



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Criminal Appeal 24 & 25 of 2008

1. Criminal Law Division
2. Criminal appeal two judge bench Ang'awa, Mugo JJ
3. Subject of subordinate court case
 - a) Robbery with violence contrary to **Section 296(2)** of the penal code.

Particulars of offence

On 16th day of July, 2007 at Kapkesosio village Bomet District within Rift Valley Province robbed Leonard Kirui of Kshs. 2,000/= on mobile make Nokia 3310 all valued at Kshs. 6,000/= and or immediately before or immediately after the time of such robbery struck the said Leonard Kirui

Plea

- a) Original accused No. 1
Appellant No.1 - Plea Not guilty
Original accused No. 2
Appellant No. 2 – Plea not guilty
- b) After trial, both found guilty convicted and sentenced to death.

4. Appeal

- a. Appeal 24/08 and 25/08 consolidated
- b. Grounds of appeal and arguments inter alia
 - i) Charge sheet defective.
 - ii) Failure to state “jointly and severally” committed the offence.
 - iii) If not amended conviction cannot stand

Case Law

Nelson Kitesse Maweu & others V R Cr. 162/07

- iv) Tunoi, Waki, Aluoch JJa
Lack of chain of events. Alibhai.

Peter Omollo Omondi

Cr. Appeal 233/06

O'kubasu, Onyango Otieno, Aganyanga JJa

- v) **Lwengele V R (1981) KLR**

500 Madan, Law & Miller JJa

Issue of identification – not established.

- vi) Lack of investigating officer's evidence.
- vii) Hearsay evidence.

5. In reply state counsel
Appeal conceded

6. Held

- a) Appeal allowed, conviction quashed, sentence set aside.
- b) Unsafe to rely on evidence before Court.

7. Case Law

- a) **Nelson Kitesse Maweu & Another V R (162/07 Cr.A Nairobi)**
Tunoi, Waki, Aluoch JJa
- b) **Peter Omollo Omondi V R (Cr. A 233/06 Nairobi)**
O'kubasu, Onyango Otieno & Aganyanya JJa
- c) **Lwengele V R (1981) KLR 500**
Madan ,Law & Miller JJa
- d) **Kimani Mwangi V R (Cra. 296/05) Nairobi)**
Bosire, O'kubasu & Deverell JJa
- e) **Gikonyo Kuruma V R** consolidated with
Mburu Mbugua V R
(1980) KLR 23

9. **Advocates**

W.R. Kiprono advocate instructed by M/S W.R. Kiprono & Co. advocates for the appellant
B.L. Kivihya Senior Principal State Counsel instructed by the Attorney General for the Republic

(Consolidated)

MICHAEL KIPLANGAT KIRUIAPPELLANT NO. 1

Original accused No. 1

LEONARD KIPSANG CHERUIYOTAPPELLANT NO. 2

Original Accused No. 2

JUDGMENT

I: Procedure

1. This is an appeal that has been consolidated. The two appellants Michael Kiplanga Kirui and Leonard Kipsang Cheruiyot were the original accused No. 1 and 2 in the subordinate courts at Bomet.

2. They were charged with the offence of :-

***Robbery with violence contrary to Section
296(2) of the Penal Code***

The particulars of offence being

***On the 16th day of July, 2007 at Kapkesosio
village Bomet District within the Rift Valley
Province robbed Leonard Kirui of
Kshs. 2,000/= , one mobile make Nokia 3310 all
valued at Kshs. 6,000/= and or
immediately before and or immediately after the
time of such robbery struck the said Leonard Kirui***

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3. Both entered a Plea of not guilty on the 24th July, 2007.
4. Their trial was held for one year and finalized on the 22nd July, 2008 when judgment was delivered. Both were found guilty and convicted of the offence as charged. Both were sentenced to Death.
5. They appealed to this High Court to quash the conviction and set the sentence aside.
6. Their advocate W.R. Kiprono came well prepared and argued the appeal extremely well. The state conceded to the appeal.

II: Brief facts

7. The complainant, a fruit vendor who lived in Kapkesosio recalls the 16th July, 2007 at 7.00p.m. He had gone to visit a neighbour and left alone. He walked down that road alone going home when two naked persons came and attacked him. They robbed him of a cell phone and moneys of Kshs, 2,000/=. None of the persons talked.
8. He recognized the two persons as Michael accused No.1 and Kipsang Accused No. 2. It was accused No. 1 who struggled with him whilst accused No. 2 removed moneys from him. They covered his head with a jacket and ran away. He knew the two as neighbours.
9. Although the complainant alleged he was robbed he never notified the court the make of the phone that was stolen from him nor the

denomination of the moneys. Was it in notes of Kshs. 500/=, 50/= or 1,000/= etc.

10. The other witnesses called was PW2 who admitted in cross-examination that he did not see the two attack the complainant nor knew the accused. He only assisted the complainant arrest the accused No. 2 at the complainant's allegation that accused No. 2 beat him.
11. PW3 stated that on the material night the complainant had visited him and left him at about 7.00p.m on 17th July, 2007. He learnt later that the complainant was attacked. He knew the two accused as neighbours but not in connection with the case.
12. PW4 – a medical officer assessed the injuries sustained by the complainant as harm. The complainant had tenderness to the chest, lower lip and neck. There was a swelling to his right leg that has a septic wound. *(previously having had a history of a fractured leg).*
13. The investigating officer had been transferred. He never testified. PW5 came to give evidence to state this. He was not aware if investigations on evidence of identification parade was ever done.
14. The two appellants were put on their defence. Both gave alibi evidence, that on the material date in question, they were not at the scene of the crime.

15. On being found guilty, convicted and sentenced (22nd July, 2008) to death the appellant filed appeals in separate files on 1st August, 2008 to this High Court.

III: Appeal

16. The appellant through their advocates stated:-

- i) The charge sheet was defective.**
- ii) There was insufficient evidence.**
- iii) The appellant were able to give alibi evidence.**
- iv) The issue of the appellant's identification was also in question.**

17. He relied on the case law of

Nelson Kitesse Maweu & 2 others

v

Republic

(Cr. A. 162/07) Nairobi

(Tunoi, Waki and Alouch JJA)

where the court of appeal declared that a defective charge sheet that is not amended before judgment renders the whole case a nullity. The judgment was set aside and appeal allowed.

In this case the state failed in the particulars of offence to state that the two appellants were jointly and severally, the ones who committed the offence.

18.The two appellant raised alibi defence.

In relying on the case law of

Peter Omollo Omondi

v

Republic

(Cr A. 233/06(Nairobi)

(O’kubasu, Onyango Otieno and Aganyanya JJa)

where the appellant gave an alibi defence but both the subordinate and superior courts failed to believe this defence. The court of appeal allowed the appeal and set the sentence aside.

19.In this case both the defendants gave alibi defence. It is the task of the prosecution to bring on this alibi, a rebuttal evidence to this defence.

20.The issue of identification of the two appellant was relied on by only PW1. The magistrate is required to warn himself in admitting such evidence and use all caution.

21.In the case law of

Lwengele V R (1981) KLR 500

where the court held that the appellant with two others on being convicted of Robbery were identified at an identification parade. The alibi pleaded had not been proved.

22.The case of

Kimani Mwangi V R (CrA. 296/05)

(Bosire, O’kubasu, Deverell JJa)

where the court held the identification of the appellant was correct.

23. Another case dealing with identification is that of

Gikonyo Kuruma V The Republic

Mburu Mbugua V The Republic

(1980) KLR 23

where the identification of a single witness requires to be taken with caution and the court needs to satisfy itself that it is safe to act on such evidence.

24. **Anjononi & others**

V

R

(1980) KLR 59

where the assailants were known to the complainant. Here is an issue of recognition as apposed to identification. The conviction was upheld.

25. In this appeal there is no where in the complainant’s evidence where there is a description of the appellants. What are the features (*besides they being naked*). What marks would have been on their face, their teeth, their hair? Were they bold or not etc? The prosecution never led evidence of such features from any of the said witnesses who recognized the appellants.

IV: Opinion

26. Our opinion is that the evidence before the subordinate court was not sufficient to sustain a conviction on the basis that evidence required to be fully recorded was never led by the prosecution nor recorded by the trial magistrate.

27. We would agree with the submission put forward by the appellants' advocate and allow this appeal.

28. *Obiter Dictum*. One other aspect of the weakness of this case is that of "trial by instalment". Five witnesses were heard per day over a span of 12 months. This is injustice.

The rules are that in criminal cases, a trial should proceed on a day to day basis till its finality. Any adjournments, as far as possible, should be discouraged as it would, in effect, delay the finalization of the case.

29. This appeal is allowed. Conviction quashed and sentence set aside.

DATED this 3rd day of December, 2009 at **KERICHO**

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M.A. ANG'AWA

JUDGE

.....

M.G. MUGO

JUDGE

W.R. Kiprono advocate instructed by M/S W.R. Kiprono & Co. advocates for the appellant
B.L. Kivihya Senior Principal State Counsel instructed by the Attorney General for the Republic