



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 177 of 2005

GEORGE MWIRIGI KARANGANIA

GEDION MUKIRA MITHEU

NICHOLAS KIRIINYA MUGUNA

EDWARD MICHERA.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ) dated 16.3.2005

in

H.C.CR.A. NOS. 216, 217, 218 & 244 OF 2001)

JUDGMENT OF THE COURT

The four appellants were tried and convicted on two counts of robbery with violence under *Section 296(2)* of the Penal Code. Their trial was before a Senior Resident Magistrate at Meru. The Magistrate convicted them on the two counts and duly sentenced them to death. They appealed to the High Court (*Onyancha & Sitati, JJ*) and that court confirmed the convictions and sentences on 16th March, 2005. The appellants now come to this Court by way of a second appeal.

We are grateful to *Mr. Orinda*, the learned Senior Principal State Counsel, that he did not at all attempt to support the convictions which were clearly erroneous. The complainant in both the two counts was *Esther Karamani Rinjuri (PW1)*. She was robbed in her house and shop first on 18th and again on 25th October, 1999. During the first robbery on 18th October, 1999, she was alone with her children when the robbers struck. She swore that she did not identify or recognize any of the attackers.

The second robbery took place exactly one week later and on that occasion she was with her husband in the house and there was a watchman outside the house. The watchman was *Shadrack Kimunai (PW2)*; the husband did not testify. Once again, it was the evidence of *Esther* and *Shadrack* that they did not identify or recognize any of the people involved in the robbery. The two were obviously honest witnesses. They told the trial magistrate that sometime after the robbery, the police called them to the police station and while in an office, the appellants were brought into that office and according to *Esther*, this is what happened in the police office:-

“----- After two days I learned that some suspects had been arrested. I was called to Police (sic) to identify them. They were called in the office. I saw them clearly. I had not identified my attackers in the two occasions when Police told me those were the people who had robbed me the two occasions. I looked (sic) them keenly to know them. Later I was called to an identification parade. In the first parade I was able to identify the 1st accused in the dock (court 1st accused identified in the dock). In the 2nd parade, I was able to identify 2nd accused (court 2nd accused identified in the dock) In the 3rd parade, I was able to identify 3rd accused in the court (court 3rd accused identified in the dock) and in the 4th parade I was able to identify 4th accused (court 4th accused identified in the dock). These were the people who wee(sic) brought in office and police said they were the people who had robbed me. I can't forget their appearance till my death. They are very bad people. -----.”

Shadrack confirmed this narration of events by Esther. It is clear that the two witnesses were not identifying the appellants because the witnesses had seen them during the robberies. Esther and Shadrack were clear in their evidence that they were unable to identify anybody during the robberies. What the witnesses were saying was that because the police had called the four appellants into the office where the two were and told them----- “these are the people who had robbed you”, the witnesses had looked at the appellants keenly in the police office and were thereafter able to identify the appellants during the various parades.

In the face of this evidence, we are at a loss to understand how the trial Magistrate and the learned Judges of the High Court could have come to the conclusion that Esther and Shadrack had properly identified the appellants during the robberies. With the greatest respect to the two courts that conclusion was wholly unsupported by the evidence on record and can only be described as perverse. We accordingly allow the appeal by each appellant, quash all the convictions recorded against each one of them, set aside the sentences of death imposed by the High Court and order that each appellant shall be released from prison unless held for some other lawful cause. Those shall be the orders of the Court.

DATED and DELIVERED at NYERI this 15th day of MAY, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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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