



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Appeal 123 & 122 of 2010**

**SULEIMAN KAMAU NYAMBURA.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(arising from the judgment of Hon. A.K.Kaniaru Principal*

*Magistrate Murang'a in Criminal Case No. 2548 of 2009)*

**CONSOLIDATED WITH**

**JOSEPH MWANGI WANJIKU.....APPELLANT**

**versus**

**REPUBLIC.....RESPONDENT**

*(arising from the judgment of Hon. A.K.Kaniaru Principal*

*Magistrate Murang'a in Criminal Case No. 2548 of 2009)*

**JUDGMENT**

The appellants were both charged with the offence of robbery with violence contrary to section 296(2) of the Penal code.

The particulars of the offence were that on 25th day of July 2009 at Makuyu area in Murang'a North District within Central Provinces jointly while being armed with offensive weapons namely knives robbed MAURITIUS NJATHAINI MWANGI cash Ksh. 15,850/- and at the time of such robbery used actual violence to the said Mauritius Njathaini Mwangi.

There were tried convicted and sentenced to suffer death.

Being dissatisfied with the conviction and sentence they both filed appeals to this court.

When the appeals came up for hearing we consolidated the said appeals.

The appellants both who were not represented submitted amended memorandum of appeal together with written submissions which they relied upon.

Miss Maundu for the State opposed the appeals by the first appellant but conceded to the appeal by the 2nd appellant on the ground that he was arrested in connection with a different offence and no

identification parade was conducted in respect of the offence appealed against.

We must however point out that we are not under obligation to allow the appeal on the ground that the same is conceded to by the state.

We shall therefore proceed with the appeals against the two appellants.

The first appellant in his amended memorandum of appeal has raised the following grounds:

- 1. *The learned trial magistrate erred in law by relying on identification/Recognition by P.W.1 which was not free from possibility of error.***
- 2. *The prosecution had not proved its case beyond reasonable doubt.***
- 3. *The learned trial magistrate shifted the onus of proof to the appellant.***
- 4. *The appellant defence was not given serious consideration***

The second appellant has added an additional ground that the Doctor who treated the complainant was not called to testify.

Before we look at the appellants submissions herein, this being a first appeal we are required to reevaluate the evidence tendered before the trial court to come to our own conclusion while taking into account the fact that we did not have the advantage of seeing and hearing the witnesses as did the trial court.

P.W.1. MAURITIUS NJATHAINI MWANGI testified that on 25th July 2009 at 10 a.m. Was pushing bicycle toward Makuyu when two young men came from behind and one of them tripped him causing him to fall down. One of them produced a knife and told him to keep quite. The second one also produced a knife and put hold of his hand in his pocket and took the money he had.

He screamed attracting two people who chased the two young men. When they came back to him they asked him what had happened and told him that they knew the two men.

He reported to the police and was issued with P3 form and that when he took back the P3 Form one of those who had robbed him was brought to the police station by the area Assistant Chief and he identified him as the first appellant and that the 2nd appellant was arrested much later.

PW. 2 Adam Kariuki the Assistant Chief testified that he was on patrol when he got information that some suspicious characters were roaming in Makuyu area. They laid an ambush for them and followed the two who out ran them.

He stated that he knew the first appellant well. They therefore went to the 1st appellant's place which they knew well and arrested the same.

The first appellant was found wearing the same T-shirt and got Ksh. 450/- for his pocket and a knife.

The 1st appellant told them that he had shared the money with the 2nd appellant.

P.W.3 JOSEPH MUTAHI APC stated that he was on patrol with P.W.2 when they witnessed the appellants attack P.W.1. He stated that he knew the appellants and that they thereafter managed to arrest the first appellant.

P.W.4 Samuel Wangai Kahando a clinical officer produced P3 form in respect of the complainant.

P.W.5 pc TOM ODHIAMBO testified that on 11th September 2009 at 9.30 p.m. He was on patrol when they heard a lady shouting. When they responded she told them that a man at her residential place wanted to assault her.

She showed them the man whom they arrested for threatening to kill the lady.

When the 2nd appellant was taken to the police station they realised that he was wanted for a robbery case.

P.W.6 Cpl VINCENT KEMBUI stated that on 25th July 2009 at 11.45 a.m. The complainant reported at Murang'a police station how he was attacked and robbed of Ksh. 15850/-. At 1.45 p.m. The 1st appellant was brought to the station by Ap. Sgt MUTETI P.W.5 and P.W.2 the Assistant chief. He stated that the complainant had told them that one of the attackers was wearing a red T-Shirt and when the 1st appellant was brought to the station he had a red T-Shirt.

On 11th September at 10.45 p.m. When on duty he received a call from APs at Mjini Chief's camp that they had arrested a suspect who turned violent and they wanted assistance.

When he reached the scene he found the 2nd appellant already under arrest and therefore took him to the police station. He further testified that he had received information that the 2nd Appellant was wanted for robbery the subject matter of this appeal.

He stated that the 2nd appellant refused to participate in the identification parade.

When put on their defences the appellants gave sworn defences.

The 1st appellant stated that on 25th July 2009 he went to his place of work upto 12.30 p.m. Then went back home. The assistant chief (P.W.2) came to his home and asked him where the occupants of a house adjacent to his who were alleged to be selling bhang were to which he stated that he did not know. The Assistant chief entered his house and conducted a search. They asked him for money and he replied that he did not have any money. They took his T-shirt, a knife and money. Under cross examination he stated that there was no grudge with those who arrested him but that the assistant chief framed him up because he refused to give him money.

The 2nd appellant testified that on 2nd August 2009 he went to church with his family and thereafter decided to go watch sports at Ihura Stadium. Before reaching the stadium he met with P.W.2 near Mathai supermarket together with his wife.

He asked him for the money he owed him to which P.W.2 stated that he did not have money and promised to pay in a months time.

On 25th September 2009 he rang P.W.2 for his Kshs. 4660/- since his child was admitted at a hospital and needed the money.

On 11th September 2009 P.W.2 rang him to go for the money and when he got there P.W.2 told him that he had used the money on construction. thereafter P.W.2 slapped him and arrested him with the assistance of his askaris. He was thereafter taken to Murang'a police station with a charge of threatening to kill and assault. He produced a court order that he be taken to hospital for treatment.

He stated that there was no report made on him as regards robbery. He produced the proceedings in Criminal Case No. 3230/06 in support and in cross examination he confirmed that there was a grudge between him and P.W.2.

It is upon the above evidence that the appellant were convicted.

Since the state has conceded to the appeal by the 2nd appellant we think it is only prudent that we

start with the same.

The issue for us to answer in this appeal is how was the 2nd appellant arrested and second whether the 2nd appellant was properly identified by the complainant at the scene of the alleged attack.

It is clear from the evidence of P.W.1 that he did not recognize any of his alleged attackers and that he was only informed by the Assistant chief P.W.2 that he knew the appellants and P.W.2 stated that the 2nd appellant was wearing a black shirt with white sport. P.W.1 did not tender in any evidence as to the colour of the shirt the 2nd appellant was wearing.

If P.W.2 and P.W.3 knew the appellants as stated in their evidence in chief why then did they not go to the home of the 2nd appellant. Further how did P.W.5 who arrested the 2nd appellant for allegedly threatening to kill some unnamed lady realised that he was wanted for robbery case?

We therefore agree with Miss Maundu for the state that the conviction of the 2nd appellant was not very safe. We have noted that the trial court did not look at the defence tendered by the 2nd appellant seriously and dismissed the same as fiction. To our mind the trial court prejudiced the appellant herein. We take note that the appellant have raised the issue of the money in criminal case No. 2220/06 and therefore the same cannot be stated to be an afterthought. Further we note that save for the evidence of P.W.5 there is no other evidence tendered to confirm that the 2nd appellant refused to take part in an identification parade.

We therefore allow the appeal in respect of the 2nd appellant quash the conviction and set aside the sentence herein.

The 2nd appellant shall be set free unless otherwise lawfully held.

As regards the 1st appellant we note that the same was arrested at the scene of the robbery by P.W.2. The complainant gave a description of the T-shirt he was wearing to the police at Muranga and when he was brought to the said station by P.W.2 and P.W.3 he was wearing the same T-shirt. P.W.1 was able to identify the 1st appellant at the said police station.

We have also noted the P.W.1 under cross examination stated that he did not know where the 1st appellant was at the time when the crime the subject of this appeal was committed.

We have looked at the 1st appellant's submission where he raises the issue of identification and recognition we have noted from the evidence tendered before the trial court that the robbery herein took place in broad day light and that P.W.2 and P.W.3 witnessed the attack. P.W.1 also gave the colour of the T-Shirt the appellant was wearing. We therefore find as a fact that the 1st appellant was positively identified and that the circumstances prevailing were favourable for positive identification.

We therefore find no merit on the appeal by the 1st appellant and dismiss the same.

Dated and delivered at Nyeri this 1st day of November 2012.

**J.K. SERGON**  
**JUDGE**

**J. WAKIAGA**  
**JUDGE**

1/11/2012

Before Hon. Justice J. Wakiaga - judge

Court clerk - Wanjohi

Joseph Mwangi Wanjiru -

Suleiman Kamau Nyambura - appellant in person  
Miss Maundu for the state.

Judgment read in open court in the presence of the above named

**J. WAKIAGA**  
**JUDGE**