



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Criminal Appeal 136 & 1350 of 2003

EPHANTUS NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

Criminal Appeal 1350 of 2003

DAVID MWANGI MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeals against conviction and Sentence arising out of the Judgment of G. C. Mutembei Esq. Senior Principal Magistrate dated 27/11/2003 in Senior Principal Magistrate's Court Criminal Case Number 1128 of 2003 (Embu).

JUDGMENT

These are two appeals arising out of same trial and were consolidated for purposes of hearing namely:-

- (i) Criminal Appeal No. 135/03 –Alex Njeru Nyaga –Vs- Republic.**
- (ii) Criminal Appeal No. 136/03- Ephantus Njeru –Vs- Republic.**

The appeals were then heard together Alex Njeru Nyaga filed 5 grounds of Appeal namely:-

- (a) that the evidence of identification was flawed.**
- (b) that the prosecution failed to avail first report made to testify the credibility of identifying witnesses the incident being brief and sudden.**
- (c) that the identification parade was prejudicial the appellant having been exposed to witnesses before the official report was arranged and no special marks were given to police arresting appellant or and investigations.**

(d) that the Trial Magistrate relied on the weakness of defence to convict placing the burden of proof on appellant.

(e) finally that the prosecution failed to prove their case beyond reasonable doubt.

The second appellant Ephantus Njeru filed 6 ground of appeal namely:-

(a) that Trial Magistrate relied on flawed evidence of identification.

(b) that prosecution failed to avail the first report made.

(c) that identification parade was prejudicial

(d) that leading evidence was not cautioned as required by law and that the Trial Magistrate rejected a defence without setting out any reasons contrary to section 169 (1) CPC

(e) finally the prosecution failed to prove their case beyond reasonable doubt.

Both appellants therefore raise the issue of identification evidence. They were accused 2 and 3 in the lower court. Both were convicted on 7 counts of robbery with violence contrary to section 296(2) and sentenced accordingly.

In evidence PW1 said she did not identify any of the robbers. PW2 testified that he saw the appellant but when he reported to the police he did not give a description to the police. He said the same of Appellant 3 he did not mention his name or give any description to the police. PW3 confirmed that he did not see 2nd appellant PW4 did not identify any of the robbers. PW5 did not identify any of the robbers

PW6 testified that he managed to see 3rd accused, 2nd appellant but the robbers did not enter his house. He saw 2nd appellant when he looked through the window, it was his first time to see him. He said the people by the light outside. He looked at the appellants face PW7 did not identify any of the robbers. PW8 identified first appellant. She recognized him as the man she had rented a room to. She also identified two of his friends who were acquitted at the end of trial. However this evidence was not relevant it belonged to another case. And the court should ignore it.

PW9 heard noise in adjoining plot. He put on light and saw several people there. He put on the light in his house many people came to his house demanding money they broke the electric bulbs. He did not identify any of the robbers.

PW10 did not identify any of the robbers who entered his house and took a watch and a panga.

PW11 identified first appellant but did not describe appellant to the police.

PW12 I.P (Simon Mwongela) prepared parade with 5 witness every time. The identification forms for Alex Njeru and Ephantus were with remarks **“picked on No. 7 and then the suspect, witness identified by physical appearance as he said there was security light. Ephantus had remarks that “the scar on the forehead was said to have been seen by the witness” and that the suspect was seen properly by the witness on the fateful night”**. PW13 examined Epenuel Kimathi and produced P3 form.

PW14 Police Officer said in evidence that 2nd appellant Ephantus Njeru came to the report office and reported that the suspects the police were looking for in respect of robbers were within Gatondo. He mentioned a few names. The police went to the Gatondo area where they arrested accused 3 Alex Njeru Nyaga and other suspects. They recovered some goods and weapons which were in a bag. Later the second accused who was an informer. Ephantus Njeru, was arrested in a house in Gachoka where the exhibits before the court were found. The landlord confirmed that first appellant was sharing a room with 2nd appellant. Accused 2 – was charged because complainant identified him PW17 went to Dallas with

police dogs but the dogs lost the scent.

PW18 was also arresting officer. The prosecution closed its case after calling 18 witnesses. Ephantus Njeru in his defence made unsworn statement about how he was arrested, interrogated and participated in an identification parade. The witnesses were the people he had met at CID Office. Alex Njeru Nyaga also made an unsworn statement about his arrest. He met P.C Chekowny who ordered his arrest because of a grudge, how his house was searched. He was taken to a parade; he was not satisfied because the witnesses had seen him earlier. Both appellants denied having committed the offence charged.

The Trial Magistrate found that identification by PW1 to be doubtful but he was identified by Charles Kariuki by the electric light of an electric bulb. Identification form (page 56) does not show that witness 2 Charles Kariuki identified the appellant. However, Daniel Mugo witness No. 5 did and there were remarks of security light. As for Ephantus Njeru he was identified by 2 credible witnesses according to the Trial Magistrate. The Trial Magistrate said "I find that 2nd and 3rd accused did not sufficiently challenge the evidence of Charles Kariuki and Daniel Mugo so as to create a doubt as to its credibility. This tends to show that the Trial Magistrate was shifting the burden of proof of the offence to the 2 appellants. This is contrary to the principles of Criminal Law. It is to be noted that the witness for prosecution did not give descriptions of the appellants to the police. Also there were many robbers and it was at night. The circumstances of identification were not satisfactory. We find that the Trial Magistrate erred as he thought the appellants had a duty to satisfy the court on the issue of identification thus shifting the burden of proof upon the appellants.

We therefore allow the appeal and quash conviction and order the appellants to be set at liberty forthwith unless lawfully held.

Dated, signed and delivered in open court on this 8th ..day of...Aug....2006.

H. M. OKWENGU

JUDGE

J. N. KHAMINWA

JUDGE