IN THE COURT OF APPEAL
AT NYERI
(CORAM: OMOLO, GITHINJI & NYAMU, JJ.A)
CRIMINAL APPEAL NO.237 OF 2008

BETWEEN

SAMUEL MWAURA KINYANJUI
JOHN MURANGA KAMAU
M.K.N……..... APPELLANTS

AND

REPUBLIC..... RESPONDENTS

(**An appeal from the Judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 2nd October, 2008**

in
H. C. CR. A NO. 72 OF 2006)
****

JUDGMENT OF THE COURT

Samuel Mwaura Kinyanjui, the 1st appellant, ***John Muranga Kamau***, the 2nd appellant and ***M.K.N***, the 3rd appellant, were tried and convicted by a Senior Resident Magistrate at Kigumo on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars contained in that charge were that on the 6th day of April 2005 at Saba Saba Town in Muranga District of the Central Province the three of them jointly and while armed with an offensive weapon to wit a knife, robbed Geoffrey Gatati Njoroge (*Geoffrey*) of cash Kshs.500/= and that at, or immediately before or after the time of robbery they injured Geoffrey. Upon their conviction, the record of the magistrate shows as follows:-

"Accused in Mitigation - I seek for leniency. Am 17 years old. I was born in the year 1987.

2nd Accused: I seek for leniency. I am 18 years old.

3rd Accused: I seek for leniency. I seek for leniency. I am 18 years old."

This was on 12th April, 2006. The accused persons appeared before the trial magistrate in the order in which they appear before this Court, namely accused one being the 1st appellant, accused two the second appellant and accused three the third appellant. Though the 1st appellant told the magistrate that he was 17 years old, he also gave the date of his birth as being 1987 and from that the magistrate upon calculation, concluded that he was 19 years old as at the date of the sentence i.e. 12th April, 2006. The offence was alleged to have been committed on 6th April, 2005 and that meant the 1st appellant was over 18 years old at the time of the offence. But the Magistrate found that the 3rd appellant was below 18 years

at the time of the offence. So the 1st and the 2nd appellants were duly sentenced to death as provided by law while the 3rd appellant was ordered to be detained at the pleasure of the President. They all appealed to the High Court against the conviction and sentences but by its judgment dated and delivered on 2nd October 2008, the High Court (*Kasango and Makhandia, JJ*.) dismissed their appeals and confirmed the sentences imposed on them by the magistrate. The appellants now come before us by way of second appeals which, by the terms of **section 361 (1)** of the Criminal Procedure Code, can only be on matters of law. The matters of law raised in the *"Supplementary Memorandum of Appeal"* filed on their behalf and argued before us by their learned counsel Mr. C.M. Kingori were three, namely:-

"1. That the learned trial Magistrate and the first appellate court erred in law in failing to evaluate the evidence of identification/ recognition and/or test it with regard to the circumstances then prevailing.

2. The learned trial Magistrate and the first appellate court erred in law and fact in relying on the evidence of identification /recognition which was not adequate to found a save (sic) conviction.

3. The learned trial Magistrate and the first appellate court erred in law and fact in failing to fully analyse the evidence of (sic) record."

Mr. Kingori, however, abandoned the third ground and argued only grounds one, and two which he argued as one. Elaborating on these grounds Mr. Kingori submitted that the identification or recognition of the three appellants was based entirely on the evidence of two witnesses, Geoffrey the complainant (*P.W.1*) and Stanley Karanja (*Stanley – P.W.2*) The evidence of the two witnesses was to the effect that just about midnight on 6th April, 2005, they were walking from Honey Pot Bar in Saba Saba going to their respective homes. They were to pass through some corridor enclosed between buildings and that along the corridor, lighting was provided by electric lights coming from the nearby buildings. Geoffrey said he saw three men along the corridor; he immediately recognized them as the 1st appellant whom he knew by the nickname *"Timer"* or "Taima", the second appellant whom he knew as Muranga and the third appellant whom he knew as K. Geoffrey said that because he knew them he was not worried about their presence in the corridor. Stanley said he also knew the three appellants and recognized them in the corridor. When the two witnesses reached the three men the 1st appellant and the 3rd appellant set upon Geoffrey while the 2nd appellant set upon Stanley. The 1st appellant stabbed or cut Geoffrey with a knife on the chest and hit him with a bottle on the mouth loosening one of his teeth. The 3rd appellant ransacked Geoffrey's pocket and took away Kshs.500/= therefrom. The 2nd appellant struggled with Stanley but Stanly managed to escape from him and ran and reported the matter at a nearby AP camp. Having taken money from Geoffrey, the attackers ran away and Geoffrey proceeded to Saba Saba Police Post where he reported the incident to Police Constable Timothy Kio (*PW4*). Timothy swore that Geoffrey told him he knew the persons who had attacked him and that Geoffrey gave him names of the three appellants. Stanley also gave the names of the attackers to AP Corporal John Kamau (*PW3*) of Saba Saba Police Post.

These were the facts upon which the prosecution relied. Mr. Kingori submitted that it was not stated how far the source of light was from the corridor and how strong the beams were. He contended that the two courts below did not consider these issues and went further to doubt whether the two witnesses actually knew the appellants and were able to recognize them along the corridor. Mr. Kaigai for the Republic supported the conviction.

There can be no doubt from the record before us that both the trial Magistrate and the first appellate court had no difficulty in concluding that the two witnesses knew the three appellants before the night of the attack. The names of the appellants must have been given to the two police officers immediately after the attack for the appellants were arrested on the very same 6th April, 2005 and taken to the police station. Listen to what the Magistrate said in her judgment:

"From the available evidence there was consistent evidence from PW 1 and PW 2 that there were sufficient beams of light from the nearby buildings. The beams of light assisted PW 1 and PW 2 to see the people who attacked PW 1. PW 1 said when we saw them at first we did not fear because those

were people he knew and he used to see them at Saba Saba Township. PW 1 also assisted the police to arrest the three accused persons. The court finds that there was sufficient light to allow PW 1 to identify his attackers. The three people who attacked PW 1 were accused persons herein whom he knew very well before he recognized them. They were also identified and recognized by PW 2."

For its part, the High Court was more cautious about the identification or recognition. The two learned Judges stated as follows:

"……The recognition of the appellants was under difficult circumstance (sic) since it was at midnight at a dark corridor. The complainants however, were very clear in their evidence that the corridor had beams of light coming into it. PW 2 even said that on that night there was moonlight. This as it may be it is essential for us to warn ourselves of relying on such evidence. We are aware that witnesses may be honest but mistaken. Witnesses may make erroneous assumptions particularly if they believe that what they think is true - see case of Joseph Leboi Ole Toroke, Criminal Appeal No. 204 of 1987 (Nairobi). PW 1 and PW 2 as we stated before were very consistent in their evidence that there was sufficient lighting in the corridor which enabled them to identify the appellants. The appellants were well known to them. They were also very clear on which of the robbers attacked them …."

In the face of these clear findings and conclusions by the two courts, we do not see how those courts can be accused of having failed to evaluate and analyze the evidence before them. The two courts did so and it was not suggested, indeed it could not have been suggested, that their conclusions were not based on the evidence before them or that they had in someway misapprehended the evidence. Like the two courts below, we are satisfied that the three appellants were convicted on sound evidence of identification or recognition by the two witnesses who knew them before and recognized them through beams of light coming from nearby buildings. Their convictions were safe and there is no basis upon which this Court can interfere on a second appeal. The sentences imposed on them were lawful. Accordingly the three appeals fail on both convictions and sentences and we order that they be and are hereby dismissed.

Dated and delivered at Nyeri this 1st day of December, 2011.

R. S. C OMOLO
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR