



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Criminal Appeal 229 of 2004**

**DENNIS MUCHOKI MUGO .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**HIGH COURT CRIMINAL APPEAL NO.230 OF 2004**

**JACOB MWANGI WAMBU .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**HIGH COURT CRIMINAL APPEAL NO.231 OF 2004**

**EDWARD WAWERU MURIUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Form original Conviction and Sentence of the Senior Principal Magistrate’s Court at Kerugoya in Criminal Case No.2470 of 2003 by LUCY W. GITARI –SPM)***

**J U D G M E N T**

On 1<sup>st</sup> December, 2003, **Dennis Muchoki Mugo, Jacob Mwangi Wambu and Edward Waweru Muriuki**, hereinafter referred to as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively appeared before **Lucy W. Gitari**, SPM, sitting in the Senior Principal Magistrate’s court at Kerugoya on the count of robbery with violence contrary to *section 296 (2)* of the Penal Code. They all pleaded not guilty to the charge and thereafter their trial ensued. During the trial the 1<sup>st</sup> appellant was the 3<sup>rd</sup> accused, the 2<sup>nd</sup> appellant was the 2<sup>nd</sup> accused whereas the 3<sup>rd</sup> appellant was the first accused. At the conclusion of the trial, the learned Magistrate was convinced that the prosecution had proved its case against the appellants to the required criminal standard and proceeded to convict them. Upon conviction, she sentenced each of the appellant to mandatory death sentence. It is against the conviction and sentence that each of the appellants have lodged the instant appeals. The three appeals were however consolidated for ease of hearing and as they

arose from the same trial.

The appellants have raised more or less the same grounds of appeal in their home made petitions of appeal to wit, insufficient and contradictory prosecution evidence, evidence of identification and or recognition and rejection of their defences without cogent reasons.

The facts of the case may be briefly stated. The complainant (PW1) on 26<sup>th</sup> November, 2003 hired a taxi at about 11.30 P.M. to take him to his house at Kimuri. He was accompanied by his wife (PW5), the taxi owner (PW3) and the taxi conductor (PW4). As they approached his house, they spotted three men peeping inside the house of PW1 and PW5 through the window. With the help of the headlights from the taxi PW1 was able to identify the 2<sup>nd</sup> appellant. PW1 confronted the three men wanting to know who they were. They responded that they were policemen taking care of security concerns of the area. They in turn asked PW1 who he was. Within no time, one of them who PW1 identified as the 3<sup>rd</sup> appellant held him by the neck and Ksh.40,000/= which PW1 had on his person in the shirt pocket was stolen. They also demanded that he gives them his mobile phone. PW1 told them that the mobile phone was in the taxi and he led them towards the taxi. PW1 entered the taxi and immediately the taxi sped off. They headed straight to the police station and reported the incident. Accompanied by the police (PW6) the trio came back to the scene and found a kiosk belonging to PW2 having been pushed across the road. PW2 who was a landlady to PW1 and owner of the subject kiosk told the police officers that she had found three people at the scene whom she recognized as the appellants herein. She led the police to the house of the 3<sup>rd</sup> appellant and he was arrested. The following morning on being told that the 3<sup>rd</sup> appellant had been arrested, the 1<sup>st</sup> and 3<sup>rd</sup> appellants went to the police station to find out reasons behind his arrest. It was then that they too were arrested. Subsequent thereto they were charged jointly with the instant offence.

Put on their defence, the 1<sup>st</sup> appellant in an unsworn statement of defence stated that on 26<sup>th</sup> November, 2003 he spent the whole day with the other appellants who are his workmates. On the morning of 27<sup>th</sup> November, 2003 he called on the 3<sup>rd</sup> appellant so that they could proceed to the place of work together. He found the house locked and on asking the 3<sup>rd</sup> appellant's mother where the 3<sup>rd</sup> appellant was, he was informed that he had been arrested the previous night. He proceeded to inform the 2<sup>nd</sup> appellant of the occurrence. The 1<sup>st</sup> and 2<sup>nd</sup> appellants then proceeded to the police station to see the 3<sup>rd</sup> appellant. At the police station, they found two policemen and PW1. They were then arrested and locked up. After four days he was charged for an offence he knew nothing about.

The 2<sup>nd</sup> appellant also gave an unsworn statement of defence. He stated that on 26<sup>th</sup> November, 2003 he spent the day with the other two appellants at work. On the way home in the evening; he invited the other appellants to his house as it was raining. After the rain subsided, the 2<sup>nd</sup> appellant escorted the 1<sup>st</sup> and 3<sup>rd</sup> appellants. On the way and on reaching the plot next to his house there came a motor vehicle which splashed rain water on them. It went ahead and stopped. A person alighted therefrom and entered the plot. The appellant then confronted the driver of the motor vehicle and asked him why he had splashed rain water on them and yet he had seen them. Before he could answer, the person who had gone to the plot entered the vehicle and told the driver to leave. Next day the 1<sup>st</sup> appellant informed him that the 3<sup>rd</sup> appellant had been arrested the previous night. They proceeded together to the police station where they were arrested. They were later charged with an offence they knew nothing about.

On his part the 3<sup>rd</sup> appellant similarly in unsworn statement stated that on 26<sup>th</sup> November, 2003 he had spent the day at work at Kanyotu's. When done and as it was raining, the 2<sup>nd</sup> appellant invited him and 1<sup>st</sup> appellant to his house. When the rain stopped the 2<sup>nd</sup> appellant escorted them out. On approaching the next plot where PW1 resides, they saw a motor vehicle coming. On reaching where they were it splashed rain water on them and stopped a few metres ahead. A person came out and entered the plot. The 2<sup>nd</sup> appellant asked the driver of the motor vehicle why he had splashed water on them and yet he had seen them. He received no answer. Soon thereafter the motor vehicle was driven off. Later that night police officers came to his house and arrested him. They also searched his house but recovered

nothing. He was later charged with an offence he never committed.

At the hearing of the appeal, the 1<sup>st</sup> and 3<sup>rd</sup> appellant opted to argue their appeals by way of written submissions. We have subjected the said written submissions to careful and exhaustive consideration.

**Ms Mwai**, learned counsel appeared for the 2<sup>nd</sup> appellant. Counsel submitted in support of the appeal that the case against the appellant was not proved to the required standard. That there were numerous contradictions in the prosecution case that should have been resolved in favour of the appellant. That the acknowledgment note for Ksh.50,000/= was not genuine but had been manufactured by PW1 for purposes of this case. That PW1 never identified in court the shirt from which his Ksh.40,000/= was stolen from. Counsel went on to submit that according to the appellant, on the way home, and whilst drunk a motor vehicle splashed rain water on them and they started cursing the driver. PW2 testified that whilst in her house, she heard noise, came out and heard the appellants cursing the taxi man. They then pulled down her kiosk and went away. She led the police to the arrest of the appellant. In support of her submissions counsel relied on the following authorities:

1. **Abdullah Bin Wendo & Anor. V Republic (1952) EACA 45**
2. **Kiarie V Republic (1984) KLR 739.**
3. **Roria V Republic (1967) E.A. 583.**
4. **Charles Eloba Rekemo V. Republic NKR. C.A.CR.APP. NO.16 of 2003.**
5. **Joseph Maruti Nabatu & others V Republic ELD C.A. No.139 of 2004**
6. **Vincent Gathu Mbugua V Republic NKR C.A. CR.APP. No. 64 of 2004.**

We have carefully read through all the said authorities.

**Ms Ngalyuka**, learned state counsel opposed the appeals. Counsel submitted that the contradictions in the prosecution case were not material and did not weaken the prosecution case. That the appellants were recognized by PW1, PW2, PW3 and PW5. The credibility of PW1 was not doubted by the court. The witnesses were consistent in their testimony. As to whether or not PW1 actually had ksh.40,000/= he stated so in the O.B. report which fact was supported by the evidence of his wife (PW5). Failure by PW1 to identify his shirt in court was not fatal. Finally counsel submitted that there was strong evidence of recognition which was not challenged. The conviction of the appellants was thus safe and ought not to be disturbed.

As we consider the submissions by the appellants and the learned state counsel it must be remembered that as this is a first appeal we are duty bound to examine and re-evaluate the evidence on record to reach our own conclusion in the matter, always remembering that we had no advantage, as the trial court did, of seeing and hearing the witnesses – ***See Okeno VR (1972) EA32.*** It is also an established principle that an appellate court will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence or on misapprehension of the evidence, or the trial magistrate is shown demonstrably to have acted on wrong principles in reaching the findings. ***See Chemagong V Republic (1984) KLR 611.***

In these appeals the conviction of the appellants did not turn on recognition and or identification of the appellants by the witnesses. The appellants all conceded in their defences that indeed they were at the scene at the material time. However they do not agree that they participated in the robbery. Their position is however that they only disagreed with the taxi driver after he had splashed rain water on them as he drove passed them to PW1 and PW5's residence. When he stopped ahead, they confronted him and presumably PW1 as well. Instead of the taxi driver offering an explanation as to what had happened he just drove off. On the other hand PW1 and all his witnesses maintained that the appellants robbed PW1 of his ksh.40,000/=. Essentially then the learned Magistrate had to decide which of these two versions he

should believe. The learned Magistrate opted to believe the version of events as narrated by PW1 and his witnesses on the basis that they were unshaken in cross-examination and that their testimonies were consistent. Our perusal of the record does not however give us that comfort.

First and foremost we doubt very much that the appellants knowing very well that they could easily be recognized by PW1, his wife (PW5) and the landlady (PW2) would mount a robbery on the PW1 and care not to disguise themselves at all. In the case of ***R. V. Eria Sebwato, (1960) EA. 174***, the court faced with a similar scenario as the one obtaining herein delivered itself thus:-

**“.....that the accused, well known to the complainant, should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view, casts doubt on the evidence of the complainant and his wife.....”**

We share the same misgivings in the circumstances of this case. PW1 and his wife knew all the appellants very well. They knew in particular that they all worked for **Mama Kanyotu**. The 2<sup>nd</sup> appellant was even a tenant in the plot next to where the PW1 and PW5 were tenants.

Further if indeed the appellants had committed the robbery, one would have expected that they would have gone under to escape immediate arrest. The conduct of the appellants was however to the contrary. Following the alleged robbery, the appellants returned to their various houses to sleep. In the middle of the night and following the complaint by PW1, the police with the assistance of PW2 went to the house of the 3<sup>rd</sup> appellant and arrested him. He was found asleep in his house. The following day the 1<sup>st</sup> and 2<sup>nd</sup> appellants upon learning that the 3<sup>rd</sup> appellant had been arrested the previous night drove themselves to the police station to find out what had led to the arrest. It was then that they were too arrested and later charged with the offence. In our view the conduct of the appellants was inconsistent with their guilt. In particular if the 1<sup>st</sup> and 2<sup>nd</sup> appellants had participated in the robbery and having been privy to the information that the 3<sup>rd</sup> appellant had been arrested on account of the said robbery in which they too were suspects, we doubt that they would have voluntarily driven themselves to the police station knowing very well that they could easily be arrested.

The prosecution case was not helped by the glaring contradictions and inconsistencies in their evidence. In his evidence in chief, PW1 claimed that at 11.30 P.M. on the material day he was going home with his wife in a taxi. He had Ksh.40,000/= in his shirt pocket. Apparently he had been refunded the money following a land deal that had turned sour. However it is instructive that the acknowledgment note for the refund is dated 30<sup>th</sup> January, 2004 long after the appellants had been arrested and arraigned in court on the instant charge. Clearly therefore it would appear that the acknowledgment note as submitted by learned counsel for the 2<sup>nd</sup> appellant was manufactured purposely for this case. Under cross-examination by the appellants, PW1 also claimed that he had another 20,000/= in his pocket. That would make a total of Ksh.60,000/=. However the acknowledgment note talks of Ksh.50,000/=. Why the discrepancy? This raises doubt as to whether the complainant had this money at all. It is not lost on us also that the 3<sup>rd</sup> appellant was arrested soon after the incident. His house was searched and no recoveries made. There is no evidence as to whether the 1<sup>st</sup> and 2<sup>nd</sup> appellants' houses were searched as well. However if indeed the 3<sup>rd</sup> appellant had participated in the robbery, one would have expected that the money or part of it would be found on him or in his possession. This was not the case. There is no reason or explanation why the 1<sup>st</sup> and 2<sup>nd</sup> appellants were not subjected to a similar search. The amount involved was substantial and one would have expected that the first step the police would mount upon arresting the 1<sup>st</sup> and 2<sup>nd</sup> appellant the following day was to search their person and or their houses for possible recoveries. This was not done. Something here does not just add up.

There is also contradiction regarding the conduct of the PW1 immediately before the alleged incident. According to PW1 and PW5 as they approached their house they saw three people peeping in their house through the window. PW1 confronted them. Thereafter one of them held him by the neck and others apparently emptied his shirt pocket and took the money. However according to the evidence

of PW3, the taxi driver, immediately he stopped at the gate and PW1 stepped out, he was immediately confronted by the robbers. The evidence in the O.B tendered in court again does not tally with what PW1, PW5 and PW3 stated. It is to the effect that after the taxi stopped at the gate, the complainant got out went into the house as there was a problem with change which PW3 was to pay PW1 on account of taxi charges. On his way back from the house he was confronted by the thugs. We also note that although the complainant claimed to have known and identified the appellants he never stated so in his first report to the police. He merely stated that “.....**he seems to know them....**” It was also the evidence of the complainant that when PW5, his wife pronounced by name one of the robbers (the name does not appear in the record though), the robbers ran away. Why couldn't PW5 give the name of the robber she had so called out to the police? There were many other contradictions and inconsistencies. We need not to go into all of them. The learned Magistrate treated these contradictions and inconsistencies as minor and not fatal to the prosecution case. We disagree considering the defences advanced by the appellants. The contradictions no doubt were material. In the case of **Charles Eloba Rekemo V Republic** (supra), the court of appeal faced with a similar situation observed.

**“.....we have come to the conclusion that given these contradictions there is some doubt as to what happened that night and the guilt of the appellant has not been proved beyond doubt.....”**

We are of similar persuasion in the circumstances of this case. See also **Joseph Maruti Nabatu & Anor V R**, (supra).

The appellants' defences, to our mind were plausible and deserved better treatment by the learned Magistrate. All the witnesses who testified agreed that it had rained. It is possible that the taxi driver may have splashed rain water on the appellants. Given that the appellants were drunk, they may have reacted in a manner which did not amuse the taxi driver and or PW1. That may also explain why they destroyed the kiosk belonging to PW2 when she tried to intervene. We cannot think of any other rational explanation regarding the conduct of the appellants. If surely they had robbed the complainant as claimed, couldn't they have run away to avoid arrest?

The conclusion we have come to with respect to the three appeals is that the conviction of the appellants was not based on sound and watertight evidence. Accordingly we allow the appeal, quash the convictions and set aside the sentence of death imposed on each one of the appellants. Each appellant should be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nyeri this 7<sup>th</sup> May, 2008.***

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**