



**CRIMINAL**

Ø Law on identification under difficult circumstances

Ø When an accused is convicted on one capital offence sentence in respect of any other subsequent charges should be in abeyance

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL CASE NO. 17 OF 2008**

**MICHAEL KATHEWA LAICHENA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH CRIMINAL APPEAL CASE 16 OF 2008**

**MARTIN MUGAMBI KARINDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the appeal against the judgment of Mr. A.K. Kaniaru Principal Magistrate in Nkubu***

***Criminal Case No. 287 of 2003 delivered on 3<sup>rd</sup> June 2008)***

**JUDGMENT**

Both appellants were charged with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. After trial before the Principal Magistrate Nkubu the appellants were convicted. The first appellant was convicted on count one and two and the second appellant was convicted on count two. They were both acquitted of the third count for lack of evidence. The first count relates to the robbery committed against PW2. The second count relates to the robbery against PW1. The appellants

have appealed against their conviction and sentence. The Court of Appeal in considering the duty of the first appellant court in the case **Robert Onchiri Ogeto Vs. Republic** Criminal Appeal No. 1 of 2004 had this to say:-

***“This is a first appeal and the court has a duty to reconsider the evidence which was before the superior court; evaluate the evidence and draw its own conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses – see Okeno Vs. Republic [1972] EA 32, Ngui Vs. Republic [1984] KLR 729 and Njoroge Vs. Republic KLR 197. Nevertheless, a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on misapprehension of the evidence, or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision – Chemagong Vs. Republic [1984] KLR 611; Kiarie Vs. Republic [1984] KLR 739.”***

We approach this appeal with that duty in mind. The prosecution called a total of 7 witnesses. PW1 recalled that on the 9<sup>th</sup> March 2002 at 7pm she and her husband were in their shop at Kianjai. Her husband is PW3. At that time, some people entered the shop. They jumped over the table which was used as the counter. She noted that they were armed. One of them had a gun and a knife whilst the other one had a panga and a rungu. They approached where PW1 and her husband were and at that point her husband ran out through the backdoor. PW1 tried to follow him but she was caught by the appellants. The first appellant stabbed her in the stomach and asked for money. She gave him Kshs. 2,000/= and although she pleaded with him not to stab her again he stabbed her and she became unconscious. She was admitted in hospital following that attack for three months. She identified those two people who entered their shop as the appellants. She used to see them because they came from the same area. They also used to go to her shop to buy cigarettes. She had operated that shop for ten years and had known the appellants for that period. She stated that the shop had electric light. She responded to cross examination by the first appellant by saying that he had a gun and a panga. She even was able to name the first appellant as Mugambi. She was also able to name the second appellant as Kathewa. She stated that the second appellant shot in the air which led to people running away. On being re examined she repeated that the appellants were well known to her and that she also knew the appellant's parents. PW2 was also a businessman operating a shop at Kianjai Market. His shop is opposite the shop of PW1. The shops are divided by a road. They are at a distance of about 10 meters from each other. On 9<sup>th</sup> March 2002 whilst he was in his shop he heard gun shot in the air and saw robbers entering the shop of PW1. When he realized they were robbers he hid himself at the back of his shop. After five minutes, he came out of hiding thinking that the robbers had gone. It was at that time that one of the robbers entered his shop. The lights were on at the time. He noted that this person had a gun. He recognized him as the first appellant. He too had known the appellant for over ten years. The first appellant comes from his home area. The first appellant demanded for money but PW2 was able to get away through the backdoor. He left the appellant there. Later he realized that the appellant took from his drawer Kshs. 5,000/=. He too stated that the first appellant was called Mugambi. PW3 was a husband of PW1. He recalled that on the material date he was in the company of PW1. He heard gunshots outside. He then heard somebody commanding people to lie down. He rushed through the backdoor and ran away leaving behind PW1 in the shop. Later when he returned to the shop, he found that his wife PW1 had been stabbed twice in the stomach. PW6 was the clinical officer who gave evidence to the effect that PW1 was admitted at Tigania Mission Hospital. At the hospital, she was operated on because the stabbing had affected her liver. PW7 was the police officer. He was the officer in the company of others that arrested first appellant. At first when they approached the first appellant he gave his name as Mwenda. However, his neighbours confirmed that he was called Mugambi. It was the first appellant who led the police to the residence of the second appellant. At the second appellant's home the police were able to recover a sub machine gun and some bullets. The second appellant was arrested subsequently. The lower court on receiving the prosecution's evidence put the appellants to their defence. In his defence, the first appellant stated that when he was arrested he was taken to the DCIO who asked him for a money making machine and paper that was used. When he failed to give that machine, he was charged with this offence. The second appellant in his defence stated that he was charged because he requested the chief to return to him second hand clothes that he had confiscated.

As can be seen, PW1 and 2 identified the appellants when the robbery took place in their respective premises. The appellants submitted that the evidence of identification cannot be relied upon because it was by a single identifying witness under difficult circumstances. The Court of Appeal in the case **Abdalla Bin Wendo & Another Vs. Republic** [1953] 20 EACA 166 set out the principals that a court should apply when receiving evidence of a single identifying evidence under difficult circumstances. The Court stated in that case:-

***“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult.”***

It will be recalled that the prosecution witnesses talked about there being electric light when the robberies took place. The witnesses also knew the appellants for period in excess of 10 years. The appellants were customers in the those shops that they robbed. The first appellant must have been in a very close proximity to PW1 when he stabbed her. PW1 therefore could not have had any difficulty in identifying him. But it should be noted that this is not a case of identification but rather it is a case of recognition. Recognition was said to be more reliable in the case **Anjononi Vs. Republic** [1980] KLR 59 where it was stated:-

***“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported).”***

We have considered the appellants defences and we find that they did not detract the weight of the prosecution's evidence and we therefore reject them. We find that the prosecution met the required criminal standard of proof. The appellants were properly convicted by the lower court. We only wish to mention that the trial court erred in sentencing the first appellant to hang twice in

count one and two. The trial magistrate should have sentenced the first appellant to death on count one and in respect of count two the sentence should have remained in abeyance. This was well stated in the case Kennedy Kawai Abdallah Vs. Republic Criminal Appeal Case No. 42 of 1999 where the Court of Appeal stated:-

***“There was no need to sentence him to death on the other counts. The usual practice in such a case is to impose a sentence only on one count and leave in abeyance the sentence on the other counts. The reason for this is that a man cannot be hanged twice over; again if there is a successful appeal on the count on which sentence has been imposed the appellate court can impose sentence on any of the remaining counts if the conviction thereon is upheld.”***

In the end, we dismiss the appellant's appeal on conviction. In respect of sentence, we confirm the first appellant's sentence of death on count number one but in respect of count two, we order that it be held in abeyance. We dismiss the appeal in respect of the sentence by the second appellant.

Dated and delivered at Meru this 29<sup>th</sup> day of October 2010.

LESIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 29<sup>th</sup> day of October, 2010.

In The Presence Of:

Kirimi/Mwonjaru ..... Court Clerks

Both Appellants ..... Present

Mr. Kimathi ..... For the State

LESIT, J.

JUDGE

KASANGO, M.

JUDGE

