



IN THE COURT OF APPEAL  
AT NYERI

(CORAM: OMOLO, GITHINJI & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 118 OF 2009

BETWEEN

KENNETH KARANU MWANGI ..... 1<sup>ST</sup> APPELLANT  
JOSEPH KINUTHIA NJOGU ..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*( Appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ) dated  
11<sup>th</sup> May, 2009*

In

**H.C. Cr. A. Nos. 195 & 196 of 2008)**

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**JUDGMENT OF THE COURT**

This is an appeal against the judgment of the superior court dismissing the appellants' appeal against the judgment of the Principal Magistrate, Murang'a whereby the learned Magistrate convicted the appellants of robbery contrary to **section 296 (2)** of the Penal Code and sentenced each appellant to death as by law required. The appellants and another were jointly charged with two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. The first count alleged that on 9<sup>th</sup> December, 2006, the appellants and one Paul Njuguna Mugethe (Co-accused) robbed Joseph Manyeki Wairimu of a bicycle and Kshs.200/- The 2<sup>nd</sup> count alleged that the two appellants and the co-accused, on 6<sup>th</sup> January, 2007 robbed John Njoroge Mwangi of Kshs.600 and an identification card. The appellants and the co-accused were acquitted of the first count after trial . However, the two appellants were convicted of the 2<sup>nd</sup> count. The co-accused was acquitted.

The prosecution called three witnesses to support the second count – namely John Njoroge Mwangi (PW4), the complainant; APC Francis Mwangi (PW5), an administration police officer at Kiria Police Post who arrested the appellants and P.C. Joseph Kariuki (PW6) the investigating officer who charged the appellants.

The complainant gave brief evidence at the trial. He testified that on the material day he was attacked by the two appellants at 10.00 p.m. at Kiria market; that he was hit on the shoulder and fell down; that the appellant continued beating him; that the appellants took his Kshs.600; that his identity card also got lost; that he screamed but no help came; that he knew the two appellants as they grew up together and that

there was electricity light from a nearby bar. On cross-examination by counsel for the first appellant, the complainant testified that the appellants did not talk to him; that the bar was about 10 metres away and that he did not obtain a P3 form as he did not want a case. APC Francis Mwangi on his part testified that on receiving a report of robbery he and another police officer went to Kiria Trading Centre and found the two appellants and their co-accused at midnight in a dark place and arrested them; that the complainants went to the A.P's Post on the following day and reported the robberies and that he later handed over the appellants to police officers among them P.C. Joseph Kariuki from Kahuro police station .

The first appellant stated at the trial that on 7<sup>th</sup> January, 2007 at 10.00 p.m he was on his way home from a bar at Kiria market when he was stopped by police officers and arrested him. On his part the second appellant stated at the trial that on 7<sup>th</sup> January, 2007 at 8.30 p.m. he was on his way home from Kiria Trading Centre when he was arrested by the police officers who alleged that he was a “*Mungiki*”.

The trial Magistrate appreciated that the prosecution case was dependent on a single identifying witness but believed the evidence of the complainant that he recognized the appellant saying in effect that the evidence of the appellants did not rebut the evidence of the complainant. The superior court agreed with the finding of the trial Magistrate that the recognition of the appellants by the complainant was satisfactory.

The main ground of appeal is that the superior court erred in law in failing to exhaustively consider and analyze the evidence on record and thereby arriving at the wrong conclusion.

Mr. Nderi, learned counsel for the appellant submitted, among other things, that, the intensity of light was not described; that the evidence of the complainant that he did not know what he was hit with is an indication that there was no sufficient light; that the name of Mwangi Mikori mentioned by the complainant is not the name of the first appellant; that the complainant was issued with a P3 form but did not return it; that the complaint was made long after the appellants were arrested, and, that, the appellants were booked for an offence of assault, mugging and impersonating police officers.

On his part, Mr. Kaigai, the learned Acting Senior Principal State Counsel submitted that there was overwhelming evidence against the appellants that they were recognized by the complainant with the aid of electricity light from a nearby bar.

The prosecution case was dependent on the evidence of a single identifying witness at night. Before basing a conviction on such evidence the court should consider all the relevant surrounding circumstances with circumspection in order to satisfy itself that there is no possibility of error.

In this case the complainant gave scanty evidence of the scene of the alleged robbery and the circumstances in which he recognized the appellants. The complainant merely testified that he was attacked at a shopping centre . He did not say what he was doing when he was attacked – whether or not he was walking and if so whether from a nearby bar. He did not describe the scene in relation to the buildings in the shopping centre and the bar. He did not say whether the electric light was from the security lights or from light inside the bar. He did not say whether he was attacked suddenly or whether he had seen the appellants at a distance and if so, how far before they attacked him. Further, other than saying that he and the appellants were brought up together, he did not give any relevant detail which would leave no doubt that the complainant knew the appellants very well before the robbery. The evidence of the complainant that he did not know what the appellants used to hit him and his reluctance to take a P3 form or return it raises doubt whether there was sufficient light and whether the complainant indeed recognized the appellants.

It was clear from the evidence of APC Francis Mwangi (PW5) and P.C. Joseph Kariuki (PW6) that the appellants had been arrested for “*terrorizing area residents*” before the report of robbery was made on 9<sup>th</sup> January, 2007 – about three days after the robbery.

Lastly, although the alleged robbery was committed on the night of 6<sup>th</sup> January, 2007 the offences entered on the Police Occurrence Book on 8<sup>th</sup> January, 2007 according to the evidence of P.C. Joseph Kariuki,

alleged assault, mugging of Manyeki (complainant in the first count) and impersonating a police officer. Further, according to the evidence of P.C. Joseph Kariuki, the complainant reported the offence on 9<sup>th</sup> January, 2007 and even then he did not return the P3 form issued to him.

All the above circumstances which are relevant were not considered by the superior court. Thus the superior court did not in reality re-evaluate the evidence. They all raised reasonable doubt about the commission of the offence by the appellants. Had the superior court performed its duty, it is probable that it would have allowed the appellants' appeal.

The upshot is that the appeals are allowed, the conviction of the appellants is quashed and the respective sentences set aside.

The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 4<sup>th</sup> day of November, 2011.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**