REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeals 514, 515 &516 of 2005

JOHN NGANGA KINUU ……..……..1ST APPELLANT

SAMUEL GIATHI NJOROGE ….……..2ND APPELLANT

JOHN KAHIA GIATHI ……..……..3RD APPELLANT

VERSUS

REPUBLIC …….....…RESPONDENT

(From the original conviction and sentence in Criminal Case No. 7 of 2004 of the Senior Principal Magistrate's Court at Kikuyu by Mrs. Murage – Principal Magistrate)

JUDGEMENT

The three appellants were jointly charged with three counts of robbery with violence contrary to section 296(2) of the Penal code. It is alleged the offences were committed on the night of 17th and 18th May 1998 at Ngarariga village in Kiambu District of Central Province jointly with others not before court while armed with dangerous weapons robbed Peter Rubiro Ndungi, Leonard Ndungi Rubiro and Josephine Karimi Muigai of the items mentioned in the charge sheet. The prosecution case is that on the night of 17th and 18th May 1998 at around 2.00 a.m. PW1 the complainant in the 1st count was at his home sleeping together with his wife. He heard a knock at the rear gate of his house and in response he put on the security light but realized the gate had been broken into and people had entered his house. He alerted his wife and escaped into the ceiling of his house. Unfortunately as he was hiding in the ceiling of his house, two people entered through the roof and found him where he was hiding. He was brought to the ground and they demanded Kshs.500,000/= from him. After receiving thorough beatings he was forced to give Kshs.18,000/= but the attackers demanded more. It was the evidence of PW1 that he was able to identify the 2nd appellant as the man who had taken the money from him. He also recognized the 1st appellant as the one who called him to say his last prayers before he could be killed. PW1 also asserted that it was the 3rd appellant who broke the left hand of his wife. PW1 was then ordered to call his children whose houses were next to his. He called the complainant in the 2nd count who opened for the attackers. The attackers also removed several items from the house of Leonard who gave evidence as PW3. PW1 and his children were locked in his house and the thugs went away. Later PW1 and his family went to MP Shah Hospital for treatment. It was also contended by PW1 that he reported the incident to police to conduct further investigations. PW1 stated that he recognized the three appellants during the attack as they were persons known to him for long period of time. He also stated that two of the appellants were his relatives and close neighbours. On 13th October 2004 when PW1 was called to give evidence he stated that he wished to withdraw the case because the appellants were his relatives and that

he had forgiven them. The application to withdraw the complaint or the case was rejected by the trial court.

PW2 on her part stated that on the material night she heard screams at her neighbour's place and immediately she was ordered to open the door by people she did not know. Before she could open the door the attackers broke the door and gained entry into the house. They took various items from the said house as stated in count 2 of the charge sheet. In her evidence she contended that she was able to identify the 1st appellant as the person she knew before that incident. After accomplishing their mission the robbers went away and PW2 allegedly reported the incident to police to conduct further investigations. Under cross examination from 1st appellant PW2 replied;

"**When people came I did not tell them about you. I went to police and informed them. I told police I had seen you. I pointed you to AP. I was called by police to identify you in a parade".**

PW3 on his part stated that on the material night while asleep at home he was woken up by the dogs who were barking very hard and loud. He then heard a bang at the main gate and found that some attackers had gained entry into the house where his parents stay. He stated that he saw about 15 people armed with dangerous weapons and it was then that he started screaming and blowing the whistle. He was then ordered to open the door and upon entry the attackers demanded money from him. He stated that the attackers took several items from his house after they stayed for about 20 minutes. He also confirmed that he went together with his parents where his mother was admitted for treatment. In his evidence before the trial court PW3 contended that he identified three of the attackers as the appellants before court. He stated that he knew all the appellants for a long time and that they were persons who were their neighbours and that they come from the same clan. He stated that the appellants were arrested one week later and were called for an identification parade. In his evidence he stated that there was no need of the identification parade since he knew all the appellants very well.

PW4 Dr. G. K. Mwaura confirmed that the three complainants had suffered injuries that were inflicted on the night of the robbery. He produced P3 form dated 9th February 2005.

PW5 was also a doctor from MP Shah who confirmed that PW1 and PW3 were treated at MP Shah Hospital.

PW6 Joseph Kinyua informed court that there was a coat which was earlier produced as an exhibit but could not be found.

PW7 PC Kieti stated that on the material time he was based at Kikuyu police station. And that on 23rd June 1998 he was instructed to collect the appellants who had been arrested and were held at Lari AP camp. He went to Lari AP Camp and arrested the person who was earlier arrested by AP officers.

After the close of the prosecution case, the appellants gave sworn testimony denying being involved in the commission of the offence that was alleged against them.

As the first appellate court we have a duty to re-evaluate the whole evidence afresh in order to arrive at an independent conclusion. In doing so we have to test evidence of the prosecution with the greatest care taking into consideration the cardinal principle of law that an accused has no obligation to prove his innocence. In convicting the appellants the trial court made the following findings;

(1) That the appellants were related to PW1 and PW3.

(2) That the robbers took 1 ½ hours in PW1's house and about 30 minutes in PW3's house. From there they proceeded to the house of PW2 where they also robbed her.

(3) The time spent in PW1 and PW3's house is sufficient for positive identification because the appellants were well known to the complainants.

(4) The issue of grudge raised by the appellants in their defence has not been challenged by the prosecution.

(5) The injuries were real and not a creation of PW1 and PW3.

(6) That the appellants had not given an account of themselves on the night the robbery occurred and she concluded that the defence has no basis.

(7) The trial court confirmed the matter arose out of a re-trial and the OB requested by the appellant was missing and could not be traced.

(8) The trial court concluded that whether the OB was produced or not would not change the evidence of positive identification by PW1, PW2 and PW3.

It is clear that the complainants and the appellants were people known to each other so it was incumbent upon the prosecution to tender evidence that the appellants were directly or circumstantially connected to the offences that took place on the night of 17th and 18th May 1998. From the evidence of PW1 and PW3 it is clear that the appellants were persons known to them. And if the witnesses who connected the appellants to the commission of the offence were persons known to them, then there was no need of identification parade. As was rightly pointed out by PW3 an identification undertaken by persons who were known to the appellants was worthless and contrary to the provisions of the law. In any case the person who conducted the alleged identification parade was not called as a witness making any basis or reliance on that evidence untenable in law. In our view the evidence of PW1, PW2 and PW3 is weakened by the existence of other circumstance which makes the inference of guilt by the appellant doubtful. Some circumstances such as the mystery surrounding the failure of the prosecution to produce the OB books showing where and when the first report was made by the complainants. There is no evidence on when and where the first report was made and by whom. Another crucial piece of evidence that is missing in this case is the circumstances that led to the arrest of the appellants and why it took considerable time/period for the police to arrest the appellants who were close relatives and neighbours of the complainants. In cases where the attackers are persons known to the complainant it is mandatory for the complainants to mention the names and any other description to the relevant authorities at the first instance in order to discourage complainants manufacturing evidence against innocent people. As was rightly pointed out by the prosecution witnesses this is a case of recognition which has been accepted as better than identification of a stranger. We have no evidence to show complainant relayed and/or informed the descriptions or the names of the appellants to witnesses who were concerned with the matter. In our view this was to be done at the earliest opportunity. This was not done. This fact is supported by the failure of the police to show by way of evidence where and when the first report was received by them. In their evidence before court PW1 and PW3 were not able to mention the names of persons or police stations in which the first report was made. In our humble view the failure of PW1 and PW3 to mention to anyone at the earliest opportunity possible that the attackers or some of the attackers were persons known to them, clearly weakens their evidence that they had seen and recognized the appellants. One can therefore conclude that the chain connecting the appellants to the commission of three robberies is not complete. In our mind there exists considerable and un-explained weaklings. Another crucial aspect which the trial court failed to consider is that most of the material witnesses who could have connected the offence with the appellants were not called to give evidence. It is strange to us that the wife to PW1 was not called, neither was the chief who received the first alleged report. It is also strange why the APs officers who arrested the 1st appellant was not called to give evidence. It is therefore our view the trial court misdirected itself by greatly and unlawfully shifting the burden to the appellants. It is not the duty of the appellants to explain their whereabouts on the night when the alleged robbery took place. And we think it was wrong on the part of the trial court to shift the burden to the appellants when there were gaping holes in the case of the prosecution.

Having considered all the issues raised in this appeal we are of the view that the conviction of the appellants is unsafe and cannot be sustained. The appellants must get the benefit of doubt which was denied by the trial court. In our humble view there is no evidence to show that the appellants were connected to the offences that took place on the nights of 17th and 18th May 1998. The totality, nature

and circumstances of the attack clearly points out that the appellants may have been wrongly connected to the offences under our determination. We sincerely think that the evidence on record is insufficient to sustain the conviction of the appellants. We equally think the factors implicating the appellants are not quite credible to say that there is an overwhelming evidence to found conviction. In the premises we allow each of the appellant's appeal, quash their conviction and set aside the sentence. We set them free unless lawfully held.

Dated, signed and delivered at Nairobi this 3rd day of February 2009.

J. B. OJWANG **M. WARSAME**

JUDGE **JUDGE**