



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAKURU

Criminal Appeal 263 of 2004

*(From original conviction and sentence in Criminal Case No. 599 of 2003 of the Senior Resident Magistrate’s Court at Narok –*

*S. M. GITHINJI – S.R.M)*

FRANCIS NGUGI.....1<sup>ST</sup> APPELLANT

STANLEY KAMWARO.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

JUDGEMENT OF THE COURT

**Francis Ngugi** and **Stanley Kamwaro** the 1<sup>st</sup> and 2<sup>nd</sup> appellant were jointly charged with another not before Court with the offence of robbery with violence contrary to section 296(2) of the penal code.

The particulars of the charge are that on the 12<sup>th</sup> day of September, 2003 at Olegito area in Narok District within Rift Valley Province, jointly with others not before Court they robbed Benard Sankale of his cash 420/= and at, or immediately before or immediately after the time of such robbery wounded the said Benard Sankale.

After a full trial, the appellants were convicted by the Senior Resident Magistrate Narok and sentenced to death as per law provided. The appellants being dissatisfied with the conviction and sentence have appealed to this Court and raised three principal grounds of appeal. During the hearing of this appeal, the appellants submitted further supplementary grounds of appeal which were accepted. The appellants challenged the conviction by the lower court which they submitted was based on the evidence a single identifying witness in what they termed as difficult circumstances.

The appellants also submitted that the learned magistrate erred by relying on contradictory evidence by the prosecution witnesses. The trial court was similarly faulted for failing to take into consideration the appellant’s statement of defence especially the defence of *alibi* and for failing to give reasons for the rejecting the defence of the appellants.

The evidence that led to the conviction of the appellant was given by a total of five (5) prosecution witness. **Benard Sankale (PW 1)** who was also the complainant testified that on 11<sup>th</sup> September, 2003 at

about 9.00 p.m. he left a shop at Olengito and was walking to his home when he met the two appellants with another one he said was called Juma. According to PW 1, the appellants were well known to him. They were his neighbours.

The appellants demanded that the complainant should give them what he had. Suddenly they pounced on him attacked him with a club and bar, as a result of which he lost a total of six (6) teeth and the attackers took away Kshs.420/= from his inner pocket. The complainant said he recognized the attackers. Although it was at night, there was moonlight. Immediately after the attack and robbery the complainant became unconscious until about midnight when he regained consciousness and went home and slept. In the morning the complainant reported to his wife about the attack. She took him to hospital and thereafter to the Police Station where he was issued with a P3 form.

**Benjamin Cheserem (PW 2)** is a Clinical Officer attached to the Narok District Hospital. He examined the complainant and completed the P3 forms. He confirmed that the complainant had lost (six) 6 teeth, had chest pains, bruises and swellings on the right knee. He classified the degree of injury as harm. He produced the P3 form as an exhibit.

**Paul Rarrau (PW 3)** is the brother of the complainant. He testified that on the morning of 13<sup>th</sup> September 2003, he found his brother writhing in pain, the complainant told him that he had been attacked by **Ngugi, Stanley Kamwaro** and one **Juma**, whereby he lost his teeth and Kshs.420/= was robbed from him. PW 3 took the complainant to hospital while neighbours went to look for the assailants. The 1<sup>st</sup> and 2<sup>nd</sup> appellants were apprehended by members of public and were taken to the Police Station.

**Samuel Mairigo (PW 4)** was part of the members of public who apprehended the 1<sup>st</sup> and 2<sup>nd</sup> appellants and took them to the Police Station on the morning of 13<sup>th</sup> September 2003. They visited the scene of the attack with the appellants. He told the court they recovered three (3) teeth from the scene.

**Corporal Jimmy Bwika (PW 5)** was at the material time attached to the Narok Police Station. He was at the Crimes Office on 13.9.2003 when the complaint was reported and the appellants brought to the station by members of public. The complainant gave the names of the attackers as **Francis Ngugi, Kamwaro and Juma**. This witness also kept the three teeth that were recovered at the Scene of Crime and he produced them as exhibits.

It was on the basis of the above evidence that the trial court found the appellants had a case to answer. The appellants gave a sworn statement in their defence. The 1<sup>st</sup> appellant denied that he was the one who attacked the complainant. He said that in the material day, that is on 11<sup>th</sup> September, 2003 he was in Narok, where he had gone to market his cabbages and that is where he slept and on the following day he accompanied the persons who offered to buy his cabbages. He was arrested by members of public while harvesting vegetables in his shamba.

During cross-examination, the 1<sup>st</sup> appellant said he knew the complainant whom he had lent Kshs.500/= and who had refused to repay. He denied that he could have attacked the complainant for the amount of money which he owed to him.

The second appellant also denied any involvement in the robbery and the attack on the complainant. He also told the court that on the material day he was busy with his own things and had slept in his house until the following day when members of the public went and arrested him alleging that he had been involved in an incident at Olengito. He said that he knew the complainant from whom he had borrowed a shovel but the shovel got lost. However the 2<sup>nd</sup> appellant denied that he knew the 1<sup>st</sup> appellant, his co-accused.

It is on the basis of the above evidence that the appellants were convicted and sentenced to death.

On the part of the state, this appeal was opposed. The learned **Senior State Counsel Mr. Koech**

submitted that the appellants were convicted based on the evidence of recognition. The complainant who was the victim of the robbery with violence identified his attackers. He told his brother and wife the next morning after the attack who his assailants were. Thereafter he reported the same at the police station. The complainant was viciously attacked where he lost six (6) teeth and sustained other injuries. According to the state the conviction of the appellants was safe.

The duty of the first appellant's court is well stated in the case of *Njoroge -Vs - Republic [1987] KLR 19* among other decisions. We have the duty to reconsider the entire evidence adduced before the trial court and arrive at our own decision on whether or not the verdict reached by the trial court should be upheld. In so doing, caution should be given to the fact that we neither saw nor heard the witnesses as they testified and make due allowance on that.

The issue for determination in this appeal is whether the prosecution proved its case against the appellant of the charge of robbery with violence to the required standard of proof. In particular the issues turn on three points whether there was sufficient evidence of identification and whether the trial court disregarded the defence of *alibi* and proceeded to rely on inconsistent evidence by the prosecution witnesses.

On the first issue, the complainant who was (PW 1) said that he recognized his assailants and gave the names to his brother the next morning. Moreover the complainant said that during the attack he was talking to the appellants. The 1<sup>st</sup> appellant spoke to him first, he gave a detailed account of how the appellants attacked him together with another attacker who was not before the court. The attack took place at night but the complainant said he recognized his assailants as people known to him. The 1<sup>st</sup> appellant was a relative by marriage and the other attackers came from the same village. Besides he said he could see them as there was moonlight. This is evidence by a single identifying witness.

The complainant said that the appellants talked to him, the 1<sup>st</sup> appellant spoke to him first and ordered him to give them what he had. This can be termed as identification by voice. The complainant said he knew the appellants and this was not denied by the appellants who said they had dealings with the complainant before the incident. We find the facts of this case similar to the case of *KARANI -VS- [1985] KLR 290* where the court of appeal while adopting what was held by its predecessor the East African Court of Appeal in the case of *RORIA [1967] E.A. 583 at page 584* held:-

***“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult.***

***In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”***

The injuries sustained by the complainant were confirmed by PW 2, the Clinical Officer who examined him. The complainant was able to identify his attackers to PW 3 and the appellants were well known to him. From the above evidence, we are satisfied that the trial court properly assessed the evidence by the witness and we find no reason why we should interfere with its finding on the issue of identification.

The appellants submitted that there were contradictions born out of the complainant's evidence and that of his brother PW 3 who said that he reported to his wife about the attack and it was his wife who took him to hospital while PW 3 said he is the one who took the complainant to hospital. We have carefully considered the entire evidence, and we are of the view that the minor contradictions or discrepancies are not material and does not in any way affect the credibility of the evidence by the complainant as the fact of the matter is that the complainant was indeed helped to get to the hospital.

On the question of the appellant's defence and especially the 1<sup>st</sup> appellant's defence of *alibi*, we have reconsidered the same and were satisfied that the trial court properly disregarded the same as a mere sham

and an afterthought raised for the first time in defence and did not otherwise shake the strong prosecution's case. We are aware that the defence had no obligation whatsoever to substantiate the defence of *alibi* as the burden of prove always remained with the prosecution. We are satisfied the defence of both the appellants was properly analysed by the trial court and the reasons given for its rejection were satisfactory.

Having gone through all the evidence by the trial court, the submissions by the appellant and carefully considered the judgement of the trial court we are satisfied that the trial court properly analysed the evidence and arrived at the right conclusion.

Accordingly the conviction sentence imposed on the appellants by the trial court is hereby confirmed. The appeal is dismissed.

**Judgement read and signed on 13<sup>th</sup> July, 2006.**

**MARTHA KOOME**

JUDGE

**L. KIMARU**

JUDGE