



**ROBERT CHARLES KARIUKI GACHIRI ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by L. NYAMBURA, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 571 of 2004 at Kigumo)*

**Consolidated with**

**Criminal Appeal 112 of 2005**

**JOHN NDUNGU KAMAU ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by L. NYAMBURA, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 571 of 2004 at Kigumo)*

**Consolidated with**

**Criminal Appeal 113 of 2005**

**STEPHEN MWANGI NYAMBURA ..... APPELLANT**

**Versus**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by L. NYAMBURA, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 571 of 2004 at Kigumo)*

**Consolidated with**

**Criminal Appeal 114 of 2005**

**ASMAN IRUNGU HASSAN ..... APPELLANT**

Versus

REPUBLIC ..... RESPONDENT

*(Being an appeal against the conviction and sentence by L. NYAMBURA, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 571 of 2004 at Kigumo)*

**JUDGMENT**

The above appellants' appeals were consolidated with the lead file being ***Criminal Appeal No. 86 of 2005*** and the appellant therein being the ***first appellant***. The ***second appellant*** was in file ***Criminal Appeal No. 112 of 2005***. The ***third appellant*** was appellant in ***Criminal Appeal No. 113 of 2005***. The ***fourth appellant*** was appellant in ***Criminal Appeal No. 114 of 2005***. All the appellants were charged in the lower court with two counts of robbery with violence contrary to ***Section 296(2)*** of the Penal Code and with the third count of rape contrary to ***Section 140*** of the Penal Code. They faced an alternative charge of indecent assault contrary to ***Section 144(1)*** of the Penal Code. The learned trial magistrate in her considered judgment acquitted the appellants of the third and the alternative counts. They were however convicted of robbery with violence on the two counts and sentenced to death. They were dissatisfied with the finding of the court and they preferred the present appeals.

This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of ***OKENO vs REPUBLIC 1972 EA 32*** is relevant. It was stated in that case as follows:-

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424.”*

PW1 who was the subject of the first count said that on 2<sup>nd</sup> April 2004 at 8.p.m he was at home. He was in the main house and as he opened the door to go to the kitchen which was a separate structure he saw Irungu, that is, the fourth appellant standing out side the house. He had a lamp with him and was therefore able to recognize him. He noted that he had a panga and an axe. This appellant was known to him because he used to see him selling miraa at Maragwa Township. Irungu told him to lie down. The lamp was placed on the side sink. Irungu started to hit him with the panga and then smashed the lamp. Other people joined Irungu and pushed him to the bedroom where he noted that his mother PW 2 was also pushed in. They both were beaten so much that his mother gave the robbers kshs. 600. The people were talking to them both in Kiswahili and Kikuyu language. They had many torches. Again they were pulled and taken to PW 1 brother's house. They were ordered to sit on a sofa set. The wife of his brother N.W.G was also brought to the house. At that point the robbers flashed their torches and this enabled PW1 to see the face of Mwangi the third appellant herein. He noted that he was chewing miraa. He knew Mwangi as a tout at Maragwa Township. He had known him for a long time. He noted that he was wearing a sweater. He and his mother were taken to his brother's bedroom and ordered to go under the bed. He heard N.W.G being ordered to remove her clothes and she was raped by all the robbers. While he was under the bed he peeped and saw the first appellant Kariuki. He said that Kariuki was his neighbour. He noted that Kariuki was wearing a 'godfather' hat. All the robbers were armed with pangas and axes. They continually beat up pw1 and his mother using the pangas. Thereafter the robbers said that they would wait for his brother and all the torches were switched off. When his brother G came to the homestead, his mother shouted that there were robbers which caused G to run away shouting which caused neighbours to come to their rescue. This witness said that the robbers were about 17 in number. He summarized by saying that he saw during the robbery the first, third and fourth appellants. He did not see the second appellant. In the robbery he lost kshs. 3,100. The robbery took two and half hours. On

being cross examined this witness said that he recognized Mwangi the third appellant because the light of the torches was directed on his face. That light was shone for a few seconds but on several occasions. He confirmed that he often saw Mwangi who was working as a tout at Maragwa township while going to Muranga. PW 2 was the mother of PW1. She is the complainant in respect of count 2. On 2<sup>nd</sup> April 2004 at 8 p.m. she was in her kitchen when she heard PW 1 open the door to the main house. He was coming towards the kitchen then she heard a bang. She saw three people beating PW 1 with the panga. She closed the kitchen door and began to scream. One of the robbers came to the kitchen and he held an axe on her. Another robber came into the kitchen and began to beat her with the side of a panga. The second person to come to the kitchen was the first appellant. The first person to come to the kitchen was Ndungu the second appellant. She said that she knew the first appellant because he came from her home area. She used to see him at Gakoigo. In respect of the second appellant he was known to her and she knew that he came from Gikundu. She was able to recognize them because there was light in the kitchen. The first appellant pulled her back because she had fallen and ordered her to take them to the main house to give them money. On entering the main house, she noted that PW 1 was lying down on the floor. She gave the first appellant ksh.600 from the bedroom. The first appellant was not satisfied with the amount and he began to look for more in the baskets. The first appellant tied her with a rope and also tied PW 1. They both were taken to her other sons house where his wife N.W.G was brought. She then narrated how N.W.G was raped by those robbers as she and PW1 were under the bed. Afterwards the robbers waited for other son Githinji. He was about to knock on the window to call for his wife N.W.G. She alerted him about the robbers. He ran away screaming. Neighbours responded to the distress call and rescued them. In summary she said that during the robbery she identified the first second and fourth appellants. She however did not see the third appellant. PW 3 was said to be a standard seven student. The court did not record the age of that witness. It is possible that he was between the ages of 9 – 11 years old. If he was within that age bracket it was necessary for the court to carry out a *voir dire* examination. Having failed to indicate the age of the witness and having failed to examine him on whether he understood the importance of the oath we make a find that his evidence may have been prejudicial to the appellants and ought to have been disregarded. PW 4 was a police officer. He gave evidence that people came on 2<sup>nd</sup> April 2004 and reported the robbery. He also gave evidence of how he arrested the first appellant. On being cross examined he said that the initial report did not indicate that the robbers had been recognized. On that night 2<sup>nd</sup> April 2004 he said it was raining heavily and that it was a cloudy dark night with no moonlight. He also said that N.W.G was not able to recognize the people who raped her. Pw5 was N.W.G. On 2<sup>nd</sup> April 2004 she was at home with her children at about 8 p.m. They were having supper when 3 (three) men entered the house. There was light. There was a lamp on. She recognized Kariuki, the first appellant and Mwangi the third appellant. She had known Mwangi for 10 (ten) years. He had been a tout at Maragwa Township. She also recognized the voice of second appellant. She heard him say “**hold that woman**”. She said that she had known Ndungu for a long time. She knew that he came from Gakoigo area. She was able to recognize his voice. These robbers hit the lamp and it fell down and went off. The three began to beat her. They were asking for money and when she said she did not have they responded by saying that she was refusing to give them. They took her to the bedroom. There was no one in the bedroom where they raped her on the floor. Her hands were held and her eyes were covered. One of them then raped her. She was then taken to the main house where she found PW 1 and 2. The house was dark. She was again taken to the bedroom and raped by another robber. She however was unable to tell which of the robbers raped her. PW 7 a policeman received a call from Gakoigo Police Post relating to the robbery. He thereafter met the complainants who reported the robbery of ksh. 3,100 and kshs. 600. They also reported that N.W.G had been raped. There was a report by the Clinical Officer on the treatment given to N.W.G. The first appellant when called to defend himself, talked about a previous case involving the complainant and himself. He said that he was known to the complainants. He stated that “**those people knew me from the time I was born**”. He however denied being involved in the offence. The second appellant also denied being involved in the robbery and claimed that the assistant chief who arrested him had a grudge against him. Similarly the third appellant also denied being involved in the robbery. He was arrested by the assistant chief. The fourth appellant denied the charge and stated that he was implicated in the case by the assistant chief.

There was no recovery of the items of robbery made against the appellants. The only evidence against the appellant is one of visual identification. The identification was under difficult circumstances since it was dark. We warn ourselves the danger of relying on such evidence but we find that the different

witnesses of the prosecution corroborated each other in the identification of the appellants. We are aware that visual identification can sometimes bring miscarriage of justice and for that reason we shall carefully examine that evidence of lower court. See the case of **CLEOPAS OTIENO WAMUGA VRS REPUBLIC (1989) KLR 424**. PW 1 was the first to encounter the robbers. These robbers were with them for two and half hours. He said that although he did not tell the neighbours who came to their rescue nor did he report to the police post the names of the robbers he attributed this to the fact that he felt fearful after the ordeal. He however did give the names of those he recognized at Maragwa police station. He was able to identify the fourth appellant who approached him when he had lamp next to him. He used to see him every day selling miraa. Fourth appellant ordered him to lie down and began to beat him with the side of the panga. He knew him as Irungu. He also saw the third appellant whom he knew as a tout in Maragwa Township. He noted the manner of dressing of this appellant. He recognized him because the torch was directed at him severally. He recognized the first appellant who he said was a neighbour. He had known him for a year. He noted that he was wearing a 'godfather' hat. PW 2 identified the first appellant. She was able to identify him because there was a lot of light in the kitchen when he entered. It was the first appellant who ordered her to give him money in the main house. When she went to the main house she was able to note that PW 1 was lying down. She recognized the second appellant and noted that he was holding an axe. She was able to see him because of the light in the kitchen. She knew him previously and knew that he was called at his home Kimani. She even saw him as he held an axe. It is noted that the police officer PW 4 said that on the material night it was dark and there was no moon. However the identification of the robbers was either by means of lamp or torches. PW 5 was able to identify with the aid of a lamp the first, second and third appellant. They entered a room where she was with the children and there was light. She was able to recognize the voice of the second appellant. She had known him for 10 years. Faced with that evidence against all the appellants we have considered the defences raised by the appellants. They all did not indicate where they were on the night of the robbery. The first appellant was of the view that a previous case with the complainant may have caused him to be charged with the present offence. He however confirmed that he was known to the complainants from birth. The second and fourth appellants attributed their arrest to a grudge with the assistant chief. The third appellant denied the charge. Those defences do not displace the cogent and clear evidence of identification by the prosecution witnesses. Having re-examined that evidence we find that the prosecution met the criminal standard of proof in respect of count one and two against the appellants. We also find that we are in agreement with the learned magistrate in respect of count three and the alternative count. There is no reason why we should interfere with the conviction of all the appellants on count one and two. We however are of the view that the magistrate was in error to sentence the appellants to death on count one and two. That sentence is tantamount to ordering the appellants to be hanged twice over. See the case **PAUL MWANGI MURUNGU vs REPUBLIC Criminal Case No.35 of 2006**.

Accordingly the appellants' conviction on count one and two is upheld and the appeal against conviction is dismissed. We do hereby vary the sentence of the lower court and order that the all appellants be hanged as the law provides on count one and in respect of count two, the sentence for all the appellants will be held in abeyance.

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MAY 2008.**

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**