



IN THE COURT OF APPEAL  
AT NYERI

(CORAM: BOSIRE, WAKI & VISRAM, J.J.A)

CRIMINAL APPEAL NO. 102 OF 2003

BETWEEN

FRANCIS GITONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Meru  
(J. V. O. Juma & Kasanga Mulwa, JJ) dated 11<sup>th</sup> July, 2002*

*in*

*H. C. Cr. A. No. 122 of 2001)*

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JUDGMENT OF THE COURT

The appellant, **Francis Gitonga**, was one of four persons charged and tried before Nkubu Senior Resident Magistrate (Nduku Njuki) for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. It was alleged in four counts that the appellant was in a gang of robbers who terrorized Igoji Market residents on the night of 11<sup>th</sup>/12<sup>th</sup> October 1999, while armed with offensive weapons, namely pistol, pangas, axes and rungun, and robbed four different persons of their money, various goods from their shops, clothing and other personal property, and inflicted personal violence on them. One of the accused persons died in the course of the trial while the appellant and two others were convicted on some of the counts and sentenced to death. On appeal to the High Court, the appellant's co-accused were released and the appellant was successful in resisting conviction on two counts. His appeal on one count was, however, dismissed and the death sentence was upheld.

The complainant in the count upon which the appellant was convicted was Eunice Njiru Njeru (PW 3) (Eunice). She was asleep in her shop in Igoji Market on the night of 11<sup>th</sup>/12<sup>th</sup> October, 1999 when at about 2.00 am, she heard the front door of the shop being broken. She realized there were many people outside and started screaming. There were electric lights outside and also in her bedroom at the rear of the shop. The robbers were unable to break down the front door and one person went round the shop and broke in through a small space used as ventilation. He broke the rear door and let in two other persons who in turn broke down the front door and let in the whole gang. She was pushed into her bedroom and ordered to produce money at the pain of being shot dead and she gave out Kshs.60,000/=. One of the persons giving those orders was the appellant. About 10 minutes later their commander ordered them to leave and Eunice heard a gunshot as they left.

She was subsequently taken to hospital by Administrative Police Officers (APs) and reported the matter to Igoji Police Post that she knew and recognized the appellant as one of the robbers. The appellant was arrested on 20<sup>th</sup> October, 1999 and Eunice was summoned to Meru Police Station where an identification parade was organized and she picked out the appellant.

In his defence, the appellant stated that he was in his rented room at Miruriri Market on 19<sup>th</sup> October 1999 when police knocked on his door at 3.00 am and upon opening for them, he was arrested. He was pushed into a car belonging to the complainant and taken to Igoji Police Post where he was beaten up and questioned about a robbery he knew nothing about. He was later placed in an identification parade where some people pointed him out and was later charged with the offence of robbery with violence which he denied. He admitted that Eunice had employed him, but only for three months.

Upon evaluating the evidence on record, the trial Magistrate believed the evidence of Eunice on the appellant stating in part:

***“This witness claimed that the person who first entered through the ventilation was accused (deceased), followed by accused 1 and 2 both of whom were her former employees. This witness further said that she was able to identify the two accused persons (1 and 2) while outside in the corridor where there was a security light on. During the operation, which took about 10 minutes, she was never asked lie down. The lights were put off inside the house by the accused 2. This witness further stated that the accused 2 who was demanding that she give out money was wearing military boots, she was able to give the names of the three (Accused 1, 2 and deceased) to the police for investigations.***

.....

***The accused 2 was also said to have been an employee of PW 3 Njeru. He was one of the three people who entered her house first and who broke the door from inside. During this robbery, it is said, and there is evidence that the complainant was injured. She testified that there was no one time she was asked to lie down. The robbery took about 20 minutes. During the whole process, the accused two was most vocal demanding that she be put to death.***

***I am of the opinion that there was no room for mistaken identity and that there was adequate time and light for this witness, Njeru to positively and adequately identify the accused 2.***

.....

***The accused 2 had also been employed by the complainant for about 3 months. He was one among the 1<sup>st</sup> three to enter and break the door from inside. The robbers were not in a hurry during the robbery she had adequate time to identify accused 2. I am satisfied that she did, and shall convict the accused.”***

The trial Magistrate also made a finding that the identification parade on which the appellant, amongst others were picked out by various witnesses was proper, and therefore fortified the evidence against him.

On appeal to the High Court, (Juma and Mulwa, JJ) the court faulted various aspects of the identification parade and discounted it. The court nevertheless believed the sole evidence of Eunice and found it sufficient to sustain the conviction. It stated in relevant part as follows:

***“She had known this Appellant as she had employed him earlier. She knew his nickname of “Wetu”. She described in detail the activities of this Appellant while in the house. In cross examination by this Appellant she stated that she had worked with him and knew him very well. She had first seen him outside the window at the corridor where there was security light. He was wearing military boots.***

***In his sworn testimony this Appellant admitted that PW 3 Eunice Njeru had employed him for about 3 months.***

***Eunice Njeru (PW 3) was awake before the robbers entered her house. She was able to see them while they were outside as there were security lights. She was not told to lie down and the lights in the house were on until put off by this Appellant. At that time she had already identified this Appellant as he was her former employee.***

***Having evaluated the evidence on record in respect of this Appellant, we are satisfied that he was positively identified by PW 3. The learned trial magistrate came to the proper conclusion in convicting this Appellant on this count.”***

The appellant now comes before us on this second and probably final appeal which may only lie on issues of law, - **section 361** of the Criminal Procedure Code. The two issues of law raised and argued by learned counsel for him, Mr. Andrew Kariuki, were on identification and the defence of the appellant. Mr. Kariuki challenged the findings made by the two courts below that Eunice knew the appellant and had recognized him at the time of the robbery. He drew our attention to the evidence of Eunice in which she admitted she did not know the name of the appellant and only called him “Wetu”. She had also said she had given his name to the police, and yet stated that she did not know it. Such contradictory evidence, in Mr. Kariuki’s view, cannot form the basis of a conviction. He also pointed out to further contradictory evidence relating to the identification parade where Eunice said she had identified the appellant but the parade forms indicated other persons had done so.

For his part, learned State Counsel Mr. Kaigai submitted that the nickname of the appellant given to the police, coupled with recognition, was reliable and credible enough to sustain the conviction. He cited **section 143** of the Evidence Act for the view that one witness was sufficient to prove a fact. As for the identification parade Mr. Kaigai conceded that the parade forms were interfered with but submitted that they were not necessary since the evidence of recognition was sufficient to prove the offence beyond reasonable doubt.

We have considered the issue of identification of the appellant and we are persuaded that the two Courts below were right in finding that the appellant was recognized by Eunice at the scene of the robbery. It is true that Eunice recognized two people who were her former employees, although the other one was acquitted for reasons on record. She stated in her evidence as follows:

***“The man who had entered through the ventilation was accused 2 (sic). He was followed by accused 1 and 2. I had employed accused 1 and even knew his name Martin Gikunda. I had also employed accused 2 but I had not known his name but we were calling him “Wetu” because he is a Tigania.***

***When they came into my bedroom the accused 2 is the one who put off the lights.***

***There was a security light outside. I gave the money to none of the accused herein.***

***Accused 1 was the one ransacking my bedroom. Accused 2 was the one who was commanding me to remove all the money I have been left by my husband. Accused 2 was the one saying I be shot dead.”***

She was cross-examined by the appellant on that evidence and she remained fairly consistent, thus:

***“I had worked with you and knew you very well.***

***I saw you at the corridor as you entered one after the other you entered through a space I had left as ventilation and light.***

***I first saw you outside my window at the corridor where there was security light.***

***You 1<sup>st</sup> cut off the padlock at the gate. You entered broke the door into the house from the bedroom inside then kicked open the bedroom door.***

***It was you accused 1 and 3 who first entered.***

*You are the one who entered 1<sup>st</sup> into my bedroom and you had military boots. You ordered me to give out money or be killed. The one I gave money is not in court.*

*The people who came I did not tell them I knew you but I told them I could identify them.*

*You were armed with sticks, pangas and axes. One pressed something very cold on my side and was told it was a gun. I did not see it but after you went out there were gunshots.*

*I told the police I had identified you I gave your name.”*

It is true that she only knew the appellant’s nickname and could not therefore have given his real name to the police. Nevertheless the nickname led the police to his arrest and therefore the apparent contradiction in the evidence has no substance. The most crucial evidence was that Eunice recognized the appellant who was her former employee and on this she was believed by the two courts below. We have no reason to differ from that assessment of her credibility. It raises the level of reassurance that identification of the appellant was free from error in the circumstances of the case. That ground of appeal fails.

On the second ground, Mr. Kariuki submitted that the two courts below totally ignored the evidence of the appellant in his defence and did not evaluate it.

The defence of the appellant was set out by the trial court but was not sustainable in view of the finding that he was seen at the scene of the robbery by Eunice. He had basically stated in the defence that on the alleged night of the robbery, he was four kilometers away at his place of business in Miruriri Market where he sells potatoes and onions. The other evidence was on the day of his arrest and the subsequent identification parade, the evidence on which the High Court discounted, without specifically referring to the defence of the appellant. He also admitted in cross-examination that he was a former employee of Eunice. In all the circumstances, we find no prejudice caused to the appellant in the manner his defence was treated and we have no reason to interfere. That ground of appeal also fails.

The upshot is that the appeal is lacking in merit and we order that it be and is hereby dismissed.

**Dated and delivered at Nyeri this 1<sup>st</sup> day of December, 2011.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**