



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 52 & 59 of 2008

MOSES KIMANI KAMAU.....1ST APPELLANT

ISAAC MUTHAMBA KIMANI2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 492 of 2007 in the Principal Magistrate's Court at Limuru – Mr. V. Wandera (PM) on 21/02/2008)

JUDGMENT

1. The Appellants Moses Kimani Kamau and Isaack Muthamba Kimani were charged with the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code**.
2. Briefly, the facts of the case were that on 2nd March 2007 at about 10.00 am and being armed with a dangerous offensive weapon, namely a pistol, the appellants jointly robbed Julius Kuria Mburu of his mobile phone Nokia 1110 and Kshs. 5,000/=, the property of the said Julius Kuria Mburu at Limuru Tea area in Kiambu District of Central Province.
3. A brief statement of the prosecution's case is that on 2nd March 2007 at about 10.00 a.m. **PW1** Julius Kuria Mburu left Itungi Trading Centre. On his bicycle to go and buy stock at Limuru for his employer's shop. He rode past the appellants and on reaching an incline he alighted from his bicycle and started pushing the bicycle which had four crates of empty beer bottles on its carrier.
4. Just when **PW1** was about to reach the top of the incline he felt something step on the rear part of the shoe he was wearing. He turned around and saw the two appellants. The 2nd appellant grabbed his neck and pointed a pistol at him. He placed the pistol on **PW1**'s neck and grabbed his left hand. **PW1** released the bicycle he was holding and it fell down. The appellants pulled **PW1** off the road and robbed him of Kshs. 5,000 from his jacket pocket and a mobile phone make Nokia 1110. In the process of robbing him the 1st appellant hit **PW1** on the left cheek with his fist.
5. **PW1** testified that he begged the appellant's to give him the sim card from his mobile phone which they did, and then fled from the scene of the robbery and disappeared inside the tea plantation. **PW1** pursued them but on failing to trace them he returned to the road where he found two people. Two more persons arrived at the scene, while he was there.
6. **PW1** borrowed a mobile phone from one of the four persons at the scene and using his sim card, telephoned the manager of Karirana Tea Estate Security to report the robbery. He then gave his bicycle to

one of the four persons at the scene and requested him to go and keep it at Georgies Pub in Limuru, as he returned to Itungi Village to collect more money from his employer to replenish the beer stock. While on the way to Itungi he met some security officer of Karirana Tea Estate and again reported the robbery.

7. The Appellants were later arrested together in the tea plantation, and charged for the offence of robbery contrary to **Section 296(2)** of the **Penal Code**. They were subsequently tried and convicted as charged, and sentenced to suffer death as by law prescribed.

8. Being dissatisfied with the conviction and sentence of the trial magistrate, the appellants have brought this appeal in which they fault the trial court's findings on four fronts.

9. The learned state counsel, Mr. Mulati in opposing the appeal on behalf of the state, gave a brief summary of events that occurred on the day the robbery took place, and urged the court to dismiss their appeal as untenable. He reiterated that the circumstances of the identification were conducive; that the appellants were exposed to the complainants because they were apprehended by members of the public immediately after the robbery; that the ingredients of the offence were proven; that the Prosecution witnesses' testimony and evidence were in harmony, and that all the evidence on record had been duly considered by the learned trial Magistrate.

10. We have examined and re-evaluated the evidence on record afresh to draw our own conclusions, as is our mandate as the first appellate court. We are also alive to the fact that we did not have the advantage of observing the witnesses as they testified.

11. The first issue for determination is **whether the circumstances of identification were indeed conducive and the evidence was sufficient to form a basis for the conviction of the appellants**. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. — See **KARANJA & ANOR V. REPUBLIC [2004] 2KLR pg 10**.

12. On this, the evidence of **PW1** was that in his report to the Tea Estate security, he stated that he would be able to positively identify the appellants if arrested. He pointed out that the 1st appellant was wearing a black sweater while the 2nd appellant was wearing a white track suit Jacket with black stripes. **PW1** also stated that the 2nd appellant was carrying a red and black bag and wearing a black Marvin cap which left his dreadlocked hair exposed at the rear.

13. **PW2**, testified that on the day of the robbery, he came upon **PW1** immediately after he was robbed. He was seated on the right side of the road holding his chin. **PW1** informed **PW2** that his assailants, who by then had made away, comprised of two men who wore blue jeans trousers with one clad in a flowery shirt. **PW2** further stated that he gave this description to the security guards of Limuru Tea Estate.

14. We find this description of the appellants clothing by both **PW1** and **PW2** inconsistent and contradictory. The confusion was further compounded by the testimony of **PW3** a security officer with Limuru Tea Company. His testimony was that the description given to him by **PW2** was that one of the appellants wore a black jacket while the other carried a black bag.

15. The prosecution's case turns on the evidence of **PW1**, who was the sole identifying witness. We note that the learned trial magistrate did not warn himself on the dangers of convicting on the evidence of a single identifying witness. In **ANTHONY KANGETHE MWANGI VS. REPUBLIC CR. APP. 81 of 2008**, the Court of Appeal held that failure of the trial magistrate to warn himself of the dangers of convicting an accused person on the evidence of a single identifying witness is not fatal if that accused person is convicted on sound evidence.

16. In this case the learned trial magistrate did not warn himself as stated above and we have already shown elsewhere in our analysis that the evidence of identification was not sound, in light of the contradictory descriptions given by **PW1**, **PW2** and **PW3** in their testimonies. In the premise, we find

that the learned trial magistrate erred in reaching a finding that the appellants had been correctly and conclusively identified.

17. The second issue for determination is **whether the learned trial magistrate acted on inconsistent and contradictory evidence** when he convicted the appellant. In evaluating the evidence we noted that **PW3** told the trial court that the 2nd appellant, who was arrested at Kambi Mathare, was found in possession of the red bag (exh. 16) which, contained a rusty pistol (exh. 11). He took possession of the red bag and the rusty pistol and escorted the 2nd appellant to Limuru Tea Office, where he handed him and the exhibits, over to one John Kaka the supervisor of security officers working for Limuru Tea Estate.

18. **PW4**, Mr. John Kaka himself on the other hand, testified that on receiving the report on the robbery from **PW3**, he mobilized all security officers to search for the two suspects. He told the court that the 1st appellant was arrested inside the tea plantation near a road junction, while the 2nd appellant was arrested at the staff quarters. He escorted the 2nd appellant to their office and telephoned the area District Officer seeking assistance.

19. **PW4** handed over the two appellants to the police who re-arrested them. He also handed over to the police, Kshs. 3,650/= (exh. 10) together with a phone, a pistol, and a red bag which had been recovered from the 1st appellant by the mob which arrested him. That **PW1** later went to Limuru Tea Office and positively identified the recovered mobile phone and cash.

20. **PW5**, Augustus Musili, attached to the DC's office Kiambu West, testified that on receiving a telephone call from members of the Public reporting the robbery, he proceeded to Limuru Tea offices and on arrival found the appellants having been arrested by Police officers from Tigoni Police Station. The police officers had recovered a rusty pistol, money Kshs.3650/= and a mobile phone make Nokia 1100.

21. The trial magistrate was satisfied that the Kshs.3,650/=, mobile phone and the red bag containing the rusty pistol were recovered from the appellants at the time of their arrest. However, this was not the amount reported in the charge sheet, nor in the testimony of **PW1** as having been taken from **PW1** during the robbery. The ownership and exact amount of the money recovered was not thoroughly tested in view of the fact that the 1st appellant also claimed the money to be his.

22. The third issue for determination is **whether there was a plausible defence by the appellants**. Both appellants denied the offence. In his defence, the 1st appellant gave an unsworn statement. He testified that on his way back from Githiga where he had gone to supply charcoal to his customers, he used a short cut passing through the tea plantation. That on reaching the junction between Karirana and Limuru Tea he found a group of people who were armed with machetes and clubs. They stopped and interrogated him and one of them claimed that because he was dirty he must be one of the suspects who robbed people along that route.

23. The people set upon him and beat him seriously until security officers arrived and announced that they had arrested another suspect. The security officers escorted him to the offices of Limuru Tea Estate where he found the 2nd appellant whom he did not know. They were subsequently escorted to Tigoni Police Station and charged.

24. The 2nd appellant also gave a sworn statement in his defence. He testified that he was walking to Limuru from Itungi Village where he had gone to collect money from his customers, who had bought vegetable seedlings from him on credit, when he met a group of people at the junction of the road to Limuru and Nazareth. They stopped and interrogated him. **PW3** who was among the group said he should be beaten as he was a stranger in the area, and the robbers in that area were usually strangers. He was beaten and pick pocketed, and his seedlings taken away from him. He was then escorted to Limuru Tea Office, where security officers already had the bag and mobile phone, that were later produced in evidence.

25. They locked him in the office after the members of the public denied seeing him at the place where the mobile phone and the bag were recovered. A short while later the 1st appellant was brought to the office, and subsequently they were both escorted to Tigoni Police Station.

26. In our analysis of the evidence therefore, we noted that each of the appellants was arrested away from the scene of the crime, and that many people were within the tea estate at the time the robbery took place. The explanations given by the two appellants regarding their presence in the area at the time of the arrest were plausible. In the circumstances under which they were arrested, it would have been necessary for the police to arrange for identification parades for the identification of the two appellants. We note however that they had already been shown to **PWI** by the time the police arrived, rendering identification parades valueless.

27. In summary, we find that the identification of the two appellants was not sound, the evidence on record was inconsistent and contradictory, raising a real doubt in the prosecution case, whose benefit should have been given to the appellants. The appellants' defences, on the other hand, were plausible.

We therefore find that the appeal of each appellant is meritorious. We quash the convictions, entered against each of them and set aside sentence imposed upon each of them. We order that each appellant be and is hereby set at liberty forthwith, unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **9th** day of **October** 2012.

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE