REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 218 & 219 of 2006

PETER KAMAU NJUGUNA ……..……..……1ST APPELLANT

SAMUEL KIMANI MUTHUA …….……...…....……2ND APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(CONSOLIDATED)

(From the original conviction and sentence in criminal case No. 1035 of 2005 of the Senior Resident Magistrate's Court at Githunguri – Ms. Lucy Mutai SRM)

JUDGMENT

PETER KAMAU NJUGUNA (1st appellant) and SAMUEL KIMANI MUTHUA (2nd appellant) were charged jointly before the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 12th June 2004 at Muchemi Village in Kiambu District within Central Province, jointly being armed with dangerous or offensive weapon namely iron bar and knife robbed JOSEPH WEKESA WANJALA mobile phone make Siemen C-30, cash 1,500/= and at, or immediately before or immediately after the time of such robbery did use actual violence to the said JOSEPH WEKESA WANJALA. After a full trial, the subordinate court found that there was no proof of being armed or using personal violence, and therefore convicted the appellants of the offence of simple robbery. The subordinate court sentenced each of the appellants to serve nine(9) yearsimprisonment. Being aggrieved by the decision of the subordinate court the two appellants filed their separate appeals to this court. At the hearing, the appeals were consolidated and heard together. In addition to their grounds of appeal, the appellants filed written submissions, which they relied on.

The learned State Counsel, Mr. Makura, opposed the appeals. Counsel submitted that there was overwhelming evidence to prove the offence for which the two appellants were convicted. Counsel submitted that though the offence occurred at night, there was light in the house of the complainant (PW1). The complainant and his wife (PW3) also knew the appellants before the incident. The case was therefore one of recognition, which was more reliable than identification. The evidence of the eye – witnesses was also strengthened by the evidence of PW2, who went to the scene and saw the appellants running away. Counsel also submitted that the unsworn defences of the appellants was considered and rejected by the learned trial magistrate. Lastly, the State Counsel submitted that the sentence of 9 years imprisonment for an offence whose maximum sentence was 14 years imprisonment was reasonable.

The facts in brief were as follows. The complainant (PW1) went back to his house at Ikinu in Kiambu district on 12th June 2004 at night, about 10 pm. His wife (PW3) was in the house. He initially sat outside the house. Then he went into the house, which was a one roomed house. The door was wide open. When he went into the house, two people came and approached him. They demanded for money. The wife (PW3) produced money Kshs.1,500/= from box and gave those people. The intruders also took away PW1's mobile phone. They then went away.

PW1 screamed and, a neighbour (PW2), came. When PW2 came to the scene, he merely saw the two people running away. It was the evidence of PW1 and PW3 that they recognized the two appellants in the light of a lamp, and that they knew both the appellants before. It was also their evidence that one had a knife as well as a metal bar .

The appellants were arrested by members of the public during the same night and handed over to the Administration Police, one of whom was PW4, who gave evidence on the arrest. The appellants were then charged through Githunguri Police Station, the offence of robbery with violence.

In their defences, both appellants gave unsworn testimonies. The 1st appellant (who was second accused in the subordinate court) stated in his defence that he was a farmer. That three people went to his house and told him that he was needed at the police station. At the police station, he met 1st accused (2nd appellant) who was his nephew. He denied that he knew anything to do with the case. The 2nd appellant (who was 1st accused before the subordinate court) testified that he was a shamba boy. He stated that on 3/6/2004 he was arrested at work, beaten and taken to Ikinu police post. He denied committing the offence.

Faced with this evidence the learned trial magistrate found that the prosecution had proved, beyond any reasonable doubt, that the appellants committed the offence, which the learned magistrate reduced from capital robbery to simple robbery.

I have evaluated the evidence on record. The conviction of both appellants was predicated on visual identification by PW1 and PW2. In PAUL ETOLE & ANOTHER –vs- REPUBLIC Criminal Appeal No. 24 of 2000, the court of Appeal emphasized the need to examine with greatest care the evidence adduced in court in proof identification before a court, and stated –

"**The appeal of second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage Justice. But such miscarriage can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification the accused the courts should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but even when a witness is purporting to recognize someone who he knows the courts should warn itself that mistakes in recognition of close relatives and friends are sometimes made."**

In analysisng the evidence of PW1 and PW3 on recognition, the learned magistrate stated –

"**The court heard that the robbers were armed with crude weapons namely a knife and iron bar and finally that the robbers who were 1st and 2nd accused were positively identified at the scene of crime by PW1 and PW2 (should be PW3). That the two were known to the complainant and PW3, the scene was well lit, it was a tiny room and I was left in no doubt that the said light was sufficient enough to enable the witness to see and recognize the accused persons at the time".**

In my view, it is clear from the above that the learned magistrate did not warn herself of the dangers of convicting on the evidence of visual identification. Indeed, the evidence is that the house was a small room. However the evidence of both PW1 and PW3 did not describe the intensity of the light from the

lantern lamp, nor where it was placed in relation to the intruders when they recognized them. The appellants could have been neighbours, however the burden was on the prosecution to adduce evidence to establish that the recognition was positive and without possibility of error. In my view, in our present case, the prosecution failed to adduce such evidence.

That is not all. Evidence of crucial witness was not tendered. The appellants were said to have been arrested by members of the public who were assisting PW1. None of those witnesses (members of the public) was called to testify as to what PW1 told them which led to then arresting the appellants. Secondly, PW4 who was an Administration Police Officer clearly testified that he handed over the appellants to Githunguri Police Station. It therefore follows that it was the OCS Githunguri Police Station who decided to charge the appellants. The charge sheet, in fact, indicates that the file in question was a Githunguri Police Station file. In my view, it was imperative for a police officer from Githunguri Police Station to have testified in the case. The Police officers from Githunguri Police Station are the ones who must have entered the arrest of the appellants in the OB, and they are also the ones who must have opened a file and recorded witness statements. These were crucial witnesses. As was held in the case of BUKENYA –vs- UGNADA [1972] EA 547, the failure of the prosecution to call crucial witness might, in appropriate cases, justify a court in making an adverse inference that if the said witnesses had been called to testify, their evidence might be adverse to the prosecution case. I draw that adverse inference in this case.

For the above reasons, I find merits in the appeals. I allow both the appeals quash the convictions and set aside the sentences. I order that both the appellants be set at liberty, unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th October 2007.

George Dulu

Judge

In the presence of –

Appellant present in person

Mr. Makura for State - absent

Eric - court clerk