**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MERU**

**Criminal Appeal 145, 146, 147 & 148 of 2005**

**PATRICK MWIRIGI ……..……1ST**
**APPELLANT**

**MARTIN MWENDA…….……2ND**
**APPELLANT**

**SAMUEL KIRIMI…….……3RD**
**APPELLANT**

**SAMSON MWITI…….……4TH**
**APPELLANT**

**V E R S U S**

**REPUBLIC ……..…….. RESPONDENT**

**(Being an Appeal against both conviction and sentence in Criminal Case No. 2354 of 2005 at Meru, Before J. Omburah Esq. Senior Resident Magistrate at Meru.)**

**J U D G M E N T**

1. The Appellants in this matter were all jointly charged with the offence of robbery with violence contrary to s., 296(2) of the Penal Code in Meru SPM's Court Criminal Case Number 2354/02. The particulars of the charge were that on 2.9.2002 at Kinoru Village, Ntima Location, Meru Central District jointly with others not before the court and "being armed with offensive and dangerous weapons namely clubs and pangas, robbed Samuel Gitonga of cash Ksh.1,700/=, one JVC colour television set, one pair of shoes, a track suit, 3 jeans trousers, one hat, a wallet containing a driving licence, a national identification card all valued at Ksh.18,000/- and immediately at the time of such robbery or immediately after the said robbery wounded the said Samuel Gitonga." The second count of robbery with violence was that they, on the same day and time, jointly with others not before the court and armed with offensive weapons namely pangas and clubs robbed Nicholas Kithinji of cash Ksh.80/=, one pair of leather shoes, one bungle, a driving licence, a national identity card, and elections card all valued at Ksh.1,600/= and immediately before or after the robbery used personal violence on the said Nicholas Kithinji.

2. The circumstances leading to the charge were that P.W.1 Winny Karimi as stated in evidence before the trial court, was walking back home from the Makutano area of Meru Town on 2.9.2002 at 10.30 p.m. together with her brother, Nicholas Kithinji and another man when a group of people ordered them to stop

and lie down. The men said that they were police officers and that the three were thieves. They then demanded money and mobile phones and proceeded to ransack their pockets and from Nicholas they took a wallet, money, national identity card, shoes, and a bungle and from the other man, Samuel Gitonga they took a hat jacket, shoes, wallet and money. The witness said that there was a security light about 4 metres away and she could clearly see the robbers. In any event, they were all shepherded by the "officers" turned robbers who had pangas, to Nicholas house nearby which had lights switched on and the television set was also on and again P.W.1 said that she clearly had another opportunity to see the robbers. She said that the 1st Appellant slashed her with a panga on the chest and her blouse and pull-over were shown to the trial court together with the panga cuts. While in the house, the 1st Appellant asked P.W.1 how a television set is switched off and she took the break to dash off screaming with the 1st Appellant in hot pursuit. Terrified, she turned back to the house and the 4th Appellant hit her with a club. She locked herself in her house and after a while came out. The television set had disappeared.

3. P.W.1 later went for treatment and at an identification parade picked out the Appellants as part of the gang of robbers. Of interest is that during cross-examination she said that the 1st Appellant was black and tall and had a jungle jacket and that she gave that description to the police. She described the 2nd Appellant as a "man, black tall and slender" and insisted that she had seen him on the material night.

4. When cross-examined by the 3rd Appellant, P.W.1 was emphatic that the 3rd Appellant was present during the robbery and there was enough light to identify him.

5. As for the 4th Appellant, P.W.1 said that he was describable as a "huge person" and that all the robbers had pangas but she never told the police about his appearance although she identified him at the parade.

6. The evidence of P.W.2 Samuel Gitonga was similar to that of P.W.1 save that when police officers came to the scene, he immediately told them that one of the six robbers was Kiremi whom he had known before and had even recognized him because "one of his teeth is cut or rotten. The teeth have brownish colour" He also stated that the 1st Appellant who was in police uniform appeared to be the person commanding others while the 2nd Appellant was identifiable by a healed scar and he had a knife and torch during the attack. He added that the 4th Appellant is the one who took his wallet and cut PW.2 with a panga. Like P.W.1 he said that he identified the robbers using security lights that were about 5 metres on each side of the scene of attack. The robbers also had torches and the lights in the house were turned on as were the security lights in the compound.

7. During cross-examination, he admitted that he had given a description of the 1st Appellant to the police; that he was dressed in a jungle jacket and that he was black but did not describe the 2nd Appellant. He said that he described the 4th Appellant as short and bearded and that he was armed with a panga and club.

8. P.W. 3 Wilson Namu, a clinical officer had treated P.W.2 for his injuries with an injury to the left cheek and a bruise on the forearm. He produced the P.3 form dated 19.9.2003 as Exh.5. He also produced the P.3 form dated 19.9.2003 in respect of P.W.1 and noted that her injuries were a bruise to the left cheek, cut wound on the right ear, and two cut wounds on the left fore arm below the elbow as well as tenderness on the lower side of the back. The P3 form was produced as Exh.6.

9. P.W.4 P.C. Stephen Makokha was on patrol duty on 3.9.2002 when he received a report of a robbery at Kinoru area in Meru. Together with other officers, he rushed to the scene and found the victims.

P.W.2 informed them that he could identify one Kirimi (who turned out to be the 3rd Appellant) as having been in the gang that robbed them. Since P.W.2 knew the suspect's home, they went there and he promptly opened his door and when the house was searched, a sharp panga was found under the bed. Upon arrest, he volunteered the names of his confederates who were six in number but that he only knew the homes of the present 2nd – 4th Appellants. He gave P.W.4 and his colleagues the names of those suspects (then) and on 14.9.2003 the suspects were netted and a bungle allegedly belonging to PW.2 was recovered from the 1st Appellant (Exh.3). The others were similarly arrested and all were then charged with the offences subject of their trial.

10. P.W.5 I.P. Andrew Moturi conducted the identification Parade and in his Report, the 1st Appellant was identified by P.W.1 and P.W.2 and one Moses Kinoti who we note was never called as a witness. The 2nd Appellant was identified by both P.W.1 and P.W.2. The 3rd Appellant was similarly identified by P.W.1 and P.W.2 while the 4th Appellant was identified by P.W.1 only.

11. All the Appellants raised concern as to the conduct of the parade by claiming that they had been removed from the cells earlier and that the witnesses had been able to have sight of them before the parade and therefore the whole exercise was a mere charade and therefore irregular.

12. When the Appellants were called by the trial magistrate to defend themselves, the 1st Appellant said that he knew nothing and had no idea about the robbery and that the "complainant" had seen him at the police station prior to the identification parade on 17.9.2002 and that PW.5 was not telling the truth. The 2nd appellant also said that when he was arrested on 13.9.2002 he had no idea why his house was being searched and also when he was put in an identification parade on 17.9.2002 he did not know the reason for it and he protested to the officer conducting the parade. He stated in cross-examination that he only saw P.W.1 at the identification parade and had not known her before.

13. The 3rd Appellant in his defence stated that he was arrested on 2.9.2002 and kept in the cells for Seventeen (17) days and on 19.9.2002 he met P.W.2 and shortly thereafter an identification parade was conducted and that P.W.2 and he had a grudge. He denied the evidence about the state of his teeth (being rotten or missing) but in an expressive remark of what the trial magistrate could see, he has missing teeth, a split one and "rotten" ones too. He also admitted in cross-examination that he lost some teeth ten (10) or so years ago.

14. The 4th Appellant said that he was arrested and tortured on 3.9.2002 and later subjected to an identification parade that he had no faith in. He denied being a robber or a thief.

15. We have seen the petitions of Appeal and they are similar and a replica of each other hence the order of 27.6.2006 consolidating the Appeals. We have also seen the submission by the Appellants and for us the issues to be determined are:

(i) Identification including the identification parade.

(ii) Manner of and reasons for the arrest of the Appellants.

(iii) Whether the defences raised by the Appellants were credible.

(iv) Non-compliance with s.200 of the Criminal Procedure Code.

16. On identification, it is our understanding that where a robbery takes place at night it is vital that the circumstances should be completely favourable to a clear visual identification of each of the alleged robbers. It is not always easy to cross that threshold of certainty as to identity and for a court to convict, it must invariably, even if uneasily, cross that mark if we were to paraphrase the words of Sir Clement de Lestang V-P in Roria vs R. [1967] E.A. 583 at 584. In the instant case, whereas P.W.1 and P.W.2 who were the most crucial witnesses attempted to describe the features of the Appellants (we have set out the

descriptions) above, those descriptions as regards the 1st, 2nd and 4th Appellants were not given to the police. As regards the 3rd Appellant, P.W.2 knew him prior to the robbery, a matter that the 3rd Appellant himself admitted in his defence. The case of the 3rd Appellant as regards this aspect of the Appeal stands out because it is in fact one of recognition and it has been said time and time again by our courts that recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger (see Siro ole Getaya vs R Cr. Appeal No. 56/76 and Anjononi vs R 1980 KLR 59). Since P.W.2 immediately after the robbery gave out the 3rd Appellant's name and the 3rd appellant was arrested the same night and picked out at the identification parade by both P.W.1 and P.W.2, we see no reason to fault his recognition and we shall overrule that limb of his Appeal.

17. Turning back to the 1st, 2nd and 4th Appellants, we have said that no description whatsoever of those four alleged robbers was given to the police for the description to be tested at the identification parade held later. What happened is that when the 3rd Appellant was arrested, he blurted out the names of his alleged confederates and they were rounded up and P.W.1 and P.W.2 were then called to participate in the parade. However when the 1st Appellant was arrested, he was found to be in possession of a bungle which was identified by P.W.2 as belonging to him and P.W.2 as well as P.W.1 later identified the 1st Appellant as being part of the gang of robbers. Having been in recent possession of goods stolen from P.W.2 during the robbery, a reasonable presumption arises that the 1st Appellant was either a thief or a receiver (see John Amunga Ogiwa Okoombo vs R. Cr. Appeal No. 89/2005 (Kisumu) which approved the decision in Andrea Ombonyo vs R [1962] E.A. 542 on this principle). He did not claim the bungle to be his own, gave no explanation for having it in his possession and coupled with the evidence of identification at the parade by more than one witness we have no alternative but to reject the submissions he made on this aspect of his Appeal.

18. How then should we treat the identification of the 2nd and 4th Appellants. It is their common argument that the circumstances of identification were unfavourable. We have carefully gone through the record of the lower court and especially the evidence of P.W.1 and P.W.2. The learned trial magistrate recorded their evidence in detail and what emerges is that the robbers initially confronted their victims on their way home and both P.W.1 and P.W.2 were unhesitant as to the lighting around them; they said that security lights 4 or 5 metres away lit up the area and they were able to see their assailants at close range. That was the first part of their ordeal because they were marched off to their house and on the way the robbers used torches to light their way. At the house, the lights were on, so was the television set and again the victims had time to see their attackers. P.W.2 recognized the 3rd appellant as Kirimi in the same light and immediately gave out his name and place of residence. P.W.1 who had not known the Appellants before was able to pick them out without hesitation at the identification parade and was able to give what description she could while in court. Granted, her identification in court was worthless but the circumstances at the time of the robbery and subsequent identification at the parade would lead us to say that all the Appellants, including the 2nd and 4th Appellants were sufficiently identified and the circumstances favourable enough for us to conclude that the identification was without fault.

19. Having so said we must advert to the question of the identification parade; our view is that the only reason why the 1st, 2nd and 3rd Appellants rejected the result of it was that the Complainants had seen them before the parade. We have however, weighed that assertion against the lucid and believable testimony of P.W.5 I.P. Andrew Moturi. He had no role save to conduct the parade as requested and his evidence in chief and under cross-examination would dispel any doubts that he may have interfered with the conduct of the parade. He had no evidence that the complainant may have seen the four suspects separately from the eight suspects in the parade and much as we try we see no reason to uphold the objection regarding the identification parade.

20. Our conclusion is that on all fronts the identification of all the suspects was without fault and we so find.

21. The second issue which we have partly touched on above, relates to the reasons and manner in which the Appellants were arrested. We have noted from the proceedings that the 3rd Appellant was arrested on

the very night of the robbery and we have said why we cannot fault his arrest. We agree with the 1st, 2nd and 4th Appellants that the alleged confession of the 3rd Appellant as to the role of his co-accused cannot be the basis for a conviction. As was said in Anyangu vs R. [1968] E.A. 239 at 240;

"If it is a confession and implicates a co-accused, it may in a joint trial be taken into consideration against that co-accused. It is however, not only accomplice evidence, but evidence of the 'weakest' kind…..and can only be used as lending assurance of other evidence against the co-accused".

22. If this be the legal position, our approach is clear from the evidence of identification

articulated elsewhere above. With or without the weak evidence of a co-accused, in this case the 3rd Appellant, we have reached the conclusion on the facts on record and the law as we understand it, that all the Appellants were present and participated in the robbery leading to their arrest.

23. The Appellants all complain that the trial magistrate failed to take into account their defences. We have however set out in summary what defences the Appellants offered. All we can say is that they all narrated events from the date of their arrest till arraignment in court. A defence would include for example an alibi defence with proper evidence to back it up and which the Republic has to disprove. No such evidence or defence was given and the narrations eventually given are no serious defences.

24. Lastly, the Appellants claim that the magistrate who initially heard their case was one Mr. Nicholas Nyamategandah Esq. who was corrupt and had been sacked and that when he left the bench the magistrate who took over the case failed to comply with s.200 of the Criminal Procedure Code. We hesitate and shall decline to make any comment on the first aspect of this complaint as we know not why and when Mr.Nyamategandah left the Meru Law Courts but we know the he no longer works there. We certainly do not know when and for what reasons he left the judiciary, if at all, and for these reasons we have no reason to attempt to answer the complaint. As for the latter part of it, s. 200 of the Criminal Procedure Code reads as follows;-

"(1) Subject to subsection (3) where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witness and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

25. We have seen the record and note that Mr. Nyamategandah last heard the case on 5.3.2004 and after passing through the hands of E.A. Mabele, P.M., G.S. Gidali, S.R.M. W.M. Muiruri, C.M., and J. Omburah S.R.M., the latter commenced further hearing of the case on 21.4.2004 and concluded with the

judgment and sentence on 29.7.2005. He failed to comply with s.200 aforesaid and there was clearly thereby a miscarriage of justice. What should this court do in the circumstances?

26. It is our understanding of the law that a magistrate who takes over a trial from another has a legal duty to explain to the accused person his right to re-summon any witness and for the case to be re-heard if the accused person so wishes. If the succeeding magistrate fails to do that, then the trial is a nullity for all purposes (see the decisions in Raphael vs R [1969] E.A. 544 and Kariuki vs R [1985] KLR 504). This being the case and inspite of our clear finding that the Appellants conviction and sentence was proper in all respects, this one aspect of the case will necessitate that we nullify the trial in the subordinate court and we say so because on 21.4.2004, the 2nd Appellant specifically sought that the trial should start afresh but the court made no ruling on the matter. On 19.5.2004 the 1st and 2nd Appellants too sought to re-summon P.W.1 and P.W.2 but the court rejected their application and we have said that the rejection is a misdirection.

27. Because we would, other than for the point of law raised above, have dismissed the Appeal, we are obligated to find the trial of the Appellants a nullity but will instead order a retrial at the Meru Chief Magistrate's court other than by J. Omburah, Esq S.R.M.

28. Pending retrial, the Appellants shall be held at Meru Police Station.

29. Orders accordingly.

Dated, signed and delivered in open court at Meru this 28th Day of September .2006.

ISAAC LENAOLA

JUDGE

RUTH SITATI

JUDGE