REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 522 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 8310 of 2002 of the

Chief Magistrate's Court at Kibera (Ms. Mwangi – PM)

JOHN KINYWA MIRITI……..……..….....……..……..…..APPELLANT

VERSUS

REPUBLIC…….....…….…....RESPONDENT

J U D G M E N T

The Appellant **JOHN KINYWA MIRITI** was accused by his Aunt **MARY WANGU,** and her husband **SIMON NESEWALEI** of robbing them on the 7th November 2002 at Kadisi area of Ongata Rongai. It was alleged at the time of the robbery that the Appellant was in company with others and that he used actual violence on the two Complainants. After a full trial the Appellant was convicted of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code i**n both counts and was sentenced to death as prescribed in the law. Being aggrieved by the conviction, the Appellant lodged this appeal.

The Appellant relied on his amended grounds of appeal which were six in number which we summarize as follows: -

1. That the circumstances prevailing at the scene of crime were unfavouralbe for accurate identification.

2. That the prosecution case had material contradictions which the trial magistrate should have resolved in favour of the Appellant.

3. That none of the exhibits were recovered in the Appellant's house.

4. That the statement under inquiry was not made voluntarily.

5. That the charge sheet was fatally defective.

6. That the Appellant's defence was not given due consideration

The facts of the prosecution case were that the Complainant, **Mary,** PW1 in the case was in her kitchen cooking supper with her worker, PW3. Her husband PW2 was in the main house when six robbers struck. They forced Mary into her house asking her to give them all the money she had. Mary gave them Kshs.1700/- and in the course of the robbery, she was hit on her head with an axe. Mary said that the Appellant was the ring leader and he was the one who demanded money from her. PW2 was robbed of Kshs.1370/- and a torch among other items. PW2 was also hit on the hand and leg. PW4, **IP**

Mwangi produced a statement under inquiry exhibit 6 which he took from the Appellant on 11th November 2003. It was a confession and was not retracted or repudiated. PW5 the investigating Officer recovered an axe exhibit 2 and metal bars exhibit 7 identified by the Complainants as ones used during the robbery, a torch exhibit 4 stolen from PW2 in same robbery from the Appellant's house. PW6 also produced P3 forms he completed after examining Mary and her husband exhibit 3 and 5. He assessed degrees of injury on both of them as harm. The object used to injure **Mary** was both sharp and blunt but one used to injure PW2 was blunt.

The Appellant in his unsworn statement denied the charge but admitted being arrested for committing it. He also admitted that his house was searched.

We have carefully considered this appeal and have analyzed and evaluated afresh all the evidence adduced before the trial court while bearing in mind that we neither saw nor heard any of the witnesses and giving due allowance. (See **Okeno vs. Republic 1972 EA 32**). We shall start by considering the fifth ground of appeal. The Appellant contended that the charge was fatally defective in that the charge omitted any mention of weapons having been used in the said robbery. That the evidence of the witnesses indicated that the robbers were armed and that that contradiction rendered the charge defective. It was the Appellant's contention that where the particulars of the charge did not tally with the evidence adduced that rendered the charge defective.

Mrs. Obuo for the State opposed this appeal. In her submission, learned counsel did not address the issue of the defectiveness of the charge. We believe that the issue the Appellant was raising here was whether the charge as framed was defective or not in terms of the particulars needed to be included in a charge of robbery with violence. A charge of robbery with violence can be predicated upon either one of three ingredients as ably put in obiter dictum by the court of appeal in the case of **Oluoch vs. Republic 1985 KLR 549.**

"***Holding (6) (a) (b) and (c)"***

The charge was not defective. The prosecution relied on the last two ingredients that the Appellant was in company with others and that actual violence was visited on the complainants. These two ingredients were supported in evidence by the three prosecution witnesses who were victims of this attack. Nothing therefore turns on this ground.

On the fourth ground of appeal, that the statement under inquiry was not voluntarily obtained, the Appellant did not retract nor repudiate his statement to police and therefore it was admitted in evidence unopposed. The Appellant did not refer to the statement or complain regarding the manner in which it was recorded from him by PW4 at any state of the trial. If there was any issue he needed to raise concerning that statement, it would have been best raised at the trial and not on appeal as the Appellant seeks to do. We find nothing on record to suggest that the statement was improperly taken. We therefore reject that ground of appeal as unmerited.

On the first three grounds concerning the circumstances prevailing at the scene and the presence of material contradictions in the prosecution case and recovery of exhibits from the Appellant, the Appellant contended that the issues were not properly canvassed during the trial. The Appellant submitted that those issues included identification of the Appellant by all three witnesses and whether PW3 was not introduced in the case to strengthen it and whether the axe was recovered in his house and whose blood was on it and whether there was any ill motive in the case. The ill motive had to do with a land dispute between the Appellant and his aunt, Mary who was PW1. The Appellant submitted that none of the witnesses mentioned his name to the other until Mary, PW1 was taken to hospital. He submitted that cast doubt on the evidence of identification.

Learned counsel for the State submitted that the Appellant was properly identified. Learned counsel submitted that there was a hurricane lamp in the kitchen where Mary and PW3 were when the attackers came. Counsel submitted that PW2 also had a lamp in the house where the robbers led Mary and PW3 in order to rob them. Counsel submitted that the Appellant was the Complainant Mary's nephew and so the

evidence of identification was that of recognition.

The evidence adduced by PW1, Mary, PW2, Mary's husband and PW3, their worker was that they saw the Appellant among the six who robbed them. Mary and PW3 said it was the Appellant who led the group into the kitchen and into the main house and that he had the axe which he used to hit Mary with. PW2 also said he saw the Appellant with an axe and that he was the one demanding money from them. The evidence of identification by the three witnesses was that of recognition. All three witnesses said they had known the Appellant before for a very long time and could not have mistaken him. They both saw and heard him throughout the attack.

In **Anjononi and others vs. Republic (1980 KLR** the court of appeal held: -

"***This was however a case of recognition, not identification of the assailants. Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

On our part we are satisfied that the Appellant was properly identified as having been a member of the gang which robbed the Complainants herein. We are satisfied that the witnesses had ample time to see and recognize the Appellant as he moved with the Complainants and PW3 from one room to another robbing them. even though the light which enabled these witnesses to see and therefore recognize the Appellant were hurricane lamps, given the movement from room to room and demands made to the Complainants as he asked them for money coupled with the fact that they knew him well, we are satisfied that the identification was safe.

We find that the evidence of identification was corroborated further by the Appellant confession in his statement under inquiry which he did not retract. In that statement the Appellant gave detailed account of how he and others planned and executed the robbery. The only difference between the statement of the Appellant and the evidence adduced in court is where the Appellant stated that he never entered the Complainants house because he was well known. That bit of variation in our view is self serving. However from the rest of the statement it is clear that the Appellant planned the robbery with others and also participated in its execution. The confession alone was sufficient to sustain a conviction in this case. However there was corroboration in the evidence of recognition and which was also strong enough to sustain a conviction. See **Woga vs. Republic [2003] 1 EA 358**.

The last ground raised by the Appellant was that his defence was not given due consideration. The trial magistrate did summarize the defence of the Appellant fully in her judgment before finding it unreliable and rejecting it. We have considered it afresh. All he said was that a cousin of his took him and other people to a restaurant and ordered tea. That cousin then went away and returned with police. The police arrested him and eventually took him to his house. He denied that any exhibits or items were recovered from there. We have considered this defence and find that the learned trial magistrate was correct in rejecting it especially in the face of the evidence of recognition by all three prosecution eye witnesses and also the Appellant's confession in the statement under inquiry.

Having considered this appeal, we are satisfied that the conviction entered herein was safe. We accordingly dismiss the appeal, uphold the conviction and confirm the sentence.

Dated at Nairobi this 18th day of July 2006.

……

LESIIT, J.

JUDGE

……

MAKHANDIA M.S.A.

JUDGE

Read, signed and delivered in the presence of;

Appellant(s) present

Mrs. Obuo for the State

Tabitha/Erick – Court clerks

……

LESIIT, J.

JUDGE

……

MAKHANDIA, M.S.A.

JUDGE