



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Criminal Appeal 111, 112, 113 & 114 of 2007**

**SHAURI KENGA MUME**

**STEPHEN GARAMA MRIRA**

**MURIRA MWAFUNGO**

**FRANCISCO MWABOJE MWAFUNGO .....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants Shauri Kenga Mume, Stephen Garama Mrira, Murira Mwafungo and Francisco Mwabonje Mwafungo, were convicted on a charge of robbery with violence contrary to section 296(2) Penal Code and sentenced to death.

They were also convicted on charge of assault contrary to section 251 of the Penal Code but the sentence on court 2 was held in abeyance.

The prosecution case was pegged to facts stated that on 2<sup>nd</sup> day of April 2005 at Baraka Chembe Village in Watamu, within Malindi District jointly with others not before court, being armed with dangerous or offensive weapons, namely pangas, iron bars, axes, bows and arrows, robbed Mohammed Athman of Ksh 22,000/-, six golden bangles, one golden chain and pair of golden earrings all valued at Ksh. 270,000/- and at or immediately before or immediately after such robbery, used actual violence.

The particulars relating to the assault was that on the same date and place, they unlawfully assaulted Shamsa Mohammed thereby occasioning her actual bodily harm.

Appellants denied the charges and prosecution called a total of five witnesses in support of its case.

The evidence presented to the trial court was that PW1 (Mohamed Athman) closed his shop at about 7.00pm in Msabaha and went home. At 12.30am while asleep he heard the door to his main house being closed from outside. He got up, went to the window, shone his torch and saw about ten people. He recognized three village youths and one of them said to him

“You go on sleeping and we are coming there right now”

Shortly the door to the main house was broken using a big stone and people entered. PW1 hid under the

bed but eventually he was pulled out from there, along with his child Shamsa. He was led to his bedroom with demands for money and he was subjected to beatings. He showed them a drawer where he had hidden the money and they took Ksh 180,000/-. They took further ksh. 20,000/- from the bags he had hidden under the bed. They were then locked up in a store for two hours as the robbers left. Police visited the scene three days later, but PW1 did not tell them that he had recognized three people. Later police told him five people had been arrested and he recognized three as being among those he knew on the night of the attack. He identified them in court as first appellant, 2<sup>nd</sup> appellant and 3<sup>rd</sup> appellant.

PW1 was treated for the injuries he suffered.

On cross-examination PW1 told the trial magistrate that he was not the one who pointed appellants to police so as to arrest them. Although it was a dark night, it was his evidence that there were lanterns inside the house.

PW2 (Shamsa) confirms occurrence of the incident and that she had the two lanterns, one was in the bedroom and the other was in the sitting room – both were burning during the incident.

It was her testimony that as the people demanded for money, she recognized two people inside the house and the other one she saw outside the window and recognized him – she specified 4<sup>th</sup> appellant and 1<sup>st</sup> appellant as the people she saw inside the house, whilst 2<sup>nd</sup> appellant is the one she saw outside at the window. It was her evidence that about five people entered into the house and each had a panga. She saw them take money and jewellery and as they were ordering her father about, it was her evidence that:

***“they opened cupboard, too move money and gold chains. One of them saw that I was studying their faces and he cut me here on left arm near shoulder. He is one of those I did not recognize.”***

PW2 was adamant that she was able to see the attackers as there was light and the three whom she recognized were persons she knew even before as they lived in the neighbourhood and she knew 2<sup>nd</sup> appellant by the name Garama who used to go to their shop daily to buy flour. It was her testimony that he was the one t the window saying:

***“kill that mzee, I wanted unga and he refused to loan it to me.”***

On cross-examination she stated:

***“About five entered the house. Out of those who entered I knew two. I did not know them by names but physical appearances.”***

Her evidence was that she was able to see and recognize the one outside the window (which was made of wire mesh NOT glass) because of the hurricane lamps which were burning inside the house. She confirmed that there were no lamps outside. She was certain that it was 4<sup>th</sup> appellant who was given the key by her father, to open the cupboard and that he wore gumboots and a long coat and held a panga in his hands.

1<sup>st</sup> appellant wore a T-shirt and long trouser (whose colours she did not register) but he too had a panga.

AP Cpl John Rotich (PW3) who visited the scene and spoke to PW1, told the trial magistrate that PW1 informed him he knew those who had robbed him and he had identified four and pW1 had named Garama (the 2<sup>nd</sup> appellant, so they traced him and found him in the home of 4<sup>th</sup> appellant – he had a panga. 1<sup>st</sup> appellant was also nearby and he tried to flee but was arrested. From 4<sup>th</sup> appellant was recovered spotlight, two axes, Omo 600grams, and a knife. 2<sup>nd</sup> appellant on being searched was found with a hammer, two pairs of pliers and a panga.

On cross-examination PW3 said PW1 named 4<sup>th</sup> appellant and 2<sup>nd</sup> appellant and that the girl (presumably

PW2) did not give names but described one attacker as someone who worked in a hotel and that he was brown.

AP Cpl. Abdullahi (PW4) who accompanied PW3 also told the trial court that the complainants named one Garama and Francisco. Complainant was never asked to confirm whether the recovered Omo was from his shop. In fact according to Pc Josephat Kamara of Watamu Police Station who also went to the scene, PW1 told him nothing was stolen from the shop – all the items stolen were taken from the house. He had arrived before the APs and told the trial court that PW1 did not give him the names of the robbers though he said he knew them and gave a description that one was tall and huge, one was short and huge, and one was black without teeth.

1<sup>st</sup> appellant in his unsworn testimony told the trial magistrate that he had gone to 4<sup>th</sup> appellant's home to greet him, when police arrived and arrested him and others and took them to a home which he did not know and then charged him with robbery. He said he knew nothing about it.

2<sup>nd</sup> appellant in his sworn testimony denied taking part in the robbery and explained that on the night in question he was inside his house alone. He confirmed that he and the complainants were known to each other. He maintained that his arrest was as a result of differences he had with the area chief over a woman which had culminated in frequent arrests as the chief had vowed to ensure he remained in prison. He explained that 4<sup>th</sup> appellant is a son to his elder brother and had requested him to help build his house and that is why he was found at 4<sup>th</sup> appellant's home.

The 3<sup>rd</sup> appellant in his sworn testimony told the trial court that on the night in question, he was at his home, as ordinarily, he does not go out at night. On 3-4-05 (i.e the next morning) 4<sup>th</sup> appellant who is his uncle requested him to assist in building his house and he agreed – so he carried tools, among them being a panga, hammer, nails and ropes. He was with 1<sup>st</sup> appellant, 2<sup>nd</sup> appellant and 3<sup>rd</sup> accused (who was acquitted). They had begun building then took a break and went for lunch when police arrived and arrested them.

4<sup>th</sup> appellant worked as a pool attendant at Bush Baby Resort Hotel. He confirms requesting his uncles Mrira Mwafungo and Stephen Garama Mrira to help him build his house and they agreed.

They were joined by Shauri Kenga (1<sup>st</sup> appellant) who was on his own errands – but worked for another of 4<sup>th</sup> appellant's uncles. That is how police found them together.

All the appellants maintained that upon arrest they were taken to the complainant's home who saw them under arrest and subsequently no identification parade was carried out.

The defence witness Damaris Mwaboje (wife of the 4<sup>th</sup> appellant) testified that her husband told her on 2-4-05, that he would call people the next day to help build their house and these were the appellants. It was also her evidence that on the night of 2-4-05, 4<sup>th</sup> appellant spent the night at home and did not leave – they had gone to bed at 9.00pm and he left the home at 6.00am to go and call the builders.

DW2 Kache Maundi, a grandfather to 4<sup>th</sup> appellant testified that he had seen 3<sup>rd</sup> appellant (who is his son) at home on the night of 2-4-05 and he had complained about an aching tooth. He confirmed that 1<sup>st</sup> appellant had come to see him to collect his salary.

The learned trial magistrate in his judgment noted that the complainants had testified to a lantern burning in the house and that some of the appellants were people known to the complainants. He found that PW2 was able to see and recognize their attackers – two inside the house which had a lantern, and one through the wire meshed window and he found her to be truthful. He also noted that when the APs went to the scene PW1 told them he had recognized their attackers and that out of the group of five found at 4<sup>th</sup> appellant's home, four had been seen and recognized at the scene.

He held that:

***“The light and circumstances of recognition of each accused ...were all sufficiently proved and were adequate. The identification was positive. They saw and recognized people they knew although for some not by name but physical appearance and even general area of residence, PW3 testified that they did not find any building straps at home of accused 1...a house under construction was far and not accused 4 or others were building it.”***

The court confirmed visiting the scene but saw no house under construction but there were some straps. He took into consideration the fact that appellants were “presented” to the complainants after arrest but found no prejudice saying that was the route to the police station and that PW1 and PW2 had in any case already said who had attacked them.

The complainant seems to have given the first police officer (PW5) who went to the scene on the very night of the robbery, different information, but the trial magistrate dismissed him as a poor performer in his work and that he did not seem interested in the work at all.

DW1 was equally dismissed as not being a truthful witness and that the fact of no recovery being made of any of the items stolen during the robbery, was not fatal to the prosecution case.

The learned trial magistrate stated:

***“I find it established as a fact that a robbery did occur where PW1 was robbed and injured and PW2 assaulted in the robbery...I also find as a fact that accused 1, 2, 4, and 5 were seen and recognised as participants in the robbery...”***

***The defence raised by each accused persons is a denial of these facts that I do not believe to be true and which I reject as such.”***

The appellants were aggrieved by the findings of the trial magistrate and appealed on grounds that:

- (1) The trial magistrate erred both in law and in fact by convicting them against the weight of the evidence entered.
- (2) The trial magistrate erred in not finding that the identification of the appellant was insufficient to warrant a conviction
- (3) The learned trial magistrate erred in not taking into account the defence by the appellant which raised serious doubts on the prosecution case
- (4) The trial magistrate erred in admitting as true the evidence of the complainant without considering that the appellant had been shown to the complainants and their family members after their arrest which fact greatly prejudiced the appellants.
- (5) The trial magistrate erred in convicting appellants on a charge which was defective.

At the hearing of the appeal, Mr. Ogoti, Counsel for the State informed us that he was conceding to the appeal on grounds that:-

1. The charge does not indicate time, although the evidence shows that the offence took place at about 1.00am. There was also conflicting evidence as to how the witnesses were able to see and identify their attackers – whereas PW1 said he recognized the three by using a torch while they were outside, this same witness later on said that when police first visited the scene he did not tell them he had recognised any one, then later when the APs came with five people and PW1 stated :-

***“As they never gave me a chance to look at them, I never saw the weapons clearly”***

He also asked court to take note that although PW3 claimed that it is 2<sup>nd</sup> appellant who spoke, PW1 said it was not 2<sup>nd</sup> appellant who spoke, saying he knew 2<sup>nd</sup> appellant's voice.

With regard to opportunity for identification Mr. Ogoti asks this court to take note that PW2's evidence was that when they were attacked she lit two lanterns then hid under the bed, and she did not indicate then how she was able to see and recognize the people.

He submitted that PW1 and PW2 were the two witnesses who were at the scene yet they did not give any information at the earliest opportunity to any person in authority, then a day later, they came up with names and the persons taken to their home where they purported to identify and recognize them and the strength of the evidence is in doubt. Mr. Ogoti referred to the decision in **Charles O. Maitanyi V R [1986] KLR.**

The learned Counsel for the State also asked us to consider the manner in which the appellants were arrested and the manner in which the weapons purported to have been used during the robbery were recovered – police just went to the homes of the appellants and collected what they found, ignoring the defence that there was a house to be constructed, hence the gathering at 4<sup>th</sup> appellant's homestead, and that the manner in which the witnesses tried to relate the weapons to the incident was not convincing at all.

Mr. Ogoti also asked us to consider the allegations of a grudge, raised by 2<sup>nd</sup> appellant, and which was never displaced on controverted by prosecution.

To this, Mr. Mouko added that the trial magistrate did not analyse the evidence adduced, but simply took it at face value and accepted it as the truth and that the investigations carried out were extremely shoddy as the investigating officer did practically nothing.

Further that the recovered items were never identified by the complaints as being connected to the robbery and these items seem to have been an idea which came from the APs. Mr. Mouko submitted that the purported recovered items were common tools used in any household. Mr. Mouko also asked us to consider that the undisclosed individual who spotted 2<sup>nd</sup> appellant and pointed him at to police was actually the area chief who had a grudge against him. Mr. Mouko submitted tht appellants were arrested on sheer suspicion and that the trial magistrate failed to consider the appellants defences which were not mere demands but detailed explanations.

We have considered the submissions made by the Assistant Deputy Principal Prosecutor on behalf of the State, as well as the submission by Mr. Mouko on behalf of the appellants – against the record of the trial court.

We note that although the complainants claim to have identified recognized three of the attackers, and one of them by the name Garama, yet immediately when a police officer came to the scene that night, they did not disclose any names to him, only giving descriptions. It is not lost to us that the officers whom the witnesses gave the names were Administration Police Officers attached to the AP Post at Msabaha and they were being given that information the next day at 2.00Pm – this becomes suspect more so as PW 4, confirmed on cross-examination that they were accompanied by the chief. Then comes the issue of opportunity for identification – there was no evidence as to how the hurricane lamps were position in relation to the appellant or even the torch that PW1 referred to. If PW1 used his torch to illuminate the group of ten who were outside the window, just how long did he have his torch trained on each individuals face so as to be able to say with certainty that the person he saw was the 2<sup>nd</sup> appellant? How far or close to the window were the people who were standing outside?

It is also significant to note that according to PW 1, after seeing the people, they went to his shop (as he could hear the shop doors being broken) then in about 15-20 minutes the people entered and he hid under the bed. He was pulled out of his hiding place and it was his evidence that

***“I did not recognize who took me there as they beat me up”***

Further on in his evidence the same witness stated;-

***“On the third day of April 2005, three Administration Police Officers came to view the scene at my home and they left ... I did not tell them I had recognized three people. Then later the Administration Police Officer came with five people they held. It was 2.00Pm. I saw them and recognized the three I had seen at night of attack using my torch at the window”***

This underlined portion of the witness statement gives credit to the appellants contention that complainants only identified them after they were arrested and taken to the complainant’s home and secondly it raises question regarding the opportunity and involvement for identification using one torch to illuminate faces of about ten people standing outside a window at night.

This opportunity for identification is also in issue with regard to evidence of PW2 who says she saw the one standing at the window with the aid of the burning hurricane lamp yet there is no evidence as to where the hurricane was placed in relation to the window, and how bright it was being in mind that it was her evidence that there was no hurricane lamp outside. Then she claimed that light came from the shop, yet again the nature of the light was not disclosed, or how far it was from where 2<sup>nd</sup> appellant stood.

Now despite the evidence of PW1 and PW2 that they only gave the name Garama to police, PW3 AP Rotich claimed on cross-examination that complainant gave him the name of Garama and Mwaboje – just where he got that is not clear and brings into suspicion the likelihood that the APs simply arrested appellants, took them to complainant to show them “these are the people who robbed you”. Then against despite PW 2`s insistence called Garama, APC Rotich on cross-examination said.

***“Girl did not give me name of accused 1 but described him”***

In a strange twist of names of the AP(Pw4) who had accompanied Pw3, on cross-examination said;-

***“Some names were given.....these are Garama and Francisco”***

He did not seem to have heard the name Mwaboje. Then there is the voice of one who spoke – according to PW1, it was not 2<sup>nd</sup> appellant and he could not tell who it was as they were making a lot of noise and the words uttered were;-

***“You go on sleeping and we are coming there right now”***

PW2 who was also present claimed it was 2<sup>nd</sup> appellant who spoke and the words he uttered were;-

***“Kill the mzee, I wanted unga and he refused to loan it to me”***

It is not clear to us how, after she had interacted with the appellant so as to be able to distinguish his voice. Quite apart from that, given the discrepancy between evidence of PW1 and PW2, we find that voice identification was not reliable. The circumstances surrounding the purported identification were clearly flawed, right given the naming of the respects, the physical identification, the opportunity for identification, the prevailing circumstances – all these made it very unsafe and indeed we find that the appeal has merit. Consequently, the conviction is quashed and sentence set aside. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 1<sup>st</sup> day of **July 2009** at Malindi in open court.

**L. NJAGI**

**H. A. OMONDI**

**JUDGE**

**JUDGE**