REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 58 of 2005, 59 of 2005, 60 of 2005 & 87 of 2005(Consolidated)

SAMWEL MBUGUA MBURU ……. APPELLANT

Versus

REPUBLIC …… ……..…...……. RESPONDENT

(Being an appeal from the conviction and sentence of L. NYAMBURA Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 838 of 2004 at Kigumo)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 59 OF 2005

JAMES KAMANDE KIBANDE ……....……. APPELLANT

Versus

REPUBLIC …….……. RESPONDENT

(Being an appeal from the conviction and sentence of L. NYAMBURA Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 838 of 2004 at Kigumo)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 60 OF 2005

BONFACE WAHOME MAINA …….……. APPELLANT

Versus

REPUBLIC …….……. RESPONDENT

(Being an appeal from the conviction and sentence of L. NYAMBURA Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 838 of 2004 at Kigumo)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 87 OF 2005

DAVID NJAU NJOGU ……..……. APPELLANT

Versus

REPUBLIC …….……. RESPONDENT

(Being an appeal from the conviction and sentence of L. NYAMBURA Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 838 of 2004 at Kigumo)

JUDGMENT

The appellants were charged with two counts of *robbery with violence contrary to Section 296(2) of the Penal Code.* All the appellants were convicted as charged by the lower court. They were sentence to death on both counts. Being dissatisfied with the conviction and sentence they have filed the present appeal.

This court is duty bound to re-evaluate the evidence of the lower court. That duty is succinctly set out in the case of OKENO vs REP (1972) EA 32 in which the Court of Appeal had the following to say:-

"*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 findings and conclusions; 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."*

PW 1 stated that on 12th May 2004 at 11 pm whilst sleeping in his house heard the dogs barking. On checking through a wooden window he saw people with torch lights outside his compound. There was sufficient moonlight which enabled him to see that they were ten people. He opened his window to ask them who they were. They said that they had been sent by the assistant chief. They insisted that the door be opened. On seeing that they were not policemen he refused to open the door. His name was called out and he recognized the voice of that person as being of third appellant. The third appellant was from his home area and he knew him from birth. He used to see him at the shopping centre and would hear him taking and sometimes he would ask that he be bought alcohol. The people on the outside hit the door with a stone and gained entry into the house. They had also removed soil from the wall of the house. PW 1's wife had lit a lantern lamp. He saw the robbers and was able to identify them but none of those people that he saw were before the court. These people began to beat him and hit his hand with a panga and it fractured. They stole kshs. 8,000, his daughter's mobile phone and his son's radio. During the robbery his wife and daughter were taken outside the house. He became unconscious due to the beating. He was later taken to Maragwa district hospital and the matter was reported to the police. The first and

third appellants were known to him although he did not identify them during the robbery. In cross examination he reiterated that he identified the third appellant through his voice. PW 2 was his wife and she too whilst sleeping heard dogs barking. The robbers broke down the door and managed to gain entry. She and her daughter PW 3 were taken outside the house. There was moonlight. She noted that the robbers had clubs and pangas. She pleaded with them not to kill them. She was able to identify two of the robbers, that is, the first appellant and the third appellant. She had known them prior to this incident. They were from her home area. She noted that the first appellant was armed. He told them to sit down. She also recognized the third appellant whom she had known for a long time. The two appellants no. 1 and 2 were not wearing masks. After the matter had been reported to the police this witness participated in an identification parade. She stated that she picked the first and the third appellants in the parade. She however did not know the other two appellants who were before court. PW 3 also heard dogs barking. She lit the lamp. Five robbers entered her bedroom. They attempted to hit her with a panga. They robbed her of her mobile phone. She was taken outside together with her mother in the compound. She noted that the robbers outside had pangas and clubs. Those that were outside she identified the first and third appellant. She said that she knew them prior to the incident and that they were from their home area. She recognized the first and third appellant through the torch light. They were in the company of those appellants for 15 minutes. Those appellants stood next to them guarding them. After the robbery and after the robbers had ran away they found PW 1 in a semi conscious state. The matter was reported to the police. This witness identified the first and third appellants at an identification parade. She also identified the mobile phone that had been recovered. The clinical officer PW 4 confirmed that PW 1 had been injured. His left arm was fractured and he had swelling on his left ankle. The injury was assessed as grievous harm. PW 4, 5, 6, 7 and 8 gave evidence of how the appellants were apprehended by members of public and were taken to Githembe shopping centre. The members of public wanted to lynch them but they were saved by the chief. There had been a recovery of the radio and the mobile telephone. The radio was identified by PW 1 as the one which was stolen. The lower court found all the accused persons had a case to answer except one. The first appellant in his defence stated that on the day of arrest he had attended to his business of selling clothes. Later he was arrested and taken to the shopping centre where he was beaten until he became unconscious. When he came through he found himself at Sabasaba Police Station. He confirmed that PW 3 picked him out at an identification parade but he denied the offence. Third appellant in his defence also stated that he was a business man selling shoes at Kariokor market. On the day he was arrested he had been at home. On being arrested he was taken to the shopping centre where he was beaten. Later he was taken to police station and at an identification parade he was picked out by PW 2 and 3. The second and fourth appellants gave similar defences. They stated that they were both arrested while at home. The fourth appellant stated that he was arrested by APs. They were both taken to the shopping centre by members of the public. They were beaten and later taken to Sabasaba Police Post. The learned trial magistrate convicted all the appellants as charged. Having re-examined the evidence we find that there was no proof of the charge against the second and fourth appellants. There was however sufficient evidence against the first and third appellants. The two were in the compound when the robbery was taking place and they were identified by PW 2 and 3. It was stated by PW 1 that there was sufficient moonlight. PW 3 stated that she was able to recognize the first and third appellants through the torch light. PW 1 recognized the voice of the third appellant which he had often heard at the shopping centre. These appellants were not masked when they guarded PW 2 and 3. PW 3 stated in respect of the third appellant:

'I looked at him and saw him properly.'

She was even able to notice that the third appellant was checking the mobile. PW 2 was able to note the attire that the third appellant was wearing. These two appellants were known to PW 1 ,2, and 3 for a long time. The evidence of PW 9 the police officer who mounted the identification parade was that PW 2 was not able to pick out the first appellant at the parade. The inconsistency of the evidence in that regard of PW 9 and 2 does not detract from the weight of the evidence against the first appellant. The first appellant was identified in the parade by PW 3. In regard to second and fourth appellants, the only evidence against them is that they were arrested by members of the public. There is no other evidence against them connecting them to this offence. We are therefore of the view that the second and fourth appellant were wrongly convicted of the offences. However in respect of the first and third appellant we find that a case was proved beyond reasonable doubt. Our judgment therefore is that the appeal against

conviction and sentence by the second and fourth appellants does succeed. Accordingly we order that the conviction against JAMES KAMANDE KIBANDE and DAVID NJAU NJOGU be hereby quashed and the lower court sentence against them is hereby set aside. We order that the said James Kamande Kibande and David Njau Njogu be set free unless otherwise lawfully held.

The appeal against conviction by SAMWEL MBUGUA MBURU and BONFACE WAHOME MAINA are hereby dismissed. On sentence the learned trial magistrate convicted the appellant to suffer death on both counts. One can only die once. Accordingly we uphold the sentence of death in respect of the first count as against Samwel Mbugua Mburu and Bonface Wahome Maina. In respect of the second count the sentence of death imposed shall be left in abeyance.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER 2008

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE