REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 192, 210, 211, 212 & 213 of 1991(CONSOLIDATED)

JAMES STEPHEN MWONO……1ST APPELLANT

JOHN KINGORI GICHUKI……..2ND APPELLANT

SIMON MAINA KANYI……..…3RD APPELLANT

PETER WAMBUGU MWANGI ……..…….....4TH APPELLANT

JOHN IRUA MWANGI……...…..5TH APPELLANT

VERSUS

REPUBLIC……..……...…….RESPONDENT

(From original conviction and sentence in Criminal Case No 932 of 1990 of the Snr Resident Magistrate's Court at Nyeri, JS Mushelle Esq)

JUDGMENT

These appeals have been consolidated.

The 1st appellant James Stephen Mwono, (original A4); 2nd appellant John Kingori Gichuki (original A3); 3rd appellant Simon Maina Kanyi (original A5); 4th appellant, Peter Wambugu Mwangi (original A1); and 5th appellant John Irua Mwangi (original A2), were jointly convicted after trial by the learned Senior Resident Magistrate, Nyeri of the offence of robbery with violence contrary to section 296(2) of the Penal Code. Upon their conviction, each of them was sentenced to death. Their appeals to this Court are against conviction and sentence.

Briefly, the prosecution case was that on the night of 7th of October, 1990 while the complainant, Anastasia Wambui Ngethe (PW 2) and her husband, Francis Ngethe Mwangi (PW1) were sleeping in their house within Othaya township, they were awakened from sleep by a loud bang on the door of their immediate neighbour, Monicah Wachuka (PW4). The complainant then came out of bed and went to their

sitting room. She switched on all the electric lights in their house including the security lights outside the house. Soon their own main door was smashed open with a huge stone block and some 3 to 4 men entered the house armed with iron bars, *simis* and axes. PW2 then ran towards their bedroom and started pushing back the corridor door leading to the bedroom to keep away the intruders who were also pushing from the sitting room side. They over-powered her and she ran into her children's bedroom where two of the said gangsters pursued her demanding to be given some money. She pleaded with them to spare her life as she led them towards her bedroom to give them some money. By then, her husband (PW1), who was then in the bedroom had armed himself with a spear and opened the door ready to attack the intruders but the gangsters ordered him to surrender the spear and the Somali sword which he had. They disarmed him while his wife (PW2) who had made a fruitless attempt to attack one of the robbers outside her bedroom door finally entered the bedroom and gave out some Shs 8,000/- to one of the said gangsters in the presence of her husband. The gangsters demanded to be given some more money as PW1 was a well established businessman. One of them then took the handbag of PW2 from where he removed Shs 11,000/- making a total of Shs 19,000/-.

The complainant's husband (PW1) testified that he was able to recognise two of the said gangsters who went to their bedroom for the money. They were the 1st and 3rd appellants. He had known both of them before by appearance. He had known 1st appellant for a period of 1 year and that he stays at Kiria-ini Trading Centre while the 3rd appellant had been known to him since 1989 as he works in an open air garage in Othaya. He stated that during the incident, he observed the said men and that it was the 1st appellant who received the Shs 8,000/- which his wife produced which he then passed on to the 3rd appellant. The 3rd appellant then handed over the money to someone who had remained outside their bedroom door and came back. When the 1st appellant removed Shs 11,000/- from his wife's handbag, he again handed over the money to the 3rd appellant who then handed over the same to someone outside the door.

The complainant testified that as the gangsters took out the money from her handbag, she managed to slip outside her bedroom in an attempt to get out of the house. When she reached outside the house, she was confronted by a gang of 8 to 10 men who were outside the house. One of the said men whom she recognised as the 5th appellant came from behind a parked motor vehicle outside the house and ordered her to go back into the house. She had known him by the name Kanega and operates as a *matatu* tout within Othaya bus stage. The said gangsters then ordered both PW1 and PW2 to cover up themselves in their bedroom before they left.

Meanwhile, the complainant's son, Martin Ndegwa Ngethe (PW3) who was then sleeping in a different house was awakened by the noise outside.

He heard of the door bangs and screams and woke up, switched the security lights and got out of the house to go and find out what was happening. He was then confronted by a large group of people who were throwing stones at him. He went back to his house. While peeping through the window, he stated that he was able by means of security lights that were on to see and recognise 2 of the said gangsters who were his old school mates. Those were the 2nd and 4th appellants. After the incident was over, he went to his parent's house and they informed him that they had been robbed.

PW1 and his son (PW3) then left in a vehicle to Othaya Police Station where they reported the matter. The report was received by Cpl Owuor (PW5), PC Muchai (PW6) and PC Mutua (PW8). The police officers then proceeded to the scene on the same night and confirmed that the house of the complainant had been broken into using a huge stone block which they found inside the house at the main door (Ex 1). PW1 and PW2 then informed them that they could recognise 2 or 3 of the said gangsters whom they were able to recognise by appearance. All the 5 appellants were later arrested in the course of police investigations and were charged with the said robbery.

All the appellants denied any involvement in the said robbery. Their defences dwelt largely on the circumstances of their arrest. The 5th appellant, in particular, testified that he had himself gone to Othaya Police Station after he had been informed by his sister in law that the police officers were looking for him. He was interrogated and released. He went back home and on the 10th of October, 1990 some CID

officers came and arrested him. He was again released on p22 and was re-arrested when he reported at the police station as directed.

There is no dispute on the evidence that the complainant (PW2) and her husband (PW1) were robbed of a total sum of Shs 19,000/- on the material night. Although the gangsters were many and were armed with iron bars, *simis* and axes, there was very little violence used if none at all in order to obtain the said money. We are in agreement with both counsels for the 1st appellant and learned state counsel that the offence that was proved to have been committed was simple robbery contrary to section 296(1) of the Penal Code.

The issue that was before the Court for determination was whether the appellants were sufficiently identified at the scene of crime as members of the gang that had robbed the complainant (PW2) and her husband of their money. The appellants are challenging the correctness of such identification.

The trial court failed to grasp clearly that the evidence of identification that was relied upon by the prosecution in this case was basically single witness identification. No appellant was allegedly identified by more than one witness on the material night. Although the complainant (PW2) was the one who had given the gangsters the sum of Shs 8,000/- in her bedroom in the presence of her husband and a further sum of Shs 11,000/- was taken from her handbag in her presence, she never identified any of the said gangsters in her room who took the money. On the contrary, it was her husband (PW1) who was with her who says that he was able to see and recognise the 1st and 3rd appellants as the ones who had taken the said money from the bedroom. The identification of the 5th appellant was based on the sole evidence of the complainant (PW2) who saw him outside her house coming out from hiding behind a parked bus to order her to go back into the house. The identification of the 2nd and 4th appellants was similarly based on the testimony of Martin Ndegwa Ngethe (PW3) who stated that he saw them outside his house through the window and recognised them as his former school mates in the year 1987.

Clearly the evidence of these identifying witnesses, had to be thoroughly tested and examined before any conviction could be safely made, particularly so when it is known that conditions favouring a correct identification were difficult. Although the learned trial magistrate did not specifically refer to the well known authorities: *Abdullah bin Wendo & Another v R* (1953) 20 EACA 166 which was subsequently followed in *Roria v R* [1967] EA 583, we believe that at last he had them in mind. It is important to reflect upon the words so often repeated:

“Subject to 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.”

In the instant case, there were no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of a single witness in respect of each appellant. It must be

emphasised that what is being tested is primarily the impression received by the single witness at the time of the incident. In this case, the witnesses claimed to have recognised the particular appellants they mentioned as having been amongst the said gangsters. The way to approach such evidence of visual identification was succinctly stated by Lord Widgery CJ in the well known case of *R v Turnbull* [1976] 3 All ER 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

We may add that the strange fact is that many witnesses do not properly identify another person even in day light.

Now turning to the evidence and dealing first with the 2nd and 4th appellants who were identified by the complainant's son (PW3) as his former school mates, he stated that they were among the people who were pelting him with stones as he attempted to get out of his house to rescue his parents. He never saw them when he got out but only saw them when he peeped through his window after he had been forced back into the house. According to his evidence, there were security lights that were outside the house that enabled him to see and recognise the said men. There was no evidence as to how far those two men were from the house where the witness was. In the course of the same night before he went to sleep, he stated that he had met with these appellants three times. At first, they asked him for some cigarettes which he did not give them. He later saw them in a large company of people before he went to sleep. When this robbery later occurred involving more than 10 people, it may well be possible that this witness (PW3) merely assumed that this must be the gang that he had earlier seen with his former school mates – 2nd and 4th appellants who had earlier on asked him for some cigarettes in town. This witness talks of the incident that occurred at about 1 am while his parents (PW1 and PW2) referred to the robbery incident that occurred at about 2.15 am. The difference in time lapse is quite great and it may well be possible that these witnesses were talking of two very different incidents. Moreover, there was evidence to show how far the house where PW3 was from that of his parents.

Upon our own evaluation of the recorded evidence, we are far from satisfied that the conviction of the 2nd and 4th appellants were safe. We entertain some considerable doubt that they were members of the gang

that had attacked and robbed the complainant in her house on the material night.

Turning now to the case against the 5th appellant whom the complainant saw emerging from hiding behind a parked bus outside her house, we observe that at that particular time, the complainant was trying to escape from the danger that was posed by the robbers that were already in her house who had taken her money and threatened to kill them. She must have been shocked when she got out only to find a larger group of 8 to 10 armed men waiting who ordered her to go back to her house. She obeyed and went back. Her encounter with these men outside her house was quite short. She had no time to observe them. She merely had a glimpse of them when she attempted to get out of her house. If she could not identify any of the men who were in her house whom she personally gave Shs 8,000/- and took Shs 11,000/- from her handbag in her presence, it is unlikely that she could accurately recognise any of the men that had remained outside the house. Her identification of the 5th appellant in these circumstances was therefore bound to be mistaken. We are unable to rule out any possibility of mistake or error on her part.

This now brings us to the case against the 1st and 3rd appellants who were identified by the complainant's husband (PW1) in his bedroom. We believe that the electric lights inside the room were on. This was clear from the evidence of PW1 and PW2. PW1 stated that he stood watching as his wife was taking out the money to give the said gangsters. He saw her giving 1st appellant Shs 8,000/- which he then passed on to the 3rd appellant who in turn handed over the money to someone outside the room and he came back. He then saw the 1st appellant removing some money from his wife's handbag, Shs 11,000/- which he again gave the 3rd appellant who then passed over to someone outside the bedroom. These men never bothered to disguise their appearance. He had seen them before. The 3rd appellant operates an open air garage. PW1 is himself a transporter who owns several vehicles including passenger vehicles. With this kind of business, he is likely to know someone like the 3rd appellant whom he says works in an open air garage in the same town. He had known him since 1989. He had similarly known the 1st appellant for a period of one year and knew that he comes from Kiria-ini. He knew him by appearance and even lead the police to look for him and he pointed him out to the police. Only two men had entered the bedroom of the complainant to take the money while others remained outside the bedroom. We believe that PW1 had therefore good opportunity to see the said men clearly under the electric lights that were on inside the bedroom. There was no violence at all inside the said bedroom on the complainant and her husband. PW1 was therefore never

in a state of shock or pain. The gangsters were never in a hurry to leave and did not disguise their appearance. PW1 had therefore time to see and recognise them. We believe that he had known them before.

Upon our consideration and evaluation of the recorded evidence, we are satisfied that the 1st and 3rd appellants were amongst the gangsters that had gone into the bedroom of the complainant and robed her of her money. In our view, their defences were rightly disbelieved by the court below. We are in agreement with the findings of the learned trial magistrate that PW1 clearly saw the 1st and 3rd appellants in his bedroom and recognised them as he had known them before. We exclude any possibility of mistake or error on his part.

As we have already stated, the offence that was proved to have been committed was simple robbery contrary to section 296(1) of the Penal Code. We have found that the 2nd, 4th and 5th appellants were not involved in this robbery. We allow their appeals, quash their conviction and set aside the death sentence that was imposed on each of them. We order that each of them shall be set free and be released forthwith unless otherwise lawfully held.

Similarly, we quash the conviction of the 1st and 3rd appellants for the offence of robbery with violence contrary to section 296(2) of the Penal Code and set aside the death sentence that was imposed. However, we substitute thereof a conviction for the 1st and 3rd appellants on a lesser offence of robbery contrary to section 296(1) of the Penal Code and sentence each of them to imprisonment for 5 years together with 3 strokes corporal punishment. We order that each of them shall undergo a period of police supervision upon release for 5 years. This sentence will be effective from the 5th of August, 1991 when the appellants were first convicted.

Dated and Delivered at Nairobi this 12th day of May 1994.

E.M.GITHINJI **S.O.OGUK**

JUDGE **JUDGE**