REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 302 & 308 of 2006

JAMES KURIA KINUTHIA……..…..1ST APPELLANT

NDUNGU MBURU NUNGARI……..2ND APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(From the original conviction and sentence in Criminal Case No. 632 of 2005 of the Chief Magistrate's Court at Kibrea by Mrs. Wasilwa– PM)

J U D G M E N T

Jpellant) were jointly charged with robAMES KURIA KINUTHIA (the first appellant herein) and NDUNGU MBURU NUNGARI (the second apbery with violence contrary to section 296(2) penal code. That on the 16th day of January, 2005 at Dagoretti Market within Nairobi area, jointly with others not before court, while armed with dangerous weapons namely pangas, swords and knives, robbed WILLIAM APAYIO LOLIMA of two car batteries, two radio speakers, a pressure lamp, two hens, assorted second hand shoes and cash Kshs 3000/- all valued at Kshs 70,350/- the property of JANE WAITHERA NJOROGE and at on immediately before or immediately after the time of such robbery threatened to use actual violence.

At the hearing, the second appellant was the first accused whilst first appellant was the second accused. Upon completion of the case the learned trial magistrate convicted both appellants and sentenced them to death.

Apayio William Lolima (PW3) was a watchman at Hakilisha Dunia Bar, in Dagorette – the bar is owned by Jane Waithera Njoroge. On 15th January, 2005 while on duty at midnight, thugs struck armed with rungus, swords and homes and threatened to kill anyone who screamed. PW3 was able to identify the two appellants and one Wangila with the aid of a pressure lamp. They took away the radios, speakers, shoes and three chicken which they slaughtered using a knife produced as exhibit 4. Second appellant put on new shoes stolen from the bar and left his used ones which were also produced in court. PW3 said he knew first appellant as a friend to second appellant and is also a neighbour. He knew second appellant as he stays with him. So when PW2 reported in the morning PW3 told her he knew who the thieves were.

PW1(Jane Waithera Njoroge) confirmed going to her bar on 16th October, 2005 after receiving a report

from one Kiarie about the incident. She confirmed that the things listed in the charge sheet were missing from the bar all having been stolen. She says the shoes left behind in a store in the bar belonged to second appellant. How did she know this? Because she had seen him wearing those shoes the previous night when he was in the bar. So they went to second appellant's house and found first appellant there and a search conducted led to the recovery of one jungle trouser, a sword and a knife.

PW2(Samuel Kiarie Wanjiru) had slept inside the bar that was attacked. He was woken up by one Ole Paiyo that thugs had raided the place and he saw people come in. They were forced to the door, but he says:-

"*They lit a lamp and I was able to see them. I identified "worrior" and his friend Wangila and Kamau. I used to see them before as we were staying in the same estate at Dagoretti."*

He identified a sword and knife in court as among the weapons the attackers had. He further stated in his evidence that he recognized the shoes as he had seen the second appellant wearing them before.

PW4 Corporal Bernard Okoth is the one who received the report about the incident at the bar and visited the scene. He recovered the shoes which were said to have been left behind by the thugs. He found first appellant inside second appellant's home and arrested him after being identified by the watchman as among those who robbed him. He confirmed that all the items recovered and produced in court belonged to the appellants. Second appellant was arrested by PC Vincent Koech.

On being placed on their defences, first appellant was unsworn and stated that he was found in second appellant's house, where second appellant had left him as he was sick. He was taken to the police station and told he would be released if the owner of the house came. Second appellant in his unsworn defence confirmed he had left first appellant inside his house. He said he worked in a slaughter house and all that was recovered were his tools of trade.

The learned trial magistrate then stated that she had examined the record and found that PW2 and PW3 were able to see the accused persons well as the robbers lit a pressure lamp which emitted ample light for them to see the appellants. She noted that, the evidence of PW2 and PW3 was corroborated regarding the events and she found them believable. The learned trial magistrate termed the appellant's defences as a mere denial. Both appellants sought to rely on similar amended grounds of appeal which were handwritten and stated that:-

The learned trial magistrate erred by relying on the purported visual identification without considering that the same was made under hectic prevailing circumstances.

The charges were not proved and did not meet section 77(2) of Kenya. (Presumably he is referring to the Contitution).

The trial magistrate rejected their defences without considering them and that the same was not displaced by the prosecution case.

In their submissions, the first appellant says the victims had not expected the attack and there is a possibility that they were in total confusion, stressed and shocked having been suddenly overwhelmed from their sleep making their observation credibilities to be unwilling and unreliable.

First appellant states that the witnesses never disclosed to the court how much time they took to observe the attackers so as to positively conclude that they had been properly identified. First appellant says this is borne out by the fact that none of the witnesses pointed out any of the physical appearances of the assailants. The efficiency or sufficiency of the lighting system is also contested and the decision in the case of *Charles O Maitany versus Republic Criminal Appeal No 6 of 1986 Criminal Appeal at Nairobi* is cited where it was held that –

"*The strange fact is that, many witnesses do not properly identity other persons even in daylight. It is at*

least essential to ascertain the nature of light available, what sort of light, the size and its position, relative to the suspect are important matters helping to test the evidence with greater care. It is not a careful test if none of these matters are not known."

It is the first appellant's contention that the learned trial magistrate ought to have examined the evidence of PW2 and PW3 with caution especially because the two witnesses did not clarify whether first appellant was inside or outside. He also pointed out that he was not found with any of the stolen items.

Similar arguments are advanced by the second appellant as regards identification, opportunity for identification the lack of a physical description of the attackers. He adds to this the shoe identification factor – that the evidence was not sufficient as to warrant the court reasonably concluding that he wore the shoes recovered from the scene as there is no description of the same at all. In this regard second appellant cited the decision in *Muiruri Njoroge and another versus Republic Criminal Appeal No. 115 of 1982 Criminal Appeal* held that –

"*Court of law does not act on assertions unless proved by the evidence before court."*

Second appellant likewise, submits that none of the items stolen during the robbery was recovered from him.

The learned State Counsel Mrs. Gakobo opposed the appeal saying both PW2 and PW3 were clear as to what enabled them to see the identity of their attackers – being a lamp which emitted sufficient light. She further submitted that PW2 and PW3 recognized both appellants as people they had known previously and that this recognition is supported by the fact that the appellants were in no hurry to leave the scene and other than ferrying the stolen items, they also had time to slaughter three chicken – which means the incident lasted a long time and this gave PW2 and PW3 sufficient time to see and recognize their attackers. She states that the totality of the evidence by recognition is water tight and there is no possibility of error. She also points out that the trial court had an opportunity to observe the demeanor of the witnesses and held that PW2 and PW3 were credible witnesses. Basically the content of this appeal is with regard to identification and the existing opportunity thereto. We take note from the evidence that the attack was at 1.00a.m. or thereabouts – which would be very dark. However, both PW2 plus PW3 are categorical that the conditions were favourable PW2 on cross examination said this:-

"*You lit the pressure lamp and I saw you. I lay down but I did not lie flat, so I saw you. I saw all the four robbers who were inside. I was laying (sic) at the counter ……I caught your appearance ……."*

On further cross examination by first appellant PW2 stated –

"*I know you as accused's friend. I have seen you together many times. We were made to lie down but our eyes were not covered, so I saw you."*

This is confirmed by PW3 who on cross examination by second appellant stated –

"*You are the ones who lit the lamp. I knew the robbers."*

And on cross examination by first appellant PW3 stated –

"*You and the others were the robbers. I had known you for two months. I watched as you people robbed us ……I did not write description of robbers as I knew you."*

We note that the opportunity to see and identify the attackers was not mere fleeting glance. Indeed the attackers did not just stumble upon PW3 while in his sleep – he was the watchman and there is nothing to suggest that he was asleep. He heard the iron sheets being cut and called to Kiarie and told him they were under attack. Which means that by the time the attackers gained entry, both Pw2 and PW3 were awake and alert – so the question of their ability to observe being fuzzed up by a sudden awakening from slumber does not hold. Both witnesses are consistent that it is the robbers who put on a lamp, which is

described as a pressure lamp and this is what enabled them to see the attackers. We find that conditions were favourable for positive identification. The identification was one by recognition since both witnesses knew and had seen the appellants in the past. Indeed PW3's answer in cross examination clarifies the question as to why no description of the attackers was given in the first report – there were not strangers and PW3 says –

"*I did not write description of robbers as I knew you.*"

Indeed PW3 even knew them by name as he states in his evidence in brief.

"*I was able to identify Ndungu, Kiarie, Kamau and Wangila.*"

One cannot fault PW3's reasoning on that, ordinarily one identifies individuals by name unless the name is not known, then a physical description will be given to identify the individual.

We find therefore that there was no error on the part of the trial magistrate in relying on this evidence. Contrary to the submissions by the appellant's submissions, the learned trial magistrate actually considered their defences and found them to be mere denials. Although the appellant's refer to their defences as detailed they are brief three to five liners which do not even refer to their activities on the night in question. Little wonder then that the learned trial magistrate rejected the same.

The upshot then is that the convictions were safe and are upheld. The sentences are confirmed and subsequently the appeals are dismissed.

Delivered and dated this 27th day of May 2008 at Nairobi.

J.B. OJWANG **H.A. OMONDI**

JUDGE. **JUDGE.**