



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI

Criminal Appeal 99 of 2007

JOHN KANYORO MWENGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeal from original Conviction and Judgment in the Principal Magistrate's Court at Murang'a in Criminal Case No. 2864 of 2005 dated 22<sup>nd</sup> March 2007 by A. K. Ndungu-P .M.)*

**J U D G M E N T**

The two appellants **Samuel Kanyi Ngunyi** and **John Kanyoro Mwengi** were convicted on a single charge of Robbery with violence contrary to section 296(2) of the Penal Code and sentenced to the mandatory death sentence. Aggrieved by the said conviction and sentence, the appellants separately and individually lodged appeals to this court. As the two appeals arose from the same trial in the subordinate court and for ease of hearing we directed that the same be consolidated. Neither the appellants nor the learned state counsel objected to that directive.

Briefly, the facts of the case as gathered through the 4 witnesses marshalled by the prosecution in support of their case was that on 15<sup>th</sup> September 2005 at about 8.30 p.m. the complainant (PW1) was on his way home from Gikoe. On reaching Mugumoini area he was suddenly accosted by one **Kagwi** who was never charged with the offence who proceeded to tell him that he wanted PW1 to kill him. The 2<sup>nd</sup> appellant emerged shortly thereafter and also demanded to be killed by PW1 or he himself dies. Thereafter 1<sup>st</sup> appellant also emerged from the side of the road and joined the fray. They then beat up PW1 as the 2<sup>nd</sup> appellant removed Kshs.4000/= from PW1's pocket whereas **Kagwi** took his umbrella and torch. They only released PW1 when an approaching motor vehicle directed its head lights on them. PW1 was then able to identify, indeed recognise all the 3 as he knew them before. They were in fact related to him in the larger family set up. PW1 went home and reported the matter to his parents. He was assisted to hospital by his father (PW2) where he was treated. A report was then made to the police. He added that he recognised both appellants as they even talked to him.

PW2 received a report of the incident from PW1. PW1 named the appellant and **Kagwi** as his assailants. PW2 assisted PW1 to go to hospital and later reported the matter to the police.

PW3 a clinical officer examined PW1 and filled his P3 form. He classified the degree of injuries sustained by PW1 as harm. PW4, a police officer received a report of the incident from PW1, who named one, **Kagwi** and the appellants as his assailants. He commenced investigations and later but separately arrested the appellants and subsequently caused them to be charged with the offence. Of interest however

is that the appellants were all arrested a month or so after the alleged robbery yet PW1 claimed to know the appellants very well and even their names. After all they were relatives.

On being placed on his own defence, the 2<sup>nd</sup> appellant who was the 1<sup>st</sup> accused during the trial said in unsworn statement that he was at home on 12<sup>th</sup> October 2005 picking tea. He took tea to the buying centre and returned. In the evening at 8.00 p.m. he heard **Bildad Mwangi** and **Miriam Wanjiru** his step mother call him. They asked him where his mother was and they left. He thereafter went to sleep. At about 11.30 pm his door was knocked. He opened only to be confronted by 6 people among them 3 police officers and civilians, **Bildad Mwangi**, **Miriam Wanjiru** and **David Gachunji**. He was handcuffed and taken to the police station. **Miriam** said that since she had been chased away from the family she would ensure that the appellant too left the area. In his defence the 1<sup>st</sup> appellant who was the 1<sup>st</sup> accused during the trial stated that on 6<sup>th</sup> December 2005 he went to the centre to buy drugs for his disabled father. At the Centre, one, **Chege** offered to buy him drinks. On his way home whilst drunk he was arrested. He was therefore surprised to be charged for an offence he knew nothing about.

The learned magistrate considered the prosecution case vis a vis the defences of Alibi put forward by the appellants and came to the conclusion that there was sufficient evidence of positive identification on which to convict the appellants. He subsequently did so.

The appellants both fault their conviction aforesaid on grounds that their alleged recognition was not watertight and free from possibility of error, there was lack of interpretation during the trial, the learned magistrate failed to appreciate the fact that the appellants had been arrested almost 3 months after the alleged robbery and failed to put some premium on their defences.

When the appeal came up for hearing both appellants with the permission of the court tendered written submissions which we have carefully read and considered. In addition they also orally submitted that the complainant was their relative and therefore they could not have staged a robbery on him knowing very well that he could easily recognise them.

**Mr. Makura**, learned Senior State Counsel opposed the appeal. He submitted that there was overwhelming evidence of identification by PW1. There was very bright moonlight at the scene. PW1 knew the appellants by names as his aunt was married to the 1<sup>st</sup> appellant's family whereas the 2<sup>nd</sup> appellant was a cousin to the 1<sup>st</sup> appellant. He concluded his submissions by stating that the learned trial magistrate warned himself of dangers of relying on the evidence of a single identifying witness as required and that the appellants' defences were duly considered and rejected as they did not cast any doubt to the prosecution case. The alleged grudge was found to be unsupportable.

It is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always strive to bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. See **Pandya v/s Republic (1957) E.A. 336**, **Ruwala v/s Republic (1957) E.A. 570** and **Okeno v/s Republic (1972) E.A. 32**.

Some of the complaints advanced by the appellants in support of their appeals are merited and cannot be faulted. To start with, the record of the trial court does not show the language of the court and in which the prosecution witnesses as well as the appellants testified. It is also not clear whether the proceedings were ever interpreted to the appellants. It is noteworthy that the appellants were not represented by counsel during the trial.

The proceedings were presided over by **A. K. Ndungu (PM)** and four prosecution witnesses testified. The record merely shows the trial magistrate recording:- **PW1 "sworn states"**, **"PW2 Adult sworn states"**, **"PW3 Adult sworn states"** and **"PW4, Adult sworn state"**. Thus the record as aforesaid does not indicate the language used and whether such language was of appellants' choice as stipulated under section 198(1) of the criminal procedure code. It is therein provided that whenever any evidence is given

in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands vide Subsection (4). The language of the subordinate court is either English or Swahili. The record doesn't indicate the language of the trial court as being English or Swahili nor the language understood by the appellants and which they had elected to have the proceedings conducted in. In the defence, the appellants are shown as “**sworn states**”. The requirement for interpretation of court proceedings is guaranteed under section 77 of the constitution. Indeed the recording of the language of witnesses in the proceedings during trial has been the standard practice of our courts. Failure of the trial court to record the nature of interpretation in the trial proceedings was a serious defect in the trial rendering the proceedings a nullity as constantly held by the court of appeal. For instance see the case of **Diba Wako Kyato v/s Republic (1982-1988) 1 KAR 1974**.

There is no dispute at all that PW1 and the appellants were related and knew each other very well. According to PW1 he was attacked by people he recognised as the appellants in the company of **Kagwi**. The appellants apparently emerged from the road side and demanded to be killed by PW1 and thereafter hell broke loose. As he was being beaten the 2<sup>nd</sup> appellant put his hands in his pockets, 1<sup>st</sup> appellant was behind him and **Kagwi**, had taken his umbrella and torch. He started stabbing PW1 with the umbrella. PW1 asked them why they were beating him and was kicked in the mouth and punched on the head. He screamed. 2<sup>nd</sup> appellant continued hitting him. A motor vehicle suddenly emerged and he was ordered to go home and he complied. It is however instructive that PW1 did not state that he used the motor vehicle lights to recognise the thugs. Indeed his evidence before the 1<sup>st</sup> magistrate who handled the case before it was taken over by the 2<sup>nd</sup> magistrate and started De novo is completely at variance. In the earlier evidence PW1 never mentioned the presence of any light that would have enabled him to recognise the appellants yet the offence was allegedly committed at night, 8.30 p.m. to be precise. Before the 2<sup>nd</sup> magistrate he now however claimed that he recognised the appellants through the headlights of a motor vehicle. Under cross-examination PW1 again changed tune and now claimed that he had recognised the appellants vide the moonlight. But in his statement to the police he never at all talked about the availability of the moonlight and or the motor vehicle. Even assuming that there was moonlight or even the motor vehicle PW1 did not testify as to the intensity of the light emitted – whether it was bright or dim and or its location in relation to the appellants.

PW1 knew the appellants very well and yet he never led to their immediate arrest after the alleged robbery. His explanation however is that the investigating officer was not available severally. However the investigating officer himself did not tender such evidence. Even assuming that the investigating officer was pressed for time hence the delay in arresting the appellants, couldn't any other police officer have been detailed to arrest the appellants? After all PW1 knew the appellants' homes. PW1 cannot be heard to explain the delay to arrest the appellants over the offence that left him assaulted and properties stolen in such simplistic manner.

Appellants were well known to PW1 since they were related. It would have been foolhardy for them to rob PW1 where there was light without at least disguising themselves. They may have known that they were bound to be recognised and hide their identity. This case is on all fours with what was stated in the case of **Republic vs. Eria Sebwato (1960) E.A. 174**. In that case **Justice Lyon** was considering whether the accused **Sebwato** was among the 8 people who had attacked the complainant who had mentioned his name to the police officers and his wife had testified that she had recognised the accused **Sebwato** thereat. The judge observed that identification in a case of this kind has to be absolutely watertight before a conviction can be had. He remarked “**that the accused well known to 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 he was bound to be recognised and that, in my view casts doubts on the evidence of the complainant and his wife**”.

In the instant case, the delay of PW1 to lead police officers to the homes of the appellants until some three or so months later and there being no evidence that they had gone underground following the commission of the offence raises substantial doubts as to their culpability which doubt ought to have been resolved in favour of the appellants. The reason that PW1 was waiting for the investigating officer to avail himself is not credible and or persuasive.

PW2 was the father to PW1, he also agrees that the appellants were neighbours and relatives. He was the first to receive from PW1 a report about the alleged robbery committed on him and in fact assisted him to report and seek treatment. Thereafter he also went quiet and did not bother to have the appellants arrested as soon as it was practicable.

PW4 is a police officer to whom the report of alleged robbery was made on 15<sup>th</sup> September 2005 at 11.20 p.m. but arrested the appellants on 12<sup>th</sup> October 2005 and 6<sup>th</sup> December 2005 respectively. He admitted that he knew the appellants before. He confirmed their names were given to him and he recorded them in the O.B. If it is true that PW4 knew the appellants why did he delay their arrest and why did he state in his testimony again “**Informer told me you were the one I was looking for in connection with this case**”. From the foregoing, it is clear to us that PW4 was not a credible witness.

The appellants denied the charge. They raised defences of Alibi which to our mind were credible and plausible. They also raised the issue of a grudge very early in the proceedings. Considering the manner in which the alleged offence was committed and the subsequent conduct of PW1 and his witnesses, we are satisfied that the issue of grudge does not appear hollow to us. In our view there is much more than meets the eye in this whole episode.

We think that we have said enough to show that this appeal is not unmerited. Accordingly it is allowed, conviction quashed and sentences of death imposed on each appellant set aside. Each appellant should be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of November 2009*

**J. K. SERGON**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**