REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 210 OF 2005

PETER MUTUOTA GICHERE ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 490 of 2005 dated 9th August 2005 by Mr. G. K. Mwaura – P.M.)

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 211 OF 2005

ELIAS KAMAU MWANGI ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 490 of 2005 dated 9th August 2005 by Mr. G. K. Mwaura – P.M.)

J U D G M E N T

The two appellants, **Peter Mutuota Gichere**, the first appellant, and **Elias Kamau Mwangi**, the second appellant, were tried and convicted on one joint charge of attempted robbery with violence contrary to section 297 (2) of the Penal Code. They pleaded not guilty to the charge and the two were tried by the principal magistrate (**G.K. Mwaura**) who in the end found them guilty on the charge preferred against them and sentenced them to suffer the ultimate penalty, namely death that being the only sentence provided for that offence. Being aggrieved by that conviction and sentence, the appellants lodged the instant appeals which at the hearing we ordered for their consolidation.

The appellants have raised similar grounds of appeal to wit; that the prosecution case was tainted with procedural irregularities, that their purported identification was doubtful, that the trial court stage managed the case for the prosecution and finally that the honourable court failed to accord the appellants' defence adequate consideration.

The facts relied upon by the prosecution may be briefly stated thus. On 2nd March 2005 at about 8 p.m. **Julius Mwangi Maina** (PW1) the complainant herein was with his family consisting the wife, **Magdalene Wambui Mwangi** (PW2) and son **Evans Maina Mwangi** (PW3) in their house at Gaitheri

village in Murang'a District when PW2 asked PW3 to go and lock the kitchen door. PW3 left the house and proceeded as requested. Just outside the main door he encountered three men. The house has solar light. Through this light, PW3 was able to recognise the 1st appellant as he was from the neighbourhood. The three men approached him dangerously and the young boy screamed attracting the attention of his father (PW1) and mother (PW2). PW2 was first off the block. She ran towards her son but met with the 1st appellant at the door step. The 1st appellant attempted to push her aside but she stood her ground screaming. She also recognised the 1st appellant. Behind the 1st appellant, she saw and recognised the 2nd appellant who told her to stop screaming. Soon thereafter PW1 joined the fray and started fighting off the intruders starting with the 1st appellant. As PW2 kept screaming the 3rd intruder took off and was followed later by the 2nd appellant. In the meantime, PW1 had caught the 1st appellant's leg whom he recognised as a person from his area. The 1st appellant started to drag PW1 along whilst hitting him with a piece of metal in a bid to extricate himself. Due to the screams by PW2 neighbours responded. It is at this stage that the 1st appellant hit PW1 so hard with the metal bar that he let go of the 1st appellant who then fled. In the process however PW1 had been able to recognise the 1st and 2nd appellants. The neighbours came including **Julius Mwangi Karagu** (PW4) and on seeing that PW1 was injured took him to a local dispensary but was referred to Murang'a District Hospital. Before that PW1 had passed through Murang'a police station and reported the incident to **Cpl. Joseph Meluto** (PW6) who issued him with the P3 form. The P3 form was eventually filled by **Dickson Kinyua** (PW5) a clinical officer at Murang'a District Hospital. He ascertained the degree of injuries sustained by PW1 in the process as harm. According to PW1, the people who attacked his homestead did not take anything. However he suspected that their intention was to steal a T.V., a radio and two mobile phones in his possession. He also had Kshs.4000/= on his person which he suspected that the assailants too had intentions to grab from him. Having given the names and or descriptions of the appellants to PW6, the latter caused the arrest of the appellants through the A.P's from Gakure area. They were then charged.

In their unsworn statements of defence, both appellants' denied their involvement in the crime. Their defences however mainly concentrated on the events on the day of their arrest i.e. on 16th March 2005. They never addressed the events of 2nd March 2005, not that strictly they were strictly required to do so.

When the appeals came up for hearing, both appellants chose to give us written submissions in support of their respective appeals which we have carefully read and considered at length. **Mr. Orinda**, learned principal state counsel appeared for the state and submitted that the entire evidence was of a family nature. It involved parents and a son who both identified and or recognised the appellants. Counsel submitted that PW1 had told PW4 that he had recognised the appellants. That the appellants' defences were duly considered and correctly dismissed. Much as Mr. Orinda was comfortable with the evidence of identification he was nonetheless disturbed as to whether really the offence of attempted robbery with violence had been committed and proved on the evidence on record. He went on to submit that other than the words "**be silent"** allegedly uttered by 2nd appellant nothing else was said. These people according to the learned state counsel could have been on a mission to kill or burn the house and not necessarily to violently rob PW1 and his family. The purpose of those people going to PW1's house thus remained a mere hypothesis.

The appellants have come to this court by way of appeal and this being a first appeal they are entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination. See **Okeno v/s Republic (1972) E.A. 32 at page 36**. It is for this reason that we have endeavoured to summarise the salient portions of the prosecution witnesses' evidence and the unsworn statements of defence by the appellants.

The evidence on record is that the alleged offence was committed at about 8 p.m. It must therefore have been dark. Both PW1, PW2 and PW3 admit as much. However they claim to have been able to recognise the appellants courtesy of the solar electricity. It would appear that the incident actually happened at the doorstep of the house belonging to PW1. Under cross-examination by the 2nd appellant on the issue PW1 retorted. "**The door area is well lighted....."** Previously he had stated under cross-examination by the same appellant as follows: "**..... I have solar light at home and I clearly saw the**

two of you....." As for PW2, she stated in her evidence in chief that "**..... I saw them as there was a bright illumination from our solar lights...."** She also went on to state under cross-examination by the 1st appellant that "**..... We faced each other well and I saw it was you....."** Under cross-examination by the 2nd appellant she reiterated that "**our house is well lighted at night and I saw the two of you well ...."** Similarly PW3 testified on the issue as follows: "**..... Just outside the door, I met three men. I saw them from the security light. One of them is Mutuota from our area....."** Under cross-examination by 1st appellant he stated "**..... The house door area is lighted by a security light. I saw the three men just outside the door where there is a security light....."** The totality of the foregoing is that there was sufficient light at the scene where the appellants and their cohort who escaped confronted PW1, PW2 and PW3. That fact has not been sufficiently controverted. The only complaint raised by the appellants in their written submissions is that the way the attack was executed, it could not have accorded the said witnesses an opportunity for them to sufficiently observe the appellants so as to be able to recognise them. We do not agree with this proposition. The evidence on record suggests that the attack on PW1 was not sudden as claimed by the appellants. What we have on record is that on his way to lock the kitchen door as directed by PW2, PW3 encountered three people who approached him menacingly. He screamed drawing the attention of his parents. His mother was first to react. She rushed towards her child only to bump into the 1st appellant at the door step in the full glare of the light. The appellant tried to force his way into the house but she resisted and stood her ground. All this time PW2 was having a face to face encounter with 1st appellant. It should be noted that the appellants were not at all disguised so recognising them with the light available could not have been that difficult, more so when they were people well known to the witnesses. The 2nd is said to have told PW2 to keep quiet and not to scream. However PW2 went on screaming and it was then that 2nd appellant took off with the other assailant. In the meantime, PW1 had caught hold of the 1st appellant by the leg and they were struggling also under the glare of light. This struggle, it would appear went on for a while. There was therefore sufficient time for these witnesses to identify the assailants sufficiently to be able to positively recognise them. It should not be lost on us that both appellants were people well known to PW1, PW2 & PW3 as they were from the same neighbourhood. This fact was not controverted by the appellants either. We doubt whether one requires a lot of time to be able to recognise a person well known to him. Both PW1 and PW2 did inform whoever cared to listen that they had recognised the appellants as among those who had come to their compound. Indeed it was on that basis that the appellants were easily arrested by PW6.

The appellants have raised the issue that if indeed they were the assailants and were indeed recognised by the witnesses and the fact that they were well known to the witnesses as they came from the same neighbourhood why was it that it took the police almost two weeks to have them arrested? It should be noted that the appellants neither raised the issue with PW1 nor PW6, the investigating officer in their cross-examination. However the answer to that rhetorical question may be found in the testimony of PW2 and PW6. PW2 testified that "**..... I have said that my husband was severely injured and went to hospital the same night ....."** As for PW6 he testified under cross-examination that "**..... The complainant first went to hospital for treatment and later assisted the A.P's identify you ....."** It would appear therefore that the delay in having the appellants' arrested was due to PW1's hospitalization. We also note that the appellants have not raised the issue of any grudge between them and PW1, 2 & 3 as would have prompted them to frame the appellants with the case.

This was not merely a case of identification and the trial court clearly appreciated that position before making the finding, correctly so, that it was also a case of recognition. The learned magistrate believed the three witnesses who supported one another materially that they knew the appellants very well before that day and recognised them when they saw them on that fateful evening. On our own assessment of the evidence, we find it consistent and credible, much as the key witnesses were members of the same family. There is no law which says that evidence tendered by members of the same family should not be accepted as credible. The evidence of the three witnesses was certainly believable. In the case of **Anjononi & others v/s Republic (1980) KLR 59**, the court of appeal stated:-

"**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 the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form of other ....."

The evidence of recognition in this case is reliable and we have no reason to disturb the finding made by the trial court on that issue.

The appellant have raised certain procedural irregularities allegedly committed by the trial court in the course of the trial. That section 77 of the constitution was breached when the language of the court and in which the appellants offered their pleas and defence was not indicated. Clearly this ground of appeal has no merit and is a mere afterthought. We have looked at the original record and it is clear that on the day of plea the substance of the charge and every element thereof was stated by the court to the accused persons, in the language that they understood and on being asked whether they admitted or denied the truth of the charge replied "**Not true"** and a plea of not guilty was accordingly entered against them. In any event, the appellants having entered a plea of not guilty and their trial having proceeded in the language they had chosen to speak in (kikuyu), no prejudice was occasioned to them therefor. The story would have been different had they pleaded guilty and the court proceeded to convict and sentence them.

As for the defence, the record shows that the appellants gave unsworn statements. There was a court interpreter. What they said in their unsworn statements were recorded. It must be taken that they were communicating with the court in a language they and the court understood. Again the story would have been different had the appellants claimed that what is reflected in the record is not what they said in court. That being our view of the matter we are unable to accept that section 77 of the constitution and sections 207 and 198 of the criminal procedure code were breached.

How about section 144 of the criminal procedure code? The appellants claim that this provision of the law was violated too. That very crucial witnesses who would have clarified and fortified the evidence of PW1, 2 & 3 were not summoned. The appellants do not say who this witnesses were and what sought of evidence they would have tendered. In the case of **Bukenya & others v/s Uganda, (1972) E.A. 549**, it was held interlia:-

"**(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**

(iii) The court has a right, and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iv) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution ....."

In Kenya, the case of **Nguku v/s Republic (1985) KLR 412** captures those principles. In this case, was the evidence called "barely adequate" to warrant our inference that the evidence not called would have tended to be adverse to the prosecution? We do not think so. The evidence on record was beyond pre-adventure and safe to return a conviction. In any event nothing barred the appellants from summoning such witnesses in their defence. We say no more on that submission. It has no merit.

Finally, on the question of defence, we have no doubt that the learned magistrate considered the same and found them wanting. Certainly the defences advanced by the appellants and which hinged only on the events of the day of their arrest were outclassed by the overwhelming prosecution evidence.

We agree however with the learned state counsel that the evidence on record does not disclose the offence charged. It does however disclose another offence though. In the judgment of the trial court, the learned magistrate stated that:- "**..... From the evidence I have no doubt that the three men intended to get into the complainant's house and rob the complainant's family ....."** This was a theory by the learned magistrate not canvassed before him nor supported by the evidence. Perhaps the appellants are

right on this one when they claim that the trial court stage managed the case for the prosecution and filled up certain gaps in their case. When the assailants struck, they did not instruct, command or order any of the victims to do anything. It cannot therefore be said with certainty that their presence in the compound was in a bid to commit a robbery. They could have been there on another mission such as to murder or commit arson as Mr. Orinda cheekily submitted. Much as PW1 had things capable of being stolen, the assailants did not manifest that intent either by word or deed. The reason behind their presence at the premises remains a mystery. The offence charged was thus not proved to the required standard.

What offence then is disclosed by the evidence? There is no doubt at all that PW1 was assaulted and suffered serious injuries. PW5's prognosis was that PW1 suffered bodily harm. However and as already stated, it cannot be said that the attack was connected with he robbery. In the circumstances, we think, that it is unsafe to uphold the conviction on the charge preferred. We therefore quash it. As the offence of assault causing actual bodily harm has been proved to have been committed by the appellants, we hereby convict the appellants of Assault causing actual bodily harm contrary to section 251 of the penal Code and sentence each one of them to four (4) years imprisonment to run from 9th August 2005.

Dated and delivered at Nyeri this 29th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE