



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 827 of 2003**

**FRANCIS KAMUNYA RUCHUNU.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL CASE NO. 828 OF 2003**

**PHILIP OSIEMO KIRATA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The two Appellants, **FRANCIS KIMUNYA RICHUNA** alias **WAGICHIRU** (hereinafter referred to as the 1<sup>st</sup> Appellant) and **PHILLIP OSIEMO KIRAITU** (hereinafter referred to as the 2<sup>nd</sup> Appellant) were jointly charged with four others with one count of robbery with violence contrary to Section 296 (2) of the Penal Code and one count of preparing to commit a felony contrary to Section 308 (1) of the Penal Code. The four co-accused were acquitted at no case to answer stage. The case then proceeded against the two Appellants. At the conclusion thereof the Appellants were acquitted of the second Count. They were however convicted on the first count and sentenced to death as provided for under the law.

Being aggrieved by the conviction and sentence, they both individually and separately lodged Appeals. The two Appeals have been consolidated for ease of hearing and as they rose from the same criminal Case in the subordinate Court. The Appellants have basically raised the same grounds of Appeal which revolve around identification, reliance on repudiated statement, mode of arrest and finally failure by the Court to consider the defences advanced by the Appellants.

The brief facts of the prosecution case were that on 24<sup>th</sup> February, 2001 at about 1 a. m. PW1, **KINYANJUI KARIUKI**, the Complainant was asleep in his house with his wife, Grace Wacuka (PW2) at Mukurwe when intruders forced their way into the house via a window. As the intruders were in the process of getting into the house, PW2 pressed the alarm and switched on the electric lights. PW2 who was sleeping in a different bedroom from PW1 woke up PW1. However by the time PW1 woke up the intruders had already gained entry in the house. On entering the house, the intruders proceeded to demand money from PW2 and in due course disconnected the electricity light. According to the

testimony of PW2 before the intruders switched of the light she had already identified the two Appellants. They were the ones who talked to her demanding money. She showed then where the money amounting to Kshs.3,800/= was. According to the witness it was infact the 2<sup>nd</sup> Appellant who personally took the money. The intruders also helped themselves to two cell phones, 3 colour televisions and three radio cassettes, all belonging to PW1 and PW2. In the course of the robbery, the robbers also entered the bedroom of PW1 and with the aid of the torches and beat him thoroughly as they demanded money from him as well. Apparently he did not have any money on him. He was then cut on the head with a sharp object fell down and became unconscious. When done the intruders demanded car keys which they were given. However they could not drive off with the vehicle. PW1 was later taken to Kiambu District Hospital where he was admitted for 2 days. Upon discharge he was issued with a P3 Form which was duly completed by Dr. Manasses Shiundu Ndakaru (PW3) who produced it in Court. The matter was then reported to Police. Following investigations, the Appellants and co-accused were arrested and charged.

In his defence the 1<sup>st</sup> Appellant denied committing the offence and stated that he was arrested by the Chief on 26. 7. 2001 without being told the reasons behind his arrest. He was then taken to Kiambu Police Station where he stayed until 3. 8. 2001 when he was released. However on 8. 8. 2001 the Chief came again and informed him that the OCS Kiambu Police Station wanted to see him. The Chief took him to the Police Station and was locked up. Later on he was taken to Court and charged with an offence he knew nothing about.

As for the 2<sup>nd</sup> Appellant, he stated that he was arrested on 25. 7. 2001 in his house by CPI Kiragu (PW9) and Constable Kingari (PW6). He used to sell Chang'aa in the house and thought that his arrest had to do with Chang'aa. He was then taken to a house in Mugumo Estate and placed in a garage where he was tortured. In order to avoid further torture he was forced to admit having committed the robbery. It was his further defence that he was forced to sign some papers that were later adduced in Court by the prosecution as a confession made by him. He denied ever making such confession and added that even if he did, it was under duress and threat of death.

In support of the Appeals, the Appellants tendered written submissions that we have carefully perused and considered.

The state through Mrs. Obuo, Learned State Counsel opposed the Appeal. Counsel first pointed out to us that there were variations in the dates regarding when the offence was committed. Whereas in the charge sheet it was indicated that the offence was committed on 24. 3. 2001, the Complainant however testified that it was on the 24. 2. 2001. Counsel submitted that the anomaly is curable under Section 382 of the Criminal Procedure Code. The Appellants were not in any way prejudiced by the variations in the dates as they knew the charge facing them, Counsel further submitted.

On identification Counsel submitted that the circumstances of identification were favourable. PW2 testified that she was able to identify the two Appellants before they disconnected the lights. PW2 said that she recognised the 2<sup>nd</sup> Appellant because he was an employee of his neighbour. Counsel further submitted that PW8 conducted an identification parade in which Pw2 identified the 1<sup>st</sup> Appellant as one of the assailants. Counsel therefore submitted that the 1<sup>st</sup> Appellant was properly identified and 2<sup>nd</sup> Appellant recognised by PW2. That the evidence on record was corroborated by the statement under inquiry made by the 2<sup>nd</sup> Appellant to PW11. In the said statement the 2<sup>nd</sup> Appellant implicated himself and 1<sup>st</sup> Appellant. Counsel further submitted that the trial Magistrate cautioned herself on the evidence of identification by a single witness before relying on it. Counsel therefore urged us to dismiss the Appeal.

The 1<sup>st</sup> Appellant had nothing to say in reply. However the 2<sup>nd</sup> Appellant submitted that though PW1 and PW2 were in the same house, the evidence of PW1 is to the effect that the electricity light was disconnected before the robbers entered the house. On the statement under inquiry recorded by PW11 the Appellant submitted that he retracted it as he had been tortured and forced to sign it. The Appellant further pointed out that although PW6 testified that he arrested the Appellant using the information given by PW2, he had however in the past arrested the Appellant because of selling Chang'aa. That PW6 therefore knew the Appellant before hand. He concluded his reply by stating that if indeed any

information had been given to PW6 implicating the Appellant, he would have caused his immediate arrest rather than arrest him about 4 months after the offence.

We have carefully considered the evidence on record. As first Appellate Court, we are expected to submit the said evidence to a fresh and exhaustive examination and to reach our own conclusions and findings as to the guilt or otherwise of the Appellants. In doing so, we should give allowance for the fact that the trial Court unlike us had the advantage of hearing and seeing the witnesses (see **PANDYA VS REPUBLIC (1957) EA 336, SHANTILAL M RUWALA VS REPUBLIC (1957) EA 570, PETERS VS SUNDAY POST (1958) EA 424 AND OKENO VS RPUBLIC (1972) EA 32.**

We start off with the issue raised by the Learned State Counsel regarding the variations in the dates when the offence allegedly was committed. According to the charge sheet the offence is said to have been committed on 24<sup>th</sup> March, 2001. However according to the testimony of PW1 and PW2 the offence is said to have been omitted on 24<sup>th</sup> February, 2001. We have perused both the typed and the original proceedings of the Lower Court. Both records confirm the evidence of PW1 and PW2 to the effect that the offence was committed on 24<sup>th</sup> February, 2001. The Appellants did not raise this issue in their grounds of Appeal nor in submissions. The assumption here being that they knew the charge which faced them as correctly submitted by the Learned State Counsel. We do not think that this variation in the dates prejudiced the Appellants in any way in the conduct of their defences as can be gathered from the way they cross-examined these two witnesses. In any event the variation is clearly curable under Section 382 of the Criminal Procedure code. Further Section 214 (2) of the Criminal Procedure Code specifically provides that variance with respect to time at which the alleged offence was committed is not material. Confronted with a similar situation as in the instant case, the Court of Appeal in the case of **MATHEKA KITHOME VS REPUBLIC, CRIMINAL APPEAL NO. 48 OF 2005** (unreported) delivered its decision thus:-

***“...In our view the conclusion reached by the superior Court as to the effect of the confusion in dates was correct. In reaching this conclusion we have taken into account Section 214 (2) set out above which provides that variance with respect to time at which the alleged offence was committed is not material. We consider that errors to dates fall within “variance with respect to time. We would also if it were necessary have relied on Section 382 of the Criminal Procedure Code as we do not consider that in this case, any failure of justice has been occasioned by the procedure adopted.....”***

We are of the same view with regard to the instant matter.

We now turn to consider the issue of recognition and identification complained of by the Appellants. It is in evidence that the offence was committed at 1 a. m. at night and PW1 did not identify nor recognize any of the robbers. However PW2 claims to have managed to identify two of the robbers. She did so with regard to the Appellants. According to PW2 the robbers were many. They were armed with axes, pangas and sticks. That she was able to identify and recognize the Appellants when they entered the house as electricity light was on. According to PW2 the robbery took about 10 minutes. From the evidence, it would appear that there was pandemonium in the house in that as soon as the robbers gained entry, PW2 and the house girl ran into the room of PW1. According to the evidence on record whereas some of the robbers were repeatedly demanding money from PW2 and shoving her around, others descended on PW1 and beat him senseless. Infact he lost consciousness. According to this witness “.....***The electricity light was disconnected....***”

In those circumstances was it possible for PW2 to be able to positively identify and or recognize the Appellants? In our view the conditions prevailing were stressful and unfavorable for positive identification and or recognition. PW2 claimed to have switched on the electricity light than enabled her to make the alleged identification. However it does appear from the evidence that no sooner had she switched on the light that the robbers switched it off. She had also by this time ran into her husband's bedroom. With the aid of torches, the robbers were able to pick the items listed in the charge sheet and visit violence on PW1. One then wonders, if this was the scenario, at what point was PW2 able to observe the Appellants keenly as to be able to identify them, considering that this witness did admit under cross-examination by the 2<sup>nd</sup> Appellant that she was scared. Even if we were to accept that there was electricity light in the room which enabled the witness to identify the Appellants, there are relevant inquiries in this

regard that the trial Magistrate did not undertake. For instance the trial Magistrate did not bother to make inquiries as to the intensity of the light, the position of the light in relation to the Appellants and for how long PW2 had kept the Appellants under close observation as to be in a position to identify them subsequently. It has been held through several authorities starting with **REGINA VS TURNBULL (1976) 3 ALL 549** that such inquiries are necessary. Indeed in the case of **CHARLES O. MAITANYI VS REPUBLIC (1960) KLR 198**, our own Court of Appeal stated:-

***“.....it is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect are all matters helping to test the evidence with greatest care. It is not careful test if one of these matters are unknown because they are not inquired into. In days gone, there would have been a careful inquiry into these matters, by the committing Magistrate, State Counsel and defence Counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrate trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with “greatest care” the evidence of a single witness.....”***

No such inquiry as contemplated above having been undertaken by the presiding Magistrate we are of the view that the purported identification of the Appellants by the PW2 cannot be said to be free from possibility of error.

PW2 claimed that she recognised the 2<sup>nd</sup> Appellant because he was an employee of a neighbour. In her evidence in Chief she stated:-

***“.....I used to see the first and second accused but I did not know them prior to the incident.....”***

However under cross-examination by the 2<sup>nd</sup> Appellant, the witness stated:-

***“.....I recorded my statement on Saturday. In my statement I told the Police that I used to see you in the farms like Kimani’s farm. In my report I did mention that you work at Kimani’s.....”***

From the foregoing it is clear that the witness was not emphatic that she knew the Appellants or that the 2<sup>nd</sup> Appellant was an employee of Kimani nor that Kimani was a neighbour contrary to the finding by the trial Magistrate. At this point it is worth repeating what was stated by Lord Widgery C. J. in **REGINA VS TURNBULL (Supra):-**

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

It does appear from the Judgment of the Learned Magistrate that he did not address his mind to this possibility. He ought to as clearly the alleged recognition was made under very difficult circumstances. The possibility of mistaken recognition cannot therefore be completely ruled out.

We are also concerned that though PW2 claimed to have been familiar with the Appellants and reported the incident promptly, it was not until 5 months later that the Appellants were arrested. There is no suggestion that the Appellants and indeed the 2<sup>nd</sup> Appellant whom PW2 described as an employee of a neighbour had gone underground after the incident.

There is no explanation at all why it took close to five minutes to have the Appellants arrested. We also note that according to PW6, he testified that he arrested the 2<sup>nd</sup> Appellant whom he had known previously from his house. In cross-examination by the 2<sup>nd</sup> Appellant he stated:-

***“.....I know you prior to the incident as a bad person. I have arrested you several times prior to the incident. I had arrested you because of being in possession of Chang’aa. The other was malicious damage to property....”***

PW6 further testified that he arrested the 2<sup>nd</sup> Appellant due to the report he got from Pw2. It is on record that the robbery was committed on 24<sup>th</sup> February, 2001. However the Appellant was arrested on 25<sup>th</sup> July, 2001. The question that begs for an answer is, if it is true that PW6 had a report involving the Appellant in the incident, why didn't he arrest the Appellant immediately since he knew his residence? It is also pertinent to state that this witness as well throughout his evidence did not mention that that Appellant had gone underground as to defeat his immediate arrest. Neither did he testify as to whether throughout this period he was looking for the Appellant.

The Learned trial Magistrate relied heavily on the statement under inquiry made by the 2<sup>nd</sup> Appellant to PW II. The Learned Magistrate found as a fact that the statement under inquiry corroborated the other evidence tendered by the prosecution. The Appellant maintained that the confessionary statement was not obtained from him voluntarily. However the trial Magistrate following a trial within a trial found that it was voluntarily obtained and admitted it. We note once again that the 2<sup>nd</sup> Appellant was arrested on 25<sup>th</sup> July, 2001. He recorded his statement under inquiry on 2<sup>nd</sup> August, 2001. In the case of *MWANGI S/O NJOROGI VS REPUBLIC (1954) EACA 377*, it was held that:-

***“.....Where a Court is called upon to consider the voluntary character of statements made by suspected persons in police custody, it must take into consideration the length of time the accused has been kept in Police custody and to what extent he has been subjected questioning.....”***

In the instant case these two aspects were entirely overlooked. We have on our part perused the statement of inquiry and going by the contents therein, we doubt whether such information would have been obtained voluntarily. Indeed in the very statement, the Appellant makes reference to the beatings they underwent. He says:-

***“.....We came back after looking for others and went to Mugumo. There we were interrogated thoroughly. We were seriously beaten. Muriuki received more beatings because he had refused to confess..... We were beaten by King'ori and the Corporal. I was not beaten seriously because I spoke the truth.....”***

We do not understand how the Learned Magistrate would have ignored this aspect and proceeded to rule that the statement was made voluntarily. It is on record that originally three person were apprehended in connection with the robbery. Unfortunately one of the suspect died whilst in Police custody. According to the statement under inquiry, this suspect was Muriuki. According to the Appellant the death of Muriuki was as a result of the torture he underwent. This information was brought to the attention of the trial Magistrate during trial within trial. However the trial Magistrate for unexplained reasons chose to ignore the issue.

The fact of the death of the suspect was not at all disputed by the prosecution. In our view and having taken into consideration all the surrounding circumstances of the case, we are not convinced that the statement under inquiry was voluntarily obtained. It ought not to have been admitted.

We also note an omission regarding the admission of the said statement. The Court did not cause the statement under inquiry once admitted to be read out in to the Appellants in Court as required. Consequently its contents remained unknown particularly to the 1<sup>st</sup> Appellant and yet it implicated him in the offence. The 1<sup>st</sup> Appellant was not even informed of his right to cross-examine the 2<sup>nd</sup> Appellant over the statement. In our view this omission was fatal to the prosecution case. In the circumstances, the Learned trial Magistrate ought not to have placed much reliance on the said statement.

We think we have said enough to show that the conviction of the Appellants was unsafe contrary to the submissions of the Learned State Counsel. The conviction recorded against each Appellant must be quashed. Consequently this Appeal is allowed, conviction quashed and sentence of death imposed set aside. Each Appellant is set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 4<sup>th</sup> day of April, 2006.

.....

**LESSIT**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**