



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 58 OF 1998

LEMARANTIN LOITAN 1ST APPELLANT

OLONUNUA LOSUBERE2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Etyang & Juma, JJ.) dated 30th October, 1998

in

H.C.CR.A. NO. 43 OF 1998)

JUDGMENT OF THE COURT

Lemarantin Loitan (1st appellant) and ***Olonunua Losubere*** (2nd appellant) appeal to this Court against their conviction and sentence on one count of robbery with violence contrary to **section 296(2)** of the Penal Code and the particulars of the charge forming the basis of their appeal to the Court were that on 4th day of March, 1997 at Isiolo River, Buffalo Springs in Isiolo District, the two appellants, together with one, ***Laindora Loituai***, the appellants while armed with dangerous weapons, namely rifles, robbed Mburu Karanja of Shs.25,000 and a watch and that during the robbery they used actual violence on Mburu Karanja. The third person ***Laindora Loituai*** was acquitted by the learned trial magistrate but the two appellants were found guilty and convicted on the charge stated herein and a second one, also of robbery involving the same incident. The two appellants appealed to the High Court and by its judgment dated and delivered on 30th October, 1998, the High Court (Etyang and Juma, JJ.) while allowing the appeal on the second count of robbery, dismissed the appeal on the first count whose particulars we have set out herein and the High Court confirmed the sentence of death imposed on each appellant on that count. That is why the two appellants are now before this Court.

This being a second appeal, the Court is only authorized to deal with matters of law. The issue of identification of the appellants which is always a question of law, does not arise before us. Though the learned trial magistrate thought ***Mburu Karanja*** (PW1) had properly identified the appellants during the robbery and subsequently on identification parades, the High Court, rightly in our view, discounted

Mburu's identification of the appellants at the various identification parades because Mburu Karanja's evidence was that after the arrest of the two appellants they were taken to the Lodge where he (Mburu Karanja) was and he was asked to identify the people who had attacked him. Eight or so people who were in a vehicle were shown to Mburu Karanja and he identified the two appellants. It was after this had taken place that identification parades were held for each appellant at Isiolo Police Station and in those circumstances, it was not surprising that Mburu Karanja was able to identify each appellant at the parade. The High Court was not impressed by such identification and held that it was flawed. We agree with them.

A game warden with the Kenya Wildlife Services, **Samuel Rukaria (P.W.2.)** and an **Administration Police Inspector Jackson Ng'ang'a (P.W.5.)** were informed about the robbery and went to the scene. They then followed the route taken by the robbers and it would appear the trail led them to a manyatta some 50 to 60 kilometres from the scene of the robbery. Mburu Karanja was a tourist driver and had been taking a French tourist couple from Nyeri to the Samburu Game Reserve. Apart from the robbers taking money and a watch from Mburu Karanja, they also took away the hand-bag of the tourist lady and her husband's shoes. The couple, however, were unable to identify the appellants at the identification parades, their reason for such failure being that all Africans look the same. Be that as it may, the evidence of Rukaria and Ng'ang'a was that outside the manyatta, they came upon a spot where things had been burnt and from the burnt heap, they were able to collect some documents – burnt photographs and such like items. They then entered the manyatta and entered a particular house in the manyatta. In that house, they found these two appellants and the man who was tried with them. The two witnesses saw a jacket on the wall and took possession of it. It would appear the two witnesses were saying the jacket belonged to the first appellant and that in its pockets they found parts of the documents which had been burnt outside the manyatta. However, the French couple did not come to give evidence and identify the documents. The jacket in which they were said to have been found was never produced in evidence and there is absolutely no explanation available from the recorded evidence as to what became of the alleged jacket. The appellants' contention was that no such documents were found with them and in the circumstances surrounding the case, it is probable that no documents were found in a jacket belonging to the 1st appellant. Mr. Orinda, the learned Principal State Counsel, conceded the appeal on behalf of the Republic. We think he was right in doing so.

We accordingly agree with Mr. Kariuki for the appellants that the conviction recorded against them is unsafe and ought not to be allowed to stand. We allow the appeal, quash the conviction, set aside the sentence of death imposed upon each appellant and order that each appellant must be released from prison forthwith unless held for some other lawful cause. Those shall be our orders in the appeal.

Dated and delivered at Nyeri this 12th day of May, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR