



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 306 OF 2010**

**DAVID MARANGU NJERU.....1<sup>ST</sup> APPELLANT**

**JOHN NJOMO KABENGI.....2<sup>ND</sup> APPELLANT**

**VS**

**REPUBLIC .....RESPONDENT**

***(Appeal from the judgment of the High Court at Embu,***

***(Khaminwa & Kasango, JJ.) dated 7<sup>th</sup> December, 2007***

***in***

***H.C.C.A. No. 81 consolidated with 82 of 2010)***

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**JUDGMENT OF THE COURT**

On the midnight of 7<sup>th</sup> and 8<sup>th</sup> October, 2004, Rose Wangai Muhia, (PW1) her late husband Evans Muchira Matu, her sister Veronica Wandia amauhia (PW4) and their six month old baby were viciously attacked and robbed by a gang of robbers at their home in Nyagati Village in Kirinyaga. Evans Muchira Matu (deceased) was also brutally murdered during the said robbery. The background information relating to this appeal can be captured from the evidence of PW1 and PW4, the victims of the vicious attack, and also from the other witnesses who went to rescue the victims and the formal witness comprising the doctors, and the police who investigated the matter and arrested the appellants respectively.

PW1 and her late husband were rudely awoken by a loud bang while sleeping in their house at Nyaganti village Kirinyaga District on the night of 7<sup>th</sup> and 8<sup>th</sup> October 2004. As the couple tried to check what was happening, they found a gang of intruders who were armed with dangerous weapons had gained entry into their house. The intruders started beating them and they immediately clobbered PW1's husband and hacked him to death using crude weapons. They repeatedly beat up PW1 while demanding for money and also threatening to kill her the same way they had killed her husband. PW1 put up a struggle with the robbers, they broke a wall unit and placed it on her; during the struggle she sustained very serious injuries from which she was admitted at Kerugoya District Hospital for 2 days.

During the ordeal the robbers also threatened to kill PW1's baby who was only 6 months old, they manhandled the baby and violently threw him to the bedroom. Luckily the baby sustained some minor injuries which were treated at the Kerugoya District Hospital. The robbers stole Kshs. 2,000/= from PW1 and unknown amount of money from her husband. The robbers also stole other personal and household items that are indicated in the charge sheet. None of those items were recovered. PW1 told the trial court that she was able to recognize the two appellants during the robbery. She described how she had known the 1<sup>st</sup> appellant as a person who used to sell eggs in her bar. They used to call him by the nickname Wamayai. PW1 had rented her hotel to the 2<sup>nd</sup> appellant; she testified that immediately the police were called at the scene on the material night, she mentioned the appellants as being among the robbers. PW1 managed to sneak through the kitchen and went to the house of her neighbor called Ngare, she told them of the attack. It was Ngare who called PW1's husband's brothers but by the time they arrived at the scene, her husband had already succumbed to the injuries.

When the robbers, struck on the material night, PW4 was sleeping in a separate room, she heard some noise and her sister crying as they were being beaten. She woke up and switched on the electricity lights, one person whom she described in her evidence as Marangu the 1<sup>st</sup> appellant (also known by the nick name Wamayai) entered her room armed with a stick. Although he threatened to kill her he only searched the room and left. PW4 peeped through a gap on the door and saw some three other robbers outside. Among them she recognized John the 2<sup>nd</sup> appellant. PW4 tried to escape through the window, but she was not very lucky as while outside, she met other robbers, who hit her with a *rungu* on the neck, she fell down and lost consciousness momentarily. When she regained consciousness, many people had gathered, her brother in law was lying there dead, her sister was wounded. PW4 recorded a statement with the police and stated that she had recognized two suspects during the robbery; and named them as Marangu and John, the 1<sup>st</sup> and 2<sup>nd</sup> appellants.

Several people came to the rescue of the victims this robbery, among them was the deceased brothers Magondu Matu (PW2) and Jonna Nguche Josiah (PW7). They found their brother dead, PW2 called the police. PW1 immediately told the witnesses who had assembled that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were among the attackers. At the scene of crime a cap was collected which PW4 said was worn by the 1<sup>st</sup> appellant when she saw him during the robbery. Another neighbor Julius Muthee (PW9) also responded to the cries of distress at Muchira's home on the material night. When he went there he found PW1 lying down with injuries and her husband was dead. He saw a cap that he too recognized as the one he used to see one of the suspects known as Wamayai wearing (1<sup>st</sup> appellant).

These witnesses were joined by the area Chief Wilson Mwaniki Mbugi, who testified as (PW6). It is necessary to point out that during the trial, the appellants had requested for the witness statement by the Chief but the prosecution stated that they did not intend to call PW6 as a witness. We do not know at what stage or why the prosecution changed its mind and called this witness, nonetheless, we will revisit this issue later on as this appeal largely turns on this issue whether the appellants, having been denied an opportunity to see the witness statement by PW6, were afforded a fair trial. The Chief also called the police and visited the scene, and he was present when the appellants were arrested. PW1 told the Chief also that she recognized two of the suspects and gave the names of the appellants. The chief led the police to the house of the 1<sup>st</sup> appellant, they did not find him at home immediately after the robbery, but at about 5 am they found him at the hotel he had rented from the deceased. The 1<sup>st</sup> appellant was found as he preparing to lock the hotel; he was apprehended and was taken to the police station where he was charged with the offence of robbery with violence.

The police took PW1 and the body of her husband to Kerugoya District hospital and mortuary respectively. At the hospital, PW1 was treated by Dr. Ngotho Nyamu PW8; he completed the P3 form which was produced in evidence. PW1 had suffered injuries to the head, and multiple cuts which were classified as harm.

PC Tobias Musyoki, (PW10) carried out some investigations and the highlight of his evidence was a cap that was recovered from the scene of crime. The cap was left behind by the robbers as they fled from the scene of robbery. PW1 prepared the inventory of the blood samples and the cap which he forwarded to

the Government Chemist for analysis. The results revealed that the cap had blood stains of A and B blood groups. The blood sample of the deceased was group A while that of the 1<sup>st</sup> appellant was B. This witness produced the report from the Government chemist. PW10 also arrested the 1<sup>st</sup> and 2<sup>nd</sup> appellants as suspects after they had been named by PW1 and PW4.

Both appellants were jointly charged before the Principal Magistrate's Court at Kerugoya with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the charge stated that on the night of 7<sup>th</sup> and 8<sup>th</sup> October 2004, at Nyanganti village Kirinyaga District within the then Central Province, jointly with others not before court while armed with dangerous weapons namely knives, rungas, and axes robbed Rose Wangai Muia one water pump make Honda, two mobile phones, one sweater, CD player disc and Kshs.102,100/= all valued at Ksh.202,200/= and immediately before or immediately after the time of robbery caused the death of Evans Muchira Matu.

The appellants pleaded not guilty, the prosecution called a total of 10 witnesses, at the close of the prosecution's case the appellants were found to have a case to answer. When placed on their defence they opted to say nothing in defence. The learned trial magistrate considered the evidence by the prosecution and was satisfied that the prosecution had proved its case to the required standard, convicted both appellants and sentenced them to death. The appellants unsuccessfully appealed before the High Court, Khaminwa & Kasango, JJ., dismissed the consolidated appeals by both appellants for lacking in merits. This is the judgment that has provoked this second appeal which is predicated on the appellant's homegrown memorandum of appeal.

At the hearing of this appeal, Mr. Kimunya learned counsel for both appellants argued grounds No. 6 & 7 which touched on the appellants' fundamental rights to a fair trial as provided for under **Article 50 (2) (e) (f)** of the **Constitution**. He submitted that the appellants were not afforded adequate facilities, that is; they were not furnished with the witness statement in regard to the evidence of PW6; that notwithstanding, the trial court considered the evidence of PW6 and made findings that were prejudicial to the appellants. The trial court considered that it was the chief who led to the arrest of the 1<sup>st</sup> appellant which was a crucial piece of evidence. The learned Judges of the High Court were also faulted for erroneously concluding that the chief was not called as a witness; for failing to fastidiously go through the record of the trial court; and for failing to observe that once the appellants were denied the statements of a crucial witness, they protested and were unable to properly cross-examine the witnesses or to offer their defence thus they were denied a fair trial.

On the part of the State, Mr. Kaigai, the learned Assistant Director of Public Prosecutions opposed this appeal. Counsel for the State pointed out that the appellants were properly recognized by the two victims of the robbery. They told more than 5 witnesses who responded to the distress call that they had recognized two of the assailants and they named them. The 2<sup>nd</sup> appellant dropped his cap at the scene, it was blood stained and when it was analyzed at the government chemist, the blood stains matched the blood of the 2<sup>nd</sup> appellant and the deceased, thereby placing the 2<sup>nd</sup> appellant at the scene of crime. The appellants adopted a belligerent attitude during the trial. They refused to cross-examine some witnesses, but the 2<sup>nd</sup> appellant apologized to the trial magistrate and requested that witnesses be recalled, but the court found the request unreasonable. The appellants deliberately tried to frustrate the trial, merely to come on appeal and challenge the trial which they boycotted; moreover, the issue of a fair trial was not canvassed before the High Court; it is clear the appellants wanted to control the criminal trial; the appellants opted not to say anything in their defence, which was also within their rights to choose to say nothing. In the circumstances nothing displaced the prosecution evidence which was strong as it proved all the ingredients of the offence.

We have considered the record, submissions by counsel and the law. This being a first appeal, we have to remind ourselves that by dint of the provisions of **Section 371** of the **Criminal Procedure Code**, this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Chemangong - vs- R, [1984] KLR 611**. In **Kaingo -vs- R, (1982) KLR 213 at p. 219** this Court said:-

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”.***

The only issue that was raised by counsel for the appellant was a complaint that the appellants were not accorded a fair trial. This was because the appellants requested to be furnished with witness statements in respect of the area Chief but the prosecution indicated that they did not intend to call him as a witness. The record shows that he was, nonetheless, called as PW6. This ground was not raised before the High Court, nonetheless, since the issue of fair trial as a principal of law and also a constitutional right cuts across all the other grounds of appeal that were before the learned Judges especially the contention that the trial of the appellants was irregular; that the appellants were denied the opportunity to transfer their case before another magistrate; that the trial proceeded without the participation of the appellants, and the trial magistrate failed to comply with **Section 146 (4) Cap 80**, we deem it necessary to address this issue.

The record shows and it was aptly captured in the judgment of the High Court how the trial proceeded and we think it is necessary to reproduce a pertinent portion of that Judgment:-

***“We have noted that after the evidence in chief of PW1 when the appellants were given a chance to cross-examine witness they requested for investigation diary and the chiefs statement. The trial magistrate ruled that investigation diary (sic) not available and the chief’s statement was not available because chief was not in the list of witnesses and there was no statement taken from him. Then trial magistrate ordered the appellant to proceed with cross-examination. However, thereafter accused 2 applied for OB on 8<sup>th</sup> October 2004. On that day hearing was adjourned to 27<sup>th</sup> July, 2005, on which date the appellants prayed that their case be transferred to another court. The trial magistrate made a ruling and allowed time to second accused to engage a lawyer and (sic) reject application for transfer. On 29<sup>th</sup> August, 2005 the appellant refused to proceed with the hearing on the ground that accused 2 did not have a lawyer for lack of money. Trial magistrate made a ruling saying he had no reason to transfer the case to another court. The trial was adjourned to another date. The appellants refused to cross-examine the complainant. On 27<sup>th</sup> September, 2005, when the trial was scheduled to proceed, the appellants refused to enter the court to proceed with the trial. Court adjourned the trial to 21<sup>st</sup> November, 2005 warning them that if they failed to proceed the trial would proceed in their absence.***

***On 13<sup>th</sup> December, 2005, (sic) for hearing the appellant came to court but they did not want to participate in the trial. PW2 gave evidence. Both appellants did not cross-examine him. On 20<sup>th</sup> February 2006, PW4 gave evidence. The appellants refused to cross-examine him though present in court. PW5 gave evidence on 14<sup>th</sup> March 2006. Accused were present but refused to cross examine. It was same for PW6, PW7 and PW8. However PW9 was cross-examined by 2<sup>nd</sup> appellant David Marangu but appellant No. 1 declined. When PW10 gave evidence 2<sup>nd</sup> appellant cross-examined him, then appellant No 2 told the court “I am praying for one chance to recall complainant whom I did not ask questions because appellant No. 1 cheated me”. He added “we are sorry for what we did, we will not repeat the same”. In a considered ruling the trial magistrate rejected the application exercising his discretion under Evidence Act Cap 80 Section 146 (4). When ruling under Section 211 of the CPC (sic) was made requiring the appellants to defend themselves the appellants submitted:***

***“I will keep quiet”***

***“I will keep quiet”***

In a nutshell of the above, captures the scenario that was before the trial court as summarized by the High Court Judges. The appellants were accorded an opportunity to cross-examine the prosecution witnesses, they were also given an opportunity to give their defence but they declined.

The gravamen of this appeal which is the issue before us is regarding the evidence of the area chief Wilson Mwaniki Mbugi who testified as (PW6). The appellants were not furnished with the witness statement in respect of this witness. It is trite that an accused person is entitled to be furnished with witness statements. However it is manifestly clear that the conviction of both appellants was not predicated on the evidence of PW6. Thus the question we have to ask ourselves is whether the appellants were prejudiced because they were not furnished with the statement of PW6. We have to look at the weight that was attached to the evidence of PW6 and whether the conviction had any bearing on the same, and we are not prepared to hold that the appellants suffered any significant violation that can amount to unfair trial or at all.

In the trial apart from PW6 whose evidence we think can safely be ignored for whatever reasons, there were 9 other witnesses who testified. The appellants were convicted principally on the strength of the evidence of identification through recognition by the two victims of the robbery that was PW1 and PW4. The two witnesses named the suspects in the presence of two brothers of the deceased and the arrest was effected almost immediately after the robbery. PW3 and PW9 both neighbors of the deceased and the two victims of robbery were present when the police recovered a cap from the scene of robbery and said that they recognized it as the one that they used to see with the 2<sup>nd</sup> appellant as he went about selling eggs. The blood stains found on the cap matched the blood group of the 2<sup>nd</sup> appellant and that of the deceased, thereby placing him at the scene of crime. PW6 merely participated in the arrest of the appellants and he was not alone, PW 2 and PW10 were there during the arrest of the appellants. Accordingly, even if his evidence was ignored, the convictions of the appellants remain safe.

From what we see, the Judges of the High Court delved into deeper analysis of all the evidence before arriving at the conclusion which is entirely justified. The evidence of identification of the appellants was simply overwhelming and we find the convictions are entirely safe. We find no justifiable reasons for us to depart from the concurrent findings of the two courts below.

In the result, we find and hold that the appellants' convictions are safe, in the upshot, the appeal by the 1<sup>st</sup> and 2<sup>nd</sup> appellants lack merit and it is hereby dismissed.

***Dated and delivered at Nyeri this 14<sup>th</sup> day of April, 2015.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**