



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI  
CRIMINAL APPEAL 172 OF 2007**

**CHARLES KARIUKI MURE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Nyeri in Criminal Case No. 4839 of 2006 dated 13<sup>th</sup> June 2007 by L. W. Gitari – S.P.M.)*

**J U D G M E N T**

**Charles Kariuki Mure**, the appellant, has come to this court on appeal, challenging his conviction and sentence by the Chief Magistrate's Court at Nyeri over two counts of robbery with violence contrary to section 296(2) of the Penal Code. In convicting the appellant, the trial magistrate, L. W. Gitari then as a Senior Principal Magistrate relied on visual identification and mode of arrest of the appellant and credibility of the witnesses. But the appellant in his home drawn Petition of appeal, which he has intitled "GROUNDS OF APPEAL", complains that his conviction was based on insufficient evidence, failure to call crucial witnesses and to introduce certain exhibits. Had this been the only grounds of appeal on record, this appeal would have been a non-starter. But there is "Amended Grounds of Appeal and written submissions" filed by the appellant on the eve of the hearing of the appeal. In this amended grounds of appeal and written submissions, the appellant laments that the trial magistrate erred in both law and fact in convicting him without eliminating the possibility that he was a victim of mistaken identity, that the learned magistrate was unnecessarily impressed by his mode of arrest, his defence was rejected without proper basis and finally that the case against him was not proved beyond reasonable doubt as required by law.

The charges against the appellant arose out of an incident that occurred on 30<sup>th</sup> September 2006 at Gatei village in Nyeri District. According to the evidence adduced before the trial court, that date the complainants in counts one and two, **David Maina Ndegwa** (PW1) and **John Kireri Mugwe** (PW2) respectively were at Kerichu village at a place called Gwa Gachanja when they were confronted by two people who claimed to be policemen. It was about 8.30 p.m. when they had stopped their vehicle and were inspecting the road to establish whether it was passable as it had rained when the two men struck. One was armed with a panga and the other a pistol. The two men ordered the complainants to sit down. They demanded money. One of them was positively identified by PW1, PW2 and **Eunice Wambui Maina** (PW3) as the appellant herein. In fact it is the appellant who hit PW1 with a panga as he demanded money. In the process PW1 was robbed of one mobile phone make Sagem NYX 5D valued at Kshs.15,000/= cash Kshs.3000/= and a wrist watch make Seiko 5 valued at Kshs.2500/=. PW2 was robbed one mobile phone make Alcatel 380 valued at Kshs.7000/= and cash Kshs.1000/=. The two men kept harassing PW1 and PW2 by constantly ordering them to stand up and sit down and beating them. When done they asked them the persons they had left behind in the motor vehicle. When told that they had women and children, they ordered them towards the motor vehicle. On reaching the motor vehicle they again ordered PW1 and PW2 to lie down. They proceeded to demand money and mobile phones

from PW3 and the mother to PW1. At this juncture PW3 screamed loudly. PW1 turned round and saw one of the men was about to cut his mother. He launched at him and managed to subdue and disarm him. The accomplice took to his heels. The appellant tried to run away as well but PW1 managed to get him. Members of the public and police came to the scene in response to the screams. They found the appellant being held by PW1, PW2 and PW3 and proceeded to administer mob justice or is it injustice on him. He was however rescued by police (PW4) and escorted to Kiganjo police station and was later charged. PW1 and PW2 were referred to hospital for treatment. Later P3 forms were filled by **Dr. Muray Joram** (PW5) which showed that they had sustained bodily harm.

The appellant gave a sworn statement of defence and denied the charges. He stated that on the material day at about 8.15 p.m., he was coming from a tea factory. On reaching Gachanja bridge, a vehicle passed him and after 5 metres stopped. When he reached the motor vehicle, someone therein called him by his nickname "Americana". When he asked who it was, he was immediately hit on the right side of the head with an iron bar and he fell down. He screamed and members of public responded to the screams. On asking what was going on, those assaulting him responded that he was a thief. One of them took out pliers and pulled out one of his teeth. Members of public started beating him and he sustained injuries on the face. As far as he was concerned this case was framed against him by the complainants so as to cover up the injuries they caused him way back on 14<sup>th</sup> November 2004 when they broke his leg.

At the conclusion of the trial, the appellant made oral submissions in which he carefully analysed the evidence of all the witnesses and concluded that the evidence was contradictory in material aspects, that PW1's mother, members of public who responded to the screams were not called as witnesses and that the evidence, taken as a whole, did not prove the charges he faced beyond reasonable doubt.

The trial court as we have already pointed out however did not agree with him. The trial court concluded that the appellant was arrested at the scene, that PW1 was a credible and reliable witness and that there was no particular number of witnesses required to prove a fact. On the basis of that evidence, the trial court was satisfied that the evidence against the appellant was overwhelming and proceeded to convict and sentence him to mandatory death sentence.

However, the appellant was charged with two counts of robbery with violence. In convicting the appellant however, the learned magistrate did not indicate on which count(s) she had convicted the appellant. It is always desirable that where an accused person faces more than one count and conviction is entered, the trial court should indicate on which count(s) the conviction has been entered.

Our reading of the judgment however suggests that the learned magistrate found the appellant guilty on both counts. She then sentenced him to death on both counts. Does that then mean that the appellant should suffer death on each count? That is quite anomalous and we do not see the practicability of it. The usual practice which this court has on several occasions pointed out to the subordinate court, is that where an accused has been convicted on more than one capital offence in the same trial, he should be sentenced only on one count as a person cannot be hanged more than once. See generally **Boru & Another v/s Republic (2005) KLR 649**. We shall revert and or revisit this issue later in this judgment.

In support of his appeal, the appellant put in written submissions which ran into eight pages which we have carefully read and considered.

The appeal was opposed. **Ms Ngalyuka**, learned state counsel in opposing the appeal submitted that the appellant was arrested at the scene by the complainants. He was therefore properly identified by PW1, PW2 and PW3. His defence was properly considered and the same was dismissed as an afterthought.

As already stated, this is a first appeal and that being so, the appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have this court's own decision on the evidence – See **Okeno v/s Republic (1972) E.A. 32** and **Mwangi v/s Republic (2004) 2 KLR 28**.

Much as the appellant faults his conviction on mistaken identity, we are of the view that his conviction really turned on the chase and arrest of the appellant at the scene of the crime so soon after the

commission of the offence. Had the conviction of the appellant actually turned on visual identification of the appellant, we would have had absolutely no qualms allowing this appeal for conditions obtaining then did not favour positive identification of the appellant. According to the prosecution case, PW1, PW2 and PW3 and the mother of PW1, together with the children of PW1 & PW3 were travelling in their motor vehicle registration number KAB 255F, Toyota Hilux double cabin. On reaching Gwa Gachanja area, they stopped the motor vehicle to go and see if the road was passable as it had rained heavily. PW1 accompanied by PW2 did the inspection. As they proceeded they reached a place with a slight corner and where the lights from their motor vehicle could not illuminate. It was then that two men suddenly emerged, ordered PW1 and PW2 to sit down. They harassed them by beating them up and demanding money and the mobile phones. Thereafter they ordered them back to the motor vehicle and again ordered them to sleep on the ground until such time that PW1 gained Dutch courage, launched at one of them who had a panga and disarmed him. They all then scampered. However PW1 was fast enough as he pursued and arrested the appellant.

From the foregoing it is quite clear that none of the three witnesses (PW1), PW2 & PW3) would have been in a position to identify any of the attackers. It was dark and yet there is no description of any light that would have assisted the three witnesses to identify any of the two attackers. Yes PW1 testified that he had a torch. However he did not indicate that he directed it at any of the attackers. PW2 talked of moonlight. However he did not talk of its intensity. There was also light being illuminated by the headlights of PW1's motor vehicle. However from the testimony of PW1 & PW2, those lights were unable to illuminate where they were confronted by the two attackers since it was in a corner. Indeed the two witnesses all proclaimed that they were unable to see the faces of their attackers because of the darkness. PW3 was not of any help either. For immediately the robbers came to the motor vehicle, one pointed something like a gun at her neck. That being the case, there is no way that this witness would have been in a position to see the robber sufficiently to be able to identify him subsequently. There is no indication even in the evidence that there was any light within the motor vehicle.

The English case of **Republic v/s Turnbull and others (1976) ALL E.R. 549**, enunciates the test to guide the court when considering the correctness of identification of an accused person. The case has been cited severally by courts in this country and there is no doubt that the English approach has been accepted without variation by courts in this country. Bearing in mind the test in that case, we are not satisfied that the circumstances obtaining at the scene of the robbery under consideration could not have favoured a correct visual identification of the appellant.

However, the appellant's conviction turned on the chase and arrest of the appellant immediately after the commission of the offence and right at the scene of crime. The appellant does not deny being at the scene of crime. His defence was that he was on his way home when he found himself at the scene of crime. He claims that PW1 framed him with the case because of previous disagreement. That in fact the case was to cover up the fact that PW1 had assaulted him and broken his leg. We are unable to buy this story just like the learned magistrate did not. There is credible evidence that the robbers were two. Both witnesses who testified on the issue said as much. If indeed the case was a frame up why would the witnesses have romped in two robbers and not just the appellant. There is evidence given by PW5 to the effect that both PW1 and PW2 were injured in the cause of the robbery and tendered their respective P3 forms in evidence. Those P3 forms show the nature and extent of the injuries sustained by these two witnesses in the course of the robbery. We do not think that the two witnesses would go to the extent of injuring themselves merely to frame the appellant with the charges. Further there is no evidence that PW1, PW2 and PW3 knew that they would meet the appellant at the scene of crime, so as to frame him. And even if it was indeed a question of frame up could it have taken the presence of PW3, PW1's wife and to do so. Further it is also strange that villagers who answered the distress call and happen to know the appellant instead of rescuing him were the ones who went on rampage and beat him and threatened to burn him up. To our mind, it is no coincident that the appellant was found at the scene. He was upto no good. PW1 claimed that he did not know the appellant before the incident. We have no reason to doubt him. In any event the basis for the alleged grudge between the appellant and PW1 was not established. What was behind the alleged breaking of the appellant's leg by PW1? To our mind that this was a make believe story and an afterthought.

We note that the prosecution did close its case before calling PW5, the Doctor who attended to the complainant. However despite having closed its case, the prosecution subsequently did call PW5 pursuant to the provisions of section 150 of the Criminal Procedure Code. According to the appellant, such procedure could only be invoked before the close of prosecution case. Nothing can be further from truth. A careful reading of the section is to the effect that a court may at any stage of a trial or other proceedings call any person as a witness. It is not limited to the stage before the prosecution closes its case as the appellant wants this court to believe. So there was nothing illegal in what the prosecution did in this case. In any case even if it was wrong, what the prejudice did the appellant suffer? After all he went to cross-examine the witness.

All in all we are satisfied that the appellant participated in the crime, was chased and arrested at the scene of crime. There is no evidence to suggest that during the chase PW1 and PW2 ever lost sight of the appellant. It has been said time and again that evidence of chase and eventual arrest of the appellant without ever losing sight of such an appellant is good evidence and it can on its own find a conviction. We have no doubt that the same situation obtains here.

Moreover, we as a first appellate court in re-appraising the evidence tendered we have to appreciate that we did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses and we have to make due allowance for that. See **Soki v/s Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2002) 1 KLR 756**. For that reason, we should not interfere with the findings of the trial court based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it is shown that the findings of the trial court are erroneous in law. See **Republic v/s Oyier (1985) 2 KLR 353** and **Buru v/s Republic (2005 2 KLR 533)**. In this case the learned magistrate made an emphatic finding “..... *I had a chance to see PW1 and I was satisfied that he was telling the truth. He struck me as credible and reliable .....*” This is a finding on the credibility of a witness. We cannot disturb it unless it is shown that the trial court had no basis coming to such a finding. Nothing has been said to let us believe that the trial court erred in reaching such decision. That being the case, the learned magistrate was right in appreciating and acting on the evidence of PW1 to find the conviction. In any event, the evidence of PW1 was appropriately corroborated in material particulars by PW2, PW3 and PW4.

With regard to witnesses who were not called, as a matter of law, there is no requirement that any number of witnesses be called to prove a particular fact. See for instance section 143 of the Evidence Act. We are not aware of any requirement that a case cannot be proved on the evidence of a single witness. Indeed it is not the quantity but quality of the evidence that counts. In the circumstances of this case we do not see what would have been gained by the prosecution calling members of the public who responded to the distress call and or PW1’s mother who was in the vehicle. With regard to the members of public, we would agree with the learned magistrate that, by the time they came to the scene, the offences had been committed, the appellant chased and arrested. Their evidence could not therefore have bolstered the prosecution case any further. As for PW1’s mother’s evidence, the evidence of PW1, PW2 and PW3 sufficed.

On the whole, this appeal is lacking in merit and we order that it be and is hereby dismissed in its entirety.

As we said at the beginning of this judgment, the mode of sentencing was strange because a person convicted and sentenced to death can only be hanged once and not twice over. There need only have been one sentence of death on one count whilst the other is left in abeyance. Accordingly we correct that error. The appellant shall suffer death in respect of count 1. The sentence in respect of count II is thus held in abeyance.

***Dated and delivered at Nyeri this 30<sup>th</sup> day of January 2009***

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**