



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 259 OF 1999
AND
CRIMINAL APPEAL NO. 260 OF 1999

(From Original Conviction and Sentence in Criminal Case No.
1779 of 1997 of the Senior Resident Magistrate's Court at
Naivasha) – L. W. Gitari

YUSUF BASHIR ALI.....1ST APPELLANT

SHABAN ALI MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellants, Yusuf Bashir Ali and Shaban Ali Mwangi were charged with two counts of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the offence were that on the 21st of August 1997 at about 7.45 p.m. at Kihoto Estate, Naivasha jointly with others not before Court and being armed with dangerous offensive weapons namely axes and rungunus robbed Anne Wanjiku Mwaura Kshs.15,000/= and at or immediately before or immediately after the time of such a robbery threatened to beat her. The particulars of the second count was that on the same night and at the same place and at the same time while armed with dangerous weapons namely axes and rungunus robbed David Mwaura Kinyanjui of Kshs. 75,000/= and immediately before or immediately after the time of such robbery killed David Mwaura Kinyanjui. The Appellants were convicted as charged and sentenced to the mandatory death sentence. They were aggrieved by the said conviction and sentence and have appealed to this Court against the said conviction and sentence.

At the hearing of the Appeal, the Appellants who had filed separate appeals consented to their appeals being consolidated and heard as one. The Appellants in their Petitions of Appeal raised more or less similar grounds of Appeal faulting the decision of the trial Magistrate. Their grounds of Appeal can be summarized as thus; That the trial Magistrate erred in law in relying on the uncorroborated evidence of PW 3 to convict them; that the trial Magistrate disregarded the evidence of the first report made by PW 1; that the trial Magistrate erred in convicting the Appellants whereas no Investigating Officer had adduced evidence in Court during the hearing of the case and finally that the trial Magistrate has disregarded their defence which raised alibi defence without any proper or cogent reason.

Mr. Gumo, Learned Counsel for the State supported both the conviction and sentence by the trial Magistrate. The Appellants, with leave of the Court, presented their Written Submissions urging the Court to allow the Appeal and acquit them.

The facts of this case briefly stated were that on the 21st of August 1997 at about 7.30 p.m. PW 1

Hannah Wanjiku had just arrived to her house from Nairobi where she had gone to see a patient admitted in hospital. PW 1 resided at Kihoto Estate in Naivasha township. She was with her husband David Kinyanjui Mwaura, a boy called Njoroge and a househelp called Njoki. She was sitting at the sitting room with her husband when the robbers entered her house. From her evidence they were at least three of them. All the robbers were hooded. They spoke to PW 1 in Kikuyu language. They were armed with axes which they showed PW 1. They demanded money. PW 1 took them to the bedroom where they ransacked the bedroom and took Kshs. 15,000/=. They locked PW 1, the boy and the househelp in the bedroom. PW 1's husband was left in the sitting room while being guarded by one of the robbers. After a short while, PW 1 heard a loud scream from her husband. She then heard the footsteps of people running. She was able to open the bedroom door. She found her husband had been injured on the back of the head where he was bleeding. He had also vomited. PW 1 with assistance of the neighbours took her husband to hospital where he later died from the said injuries.

PW 1 did not recognize or identify any of the robbers as they were all wearing hoods. She could only hazard that the Appellants were young men. A severed thumb was later recovered in the house by the househelp PW 2. PW 2 Elizabeth Njoki Ndung'u testified that she was in PW 1's house on the material day working as a househelp. She narrated how three men entered the house and demanded money from PW 1. She testified that she was able to identify the Appellants from the strong electric light which had been put on at the time of the robbery. She testified that the robbers were not wearing any hoods and two of them (the Appellants) had scars on their faces. She further testified that the robbers had a pistol and used the same to threaten PW 1. She was locked in the bedroom with PW 1. When she managed to get out of the bedroom, she found PW 1's husband had been injured on the back of the head by the robbers. She testified that PW 1's husband later died from the injuries sustained during the robbery attack. PW 3 Ibrahim Ahmed Ali a watchman at the kiosks near the Ministry of Works Camp, Naivasha, saw the 1st Appellant at about 9.00 p.m. on the material night. The 1st Appellant has an injury on the forehead and was covered with bloodstains. The place where PW 3 saw the 1st Appellant was about one and half kilometers from where the PW 1 and the deceased had been attacked. PW 3 knew the 1st Appellant. He asked him where he had sustained the injuries from. The 1st Appellant replied that he had been cut by a man called Kaunda. The 1st Appellant was advised to go to hospital. The 1st Appellant left PW 3 and went away. PW 4 Joseph Njoroge Francis, was aged sixteen years at the time. He was with PW 1 and PW 2 at the house when the robbery took place. He was not able to identify any of the Accused Persons as being among the robbers who attacked them on the material night. He testified that the three people who attacked them said that they were members of the Jehova's Witness Church. He was emphatic that he did not see any of the Appellants during the material day. PW 5 Mohamed Godana testified that on the material night at about 8.00 p.m. he was at his kiosk opposite Total Petrol Station, Naivasha. He saw the 2nd Appellant whom he knew as they had been in school together with blood stained clothes. The 2nd Appellant's face, chest and the front of his torso was blood stained. PW 5 asked the 2nd Appellant where he had sustained the injuries and he said that he had been attacked by thugs. He testified that his kiosk was about two kilometers from the estate where the deceased and his wife resided. PW 6 Dr. Alex Onzele Olumbe performed the postmortem on the body of the deceased, David Mwaura Kinyanjui. He formed the opinion that the cause of death of the deceased was head injury consistent with a blunt and sharp object. PW 7 Inspector Hansen Karoki conducted an identification parade PW 2 and PW 4 were unable to identify any of the Appellants as being among the robbers who robbed PW 1 and killed her husband. PW 8 Police Constable Joel Rotich assisted with the investigation of the case. He testified how acting on information received from one of the co-accused of the Appellants he was able to arrest the Appellants who are brothers. They were later charged with the offence now facing them. PW 9 Inspector Henry Muriithi, recorded a charge and cautionary statement from one of the Appellant's co-accused who was later acquitted. When the Appellants were put on their Defence, the 1st Appellant testified that on the material night at about 8.00 p.m. he was coming from hospital where he had taken his parent for hospitalization. He saw two people fighting by the roadside. He went to separate them. He was hit on the face with a bottle and sustained facial injuries. The following day he sought medical treatment. After about a week he was arrested by the police. He was later taken to the house of the Complainant. When the two persons who were there were asked if they were able to identify him they denied that the 1st Appellant was known to them. The 1st Appellant denied that he was involved in the robbery. He further denied that he had a birthmark on his face. He testified that the injury that was inflicted upon him was what caused the scar. He testified that the Investigating Officer did not tell the Court the truth and further

that no evidence had been adduced to enable a conviction to be sustained.

The 2nd Appellant testified how on the 22nd of September 1997 while at the river washing his clothes he was arrested by the Police and taken to Naivasha Police Station. He testified that he was beaten by a Corporal Chege to confess involvement in the robbery incident. He denied involvement in the robbery and testified that he was improperly identified by PW 3, a person whom he had not seen before.

The High Court as the first Appellate Court is mandated to re-examine the evidence adduced before the trial Magistrate afresh, re-evaluate and reassess the same and reach its own independent conclusion whether or not to uphold the conviction of the Appellant by the trial Magistrate. In the instance there are basically two issues for determination. The first issue is whether or not the Appellants were identified by the Prosecution witnesses at the time of the robbery. The second issue is whether the circumstantial evidence offered by the Prosecution is such that the Appellants ought to be convicted. It is not in dispute that a robbery took at the residence of PW 1 where the husband of PW 1 David Mwaura Kinyanjui was killed. The circumstances of the robbery as explained to the Court by the Prosecution witnesses are not clear. PW 1 testified that the robbers were wearing hoods on their heads and therefore she could not be able to identify any of them. On her part PW 2 the househelp who was in the house with PW 1 testified that she was able to identify the Appellants from the scars which they had on their faces. One of the Appellants was said to have a birthmark on his face. PW 4 a sixteen year old boy who was in the house with PW 1 and PW 2 testified that the robbers did not wear any disguises. He testified that if he was shown the three robbers he would be able to identify them. He testified that the Appellants were not among the three robbers. It is therefore evident that the evidence of PW 1, PW 2 and PW 4 who were all in the house at the same time was contradictory and irreconcilably different. This contradiction has to be resolved in favour of the Appellants. The evidence of PW 2 as relates to the identification of the Appellants could not therefore be admissible to prove the fact that the Appellants had participated in the robbery. The Prosecution put much reliance on the fact that PW 3 a watchman saw the 1st Appellant bleeding from a cut from his face. When the 1st Appellant was asked who had injured him by PW 3, he testified that he had been cut by a man called Kaunda. The 1st Appellant was seen with the injury a few minutes after the robbery at the residence of PW 1. PW 5 testified that he saw the 2nd Appellant with bloody clothes at around 8.00 p.m on the material night. He testified that the Appellants face, chest and the entire from his torso was bloody. When asked where he had sustained the injury the 2nd Appellant said that he had been attacked by thugs. When the Appellants were put on their defence, the 1st Appellant explained that, he was hit by a bottle on the material night while returning home from the hospital where he had taken his parent. He testified that he was arrested immediately after the robbery incident by the police. He was taken to the house of PW 1 where two of the witnesses said that they were not able to identify him as being among the robbers who killed PW 1's husband. The 2nd Appellant likewise testified that he was arrested soon after the robbery incident, interrogated and later charged with the offence which he was convicted. No evidence was adduced by the Prosecution to prove that any item stolen from the Complainant was recovered from the Appellants. The evidence of the injury to the Appellants soon after the robbery incident, was the circumstantial evidence that the Prosecution sought to rely on to prove the guilt of the Appellants. In **Republic –versus- Kipkering Arap Koskei & Anor (1949) 16 EACA 135** it was held that in order to justify, on circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonably hypothesis than that of guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always the Prosecution and never shifts to be accused. In the present case, the prosecution did not prove that the injuries sustained by the Appellants when they were seen by PW 3 and PW 5 pointed to no other conclusion other than the fact that the said injuries could only have been sustained by the Appellants during the course of the robbery. No evidence was adduced by the Prosecution that the deceased husband of PW 1 had struggled or had injured the Appellants during the robbery. There is no evidence which could have enabled us to draw the inference that the Appellants were injured in the course of the robbery in question. The explanation given by the 1st Appellant that he was hit by a bottle on the head while separating two people who were fighting could as well be true.

We do not find that there was sufficient evidence in the circumstances of this case to sustain the Appellants conviction on the charge. In the premises therefore we do find that the Appellants' Appeals

have merit.

For the aforementioned reasons, the Appellants Appeals are allowed, their conviction quashed and the sentence set aside.

The Appellants are hereby set at liberty unless otherwise lawfully held.

DATED at NAKURU this 6th day of May 2004.

D. K. MUSINGA

AG. JUDGE

L. KIMARU

AG. JUDGE