**REPUBLIC OF KENYA**

**Court of Appeal at Nyeri**

**Criminal Appeal 651 of 2010**

**PETER GITONGA GERALD**

**PETER GITHINJI MWANGI.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

***(An appeal from Judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 21st October, 2008***

**in**

**H.C.CR.APP. NO.30 & 44 OF 2006)**

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**JUDGMENT OF THE COURT**

**1.** In this second appeal, two appellants, Peter Gitonga Gerald (1st appellant) and Peter Githinji Mwangi (2nd appellant), were charged 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 15th day of August, 2005 at Majengo Estate in Laikipia District within Rift Valley Province, jointly with others not before Court, being armed with offensive weapons namely knives, robbed John Kahiga Kiraru of cash 2,000/=, one Jacket and one identity card all valued at Kshs.2,800/= and at or immediately before or immediately after the time of such robbery used violence on the said John Kahiga Kiraru.

**2.** The appellants were tried before the Senior Resident Magistrate, Nanyuki and at the conclusion of their trial, both were found guilty as charged, convicted and each of them sentenced to death. Being dissatisfied with their respective conviction and sentences, both appellants appealed to the High Court and the learned Judges (Kasango and Makhandia, JJ.) after analyzing and re-evaluating the evidence against each appellant came to the conclusion that there was no basis for interfering with the trial Court's decision.

**3.** That is the judgment that has provoked this second appeal. By dint of the provisons of Section 361 of the Criminal Procedure Code, this Court is mandated to consider only points of law. See the case of ***Njoroge v Republic [1982] KLR 388***, the Court held:

***"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the***

***Court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."***

**4**. The evidence that was before the learned trial magistrate was given by the complainant and two police officers who arrested the appellants. John Kahiga Kiraru (PW1) testified that on the 15th August, 2005, at about 2.00 p.m., he was walking along Majengo, near the stadium. He found four men. One of them was standing on the road, and he stopped PW1 and asked him whether PW1 was selling potatoes. PW1 had two *debes* of potatoes that he was selling. After negotiations the man pretended to have agreed to pay Kshs.130/= per *debe*. Suddenly another man emerged from the back and placed a knife on PW1's neck. The other man put his hand in the pocket and removed Kshs.2,000/=. Another one joined the duo. They also stole PW1's jacket, identity card and Kshs.2,000/=.

**5.** PW1 reported the matter to the Nanyuki Police Station. After reporting, he was accompanied back to the Majengo area by PC Aggrey Kibaba (PW2) and PC Fredrick Gikundi (PW3) as he had told the police officers that he would be able to identify the assailants. At Majengo, PW1 saw one man (1st appellant) whom he identified as one of the men who had robbed him a while ago. The police arrested him. PW1 saw the the 2nd appellant, pointed him out to the police and he was also arrested. On being searched by the police, they recovered a pen-knife from him, which PW1 said was the one used to attack him.

**6.** After the prosecution's case, both appellants were found to have a case to answer and they elected to give sworn evidence. They gave a similar version of evidence which in a nutshell stated that they used to do casual work for PW1. On 15th August, 2005 they demanded from PW1 for their money for work done amounting to Kshs.900/= for each. They claimed that they had carried potatoes for PW1 and he had refused to pay them. On that material day, they quarrelled and PW1 went for the police, and that is how they were both arrested and charged with the offence of robbery with violence which they denied.

**7.** In the course of his judgment, the learned trial magistrate stated: -

***"Having carefully considered all the evidence adduced by the prosecution witnesses and the defence and also submissions by the defence, I am satisfied that there is sufficient evidence adduced by the prosecution in this case to prove (sic) the essential element prerequisite to proving a charge of robbery with violence C/S 296(2). The accused were in a group of others not before court and accused 1 was arrested with a knife which he held to his neck and when the accused robbed the complainant they even tore his t-shirt and they actually used violence on him."***

Having so stated the learned trial magistrate convicted both appellants and sentenced them each to death.

**8.** The appeal before the High Court was also dismissed. The High Court stated, *inter alia*: -

***"We find that PW1's evidence was consistent and sufficient to support a conviction of the charge. It is pertinent to notice that the appellants did not cross-examine PW1 on the issue alleged in their defences that they were his employees and that he owed them some dues. That defence indeed was an afterthought. The learned trial magistrate was correct in our view in rejecting that defence. On our part we find that there was no merit in the appeal filed by the appellants."***

**9.** When this appeal came up for hearing before us, Mr. Nderu, learned counsel appearing for both appellants relied on the homegrown memorandum of appeal filed by the appellant and raised three main issues:

(1) Identification

(2) Misdirection on the evidence by the two Courts below.

(3) Failure by the learned Judge to re-evaluate the evidence as required by the law.

**10.** Mr. Nderu went on to submit that the trial Court failed in its duties to caution itself while basing a conviction on the evidence of a single identifying witness. The Court also failed to analyze the circumstances surrounding the identification of the appellants when they were arrested. That had the learned Judges of the High Court carried out their duty of re-evaluating the evidence and subjecting it to fresh consideration properly, they would have found that PW1 did not give any description of the assailants to the police; that evidence that the appellants were arrested at Majengo would lend credence to the defence and lastly that what transpired between PW1 and the appellants was merely a quarrel which was reported to the police.

**11.** Mr. Kaigai, learned Acting Assistant Deputy Public Prosecutor supported both conviction and sentence, notwithstanding that the prosecution had conceded to the appeal in the High Court. He submitted further that although this was a conviction based on evidence of a single witness, PW1 was able to observe the assailants and he gave their descriptions to PW2 and PW3 who merely arrested the appellants based on the information they got from the complainant. As regards the defences, Mr. Kaigai was of the view that they did not dent the prosecution's case, and they were properly dismissed. The appellants were therefore properly convicted based on the evidence of PW1 who had properly identified the appellants and led the police to Majengo where they were arrested.

**12.** Mr. Nderu took issue with this evidence and rightly so as the learned trial magistrate or even the learned Judge of the High Court did not test the entire evidence including the defence with care. See the case of ***Maitanyi v Republic [1986] KLR*** **page 200** where this Court repeated the oft' cited words in well known authorities *Abdulla Bin Wendo & Another V Reg (1953) 20 EACA 166* followed *in Roria Vs Rep (1967) EA 583*

***"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 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."***

**13**. The learned trial magistrate did not warn himself of the dangers of relying on the evidence of a sole identifying witness although in our view he went about analyzing the circumstances under which the offence took place, namely that the offence took place during the day, the appellants were arrested at Majengo wearing the same clothes they had and therefore there was no possibility of mistaken identity. There was misdirection, especially on failure to consider the appellants defences and the circumstances of the arrest, as well as the evidence of PW1.

**14**. The learned Judges of the High Court accepted these findings. The conviction was based on the evidence of a single witness. This evidence, including the defence needed to be tested with the greatest care. The two courts failed to recognize that the defence by the appellant raised certain issues that challenged the evidence of PW1 especially at to whether the appellants had committed the offence of robbery with violence, a simple robbery, theft from a person or a quarrel over unpaid dues. The appeal in the High Court was conceded by the prosecution on the grounds that the evidence revealed an offence of theft from a person. This matter was however not given consideration by the learned Judges of the High Court.

**15.** Going back to the evidence of identification, we are in agreement with Mr. Nderu that there is no evidence at all that PW1 gave the descriptions of his attackers to the police, before they set out to arrest them. Secondly, the evidence is not clear on how the police arrested the appellants in connection with the offence. These are persons who were found in Majengo after committing a serious offence just a few minutes earlier. It is not clear whether the police carried out a swoop, or a raid in their houses or whether the appellants were just arrested while going about their own business. If the later was the case, then it gave credence to the defence by the appellants that they had merely quarreled with PW1 over their unpaid dues. This is because it is unlikely and beats logic that an assailant can commit a serious offence such as

robbery with violence during the day time and after a few minutes, be arrested immediately while going about his business within the locality.

**16.** In our view the appellants defences were disregarded. This was a misdirection. Had it been tested alongside the prosecution's evidence, and in particular the fact and there was no evidence of how the police were able to identify and effect arrest of the appellants from a residential place, the two courts below would perhaps have arrived at a different conclusion. Moreover, the High Court Judges failed to give consideration to the prosecution's concerns that the offence revealed by the evidence reevaluated was theft from a person. We therefore find that the conviction of the appellants for the offence of robbery with violence was not safe to sustain and this appeal has merit.

**18.** We need not say more as we are satisfied that there is justification for us to interfere with the findings of the two courts below. In the result, we allow the appeal and quash the conviction and set aside the death sentence imposed on the appellants. The appellants to be immediately released unless otherwise lawfully held.

**Dated and delivered at Nyeri this 6th of February, 2013**

**ALNASHIR VISRAM**

**….....**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**….....**

**JDUGE OF APPEAL**

**M. K. KOOME**

**….....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**