



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBILW COURTS)**

**CRIMINAL APPEAL NO. 656 of 2002**

**FRANCIS MUIGAI MWAURA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**FREDRICK MWANGI NJUGUNA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH GEORGE KURIA NGUGI.....  
.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

FRANCIS MUIGAI MWAURA (1st Appellant) FREDRICK MWANGI NJUGUNA (2nd Appellant) and GEORGE KURIA NGUGI (3rd Appellant) had their appeals consolidated having arisen out of the same trial. They were all convicted of one count of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. They were all sentenced to death. The evidence of the prosecution was that the 2nd Appellant, who is a nephew of the Complainant's husband accompanied by others including the Appellants violently broke into the Complainant's house on the night of 15th January 2002. One of them removed iron sheets from the roof and entered the house through the ceiling. He then opened for the other accomplices. They first went to the Complainant's bedroom, ELIZABETH (PW1) where they stole money from her.

They ransacked the entire house and took away clothing, shoes, television set, mobile phones, lamps, cutlery, utensils, batteries, a bag and cash Kshs.2,000/-. The Complainant said she saw the 2nd Appellant outside the house as she fled for dear life. She said she was also able to see three others, the 3rd, 4th and 1st Appellant as they ransacked the various rooms with torches in their mouths. The Complainant stated that due to the manner in which they held the torches, the light reflected on their faces and she was able to see them. Besides, there were hurricane lamps which were still lit, one in her bedroom, one in the sitting room and one in her son's (Kariuki) room. KARIUKI was PW7. The Complainant was able to identify the 1st, 3rd and 4th Appellants in identification parades conducted by IP EKAI, PW5, 7 days after the

incident. PW7 said that the 1st Appellant found him in his bedroom where a lantern was lit.

He made no attempt to cover himself as indeed his accomplices. KARIUKI said that the 1st Appellant took his shoes which he wrapped in his bed sheets which were on the bed, and then gave them over to his colleagues. The 3rd Appellant was also present in the room and KARIUKI said that he opened the wardrobe and removed all his nice clothes and packed them in a sack which they carried away. The 2nd accused in the case, now deceased, according to KARIUKI demanded for money from him. KARIUKI also said that he heard the 2nd Appellant talking outside. KARIUKI was also able to identify the Appellants in the identification parades conducted by IP EKAI 7 days after this incident. After their arrest, the 2nd Appellant wrote a statement under caution, taken by IP GITHAMBO PW8. He did not object to its production during the trial.

In that statement, which is a confession, he gave details of how the robbery was planned and executed. He also implicated all his co-accused in the case and led to their arrest. The 2nd Appellant however retracted the statement in his unsworn defence. All the Appellants gave unsworn statements. They all denied the charges and pleaded innocence to any involvement in it. The 2nd Appellant alleged a grudge existed between him and the Complainants over a piece of land which they wanted him to sell to them. In this Appeal, all the Appellants have taken issue with their identification by the Complainant and KARIUKI.

They contend that the evidence that anyone had been identified by the Complainant was an afterthought because she did not indicate that to the police during the time that she reported the incident. They all also questioned the reliability of the identification. MRS. GAKOBO learned counsel for the State submitted that the State was opposing the Appeal and supporting both the conviction and sentence. She submitted that the Complainant had been able to see the 2nd Appellant and recognize him at the scene of robbery. That the Complainant had brought up the 2nd Appellant from childhood when his mother left home. MRS. GAKOBO also submitted that the 2nd Appellant had implicated 1st and 3rd Appellant in his un-retracted statement under inquiry and that the two were subsequently identified by PW1 and PW7 in identification parades.

We have re-evaluated the evidence adduced before the trial court as we are mandated to do. The evidence against the Appellants is that of identification. In addition, as against the 2nd Appellant, there is the confession he made implicating himself and all his co-accused. In considering the evidence of identification of 2nd Appellant by PW1, the learned trial magistrate was not convinced that PW1 saw the 2nd Appellant's face. The trial magistrate observed: - "So out of the three people who knew the accused very well only one (PW1) identified him. How was she able to identify. She says she turned and saw him bending to pick a bag – in a bending position really can one clearly identify someone.

Since she does not say she waited to see his face or rose to confirm it was accused one (sic)". The learned trial magistrate nevertheless found the 2nd Appellant guilty on the basis of his statement taken together with the identification by PW1. In regard to the statement by the 2nd Appellant, the learned trial magistrate observed:

"But lets consider accused 1 statement must be taken in the input of what he says that after the earlier beatings he decided to mention any name that came to mind, yet is it a coincidence that the very names he mentioned belong to the same people who were identified at the scene. I think it would have been different if accused 1 had said that the statement plus names were first prepared then he would have a very strong case against the evidence of PW1. However, the contents of his statement coupled with identification by PW1 is what is ....unduly and consequently he too is convicted as charged."

With respect, the learned trial magistrate misdirected herself when she found that the identification by PW1 could be taken into consideration and together with the 2nd Appellant's confession to sustain a conviction against him. Having found that PW1 did not see the 2nd Appellant sufficiently in order to identify him, then the identification by PW1 was worthless and could not have been considered. The learned trial magistrate further misdirected herself concerning the statement by the 2nd Appellant. The learned trial magistrate observed correctly that the 2nd Appellant retracted the statement in his unsworn statement in defence. The proper time for the 2nd Appellant to have retracted it was at the time of the

production of the statement as evidence.

The mere fact that the statement was not retracted did not lessen the need for the court to carefully analyze the content of the statement before relying on it. The correct position in law is that a trial court should only accept any confession, which has been retracted or repudiated or both, with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. See TUWAMOI vs. UGANDA 1967 EA 84. We have tested the truthfulness of the confession by the 2nd Appellant by comparing it with the evidence adduced in the case by PW1, the Complainant and KARIUKI, PW7. From the evidence of PW7, it is not clear where the 2nd Appellant was when he alleged that he heard his voice.

The learned trial magistrate was right in ignoring PW7's evidence. As for PW1, she claims to have looked behind her while inside the house and to have seen the 2nd Appellant picking a bag with a torch in his mouth. It would appear from her evidence, even though she was not asked to state it clearly in her evidence, that the 2nd Appellant was inside the house and that he was actively involved in collecting the stolen items. That contradicts the 2nd Appellant's confession in that he states clearly that he never went inside the house throughout the robbery but stood outside, guarding his accomplices. We have also noted other inconsistencies between the 2nd Appellant's confession and the evidence of PW1 and PW7. In the evidence of the Complainant, PW1, the amount of money stolen was from her handbag and it was Kshs.2,000/-.

In the 2nd Appellant's statement, it was Kshs.6,000/- out of which he was given Kshs.2,000/- as his share. There was also an inconsistency of how entry was gained into the house. From the evidence of PW1, the thieves entered through the roof. PW1 explained that she saw a man jump down into the sitting room through the ceiling and at the same time others emerged from the other rooms in the house. PW7 said he saw the 1st Appellant jumping into his bedroom through the ceiling. From the evidence of PW1 and PW7, at least two people entered the house through the ceiling, one in the sitting room ceiling and the other through PW7's bedroom. The 2nd Appellant on the other hand said that only one, MAINA entered the house through the ceiling and then opened the door for the rest to enter.

Having considered all these inconsistencies in the evidence of PW1 and PW7 as against the alleged confession by the 2nd Appellant, we are not satisfied in all the circumstances of the case that the confession is true. We are satisfied that in the circumstances, it was necessary for the confession to be corroborated by other evidence tending to implicate the 2nd Appellant in some material way with the offence. We have searched for such evidence and found none. In regard to the 1st and 2nd Appellant, the only evidence against them was that of identification by PW1 and PW7. We have already dismissed the confession by the 2nd Appellant.

As against the 1st and 3rd Appellants the confession by the 2nd Appellant was of no material evidential value. As for their identification by both PW1 and PW7, the circumstances of identification were difficult. The two prosecution witnesses claim that they saw the two Appellants with light of torches which the Appellants held in their mouths and also by hurricane lamps. We note that none of these witnesses said, at the time of making their first reports, that they could identify anyone. Furthermore, none of them described any of the Appellants before the parade officer conducted the parade. Taking that into consideration, with the fact that the circumstances and conditions of identification were not conducive for positive identification we find their convictions on the basis of this identification quite unsafe.

Having considered these appeals, we find that the convictions entered herein were unsafe for the reasons given. We therefore quash the convictions and set aside the sentences. The verdict in these appeals is that they are all allowed. It is therefore ordered that the Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 31st day of May 2005.

**LESIIT, J.**

**F.A. OCHIENG**

**JUDGE**

**JUDGE**

Read, signed and delivered in the presence of;

**LESITT, J.**

**F.A. OCHIENG**

**JUDGE**

**JUDGE**