REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 101 of 2006, 104 of 2006 & 121 of 2006 (Consolidated)

LIWEL KAMAU NJERI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 104 OF 2006

PETER MWANGI MURANI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 121 OF 2006

PAUL NJOROGE MAINA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeals from original Conviction and Sentence of the Principal Magistrate's Court at Murang'a in Criminal Case No. 1346 of 2004 dated 20th June 2006 by G. K. Mwaura – P.M.)

J U D G M E N T

These three appeals were consolidated for ease of hearing and as they arose from the same trial in the subordinate court. The appellants were among the 8 accused persons who were charged before the Principal Magistrate's Court at Murang'a with a single count of robbery with violence contrary to section 296(2) of the Penal Code. In that court, the 1st appellant was the 4th accused, 2nd appellant was the 1st accused whereas the 3rd appellant was the 8th accused. After a full trial, the appellants were convicted of the offence charged and were sentenced to the

mandatory death sentence. Their 5 co-accused were however acquitted. The appellants now appeal to this court against the conviction and sentence.

Through **Messrs Gacheru J & Co. Advocates**, the appellants fault their conviction and sentence by the learned magistrate on the following broad grounds; failure to comply with section 200(3) of the Criminal Procedure Code, wrongful acceptance of a dying declaration, failure by the magistrate to abide by the provisions of sections 169 and 198 if the Criminal Procedure Code and identification.

The facts that informed prosecution case were that on the night of 24th and 25th August 2004, a gang of robbers raided the house of **Antony Mwangi Kariuki** P.W.2 the complainant in the case. He used to reside in a house adjacent to his shop at Gakoigo shopping centre in Maragua District. At about 2 a.m. on the material night PW2 heard some movements outside and when he checked through the window he saw about 10 men armed. The men then began to break the door open. PW2 and his wife **Salome Waithira** (PW3) tried to prevent and or block the robbers from gaining entry into the house by reinforcing the door using a sofa set but was all in vain. The door was forced open by a huge stone. Four of the men got into the house and demanded for money. PW2 gave them some Kshs.19,000/=. Some of the men then ransacked the wardrobe and took clothes. The complainant also gave them his mobile phone on demand. The keys to the shop were then taken and PW3 was led to the shop where some money in the form of coins kept in the tin was taken. In the meantime the couple had lit a lantern lamp which helped them to see and recognise some of the robbers. All of them were from their home area and usually shopped at the shop. PW2 was able to recognise the appellants among them. PW3 on the other hand testified that some five men entered the house and that she recognised the appellants among them.

Before the robbers broke the complainant's door they had confronted their watchman **Charles Maina Benard** who had attempted to repulse them. They beat him up severely causing fatal injuries from which he later succumbed to and passed on whilst undergoing treatment at Maragua District hospital. As all these was happening PW4 the couples opposite and immediate neighbour and whose sleep had been disrupted by the robbers had woken up and was observing keenly the goings on whilst standing at his window. Through moonlight he was able to recognise the appellants among the robbers. Just like PW2 and PW3,, this witness recognised the three appellants as they were people from his home area and they met frequently. It is the prosecution further case that PW2, PW3 and PW4 were able to identify all the robbers either by seeing them or picking their voices. PW2 later led police officers, among them PW5 first to the house of the 2nd appellant. The 1st and 3rd appellants were however arrested by members of the public and brought to Kigumo police station where they were re-arrested by PW5. The appellants and the co-accused were then charged as aforesaid.

Put on their defences, the appellants elected to give unsworn statements in defence and called no witnesses. The first appellant stated that on 24.8.04 he woke up early and went to feed his cows. Later he was sent to Gakoeini shopping centre to get cattle feed. On his way home a certain Paul called him and told him that some people wanted to talk to him. He went to the people and saw the complainant in this case. The complainant did not tell him what he wanted him for. He was then arrested and beaten up thoroughly. From there he was taken to Kigumo police station and later to court. He maintained his innocence.

On his part the 2nd appellant stated that he ran a hotel business at Gakoigo shopping centre. On the material day he closed his business at 8.00 p.m. and went home and later went to bed. However at 5.30 a.m. he was visited by some people. He came out and realised that the visitors were police officers. They then searched his house. He was then taken to a police land-rover which had another suspect known as Zakary, a neighbour. They were then taken to Kigumo police station together. He was later brought to court and charged for an offence he knew nothing about.

As for the 3rd appellant, he testified that he came from Gakoeini village in Kigumo. That on 30.8.04 he woke up and went to the farm until evening when he came back home. At 10.00 p.m. someone knocked the door. Police officers came in and told him that they wanted him. He was taken to a police vehicle and driven to Kigumo police station. On 1.9.04 he was brought to court and charged.

At the hearing of the appeals the appellants were represented by **Mr. Gacheru**, learned counsel whereas the state was represented by **Mr. Orinda**, learned Principal State Counsel.

In his oral submissions in support of the appeals, **Mr. Gacheru** submitted that the language in which the appellants gave their defences was no indicated in the record of the trial magistrate. That omission was fatal to the prosecution case. Case as it infringed the constitution and section 198 of the criminal procedure code. He went on to submit that the learned magistrate also failed to comply with the requirements of section 169(2) of the Criminal Procedure Code when crafting the judgment. To counsel that failure was once again fatal to the case. With regard to the dying declaration, counsel submitted that a dying declaration can only be reverted to in murder case. Finally, counsel submitted that the identification of the appellants was unsafe. The witnesses merely said that they saw the appellants. None of them said that they saw the appellants' faces.

On his part, **Mr. Orinda** in opposing the appeals submitted that during the robbery there was a lamp in the house as well as moonlight outside. That the 1st appellant was recognised by PW2 and PW3. That before death, the watchman gave the name of the 2nd appellant to his wife. The 3rd appellant too was recognised by PW2. PW2 and PW3 were consistent as to what each appellant did to them as they were being moved from the house to the shop. That movement gave opportunity to the two witnesses to recognise the appellants. With regard to language, counsel maintained that, that cannot be an issue since it was the appellants who were speaking and trial court was merely recording. The appellants cannot complain that they could not understand themselves. With regard to non-compliance with section 169(1) of the criminal procedure code, counsel submitted that the learned magistrate was clear that the conviction was based on the charge sheet. They were found guilty as charged. On dying declaration, it was the counsel's contention that it can be acted upon as long as the court warns itself of the dangers. In any event the dying declaration was not the only evidence upon which the appellants' conviction turned on. There was also evidence of identification.

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 he 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 offence was committed at night. According to PW2 and PW3 it was actually committed at 2 a.m. It was therefore dark. That being the scenario it is difficult to see any person sufficiently to be able to identify and or recognise someone. It is this kind of scenario that calls for the trial magistrate to be extremely cautious before he can enter a conviction based on identification of an accused person at night and 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 made by the trial magistrate. Accordingly the conviction of the appellants

based on the evidence of identification proffered by PW2, PW3 and PW4 cannot be said to be safe. Possibility of mistaken identity cannot therefore be completely ruled out.

Much as the three witnesses testified that there was moonlight which enabled them to identify the appellants none of them talked of its intensity and its location in relation to the appellants. The appellants were said to have been in a group of 10 or so robbers. That being the case, how possible was it for the said witnesses to have identified the appellants from the group. In any event PW2 was categorical that "**the light was not sufficient to enable me to pick the colour of your clothes."** If the light emitted by the moon did not enable PW2 to pick out the colours of the clothes that the robbers had on, how could he then have been able to identify any of them by the face. The learned magistrate had this to say on the issue "**..... I find that though the moonlight was not sufficient to enable someone to pick colour of clothes and other details it was nonetheless there and it was possible to see someone ....."** We must confess that we have found it difficult to appreciate this reasoning. We would imagine it would be easier to pick out colours of clothes with a bright moonlight than a face of a human being.

Further inside the house PW2 and PW3 testified that there was a lantern lamp and that its light made them see the robbers who came into the room including the appellants. PW2's evidence on the lamp is that he is the one who put it on. His wife's (PW3) testimony on the other hand was that she is the one who put it on. This is a material contradiction. The two later recorded their statements with the police where they did not mention the presence of the lamp. In fact their testimony was that they saw the robbers due to torch lights and moonlight. This yet another material contradiction. In our view there is a doubt as to whether the house had light on that material night. That doubt must be resolved in favour of the appellants as required of our criminal justice system.

PW4 too claims to have identified the appellants among the robbers. It may be recalled that PW4 was a neighbour of PW2 and PW3. The door to PW4's house faces that of PW2 and PW3. The two houses face each other and are close. According to the testimony of PW4 when the robbers struck at the house of PW2 & PW3, he immediately drew the curtains of his house and observed the goings on. He noticed that the robbers numbered 10 men or so. Among them he recognised the appellants. We have our own doubts regarding this testimony. We doubt that PW4 having seen 10 men violently attack the watchman employed by PW2 & PW3 who they beat mercilessly so as to gain entry into the house of PW2 & PW3, and the violently nature they forced the door of the house would have had the courage to stand by the window with the curtains drawn to observe the robbers sufficiently to recognise them. The natural reaction would have to secure himself sufficiently so that he does not become the next victim of the robbers. In any case, if the house of PW4 faced that of PW2, then naturally the robbers as they attacked PW2 had their backs on PW4. In those circumstances, we doubt whether PW4 would have been able to recognise any of the appellants in the circumstances.

According to the trial magistrate, this was a case of recognition as opposed to visual identification. It has been said that recognition is more reliable and assuring. Nonetheless it does not lessen the need for such evidence to be watertight before returning a conviction. Whatever I have said with regard to visual identification of the appellants applies with equal force to the alleged recognition of the appellants. This finding is further buttressed by the fact that in their initial reports to the neighbour and later to the police, they never mentioned to any of them the names of the appellants much as they claimed to have known them since childhood and that they came from the same home area. We do not accept the reason advanced that they feared reprisals as some of the neighbours were their relatives. The police came to the scene immediately after the incident and nothing stopped the said witnesses from giving the names to the said police. In convicting the appellants, the learned magistrate took the view that the evidence of recognition tendered by PW4 corroborated the evidence of PW3 and PW4. However the learned magistrate having entertained doubts regarding the presence of light in the house of PW2 and PW3 and the intensity of moonlight, could he then hold that the evidence of PW4 on identification corroborated that of PW2 and PW3? We also note that both witnesses

claimed to have recognised the appellants by their voices. However none of the witnesses indicated what each appellant might have said that enabled them to recognise them by voice. In any event in their first report to the police none of them claimed to have recognised any of the appellants by voice. Yes the offence might have taken 20 – 30 to be committed. However considering the vicious manner in which it was executed, we doubt that any of those witnesses would have been afforded an opportunity to observe the appellants who were in a crowd of 10 or so people and at night sufficiently to be able to identify and or recognise all of them or any one of them. We are therefore satisfied that the evidence of identification and or recognition was not watertight as to return a conviction.

How about the dying declaration? According to PW1, the wife of the deceased watchman, when she visited the deceased in hospital on the second day of this admission, he was able to speak to her and told her that he had been attacked by **Peter Murani**. That was on 26th August 2004. The deceased later passed on. He died on 31st August 2004. In law a dying declaration can be relied on as good and credible evidence. However before doing so the trial court needs to caution itself that in order to obtain a conviction upon such dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the offence was committed, the identification of the robbers and means used. Before a dying declaration is relied on, it has to be shown that death was imminent and directly related to the incident. See generally **Kihara v/s Republic (1986) KLR 473**. In the circumstances of this case, we are not certain that the **Peter Murani t**hat the deceased was referring to is the same as the 2nd appellant. No evidence was led to that effect. Further it has not been shown that the death of the deceased was imminent. Indeed according to PW1, he was on his way to recovery when he made that disclosure to his wife. She testified thus "**..... During this time, he was sometimes talking and was receiving visitors. I do not know if he told the visitors .....**" Later on however his condition deteriorated and on 31st August 2004 he passed on. Clearly therefore whatever he said was not in contemplation of death. It is also instructive that he did not even mention that fact to PW2 his employer when he visited him. We entertain doubts as to whether the deceased made the alleged dying declaration. We think that in the circumstances, the learned magistrate erred in holding "**..... I have no doubt at all that the deceased left a dying declaration that the 1st accused was one of the assailants.....**" And even if there was such dying declaration, there was no other evidence in corroboration thereof.

Finally on the question of language, we agree with **Mr. Orinda** that, this ground of appeal has no merit whatsoever. Much as the language in which the appellants testified is not indicated in the record of the trial magistrate the appellants' cannot complain that they could not understand themselves. Neither can they purport to complain on behalf of the court. We do not hear the appellants saying that what was recorded by the learned magistrate was not what they told the court. The appellants are not also saying that they were forced to speak in a language that they were not fluent in or that they were prejudiced in any manner. Clearly this ground of appeal is an afterthought.

Nonetheless the long and short of all that we have been saying is that the three 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 21st day of October 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE