



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 114 & 121 of 2001**

**DAVID KINYUA KABURU ..... 1<sup>ST</sup> APPELLANT**

**BENJAMIN NKUNJO KIRIAMANA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the conviction and sentence of D.K. Gichuki, S.R.M. in Meru Chief Magistrate's Court Criminal Case No. 516 of 1999)***

**JUDGMENT**

The to accused persons, Benjamin Nkunjo Kiriamana and David Kinyua Kaburu were jointly charged with nine counts of robbery with violence contrary to section 296(2) of the Penal code. The 1<sup>st</sup> appellant also alone faced the charges of being in possession of a dangerous weapon and handling stolen property while the 2<sup>nd</sup> appellant also alone faced a charge of being in possession of a dangerous weapon. The appellants were eventually acquitted of all counts charged except the two counts of robbery with violence in counts 1 and VII in respect of which they were each convicted and sentenced to suffer death as per the law established in respect of each count. Neither of the two sentences in respect of the two counts was suspended. Each appellant appealed against the convictions and the sentences.

The facts of the case as we understand them is that on the 9.2.1999 at about 8p.m. one Gidion Kimathi Kerera PW8 and a police officer was walking from Meru Police heading for Meru Divisional Police Headquarters for duty. He was attacked by two persons at Meru Post Office and robbed of Kshs. 300/= and a bunch of keys both of which were in the complainant's pocket. The attackers who the complainant later identified as the two appellants injured the complainant during the robbery by stabbing him with a knife on the back shoulder. The complainant's testimony shows that he struggled with the attackers and managed to break away to the Meru Divisional Police headquarters from where he made a report to Meru Police Station. He was taken to hospital for treatment after making the report and later a P3 was filled and was produced in court as evidence against the appellants.

The witness testified that eh saw and identified the 1<sup>st</sup> appellant, David Kinyua Kaburu well during the robber although he had not seen them before the attack. In particular he managed to notice that the 1<sup>st</sup> appellant had a deformed left hand as he held him. He testified that he managed to see the face of the appellant using electric light coming from the post office. Also at the same time a motor vehicle came along and shone its headlights on the attackers and the witness was able to see the faces clearly despite it being the first time to see them. The 1<sup>st</sup> appellant had held the witness by the neck while the 2<sup>nd</sup>

appellant stabbed the witness. The witness also testified that the person who took the money from his trouser back pocket is the 2<sup>nd</sup> appellant. None of the complainant's stolen property was recovered. But later in a police identification parade the witness managed to identify the two appellants. Although he immediately reported the robbery to the police, he did not give a description of the attackers. He did not even mention the 1<sup>st</sup> appellant's deformed hand. The witness also during cross examination testified that he had noticed that the 2<sup>nd</sup> appellant had a swollen flesh or lump on the face. This he also had not described to the police in the first report.

The facts as to count VII relate to PW3, Julius Gikunda M'Muthiri. The witness testified that on 15.2.99 at about 7.30pm, he was walking home from Makutano area in Meru District. At the Meru town Post Office, he met with two people whom he had later to identify as the 1<sup>st</sup> and 2<sup>nd</sup> appellant. They walked from the direction of the Muslim primary School. The appellants then confronted PW3 and demanded that he produces all he had in the pocket as the 1<sup>st</sup> appellant by now held the witness by the collar and the neck. Meanwhile the 2<sup>nd</sup> appellant held the complainant round the waist as the 1<sup>st</sup> appellant pulled out a sum of Kshs. 1,400/= from the complainant's rear pocket and took it away. The 2<sup>nd</sup> appellant then pulled out from complainant's inner coat pocket a Barclays Bank Account Card No. 5155942 together with another sum of Kshs. 400/= and an elector's card. Complainant testified that he attempted to struggle but was threatened with violence by the 1<sup>st</sup> appellants who stabbed the complainant on the outer side of the left thigh and at the back of the head. He was forced to sit down before the attackers then fled towards where the complainant had come from. He then screamed for help. Fortunately the people who answered first were the police on patrol in a salon car barely two minutes after the attack. He directed the police to the direction which the attackers had fled. Some policemen immediately followed on foot running to catch up with the thieves. He was meanwhile instructed to go and make a formal report at the police station as the police car followed the officers who had run on foot. On the way to the police station, complainant heard gun shot from the direction followed by the police.

At the police station the complainant made the initial report of robbery and as he waited for a police vehicle to escort him to hospital, the 1<sup>st</sup> and 2<sup>nd</sup> appellant were brought to the police station by the police car which he had given information to follow his attackers earlier. He noticed that the 1<sup>st</sup> appellant had been shot on the leg. When he looked at them properly he identified them to be the people who had earlier robbed him. He confirmed the same to the police there and then. The police then made a search of the appellants in the presence of the complainant. The police immediately recovered from the 2<sup>nd</sup> appellant the complainant's Barclays Bank Account Card No. 5155942 in the name of Julius Gikundi. It was inside a bank card purse – exhibit 4, which also carried a banking slip dated 22.10.98 – exhibit 5 – and a similar slip dated 22.9.98 – exhibit 6. The two slips were in the name of the complainant and related to complainant's account No. 5155942. therein was also the complainant's identity card and a photocopy thereof. Therein also was found the complainant's electors card-exhibit 7. the complainant testified that the above items were all properly shown to him and he identified them as his properties. The money stolen of Kshs. 1,800/= or part thereof was not recovered from either of the appellants.

Thereafter the complainant was escorted to Meru Hospital where he was admitted until 20.3.99. It was the complainant's further testimony that he had been seeing the 1<sup>st</sup> appellant at Gakoromone before robbery and that the 1<sup>st</sup> appellant was nicknamed "Gitemenge" and that he did not for a moment mistake him for another person. But he did not know the 2<sup>nd</sup> appellant before the incident but during the robbery the complainant noticed that the 2<sup>nd</sup> appellant wore a green t-shirt and his upper teeth were sort of rotten. He identified both appellants at the police identification parade soon after the robbery.

PW7 No. 65437, PC Alex Kinyua was in the company of P.C. Ngali and PC Mati (now deceased) on 15.2.99 along Kaaga-Meru Road. They had been instructed to stage an ambush along that road after several reports of robbery along the said road. At about 7.30pm of the said day, and while they were near the Post Office, they received a report from one Benson Muriuki that someone was being robbed near the place. PW7 with his colleagues moved to where they heard screams from the Post Office exit. There they found one Julius Gikunda M'Muthuri, PW3, being surrounded by three men and being assaulted and robbed. When his attackers saw them, they started to flee. PW7 and the other officer went after them

ordering them to stop or be shot. The attacker ignored the orders as they continued to flee. P.C. Ngii then shot into the air to warn them that they meant to shoot if the attacker failed to obey, but once more the warning was ignored. That is when according to PW7's testimony, P.C. Ngii shot the 1<sup>st</sup> appellant on the left leg and immobilized him. The 1<sup>st</sup> appellant was thus arrested. The officers pursued the 2<sup>nd</sup> appellant shouting for help. PW7's testimony is that the members of the public responded positively and actually arrested the 2<sup>nd</sup> appellant who was handed over to the police pursuing him under threats from the members of the public to lynch him. The third attacker could not be arrested. The two appellants were then escorted to the Police Station at Meru after some little search on them when the police recovered a knife from 2<sup>nd</sup> appellant, exhibit 3 and a dagger from 1<sup>st</sup> accused, exhibit 11. At the police station a further search was done and four bunches of keys, two from each appellant were recovered – exhibit 12 and 13. a Barclays Bank Card purse exhibit 4 was recovered from the 1<sup>st</sup> appellant. In it a deposit receipt dated 22.9.98, exhibit 6 and another deposit receipt dated 22.10.98, exhibit 5. They both related to deposits made to account No. 5155942 belonging to PW3, Julius Gikunda M'Muthuri the complainant. Also recovered from the 1<sup>st</sup> appellant was complainant's original electors card number 0708851570, exhibit 7. There were other documents recovered from the appellants but this court is not much concerned with them in relation to this appeal since the related charges were dismissed. It was PW7's further testimony that the two appellants were the people whom they found robbing the complainant Julius Gikunda who is PW7 and they arrested them without losing sight of them. He later charged the appellants with the offences aforementioned.

PW6, Inspector of police, Jacinta Muthoni and PW9 Inspector of police Bernard Wambua conducted police identification parade touching each of the appellants on 24.2.99 and their evidence is that both PW3 and PW8 properly identified each appellant herein and that their conduct of the same was proper and according to the law.

PW1, Stephen Mukira was a clinical officer at Meru General Hospital on 15.2.99 and he attended to PW2, Kendrick Omukunda Omutanyi. His evidence is not directly relevant in this appeal.

The above then is the evidence upon which the two appellants were put on their defence. The 1<sup>st</sup> appellant gave unsworn statement. He in effect stated that on 19.2.99 (not 15.2.99) he had gone to Chogoria Hospital to see his sick brother and returned to Meru Town at 6pm. As he proceeded to the stage to catch a bus home and was carrying a bag containing a jacket, food dish and a thermos flask, he was confronted by the police whom he explained what he was carrying. They promptly arrested him when they saw the jacket. He was taken to Meru Police Station where he was put in cells and later charged with robbery offences which he had not committed and which he denied. The police beat him and the court ordered that he be taken to hospital after an identification parade was conducted.

The 2<sup>nd</sup> appellant gave sworn defence. He said that on 15.2.1999 he never left home until 6pm when he came to Meru Town. When he went back home again he realized he had no paraffin. He returned to town to buy it. On the way the police confronted him. When he could not produce his identity card they arrested him and took him to the police station. They took away the jacket he wore and the bunch of keys he carried. He was later charged with these robbery offences but he denied them. He said that although in court he saw several bunches of keys only one was his. During the time of arrest there was no gunshot. He was indeed identified at the police staged identification parade, but he did not complain or protest but he voluntarily signed a parade form. He concluded his testimony by stating that the relevant night was a dark night and he himself was walking in darkness. No vehicle came by or shone any headlight.

The trial magistrate considered all the evidence on record. The record shows that he was quite careful and that he kept in mind the relevant legal principles that should be considered. He found it proper to dismiss all the charges laid against the appellants except the count 1 and count VII both of robbery with violence on PW3 and PW8.

We have a first appeal court considered all the evidence on record as we ought. We also have considered the relevant legal principles applicable and the trial court approached them. As stated by the trial

magistrate, he considered the evidence on the record as a whole, taking into account the defences raised by the appellants. We are satisfied he did so.

Examining the evidence relating to count 7 as basically and mainly testified by PW3, PW3 states that the police officers who rescued him came when the three attackers two of whom were later arrested and identified as the appellants herein were robbing him as they assaulted him. The police went after them as they started to flee. The police shot the 1<sup>st</sup> appellant on the left leg when the attackers refused to heed their warning to stop. The police there and then arrested the 1<sup>st</sup> appellant and never released him until he was charged in the court of law. This is very strong, practical and easily credible and acceptable evidence. The 1<sup>st</sup> appellant needed, if so wished, to deny or explain the evidence otherwise the trial court would have no reason to disbelieve it. We are conscious of the fact that in criminal cases the burden is always upon the prosecution to prove the case beyond a reasonable doubt and that accused has no deligation to say or explain anything. However common sense always would require that where the prosecution has properly laid their case, the accused would fail to explain it away at his own risk. In this case the 1<sup>st</sup> appellant did not deny being shot and being arrested in the circumstances testified in the prosecution evidence. PW7 stated they found the appellants attacking the complainant, they chased him, they shot him when he ignored their warning and they arrested him. The trial court believed, accepted and relied on this evidence to convict the 1<sup>st</sup> appellant. The trial magistrate was properly entitled to rely on the said evidence. Together with the positive identification of the 1<sup>st</sup> appellant arising from the fact that there was sufficient electric light from the Post Office and the fact that the complainant after 10 days positively identified the appellant in a police parade, we are satisfied that he came to the conclusion he did properly. We find that the conviction of the 1<sup>st</sup> appellant on count VII upon the evidence on the record was safe. We confirm the same. We will revert to the 1<sup>st</sup> appellant's conviction on count 1 hereafter.

The honourable trial magistrate also convicted the 2<sup>nd</sup> appellant on count VII. The prosecution evidence is that the 2<sup>nd</sup> appellant was chased after refusing to heed the police warning to stop until he was arrested by the members of the public who answered to the alarm raised by the police. PW7 was categorical that the police did not lose sight of him as he tried to escape from the police who had found him among others robbing the complainant, PW3. In our view that alone is good and reliable evidence upon which the 2<sup>nd</sup> appellant can be linked to the robbery committed against PW3. However, there is also the evidence that on being searched after being arrested and escorted to the police station he was found carrying several properties which just a few minutes before had been stolen from PW3. They concluded PW3's Barclays Bank purse card, two deposit receipts, the Bank Card to bank account No. 5155942, electors card and the photocopy of the national identity card, all in the name of the complainant, Julius Gikunda M'Muthuri. These documents were all identified by the complainant as his before he was taken to hospital. As the trial magistrate rightly found, this was evidence of "**possession**" of recently stolen property and the law required the 2<sup>nd</sup> appellant to give adequate acceptable explanation as to how he got such possession. The burden of proof in respect to such explanation is not as high as the one required to prove criminal cases. It is sufficient if the explanation given by the accused is possibly true. In this case there was adequate evidence that the 2<sup>nd</sup> appellant was in possession of the above properties soon after the robbery in which he was a serious suspect. The law required him to give an explanation to show that the possession was innocent otherwise the law would authorize an assumption that the 2<sup>nd</sup> appellant was one of the robbers. He did not give or even attempt to give such an explanation. He denied being found with any bunches of keys but did not deny being found with the purse containing the complainants documents aforementioned as per the strong evidence of PW3 in the last paragraph of the typed evidence on page 19. Although this piece of evidence would appear to be contradicted by PW7 who appears to suggest that the purse containing the complainants evidence was found in the 1<sup>st</sup> appellants evidence, we have considered the same and have come to the conclusion that the search which was done at the police station in the presence of the complainant is not denied by the 2<sup>nd</sup> appellant nor are the findings of the search also denied by the 2<sup>nd</sup> appellant. We would otherwise choose to rely on PW3's evidence on this issue. Having come to this conclusion we find that apart from the direct evidence on the record which conclusively links the 2<sup>nd</sup> appellant to the charge of robbery in count VII, the evidence of recent "**possession**" also and independently would link him with the charge. We accordingly as did the honourable trial magistrate find

the 2<sup>nd</sup> appellant guilty of the robbery with violence contrary to section 292(2) of the penal code and hereby confirm the trial court's conviction.

Turning to count 1 and the evidence of PW8, we note that he was attacked on 9.2.99, a week before PW3 was robbed. The place of attack is the same, next to the Meru Post Office. PW8 testified that he was attacked by two people whom he identified in a police identification parade about two weeks later. He claimed to have positively seen the attacker's faces by the electric light from the post office and also by the head light of a motor vehicle which came along the road upon which he was being robbed and assaulted. The attackers who stabbed him with a knife on the shoulder also held him until the vehicle passed by before he got an opportunity to slip away and run to the Police Divisional Headquarters. This is after they had stolen his money amounting to 300/= and a bunch of keys. PW8 noticed that the 1<sup>st</sup> accused had a deformed hand and yet he did not as much as mention it in his first report to the police. He admitted as much in his testimony. PW8 is himself a police officer who is assumed to be aware of the consequences of such first reports. We are aware that he properly identified the appellants in the police identification parade. We are not however satisfied that his evidence is wholly reliable due to the fact that his first report did not sufficiently describe the attackers although he claimed to have had sufficient information to do so. His evidence as well was evidence of a single witness and although he rightly warned himself on the danger of relying on such evidence to convict, he nevertheless went ahead to disregard the fact that the evidence he was relying on was not infact safe evidence to convict on. In particular having noted that the sole witness failed to fully describe the fact that the 1<sup>st</sup> appellant had a deformed hand, then he should have come to the conclusion that the witness was not fully reliable and the benefit of the doubt would need to go to the accused persons. For the above reason we have come to the conclusion that the conviction on count 1 is unsafe and give the benefit of about to the two appellants.

In conclusion this court quashes the conviction on count 1 against each appellant and sets aside the sentence of death against each of them in relation thereto. On the other hand the court at the same time confirms the conviction and sentence in relation to the charge of robbery with violence in relation to count VII. It is so ordered.

Dated and delivered at Meru this 14<sup>th</sup> day of March, 2005.

D.A. ONYANCHA

JUDGE

**RUTH N. SITATI**

Ag JUDGE