



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 463 of 2010

MOSES GIKUNDI LITHARA.....1<sup>ST</sup> APPELLANT

JOGINDER KABURU..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Meru (Lesiit, & Kasango, JJ.) dated 29<sup>th</sup> October, 2010*

*in*

*H. C. Cr. A. NO. 81 OF 2009)*

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**JUDGMENT OF THE COURT**

The two appellants were jointly charged together with one **Milton Mugendi Nkabu** with robbery with violence contrary to **section 296(2)** in count 1. The two appellants were also charged in count II and with assault causing actual bodily harm contrary to **section 251** of the Penal Code.

At the close of the prosecution case the trial magistrate made a finding that the appellants' co-accused had no case to answer and acquitted him. However, the two appellants were convicted on both counts and sentenced to death for robbery with violence. The trial magistrate did not impose any sentence for assault saying that the sentence would remain suspended. The appellants appeal to the High Court were dismissed.

In the first count the appellants were alleged to have robbed **Jerusha Mwakiuna Kariti** of a radio valued at Shs.6,000 and cash Shs.4000 on 6<sup>th</sup> April 2008 while armed with pangas. On 6<sup>th</sup> April 2008, at about 8.30 p.m. **Jerusha Mwakiuna Kariti** [PW1] (**Jerusha**) and her husband **Jason Kariti Mungania** [PW3] (**Jason**) were in their timber house when people called them to open the door, saying that they were police officers. The door was immediately kicked open and two people who were armed with pangas entered and went to the bedroom where Jerusha and Jason were. There was a tin lamp on the frame of the wall above the bed. Jerusha was slapped and hit with a stick on the right knee and she fell down.

Jason was hit with a panga on the cheek and several times on the ribs. He was then held, his belt removed and was tied with his own belt and laid on the ground. The two then demanded Shs.200,000 from Jerusha claiming that she had been given the money by her son. The complainant told them that she did not have the Shs.200,000 but showed them some money which was under the cushion of a sofa set in the living room. The money was taken, counted and found to be Shs.4,000/-. One of the robbers flashed a torch on Jerusha and cut her skirt, petty coat and underwear into pieces leaving her naked. The robbers left after about 30 minutes. At about 10.00 p.m. Jerusha and other people reported the robbery to **Lucy M'Kinganga [PW2] (Lucy)** the Chief of the area. She reported to Lucy that she had recognized two people Gikundi Moses and Joginder Kaburu who are the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively.

The Chief, Jerusha and other people accompanied by administration police went to the house of Joginder first. They found him asleep and he was arrested and a pair of gumboots, jungle shirt and panga were taken away. They then proceeded to the home of the second appellant. He was found asleep and a jungle jacket, panga and rungu were taken away. The items were taken from the home of each appellant because Jerusha had reported that the robbers had such things at the time of the robbery.

The 1<sup>st</sup> appellant stated at the trial that on the material day, he arrived at his house at 7.00 p.m. and slept until 2.00 a.m. when the sub-chief woke him up, and that he was framed up by the sub-chief because he had a land dispute with the sub-chief's father. On his part, the second appellant stated that on the material day he slept after supper until 2.00 a.m. when he was woken up and arrested.

The trial magistrate evaluated the evidence and made a finding thus:

***“Both the complainants said that the tin lamp light was on when the people entered. Jason PW3 said that it was on a frame on the wall above the bed. He said that it was producing enough light to light up the room. I am convinced that the two complainants clearly saw the people as they entered in aid of the candle light (sic). The candle was producing enough light to enable them to see clearly. The accused were people well known to the complainants. The accused were not wearing anything on their heads. The witnesses positively identified the accused.”***

The High Court after cautioning itself on the dangers of relying on the evidence of visual identification, made a finding that Jerusha and Jason knew the appellants before; that the two witnesses spent a long time with the robbers during which the robbers were conversing with them and harassing them to produce money and that although the circumstances of visual identification were difficult, the evidence of identification by recognition was safe.

The main ground of appeal by each appellant states that the High Court erred in upholding a conviction while relying on the evidence of identification by recognition without observing that the circumstances which prevailed during the attack could not have warranted positive identification.

**Mr. Muhoho**, learned counsel for the appellants submitted, among other things, that the only source of light was the lamp, that there was no evidence on the intensity of light; that the tin lamp was switched off at some point; that Jerusha was lying on her abdomen under the bed and that the High Court also relied on identification by voice which was not in issue.

On his part **Mr. Kaigai** the Ag. Assistant Deputy Public Prosecutor, supported the conviction and sentence submitting that there was no possibility of mistaken identity; that Jerusha identified the appellants with aid of light from tin lamp and from torches; that the tin lamp was not put off immediately; that Jerusha gave description of the clothes that the appellants were wearing which were found in their houses and that Jerusha had known the appellants for 15 years.

The conviction of the appellants was solely dependent on the evidence of recognition by Jerusha and Jason. The only legal issue which arises in the appeal is the identification of the appellants. This was a case of identification at night in circumstances which were not wholly conducive to positive identification. It is the law that such evidence should be tested with the greatest care. Before the conviction of the appellants can be sustained the court must be satisfied that Jerusha and Jason were

honest and un-mistaken about their identification of the appellants.

The robbery took place early in the evening at about 8.30 p.m. The evidence of Jerusha and Jason show that they were not asleep. There was consistent evidence from Jerusha and Jason that there was a tin lamp in the bedroom which was on. Jerusha testified that she was standing next to the bed when the robbers entered the bedroom and assaulted her. She was taken from the bedroom to the sitting room where she showed the robbers where money was. She was then returned to the bedroom. Her clothes were cut when she was standing. She described the role that each appellant played while inside the house. She testified that she had known 1<sup>st</sup> appellant for 15 years and the 2<sup>nd</sup> appellant since birth, and that the home of each appellant was less than a kilometre from her house. She also testified that only the two appellants entered into the house but after they left she saw other two people walking away in the company of the appellants.

On his part Jason testified that there was a tin lamp in the bedroom which produced enough light and that he was seated on the bed when the two robbers entered into the bedroom and that he also described the role each appellant played, and the clothes each was wearing. He struggled with the robbers as they were tying him. He also testified that after the 1<sup>st</sup> appellant poured the money which was in form of coins that he had taken from the sitting room, he counted it using torchlight, and that it is at that point that he saw that the 2<sup>nd</sup> appellant (Kaburu) was wearing gumboots, while the 1<sup>st</sup> appellant (Gikundi) was wearing a pair of sleepers. He also testified that he had known the appellants since 1992 and that they stayed in his house for about 25 minutes.

The evidence of Jerusha and Jason was clear and consistent. Both the Chief (Lucy) and **AP Clp. Jacob Mugwika** [PW4] testified that Jerusha reported that she had identified two robbers and gave the names of the appellants and the appellants were arrested a few hours after the robbery.

The evidence that Jerusha gave the names of the appellants to the people in authority immediately after the robbery, lent credence to her evidence that she had recognized the appellants. Further, the fact that the clothing that each appellant was wearing at the time of the robbery as described by Jerusha, supported her evidence of recognition.

There was concurrent findings by the two courts below that Jerusha and Jason had recognized the appellants. Those findings were based on the credibility of the two witnesses. The court cannot interfere with those findings unless no reasonable court could have made such findings. On our own analysis, we are satisfied that the concurrent findings were supported by the consistent and credible evidence of the two witnesses.

In the result, the appeal has no merit and is hereby dismissed.

***DATED and DELIVERED at NYERI this 6<sup>th</sup> day of February, 2013.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**