



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CRIMINAL APPEAL 118 OF 2005, 119 OF 2005 & 120 OF 2005

ALLAN MULEI PETER .....1<sup>ST</sup> APPELLANT

CYRUS KIOKO MONI.....2<sup>ND</sup> APPELLANT

DANIEL MUTUKU KILONZO.....3<sup>RD</sup> APPELLANT

-AND-

REPUBLIC.....RESPONDENT

*(An appeal from the Judgement of Chief Magistrate Mrs. H.A. Omondi dated 29<sup>th</sup>*

*November, 2005 in Criminal Case No. 3827 of 2003 at Machakos Law Courts)*

**JUDGEMENT OF THE COURT**

The appellants herein were jointly charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellants, on 10<sup>th</sup> October, 2003 at 1.00 a.m., at Kyamwei Village, Mathunthini Sub-Location, Makutano Location in Machakos District, within Eastern Province, jointly with others not before the Court, and while armed with dangerous or offensive weapons, namely axes, machetes and hammers, robbed **John Ndata Nthiwa** of a cellphone, Nokia by make; a Seiko 5 wrist-watch; and cash in the sum of Kshs.40,000/= ? all valued at Kshs.52,000 – and at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said **John Ndata Nthiwa**.

When this appeal came up before us for hearing, the respondent’s counsel, **Mr. Wang’ond** promptly *conceded*; and his explanation was that there had been a *change of Magistrates during the trial*, but the Court did not take the care, in the circumstances, to comply with the terms of s.200(3) of the *Criminal Procedure Code* (Cap. 75, Laws of Kenya). That section confers certain rights upon the accused, and specifically provides as follows:

***“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

**Mr. Wang’ond** submitted that the accused persons had not been informed of their rights to recall witnesses, at the time of change of presiding judicial officers.

We have looked at the record, to ascertain the validity of the said concession to the appeal.

**His Honour Mr. S. M. Kibunja**, Senior Resident Magistrate, took the pleas on 22<sup>nd</sup> October, 2003 and thereupon, began the trial process. He continued with the hearing on 17<sup>th</sup> March, 2004. As at the date of mention, on 26<sup>th</sup> August, 2004, it seems to have been apparent that the original trial Magistrate would not be available, and **Senior Resident Magistrate Ms. D.W. Nyambu** directed that the proceedings be typed. The learned Magistrate scheduled the matter for further hearing on 26<sup>th</sup> October, 2004 before herself. The record for 26<sup>th</sup> October, 2004 shows the *coram*, and the fact that the learned Magistrate *proceeded straight to PW3 who was sworn* and gave her evidence in Ki-kamba. Clearly, the presiding Magistrate did not *specifically address the accused persons*; and it follows that trial went on informally without the invocation of the requirements of s.200(3) of the Civil Procedure Code. After hearing PW3, the Court heard PW4. After several mentions, **Ms. Nyambu** scheduled the hearing for 27<sup>th</sup> July, 2005 but, in the event, she was not available to conduct the hearing. The matter came up before Chief Magistrate **Mrs. H.A. Omondi** (now **Lady Justice Omondi**) who did record: “*Section 200 of the Criminal Procedure Code explained to the accused [persons]*” – and each *indicated his preference that the hearing should proceed*. On that basis the trial Court proceeded to take the testimonies of PW5, PW6, PW7 and PW8, as well as the unsworn statements of all the accused persons. The learned Chief Magistrate then prepared her judgement, in which she analyzed all the evidence and reached the verdict that guilt on the part of the appellants herein, had been sufficiently proved.

It is clear that there is a stage in the trial-Court proceedings when a lapse occurred in the application of the law: the transition in the hearing from **His Honour Mr. Kibunja** to **Her Honour Ms. Nyambu**, was not marked with the required information to the accused persons that they, on account of the change, had a *right to recall any witness* they may wish to further examine. Had the hearing ended in the hands of **Ms. Nyambu**, then clearly, the accused persons would have entirely missed out on the opportunity to further examine the witnesses if they had been minded to do so. In that case, learned counsel **Mr. Wang'odu's** conceding to the appeal would have been entirely justified, as the unavailing to the accused persons of their right to recall witnesses would, in all likelihood, have led this Court to annul the proceedings.

However, when the proceedings passed on from **Her Honour Ms. Nyambu** to **Her Honour Mrs. Omondi**, the accused persons were *duly informed that they had a right to recall witnesses*. They chose not to recall any witness, and so trial proceeded according to law, up to the end.

We hold that the lapse in procedure that was occasioned in the hands of **Her Honour Ms. Nyambu**, was for all practical purposes, cured when, subsequently, **Her Honour Mrs. Omondi** informed the accused persons that they were free to recall witnesses. We hold, in the circumstances, that there is *no merit* in the respondent counsel's concession to the appeal; and we note that when he so conceded, he asked the Court *to order a retrial* – a request which **Mr. Nyakeri**, learned counsel for 1<sup>st</sup> appellant, opposed. He opposed retrial on the following grounds: (a) the appellants will be prejudiced; (b) prosecution witnesses will then be accorded a second chance – to fill in gaps in the evidence; (c) appellants had been in prison for as long as five years.

**Mrs. Nzei**, learned counsel for 2<sup>nd</sup> and 3<sup>rd</sup> appellants, urged that the trial Court proceedings be annulled because *one part* thereof, marked by the transition from **Mr. Kibunja's** hearing to **Ms. Nyambu's** hearing, was *irregular*; but she acknowledge that proceedings were regular at the time of transition to hearing by **Mrs. Omondi**. So, in learned counsel's submissions, the trial process taken as a whole, had been invalid.

Such an argument, in our view, is *plausible* in law; but we hold that the *practical objects* of criminal prosecution, which focus on the protection of members of the public from crime, are far more important than purely technical concerns; and this Court, by virtue of the overall design of the Criminal Procedure Code (Cap. 75), has a *discretion* to take decisions for ensuring effective application of the criminal law.

**Mrs. Nzei** doubted that a retrial if ordered, would have ended in conviction, in the light of weaknesses

in the *evidence* tendered. Such a submission is consistent with our conviction that, it is proper to review the *evidence* herein, and to see whether the appellants were properly convicted.

PW2, **John Ndata Nthiwa**, testified that on 10<sup>th</sup> October, 2003 at about 10.30 p.m., he was at his home in the company of his wife. At that time PW2 had just shown 3<sup>rd</sup> appellant a cow which was to be slaughtered in the home, on the following day. The 3<sup>rd</sup> appellant then went to sleep in a separate house, in the same home. At 11.00 p.m. that night, there were intruders in the compound, calling out PW2's name; and he recognized the voice of 2<sup>nd</sup> appellant, as the person calling out his nickname, "**Matiba.**" The 2<sup>nd</sup> appellant had been PW2's employee, and he lived some 100 metres away from PW2's house. The voice of 2<sup>nd</sup> appellant was calling on PW2 to come out, and if he failed to do so, he would be killed. When PW2 went into the lounge, he found that all the windows had been damaged, and he then saw two people enter the house through the rear door – and this caused him to seek refuge in his bedroom. The house has solar lighting, and the lounge lights were switched on; there was lighting too outside – bright moonlight. Of the two people entering through the back door, PW2 noticed that one was 2<sup>nd</sup> appellant herein.

PW2 found his way into the ceiling, and hid there. From there, he saw the intruders manhandling his wife and extracting money from her. One of the attackers followed PW2 into the ceiling, and cut him with a machete on the foot and on his back; he did not recognize this man who followed him into the ceiling. He was forced out and came into the bedroom, where he was kept in a sitting posture. When he came out of the ceiling he found two intruders in the bedroom, one of them wielding a machete. They ordered PW2 not to gaze at them; they seized his wrist-watch and his cellphone. He was unable to see these two robbers well; and he did not see numbers of other attackers who were positioned outside. The robbers decided to leave, as they said there were people getting attracted to the scene. But as they left, PW2 and his family, who were yelling in alarm, heard a loud bang. Neighbours came to rescue PW2 and his family – among them one **Richard Kiio**, one **Makundi**, one **Kataa**, and one **Matheka**. PW2 told them of the robbery which had just taken place, and gave the name of 2<sup>nd</sup> appellant herein as one of the attackers. **Makundi** drove PW2 and his wife to the Police station to make a report, and then to Machakos Hospital, for treatment.

**Kiio** later told PW2 that he had encountered the robbers and shot at them with his bow and arrows, as he headed to PW2's home in response to the alarm; and **Kiio** said he had recognized both 1<sup>st</sup> and 3<sup>rd</sup> appellants herein, among the robbers; the two were running away from PW2's house.

PW2's wife (PW3), **Juliana Wandia John** said that while in her house at about 12.20 a.m. she heard 2<sup>nd</sup> appellant herein calling out to her husband, "**Matiba**"; and she awakened her husband, who went into the lounge. PW3 said she saw four intruders inside the house; they had broken the window using a hammer; three entered the house, but **Kioko** (2<sup>nd</sup> appellant) remained outside. Those who entered battered her, as they demanded money and mobile phone with menaces; she gave them Kshs.40,000/= which had been kept in her husband's coat-pocket; in the meantime, her husband had gone up the ceiling. She also surrendered to the thugs her husband's Nokia cellphone, and a wrist-watch, Seiko 5. They demanded to know where her husband was, and she told them he was in the ceiling. Two intruders went into the ceiling and battered PW2, as they demanded money. Those who remained outside then gave the warning that the robbers should now leave; they said, "*nje kumeharibika*" (Kiswahili for, "*things are getting bad for us outside*"); it arose from the screams of children which were now attracting Good Samaritans.

The 1<sup>st</sup> appellant herein, in unsworn testimony, pleaded alibi: on the material date he had gone to see his sick mother who soon thereafter, died, and on his way back home he was arrested by Policemen.

The 2<sup>nd</sup> appellant, in his unsworn statement, too, pleaded *alibi*, as did also 3<sup>rd</sup> appellant in his unsworn evidence.

PW2 testified that 2<sup>nd</sup> appellant was well known to him, firstly because 2<sup>nd</sup> appellant was his relative,

and secondly, as he had employed 2<sup>nd</sup> appellant, who had left his employ only a month earlier. The solar lighting had been switched on, both in the lounge and the bedroom, at the material time, and PW2 said he did see and recognized 2<sup>nd</sup> appellant herein. PW2's brother **Richard Kiio** told him he (**Kiio**) had seen 1<sup>st</sup> appellant and had shot an arrow at this appellant who was escaping from PW2's house following the robbery attack; and **Kiio** said he had also recognized 3<sup>rd</sup> appellant herein.

The exact state of the lighting, at the material time, was not the subject of all-consistent testimony. PW2, on cross-examination, admitted that in his statement to the Police, he had stated that he did not see the robbers, but heard the voice of a person he thought he knew; and he said: "No lights were on at the time"; he further said, in answer to cross-examination: "The robbers had entered the house through the windows and set on the solar lights of the sitting room, and by then I was already in the ceiling. I assumed it was [2<sup>nd</sup> appellant] who put [on] the solar lights...as he knew where the switch was." When he was forced out of the ceiling hide-out, PW2 found the bedroom in darkness, as the solar light had been switched off by the robbers.

PW3 said she heard 2<sup>nd</sup> appellant calling out to her husband (PW2) and she then proceeded to the sitting room, where she saw four intruders, and she saw that 2<sup>nd</sup> appellant was outside. PW3 then says three of the intruders entered the house through the window, 2<sup>nd</sup> appellant remaining outside. PW3 says there was a strong moonlight, which enabled her to see the other intruders. She said she well knew both 1<sup>st</sup> and 2<sup>nd</sup> appellants, as they are neighbours, and that, those who entered the house were not well known to her. On cross-examination, PW3 said she was so scared she did not look at the clothing worn by the attackers.

**Richard Nthiwa** (PW4) testified that he armed himself with a bow and arrows, and approached PW2's house when he realized his brother was under attack. In bright moonlight, PW4 found his father, **David Nthiwa**, also armed, and they attacked the escaping intruders with bows and arrows. PW4 said he saw 3<sup>rd</sup> appellant as the man in charge of the gang of robbers, and that he had seen this appellant in the moonlight. PW4 said 3<sup>rd</sup> appellant was known to him, as they grew up in the same village; and 2<sup>nd</sup> appellant used to work for his brother. It was PW4's testimony that the fleeing robbers had left behind a hammer, a machete, and a blue cap. He collected these items, and handed them over to the Police officers who soon arrived at the *locus in quo*. On the following morning, PW4 saw the appellants herein at Makutano Market, and he alerted Police officers, who came and arrested the three.

PW4 said, on cross-examination, that he saw and recognized 3<sup>rd</sup> appellant herein as he (PW4) was in the bush, some 20 metres away from him. PW4 said 1<sup>st</sup> appellant was at the material time dressed in trousers and a jacket – though colour and particulars are not given. PW4 was not sure which ones of the robbers were armed with the weapons recovered.

PW5, **Patrick Mutiso**, a brother of PW2 and PW4, said he joined his father and brother in attacking the fleeing robbers, and that there was bright moonlight at the time. PW5 said he saw the intruders arguing among themselves, as to who caused the failure of the robbery-mission, and referring to one another by name; he said he saw all the three appellants herein.

But on cross-examination, PW5 did speak clearly as to the identity of the attackers.

The learned Chief Magistrate rightly identified the crucial question in the trial as *identification*. This is how she resolved it:

**"So the main issue here in identification, and whether the circumstances were so favourable as to rule out the possibility of a mistake. PW2 initially said he was able to see, identify and recognized [2<sup>nd</sup> appellant] by his voice and the solar-powered lights as he stood outside, but on cross-examination it turns out that the solar lights were not on, and ...he had, in fact, told the Police that it was dark, and he heard a voice which he thought he knew.**

The learned Magistrate came to the conclusion that “PW2’s identification is not reliable, given the contradiction in his evidence...” But she then relied on the testimonies of PW3 and PW4 as proof that, indeed, the appellants herein had been identified at the *locus in quo*. On that basis, the trial Court stated as a point of caution that: “...I recognize that where the only evidence against a defendant is of identification by recognition, a Court has to examine such evidence carefully, and be satisfied that the circumstances of identification were fair and free from the possibility of error.” The learned Magistrate then proceeded to find that “the evidence sufficiently proves the charge against the accused [persons], and they are convicted as charged.”

Since counsel in this case were mainly concerned with the possibility that this Court may order a *retrial*, hardly any attention was devoted to *merits* of the case which, of course, rests in the *evidence*. It is well recognized that a first appellate Court such as this one, has a duty to *rehear* the matter, albeit essentially relying on the record, and to come up with what, in its conviction, is a right and just verdict: ***Coghlan v. Cumberland*** [1898] 1 Ch. 704; ***Wycliffe Abam v. Republic*** Nbi High Ct. Crim. Appeal No. 167 of 2006. Accordingly, we have ourselves carefully reviewed the evidence on record.

Learned counsel ***Mrs. Nzei***, who devoted some attention to the evidence on record, urged that the claim by PW2 and PW3 that they had recognized one of the appellants herein by voice, at the time of the robbery, was unreliable; and also that the claimed visual recognition of the appellants by PW2, PW3, PW4, PW5 and PW6 was equally unreliable.

Upon a careful consideration of the evidence, we have formed the clear impression that the state of lighting at the *locus in quo*, at the material time, was mostly the subject of *uncertainty* among the key witnesses, and was the subject of *contradiction* among some of these witnesses. It is impossible to say that PW2 definitely perceived any of the three appellants at the time of the robbery attack. We have noted that PW3 was under great *stress*, during the attack, and could not very well have identified the individual robbers, especially at a time when there was no steady supply of lighting. Between these two crucial witnesses, there is much contradictory evidence, as to what each did, and what each saw. It is also not certain that the witnesses who engaged the robbers in a fight, as these robbers fled, clearly saw who the enemy was. None of the witnesses could describe clearly the apparel worn by any of the robbers. And nothing was recovered which, by its identity, pointed to any particular appellant as the one associated with it on the material night, or at any other time. In effect, it is *not possible* to state that any of the three appellants was identified at the scene of crime. Consequently, the prosecution did not identify any definite bond, of probative force, that linked the hands of any of the appellants herein to the robbery which was the basis of the charges. Even if it were the case that one or all of the appellants were part of the gang of attackers on the material night, which would, of course, be most reprehensible, the prosecution did not, by the lawful method of proof, lay bare the evidence before the Court; and thus, there was **no** proof beyond reasonable doubt.

Consequently, we will allow the appeals by the three appellants, acquit each one of them, set aside the convictions and sentences, and order that they shall be set at liberty forthwith, unless otherwise lawfully detained.

***Orders accordingly.***

**DATED and DELIVERED** at Machakos this 22nd day of April, 2008.

**J.B. OJWANG**

**I. LENAOLA**

**JUDGE**

**JUDGE**

**Coram: Ojwang & Lenaola, JJ.**

**Court Clerks: Mueni**

**For 1<sup>st</sup> Appellant: Mr. Nyakeri**

**For 2<sup>nd</sup> & 3<sup>rd</sup> Appellants: Mrs. Nzei**