



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL 46 OF 2008**

**JOSEPH KAMAU GICHUKI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***{Appeal from Original Conviction and sentence in the Senior Resident Magistrate's Court at Kangema in Criminal Case No. 98'B' of 2007 dated 30<sup>th</sup> January 2001 By S.N. MBUNGI SRM}***

**JUDGMENT**

The two appellants were charged in the subordinate court with the offence of Robbery with violence contrary to section 296(2) of the Penal code whose particulars were that:

**“on the 11<sup>th</sup> May 2007 at Wanjengi village in Muranga district within central province the appellants jointly robbed Veronica Gathoni Koigi four jackets, four trousers, a mobile phone make Siemen, assorted children wear and cash Kshs. 3,000/= all valued at Kshs. 22,000/= and immediately before such robbery used actual violence to the said Veronica Gathoni Koigi.”** They pleaded guilty to the charge in support of its case the prosecution called a total of 6 witnesses.

The complainant **Veronica Gathoni P.W.1** testified that on the material day at about 11.30 p.m. she was asleep in her house with her family when she heard a knock on the door. She screamed but a voice outside told her to open the door. She was further threatened that if she refused to open the door they would still get in. She opened the door and 2 men entered the house. They forced her to open the back door and more than 10 other men entered the house. They demanded money saying that they knew that her husband usually had money. They took Kshs. 640/= which was on top of the cupboard. They also took her husband's clothes and childrens clothes. One of the jackets belonging to her husband had money though she did not know the exact amount therein. The robbers also took her mobile phone. As they moved from one room to another, the complainant was able to identify the appellants. The 1<sup>st</sup> appellant even slapped her when he realized that she was looking at him keenly. They told her that they were Mungiki and no one screams when they are around After taking whatever they wanted, they then left. After a few minutes police came having been contacted by the complainant's brother in law (P.W.2) who had heard the commotion and the complaint's screams. Later the appellants were arrested and the complainant was called for an identification parade at Kirogo police post. She managed to pick out the appellants as part of the gang that robbed her on the material day.

P.W.2 heard a bang whilst asleep in his house. He woke up. He noticed that the bang was from P.W.1's house. He armed himself and proceeded to the scene. He threw stones at the homestead. He saw three torches flashed towards him. He ran a way. He called other neighbours but when they went back to P.W.1's house they found that the thugs had left.

P.W.3 testified that while on patrol duties, he received a report of suspicious characters in the neighbourhood from members of public. The said members of public led him and his fellow administration police officers to the 1<sup>st</sup> appellant's home. They found the appellants seated in the shamba doing nothing though they were wearing tracksuits. They arrested them and took them to Kirogo police post for further investigations. They handed them over to P.W.4. who had earlier received a report at Kirogo police post regarding the robbery.

P.W.5. the clinical officer examined the complainant and filled her P3 form. He produced the same in evidence and it showed injuries sustained by the complainant.

P.W.6. conducted the identification parade. He produced identification parade forms that he filled after he conducted the identification parade. The complainant picked the appellants in identification parades by touching them.

When placed on their defence the appellants denied having committed the offence and said they were arrested while cutting fodder for their cows.

The learned magistrate having carefully evaluated and considered the evidence tendered as well as the defence offered, was persuaded that the appellants were guilty as charged. Accordingly he convicted them and sentenced them to death as required by law. The appellants were not amused by the conviction and sentence aforesaid. Hence they separately lodged appeals to this court which we have consolidated for ease of hearing and as they arose from the same trial in the subordinate court.

In their petitions of appeal, the appellants have more or less raised the same grounds of appeal. They all revolve around identification. That they were arrested without their description having been given to the police by the complainant in the first place, that the prevailing circumstances during the robbery were such that the alleged identification could not have been free from possibility of mistake, that the evidence of identification was full of doubts, inconsistencies and discrepancies and finally that the identification evidence was of a single identifying witness.

When the appeal came up for hearing the appellants who were appearing in person offered to argue their respective appeals by way of written submissions which they had filed earlier. We have carefully read and considered the same.

On his part, **Mr. Orinda** learned Senior Principal State Counsel conceded to the appeal. In conceding to the appeal, the learned Senior Principal State Counsel submitted that the identification of the appellants was not safe and free from possibility of mistake. However this being a first appeal he urged us to evaluate the evidence afresh.

As a first appellate court, it is our duty to subject the evidence tendered during the trial to fresh and exhaustive evaluation and reach our own conclusion as to the guilt or otherwise of the appellants. In doing so we must bear in mind that we did not enjoy the benefit that the trial court had in seeing and observing the witnesses as they testified and make due allowance.

It is common ground that the appellants were convicted on the evidence of a single identifying witness in difficult circumstances. A conviction of an accused person on as in this case requires the exercise of great caution due to the danger involved in relying on such evidence. In **Roria v Republic (1967)E.A 583** it was stated by the court of appeal as follows:-

***“subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a***

***single witness respecting identification, especially when it is known that conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.***

Much as the learned magistrate warned himself on the dangers inherent in acting on the evidence of a single identifying witness and correctly so in our view, he nevertheless proceeded to rely and act on such evidence. In our view however, we doubt whether the learned magistrate should have acted on such evidence. Why?

According to the evidence of the complainant, the offence was committed at night, 11.30 p.m. to be precise. Over 10 robbers or so were involved. She was suddenly awoken from her sleep. She rushed to hide her husband in the toilet fearing that the robbers would kill him. The robbers proclaimed themselves as Mungiki. They had all covered their faces. When the robbers entered the house they held the complainant hostage and moved with her from room to room as they looked for money and other properties to steal. The mere mention of Mungiki was sufficient to set shivers down the complainant's spine. As they went about one of the robbers hit the complainant on the head, shoulder and on the back. From the evidence, the robbers had a big torch whereas the complainant had 2 torches which they also took immediately they entered the house. However throughout her testimony the complainant does not at all mention any occasion that she was able to use her alleged 2 torches on the robbers. Indeed her testimony is silent as to whether there was any light in the house that would have assisted her to identify any of the robbers. From the evidence it is apparent that the complainant did not get a chance to have her torches lit. Yet the trial magistrate found that **"she (P.W.1) said she was able to mark the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused with the help of light from her torch and torches which the thugs had"**. There was no such evidence. If the robbers were hooded and there was no light in the house that would have assisted the complainant identify the robbers or any one of them, on what basis then was she able to identify any of the robbers? Small wonder that the complainant was unable to give any description of the robbers to the police who came to the scene immediately after the robbery. Not even to her neighbours or members of the public who preceded the police to the scene. If the robbers were more than 10, and hooded, how possible was it for the complainant to identify the two appellants. We cannot think of any possibility unless of course the complainant was a super human being capable of seeing through darkness unaided. We are certain that the complainant is no such human being.

Yes, the complainant may have picked out the appellants in an identification parade. However in the absence of a description of the appellants to the police in her 1<sup>st</sup> report, the identification parade may very well have been worthless since no proper basis had been laid for the same.

The appellants were arrested on the information passed to the Administration police officers by members of the public. No such member of public was however called to testify so as to shed light on the basis of their report to the police. In any event the said members of public had not even been given any description of the robbers by the complainant. It would appear therefore that the appellants were merely arrested on suspicion.

We have looked at the defences tendered by the appellants. We are of the view that they were credible and should have received better treatment by the learned magistrate. Compared to the prosecution evidence, we think that the appellants' explanation as to their presence in the place of arrest was reasonable.

All in all we are satisfied that the circumstances obtaining at the scene of robbery were not favourable for positive identification of the robbers leave alone the appellants by the complainant. Consequently, **Mr. Orinda** was right in conceding to this appeal on that score.

In view of our conclusion on the issue of identification, we would allow these appeals quash the appellants' convictions and set aside the sentences imposed upon them. Unless they are otherwise lawfully held we order that they be set at liberty forthwith.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of May 2009.**

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**