



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 261 & 262 BOTH OF 2003**

(From original conviction and sentence in Criminal Case No. 811 of 2000 of the Chief Magistrate's Court at Nakuru –G. A Ndeda, Mrs

**JAMES KAMAU IRERI.....1ST APPELLANT**

**PATRICK NDUNGIRE MUCHIRI.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellants have appealed against the original sentence and conviction imposed on them in Nakuru Chief Magistrate Criminal Case No. 811 of 2000. In the above case the appellants were charged for five counts of robbery with violence, contrary to Section 296

*(2) of the Penal Code.*

The two appellants were also charged with two counts of attempted robbery, contrary to *Section 297 (2) of the Penal Code*. All the above counts and facts are clearly indicated in the charge sheet. Before the commencement of the trial, the Court consolidated the Criminal Appeals No. 261 and 262 of 2003.

In his submissions, Mr. Oumo for the 1st appellant viz, James Kamau Ireri submitted that the learned Magistrate erred in law and facts in rejecting his client case without outlining any reasons. According to Mr. Oumo, the 1st appellant was denied facility to conduct his case by the refusal to allow him to call Mr. Joel Mwangi.

Apart from the above, Mr. Oumo also submitted that his client was not given two files:

- *Criminal Case No. 743 of 2000 and*
- *Criminal Case No. 813 of 2000.*

that he had wanted to use during his defence. He further submitted that the 1st appellant had been denied his constitutional rights under Section 77 and 84 of the Kenya Constitution. In support of his submissions, he referred the Court to the case of:

**George Ngodhe Juma & 2 Others**

## Versus Attorney-General Misc.

### Application No. 345 of 2001

He explained that in the above case, the High Court reviewed the rights of an accused person during a trial. Apart from the above, the Court gave minimum conditions for a fair trial – which includes a compulsory attendance of a witness if necessary.

Secondly, Mr. Oumo submitted that the learned Magistrate erred in law and fact in relying on the identification by the complainant. He pointed out that the offence was committed at 10.00 p.m. and that the only available light was from the moon and the vehicle. Apart from the above, he stated that the four vehicles had arrived at different times. He concluded by stating that given the circumstances, it was impossible to identify a stranger's complexion and stature. To him, that was an exaggeration.

Mr. Oumo also submitted that none of the witnesses had blood-stained money. Thirdly, Mr. Oumo also submitted that the evidence of the witnesses was contradictory. He gave the examples of the PW1, PW2 and the PW3. Whereas the PW1 had stated that he had attended a parade of 12 people, the PW2 stated that he had attended a parade of 25 people. On the other hand, the PW3 stated that he had attended a parade of many people. Fourthly, Mr. Oumo submitted that the learned Magistrate had wrongly relied on the confessions and that the 1st appellant never got an opportunity to cross examine on the confession.

On the other hand, the 2nd appellant who appeared in person opted to hand over written submissions to the Court. The main highlights of the written submissions are as follows:

*(1) That I pleaded not guilty at trial.*

*(2) That the learned trial Magistrate erred in law and fact by convicting me relying on identification which was not free from error owing to the fact that the crime was committed at night where identification was rather difficult*

*(3) That the learned trial Magistrate further erred in law and fact by convicting me relying on contradictory evidence of PW1, PW2, PW3, PW6 and PW11.*

*(4) That the learned trial Magistrate further still erred in law and fact by considering me on my co-accused's statement which he repudiated by producing the medical kit to support his claim that he was tortured and forced to confess. (5) That the learned trial Magistrate still erred in law and fact by failing to consider that the same case raised an elbow in files No. 743 of 2000 and 813 of 2000 which were produced as my defence witness and I still request this Honourable Court of Justice to furnish me with during the hearing of this appeal.*

*(6) That the learned trial Magistrate further erred in law and fact by rejecting my defence without outlining cogent reasons leading to its objection.*

On the other hand, the State through Mr. Koech, State Counsel supported the convictions and sentence on the ground that the prosecution evidence was based on identification by the complainant. According to Mr. Koech, the conditions were favourable for positive identification and that each appellant was identified by at least two witnesses. Apart from the above, Mr. Koech was also of the opinion that the identification parades were properly carried out. Specifically, Mr. Koech stated that the PW1 was able to identify both appellants. He recalled how the PW1 had found the vehicle of a colleague on the way and decided to stop and enquire on what was going on. Immediately he stopped, he was surrounded by the two appellants and others. Apart from the above, the PW2 was also able to identify the 1st appellant. The whole episode took about 15 to 30 minutes. On the basis of the above, the PW2 told the police that he could identify his attackers who were many and armed. In addition, the PW3, the PW5 and PW11 were able to identify the 1st appellant.

Besides the above, the learned State Counsel also submitted that the conviction of the 2nd appellant was

based on his own confession that was tested during the trial within a trial. As far as the argument on calling of a witness by the 1st appellant is concerned, Mr. Koech stated that he never demanded for the witness to be summoned and that he had only referred to cases where he was an accused person. In fact, he had been “acquitted” in those cases.

We have carefully perused the evidence on record that also contained the Judgment of the learned Magistrate viz, Mrs. Gladys Ndeda, then Chief Magistrate, Nakuru. Being the first Appellate Court, we appreciate that we have to evaluate the evidence afresh and make our own independent findings. We are also aware that we never had the advantage to see the manner and demeanour of the witnesses during the hearing. Apart from the above, we are aware of our duty to peruse and consider the grounds of appeal by both appellants as stated in the case of **Okeno Vs Republic [1972] Page 32.**

From the evidence of the PW1 – Japheth Kabeke Murogo, it is apparent that the incident took place at around 10.00 p.m. The PW1 admitted himself that he had **not** known the robbers prior to the above date. Since the night was dark, the PW1 stated that he had to rely on the moonlight and the light from the vehicle to see the robbers. The PW1 reckoned that on 23rd November, 2000 he was called to an identification parade where he was able to identify the Accused 2. That was after a period of 8 months. The PW1 never gave any reason how he could remember the Accused 2 after such a long lapse. The PW1 conceded that during the robbery, there was shooting and that he had been ordered to lie down.

On the other hand, the PW2 – Victor Kipkoech Korir also narrated how he had reached the scene where he was slapped by one of the robbers who later pulled out a pistol. The PW2 was later left lying down before being taken to another vehicle. The PW2 also conceded that the robbers were strangers to him – though he was able to see them by the assistance of moonlight and the lights from the vehicle.

In his evidence, the PW3 – Joseph Kimerir Sambili explained how he had been given a lift by the PW1 on the material night. The PW3 conceded that during the robbery he fell down, became unconscious and later found out that he had lost a tooth. Though he was kicked and boxed by the robbers, the PW3 was able to identify the Accused 1. He managed to see him through the moonlight and light from the motor vehicle.

On the other hand, the PW6 – Kikwari Barmosoti deposed how on reaching the scene, somebody ordered their driver to alight or he would be shot. Later, the PW6 and his colleagues were pushed out of the vehicle and ordered to lie down. The PW6 reckoned that he could see the robbers through the moonlight and lights from the vehicles. The PW6 was categorical that he was able to identify the Accused 1 who had a pistol on the material night.

From the above evidence, it is crystal-clear that the alleged offences were committed at night at around 10.00 p.m. Apparently, all the above witnesses never knew the robbers prior to that date. The above witnesses are all in agreement that they were able to identify the robbers through moonlight and lights from the vehicles. Unfortunately, the brightness of the moonlight and lights from the vehicles was **not** emphasized by any of the above witnesses. Besides the above, it is apparent that there was shooting at the scene and that the witnesses were pushed around by the robbers. The above circumstances cannot be said to favour a positive identification. See: **Turnball & Others Vs Republic [1976] 3 All ER.** Apart from the above, the description given by some of the witnesses when the initial report was made to the police did not tally up with the description of the appellants. There was doubt that the appellants were actually positively identified at the scene of the robbery. See **Maitanyi Vs Republic [1986] KLR.** It is obvious that the trial Court did not warn itself on the dangers of relying on the evidence of identification especially in the circumstances where the conditions favouring positive identification were absent. Later, identification parades held could only be effective and support the identification parade if the appellants initial identification was made in circumstances that favoured a positive identification of the appellants. From the above analysis, we are doubtful that the appellants were positively identified.

Secondly, the record clearly show that the 1st appellant had asked to be supplied with the proceedings in respect of Criminal Case No. 813 of 2000. Despite the above, no order either admitting or refusing the request was made by the learned Magistrate. Obviously, we do **not** know the contents of the said

proceedings. However, it is apparent that the 1st appellant had been denied an opportunity of relying on the contents of the said file. That raises a fundamental question of law – that the appellant was denied an opportunity to defend himself appropriately as provided by the Constitution.

In view of the above analysis, we are of the considered view that the convictions are **not** safe nor merited. The upshot is that we hereby allow the appeals and “**quash**” the convictions for all the eight counts. In addition we hereby set aside the death sentence imposed on the appellants for all the counts.

Both appellants should be released forthwith unless held lawfully.

Those are the orders of this Court.

**(1) MUGA APONDI**

**JUDGE**

**(2) L. KIMARU**

**JUDGE**

Judgment read, signed and delivered in open Court in the presence of the appellants and

Mr. Gumo, Assistant Deputy Public Prosecutor and Mr. Maragia for appellants.

**(1) MUGA APONDI**

**JUDGE**

**(2) L. KIMARU**

**JUDGE**

**1ST APRIL, 2005**