REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 100 OF 2006

FRANCIS KAMANDE NGUGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 105 OF 2006

JOHN GICHIGI MUCHOKI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 124 OF 2006

PAUL MWANGI KINUTHIA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 125 OF 2006

STEPHEN NJUGUNA NGUGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeals from original Conviction and Sentence of the Senior Resident Magistrate's Court at Kigumo in Criminal Case No. 856 of 2005 dated 17th May 2006 by L. Nyambura – S.R.M.)

J U D G M E N T

These four appeals were consolidated for ease of hearing and as they arose from the same trial in the subordinate court. The appellants were charged before the Senior Resident Magistrate's Court at Kigumo with two counts of robbery with violence contrary to section 296(2) of the Penal Code and one count of Malicious damage to property contrary to section 339(1) of the penal code. In that court, the 1st appellant was the 1st accused, 2nd appellant was the 4th accused, the 3rd appellant was the 2nd accused whereas the 4th appellant was the 3rd accused. The appellants pleaded not guilty to both counts but after a full trial, they were convicted on the two counts of capital robbery as charged and sentenced them to death on each count. Since the only sentence provided by law upon conviction for each of the two counts was death, the magistrate ought to have sentenced the appellants only on one count and need not have imposed another sentence of death on the second count. He should have held it in abeyance instead. As we have repeatedly pointed out it is not possible to hang a person twice over.

Being aggrieved by the conviction and sentence, the appellants now appeal to this court against the said conviction and sentence.

The appellants have faulted their conviction and sentence by the learned magistrate on the following broad grounds; identification, credibility of prosecution witnesses, contradictory, uncorroborated and insufficient prosecution evidence and finally failure by the learned magistrate to evaluate the appellants' defences alongside the prosecution evidence.

The facts that informed the prosecution case were that one **Josephat Gatimu Maingi** (PW3) the complainant in count one was on 21/5/2005 at 6.20 p.m. on his way to work at Summit Academy in the company of his co-worker, **Peter Muiruri Machaira** (PW6) when they were confronted by two men who were shouting. The two men then blocked their path. When they asked them why they blocked their path, the two men said they would do what they wanted. Those two men were soon thereafter joined by another man and they proceeded to hold PW3 whom they pushed into the trench. They assaulted him repeatedly and robbed him of Kshs.300/=, a wrist watch and undressed him. In the meantime PW6 had fled. He later realised the people assaulting him were five. He was injured all over the body and he sustained a broken tooth. When done the assailants left. Later PW3's employer (PW5) came and took him to Maragua District Hospital where he was treated. He subsequently reported the matter to Maragua Police Station and was issued with P3 form. It was duly completed by a clinical officer (PW1) who classified the injuries sustained as grievous harm. Later he participated in the police identification parade when the appellants were arrested. He was able to identify the 4th appellant.

PW4 **Samuel Kamau Njiba** was the complainant in the 3rd count. His story was that on 21/5/2005 at 9.30 p.m. he was going home from Maragua township. At Rure area, he saw two men behind him. He started to run. He was chased by two men who caught up with him in the maize plantation. They hit him with a blunt object and cut him on the head. He was also undressed and robed of his mobile phone Nokia valued at Kshs.5000/=, Kshs.500/=, keys and a handkerchief. During the robbery he was able to identify the 1st appellant as there was ample moon light and is a person known to him very well as he was his area councillor. When the assailants left he collected himself and with the assistance of his wife was taken to Maragua District Hospital where he was treated and P3 form filed by PW1 as well. At a subsequent police identification parade he was able to identify his assailants as 1st, 2nd and 4th appellants respectively. PW8 **P.C. Joseph Munyua** received from the two complainants the robbery reports and commenced investigations. On 27th May 2005 the area chief **Mr. Peter Kamande Mwangi** (PW7) in the company of his Assistant Chief brought to him the appellants in connection with the said offence. He contacted the complainants who came to the police station. An identification parade was conducted by **Chief Inspector Rotich** (PW2). Thereafter the appellants were charged. Apparently the appellants had been arrested by PW7 on the instructions of the Deputy OCS, Maragua police station. He had drawn up the list of the names of the appellants and instructed PW7 to arrest them at whatever cost.

From the evidence of the witnesses aforesaid, it would appear, on 21/5/2005 there were two incidents. One was at 6.20 p.m. along Kianjiru-ini route involving PW3 and PW6. During this incident PW3 and

PW6 were attacked by a group of men. They were assaulted and PW6 ran away. PW3 **Gatimu** was not able to run away. He was assaulted and robbed Kshs.300/= and wrist watch. That he was also undressed and left for dead. He was rescued later and taken to Maragua Police Station where he reported the incident. PW3 was later taken to Maragua District Hospital where he was treated. He had fracture of the 6th and 7th ribs of the right side. He had injuries on the mouth. PW3 told the court that he was attacked at first by two people. He later realised they were five.

The 2nd incident on the same day was at 9.30 p.m. PW4 **Samuel Kamau Njiba** was going home. He was also attacked by two men who first chased him. He allegedly entered a maize plantation. The attackers caught up with him there and allegedly hit him with a blunt object on the mouth. He was also cut and robbed of several items.

Each of the appellants denied the charge. They all told the court in their unsworn statements of defence that they were arrested from their respective homes by area Assistant Chief and Chief and taken to Maragua police station. That they were charged with present offences which they had not committed. The appellants were of the view that they were wrongly charged with the present offences.

At the hearing of the appeals the appellants were unrepresented whereas the state was represented by **Ms Ngalyuka**, learned State Counsel. The appellants opted to argue their appeals through written submissions which they had filed. We have carefully read and considered them.

In her oral submissions in opposition to the appeals, **Ms Ngalyuka** submitted that the identification of the appellants was sufficient. That one of the complainant was attacked at 6.20 p.m. whereas the other was attacked at 9.30 p.m. respectively. That there was sufficient light at 6.20 p.m. as it was not so dark. However as for the 9.30 p.m. incident there was moonlight. That PW6 identified 3rd appellant, PW3 and 4th appellant whereas PW4 identified all the appellants. She went on to submit that identification parade was conducted so soon after the robbery and the witnesses identified the appellants quite easily. Conviction was thus safe.

As the first appellate court it is our duty to subject the evidence tendered during the trial to fresh and exhaustive re-examination and evaluation so as to reach our own independent conclusion as to the guilt or otherwise of the appellants. In doing so we must give allowance to the fact that we did not see the parties as they testified and accordingly we are unable to assess their demeanour. See **Okeno v/s Republic (1972) E.A. 32**.

From the evidence on record it is apparent that the offences were committed early in the evening and at night. According to PW3 and PW6 the attack on them was actually committed at 6.20 p.m. It was therefore in the evening. The attack on PW4 was 9.30 p.m. and therefore at night. There is no suggestion by evidence as to the brightness or otherwise of the light on that day at about 6.20 p.m. We cannot assume that it was indeed bright as the learned magistrate did nor as the learned state counsel wanted us to. There are occasions when 6.20 p.m. can be relatively dark. As for 9.30 p.m. it was dark, hence the moonlight. It is this kind of scenarios that call for the trial magistrate to be extremely cautious before entering a conviction based on identification of an accused person in difficult circumstances. It has been held that before a court can return a conviction based on identification of an accused person at night and in difficult circumstances, such evidence of identification must be water tight. See **Abdalla bin Wendo and Another v/s Republic (1953) 20 EACA 166**, **Roria v/s Republic**, **Wamunga v/s Republic [1989] KLR 424** and **Maitanyi v/s Republic [1986] KLR 198**. It is required that before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently. Failure to undertake such enquiries is an error of law and fatal to the prosecution case. In the circumstances of this case no such inquiry was undertaken by the trial magistrate. Accordingly the conviction of the appellants based on the evidence of identification proffered by PW3, PW4 and PW6 cannot be said to be safe. Possibility of mistaken identity cannot therefore be completely ruled out.

With regard to the 1st incident the victims were attacked while it was not dark according to them. PW3 testified that "**It was not dark."** This statement can easily lead one to assume that there was enough illumination and therefore no room to err. However a close look or scrutiny of the evidence reveals otherwise. Under cross-examination by the 3rd appellant PW3 deposed that "**I did not give your descriptions to the police. I did not pick you in the identification parade."**

This clearly points to the fact that this witness did not identify some of the appellants at the scene during the ordeal. Perhaps the reason comes from the testimony of PW6. He stated that, "**We were riding a bicycle. We met with 1st and 2nd accused persons. They were walking along the road. The 3rd accused was also present. He hit Gatimu. The 3rd accused assaulted Gatimu. I asked what was it. 2nd accused slapped me. I dropped the bicycle and fled. I reported to my employer. We went to the scene we found Gatimu at the scene."**

It is not easy to easily identify a person if the person seeking to make such identification is riding a bicycle and at some speed. In this case even when they came face to face, the gang turned violent and PW6 ran away, or took to his heels. This would suggest that he had no ample time at all to make any unimpended observation of the appellants. The complainant who was left behind was then subjected to a brazen, violent and cruelty beating. We doubt that he would have been able to identify any of the assailants in that state. This is compounded by the fact that the assailants were total strangers to him. Given the nature of the attack coupled with the strangeness of the assailants, it is doubtful whether he could have registered their identification sufficiently as to be able to identify them subsequently. The time taken by this witness to observe the appellants was also not revealed. That would have helped to determine the accuracy or correctness of the identification. It is instructive that PW6 under cross-examination stated "**I said I was assaulted but I did not describe you."**

If there was a case where a first report was critical, this was it. Yet the court did not bother to conduct such an inquiry. The court failed to note that the first report to the police should have been put forward in evidence so as to check whether the identifying witnesses had positively identified the suspects and by what means. **Mohammed Bin Allui v/s Republic (EACA) No. 72**.

PW8 received the report of the robbery against PW3 & PW4. PW3 and PW6 were taken to the police station by PW5. PW8 testified that, "**They made a report of robbery and malicious damage to property. They reported that as they rode a bicycle to Kianjuruini area – summit academy, they were stopped by four people. The four people assaulted them."** From this evidence neither PW3 nor PW6 revealed their assailants identities to PW8. The same can be said of the evidence of PW4 with regard to the second incident. Subsequent thereto however, PW8 testified that; "**Later on 27/5/05 the area chief Mr. Kamande and assistant chief brought five suspects in connection to the said offence."** Its worthy to note that

the record does not indicate the complainants as having made any report to the area chief. This begs the question who directed the chief to arrest the appellant?

In his evidence in chief PW7 stated that "**I cannot recall the 2nd accused person. He had been implicated by members of public."** A further question which cries out for an answer is which members of public and why were they not availed to testify during the trial?

On the other hand when PW7 the chief was being cross-examined by the appellants he stated that "**I was given all your names."** apparently by the Deputy OCS, Maragua Police Station. How and where did the said officer get the names? From the evidence, it is not clear. PW8 certainly did not give him the names because none was given him yet the prosecution did not deem it absolutely necessary to summon this particular police officer to testify so as to shade light the basis upon which he caused the arrest of the appellants.

When the appellants relentlessly sought reasons behind their arrest, PW7 said with regard to the 1st appellant "**I was told by the police to arrest."** As for the 2nd appellant, he retorted "**I received a report**

from Maragua police station, Deputy OCS ordered me to arrest you ..... you are a changaa brewer." As for 3rd appellant he said "**..... I know you as a bad person. You sell changaa."** Finally for the 4th appellant he claimed "**..... I had been given the names of the suspects. You were one of them ....."**

In the absence of the evidence of the Deputy OCS, there is no nexus between the arrest of the appellants and the commission of the crime. It would appear that following the commission of the crime, the police went about rounding

up people with known bad character. The possibility therefore that the appellants were arrested merely because of their past antecedents cannot be eliminated. PW2 the parade officer testified about the identification parade and told the trial court that "**I placed one by one among other members of the parade. The first was Francis Kamande Ngugi."** This piece of evidence implies that when one suspect left the parade, another suspect was placed among the eight without changing the members of the parade. That being the case, after the first suspect is removed, the second suspect would definitely be an easy target to pick in the light of being the only new face in the line. This is not how to conduct a proper police identification parade. It was unprocedural. The identification parade in our view was thus conducted contrary to the laid down legal requirements. Our perusal of the identification parade forms in respect of the appellants confirm this fact. Each appellant should have had a different set of parade members.

PW2 attested that "**I called 3rd complainant Samuel Kamau Njiba. He managed to identified 2nd accused person by touching him."**

In the record, **Samuel Kamau Njiba** is PW4 and in his evidence under cross-examination by the 3rd appellant he stated that "**I do not know you."**

However, the trial court it would appear was moved by PW2's testimony. The court held that "**.... and 2nd accused person was identified by PW4 and ...."** This was erroneous. PW4 did not identify the 3rd appellant.

The charge sheet in respect of count 1 talks of "**jointly while armed with offensive weapons namely pangas ....."** However PW3 the complainant in his count testified that "**They were not armed."** Accordingly the charge sheet is at variance with the evidence tendered. There is also the issue of the wrist watch allegedly stolen from PW3 which the charge sheet indicates the value as Kshs.350/=. The owner (PW3) testified that "**.... and Disco Wrist watch. It was valued at 100/=."**

The long and short of all that we have been saying is that the four appeals have merit. Accordingly, they are allowed, conviction quashed and the sentences of death imposed on the appellants set aside. The appellants and each one of them is hereby set at liberty forthwith unless otherwise lawfully held.

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

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE