



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 342 of 2007**

**PETER WACHIURI
GICHIRA**
.....
APPELLANT

VERSUS

REPUBLIC ...
.....
.....
RESPONDENT

(Appeal from original Judgment and Conviction in Senior Principal Magistrate’s Court at Murang’a in Criminal Case No. 585 of 2006 dated 31st August 2007 by T. W. Murigi – S.R.M)

J U D G M E N T

Peter Wachiuri Gichira (“the appellant”) comes before us on a first appeal against his conviction by the Senior Principal Magistrate’s Court at Murang’a (**T.W. Murigi SRM**) on one count of robbery with violence contrary to section 296(2) of the Penal Code and consequent sentence of death. The appellant initially faced two counts of robbery with violence going by the charge sheet. However it would appear that the learned magistrate treated the case as though the appellant faced only one count. This omission on the part of the learned magistrate ought to be deprecated. However since the complainant in count two did not testify, no prejudice was occasioned to the appellant by the said omission. Be that as it may, it was necessary that the learned magistrate deals with that aspect of the matter and make a finding on the same in her judgment.

The particulars of the charge in respect of which the appellant was convicted were that on the 7th February 2006 at Kiangochi village in Murang’a District within the Central Province, jointly with another not before court and while armed with dangerous weapons namely pangas and rungus, robbed **Joseph Kamau Gituru** of cash Kshs.2,700/=, one mobile phone make Erickson T10 valued at Kshs.3,400/= and one wrist watch make Seiko five valued at Kshs.450/= and at or immediately after the time of such robbery threatened to use actual violence on the said **Joseph Kamau Gituru**. The trial commenced before **T. W. Murigi** on 8th January 2007 and was concluded on 31st July 2007 after 3 prosecution witnesses and the appellant had testified. Judgment was thereafter reserved and later delivered on 31st August 2007.

As this is a first appeal we are duty bound to examine and re-evaluate the evidence on record to reach

our own conclusions in the matter, always bearing in mind, however, that we had no advantage as the trial court did, of seeing and hearing the witnesses testify. The trial court was in a comparatively better position to assess the significance of what was said, how it was said, and equally important what was not said – See generally **Okeno v/s republic (1972) E.A. 32**.

On or about 7th February at about 7.30 p.m. the complainant, **Joseph Kamau Gituru (Gituru)** was from Kiangochi headed home in the company of one **Kimani** when they came across some people seated near a tree. When they neared them, they were ordered to stop. One of them introduced himself as a police officer and **Gituru** recognised him immediately and asked him since when he had become a police officer and why was he armed with a panga if he was indeed a police officer. That was the appellant. The appellant then held him by the shirt and the other man who had been seated with him came and hit **Kimani** and he fell down. The appellant hit him with the side of the panga and he fell down as well. The other man came over and joined him and they went about beating him with their pangas. In the process he was robbed of his Seiko five, wrist watch and his mobile phone make Erickson T10 worth Kshs.3400. He testified that he recognised the appellant as the moon was bright. When done the appellant and his accomplice ran away. **Gituru** and **Kimani** proceeded to the home of the appellant and reported to his mother what her son had done to them. They also reported at Kiangochi police post and **Gituru** was issued with a referral note and sought treatment the following day. Subsequently he took the police officers to the appellant's home and he was arrested. His house was searched but nothing was recovered. The appellant was a relative as his niece was married to the appellant's brother. Nonetheless he had no grudge against him.

Upon cross-examination **Gituru** stated that he was able to recognise the appellant since he had known him for a long time and that the moon was bright and he even came near him though he was not able to identify the other man. That after the robbery he went to the appellant's home and informed the appellant's mother what had transpired. However the appellant had not arrived. He further testified that there was no existing grudge between them and he did not know if the appellant had quarrelled with his cousin.

PW2 **Patrick Mwangi** testified that he was the District Clinical Officer and that he was the one who filled **Gituru's** P3 form after examining him on 24th February 2006. **Gituru** had suffered soft tissue injuries to the left arm and had tenderness on the left arm and left shoulder. That the probable weapon used was a blunt object and classified the degree of injuries sustained as harm. Upon cross-examination he testified that the complainant told him that he had been attacked by someone known to him.

PW3 No. 83141 P.C. **Isaack Njuguna Mwangi** testified that on 7th February 2006 at about 8 p.m. two people went to the Kiangochi patrol base where he was then based and reported that while on their way home they had been attacked by two men armed with pangas and rungus and were robbed of various items. Whereas **Gituru** was robbed of Kshs.2700/=, mobile phone make Erickson T10 and a Seiko five wrist watch his friend, **Francis Kimani** was robbed of Kshs.900/=. It was his further evidence that they informed him that they were able to identify one of their attackers as the appellant who was also known by his nickname **Fuaga**, since he was from their village and they had grown up together. The following day they tried to trace him in vain. On 13th February 2006 in the company of **Gituru** they went to the home of the appellant and upon enquiring as to his whereabouts his parents informed them that he was not around. Though his house was locked from outside they heard someone laugh from within and that is when they ordered his mother to open the door. She complied and the appellant was arrested from within the house. Apparently a search was conducted but yielded nothing.

On being put on his defence, the appellant elected to make a sworn statement and called no witnesses. He testified that on 13th February 2006 he was feeding the cattle when he heard his mother making noise and upon enquiring what the matter was, she informed him that his sister in law was abusing her. That upon asking his sister-in-law why she was abusing his mother she also abused him and he got angry. That is when he slapped her and she vowed to teach him a lesson. That same night police officers knocked at his door and he opened. They entered and started conducting a search and in the process took away his camera. Later they escorted him to Murang'a police station and charged with the offence before

court. It is his evidence that he was implicated with the offence by the sister in law whom he claimed was a niece of **Gituru**.

The appellant has faulted his conviction and sentence by the learned magistrate on grounds that:- the evidence of identification by recognition was not free from error, that the charge sheet was defective, that the prosecution evidence was contradictory and finally rejection of his defence by the magistrate without due consideration and when the same was not displaced by the prosecution.

In the main it is the contention of the appellant that the conditions prevailing at the time of the alleged robbery were not conducive for a positive recognition as it was at night, the attack was sudden and that the intensity of the moon was not inquired into.

With respect, this was not merely a case of visual identification and the trial magistrate clearly appreciated that fact. Rather it was a case of recognition as well. She believed the evidence of PW1 on the question of recognition. That **Gituru** knew the appellant before the day in question and recognised him when he saw him on the fateful evening. On our own assessment of the said evidence, we find it consistent and credible. In **Anjononi & others v/s Republic (1980) KLR 59**, the court of appeal observed “..... **The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case 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 reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.....**”

This authority is on all fours with the circumstances obtaining in this case. The evidence of recognition in this case was reliable and we have no reason to disturb the magistrate’s finding on this aspect of the matter.

The offence was committed at about 7.30 p.m. According to **Gituru**, he recognised the appellant courtesy of the moonlight. It is evident that the moonlight was bright. This fact has not been discounted at all. **Gituru** was in the company of one, **Kimani** who was the complainant in count II. He too recognised the appellant. However since he did not testify nothing much turns on this aspect of the case. So that the identification, Nay, recognition of the appellant was by a single witness in difficult circumstances to wit, **Gituru**. The trial magistrate ought to have warned herself of the dangers of relying on such evidence to find a conviction even if it was a case of recognition as opposed to visual identification and also carried out inquiries in terms of **Maitanyi v/s Republic (1986) KLR 198**. Even if it is a case of recognition, the burden of testing such evidence of recognition carefully is not lessened knowing that mistaken recognition of close relatives and friends are sometimes made – **Wamungi v/s Republic (1989) KLR 424**.

In this case however, the appellant was a person well known to **Gituru**. Indeed they were even relatives, the appellant’s brother having married **Gituru**’s niece. The appellant engaged PW1 in a discussion during the encounter. First he identified himself as a police officer. When PW1 discounted that fact after perhaps having recognised him, he changed tune and now claimed to be Mungiki perhaps with a view to scaring **Gituru** more. It is important to note that as all these was going on the appellant had not at all disguised himself as to make his recognition difficult. Following that exchange, the appellant went for his shirt and held him by the neck. This encounter was in our view at an arms length and or in close proximity. Consequently it would not have been difficult for someone to recognise a person he knows very well. It has not been suggested in evidence that **Gituru** was held by the neck from behind. Had that been the case then perhaps his recognition of the appellant would have been impeded. However on the evidence on record we cannot make such an assumption. As this was going on, the moon was shining and was bright according to PW1. This assertion was neither challenged nor countered. That made the recognition of the appellant easy.

As further proof that indeed **Gituru** had recognised the appellant, immediately after the encounter and in the company of **Kimani**, he proceeded to the appellant’s home where they found the appellant’s

mother and told her what her son had done to them. This evidence too was not discounted by the appellant. By then the appellant had not arrived at home.

From the appellant's mother's home, the duo proceeded to Kiangochi police patrol base and reported to **P.C. Issac Njuguna Mwangi** (PW3) that they had been robbed by the appellant. The following day they tried unsuccessfully to trace the appellant. 6 days later they managed to trace him at his parent's home. When the police officers inquired from the parents the whereabouts of the appellant, they lied that he was not around. However, the appellant's laughter betrayed him. Apparently he had been locked in the house from outside. The police ordered the mother to open the house and when she did so, the appellant came out. This evidence was once again not at all discounted and or challenged by the appellant in his cross-examination and or in his defence. The behaviour of the appellant as aforesaid cannot therefore be said to be consistent with his innocence. Finally, according to the clinical officer (PW2), PW1 had told him that he had been assaulted by persons well known to him. The totality of the foregoing is that we are satisfied on our own evaluation of the evidence on record that much as the conditions obtaining during the robbery may have been difficult, PW1 was nonetheless in a position to positively identify the appellant. We therefore agree with the learned magistrate on this aspect of the matter.

The appellant has challenged the evidence of identification and indeed the entire prosecution case on the grounds that he could not have robbed **Gituru** someone well known to him and knowing very well that he could be a target of easy recognition. In making this submission, perhaps the appellant has in mind what the court in Uganda said in the case of **Republic v/s Eria Sebwato (1960) E.A. 174**. The court observed therein "..... **That this accused, well known to the complainant should go with seven other men to commit an organised robbery in a house where he was well known seems to me to be inexplicable. He must have known that he was bound to be recognised, and that, in my view, casts doubt on the evidence of the complainant and his wife**" Our response to this is that, that may well have been the case in the 1960's and 70's. That proposition no longer holds in modern times. Cases are bound where children have brazenly robbed their own parents under false hope that nothing will be done to them even if they are recognised. No man knows what goes in the mind of another. It cannot therefore be a correct proposition nowadays that a friend, relative or even a person well known to a victim can never commit a crime on such victim for fear that he could be recognised. It may as in the circumstances of case be that the appellant was labouring under a false hope or illusion that he could not be recognised and even if he was nothing will be done to him.

The appellant too has stated that the case was a frame up. He was framed by **Gituru's** niece who was married to his brother. We do not agree. If indeed his sister in law had framed him, one would imagine that she would be the complainant. Secondly, there is the evidence of PW2, the clinical officer, confirming that **Gituru** was injured. **Gituru** we would want to believe that he could not have injured himself deliberately that much purposely to frame the appellant or so as assist his niece to do so. For what gain would he have pushed himself that much? He had no personal score to settle with the appellant.

The appellant has also complained that that the evidence of recognition was not corroborated. That such corroboration would have been provided by one, **Francis Kimani** who was in **Gituru's** company at the time of the robbery. There is no requirement in law that in every criminal trial, evidence tendered must be corroborated. Yes, there is a class or classes of offences that require evidence of corroboration. However this is not one of those cases. Much as it would have been desirable to call **Kimani** as a witness, we do not think that failure to call him wittled down the prosecution case against the appellant. In any event he was a complainant in count two and his evidence would most probably have been in support of that count.

Then there is the issue as to the date and month when **Gituru** was robbed. In evidence in chief **Gituru** and **PC Mwangi** stated that the offence was committed on 7th December 2006. However the charge sheet talks about 7th February 2006. We have looked at the original record of the trial court and we are satisfied that the offence was committed as per the charge sheet. Reference to 7th December 2006 is simply a typographical error. The evidence of the clinical officer and even the appellant himself supports this position. In any event even if such contradiction existed it is curable by virtue of section 382 of the

criminal procedure code.

Finally in convicting the appellant, the learned magistrate made this rather unfortunate observations “... **Accused did not give evidence on to (sic) his whereabouts on the night of 2nd February, 2006 and only talked of the day he was arrested. It is his evidence that he had a grudge with the complainant since he slapped his sister (sic). I find the evidence holds no water as he did not call evidence to substantiate the same. Further more he did not call evidence to prove that indeed a grudge existed between the two of them that would have led the complainant to implicate him with such an offence.....**” Clearly by these observations, the learned magistrate is shifting the burden of proof on to the appellant. It is trite law that the burden of proof in criminal cases never shifts from the prosecution to an accused save in very few and exceptional cases. This was not such case. The appellant need not prove his innocence. Indeed he can even keep quiet throughout the proceedings and yet the prosecution must prove its case against him to the required standard. Much as the aforesaid remarks were unfortunate, we discern no prejudice occasioned to the appellant. The evidence on record even if the above remarks are ignored as they should, was sufficient to convict the appellant.

In the upshot, we find no merit in this appeal and is accordingly dismissed in its entirety.

Dated and delivered at Nyeri this 19th day of November 2009

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE