



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 67 OF 2001

SIMON KINYUA NYAGA APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant *Reuben Njagi Njeru* (the second accused) and *Simon Kinyua Nyagga* (accused 12) was convicted by the Senior Resident magistrate Embu on a charge of robbery contrary to section 296 (2) of the Penal Code. He was charged with 10 others who were set free under section 210 of the Criminal Procedure Code.

ROSA GICUKU NJUE (P.W.1), Gicuku was on the night of 17th December 2000 about 2.00 a.m. attacked by a gang of robbers who demanded money. While 3 men stood guard with torches others ransacked the house. She was hit on the right sheen. One ordered the rest to fire their guns at her. She parted with Sh 5,000/=. They commanded her to take them to Hilda a niece to Gicuku. Hilda (P.W.2) parted with Sh 3200/-. At the time of giving money he recognized a fair skinned, short man with broad face and big cheeks. She recognized the voice of Kinyua Nyaga (accused 12) who was a village mate. She had heard Nyaga talk many times. Nyagah is the one who suggested that a ... be taken to the house of Hilda (P.W.2) next door. The police recovered rock (MFI – 1). She was issued with a P3 form. Later accused 1 incriminated *Kinyua Nyaga* (accused 2), *Kausi Njagi Kingaru* (accused 4) *Kausi Njiru Karua* (accused 7). He gave the names of Kingaru (accused 4) and Karua (accused 7) to the police.

After one week accused *David Musyoka Musili* was arrested and interrogated by members of the public and he mentioned his accomplices one of them was Njeru (2nd accused). Gicuku lost property worth Sh 6000/=.

HILDA KARIMI (P.W.2) Karimi was in bed when she hear a loud bang. Gicuku cried out for her to open to avoid being killed. She obliged and on being ordered to pay produce money parted with Sh 3200/=. The gang had torches. She noticed one with a walking stick. She reported the incident the following morning. She did not recognize any of the assailants.

SAMWEL NJIRU MBITI (P.W.3) Mbiti came to the aid of Gicuku and Karimi. He slapped a member of the gang with a panga and they took off. He id not recognize any of those attackers not even the person he slapped with a panga.

JOYCE WAWIRA MBOGO (P.W.4) Mbogo was in bed when she heard a bang on her door. She identified a young short man dressed in a jacket and a sisal hat. There was moonlight. He recognized Reuben Njagi (accused 2). He know him by name and as son of Kagagio. His further testimony s as follows;-

“I knew him well before th at incident.

He was talking in Kiswahili saying “Nyamazeni ama nichome nyum a”.

Accused 2 was at our window for about 20 minutes as we heard commotion around P.W.1’s. He kept moving round our house. I have known accused 2 for about 4 years and he usually does causal work around ----- Accused 2 had a stick in his hands. The Accused 2 stood some five meters from the window where I kept observing him”.

DR JOHN E. THIONGO (P.W.4), Thiongo a Medical Superintendent at Embu filled the P3 form of one Rosa Gicuku. He saw the P3 and medical documents on 19th December 2000. He examined the patient and established injury to the left lower leg. He was reddish. She was treated 45 hours after the injury. There was a bruise of the right lower leg. He opined that the cause of injury was a blunt object. He filled the P3 from which he produced as exhibit 2. He assessed injury as harm.

NO. 63869 P.C. KANGOR KIPRUYO (P.W.5) Kipruyo received a report from Hilda Karimi (P.W.2) of attack by thugs on 16th December 2000. He visited scene of crime and found Gicuku (P.W.1) with a leg injury. Took away the tone exhibit 1.

At that time one Kinyua and Reuben Njagi had been mentioned as suspects. His team arrested accused 4 (Kausi Njagi Kingaru) accused 5 (Moses Mbogo Njiru) accused 2 Reuben Njagi Njeru (and accused 1 (David Musyoka Musili) alias Corporal. He issued a P3 to Gicuku (P.W.1).

NO. 48212 P.C. LEAKEY NDHIWA (P.W.6) Ndhiwa was on patrol on 20th December, 2000 at Githimu when members of the public brought three suspects on allegation of shop breaking and stealing therefrom. He re-arrested them and booked them at Itabua police station with some exhibits. He charged them with the offence of robbery contrary to section 296 (2).

NO. 43385 INSPECTOR JULIUS KALINDA (P.W.7) Kalinda received a suspect Rueben Njeru for a statement under enquiry. He cautioned him. He gave a statement which was rejected by the trial magistrate. Similarly the statement by Simon Kinyua Nyaga (accused 12) was equally rejected.

At the close of the prosecutions case the learned trial magistrate found that the accused had a case to answer after (complying with section 211 of the Criminal procedure Code.

In his unsworn statement Reuben Njagi Njeru (accused 2) denied the offence. To him, the case was a frame-up.

Simon Kinyua Nyaga (accused 12) denied the charge. He alluded to a frame-up.

At the close of the defence case the learned trial magistrate delivered a judgment which he sentence the appellants to suffer death as provided by law and thus provoked this appeal.

The appellants relied on their written submissions which we have analysed and considered fully.

Mr. Obuo for the Republic informed us that the state supports the conviction and sentence. He submitted that Gacuku (P.W. 1) recognized the voice of Reuben Njagi Njeru (second accused). She knew Njeru before and had heard him speak/talk many times. That is Njeru who suggested that Gicuku be taken to Karimi’s (P.W.2) house. That there was moonlight.

All the while, counsel submitted Njeru (second accused) was standing about four meters away from where Mbogo (P.W.4) who kept on observing him was. Mbogo gave the names of the accused (now appellants) the same day as per evidence of Kipruyo (P.W.5).

We on our part have re-evaluated the evidence adduced carefully as we are bound to do on first

appeal.

Mbogo (PW 4) testified that there was moonlight. He recognized Reuben Njagi Njeru who was at the window for 20 minute. She had known him before for about 4 years. She heard him talk in Kiswahili thus:-

“..... *“Nyamazeni ama nichome nyumba”* *Accused 2*
had a stick in his hands.....”

Gicuku (PW 1) recognized the voice of Kinyua Nyaga (Accused 2). She had heard Nyaga talk many times. She heard Nyagah say that she could be taken to the house of Karimi (PW 2) next door.

After one week (accused) David Musyoki Musili was arrested and on interrogation by members of the public he mentioned as his accomplice Reuben Njagi Njeru (the second accused).

Thiongo (PW 4) examined Gicuku (PW 1) and established injury to the left lower leg. He explained that the cause of injury was a blunt object. He filled the P 3 which was received in evidence as exhibit 2. He assessed the injury to Gicuku as harm.

Against that backdoor/background, we share the view that the conviction was sound in law. That being so the sentence meted out by the superior court was a legal one.

In the final analysis we see nothing to interfere with the judgment of the Senior Resident Magistrate. This appeal is ordered dismissed.

DATED and DELIVERED at NYERI this day of 2003.

J.V.O. JUMA

JUDGE

N.R.O. OMBIJA

JUDGE