REPUBLIC OF KENYA

COURT OF APPEAL
AT NAIROBI

CRIMINAL APPEAL 452 OF 2007

GEORGE KIMANI WAMAI
ELIAS MWAURA WAWAI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 2nd November, 2005

in

H.C.CR.A. NO. 472 OF 2002)
****

JUDGMENT OF THE COURT

The appellants **Elias Mwaura Wawai** and **George Kimani Wawai** were jointly charged with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code and were after a full trial convicted and sentenced to death by Betty Rashid, Senior Principal Magistrate, Thika.

The particulars of the offence are that on 31st July, 2001 at Makongeni Estate in Thika District of Central Province, jointly with others not before the Court robbed **Polland Joram Imbiakha** of his Hero Jet bicycle and a mobile phone all valued at Kshs.13,490/= and at or immediately before or immediately after such robbery used actual violence on the said complainant.

Upon conviction and sentence, the appellants appealed to the superior court against their conviction and sentence. However on 2nd November, 2005 the superior court dismissed the appeal.

Aggrieved by the decision of the superior court, on 11th November, 2005 by a home made memorandum of appeal filed, the appellants appealed to this Court and subsequently filed a supplementary grounds of appeal and finally on 26th August, 2009 a further supplementary memorandum of appeal was filed on behalf of the appellants by their counsel.

During the hearing, their counsel, Mr. E. Ondieki relied on the further memorandum of appeal and abandoned the other two sets as described above. Mr. J. Kaigai, Principal State counsel, appeared for the State. The further supplementary memorandum of appeal raises ten grounds as follows:

> **"1. THAT superior court erred in law by confirming the conviction on the basis of evidence of identification that did not meet the required legal standards.**
>
> **2. THAT the superior court erred in law by failing to re-evaluate the entire evidence and drew their own conclusions as enjoined by law.**

3. **THAT the trial court and the superior court misapprehended the facts, applied wrong legal principles and drew erroneous conclusions to the prejudice of the Appellants.**

4. **THAT the superior court erred in law by confirming the conviction on the basis of a defective charge sheet.**

5. **THAT the trial court and the superior court erred in law by failing to consider the plausible and alibi defence given by the Appellants.**

6. **THAT the superior court erred in law and fact by failing to resolve material contradictions and inconsistencies in favour of the Appellants.**

7. **THAT the prosecution never discharged its legal burden of proof beyond reasonable doubt.**

8. **THAT critical witnesses were never called to testify.**

9 **THAT the superior court erred in law by relying on evidence that required corroboration to corroborate.**

10. **THAT the superior court erred in law by confirming the conviction on the basis of suspicion without cogent evidence".**

As has been repeated often, our mandate as the second and final appellate court is confined to issues of law.

On the first critical issue of identification, Mr. Ondieki, submitted that the identification of the appellants was not water-tight as laid down in the relevant case law on the point. He illustrated by stating that the appellants were arrested eight days after the alleged robbery; the appellants were in a group of youths whose number was not constant and that the complainant had visited the scene where the youths used to play *Kamari* three days before the date of arrest; the complainant had not before the date of arrest, positively identified the two appellants; and that the only description he had given was that out of the six persons who allegedly robbed him one was tall and had a hat on similar to the one he was wearing at the date of arrest, eight days after the event; the complainant admitted in evidence that he did not know whether he recorded the statement to the police either before the arrest or after the arrest and concerning this, he is clearly recorded as having stated: *"It is I who is not talking the truth"*. The learned counsel added that no description of the two appellants had been given to the police even after nearly three visits. The circumstances under which the bicycle was recovered were unclear and no evidence of ownership was adduced and its number was not given and that there was no evidence of any other witness of the circumstances of its recovery. He wound up his submissions on that aspect by stating that it was wrong for the two lower courts to have treated the evidence of identification as that of recognition.

The second issue, Mr. Ondieki raised is that of failure by the prosecution to call critical witnesses, for example the village elders who allegedly identified the third youth who had been arrested along with the two appellants but subsequently released. Similarly photos of the bicycle were never processed or produced.

The third issue was that the evidence of alibi by the appellants was never controverted at all.

On his part, Mr. Kaigai in a brief address, submitted that the robbery took place in broad daylight and there was nothing unusual in the lower courts accepting the evidence of identification by one witness as this was in accordance with **Section 143** of the Evidence Act and furthermore the complainant had sufficient time to identify the appellants because a conversation did take place at the point when the youths asked the complainant what he thought they ate. He further submitted that in the circumstances, the necessary ingredients of the offence were present. On the defence of alibi, Mr. Kaigai stated that this had been displaced by the prosecution case.

We have considered the grounds raised and on the issue of identification the complainant testified, thus:

> **"I recorded a statement before accused were arrested on 8/8/2001. My statement had been recorded before 8th: Ref: Statement; it is mine; it was recorded on 10/8/2001. It is me who is not telling the truth that I did not record on 10th. I do not lie everyday".**

Further evidence by the complainant upon recall was:

> **"So far I have not told the police their identification marks as the police did not ask me that. Even their cloths have not been described …… I record statement before arrest …….. They were arrested when I recorded this statement. …… 2 stories are not telling the truth that I recorded after the arrest".**

From the above evidence, it is clear to us that the evidence of identification by the only witness is highly unsatisfactory and inadequate and in our view, it would not be safe to rely on it to sustain the conviction. On the actual day of arrest of the appellants, it is the elders who identified the third arrested youth as sickly and not a member of the gang otherwise he too would have been arrested on the basis of identification by the complainant. The complainant could not recall when he made his statement to the police and states that he had not given any description of his attackers prior to their arrest. In our view, this makes it unsafe to rely on the complainant's identification of the appellant. It is significant that evidence points to the village elders as having identified them yet the elders were not there at the time of the robbery. In addition, when the complainant visited the scene three times before the arrest it is possible he found groups of youth playing *Kamari* or smoking bhang but not necessarily the same youths who robbed him. Nothing links the appellants to the bicycle which was never identified by number or its ownership proved in Court. The photographs of the bicycle were not produced in court.

All in all, we find that the evidence on identification was not water-tight.

In this regard, we would like to re-echo two holdings of this Court on the point in the case of **JAMES MWANGI VS. REPUBLIC [1983] I KLR 327** where the Court rendered itself:

> **"1. In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.**
>
> **2. In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of accused".**

In this case as analyzed above the complainant wavered concerning when he gave a statement to the police whether before or after the arrest. He confessed of having told an untrue story concerning the statement and also admitted that he had not given any description of his attackers. The record depicts the witness as unreliable yet the entire conviction and sentence hinged on his evidence. Again, there is no proof that when the complainant visited the scene three times, it is the same youths who were present. The intervening period between the alleged robbery and the arrest was eight clear days. In our view, the chances of any other innocent youth joining the group to play *Kamari* are high and the appellant's presence is not necessarily compatible with their guilt in the circumstances.

On the second issue, we agree with Mr. Ondieki that although the evidence of only one witness of identification may be relied on, the complainant's evidence as demonstrated above was extremely shaky hence the need to have called the village elders to explain to the court why they thought the appellants were in the group which robbed the complainant on 31st July, 2001 and not any other innocent youths with a passion of the game for *Kamari.*

In this regard, we consider failure on the part of the complainant to have described the robbers before the arrest, in turn meant that such evidence should have been reinforced by evidence of identification by other witnesses such as the village elders and the witnesses at the point of the recovery of the bicycle. In the circumstances of this case, more witnesses would have assisted the court in ascertaining the truth and failure to do so is in our view is fatal to any conviction.

Section 143 of the Evidence Act states:

> **"No particular number of witnesses shall in the absence of any provision of law to the contrary be required for proof of any fact".**

While we agree that the evidence of a single identifying witness may be relied on, in the case before us that evidence is unreliable and shaky as demonstrated above.

On the third critical issue of the defence of alibi, with respect, we do not agree with Mr. Kaigai that it was displaced by the prosecution case since in the light of the weaknesses in the totality of evidence by the prosecution as described above, the alibi provided a reasonable defence that the two appellants were not part of the group of youths which robbed the complainant on 31st October, 2009 because there is no evidence placing them at the scene.

We are not satisfied that the appellants defence was displaced by the prosecution case as held by the trial court and the first appellate court. We think, shaky and unreliable evidence of identification as analysed above cannot in our view, displace a reasonable defence of alibi. The appellants had said that at the material time they were in Kandara, Murang'a on 31st July, 2001 and were coincidentally at the scene in the company of other youth on the day of arrest, namely 8th August, 2001. The defence of alibi in view was not treated as recommended by this Court in the case of **KIARIE VS. REPUBLIC** [**1984] KLR 739** where in holding (6) the Court held:

> **"An alibi raises a specific defence and an accused person who put up an alibi in an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi".**

In the circumstances of the case, we say the same in that it is reasonable to conclude that the appellants were not at the scene of the crime eight days before their arrest. We think, their defence of alibi was never displaced at all because there was no cogent evidence that placed them at the scene of the crime eight days earlier. All in all, we think the errors of law on the lower court's finding on identification and alibi were such as to making the conviction of the appellants' unsafe.

We accordingly allow the appeal, quash the conviction and set aside the sentence of death (now commuted by His Excellency the President following the recent general commutation of death sentences) and order that the appellants be forthwith released unless lawfully held. It is so ordered.

Dated and delivered at Nairobi this 18th day of December, 2009.

S. E. O. BOSIRE
.....
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