



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

**AT NAKURU**

**Criminal Appeal 460 of 2001**

**(From original conviction and sentence of the Senior Principal  
Magistrate's Court at Naivasha in Criminal Case No. 1549 of  
2001 – M. M. Muya (S.P.M.)**

**PETER KIERU KARIUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, Peter Kieru Kariuki, was charged with four counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that on the 27th of July 2001 at Gitare Shopping Centre, the appellant jointly with others not before court and while armed with axes, simis, runkus and knives, robbed John Kangethe Keriro, Isaac Ndungu Gikanga, Stanley Njoroge Mwangi and James Thungu (*hereinafter referred to as complainants*) of various amounts of cash, other personal items and merchandise for sale as listed in the charge sheet and at or immediately before or immediately after the said robbery used personal violence upon the said complainants. The appellant pleaded not guilty to the charge and after a full trial the appellant was convicted as charged on all the four counts. He was sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by the conviction and sentence and duly filed his appeal to this court.

In his petition of appeal, the appellant raised a total of five grounds in support of his appeal; The appellant was aggrieved that he was convicted on the sole evidence of identification that was made in circumstances that were difficult. The appellant was further aggrieved that he was convicted on insufficient evidence adduced by the prosecution. The appellant was further aggrieved that the trial magistrate ignored the alibi defence that he had offered as a consequence of which he wrongly convicted him. Finally the appellant faulted the trial magistrate for convicting him yet no weapons nor any of the stolen items were recovered from him. At the hearing of the appeal, the appellant who was acting in person, with leave of the court, presented written submissions in support of his appeal. He further made oral submissions urging this court to allow his appeal. Mr Koech, the Learned State Counsel supported the conviction and sentence imposed by the trial magistrate. He urged the court to dismiss the appeal. We shall revert to the submissions made by the parties to this appeal after briefly setting out the facts of this case.

PW1 Stanley Njoroge Mwangi testified that on the 26th of July 2001 at about 7.00 am, the appellant went to his shop at Gitare Shopping Centre with another person and purchased cigarettes and maize flour. PW 1 testified that the appellant left his colleague at the shop. He said he was going to purchase meat from a butchery. After a while, the appellant returned to the shop and then went away with his colleague. PW 1

closed his shop at 7.00 p.m. At 2.00 a.m. PW 1's shop was broken into by a gang of eight men. The men were armed with machetes and clubs. They ordered PW 1 to surrender the money that was in his possession. He gave the robbers the sum of Kshs 6,500/=. He was hit with clubs on his legs. When the robbers were ransacking his shop PW 1 saw the appellant by the light of the torch. He recognised the appellant. PW1 was restrained with ropes. After the robbery, he was untied by his wife. He made a report to the police and confirmed that he had identified the appellant.

PW2 James Mungai testified that his shop at Gitare Shopping Centre was broken into on the night of the 26th and the 27th of July 2001 at about 2.30 a.m. The robbers broke the rear door of the shop and entered inside the shop. According to PW2, the robbers were six in number. They were armed with clubs and axes. They also had torches. They demanded money from PW2. PW2 gave them Kshs 4,000/=. During the robbery PW2 attempted to escape using the front door. When he went outside, he saw three men. He had a torch. He directed the beam of the torch at the three men. He identified the appellant and another man called "Blackie ". PW2 was emphatic that he had identified the appellant as being among the robbers who had robbed him.

PW3 James Ndungu Nderitu was also asleep at his business premises at Gitare Trading Centre. He woke up when he realised that the door to his house was being knocked. It was about 2.00 a.m. The date was the 27th of July 2001. The robbers broke into his house and stole PW3's shoes, wrist watch and Kshs 4,200/=. During the attack, PW3 was able to identify the appellant as being among the gang of robbers who attacked him. He was beaten up in the course of the robbery. PW3 testified that he was able to identify the appellant by the light of the torches that were in possession of the robbers.

PW4 Isaac Ndungu Gikonyo testified that he was asleep at his house situated at Gitare Shopping Centre. At about 1.30 a.m. on the 27th of July 2001 he heard his dogs barking. He got out of his house. He had a torch. One of the robbers called him by name. He saw many robbers. He could not estimate their number. He testified that the robbers were armed with axes and machetes. PW4 was hit and forced to sit down. The robbers demanded money from him. He gave them Kshs 2,000/=. They also stole cigarettes and torch batteries from his shop. PW4 testified that he was able to identify the appellant and another man called "Blackie " during the commotion. He testified that he was able to identify the appellant when he pointed the beam of his torchlight when the appellant was running away.

PW5 Beth Wanjiku the wife of PW1 corroborated the evidence of PW1 as to the identification of the appellant. PW5 testified that she was able to identify the appellant by the torchlight. She recognised the appellant as she knew him as a resident of the village.

PW6 Corporal Charles Rutto testified that a report was made of the robberies which had been committed at Gitare Shopping Centre. The complainants identified the appellant. After several attempts, PW6 arrested the appellant on the 28th of July 2001 when he was informed by the members of the public that the appellant had been sighted. PW6 testified that when he arrested the appellant, the appellant told him that he was at Njoro when the robbery incidences took place at Gitare Trading Centre. PW6 did not believe the story of the appellant. He arrested him and charged him.

When the appellant was put on his defence he testified that on the 27th of July 2001 he was at his home at Gitare. On the 28<sup>th</sup> of July 2001 he went to Gilgil to get his money from a customer whom he had sold charcoal. At Gilgil, he was arrested by the police. He denied that he was involved in the robberies in question.

This is a first appeal. As the first appellate court in criminal cases, this court is required in law to look at the evidence adduced before the trial magistrate afresh, reexamine and re-evaluate the same so as to reach its own independent conclusion whether or not to uphold the conviction of the appellant by the trial court. In reaching its determination, this court is mandated to put into consideration that it neither saw nor heard the witnesses as they testified, and therefore should give due allowance for this fact in its judgment (See **Okeno vs- Republic 11972JEA 32**).

In the instant appeal the prosecution's evidence against the appellant was basically that of identification.

The five identifying witnesses who testified against the appellant, testified that they were able to identify the appellant during the robbery. PW1, PW2, PW3, PW4 and PW5 testified that they recognised the appellant as being among the gang of robbers who robbed them during the fateful night. PW2 and PW4 testified that they recognised the appellant and another man known as "Blackie ". "*Blackie*" went underground after the robbery. All the witnesses testified that they were able to recognise the appellant by the torchlight which was either in possession of the robbers or in possession of some of the witnesses. All the five witnesses identified the appellant by recognition. They knew the appellant prior to the robbery incident. The appellant was a resident of the village. He used to undertake casual work at Gitare Trading Centre.

We have re-evaluated the evidence which was adduced by the prosecution and that offered by the appellant in his defence. We have also considered the submissions made by the appellant and that which was made by the Learned State Counsel. The issue for determination by this court is whether the five prosecution witnesses who testified that they saw the appellant during the night of the robbery, actually identified him as being among the robbers. As stated earlier in this judgment, none of the items which were stolen from the complainants were recovered from the appellant. Neither was any weapon used in the said robbery recovered in the possession of the appellant.

Apart from the evidence of identification by the five witnesses, no other evidence was adduced by the prosecution to connect the appellant with the robbery. In his defence the appellant protested his innocence. He testified that he was at home during the night of the robbery.

As was held in the case of **Maitanyi -versus- Republic 119861KLR 198** the court should test the evidence of identification carefully especially where the identification was made in circumstances which can be described as difficult. The court of appeal in the above cases, mandated the trial court to warn itself of the dangers of convicting an accused person on the sole evidence of identifying witnesses especially in circumstances which are difficult and especially where conditions favouring correct identification were absent. In **R -vs- Turnbull X197613 All ER 549** it was held that a witness may be honest but mistaken in his identification of a suspect. Likewise many witnesses may be honest but mistaken that they had identified an accused person. In the instant case we have sufficiently warned ourselves of the dangers of convicting the appellant based on the sole evidence of identifying witnesses especially in the circumstances that the said identification was made.

After re-evaluating the evidence, we are satisfied that the five identifying witnesses correctly identified the appellant as being a member of the gang of robbers who robbed them. All the witnesses knew the appellant prior to the robbery incident. The identification was that of recognition. PW1 and PW5 testified that the robbers were in their house for about thirty minutes. While in their house, they were searching the house looking for valuables. They were using the torchlight to illuminate and search the house. PW1 and PW5 recognised the appellant. Likewise when the robbers went to the house of PW2, PW3 and PW4, they were able to identify him. The evidence of PW2 is particularly critical. He testified that he had a torchlight when he attempted to escape from his shop using the front door. He was confronted by three men who were standing in front of the house. He directed the beam of his torchlight at the three men and was able to identify the appellant together with another man called "*Blackie*" who was still at large during the trial in the lower court. We have no doubt in our minds that the five witnesses identified the appellant. They did not hesitate to name the appellant when they made the report to the police on the following morning. It is also instructive that when the police, in the company of the complainants, went to the house of the appellant the morning after the robbery they did not find him. When the appellant was arrested by PW6, he told him that he had gone to Njoro on the material night of the robbery. When the appellant however gave his testimony in his defence, he stated that he was at his house during the night of the robbery. When he made his submissions before this court, he testified that he had slept with his visitors in his house.

We have re-evaluated this evidence which was offered by the appellant in his defence. It is our finding that the said defence offered by the appellant is not credible. It does not in any way dent the strong evidence adduced by the prosecution as regards his identification during the night of the robbery. In the circumstances of this case it is our finding that the prosecution proved its case against the appellant

beyond any reasonable doubt. The appellant was correctly identified during the robbery incidences by the five prosecution witnesses. His appeal against conviction and sentence therefore lacks merit. The same is dismissed. The conviction and sentence imposed by the trial magistrate is hereby confirmed.

It is so ordered.

**DATED at NAKURU this 9th day of May 2005.**

**DANIEL MUSINGA**

**JUDGE**

**L. KIMARU**

**JUDGE**