REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEALS NOS 520 AND 521 BOTH OF 2013*(CONSOLIDATED)*

(Appeal from original Conviction and Sentence in Kigumo Criminal Case No 1343 of 2012 – B. Khaemba, SRM)

1. ROBERT KARANJA MAINA

2. GEORGE MUIRURI NYOIKE.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellants herein, **Robert Karanja Maina** (who was 2nd accused before the trial court) and **George Muiruri Nyoike** (3rd accused) were convicted after trial of ***robbery with violence*** contrary to **section 296(2)** of the ***Penal Code***. It was alleged in the particulars of the charge that on 14/11/2012 at Kabati area within Murang'a County they and their co-accused (1st accused) with others not before court, while armed with dangerous weapons, namely pangas, metal bars and knives, robbed one **Nancy Nyambura Wahinya** of cash KShs 5,000/00 and various household and other items listed, all of the total value of KShs 275,100/00, and that at the time of the robbery they threatened to use actual violence to the said complainant. They were each sentenced to death as by law provided. They have appealed against both conviction and sentence.

2. The Appellants' co-accused Joseph Mburu Kimani (1st accused) was acquitted of the offence charged of robbery with violence but was convicted of the minor but cognate offence of **handling stolen goods** contrary to **section 322(1) & (2)** of the Penal Code. He was sentenced to five (5) years imprisonment. Apparently he did not appeal.

3. The Appellants challenge their convictions upon the following main grounds –

(a) Their identification by the complainant (PW1) was not good and positive.

(b) That the evidence surrounding recovery of the motor vehicle parts (that led the trial court to invoke the doctrine of recent possession) was not satisfactory.

(c) That on the whole the evidence adduced by the prosecution was not sufficient to prove the offence charged beyond reasonable doubt, and that therefore their convictions are not safe.

4. At the hearing of the appeals the Appellants relied upon their written submissions, which I have read and considered.

5. Learned prosecution counsel for the Respondent on the other hand supported the convictions of both Appellants. She submitted that the prosecution proved the case against each Appellant beyond reasonable doubt in that it was established –

(a) That there was a robbery at the house of PW1 and PW2 (testimonies of those two).

(b) That there was use and threat of, violence upon PW1.

(c) That there were four robbers.

(d) That the Appellants were positively identified by PW1.

(e) That the prevailing circumstances were conducive to such positive identification.

(f) That at the time of their arrest the Appellants were found in possession of some of the items very recently stolen from PW1 without plausible explanation of such possession.

6. In his defence the 1st Appellant gave sworn testimony while the 2nd Appellant gave an unsworn statement. They did not call any witness. They both denied the offence.

7. I have carefully read through the record of the trial court in order to evaluate the evidence placed to before it and arrive at my own conclusions regarding it. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses, and I have given due allowance for that fact.

8. Four (4) witnesses testified for the prosecution. **Nancy Nyambura Wahinya (PW1)** was the complainant. She was attacked in the early night of 14/11/2012 at her home. Her mother-in-law was also present, but she was too old and sick to testify. PW1 was the only identifying witness.

9. Alexander John Wahinya (PW2) was PW1's husband. He came home very soon after the robbery. Upon PW1 informing him of it, both reported the matter to the police. He subsequently learnt from an informer that some of the items stolen from their home in the robbery (motor vehicle parts) were being offered for sale in Thika Town. He connected the informer with the police who laid an ambush and arrested the Appellants and their co-accused with the motor vehicle parts which he said he identified as those stolen from his home.

10. PC Kwauli Wanyama (PW4) was the officer who laid the ambush, arrested the Appellants and recovered the motor vehicle parts. He produced them in evidence.

11. **IP Jacob Mutiso (PW3)** conducted the identification parade in respect to the 1st Appellant and produced the relevant forms thereof. PW1 identified him in the parade.

12. The Appellants were convicted upon two pieces of evidence –

(a) Their identification by PW1.

(b) Recovery of some of the recently stolen goods while in their possession at the time of their arrest.

<u>Identification by PW1</u>

13. The Appellants were total strangers to PW1. She stated that it was already dark when she was attacked. Regarding available light by which she could see and observe her attackers she said towards the

end of her testimony-in-chief –

> **"At my home they did not switch off the lights and thus I was able to identify them properly".**

14. That was the only reference in her entire testimony (in-chief and in cross-examination) to the light available. What kind of lights were these that the robbers did not switch off? Were they electric lights? Were they gas lamps? Were they kerosene lamps? Were they little tin lamps? We do not know! What kind of light and of what intensity did the lights give? We do not know! Where were they positioned in the rooms that the robbers visited? We do not know!

15. For visual identification the available light is crucial, for it is only by such light that the witness will be able to observe the attacker(s) sufficient to identify him or them. So, it is always necessary to interrogate the issue of the available light. It should not be glossed over, not by prosecution, and certainly not by the trial court.

16. The greater or clearer the light available (for instance broad daylight or bright electric lights) the more certain and positive the visual identification will be. Needless to say, the poorer the light available, say at night, the less certain the visual identification, for people are not like cats that see in the dark. The trial court stated that it believed PW1 that she had seen and identified the Appellants. It is however useful to remember that even a convincing witness can be mistaken! That is why it is so important to interrogate the entire circumstances in which the identification, particularly of total strangers, was made.

17. I find that the issue of the light available to PW1 to enable her to make a good and positive identification of the Appellants was not properly interrogated at the trial. The Appellants' convictions solely upon their identification by PW1 cannot be safe.

<u>Possession of recently stolen goods</u>

18. If the evidence of recovery of some of the items very recently stolen in the robbery is found to be good, it will lend credence to the Appellants' identification by PW1. But that evidence has one major problem: PW4 (the police officer who arrested the Appellants and recovered the items) merely stated that PW2 positively identified the items. He did not explain how that positive identification was made. The items were described as 2 axles, a starter and an alternator. PW2 himself merely stated –

> **"I identified them as I was the one who removed them from my lorry and kept them in my house."**

19. Now, as far as motor vehicles go, axles, starter motors and alternators are common parts and will be similar for similar vehicles. By what mark or feature or other peculiarity did PW2 identify the four parts? Were they new or old? Did any of them have some kind of peculiar mark or fault or whatever that would have told it apart from similar parts?

20. I hold that the four motor vehicle parts found in the possession of the Appellants were not positively identified by PW2 as having been stolen in the robbery at his house. The evidence of possession by the Appellants of recently stolen goods is thus questionable, and cannot corroborate the equally questionable identification of the Appellants by PW1.

21. It must be remembered that the Appellants were facing a very serious charge which carried the ultimate punishment – death. I am not satisfied that the charge of capital robbery was proved beyond reasonable doubt against either Appellant.

22. In the event I will allow these two appeals in their entirety. The Appellants' convictions are hereby quashed and the sentence of death passed against each of them set aside. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 9TH DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 10TH DAY OF MARCH 2017