REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 371 OF 2006

JOSEPH POTELI WANYONYI …… APPELLANT

AND

REPUBLIC ……..…….... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (W. Karanja &

M.K. Ibrahim, JJ) dated 26th September, 2006

in

H.C.CR.A. NO. 48 OF 2004)

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JUDGMENT OF THE COURT

The appellant herein, *Joseph Poteli Wanyonyi* (as the 1st accused) and one *Stephen Mwangi Karuma* (as the 2nd accused) were arraigned before the Senior Principal Magistrate's Court at Kitale on 23rd January, 2004 where they were jointly charged on two counts of robbery with violence contrary to *section 296(2)* of the Penal Code and four counts of assault causing actual bodily harm, contrary to *section 251* of the Penal Code. After the trial before the learned Senior Principal Magistrate (Mrs. H. I. Ong'udi) they were convicted on all the six counts and sentenced as follows, according to the trial Magistrate's record:-

"*C1* - *Each to suffer death as provided by the law.*

C2 - *To serve 2 years imprisonment each.*

C3 - *Each to serve 2 years imprisonment.*

C4 - *Each to serve 2 years imprisonment.*

C5 - *Each to serve 2 years imprisonment.*

C6 - *Each to suffer death as provided by the law*

Order - *Sentences to run concurrently."*

Being dissatisfied with the foregoing they both preferred an appeal to the High Court and in its judgment delivered on 26th September, 2006 the superior court (Ibrahim and Karanja J.J) allowed the appeal of Stephen Mwangi Karuma and set him free but dismissed the appellant's appeal. This is why the appellant is standing alone before us.

The facts of the case as accepted by the two courts below were that on the night of 18th January, 2004 David Wabwire (PW3) and his wife Bernetta Masitsa Wabwire (PW1) were in their house at Bondeni Farm Kinyori within Trans Nzoia District when they were attacked by people who knocked down their door at about 11.00 p.m. These people beat up the two complainants (PW1 and PW3) and robbed them of

the items indicated in the charge sheet. PW1 and PW3 were able to recognise the appellant among the robbers. Bernard Simiyu Wabwire (PW4) a son to PW1 and PW3 heard the commotion at his parents house and on coming out, he saw two people armed with rungus and one of them hit him on his head. He fell down unconscious. As he was being beaten he identified the appellant as one of the two people. Esther Naliaka (PW2) a neighbour to PW1 and PW3 was also beaten up and stabbed with a sharp object. She sustained injuries on her head, face and on her left hand. Her right hand was also broken in the process. The robbers stole from her various items including a Sony radio cassette, seven skirts, children's clothes, a panga and an axe. Naliaka (PW2) was able to identify the appellant among the robbers.

Daniel Kasembeli (PW6) and Samwel Lucheli Okunga (PW7) answered the distress call of the complainants and on reaching the scene saw a group of people and identified the appellant among them. PW6 was ordered to sit down but when he refused to obey the order he was hit on the hand by the appellant. The attack was reported to Pc Nelson Wanyonyi (PW8) of Kitale Police Station who immediately arrested the appellant.

In his defence the appellant told the court in his unsworn statement that he did not commit these offences and that he was arrested from his place of work by the police officers who were in the company of his father.

The learned Judges of the superior court in allowing the appeal of the appellant's co-accused who was the 2nd appellant in that court said:-

> "*As far as the 2nd appellant is concerned, we find that the evidence of identification against him was rather disjointed and inconsistent. PW1 said in her evidence that she did not know the 2nd appellant's first name. She said she only knew him as "Mwangi's son". On cross-examination by the 2nd appellant, she stated "I did not know you prior to this."*

She contradicted herself further down in her evidence when she said "yes you stay near me at home".

Having rejected the evidence of identification in respect of the appellant's co-accused the learned Judges concluded their judgment thus:-

> "*For those reasons, we find that his appeal has merit. We allow the same and quash the conviction and set aside the death sentence imposed by the trial court. We order that the 2nd appellant be set at liberty unless otherwise lawfully held".*

It is in view of the foregoing that the appellant now comes to this Court by way of second appeal. That being so only matters of law fall for consideration by virtue of *section 361(1)* of the Criminal Procedure Code.

When this appeal came up for hearing on 23rd September, 2008 Mr. G. K. Chemoiyai appeared for the appellant while Mr. A. J. Omutelema the learned Senior Principal State Counsel appeared for the State. In his submission, Mr. Chemoiyai relied on the grounds set out in his Supplementary Memorandum of Appeal and the grounds filed by the appellant. It was Mr. Chemoiyai's submission that there was no evidence of robbery proved and that the charge sheet was defective in that it was not properly framed.

In answer to the foregoing, Mr. Omutelema submitted that the evidence of PW1 and PW2 should be taken together with that of PW3 and PW4 which established that this was a gang which had various dangerous weapons. He submitted that, the particulars of the offence were clearly set out in the charge sheet. He therefore urged us to dismiss the appeal.

We have considered the submissions by Mr. Chemoiyai and Mr. Omutelema and we must point out that as already stated this being a second appeal only matters of law may be considered. There are concurrent findings by the two courts below that there was a series of robberies and assaults on various complainants during the material night. If we understood Mr. Chemoiyai, he was submitting that the ingredients of robbery had not been proved. But these witnesses testified that the assailants were armed with various weapons and that they used violence as they robbed the complainants.

In our view the only point of law in this appeal is whether the appellant was properly identified. This point was considered by the superior court and in their judgment the learned Judges of the superior court said:-

> "*As rightly stated by the learned trial magistrate and the learned counsel for the state, as far as the 1st appellant was concerned, the evidence of identification was that of recognition as opposed to visual identification. He was very well known to not less than 5 of the prosecution witnesses who were all his relatives. They knew and identified him when they saw him by recognition. Even before they came face to face with the 1st appellant PW1, PW3 and PW4 had already heard his voice and identified him. His was therefore a case of identification by recognition rather than usual identification. The circumstances of identification in this case in respect of the 1st appellant are similar to those in the case of ANJONONI VS REPUBLIC [1980] KLR 59 where the Court of Appeal held:-*

> "*Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in one form or other."*

> *In this case, the 1st appellant was recognised by not less than 5 of his relatives. In our considered view, there was sufficient light inside PW1's house for her and PW3 to see and identify him properly. Even where the circumstances were not very conducive – outside PW1's house, PW4, PW6 and PW7 had torches which they shone on the assailants. They recognised their 1st cousin/brother. Coupled with this evidence, it is noted that the matter was reported to 1st appellant's father soon after the incident and he took him to the police station the very following morning.*

In our considered view, this identification of the 1st appellant was foolproof. The same was watertight. It left no possibility of error whatsoever."

We are in entire agreement with the foregoing as the appellant was clearly recognised by people who did not only know him but some were actually his relatives.

It is to be observed that the appellant was sentenced to death on both counts. As we have stated before in other appeals a person cannot be sentenced to suffer death on two counts. The practice is to impose a death sentence only on one count while the sentence on other counts are held in abeyance. Apart from what we have said about the sentence we are satisfied that this appeal has no merit and we order that the same be and is hereby dismissed.

Dated and delivered at ELDORET this 26th day of September, 2008.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR