



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL 174, 175, 176 & 177 OF 2005

DANIEL KINYUA MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL 175 OF 2005

PATRICK NYAGA IRERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL 176 OF 2005

PETER KARIUKI NJOGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL 177 OF 2005

ABDALLAH MWANGI MUHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Judgment and sentence in Criminal Case No. 806 of 2003 of Senior Principal

(CONSOLIDATED)

JUDGMENT

The four appeals were consolidated for purpose of hearing the trials were one in the lower court. There was no objection by the appellants. First Appellant is Daniel Kinyua Maina, then Patrick, Peter and Abdalla Mwangi is 4th Appellant. The Appellants were all charged with the offence of Robbery contrary to section 296 (2) of the Penal Code. The particulars showed that the 4 appellants jointly with others not before the court while armed with dangerous weapons namely rungas and pangas robbed Paulinah Joseph Wechuli of Shs.400/= and at or immediately after the time of such robbery threatened to use actual violence to the said Paulinah Joseph Wechuli. There was also a charge for contravening the provisions by failing to get himself registered under the Registration of Persons Act. This charge was against the first Appellant only. The prosecution evidence was given by PW1 who on 23/1/2003 at about 10.00 p.m. when people forced her to open her door by threatening to burn the house. They came in the house and threatened to cut her up and were looking for money. Her premises was a Kiosk but the house was nearby where her son Richard was. One man said they had found money after which the robbers left with shs.4400/-. She went to report on the following morning. She was able to identify Kariuki Njogu Kinyua Maina Nyaga Mbogo and Abdalla Mwangi. They are the ones who entered the Kiosk. The four were also the children of her neighbours and they used to school with her son. She also had a lamp in the Kiosk. She gave their names to the police.

On cross-examination she said she was flashed with a very bright light. But she was able to see them. This could not be since the bright light must have blinded her and she could not see. She also said she was using a lamp with enough light. When her statement to police was read the names mentioned were of Mboi Nyaga, Karigi and son of Mbogo. Regarding 2nd accused she said that she saw him wearing police uniform or prison warder's uniform. She further said she had talked to one Wangari Rajab that day but she did not know if she is the one who committed the offence. Regarding the issues of name, she told Accused 2 that she knew him as Nyaga Mbora Boy and if he was called Patrick Nyaga Ireri she used that as nickname. Of the third accused she said she saw the robbers inside her kiosk. "The torch you were using to flash me so that I could not recognize you". She said of the 4th accused he told him that he knew him over 17 years. He was also wearing uniform of Prison Warders. He was stepping on his back.

PW2 was her son Richard Twele Joseph who said that while at their house he heard commotion as if it was policemen. Then he went to his mother's kiosk. He saw people, then he noticed his mother was knocked down and there were people demanding money from her. There was a lamp in the kiosk. These were people he knew. He asked them why they were attacking his mother and one of the man threatened to shoot him. He recognized Mboi wa Mbora and run away. He went to report to the chief. PW2 also identified Kariuki Njogu. He did not see first appellant Daniel Kinyua and 4th Appellant Abdalla Mwangi Mohammed. Of Peter Kariuki Njogu he told him that he knew him. They grew together. He saw his face by torch light. He was at the door. He is the one stepping on the PW1 his mother. When PW2 statement was read the names of Mboi wa Mbora and Kariuki son of the late Njogu were read. Regarding the other Appellant Patrick Nyaga Ireri PW2 emphasized that he is from the same estate and he knew him before and that night he was able to see his face by torch light and the lamp inside the kiosk.

PW2 was also cross-examined by first Appellant Daniel Kinyua Maina 4th Appellant failed to cross examine the witness. The evidence of the complainant and her son Richard was firm and clear. All Appellants gave sworn evidence. Peter Kariuki Njogu testified that on 23/1/2003 he was engaged in transport business all night and he slept in the house of Samuel because the lorry he was driving broke down. He admitted knowing the complainant. His witness Samuel Nthiga Nyaga corroborated his alibi. Patrick Nyaga Ireri also testified on oath saying on 19/1/2003 he was at Embu Stadium. He said between 21/1/2003 to 29/1/2003 he was working at Kathita with Plan International. On 30/1/2003 he was ridding his bicycle towards Embu when he was arrested by Police and charged. He stated that the complainant had a grudge against him. He said he was not at the scene on 23/1/2003. Daniel Kinyua Maina also gave

sworn evidence. He said he is a mason. He testified that on 23/1/2003 he was sleeping in his house when policemen knocked at this door and asked about his neighbour "Njue" He was not able to explain where his friend was and therefore he was arrested and taken to Police Station. He was booked on O.B of 23/1/2003 at 3.00a.m. That O.B Samuel Kinyua Maina was recorded suspect of robbery. He said when cross-examined that he was not at scene at 10.00 p.m. and that he was arrested on same night at 2.00 a.m. Note his arrest was O.B 23/1/2003 at 3.30 a.m. He said the testimony by the complainant that he was standing at the door is false, he said his witness DW6 confirmed the story that people came at 2.00 a.m. and went away with him. Also Abdalla Mwangi Mohamed said that on 27/4/2003 he was taking brew with other persons and he was arrested and charged in a court. After some five months he was taken to police station and charged with this offence. He said the case was not investigated. Apart from PW1 and her son, PW2 prosecution produced other witnesses. PW3 was a police officer N. Kisavi. ON 24/1/2003 he received a report of this offence from PW1 that she was attacked the previous night at 10.00 p.m. He visited the scene. On 29/2/2003 Patrick Nyaga Ileri alias Mboi was arrested by Embu police. On 3/3/2003 he accompanied other officers and they went to Gatondo where they arrested Daniel maina Kinyua. On 27/4/2003 one Abdalla Mwangi Mohammed arrested by police officers from Embu. All of them were later charged with this offence. On cross-examination he told Accused No. 1 that he was arrested over this case but he had other cases. He told Accused No. 2 that he was arrested over another case and was brought to police station from prison. It was the complainant who saw this accused in court on another case and she informed the police. He told the 3rd Accused that he arrested him, that he was wanted by police over many cases. And he told 4th accused that he investigated the case after report was made. The officer said the case was investigated. He was the investigating officer. He knew. The prosecution closed its case with this witness. Each appellant filed separate petition of Appeal. For Peter Kariuki Njogu his appeal was argued by Counsel Mr. Mugwika who with permission of court filed a supplementary Petition in paragraph 7 of that petition the Counsel Stated that the Trial was a nullity not prosecuted by a competent prosecutor. Such a submission needs to be given investigation on priority basis.

We have examined the submission of counsel and the record but found no evidence on this ground. Also a close check on the proceedings indicates that the prosecution was at all times conducted by Inspector of Police or Chief Inspector. We dismiss this ground. The other common ground is that of identification. The appellants were said to have been identified by complainant. It was dark but she said she had a lamp on the counter. However when the robbers entered, she was pushed down and one of the robbers put his foot on her back so she was looking downwards. It was a difficult situation to turn her head upwards to look at the robbers. She did not say she tried to do this. She said "They hit me and dropped me and stepped on me. Then one man found some money. Then they left. Although she insisted that she had identified them she did not give any details. He only said they were children in the neighbourhood but she gave some names and said some were wearing prison warder's uniform. She said she thought they were policemen. PW2 her son said when he heard commotion he went to the kiosk. Before reaching the kiosk he saw two men ran away behind the kiosk so he did not identify the two men. At the kiosk he saw his mother was knocked down and there were people asking for money. There was a lamp and one man was stepping on his mother. He was struggling with one robber holding a stick. He was able to see his attacker. He shouted Mboi wa Mbora. Then the robbers left.

PW1 and PW2 insisted that they knew the appellant for a long time and that they were attending school with PW2 and they lived in same estate. The question is, would such people dare rob and attack a woman they have known for so long without the fear of being recognized? In the case of Republic vs Eria Sebwato 1960 EA 174 the court held that where the above relied upon to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction. The court also said that where an accused is known he may be afraid being recognized. On the issue of identification by the complainant and then her son, we find it was under stressful and difficulty circumstances and it cannot be relied upon. Apart from that evidence the appellants were not implicated by any other evidence. The authority of ***Kiarie vs Republic Court of Appeal 1984 KLR 739*** holding Number 3 emphasized the same point. This same authority dealt with the issue of appellants alibi defence. In that case the defence was given on oath and in two cases supported by witnesses. The Trial Magistrate was not convinced of the truth on ground of their demeanor when testifying but no record of evidence that have led the Trial Magistrate to make adverse comments on their demeanor. "The necessity for the full disclosure of

matters relied on as discrediting the witnesses is greater here as the Trial Magistrate rejected the defence evidence on the alibi solely on unimpressive demeanor of the defence. “An alibi raises a specific defence and an accused who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that it is not unreasonable.

The issue of identification parade was raised by Mr. Mugwika. He relied on the case of **Okello vs Republic 1986 KLR 219** where it was held that the failure of police to preset the three complainant’s evidence of identification of the complainants evidence. In this present case there was no identification parade. Mr. Mugwika also relied on the case of **Maienyi vs Republic KLR [1986] 198**. Where it was held (holding1) that “Although it is trite law that a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficulty”. The court must warn itself of dangers of relying on such evidence. Then there is the authority of court of Appeal decision in Mombasa Criminal Appeal No. 236 of **2004 Athman Galgal Bajila & the other vs Republic** in that appeal the evidence of single identification witness was by one Rose Kobe. The court found that the circumstances were difficult and that Trial Magistrate failed to test that evidence by making an inquiry of the relevant circumstances such as the nature of light, its size, its position relative to suspects. In this respect the Trial Magistrate commented on the lamp which was inside the kiosk which enabled complainant to see and that it was 10.00 p.m. “The complainant was not asleep she must have had some light and therefore I cannot doubt her when she says she had a lamp at her kiosk” The Trial Magistrate did not realize that as one robber was stepping on her back and some torch was being flashed “on eyes to prevent her from seeing the robbers” She was not in a position to see and identify her assailants. When her son PW2 came he saw one of the men stepping on the back of his mother. She had no opportunity to see the robbers. We find the failure to consider this position a serious error creating doubt as to the identification of the appellants. PW2 did say that he recognized the one called Mboi wa Mborwa who he called “known thief in the area” This shows that the PW2 may have referring to Mboi wa Mborwa because he had a reputation as a thief not because he saw him that night.

On the issue of defence evidence, they all gave sworn evidence and made defence of Alibi. The Trial Magistrate dismissed the same as general denials. Trial Magistrate did not consider whether defence of alibi could be reasonable. She addressed the mind more the truth of prosecution case. She failed to address and to test the evidence of identification because although there were two witnesses the second witness PW2 came later and found his mother down and the circumstances were difficult. There is the issue raised by Mr Mugwika regarding the evidence given by two witnesses who were mother and son. Counsel relied on the decision of Court of Appeal, **Ragui vs Republic 1981 KLR**. Where the only evidence was of complainant who gave contradictory statement. The court found that the appeal was rejected unlawfully and on that ground quashed conviction and set sentence aside. It is clear the court could have upheld the appeal if there was no illegality.

It is our view then that the appeal must succeed if the Trial Magistrate tested on the identification evidence and if she had considered the alibi evidence offered by the appellants, it is possible she could have reached a contrary Judgment. We therefore allow appeal, quash conviction and set aside sentence of death. We order the Appellants and each of them to be set at liberty forthwith unless otherwise lawfully held.

Dated this 7th day of March 2008.

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J. N. KHAMINWA

JUDGE

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M.S.A. MAKHANDIA

JUDGE