Njeri (Ruth)** narrated how on that very night, the door to her house was forcibly opened by robbers demanding to be given money. They ordered her to take them to her mother-in-law, **P.W.5, Anne Wambui (Anne)**. She complied. At Anne's house, four (4) of the gang members robbed Anne of cash and 2 watches. While still harassing Anne and Ruth, there were screams from outside which scared the robbers away. The screams were from Samuel and Pauline, a son and 2<sup>nd</sup> daughter-in law to Anne, respectively.

A report was made to the police and the victims rushed to the hospital for treatment. Investigations were immediately launched and five suspects including the four (4) appellants arrested. An identification parade was conducted in respect of 3 suspects.

The 1<sup>st</sup> appellant who was the 2<sup>nd</sup> accused person at the trial gave an unsworn statement in which he blamed his arrest and subsequent arraignment in court to **P.C. Kimolo (P.W.7)**. That P.C. Kimolo owed him some money which he did not intend to pay back. When the 1<sup>st</sup> appellant demanded the repayment, P.C. Kimolo locked him up in the cells. He was eventually charged with the offence of robbery, the details of which he did not know.

The 2<sup>nd</sup> appellant blamed his woes on Anne's other son, Peter Kabiru, who did not approved of the relationship between the 2<sup>nd</sup> appellant and a lady called Esther Njoki. Peter Kabiru using P.C. Kimolo had the 2<sup>nd</sup> appellant arrested and charged with the offence in question.

The 3<sup>rd</sup> appellant blames his problems on Cpl. Hassan who demanded Kshs.300/= from him. When he told him that he did not have the money, Cpl. Hassan placed him in the police cells for four (4) days and eventually had him charged with the offence in question.

Finally the 4<sup>th</sup> appellant's evidence was that Samuel caused his arrest as he (the 4<sup>th</sup> appellant) had a relationship with his (Samuel's) daughter, Anne Wambui.

The learned trial magistrate considered this evidence and found that the prosecution evidence was overwhelming; that the robberies in question were committed by the appellants, convicted them and as we have stated, sentenced them to death.

This appeal turns on the question of identification and we shall endeavour to consider the evidence of each eye witness in this regard and the police identification parade. It is not denied that the robbery occurred late in the night between 12 mid-night and 2a.m. According to Samuel, he was able to identify the robbers using a torch and moon light

when he opened the door to find out why the dogs were barking. He saw eight people and confirmed that they were known to him, identifying the appellants and the accused person who was acquitted; that they are from his village; that upon reporting the incident, he told the police that he had been attacked by people known to him; and that he was able to pick them out at the identification parade. He also confirmed that there was no light inside his house.

Three issues arise from this evidence. Samuel was only able to see the assailants with the aid of torch light and also the moonlight. What he did not tell the court was how bright the torch and moonlights were; how far from the robbers he was standing while flashing the light and how long he watched them.

Secondly, the first report to the police was made by Peter Kabiru and not Samuel. Peter reported, according to the Occurrence Book, that the attackers were not known. The said Peter Kabiru was not called to testify. The other issue is, if Samuel knew the appellants and was able to identify them being village mates, why did he not supply the police with their names and why were they not arrested the following day? We may further ask why was an identification parade necessary for persons who had been recognized? We own to them.

We turn to the evidence of Pauline. It was her evidence that she was able to see 1<sup>st</sup> appellant from a mirror reflection and the torch lights. Again we have our doubt as to the credibility of this piece of evidence. The witness recorded her statement immediately but failed to mention that she could identify one of the robbers. She was only told of the 1<sup>st</sup> appellant's name after the identification parade. The identification parade itself was flawed as confirmed by Pauline's evidence that after some suspects were arrested, she was called to the police station where she saw the 1<sup>st</sup> appellant a few days before the parade. That was irregular as a witness is expected to see the suspect only at the identification parade.

The evidence of Ruth is equally incredible in so far as identification is concerned. According to her, she was also only able to see the 1<sup>st</sup> appellant with the aid of solar-powered light. She later identified him at the police identification parade. We cannot understand why Ruth was only able to identify the 1<sup>st</sup> appellant out of the four people who had gone into her house. She did not point out any unique features on the 1<sup>st</sup> appellant. She also maintained that the 1<sup>st</sup> appellant was called Jeremy, a name she learnt from the police, when clearly that is not the 1<sup>st</sup> appellant's name.

Ann also testified that with the aid of electric light, she was only able to identify the 1<sup>st</sup> appellant out of the four (4) gang members. Again no reason or particular feature has been pointed out why it was easier to identify the 1<sup>st</sup> appellant. According to P.W. 4, the parade officer, the witness was able to identify the 1<sup>st</sup> appellant by his voice yet the witness in her evidence was categorical that she identified him by his appearance

Apart from the evidence of Samuel, that he knew all the attackers and his identification of the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant, there was no other evidence against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants.

We come to the conclusion that the conditions prevailing at the time of the robbery were not favourable for positive identification.

For those reasons, we allow the appeal, quash the conviction and set aside the death sentence imposed on the appellants. They shall all be set at liberty forthwith unless lawfully detained.

**Dated, Signed and Delivered at Nakuru this 9<sup>th</sup> day of July, 2010**

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

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