



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA**

AT NAKURU

Criminal Appeal 151, 152 & 153 of 2003

JOHN MAINA KANYI 1ST APPELLANT

JOHNSON WAITHAKA 2ND APPELLANT

DANSON MWANGI KAGIRI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Justice Muga Apondi) dated 2nd July, 2003

in

H.C.CR.A. NO. 251, 252, 253 OF 1999)

JUDGMENT OF THE COURT

The three appellants, *John Maina Kanyi* (1st appellant), *Johnson Waithaka Kamau* (2nd appellant), *Danson Mwangi Kagiri* (3rd appellant) and one, *Samuel Wanjau Mwangi* were arraigned before the Principal Magistrate's Court at Nakuru where they were jointly charged on five counts of robbery with violence contrary to *section 296(2)* of the Penal Code.

After a long trial before the learned Principal Magistrate (Mr. H. Bomet), the three appellants were eventually convicted on two counts (*the first and second counts*). The particulars of the offence in respect of those two counts were as follows:-

"COUNT I

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

(1) JOHN MAINA KANYI (2) JOHNSON WAITHAKA KAMAU

(3) DANSON MWANGI KAGIRI (4) SAMWEL WANJAU MWANGI

On the nights of 22nd and 23rd August, 1998 at Muguga Farm, Lanet in the Nakuru District of the Rift-Valley Province jointly with others not before court, being armed with dangerous weapons namely Pistols, simis, axes, pangas and rungas robbed JOHN KAIRU KIBUU of one motor-vehicle registration number KYC 056 Toyota Hilux Pick up, cash Kshs.40,000/=, one jacket and personal documents all valued at Kshs.640,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said John Kairu Kibubu by wounding him.

COUNT II

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

(2) JOHN MAINA KANYI (2) JOHNSON WAITHAKA KAMAU

(3) DANSON MWANGI KAGIRI (4) SAMWEL WANJAU MWANGI

On the nights of 22nd and 23rd August, 1998 at Muguga Farm, Lanet in the Nakuru District of the Rift-Valley Province jointly with others not before court, being armed with dangerous weapons namely Pistols, simis, axes, pangas and rungas robbed one, JANE WANJIRU KAIRU of her cash Kshs.122,000/= and at or immediately before or immediately after the time of such robbery, used personal violence to the said JANE WANJIRU KAIRU by wounding her.”

The complainant and the victim of the offence in the first count was *John Kairu (PW1)* while the complainant and the victim of the offence in the second count was *Jane Wanjiru (PW4)*. These two witnesses testified how a gang of six people descended on their home at Muguga Farm during the night of *22nd and 23rd August 1998* and subjected them to a reign of terror before making away with the various items as stated in the particulars of the offence set out above. In his evidence in chief, *John Kairu (PW1)* stated:-

“I identified two people out of the six. That was 1st and 3rd accused. 1st accused was the one who was given ignition keys by my wife. 3rd accused is the one who said the vehicle was to be driven by Mokorino. 1st accused had a club. 3rd accused had a wood. 1st accused went outside with ignition key.”

In her evidence in chief *Jane Wanjiru (PW4)* stated:-

“On the night of 22/23-8-98 at about 12:00 midnight I was sleeping in my house with my husband called John Kairu. My door was hit with a heavy object. I woke my husband. My husband woke up and he went under the bed. Lights were on in my bedroom. I opened the door of my bedroom and I saw six people entering my bedroom. Three of the people who entered in my house were people I had seen before. That was the 1st, 2nd and 3rd accused. The 1st accused had an axe. The 2nd accused and 3rd accused had pangas. 3rd accused also had a club. The 1st accused asked me for ignition keys for our vehicle. I picked the keys and gave to the 1st accused.”

The two prosecution witnesses (*PW1 & PW4*) were called to identification parades and were able to identify the appellants as some of the people who raided their home. The appellants are alleged to have made confessions but each appellant retracted his statement claiming that the statements were not obtained voluntarily.

The learned trial magistrate considered the evidence before him and came to the conclusion that the three appellants had been positively identified by the two complainants (*PW1 and PW4*). He, however, did not convict the appellants on the two counts of robbery with violence contrary to *section 296(2)* of the Penal Code as charged but contrary to *section 296(1)* of the Penal Code. In concluding his judgment, the learned trial magistrate stated:-

“The court further is satisfied that the prosecution has proved a charge of robbery under section 296(1)

of the Penal Code on the 1st and 2nd counts against the 1st, 2nd and 3rd accused

Having so stated, the learned trial magistrate proceeded to sentence the three appellants as follows:-

“The offences committed by the 1st, 2nd and 3rd accused are of a serious nature. Members of public and their property must be protected. However, accused persons are young people. They have family responsibilities and the court has taken into consideration what each accused has told the court in mitigation. The 1st, 2nd and 3rd accused each is sentenced to seven years imprisonment on Count 1 and 2. Each accused will also receive corporal punishment two times.”

The problem in these consolidated appeals starts with the foregoing. What sentence was imposed on each appellant? The learned trial magistrate merely stated that *“each is sentenced to seven years imprisonment on counts 1 and 2. Each accused will also receive corporal punishment two times.”* What did the learned trial magistrate mean by that sentence?

The appellants being dissatisfied with their conviction and the sentence imposed on each of them appealed to the superior court.

The appellants' appeals were consolidated and came up for hearing before the High Court at Nakuru (Apondi, J.) who in his judgment delivered on 23rd June, 2003 stated:-

“This court entirely concurs with the evaluation of the evidence by the learned Provincial State Counsel. Significantly is the fact that the appellants were positively identified under electric lights by the PW1 and PW4. The appellants were in their house for about an hour. That was more than sufficient time for the witnesses to be able to identify them. The circumstances were definitely favourable for a correct and proper identification. The same applied to count II.

Having said the above, the learned trial magistrate should then have considered the essential ingredients under section 296(2) of the Penal Code which are as follows:-

- *that the offender is armed with any dangerous or offensive weapon or instrument.*
- *Or is in the company with one or more other person or persons.*
- *Or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

Apparently, all the above ingredients were explicitly proved in this case. Section 354 of the Criminal Procedure Code states clearly that the high court has the following powers:-

- (ii) *alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence or*
- (iii) *with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence*

The circumstances of this case do dictate that I alter the sentence imposed and substitute the same with mandatory death sentence for count I and II.”

The High Court decision must have struck the three appellants like a thunderbolt from the sky when the sentences of imprisonment were changed to death sentences. The appellants would not take it lying down and hence through their advocate (Mrs. G.A. Ndeda) appealed to this Court by way of second and final appeal.

When the appeal came up for hearing before us on 26th February, 2007 Mrs. Ndeda raised four main

issues:-

- (i) *identification*
- (ii) *consideration of defence of alibi*
- (iii) *re-evaluation of the evidence by the first appellate court*
- (iv) *failure of the High Court to comply with section 359(1) of the Criminal Procedure Code.*

We have already stated that the attack on the complainants' home was carried out at midnight. The two witnesses stated that they were able to identify their assailants. Mrs. Ndeda submitted that since each appellant put forth an alibi as a defence the two courts below ought to have critically examined the evidence of identification vis-à-vis the defence of alibi. Mrs. Ndeda emphasized that description of the appellants was not given to the police and hence their identification was doubtful.

As regards *section 359(1)* of the Criminal Procedure Code, Mrs. Ndeda contended that the High Court was not properly constituted as the appellants' appeals were heard by one Judge instead of two Judges.

Mr. Koech, the learned State Counsel, supported both the conviction and sentences imposed on the appellants.

Having considered the history of these consolidated appeals, we found that there were a number of errors either by the trial court or the first appellate court. We have already alluded to the issue of the sentence imposed by the trial court on 8th November, 1999. It would appear that each appellant was sentenced to seven years imprisonment on each count. It was not stated whether the sentences would run concurrently or consecutively. Then there was the order for corporal punishment which was expressed as follows:-

"Each accused will also receive corporal punishment two times."

From the foregoing, it is not clear to us what sentence was imposed on each appellant by the trial court. When the matter came to the superior court, the sentences of imprisonment were changed to death sentence on both counts.

In *Abdul Debanu Boye & Another vs. R – Cr. Appeal No. 19 of 2001* (unreported), this Court stated as follows:-

"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance."

The above applies to this appeal in which the learned Judge of the superior court appears to have imposed death sentence on the appellants on both counts.

Coming now to the issue of the number of Judges of the High Court sitting on criminal appeals, the starting point must, of course, be *section 359(1)* of the Criminal Procedure Code which provides:-

"Appeals from subordinate courts shall be heard by two judges of the High Court, except when in any particular case the Chief Justice, or a judge to whom the Chief Justice has given authority in writing directs that the appeal be heard by one judge of the High Court."

This Court has dealt with the issue of *section 359(1)* of the Criminal Procedure Code in its earlier

decisions. Indeed, the most relevant decision that comes to our mind is where an appellant who was convicted of robbery contrary to *section 296(1)* of the Penal Code appealed to the High Court where a single judge of the High Court revised the conviction to robbery with violence contrary to *section 296(2)* of the Penal Code and proceeded to sentence the appellant to death. That was in the case of *Peter Ndungu Kihiko v. Republic – Criminal Appeal No. 162 of the 2003* (unreported) in which this Court sitting at Nakuru in *September, 2004* stated:-

“The appellant herein was convicted of robbery contrary to section 296(1) of the Penal Code but when the appeal came up for hearing before Muga Apondi, J. he revised the conviction to robbery with violence contrary to section 296(2) of the Penal Code.

The learned counsel for the appellant has drawn our attention to the provisions of section 359(1) of the Criminal Procedure Code which refers to appeal by two judges. Since the practice by the High Court is that appeals be heard by two judges unless there is a written authority by the Chief Justice directing that the appeal be heard by one judge, we are satisfied that there was an error on the part of Muga Apondi, J. in proceeding with the hearing of the appeal while sitting as a single judge. For these reasons, we allow the appeal and set aside the conviction and sentence of death imposed on the appellant. We further direct that the appeal be re-heard by a bench of two judges.”

See also *Nzingo v. Republic [2004] 2 KLR 1.*

In the present case there is no evidence that the Chief Justice had given authority that the appeal be heard by one judge of the High Court. This being so the appeal is allowed.

Should we order a re-hearing? We have agonized over this matter and in view of the fact that the appellants have been in custody since 1998 and as the learned trial magistrate was of the view that the appellants ought to serve a prison sentence rather than be sentenced to death, we are of the opinion that taking into account various errors by both trial court and the first appellate court, it would be in the interest of justice to allow this appeal, quash the convictions recorded against the appellants and set aside the sentence of death imposed by the superior court.

In view of the foregoing, the appeals are allowed and we order that the appellants be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 2nd day of March, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR