



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 87 OF 2007,**

**BONIFACE KIONGO MUCHIRI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***CONSOLIDATED WITH***

**HIGH COURT CRIMINAL APPEAL NO. 88 OF 2007**

**DAVID MAINA NGANGA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**AND**

**HIGH COURT CRIMINAL APPEAL NO. 89 OF 2007**

**PATRICK MAINA WATHUO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**AND**

**HIGH COURT CRIMINAL APPEAL NO. 90 OF 2007**

**GEORGE KAMARI WATHUO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**AND**

**HIGH COURT CRIMINAL APPEAL NO. 91 OF 2007**

ANTONY MWANGI THUKU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

**HIGH COURT CRIMINAL APPEAL NO. 92 OF 2007**

JOHN WAINAINA NDUNGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

**HIGH COURT CRIMINAL APPEAL NOL 93 OF 2007**

PATRICK MAINA MAINGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

**HIGH COURT CRIMINAL APPEAL NO. 94 OF 2007**

PAUL KIMARI MUTUNGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

**HIGH COURT CRIMINAL APPEAL NO. 95 OF 2007**

NICHOLAS KAMENGERE MUGO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 3657 of 2005 dated 12<sup>th</sup> February 2007 by Mrs. Osoro – SRM)*

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

These nine appellants were convicted on one count of robbery with violence contrary to section 296(2) of the Penal Code. Upon conviction, they were all sentenced to death. Being aggrieved by the conviction and sentence aforesaid they each separately lodged appeals to this court which at the hearing hereof, we ordered for their consolidation.

It transpired at the hearing of the appeals that the 4<sup>th</sup> and 5<sup>th</sup> appellants had escaped from prison custody and disappeared into thin air. As possibility of their re-arrest was remote and so as not to prejudice the present appellants by staying the hearing of their appeals pending the re-arrest of the escaped appellants, we directed that the appeals with regard to the escapees be marked as abandoned pending their re-arrest if at all.

During the trial in the subordinate court, the 1<sup>st</sup> appellant was the 9<sup>th</sup> accused, the 2<sup>nd</sup> appellant was the 8<sup>th</sup> accused, 3<sup>rd</sup> appellant was 6<sup>th</sup> accused whereas the 4<sup>th</sup> and 5<sup>th</sup> appellants (the escapees) were 7<sup>th</sup> and 5<sup>th</sup> accused respectively. The 6<sup>th</sup> appellant was the 1<sup>st</sup> accused, 7<sup>th</sup> appellant was 3<sup>rd</sup> accused, 8<sup>th</sup> appellant was the 4<sup>th</sup> accused and finally the 9<sup>th</sup> appellant was the 2<sup>nd</sup> accused.

The brief facts that informed the prosecution case and accepted by the trial court were that the complainant **Moses Nduru Muigai** (PW1) was on 8<sup>th</sup>/9<sup>th</sup> August 2005 at about 1.30 a.m. asleep with his wife in his house at Kiariuia village when suddenly he heard someone calling him from outside. He could not recognise the voice. When he asked who it was he was told that it was his mother who wanted medicine for a headache. PW1 got suspicious as his mother (PW2) usually used a different door when she required to see him. He got a torch and opened the other door and flashed it. He immediately saw and recognised the 6<sup>th</sup> and 3<sup>rd</sup> appellants. He knew them as he used to see them at the local market and also used to stay in their village. He had known them for close to two years. They were armed with pangas and axes. He quickly retreated and closed the door and pushed the seats against it. He then demanded to know who they were but they kept quiet. He proceeded to the bedroom and opened the window, and again flashed his torch and saw and recognised the 6<sup>th</sup> and 1<sup>st</sup> appellants. Among them too was the 3<sup>rd</sup> appellant whom he did not know by name but used to see him. Sensing danger he went and hid himself in a room and told his wife (PW3) to scream. As she screamed those people broke down the kitchen door as well as the house door. 6<sup>th</sup> and 9<sup>th</sup> appellants then entered the house and the 9<sup>th</sup> appellant immediately hit him with the blunt side of the panga on the head and ordered him to stoop screaming. He also reminded him that he was aware that he had sold cabbages and wanted Ksh.10,000/= . PW1 took them to the house and showed them Kshs.5,100/= which was under the suitcase. He told them that that was all that he had. Subsequent thereto the 2<sup>nd</sup> and 7<sup>th</sup> appellants entered the house. Apparently, PW1 recognised them as he had known them for over a year. The 7<sup>th</sup> appellant came with a small axe and ordered that PW1 be cut on head if he does not give out more money. PW1 was then left with the two appellants. The others took his mother's radio – National Panasonic. PW1 stated that when his mother called him out he lit the lamp and it was still on as all this was going on. That none of the appellants had covered their faces. They took a panga and radio. At this juncture neighbours started screaming, the appellants left. In the morning the complainant reported the incident to the police and told them that he knew the persons who had robbed him, the appellants herein. Police told him they would arrest the appellants at night. PW1 thereafter went to Muthagi to work. There he saw the 9<sup>th</sup> appellant and called the police and he was arrested with the assistance of PW6. In the evening PW1 took the police officer (PW5) to arrest the remaining appellants and when their houses were searched nothing of significance was however recovered. At the 7<sup>th</sup> appellant's house however PW1 spotted the small axe that the appellant had threatened him with during the robbery and it was recovered. PW2 was **Jane Wachera Murage** the mother to PW1 who and lived within the same compound as PW1. On the material night she was asleep in her house when at around 1.00 a.m. she heard someone open the corridor door which was followed by foot steps of many people. She asked who it was and they said it was her son. She realised it was not her son's voice. Those people told her that they were police officers and wanted her son. She told them to go and look for him. They ordered her to voluntarily open door or they would break it. She woke up, lit the lamp, dressed then opened the door. 4 men entered but she could not identify any immediately. One had an axe, two had pangas, they asked for her husband but he was away. They then ordered her out and forced her call out her son (PW1) and tell him that she was sick. She went along with the demand. The son opened the back door and one man was left guarding her. The others went and broke PW1 door using axes. They then took her to her house and locked her. She screamed and neighbours responded. When the robbers fled PW1 managed to open the door for her. Later she recorded her statement with the police. Subsequent thereto she attended an identification parade and identified 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 9<sup>th</sup> appellant as the ones who had gone to her house and forced her to call her son. The

identification parade was conducted by PW4 **I.P. Joseph Musyoka**.

PW5 **Sammy Gichohi** testified that he was on duty at Muthuthine in the Company of the complainant and the Assistant Chief (PW8) when they went looking for robbery suspects. They managed to arrest the appellant person from their homes.

PW6 **APC James Kirimi** of Muthuthine APC post testified that on 8/8/05, he was on duty at 6.00 p.m. PW1 reported that he had been robbed and had spotted one of the robbers. PW6 and **Sgt. John Githaiga** went with the complainant and arrested the 9<sup>th</sup> appellant. PW6 called the OCS Mukurwe-ini. He came with police officers and together with PW1 went and arrested all the other appellants and took them to Mukurwe-ini Police Station.

Put on their defence, the appellants elected to make sworn statements of defence. They all denied the offence and advanced alibi defences. Some of them claimed that the assistant chief had framed them with the case because of their previous misunderstanding over relief food.

In convicting the appellants, the learned trial magistrate (**M.R. Gitonga**) stated thus “..... **all in all, my conclusions are that the complainant knew all the accused persons. I am satisfied that having flashed his torch he was able to recognise them thus. He saw accused he flashed his torch after opening the door again when he flashed his torch through the window and when accused entered the house which was lit with light from the lamp. Accused 2 when he entered the house so also accused No. 3 and accused 2 and 3 were identified again by PW2.**

**PW1 identified accused 4 when he flashed the torch on opening the door. I find the same was known to PW1, so he was able to recognise him. PW1 identified accused 5 and 6 when he opened the door and again through the window. He also knew them before. Accused 6 was identified by PW2 at a parade. Accused 7 was identified by PW1 who flashed his torch when he opened the door PW1 knew him there before. Accused 8 entered the house and it was lit so PW1 identified him. Accused 9 was identified by PW1 using torch light through the open door and through the window. He was known to PW1. He was earlier identified at a parade by PW2. I will warn myself regarding usage of torch light for identification but I note none of the accused denied that they do not come from the village where complainant says he sees them and none challenged complainant that he did not know them. I am satisfied the identification was proper. I am satisfied the prosecution has satisfied the essential ingredient of section 296(2) in that they proved that the complainant was robbed on the night of 8<sup>th</sup>/9<sup>th</sup> August 2005. A panga, torch, National Panasonic radio all valued 9,500/= were stolen from him. The robbery was conducted by more than one person.**

**In the circumstances, am satisfied the prosecution has managed to prove its case beyond all reasonable doubts against all the nine accused persons. I convict them of the offence as charged....”**

The appellants have faulted their conviction by the learned magistrate more or less on the same grounds. Broadly speaking they all question evidence of identification, nay recognition, their conduct after the alleged crime, failure to consider their defences adequately and finally the constitutionality or otherwise of their trial.

The appeals came up for hearing before us on 18<sup>th</sup> September 2008. The appellants were unrepresented whereas **Ms Ngalyuka**, learned state counsel appeared for the state. The appellants tendered written submissions in support of their appeals which we have carefully read and considered.

On her part, **Ms Ngalyuka** submitted that the appellants' conviction was safe. PW1's evidence was strong which evidence was supported by that of PW7 who confirmed that PW1 gave him the names of the robbers. She further submitted that the PW1 took the Assistant Chief to the homes of all the appellants and were arrested. The evidence of PW1 was further buttressed by the evidence of PW2 who participated in the police identification parade and picked 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> appellants. Counsel concluded her submissions by saying that the appellants' identification was never an issue. Accordingly their conviction

was beyond reproach.

Having considered the written submissions of the appellants and oral submissions of **Ms Ngalyuka**, we are of the view that the twin issues raised in this appeal are identification/recognition of the appellants and the constitutionality of their trial. We are not oblivious though of the duty cast on us as a first appellate court as enunciated in the celebrated case of **Okeno v/s Republic (1972) E.A. 32**. The complainant testified that during the robbery he recognised the appellants. So that this was more of a case of recognition than visual identification of appellants. Though this was a case of recognition there is still need for caution as was reiterated by the court of appeal in the case of **Roria v/s Republic [1967] E.A. 583** in which **Sir Clement De Lestang V. P.** said:-

**“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on Section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:-**

**“There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”**

**That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In Abdalla bin Wendo and Another v/s Republic (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A. at page 168):**

**“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be acceptable as free from the possibility of error.”**

Although it has been held that recognition of an assailant is more satisfactory, more assuring and more reliable than identification as was stated in **Anjononi v/s Republic [1980] KLR 59** the way to approach evidence of visual identification was succinctly by **Lord Widgery, CJ** in the well known case of **Republic v/s Turnbull [1976] 3 ALL E.R. 549 at page 552** where he said:-

**“Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

Is there any remote possibility that the appellants could have been victims of mistaken identity or recognition? We do not think so. The evidence on record as correctly pointed out by the learned state counsel was overwhelming and placed the appellants right at the scene of crime. The appellants' first port of call in their escapade was PW2, the complainant's mother's house. She was rudely awakened from her sleep by people claiming to be police officers who were looking for his son. She lit her lamp, dressed and then opened for them. 4 men whom she was later to identify at an identification parade as 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 9<sup>th</sup> appellants walked in. Under cross-examination by **Mr. Kariuki**, the then counsel appearing for all the appellants, she stated that her lamp was lit and those appellants she identified were talking to her face to face. She identified the four by their height and looks. It is also important to note that the said four were not at all disguised as to make their identification difficult. This witness too was with the 4 appellants in the house as they asked her for the whereabouts of her husband and thereafter as they walked her to her son's house and also as some walked her back to her house before locking her up. This

could not have taken a split second to achieve. This witness cannot therefore be said to have had a fleeting observation of the 4 appellants. The record does not show that inquiries of the nature of light, intensity thereof and its source in relation to the appellants was undertaken by court as required in terms of **Maitanyi v/s Republic (1986) KLR 198**. However we note that though the appellants were represented by able counsel, the issue of light or lack of it was not canvassed. The witness maintained that her light was on and the appellants were talking to her face to face. Thus they were in close proximity. There is no evidence that this witness was threatened with any violence as to impede her process of identification. She was even able to observe that one of the 4 men had an axe and two others had pangas. She also observed their height and looks. To have been able to observe the foregoing, the light emitted by the lamp must have been sufficient. That evidence was not at all challenged in cross-examination.

On 17<sup>th</sup> September 2005, nine days or so after the incident, this witness participated in a police identification parade. This was such short period of time after the robbery such that the images of the 4 appellants were still imprinted in her mind and or memory. That is the reason perhaps that she managed to easily pick out the four appellants. We have looked at the identification parade forms in respect of each appellant and in each one of them none of the appellants has faulted the manner in which the parade was conducted. For the 1<sup>st</sup> appellant he merely remarked “**Mama alitasita kwa kunishika**” meaning the lady hesitated before touching me according to the testimony of PW4, the police officer who conducted the parade. As for the 3<sup>rd</sup> appellant he simply remarked in Kiswahili “**..... Sina la kusema kwa sababu simjui .....**” We understand the appellant to be saying I have nothing to say because I do not know her. PW4 confirmed our said interpretation. As for 7<sup>th</sup> appellant, he had nothing to say. Finally the 9<sup>th</sup> appellant, he said “**Nimetosheka**” meaning he was satisfied. From the foregoing it would appear that the parade was properly conducted. The issue was not even raised by the appellants in the cross-examination of PW4 or even PW2. The appellant of course have argued that their identification could have been as a result of a mistake since the witness never made a first report giving their description. Our response to the same going by the evidence on record that the issue was never put to her examination in chief. There was however a faint attempt at that time of cross-examination by their counsel which immediately fizzled out on being answered “**..... I recognised the four accused by their height and looks.....**” To our mind therefore much as the conditions or circumstances prevailing in PW2’s house during the robbery may have difficult, we do not think that they were so difficult as to render the witness completely incapable of identifying the 4 appellants who entered his house. We are not oblivious to the fact that when being examined in chief, the witness stated that “**.....I did not know them there before.....**” However this does not mean that she could not visually identify them.

PW2 evidence of identification lend credence to the complainant’s evidence of recognition of the appellants. PW1 had three encounters with the robbers who according to him were the appellants. The first encounter was when he was led by the appellants to open the door under the pretext that his mother (PW2) wanted medicine from him. He opened the door and on flashing his torch, he recognised the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> appellants. According to him, these appellants were persons well known to him. He used to see them at the market and had also stayed in their village. He had known them close to two years. He also saw them armed with pangas and axes. According to the witness, having recognised them he quickly closed the door and pushed the seats against it as a further defence mechanism. We note from the evidence that no inquiry was made as to the time taken for all these to happen. However from our assessment it must have been within a span of a very short time. Can it be said that merely because the time taken by PW1 to observe the said appellants was short therefore he could not have been in a position to recognize them! These were people well known to him. They did not deny that aspect of the matter in their cross-examination of the witness or in their defence. Indeed some of them admitted in their defences of knowing PW1. They wore no disguise as to make their recognition difficult. The witness under cross-examination stated that his torch was bright. This aspect of the matter was not at all challenged. In those circumstances it would not be difficult to recognise people you already knew and or acquainted with.

The next encounter is when the complainant moved to the window. He moved to the bed, opened the window and flashed his torch. He saw and recognised the 1<sup>st</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> appellants. The 5<sup>th</sup> appellant,

the escapee was also in toe. As previously stated these were people he had known close to 2 years. Much as it is not possible to tell from the record how long the flash of the torch remained trained on the appellants as to make the complainant easily recognise them, it could not have been a fleeting flash. Counsel for the appellant never raised the issue in the cross-examination of this witness. The witness maintained that his torch was bright meaning that the beam from the torch was so bright that it easily enabled him to recognise the appellants.

The last encounter was when the robbers broke into the house. When the robbers ordered him to open the door, the complainant went and hid himself in room and told his wife to scream. However the robbers managed to force themselves into the house and into the room where the complainant had hidden himself. Otherwise, how else can one explain the fact that the complainant was found and hit by the blunt side of the panga on the head. According to the complainant, the person who hit him as aforesaid was none other than the 9<sup>th</sup> appellant. He had entered the house alongside the 6<sup>th</sup> appellant. The 9<sup>th</sup> appellant demanded Kshs.10,000/= from the complainant as he knew that that the complainant had sold cabbages. The complainant showed them Kshs.5,100/= that was under the suitcase and told them that, that was all the money that he had. It is at this juncture that the 2<sup>nd</sup> and 7<sup>th</sup> appellants entered the room. The 7<sup>th</sup> appellant threatened to cut him with a small axe on the head if he did not give out more money. From this evidence it is quite clear that the complainant spent quite a bit of time with the appellants in close proximity. The lights were on. According to the complainant, they had not covered their faces. They moved him around the house looking for the money. They were people well known to him. In fact the 9<sup>th</sup> appellant even knew that the complainant had sold cabbages and had been paid. In our view, the circumstances obtaining were favourable for positive identification of the 4 appellants by the complainant, much as the inquiry as to the state of light obtaining was not made by the learned magistrate.

In the morning the complainant made a report of the incident to the police and told them that he knew those that had robbed him. Indeed according to PW7, the complainant gave him the names of those robbers that he had recognised during the robbery. In turn PW7 handed the names to the OCS, Mukurweini police post.

On the same day the complainant went to work at Muthagi and spotted the 9<sup>th</sup> appellant. With the assistance of PW6, he caused his arrest. Later that evening he took the police led by PW5 in the company of PW8 to the homes of the remaining appellants and had them arrested. It is noteworthy that at the 7<sup>th</sup> appellant's house, a small axe similar to that, that he had threatened to cut the complainant with during the robbery was recovered. Was this a mere coincidence? We do not think so. The appellant did not deny ownership or recovery of the said axe from his house. For the complainant to have given the names of the appellants in his first report to the police and thereafter lead the police to their arrest he was certain that he had recognised them. He could not have just picked on them if he was not sure. None of the appellants have claimed any grudge existing between the complainant and the appellants or any one of them. If anything some of the appellants in their sworn statements of defence alluded to some grudge prevailing between them and or their parents and PW8, the Assistant Chief over relief food, bribery etc. However the Assistant Chief is not the complainant herein. In any event he only came into the picture long after the complainant had given to the police the names of those people he suspected to have robbed him. The police merely came to him for back up during the operation to arrest them. Though he was an assistant chief of a different Sub-location he offered his assistance as when approached by police officers for assistance he was about to set out on patrol with his APCs. He accompanied them to Kabuito sub-location and having picked the area Assistant Chief and the Chief respectively they set about arresting the appellants from their homes.

The appellants have complained that PW8 was not their assistant chief and accordingly his evidence should be disregarded as he did not know them. The role of this witness was clear. He was only providing back up. He never identified any of the appellants for arrest. We do not think that there is anything fundamentally wrong with a Sub-chief from another sub-location participating in the arrest of suspects in another sub-location. It is all part of their cooperation in administration work.

For all the foregoing reasons we are in agreement with the learned magistrate that circumstances obtaining during the robbery favoured positive identification of the appellants. We note also that the learned magistrate was alive to the dangers of relying on the torch light for purposes of identification. The alibi defences advanced by the appellants were in our view displaced by the overwhelming prosecution evidence. The learned magistrate having carefully considered them, out rightly rejected them as afterthoughts and correctly so in our view.

The appellants have raised a constitutional issue. It is to the effect that the language used by the witnesses was no stated in the record of the trial magistrate as required by our law and accordingly theirs was a mistrial. It is obvious that the appellants are alluding to the provisions of section 77(2) of the constitution as well as section 198 of the criminal procedure code. These provisions of the law emphasis the need for interpretation of the court proceedings to an accused in the language he best understands. If this is not done, then such trial is deemed defective and or a nullity. See **Degaow Dagane Nunow v/s Republic, C.A. Cr. Appeal No. 233 of 2005** (unreported). In the instant case, it is true that the language in which the witnesses testified was not indicated. We also note that the learned magistrate took very short notes of the evidence tendered by witnesses. However the language must have been either English or Swahili, for these are the languages that the subordinate courts are authorised to conduct their proceedings in. There is no suggestion from the record that the appellants were unable to follow the proceedings because they were in a strange language. In any event, the appellants were all through represented by counsel. The record does not show that counsel was unable to follow proceedings and requested for interpretation in terms of section 198(2) of the criminal procedure code and he was denied that right. This ground of appeal in our view lacks and is for dismissal.

Having considered the submissions of the appellants and **Ms Ngalyuka**, we are of the view that the appellants' conviction was inevitable in the circumstances and we detect no error on the part of the trial magistrate as would call for our intervention. Accordingly we find no merit in all the seven appeals. They are dismissed in their entirety.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of October 2008*

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**