



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 195 of 2008 & 196 of 2008 (Consolidated)**

**KENNEH KARANU MWANGI ..... APPELLANT**

**Versus**

**REPUBLIC .....**

**RESPONDENT**

**consolidated with**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 196 OF 2008**

**JOSEPH KINUTHIA NJOGU ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

*(Being appeals from conviction and sentence of A. K. NDUNGU, Principal Magistrate*

*in the Senior Principal Magistrate's Criminal Case No. 133 of 2007 at MURANGA)*

**JUDGMENT**

Following the consolidation of the above appeals, KENNETH KARANU MWANGI became the first appellant. JOSEPH KINUTHIA NJOGU became the second appellant. They were both charged before the lower court with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. After trial before the lower court they were acquitted on the first count but convicted on the second count and sentenced to suffer death. They were aggrieved by that conviction and sentence and filed this appeal. This court is duty bound to re-evaluate the evidence of the lower court. That duty is succinctly set out in the case of OKENO vs REP (1972) EA 32 in that case the court of appeal had the following to say:-

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*

*(Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424."*

We must begin by stating that we are in agreement with the finding of the lower court in respect of the first count. PW 1 stated that he was robbed at 1pm of money and a bicycle. The persons who robbed him were familiar to him although he did not know their names. At the trial he identified the first appellant from the dock. There was no identification parade organized for him to identify the first appellant. We are in agreement with the learned magistrate that such dock identification was not satisfactory for a conviction. PW 4 stated in evidence that on 6<sup>th</sup> January 2007 at 10 p.m. whilst at a shopping centre he was attacked by two people whom he said were before court. He said that he was able to see them by means of electric light which was coming from a near by bar which was 10 metres away. He then stated:-

*"I knew the accused persons (first and second appellants). We were brought up together".*

They stole from him kshs. 600 and his identity card. Although he was treated at Maragwa for the injuries he received as a result of that attack he did not obtain a P3 and therefore could not prove before court that he was injured. He was recalled of further cross examination and whilst being cross examined by the second appellant he again confirmed that he was able to see the appellants by means of a light that was coming from the bar. When being cross examined by the first appellant he responded:-

*"I know you. You came from our village. I know you so well. I made a report. I mentioned your name."*

He further stated that he reported to the police that the first appellant attacked him and in so doing gave the police his name as Mwangi Mikori. He said that that was the name he knew the first appellant by. PW 5 was a police officer. After reports were made of robberies taking place the police arrested the first and second appellant. On being arrested each was found to be having a whip. PW 6 was investigating officer. He took over the appellants from the arresting officers. The lower court on finding that the appellants had a case to answer invited them to present their defence. The first appellant gave an unsworn statement. He denied the offence and proceeded to give details of the day he was arrested. The second appellant also denied the offence in an unsworn statement. He too gave details of his whereabouts on the day of his arrest. The evidence against the appellants in respect of the 2<sup>nd</sup> count related to recognition rather than identification. PW 4 grew up with the appellant and therefore said that he knew them. In respect of recognition a case in point is ANJONONI & OTHERS VS REPUBLIC (1980) KLR 59 where the court of appeal said:-

*"..... The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in cases like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of 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 are in agreement with the learned trial magistrate that the recognition of the appellants by PW 4 was satisfactory and satisfied the criminal burden of proof. PW 4 recognized the appellants through the electric light. In cross examination the appellant did not contradict the statement of PW 4 in respect of that light. We have considered the appellants written submissions in support of the appeal. We find it necessary to respond to their argument that there was no medical treatment notes produced to prove injury on PW 4. That as it may be we are satisfied that the evidence adduced by PW 4 met the ingredients of robbery with violence offence. Those ingredients were succinctly brought out in the case of JOHANA NDUNGU vs REPUBLIC Criminal Appeal No. 116 of 1995 (unreported) where it was held:-

*“In order to appreciation properly as to what acts constitute an offence under Section 296(2) one must consider the sub-section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and anyone of which if proved will constitute the offence under the sub-section;*

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or*
- 2. If he is in company with one or more other person or persons, or*
- 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.*

The court continued after explaining the essential ingredients under the first two sets of circumstances:-

*“With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under subsection (2) proved and convict accordingly”.*

We are therefore of the view that in respect of conviction and sentence the appellants appeal has no merit. The appeals of both appellants are therefore hereby dismissed.

***Dated and delivered this 11<sup>th</sup> day of May 2009***

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKANDIA**

**JUDGE**