



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT NYERI

Criminal Appeal 185, 208 & 209 of 2003

ROBERT MURIITHI 1ST APPELLANT

JACKSON MBAABO 2ND APPELLANT

CYPRIAN KAMANDE 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma & Tuiyot JJ.) dated 14th March, 2002

in

H.C.C.R.A .NOS. 228/01, 227/01 AND 229/01)

JUDGMENT OF THE COURT

The three appellants were convicted by the Senior Resident Magistrate Meru of two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and each sentenced to death. Their respective appeals to the superior court were dismissed.

ROBERT MURIITHI, the first appellant, herein was the first accused at the trial while **Cyprian Kamande (the second appellant)** and **JACKSON MBAABU (third appellant)** were the second and third accused respectively. The first appellant died while undergoing treatment on 3rd August, 2002 less than 5 months after lodging the appeal. His appeal has abated under **rule 68(1)(a)** of the Court of Appeal Rules.

In the first count the appellants were charged with robbing one **GEOFFREY KIRIMI (Kirimi)** of motor vehicle registration number **KAJ 667M** Isuzu Pick-up valued at **Shs. 1,200,000** and shs. 740/= on the night of 12th August 1999. In the second count the appellants were charged with robbing one **STEPHEN KAGUTE (Kagute)** of Kshs. 30,000/= on the night of 12th August, 1999.

KIRIMI (PW1) is a businessman in Meru Town where he owns a shop but lives at **Kainginyo village** – a fifteen (15) minutes drive from Meru Town. On 12th August, 1999 at about 2 a.m., he, his wife **Jennifer Kathure Kirimi (Jennifer) (PW2)** and daughter Pamela Kanana were awakened by a loud bang at the gate of the homestead. Shortly thereafter Kirimi heard people shouting outside the bedroom

window telling Kirimi to wake up and give out money and car keys. Kirimi peeped through the window. There was bright moonlight. He saw about seven people outside who were armed with axes, pangas and clubs. Kirimi fetched the keys and threw them out through the window but the robbers knocked down the steel window after which four robbers jumped into the house. Jennifer had switched on the solar lights and the whole house was brightly lit. Three of the robbers were armed with axes while the fourth one had a panga and a piece of chain. The robbers beat Kirimi and Jennifer viciously demanding money. They were beaten with the chain all over the body. Kirimi's left leg was broken with the head of an axe and when he fell on the bed he was hit on the back of the head with the axe thrice. Kirimi identified the first appellant (**deceased**) as the first person who jumped into the house and as the one who beat them with a chain. He also identified the third appellant as the one who broke his leg with an axe. Jennifer was also beaten with a chain. She was also cut on the left temple with an axe by a person she identified as the second appellant. Kirimi told the robbers that he had no money. Jennifer also told them that she had no money but she could give them money which was in the shop in Meru Town. She was then dragged from the house and put inside Kirimi's pick-up. The robbers who were about twelve (12) in number, according to Jennifer, left the house and boarded the pick-up. Jennifer was driven to her shop in Meru Town. The vehicle stopped near the shop at about 2.30 a.m. A watchman went near the vehicle and was cut with an axe on the face. The poor soul died in hospital three months later. Jennifer was pushed to the shop by a person she identified as the first appellant. The security lights at the verandah of the shop were on. Jennifer did not want to open the shop. She moved up and down the verandah and ultimately into a narrow corridor followed by the robbers. The corridor led to a shop where a Landrover was packed. There were two young men. The robbers fled and drove away when they saw the two men.

On the same night at about 3.30 a.m. the shop of **Stephen Kabute M'Marete (PW4)** was raided by robbers. The front door of the shop was banged with a vehicle and one side of the door gave way. The headlights of the vehicle flooded the shop with lights and three people armed with axes and a panga entered. The robbers demanded money and one of the robbers hit Kabute on the head with an axe. Kabute led them to the bedroom where he gave them **Kshs.15,000**. Kabute also gave them a further **Kshs.10,000** from the cash box inside the shop and some money in coins (**about shs.5,000**) which the robbers placed in two paper bags. Kabute was then taken to his bedroom where his wife **Monica Ntarara (Monica) (PW5)** was. Monica was beaten with the blunt side of the axe by a person she identified as the second appellant. The second appellant hit Kabute on the thigh and locked him and his wife in the bedroom. The robbers then drove away in motor vehicle registration **No.KAJ 667M** which belonged to Kirimi.

The two robberies were reported to the police. Kirimi and his wife Jennifer were taken to hospital where they were admitted for two weeks.

The motor vehicle stolen from Kirimi was recovered on the following morning abandoned near **Nkubu market** with the radio cassette stolen.

On 9th January 2000, **P.C. David Mutuku** got information that the second and third appellants were hiding in **Magundu** area. He went there and arrested them in the same house.

On 21st January, 2000 the second appellant was identified by **Kirimi, Jennifer, Kabute, and Monica** in an identification parade conducted by **IP Hudson Nzioka (PW8)** at Meru Police Station. Similarly, on the same day the third appellant was identified by Jennifer, Kabute and Monica in an identification parade. Kirimi did not identify the third appellant in the identification parade.

The second appellant said in an unsworn statement that he was arrested on 5th January, 2000 and not on 9th January, 2000 by one **Cpl. Maitima** for failing to pay him protection money in connection with changaa. The third appellant stated in his defence that he was also arrested on 5th January, 2000 by **Cpl. Maitima**. He denied that he was arrested on 5th January, 2000 by **Cpl. Mutuku**.

The appellants' advocate relies on the three grounds of appeal in the supplementary memorandum appeal which states:

- 1) **The learned trial magistrate erred in law and in fact in failing to consider the defence of the appellants**
- 2) **The learned trial magistrate erred in failing to evaluate the evidence leading to the arrest of the accused persons**
- 3) **The learned Judges of Appeal erred in failing to subject the evidence of the trial court to a fresh and exhaustive scrutiny and arrive at their own findings of the fact and law.**

Mr. Nderi, learned counsel for the appellants argued ground three as the main ground of appeal. He relied on the case of **Okeno v. Republic [1972] EA 33** and contended that the superior court failed to perform its duty and that the trial court also failed to consider the appellants' defences separately on the merits. He pointed out that the identification parades were held four months after the alleged offence.

Mr. Orinda, learned Principle State Counsel, supported the convictions. He submitted that although this was a case of identification at night in difficult circumstances the appellants were identified by several witnesses, that there were lights at the scenes of both robberies and that the witnesses spent a lot of time with the robbers. He admitted that the judgment of the superior court is short but submitted that the superior court re-evaluated the evidence and made its own findings.

This is a second appeal. Just as a first appellate court will not normally interfere with findings of fact by a trial court unless the findings are based on no evidence or a misapprehension of the evidence or where the Judge is shown demonstrably to have acted on the wrong principles in reaching his decision, so also the second appellate court will not lightly interfere with the concurrent findings of the trial court and first appellate court unless for the same reasons.

Further, once it is established that there was evidence to support the conviction the court on the second appeal will not examine the sufficiency of such evidence. It is only if the conviction is based on no evidence or the court below misapprehended the evidence or misdirected itself that a question of law arises warranting interference by the second appellate court. (See **Njeri vs. Republic [1981] KLR 156**).

In this case the trial magistrate appreciated that the prosecution case was dependent on the identification of the appellants. He also appreciated that the court was required to weigh and test the evidence of identification with the greatest care. In the end the trial magistrate concluded:

"I have cautioned myself of the dangers inherent in evidence of identification and I still find that the evidence that the accused herein were positively identified is safe and positive. I find no reason to doubt the witness. The witnesses were firm and consistent. The evidence of KIRIMI (PW1) KATHURE (PW2), KABUTE (PW4), and MONICA (PW5) contains details of the suspects they identified particularly what the suspects did during the robbery which further re-affirms to the court that the witnesses had clearly seen and identified the accused."

The superior court after reviewing the evidence said in part:

"when the identification parade was conducted (sic) at Meru Police Station on 21st January, 2000 by Inspector Hudson Nzioka the appellants were identified by the complainant(sic) to be the ones who robbed them of (sic) their properties. We found that the prosecution witnesses gave consistent evidence against the appellants at lower court trial. We found that the complainants who were prosecution witnesses at lower court identified the three appellants at the scene of the robbery incident. There was sufficient light at both scenes of robbery and we find that the complainants had no difficulties in identifying the appellants ..."

It is evident from that brief passage of the judgment of the superior court that the superior court at least reached its own findings that the appellants were identified by the complainants at the identification parade; that the prosecution witnesses gave consistent evidence against the appellants; that the complainants identified the appellants at the scene of robbery and that there was sufficient lights at the

scenes of both robberies.

The evaluation of the evidence by the superior court was not exhaustive. Nevertheless the superior court made its own findings on the material aspects of the case.

Furthermore Mr. Nderi did not deal with the evidence given at the trial or with the findings of fact by the two courts below. He does not say that the evidence was insufficient, unsatisfactory or inconsistent or inconclusive. Nor did he say or show that the two courts below misapprehended the evidence or acted on the wrong principles.

It is not enough merely to say that the superior court failed to subject the evidence to a fresh and exhaustive scrutiny. It must, at least, be further shown what evidence was not reconsidered, the need for such reconsideration and the impact the reconsideration would have had on the conviction or the decision of the superior court.

As the case of **Okeno v. Republic** (supra) illustrates, it is not every dereliction of duty by the first appellate court that will lead to the quashing of the conviction. Although each case will be judged on its facts the conviction is generally likely to be quashed where the irregularity in the judgment of the superior court has occasioned a failure of justice. In the **Okeno's** case the court said in part at page 36 para I:

“Notwithstanding the form taken by High Court’s judgment, we are nevertheless satisfied that the Judges did make their own evaluation of the facts although this is not made to appear clearly. We are satisfied that the High Court came to an affirmative and definite conclusion that there was evidence upon which the magistrate properly and reasonably found as he did. We are satisfied that the irregularities contained in the first appellate judgment did not in fact occasion a failure of justice, and that had the Judges discharged their duties in accordance with the law as laid down in a long line of authority they must have inevitably come to the same conclusion and dismiss the appeal against conviction as they did so.”

That with respect is the correct approach.

There is no merit in the complaint that the defences of the appellants were not considered. Their respective unsworn statements did not contain any facts showing that they did not commit the offences charged or casting doubt that they committed the offences. Their statements merely referred to the fact of their arrest.

In this case the two courts below believed that the visual identification of the two appellants was free from the possibility of error. Both were identified at the home of Kirimi and at the verandah of the shop of Kirimi in Meru Town. There was also evidence that both were subsequently identified at the shop of Kabute by Kabute and his wife Monica. They were subsequently identified at the identification parades. The appellants have not shown that there was no evidence to support the findings of the two courts below or that the two courts below misapprehended the evidence or acted on the wrong principles. We are satisfied that there was clear and cogent evidence to support the concurrent findings of the two courts below.

In the circumstances we find no merit in the two appeals. The two appeals are accordingly dismissed.

Dated and delivered at Nyeri this 19th day of May 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR