



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Criminal Appeal 436 of 2007**

**JOHN NJERU KITHAKA..... 1<sup>ST</sup> APPELLANT**

**IBRAHIM NDWIGA MVUNGU.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Embu, (Khamoni & Okwengu, JJ) dated 19th May, 2004***

**in**

**H.C.C.R.A. NOS. 30B & 30C OF 1998)**

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**JUDGMENT OF THE COURT**

This is a second appeal, the first appeal having been dismissed by the superior court (*Khamoni & Okwengu, JJ*) in a judgment dated and delivered at Nyeri on 19th May, 2004. The appellants *JOHN NJERU KITHAKA* (first appellant) and *IBRAHIM NDWIGA MVUNGU* (second appellant) were, together with three others, charged before the Senior Resident Magistrate's court at Runyenjes with three counts of Robbery with Violence contrary to *section 296(2)* of the Penal Code and one count of malicious damage to property contrary to *section 339(1)* of the Penal Code. The first appellant *JOHN NJERU KITHAKA* was the third accused while the second appellant *IBRAHIM NDWIGA MVUNGU* was the first accused in that court. After full hearing, the appellant together with the second and fourth accused in that case were found guilty, and convicted of two counts of robbery which were counts 1 and 2 in the charge sheet before that court and of the offence of malicious damages to property contrary to *section 339(1)* of the Penal Code. They were sentenced to death in respect of each of the two counts of robbery with violence contrary to *section 296(2)* of the Penal Code and to serve one year imprisonment in respect of the offence of malicious damage to property. The fifth accused before that court was acquitted of all counts and was released. The appellants together with the other two with whom they were convicted by the subordinate court felt dissatisfied with the decision and they all moved to the superior court on first appeal. Unfortunately the other two, who were accused 2 and 4 in the subordinate court passed on before their appeals could be heard by the superior court. The appeals in the superior court by the two appellants before us, however proceeded to hearing, and as we have stated above, after full hearing their appeals in respect of the two counts of robbery were dismissed, but that in respect of malicious damage to property was allowed and sentence set aside. In dismissing their appeal the superior court had this to say:-

*“The upshot of the above is that we are satisfied and do find that the two appellants were properly identified as having participated in the robbery. We allow the appeal against conviction in respect of*

*count 4 which was rightly not supported by learned State Counsel as the alleged damage was in furtherance of the robbery offence. We uphold the convictions and sentence in respect of both counts 1 and 2 and dismiss both appeals in this regard.”*

It is against that decision that this appeal was preferred. The particulars of the offence in respect of which the two appellants stand convicted and against which conviction they have appealed namely counts 1 and 2 in the subordinate court read as follows:-

On count 1:-

*“On the night of 28<sup>th</sup> day of December, 1997 at Nthagaiya village, Kagaari South Location in Embu District within Eastern Province, jointly with others not before court robbed Joseph Kariuki Njeru of cash Ks.6500/= and at or immediately before or immediately after the time by such robbery used actual violence to the said Joseph Kariuki Nderi.”*

On count 2:-

*“On the night of 28<sup>th</sup> day of December, 1997 at Nthagaiya village Kagaari South Location in Embu District within Eastern Province, jointly with others not before court robbed Njeru Murani of Kshs.1,000/= and a wrist watch make scorpion valued at Kshs.2,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Njeru Murani.”*

The first appellant filed a memorandum of appeal in person in which he raised four grounds of appeal, whereas the second appellant raised five grounds of appeal in his home-made memorandum of appeal. Mr. Ndirangu, the learned counsel for the appellants came into the scene after those two memoranda of appeal had been filed. He filed one supplementary grounds of appeal for the first appellant but later filed further supplementary grounds of appeal for the appellants and which he relied on in his submissions before us at the hearing of the appeal. We will revert to those grounds later in this judgment.

The brief facts giving rise to this appeal as can be deciphered from the record before us are that on 28<sup>th</sup> December, 1997, at 9.a.m., Joseph Kariuki Nderi (PW1), (Kariuki), who was working with the Ministry of Works and at the same time operating a bar at Runyenjes and at Nthagaiya left his bar at Nthagaiya heading home in his vehicle KAH 115S. He was with Paul Mbogo Gitonga (PW6) (Paul), Njeru Murani (PW2)(Murani), and Mate Waithanje (PW5) (Mate) in his vehicle. He was driving the vehicle. Njeru Murani was with him in front whereas the other two were sitting in the rear cabin of the vehicle. As they neared his home he saw logs of wood placed across the road leaving no space for his vehicle to pass through. He stopped the vehicle and started to reverse immediately. The vehicle veered into a ditch and then he heard a bang. He noted that the front windscreen of his vehicle had been broken. He left the engine running and the lights on and came out of the vehicle. At that time he saw a group of people emerge from the sides of the road to the front of the vehicle. He recognized four of those people and the two appellants were two of those he recognized. He had known them before. One of those people attacked him with a panga while demanding money. That person who attacked him is one of those who have since died. Kariuki gave him Kshs.6500/= and as Kariuki started to raise alarm, that person cut him again on the back of his head. He fell down unconscious and later regained consciousness while in the hospital where he noted he had another cut on the head and his five teeth were broken. The jaw was also fractured. Kariuki said before he fell unconscious, he had seen the second appellant with a panga and the fourth appellant with an iron bar. Njeru Murani (PW2) (Njeru) who was with Kariuki in Kariuki's vehicle confirms the evidence of Kariuki. He was cut with a panga by the second appellant whom he recognized as being among the people who attacked them, four of whom he recognized. He also lost consciousness and only gained it in the hospital. After gaining consciousness at the hospital, he realized that his Kshs.1000/-, wrist watch, identity card and spectacles were all stolen from him during the encounter. Mate Waithanje alias Erastus Kithaka Waithanje (PW5) (Mate) who was in the same vehicle was attacked and cut in the head, left jaw, left ear, and left big finger, immediately the vehicle stopped and reversed to avoid the logs on the road. He was cut while still in the vehicle but he on being cut, fell from the vehicle. He ran into the bushes and went to his house but in the house, he fell down unconscious and had to be rushed to the hospital. He too lost Kshs.80/= and three pairs of torch batteries to the thugs.

He was not certain whether some of his property such as shoes got lost as he was running through the bush to his house or they were taken by the robbers. He however was unable to identify any of the attackers as he was sitting on the rear cabin of the vehicle with his back to the driver. He further stated in his evidence that after he heard a bang, the vehicle headlights went off. It was however not certain as to what bang he heard as it could have been a bang when the vehicle veered into the ditch or when the windscreen was broken. *Paul Mbogo Gitonga (PW6) (Gitonga)* was in the vehicle with *Kariuki, Murani* and *Mate*. He was sitting in the rear cabin of the vehicle with *Mate*. He was one of the victims but he was not injured. He however saw the person he described in the subordinate court as the 5<sup>th</sup> accused and another person who was not in court.

On the same day 28<sup>th</sup> December, 1997, *Dr. Stephen Maina, (PW3) (Dr. Maina)* who operates a clinic at Runyenjes received *Kariuki* and *Murani* at his clinic. The two were taken there at different times but each complained of having been assaulted by thugs. *Kariuki* had a cut in his forehead and back of his head and his fore teeth were knocked off. *Dr. Maina* formed the opinion that the injuries were caused by sharp and blunt objects. Later on 20<sup>th</sup> January, 1998, he signed P3 form for *Kariuki*. As to *Murani*, *Dr. Maina* noted he had a cut on the head behind his left ear, a cut on the left hand and left leg. These injuries were caused by a sharp object. He signed *Murani's* P3 Form on 20<sup>th</sup> April, 1998. He produced both P3 forms to the court. On the same night of 28<sup>th</sup> December, 1997, *PC Okong'o, (PW7)* of Runyenjes Police Station received a report from *Kariuki's* wife and an employee concerning the attack on *Kariuki*. As a result of that report, *PC C Okong'o* visited the scene and started investigations which led to his visiting *Kariuki* and *Gitonga* who were in hospital. He saw *Kariuki* and *Gitonga* who disclosed to him the names of the suspects. On 2<sup>nd</sup> January, 1997 he arrested the two appellants. *I.P. Jotham B. Chesire, (PW4)* received *Kariuki's* vehicle of which windscreen was smashed and took photographs of it. He produced the photographs in the court.

We need to mention here that earlier, in the course of hearing the case, and after *Murani* had given evidence, the first appellant applied to have the case moved to another Magistrate on account that the trial Magistrate had convicted them in another case. When that application was refused, the two declined to take part in the proceedings. That in effect meant that the first appellant and that other accused did not cross examine *Dr. Maina, IP Chesire, Mate, Gitonga* and *Okong'o*. That issue is the subject of this judgment hereafter.

When put on their defence the first appellant stated:

*"I will not also participate in the hearing."*

The second appellant stated in his defence as follows:-

*"I am Ibrahim Ndwiga from Gicheche sub location. On 30.12.97 I was given leave and came even on (sic) in 1.1.98. On 2.1.98 I went to Nthagaiya to visit a friend while waiting at a verandah for the friend, I was found by Police Officers and taken to Police Station and charged as present. The witnesses lied to say they had seen me. The second complainant had made a (sic) lies to say he had been seriously injured. Yet the doctor did not say he was seriously injured. I also wonder why the second complainant Njeru Murani did not personally go to Police station and report.*

*The Police Officer said it is the complainant who had given him my name yet the 1<sup>st</sup> complainant had denied."*

The above are the salient facts that led to conviction of the appellants by the trial court and to confirmation of that conviction in respect of the two charges of robbery with violence contrary to section 296(2) of the Penal Code and hence to this appeal.

As we have stated, this is a second appeal. By dint of the provisions of sections 361(1) of the Criminal Procedure Code, we are in law enjoined to consider only matters of law. The further Supplementary Memorandum of Appeal filed by the appellants through their counsel, *Mr. Ndirangu*, cites

three grounds which are:

“1. *The learned Judges of the superior court erred in law in failing to re-evaluate the evidence on record regarding circumstances surrounding the identification of the appellants and therefore came to the wrong conclusion that the appellants were properly identified.*

2. *The Judges of the superior court erred in law in failing to come to the conclusion that the appellants were not afforded fair hearing and that their rights under section 77(1) (2) of the Constitution of Kenya were violated.*

3. *The learned Judges of the superior court erred in law in failing to address adequately the complaint of the 1<sup>st</sup> appellant concerning unfair trial upon his conviction of the same court.”*

In his address before us, *Mr. Ndirangu* raised on the main two grounds and rightly too as he relied on the above further Supplementary Memorandum of Appeal. The two grounds were that the evidence on identification, when properly analysed fell short of the standard required in law for purposes of conviction and that in the trial court refusing to have the matter proceed before another court, the appellant’s rights - (and we think this refers to first appellant only) were violated.

*Mr. Ndirangu’s* submission on identification was that, as there was evidence that the windscreen was broken just as *Kariuki* was reversing the vehicle and as the vehicle veered into a ditch, the witnesses could not have seen the appellants as by that time none had emerged from the bush. Further, he contended that as there was evidence that the vehicle lights went off at the time the windscreen was smashed, the witnesses could not have identified or even recognised the appellants. Lastly he maintained that as *Kariuki* said he recognised the appellants only by appearance and did not know their names, it was not possible for him to identify them to police when he was unable to speak as a result of the injuries received at the time of attack. On the second ground, he maintained that as the first appellant had apprehension that justice would not be done to him and sought another court, the trial court should have acceded to that request. In failing to do so, the rights of the first appellant under *section 77 (3)* of the Constitution were violated.

*Mr. Makura*, the learned State Counsel supported the appellant’s respective convictions stating that the complainants i.e *Kariuki* and *Murani* knew the appellants before the incident and *Kariuki* gave the names of the appellants to *P.c. Okong’o* immediately he was able to talk, and as to lights, *Mr. Makura* stated that there was evidence that lights were still on for sometime after the incident. On alleged violation of *section 77(3)* of the Constitution, *Mr. Makura’s* submission was that the first appellant was afforded all opportunities to participate in the case, and he was the one who refused to do so. He contended that the superior court considered that issue in its judgment and no prejudice has been shown to have occurred to the appellant.

As we have stated, only two matters of law were raised and are for consideration before us. On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition raises less problems than identification of strangers, nonetheless, even in cases of recognition, there is need to exercise caution before a conviction is entered. It is thus established that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In the case of *KIARIE V. REPUBLIC* (1984) KLR 739, this Court made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even an honest witness to make a mistake. In cases of recognition it was stated in the case of *R V. TURNBULL* (1976) 3 ALLER 549 as follows:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The law is thus certain that there is need to exercise utmost care before the appellants could be convicted on the evidence of Kariuki and Murani who were the only two identifying witnesses. The trial magistrate in his lengthy judgment analysed the evidence relating to the events that took place that night and after full analysis and evaluation concluded:

*“Soon after the windscreen was damaged PW1 was set upon with a panga and cut one (sic). He saw the one who cut him as the 2<sup>nd</sup> accused who also demanded money from him. He gave 2<sup>nd</sup> accused Shs.6,500/= before 2<sup>nd</sup> accused cut him again and he fell down unconscious when he was being attended by PW3 soon thereafter he told him he knew those who assaulted and robbed him. He told PW7 the same through writing as he could not talk well then disclosed the names of the people he had recognised. These are 1<sup>st</sup> to 4<sup>th</sup> accused. PW2 recognised the same people and said 1<sup>st</sup> accused is the one who cut him thrice. These two witnesses PW1 and PW2 even agree on how each of the four accused were armed and sequence of events and have satisfied myself that even though it was at night they had sufficient occasion to see the four with the vehicles headlights as they were the ones at the front of the group and had approached from the front of the vehicle where the headlights were facing. They knew the accused were (sic) before and there is no chance of mistaking some other people for them.”*

The superior court, acting as first appellate court, considered the evidence that was before the trial court afresh, analysed it and evaluated it as was in law required of it – see case of OKENO V. REPUBLIC (1972) EA 32 and having done so came to the following conclusion as regards the issue of identification:

*“The trial magistrate did not specifically warn himself of the danger of relying on the identification of a single (sic) witness because he was satisfied that PW2 and PW6 did also identify the robbers. The identification by these 2 witnesses was however shaky. Nevertheless we are satisfied that had the trial magistrate properly directed himself, warned himself and tested the evidence as we have done, he would no doubt have come to the conclusion which we arrive at that though the circumstances were rather difficult for a correct identification, PW1 did see the two appellants during the robbery and recognized them as persons known to him. We find that the identification by PW1 was free from error and could be safely relied upon.”*

Thus there was concurrent finding by the trial court and first appellate court that the appellants were properly recognised at least by Kariuki as two of the robbers that attacked him and Murani that night of 28<sup>th</sup> December, 1997. Those analysis considered matters of light and reports made to police by PW1 as well. We have considered those concurrent findings of fact and we have no reason to disturb it. In our view, the evidence on record supported that finding. It will stand.

On the question of the breach of the first appellant’s rights to a fair trial under section 77 (1) (2) of the Constitution, the starting point is the application that was before the trial court and which was refused. The salient part reads as follows: -

*“2<sup>nd</sup> Accused: This court has already condemned me in another case and as such I am not ready to have my case handled by this court. If the case continues to be heard here I will not participate.*

.....

*3<sup>rd</sup> Accused: That is the position that I also adopt. I will not participate in hearing as this court has convicted me in another case a few days ago.”*

The other co-accused had no complaint and wanted their case to continue. The prosecution opposed the application and the learned magistrate, in a rather lengthy ruling rejected the application and ordered the hearing to continue. The first appellant who was the third accused refused to participate notwithstanding that opportunity was given to him to cross-examine each witness whenever it was his turn to do so. He also refused to defend himself when he was put on his defence. In those circumstances, we find it difficult to appreciate this complaint hinged on section 77(1) and (2) of the Constitution. The superior court considered it and in a considered judgment, rejected it. In our view, the mere fact that the learned

magistrate had convicted the appellant in another case as happens often in the courts did not *ipso facto* render the magistrate partial to the matter before him and unless any other allegation is availed to buttress that allegation we see no reason to accept the allegation made before us that the appellant was apprehensive and that is what made him together with another make that application. In our view, such an application should have been supported by some other allegation about the trial court that would raise an honest apprehension in the minds of the accused, that justice would not be done or would not be seen to be done even if it would in fact be done.

In the matter before us, all that the appellant and his other co-accused said was that because the court had condemned them in another case, they did not want the case to proceed in that court. That was in our view far from what is required of such applications to warrant the disqualification of a Magistrate or Judge. In the case of *REPUBLIC VS. HASHIMU (1968) EA 656* the predecessor of this Court held:

“1. Before a transfer of any trial is granted on the application of an accused person a clear case must be made out that the accused person has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred.

2. There was nothing arising from the facts of the case or attitude of the magistrate that could be taken to indicate that the accused would not have fair and impartial trial.”

Likewise in this case nothing was said to indicate that the learned magistrate had in any way breached any provisions of section 77(1) and (2). Nothing turns on this ground of appeal.

Before we conclude this judgment, we note that the appellants were each sentenced to death on each of counts 1 and 2 and no order was made for sentence in count 2 to be left in abeyance. The superior court did not comment on this. We have stated on several occasions that no person can be hanged twice. The correct thing to do in a case such as this was to order that the said sentence of death be left in abeyance. We order that the sentence in respect of the second count be left in abeyance.

In the result, this appeal lacks merit. It is dismissed. Order accordingly.

***DATED and DELIVERED at NYERI this 22<sup>ND</sup> day of MAY, 2009.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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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**