REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1052 OF 2002

WILFRED MAINA TUORI……..……………..………………...APPELLANT

VERSUS

REPUBLIC…………………… ……………………….…....RESPONDENT

J U D G M E N T

The Appellant, **WILFRED MAINA TUORI**, was convicted on three counts. On count 1, he was convicted for **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code, and was then sentenced to death. On count 2, the Appellant was convicted for **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to Section 297(2) of the Penal Code; for this offence he was sentenced to death. On count 6, the Appellant was convicted for ASSAULT CAUSING ACTUAL BODILY HARM contrary to Section 251 of the Penal Code, and he was then sentenced to imprisonment for one year.

In this Appeal, the Appellant has challenged his conviction and the sentences meted out to him on all the three counts. In the Appeal, the Appellant raises three grounds, which we summarise as follows: -

1. The identification was not free from error as the circumstances prevailing were not conducive.

2. The trial court dismissed the Appellant's defence for no good reason.

3. The Prosecution failed to prove the case beyond any reasonable doubt.

In response to the Appellant's submissions, the learned state counsel, Mr. Makura submitted that the Appellant had been positively recognized by PW1 and PW2. He also said that the Appellant's defence was given due consideration in the judgment of the learned trial magistrate. Finally, the Respondent contended that the Prosecution proved the case to the required standard.

In giving due consideration to the competing submissions, this court is enjoined, by law, to re-evaluate the evidence on record. That is the exercise which we shall now delve into, whilst at the same time taking into account the detailed submissions by both parties.

PW1, Michael Masaba Yusuf, was the Complainant in count 1. From the charge sheet, it was indicated that the Appellant together with his two co-accused and others not before the court, raided the house of PW1, whilst armed with dangerous or offensive weapons, namely, an axe and pangas. The said assailants robbed PW1 of one mattress, one television and a thermos flask. The value of the items stolen from PW1 was said to be Kshs.5,350/-.

When giving evidence, PW1 testified that on the night of 21st/22nd May 2001, he was at his house, which is located at Kamahindu, within Kiambu. At 2.00 a.m. PW1 heard a bang on his neighbour's door. He therefore, woke up and put on his lamp. Shortly thereafter, PW1's door was also hit. It gave way, and two people entered the house. When PW1 asked the intruders what the matter was, he was hit on the face, with an axe. PW1 struggled with the intruders, but they knocked him down. The intruders then stole PW1's television, a mattress, a thermos flask and an axe. PW1 said that he identified the two robbers as the 1st and 3rd accused. The Appellant herein was the 3rd accused.

But later, in cross-examination by the Appellant, PW2 said that he did see the Appellant at his house. It would therefore, appear that the reference to the 2nd accused, in the evidence-inchief was a typographical error. That would perhaps explain why the 2nd accused did not crosswww. examine PW2, and also why the learned trial magistrate stated, in her judgment, that PW2 had identified the Appellant and the 1st Accused.

PW1 said that he did not see the 2nd accused in his house. But as regards the Appellant, the witness was very categorical that it is he who hit the witness with an axe.

PW1 also testified that he later reported the incident to the police, whom he told that he knew the robbers. The Police then accompanied PW1 to the house of the 1st accused, where PW1 identified his television and the television cable. Thereafter, the police went with PW1 to the Appellant's house, where they recovered an axe and a whip. The whip had been used by the Appellant to beat up PW1, whilst the 1st accused raped PW1's wife. That was PW1's testimony.

As far as PW1 was concerned, he was able to recognize the Appellant as the latter used to work in the neighbourhood. PW2, Nicholas Wanjama Omulira, was the Complainant in respect of count 2. He testified that he lived in the same compound as PW1.

On the material date, two persons invaded his house, at about 2.00 a.m. They had axes, pangas and whips. The intruders smashed the door to PW2's house and gained entry. PW2 said that he recognized the 1st and 3rd accused. He also said that he knew the two accused persons very well. He was able to identify the two as they shone torches on his wife.

PW2 also said that when the robbers entered the house, his 8 year old daughter was crying. One of the robbers cut the young girl on the leg, in an endeavour to force her to be quiet.

Later, that night, after the robbers left, PW2 accompanied PW1 to the police station to report the incidents. PW2 corroborated the evidence of PW1 to the effect that the police first went to the house of the 1st accused, and later to the Appellant's house. At the Appellant's house an axe and a whip were recovered.

The evidence of PW3 had no relevance to this Appeal, as it was in relation to count III, in respect of which the Appellant was acquitted.

PW4, Sera Wanyanze Wanjama, testified that she was cut with a panga, by the Appellant. Before that, PW4 was hit with a stone, which fell on her where she was sleeping on the floor.

Although, it does not come out clearly from the record of the proceedings, we presume that PW4 was the daughter of PW2. We can only make a presumption because PW2 gave his names as NICHOLAS WANJAMA OMULIRA, and PW4 gave her father's name as WANJAMA.

It is noteworthy that PW2 had testified that his daughter was 8 years old. And although this issue was not touched upon by either of the parties to this Appeal, the age of PW4 brings into focus the provisions of Section 19(1) of the Oaths and Statutory Declarations Act (Cap 15). The said section reads as follows: -

"Where, in any proceedings before any court or person having by law or consent of

parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence in any proceeding as against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."

Was PW4 a child of tender years, as envisaged by Section 19(1) above? If so, was her evidence taken in compliance with the statutory provisions?

In **JOHNSON MUIRURI vs. REPUBLIC [1983] KLR 445**, the Court of Appeal examined several authorities which set down the application of the provisions of Section 19(1) of The Oaths and Statutory Declarations Act. The Court at page 448 expressed itself, inter alia, as follows;

> **"We once again wish to draw the attention of our courts to the proper procedure to be followed when children are tendered as witnesses.**
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> **In Peter Kiriga Kiune, Criminal Appeal No. 77 of 1982 (unreported) we said;**
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> **"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, Cap 15. The Evidence Act (Section 124, Cap 80).**
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> **It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the Appellate court is able to decide whether the important matter was rightly decided, and not forced to make assumptions."**

In that case (of **Johnson Muiruri vs. Republic**), the Court of Appeal held that the Wambere who was then aged 13½ years was a child of tender years. In arriving at that decision, the Court of Appeal cited, with approval the dictum of Lord Goddard CJ in **Republic vs. Campbell [1956] 2 All E.R. 272**, to the effect that;

> **"Whether a child is of tender years is a matter of the good**
>
> **sense of the court … where there is no statutory definition**
>
> **of the phrase."**

As there is no definition of that phrase in section 19 of the Oaths and Statutory Declarations Act, it must be an issue to be resolved by the court, as to what the phrase "**child of tender years**", means. We shall not endeavour to formulate a definition of the phrase. But we will stand guided by the decision in the **Johnson Muiruri case (Supra)**, in which the Court of Appeal held that Wambere, a girl aged 13 ½ was a child of tender years. It would therefore follow that in this case, Sera Wanyanze Wanjama (who was PW4) was a child of tender years, as she was only 8 years old. Accordingly, the learned trial magistrate ought to have gone throug the process of ascertaining whether the child had sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth, which is an ordinary duty of normal social

conduct.

It is only if the court had satisfied itself on those two aspects of the matter that it could have decided whether or not to have PW4 take an oath. However, in this case, the learned trial magistrate does not appear to have conducted the requisite process. What therefore, is the effect of the learned trial magistrate's failure to go through the requisite exercise?

In **Oloo s/o Gai vs. Republic [1960] E.A. 86,** the Court of Appeal held that as the trial judge had failed to direct himself and the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence, the conviction could not stand.

Prior to that, in **Kibangony Arap Kolil vs. Republic [1959] E.A. 92**, the Court of Appeal held that the evidence of the two boys, aged 12-14 years and 9-10 years, respectively, was of so vital a nature that the Court could not say that the trial court's failure to comply with the requirements of Section 19(1) of the Oaths and Statutory Declarations Ordinance was one which did not occasion a miscarriage of justice. The Court of Appeal went on to hold that the failure of the trial judge to warn either himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the Appellant was a ground enough for allowing the Appeal.

From the foregoing decisions, it is clear that emphasis is placed on the need for corroboration. In other words, if the evidence of the child of tender years was not corroborated, that would imply that no conviction upon it would be sound. Pausing there for the moment, we note that PW2 did appear to corroborate the evidence of PW4. He too testified that the Appellant cut the leg of PW4.

But then again, if the evidence of PW2 and PW4 is examined in greater detail, there appears to be some inconsistency. We note that whilst the learned trial magistrate made an express finding that the testimony of PW4 corroborated that of PW2, she seemed to have overlooked one matter. According to PW2, the Appellant was armed with an axe. According to him, the person who was armed with a panga was the 1st accused. Indeed, he said that from the Appellant's house, the police recovered an axe and a whip.

But, in contrast, PW4 testified that she was cut using a panga. The said panga was said to have been used by the Appellant.

In the light of these two pieces of evidence, it is not clear if the two witnesses were talking about the same incident. True, PW4 was cut on the leg, as verified by PW5. About that fact, there is no dispute or doubt at all. However, the question is as to who exactly inflicted the injury, and the implement, tool or weapon used. Both PW2 and PW4 say that the person who inflicted the injury was the Appellant. But thereafter, PW2 says that the Appellant was armed with an axe, whilst PW4 says that the Appellant used a panga. The two witnesses are not agreed, in that respect. Consequently, we reluctantly have to conclude, as we hereby do, that there was some doubt as to the circumstances of the commission of the offence on count 8. Therefore, the conviction in that regard is unsafe: Accordingly, it is quashed, and the sentence is set aside. That conclusion is arrived at on the presumption that the evidence of PW4 was received regularly. The reasons we have made that presumption, at this state is that by the time the trial court was passing judgment, it believed that PW4's evidence was admissible, even though she was a child of tender years.

However, for the reasons stated earlier herein, the court did not comply with the provisions of Section 19(1) of the Oaths and Statutory Declarations Act, thus rendering PW4's evidence inadmissible.

We now move on to tackle the Appeals against convictions on counts 1 and 2. We have got to ask ourselves whether the Appellant was positively identified; if the Prosecution proved the case to the required standard; and if the trial court gave due consideration to the Appellant's defence.

PW1, Michael Masasa Yusuf, said that he recognized the 1st and 3rd accused persons. The latter is

the Appellant. He is said to be the person who hit PW1 in his face, using an axe. PW1 then struggled with his assailants, but they knocked him down.

On the other hand, the Appellant insists that PW1 could not have identified him as the circumstances prevailing were difficult. PW1 was hit on the face with an axe, and therefore, according to the Appellant, PW1 was not in a position to positively identify his attackers. We have already pointed out that the witness had put on his lamp. That was before the attackers entered his house. And PW1 testified that he saw the attackers well. In relation to the 1st accused, PW1 said that he saw him well when the accused came into the house. But no such statement was made in relation to the Appellant. So the question remains, was the Appellant positively identified, or was there a possibility of error in his identification?

Both PW1 and PW2 testified that they reported the incidents to the police, on the same night when the said incidents happened. The police officer who recorded the report, at Kamahindu Administrative Police Post, was PW9, APC Daniel Kigundu. In his evidence, PW9 said that PW1 reported to him that he had identified the 1st accused. He also said that PW1 led the police to the house of the 1st accused, who in turn led them to the house of the Appellant.

At this juncture, we pause to ask ourselves why PW1 did not tell PW9 that he had also identified the Appellant.

Later, when PW10, APC John Njuguna testified, he too said that the person who told them that the Appellant was amongst the robbers, was the 1st accused. During cross-examination by the Appellant, PW10 said;

> ***"It is the 1st accused who directed us to your house."***

Prior to that, PW10 had said, during his examination-in-chief that;

> ***"We interrogated the 1st accused at the post and he told us he had been with the 2nd accused during the theft. We proceeded to the house of the 2nd accused and arrested him. We did not recover anything. The 1st accused also told us that the 3rd accused was involved. He directed us to his house and we arrested him."***

The legal position regarding the evidence of one accused against another accused is deemed to be hearsay, if such evidence is given at the time of investigations. On the other hand, if such evidence was tendered in court, during trial, it would be deemed the weakest form of evidence. Such evidence would have to be treated very cautiously by the trial court.

Again, we must ask why PW1 and PW2 did not mention the Appellant in their first report to PW9 and PW10. Just like PW9, his colleague PW10 also testified that one of the robbers had allegedly been identified. That robber was said, (by PW9) to be the 1st accused. Therefore, by necessary implication, the Appellant was not identified by either PW1 or PW2. Or at the very least, the said two witnesses did not say so to the first persons in authority, to whom they reported the incidents.

In **BOSCO LEWA MBABU AND ANOTHER vs. REPUBLIC, CRIMINAL APPEAL NO. 83 OF 2001,** the Court of Appeal expressed itself in the following manner, regarding the failure by an identifying witness to disclose to the police, when he first reported, that he had identified the Appellant;

> ***"In cross-examination, he admitted that he first told the police that he did not know the robbers. It was also Kapombe's evidence that he knew their attackers but he did not disclose this to the police when he reported at Bamburi Police Station. The prosecution, the trial court and the superior court tried to get round this glaring and fatal omission by saying that Kapombe and Charo were in shock and that was why they did not name the robbers either to their employer or the police at the earliest possible opportunity. With respect, we cannot agree because these witnesses had the presence to walk home from the scene of crime to look for fare before going to the police. If indeed they had been robbed***

by people they knew they would have informed the police or their employer at once."

In this case PW1 testified that he had told the police that he knew the robbers. However, PW9, to whom he had made his report, testified that PW1 had told him that he had identified the 1st accused. Similarly, PW10 said that the Complainant had identified only one of the robbers. In the circumstances, bearing in mind the fact that PW1 only led the police to the house of the 1st accused, we find that that is the one robber whom he had positively identified.

In **SHABAN BIN DONALD vs. REPUBLIC [1940] 7 EACA**, the Court held as follows;

> ***"We desire to add that in cases like this and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called to give evidence, details of such report ought to be made available to the court. Such evidence frequently proves most valuable sometimes as corroboration; And sometimes as showing that what he now swears in court, is not an afterthought or that he is now purporting to identify a person whom he really did not recognize at the time of attack."***

In the light of the evidence on record from PW9 and PW10, we hold that the same does not corroborate the evidence of PW1 and PW2 on the question of the Appellant's identification, because neither PW1 nor PW2 told the police officers to whom they made their first report, that they had identified the Appellant.

If the Appellant's conviction was founded solely on identification, this judgment would have ended here. But in his case, PW1, PW2, PW9 and PW10 all testified that when they searched the Appellant's house they recovered an axe and a whip. PW1 identified the axe as belonging to him. He said that the axe had been left lying outside his house, on the material night. However, the witness did not give any particular evidence, from which the court could rule that that the axe was his.

As regards the whip found in the Appellant's house, PW1 identified it. But again, he did not specify what enabled him to identify a whip which he says the Appellant used to beat him. Could the Appellant have been mistaken? We ask this question because whereas PW1 reported to the police that he had identified one of the attackers, when he testified in court, the witness said that he had recognized two people. Even assuming for a moment that PW1 and PW2 had identified their two attackers, one cannot help wondering why they then allowed the 1st accused to lead the police (and the witnesses) to the house of the 2nd accused.

In his testimony, PW1 said he knew the Appellant well, and also knew his timber house. If that be the case, why did PW1 not

(a) tell PW9 and PW10 that he had identified the Appellant? and

(b) lead the police straight to the Appellant's house, from that of the 1st accused?

PW9 said that they had to interrogate the 1st accused, and that it is he who then led the police to the 2nd accused, and the Appellant.

All these circumstances prevailing leave us with an uneasy feeling that the Appellant was not positively identified. It is even more so because the Prosecution did not lead evidence to prove the intensity of the lighting that was present in the houses of both PW1 and PW2. In the first house, PW1 said that he lit a lamp. The nature of that lamp is not illustrated, thus we do not know whether it was a tin-lamp on a hurricane lamp. We also have no idea where the lamp was placed after it was lit. Was it on a pedestal or on the floor? We do not know. Therefore, it was not possible to say how much light was available in the room, so as to enable PW1 identify the Appellant clearly.

As regards PW2, he said that he saw the robbers when they shone torches on his wife. That the torches were shone at PW2's wife, implies that they were shone away from the robbers. That would mean that the

witness identified the robbers either from a reflection of the light, or from the general lighting emanating from the torches. Were the torches bright? We are not told.

But the bottom line in all these, remains the question which we have already dealt with above; for if indeed PW1 and PW2 identified the Appellant, why did they not say so in their first reports to PW9 and PW10?

In conclusion, and after much anxiety, we have come to the conclusion that it would be unsafe to sustain conviction on counts I and II. Therefore, in the final analysis, the Appeal is wholly successful. The convictions on all three counts are quashed, and the sentences set aside. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of January 2005.

LESIIT **F. A. OCHIENG'**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

Ms. Nyamosi for Mr. Makura for State

Appellant in person

CC: Muia/Odero

LESIIT **F. A. OCHIENG'**
JUDGE **JUDGE**