

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 49, 50, 51 & 52 of 2006

BENARD KAHARA GACHERU

DAVID KURIA MUTURA

PATRICK MUTURI MBUGUA

EPHRAM MUYA MBUGUA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appeals herein were consolidated and heard together on 4th December, 2008. Ms. Nancy Njoroge appeared for the 1st, 2nd and 3rd appellants who were the 1st, 2nd and 3rd accused persons in Criminal Case No.3246/2004). The 4th appellant, who was the 4th accused in the same criminal case appeared in person at the hearing of the appeal. The four Appellants were charged before the Senior Resident Magistrate, Molo with three counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 17th day of December, 2004 at Kasarani Estate, Elburgon in Nakuru district jointly with others not before court while armed with pangas and rungun robbed Harrison Muiruri (Count 1), Jeremia Mwenjera (Count 11) and Joseph Muiruri Ng'ang'a (Count III). They are said to have used actual violence on the said robbery victims in the course of robbing them. In the 1st count, Harrison Muiruri is said to have been robbed of K.Shs. 3,850/= in cash, and a Nokia mobile phone valued at K.Shs. 10,500/=. Jeremiah Mwenera is said to have been robbed of K.Shs. 80/= and a tiger head torch valued at K.Shs. 200, while Joseph Muiruri was robbed of K.Shs. 3820/= in cash, one Aucma T.V., one supersonic video deck, all valued at K.Shs. 20,820/=.

After a full trial, in which the prosecution called nine witnesses, all the four appellants were acquitted of the charges under count 1 but were convicted in relation to count 3. The 1st, 3rd and 4th appellant were acquitted of the charges in count 2 but the 2nd appellant alone was convicted in respect thereof. The appellants were sentenced to suffer the death as prescribed by the law. They have now appealed against both the conviction and sentence on the grounds that the evidence as to identification was wanting in that no evidence of positive identification was adduced before the trial court by any of the prosecution witnesses. They contended that the evidence adduced was full of contradictions and inconsistencies which meant that the same was not sufficient to sustain a conviction.

Submitting for the for the 1st, 2nd and the 3rd appellants, Ms. Njoroge argued that, in view of the said contradictions and discrepancies, the learned trial magistrate ought to have accorded the appellants the benefit of doubt, instead of convicting them, since there was no basis for to finding that the offence had been proved beyond reasonable doubt. The 4th appellant adopted the submissions made by counsel for his three co-appellants fully and relies on them entirely to support his own appeal. The State, represented by the Learned State Counsel Mr. Mugambi concedes the appeals as regards the conviction and sentence

under count 3 wherein all the appellants were convicted but opposes the appeal in relation to count 2 wherein the 2nd appellant alone was convicted.

We have, as is required of us as the first appellate court, carefully studied the record and judgement of the lower court, analysed and evaluated the evidence adduced at the trial. Although P.W.7, Inspector Dalmas Ong'eno testified that the appellants were identified by various witnesses at an identification parade, conducted by him for that purpose, we note that the appellants were arrested (in regard to the complaint by P.W.4- Count 3) following a lead by the complainant in the 1st count (P.W.2) who testified that he did not identify any of his attackers either during the attack on himself or at the identification parade. Yet P.W.9 testified that it was P.W.2 who telephoned the police and pointed out the 2nd and 3rd appellants to them leading to their arrest. P.W.4, the complainant in count 3, testified that he was attacked in the presence of his wife P.W.5, yet the two contradicted themselves as to how many people attacked them, with the complainant saying the attackers were four and his wife saying they were only three. P.W.4 also said that he knew his attackers by names and that he reported the same to the police when he first reported the robbery, a fact which was contradicted by P.W.5 and P.W.6 (police officer Dadius Okuku). The latter testified that P.W.4 never gave him any names of his attackers but only said he could recognise them. In addition P.W.6 said that P.W.4 did not say they were his village mates. Under cross-examination, P.W.5, (P.W.4's wife) who was with him when the two were attacked, testified that she never heard her husband telling the police the names of the people she opened the door for. Although P.W.6 testified that the complainants said they could identify the robbers by appearances, he did not indicate what distinguishing features or descriptions, if any, were given to him by which the complainants could identify their attackers either for the purposes of making an arrest or for the conducting of the identification parade. P.W.4 and P.W.5 also contradicted themselves as to the source of light under which they claim to have identified the appellants during the attack.

In his defence, the 1st appellant said that he was arrested when one Peter Kahato (whose interest is not disclosed in the entire proceedings) pointed him to police officers. He and the 3rd appellant testified that the said Peter Kahato was present at the identification parade and that he, P.W.5 and P.W.6 picked them out from among the persons paraded for identification. Given that no names or descriptions appear to have been given by P.W.4 and P.W.5 when they reported the robbery at their house, it is surprising that the two picked out the 1st and 3rd appellants as their attackers yet, as stated by the said appellants in their own defences they were known to the couple all along. From the evidence, we are led to hold the view that the trial court ought to have found that Peter Kahato probably influenced P.W.4 and P.W.5 to pick the 1st and 3rd appellant at the parade as suggested by the 1st appellant. Clearly from the above, the conviction of the appellants in regard to count three was not safe.

Regarding the 2nd appellant's conviction and sentence, we are of a different view. He was convicted based on the evidence of the victim P.W.1 who testified that he was attacked by four people as he went home from work, they beat him and robbed him of 80/= and a torch and in the process they cut him on his left shoulder, hit him on the left side of his face and left arm with a piece of timber. He noticed that in addition to the timber they were armed with pangas. He recognized 2nd appellant whom he knew as Kuria and also by his nickname "**coach**". He testified that he saw him clearly and also called him by his name asking him why the group was attacking him. The witness stated that it was not dark since there was light from torches and moonlight. The witness also said that it was the 2nd appellant who removed his money from his pocket and also took his torch. P.W.1 further testified that he knew the 2nd appellant's house and he helped the police in arresting him. The 2nd appellant did not cross-examine his accuser thereby leaving the evidence adduced against him unrebutted and watertight. P.W.1's injuries were confirmed by P.W.8, a clinical officer by the name Ephantus Kinyanjui, who testified having examined him and who also produced a P.3 form which confirmed the injuries as stated by P.W.1 in his testimony. In view of this, we agree with the learned State Counsel that the conviction of the 2nd appellant was based on sound evidence and should be upheld.

We do agree with both counsels herein that the evidence upon which the appellants were convicted under count 3 fell short of the required legal standard to sustain a conviction on a robbery with violence

charge. Accordingly, we allow the four appellants' appeals as regards count 3 and disallow the 2nd appellant's appeal in regard to his conviction and sentence under count 2. We quash the convictions of all the appellants under count 3 and set aside the death sentences imposed as a consequence thereof. We uphold the 2nd appellant's conviction and sentence as regards count 2. The 1st, 3rd and 4th appellants are hereby set free and shall be released from jail forthwith unless they be otherwise lawfully held. The 2nd appellant will suffer the death sentence in accordance with the law unless the same be set aside upon a successful appeal in the Court of Appeal.

SIGNED, DATED and DELIVERED at Nakuru this 13th day of February, 2009.

M. KOOME

M. G. MUGO

JUDGE

JUDGE