



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 147 of 2008

1. LOISE KAGURE NJERU

2. BERNARD WACHIRA NJERU.....APPELLANTS

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 29th May, 2008

in

H.C.C.R.A. NO. 161 & 171 OF 2005)

JUDGMENT OF THE COURT

These are consolidated appeals by *Loise Kagure Njeru* (1st appellant) and *Bernard Wachira Njeru* (2nd appellant). According to the 1st appellant the two are brother and sister. The two appellants were charged before the Senior Principal Magistrate’s Court, at Nyeri, jointly with four others whose appeals are not before us with one count of robbery with violence contrary to **section 296 (2)** of the Penal Code; they were tried and eventually convicted of that charge and sentenced to the mandatory death penalty. Their separate first appeals to the superior court were consolidated and heard together but at the conclusion of those appeals the superior court in a reserved judgment affirmed the decision of the trial court and thus provoked this appeal. Several grounds of appeal have been raised but before going into them it is important to set out the background facts.

On the night of 9th August, 2003, at about 9 p.m., a man wearing a cap approached *James Maina Nganga*, the complainant, and requested to hire his taxi. The complainant was then a taxi driver of motor vehicle KAB 228 U, a Toyota Corolla, which was then being operated from “Cerebration” Hotel, Karatina. The man informed the complainant that he wanted to be dropped at Mathaithi. The complainant agreed. The hirer sat in the co-driver’s seat and informed the complainant that they would pick a certain lady about 100 metres from the Hotel. The complainant testified that as the hirer was boarding his motor vehicle he was able to observe him using electricity light from the Hotel and a nearby petrol station. Near the Co-operative Bank, Karatina, they picked the lady. The lady was facing the car as they approached her and the complainant testified that he was able to observe her as well. She had

braided hair, had a scar on her forehead but he could not remember the colour and nature of her attire. It was his first time to see both the man and the lady. Although he didn't switch on the lights in the car, he said he was able to observe the lady using lights from nearby premises. He did not indicate how far the lights were from her nor did he indicate its intensity.

The lady boarded the car at the back and sat behind the complainant. After about 1½ kilometers the complainant was instructed to stop, which he did. Immediately he stopped, the woman at the back seat held him by the neck and pointed what he made out was a pistol at him. She ordered him to surrender all the money he had, which he did. He had Kshs.8000/= and he gave all of it to the hirer. The latter rummaged his pockets and found a Motorola cell phone which he took. As this was happening, the complainant testified that he could hear voices of other people outside the car and believed there were more than two people involved in the attack. The robbers then left after warning him not to report the incident to the police. However, the warning notwithstanding the complainant reported the matter to the police the next day. It is incomprehensible why he did not make the report immediately.

The 1st appellant was arrested on 16th September, 2003, by **Sergeant James Wanyonyi**. He did not explain how he identified the 1st appellant, or on what basis he caused her arrest. Sergeant Wanyonyi testified that on the basis of information supplied by the 1st appellant he arrested the other suspects other than the 2nd appellant. There is no witness who testified that he arrested the 2nd appellant and the date of arrest. The 2nd appellant himself stated that he was arrested on or about 10th September, 2003, but the original charge sheet shows he was arrested on 1st October, 2003, and presented to court on 21st October, 2003. He raised the issue of delay in taking him to court both before the superior court on first appeal and before us. We will revert to this issue later on in this judgment.

Both the appellants took part in separate identification parades in which the complainant was the identifying witness. The parade officer was **Chief Inspector of Police Ndumba Mathangani** (Ndumba). In the parade of the 1st appellant, the witness stated in evidence at the trial that he got female parade members of similar features as the 1st appellant. An issue was however raised in the course of the trial whether any of the parade members was visibly pregnant. Ndumba testified under cross-examination that he was not aware "*4th accused was visibly pregnant and you are the one now telling me.*" In her evidence the 1st appellant stated that at the time of the parade she was 6 months pregnant. The trial magistrate did not however, deal with that issue. The superior court likewise did not deal with the issue. It only mentioned in passing the 1st appellant's complaint about the propriety of the identification parade in which she was the suspect. The 1st appellant also lamented that the complainant knew her before the date of the parade. It was her evidence on this aspect that the identification parade was conducted after she had been arraigned in court and was thus exposed to would be identifying witnesses. These were not minor aspects of the case. The 1st appellate court did not give its decision on those matters. It thus failed in its duty of re-evaluating the evidence and giving its decision on issues raised.

As regards the identification parade of the 2nd appellant it was held on the same day with that of the 1st appellant. The 2nd appellant was, too, not satisfied with it. His case was that the identifying witness, the complainant in the case, knew him before. He testified that he used to be the cashier at Walkers Hotel, to which the complainant was at some stage selling newspapers. It was during such sales that the complainant came to know him. It was also the 2nd appellant's case that during the parade some parade members had caps on and others did not. He was one of those in the parade who did not have a cap on.

In their grounds of appeal the appellants, on the main, raise four issues. First, that the evidence on identification was insufficient to show that the 2nd appellant had been positively identified as the person who hired the complainant's taxi, and the 1st appellant was the lady whom the complainant picked from near the Co-operative Bank, Karatina. Second, that the identification parade evidence was flawed and therefore incapable of providing the assurance necessary as to the correctness of the complainant's identification of both appellants. Third, that the 1st appellate court did not properly re-evaluate and analyse the evidence presented before the trial court. Fourth and lastly, that the 2nd appellant was not

presented to the court upon arrest within the 14 days stipulated in **section 72 (3)** of the Constitution.

Mr. Orinda, Senior Principal State Counsel, does not support both appellants conviction, we think, with justification. The complainant as we stated earlier, testified that he did not know both appellants before. If that be so, there are aspects of the case which are not clear. The robbery was committed at night time. Although the complainant said he identified the appellants using light from nearby premises, the circumstances as narrated by him were such that one cannot say with certainty that they facilitated a correct identification of the appellants.

Besides the superior court superficially dealt with the evidence that had been presented to the trial court. For instance the court did not comment on how the police came to know the 1st appellant was involved in the robbery, if at all. The arresting officer testified that he went to Nyeri town and there met the 1st appellant and immediately arrested her. She did not have anything relevant to this case. How did he know she was involved and who identified her to him? The evidence lends credence to the 1st appellant's defence that the arresting officer and herself had been friends and that her arrest had no connection with the alleged robbery of the complainant.

It is also noteworthy that the prosecution did not adduce any evidence as to when and who arrested the 2nd appellant and for what reason. The evidence of arrest of the 2nd appellant was given by the appellants themselves. The 2nd appellant testified that police officers went to his house, picked six of his photographs before arresting him. He was taken to Mweiga Police Station and was later escorted to Nyeri Police Station. After a short stay there he was returned to Mweiga Police Station where he remained for 16 days without being told the reason for his detention. Had the first appellate court analysed and re-evaluated the evidence fully, it is unlikely that it would have affirmed the 2nd appellant's conviction.

Okeno v. R. [1972] EA 32 sets out what the duty of a first appellate court entails. The court has a duty of re-assessing the evidence, analyse and evaluate it afresh and draw its own conclusions on the matter without overlooking the conclusions of the trial court, but also giving allowance to the fact that unlike the trial court, it did not have the benefit of seeing and hearing witnesses testify as to assess their credibility as witnesses.

The superior court rehashed these principles which are restated in this Court's decision in the case of **Gabriel Kamau Njoroge v. Republic (1982 - 1983) 1 KAR 1134** in which the Court rendered itself thus:

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and made due allowance in this respect (see Pandya v. R. (1957) EA 336, Ruwala v. R. (1957) EA 570)”

Although the superior court cited the above passage it does not seem to have acted according to the principles therein enunciated. It cited the case perfunctorily and this is to be deprecated.

The appellants put forward issues which merited serious analysis, but which was not done. Had that been done there are glaring gaps and contradictions which it would have noted, a decision on which would have led that court in all probability to decide the appeal in favour of the appellants. The contradictions included the particulars of the taxi. There was also the issue concerning the manner the identification parades were conducted, and the fact that the 1st appellant was pregnant, but the trial court did no make a note of it in its observations on the evidence.

Finally, there is the fact that the 2nd appellant appears to have been kept in police custody before being taken to court for about 20 days. The first appellate court merely glossed over the issue and we do not have the benefit of its decision on the matter. *Prima facie*, however, it is clear the court denied the

2nd appellant a decision on the matter.

In all the circumstances, it is quite clear that both appellants' respective appeals were not given fair treatment by the superior court with the result that we come to the conclusion that had the superior court fully re-evaluated the evidence, in all probability it would have come to the conclusion that the charge against both appellants was not proved to the standard required. In the result we agree with Mr. Orinda that the appellants respective appeals have merit, and accordingly, we allow the respective appeals, quash conviction for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, and set aside the sentence of death imposed on each of them. They should be set at liberty forthwith unless they are held for any other lawful reason. Orders accordingly.

Dated and delivered at Nyeri this 6th day of November, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR