REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 165 & 166 of 2006

STEPHEN KIBUTHA M'MWONGO …… APPELLANT

CRIMINAL APPEAL CASE NO. 166 OF 2006

SILAS MARETE …….. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal against the sentence and conviction of Hon. M.S.G. Khadambi (Mrs.) S.R.M.

Meru in Criminal Case No. 275 of 2005 delivered on 26th October 2006)

JUDGMENT

The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code and were convicted after trial by the lower court and were sentenced to suffer death as provided under the law. They were aggrieved by the conviction and sentence and have preferred this appeal. When the appeals came for hearing, they were consolidated whereby Criminal Appeal No. 165 of 2006 was made the lead-file and thereby Stephen Kibutha M'Mwango became the first appellant. Silas Marete became the second appellant. This is the first appellate court. To that end, we are guided by the principles enunciated by the case of **Gabriel Njoroge Vrs. Republic (1982 – 88) 1KAR 1134** where it was held:-

"***As this court has constantly explained it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya Vrs. R. [1957] E.A. 336, Ruwala Vrs. Republic [1957] EA 570.)"***

In the lower court, PWI, the complainant herein, said that on 19th December 2004, at 9pm while sitting in their sitting room with his wife, PWIII, they heard a bang on the door. The door opened and he saw both appellants standing at the door way. The sitting room was 12 x 12 ft. wide and it was illuminated by a hurricane lump that was on the table. Both appellants were well known to him because they were neighbours. He had known them for more than 10 years. He noted that there were several other people behind the appellants. He noted that they all had pangas. He grabbed the first appellant by his legs and

they both fell outside the room. As he lay on top of the first appellant, the other members of the group began to attack him. It was then that the second appellant signaled those attacking him to stop. At that point, PWI stood face to face with the second appellant. The second appellant cut him with a panga. The first appellant got up from the ground and also cut him on his right hand and his fingers. The other members of the group begun to attack him and begun to search his pockets. They stole from him a solar wrist watch. He could hear his wife screaming. Their neighbours came to their rescue but found that the robbers had escaped. On his return from hospital, he found several other items had been stolen during that robbery. None of those items were ever recovered. In response to cross-examination by the first appellant, he said:

"I recognized the two of you amongst the robbers. I recognized you because you were not covered…… I recognized you as I know you."

On being cross-examined by the second appellant, he said that the robbers were with him for half an hour. He further stated that he had informed his neighbours that he recognized the appellants. He denied that he had implicated the appellants because of a previous case between them and his wife at Tigania court. On re-examination by the prosecution, this witness said that he only estimated the time the robbers were at his home because he had no watch.

PWII was one of the rescuers who heard the complainant and PWIII screaming. He and several others went to the complainant's home and found that he had been beaten. Because they went there shouting, the robbers had run away. They found PWI crying and he noted that he had been cut on his head, right leg and right hand.

PWI's wife was the third witness. She too said that on 19th December 2005, at 9pm, as they were seated in their sitting room with her husband, they heard the door being banged then it opened. She saw a group of people walk in armed with pangas by the aid of a hurricane lump. According to her, the room was well lit. She recognized the appellants who were ahead of a group of people who had gone to their home. She also saw PWI grab the first appellant. She was beaten by some of the robbers, whom she did not recognize, whilst they were demanding money. She also gave a list of the items that were stolen by the robbers. Although she recognized and knew the appellants, she said that she did not give their names to their rescuers because she did not want the appellants to run away and because she did not want them to be lynched by their rescuers. That she only gave their names to the Police. She confirmed that there was a previous case between her and the second appellant relating to land. The second appellant was charged because he had attempted to cut her. That case was by then pending before Tigania magistrate court. She estimated that the robbers stood by the door for one minute.

PWIV was the clinical officer who examined the complainants and found that the injuries suffered by PWI were classified as maim and those suffered by PWIII were harm. PWV a neighbour of the complainants on the material date heard them scream and went over to their home which is about 50m away from his. He was able to recognize PWIII's voice whilst she was screaming. She was able to hear people demanding money from the complainants. Whilst at their fence he decided to bang the roof of the complainant with an axe in an attempt to scare the robbers away. He thereafter run back to his home where he was able to re-group with other villagers and went to rescue the complainant.

The appellants on being put to their defence gave an unsworn statements. First appellant in his defence faulted the complaint made by PWI and III because they had failed to tell their rescuers the names of the robbers. He also faulted their evidence by saying that PWI and III contradicted each other on the timing taken by the robbers. In his defence, he mistakenly stated that the investigating officer had stated that PWI was present when he was arrested. The correct position was that the investigation officer said that none of the complainants were present when the appellants were arrested. The 2nd appellant in his defence blamed the allegations against him to the pending case between him and the complainants at Tigania magistrate court. He further stated that he was away from his home from 10th December 2004 up to 23rd December 2004. He had gone to harvest tobacco as a casual labourer. He said that the charges against him were trumped up because of the dispute with the complainants over the shamba. The learned trial magistrate in her considered judgment had this to say:-

"Having heard both parties herein, I find that the prosecution witnesses were quite consistent and straight forward. I have no doubt in my mind that the hurricane lump was bright enough for both complainants to see and clearly recognize the assailants, the two accused (the two appellants). I do not find that the other criminal case the parties have could have been the motivation for the complainants to frame up the accused. I am also satisfied that the complainants presented their initial report of the robbery by naming the two accused, so that they did not need to give a further physical description. I am fully satisfied that all the ingredients that go towards the formation of a robbery with violence case have been met. The defence presented did not raise any triable issue (s)."

We in turn fully agree with that finding of the learned magistrate. The evidence is clear that the complainants recognized the appellants, who were known to them for a long time, as they stood by the door way of their sitting room which was lit by a hurricane lump. We note that the robbery took place at night but both complainants were very clear that there was sufficient light from the hurricane lamp. This was the case of recognition and in the case of **R. Vrs. Turnbull** [1976] 3 ALL ER 549 the court found that recognition is more reliable than identification of a stranger. We are well aware that even identification can have errors. This indeed was the finding of the Court of Appeal in the case of **Abdalla Bin Wendo Vrs. Republic** [1953] EACA 166, where the Court of Appeal of East Africa had this to say:-

"……but on identification issue a witness may be honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true……."

We are however persuaded that there was no error in the identification of the appellants since this was not a case of a single identifying rather recognition of the appellants. PWI and III were clear in their evidence that they saw and recognized both the appellants who had not disguised themselves when they appeared at their door step. The fact that there existed a case between one of the appellants and PWIII in our view does not detract from the efficacy of the evidence of recognition. It is sufficient and meets the required standard of proof. The defence offered by the appellants does not displace that evidence. Moreover, the defence was given by way of unsworn testimony.

The appellants raised a few issues in their written submissions which we shall proceed to consider. In parts of the proceedings, the learned trial magistrate indicated that certain applications such as the consolidation of the case and the amendment of the charge were made by the complainant. The appellants argued that that mistake caused the proceedings to be a nullity. We beg to disagree. There is no obvious prejudice that could have been suffered by the appellants in view of that error. That argument therefore is rejected. Further, the fact that the complainants did not disclose the names of the appellants to their rescuers was well explained by PWIII. She said that she feared the rescuers who seemed to have come from the neighbourhood would lynch the appellants if they were told their names. The failure to disclose their names therefore to their rescuers cannot nullify the evidence of recognition. Similarly, we find there is no prejudice suffered by the complainants stating different timings that they saw the appellants. PWI explained that he may have not been exactly correct in the time he observed the appellants because he did not have a watch to refer to. We make a finding that the appellants must have been at the complainant's homestead for quite a considerable time because by the evidence of PWV he seemed to have taken time first to try to scare the robbers and thereafter went to join up with the other rescuers. The time taken could well explain how much time the complainants had to recognize the appellants. All in all, we find that there is no merit in the appellants' appeal and we therefore hereby dismiss both appeals.

Dated and delivered at Meru this 20th day of November 2009.

MARY KASANGO

MERU

M.J.A. EMUKULE

JUDGE