



**IN THE COURT OF APPEAL OF KENYA
AT NYERI**

CRIMINAL APPEAL 178 & 180 OF 2005

BETWEEN

1. GEORGE MUCHEMO AKWALU

2. ZACHARY KAILI M’EKANDI..... APPELLANTS

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ)
dated 15th March, 2005**

in

H.C. Cr. Appeal Nos. 156 & 153 of 2002 (Consolidated))

JUDGMENT OF THE COURT

These two appeals have been consolidated for convenient disposal. The two appellants, *George Muchemo Akwalu* and *Zachary Kairi M’Ekandi*, were after trial convicted of robbery with violence contrary to *section 296(2)* of the *Penal Code* and sentenced to death. Their first appeals to the High Court of Kenya at Nyeri (Onyancha and Sitati, JJ) were dismissed on 15th March, 2005 and hence this is a second and final appeal.

The prosecution presented the following facts before the trial court. On 13.11.2000 at about 12.30 a.m. *Charles Mbui* (PW 1) and his wife *Mary Kananu* (PW 2) were asleep in their house at Kitheo Location in Meru North District when they were attacked by a gang of robbers. It forced open the door while calling out on PW 2 to tell them where her husband PW 1, was. Sensing danger, PW 1 climbed and hid in the ceiling. Once inside the house, about five members of the gang who were armed with two rifles, a panga and clubs mounted a search in the house. They had torches. They spotted PW 1 in the ceiling and ordered him to come down. They beat him up while demanding money – Shs.100,000/= . PW 2 gave Shs.17,900/= . They tortured PW 1 further and he showed them Shs.52,100/= which was hidden under the bed. As they were not satisfied, they pulled PW 1 outside the house where they continued to assault him further. PW 1 and PW 2 testified that they had known the appellants before and had immediately given their names to the police.

PW 1 testified: -

“I know accused persons. 1st accused

operates a power saw and also 2nd accused.”

.....

I was able to identify the accused persons.....”

and PW 2 testified: -

“I know accused persons in this case even by name.”

Bernard Mburi (PW 3) and **Francis Thiaine** (PW 4) are the complainant’s neighbours. They responded to the complainant’s scream but could not get quite close to the compound because they had heard gunshots. They hid in a fence at the complainant’s house. They saw two people come out of the compound. They identified them as the appellants. The 1st appellant, **George Akwalu (Akwalu)**, was carrying a rifle while the 2nd appellant, **Zachary M’Ekandi (M’Ekandi)**, was armed with a panga and a rungu. They identified the appellants because there was moonlight and because they passed near where they had hidden. PW 3 testified:

“I know you quite well for a long time.”

and PW 4 testified:

“I know all accused persons well.....”

and in cross-examination by the appellants: -

(1st accused):

“We grew up together with you. You had a rifle.”

(2nd accused):

“I know you quite well. We are neighbours.”

In his defence before the trial court, **Akwalu** testified that on 15th November, 2000 he was at home when PW 1 arrived with a group of people. He was pointed out *“as the one he had told them about”*. **Akwalu** was beaten by the group who later took him to the police. **Akwalu** admitted that he knew PW 1 well and that the knowledge was mutual. He denied committing the offence charged.

M’Ekandi testified that he was arrested for nothing. However, he admitted that he worked with PW 3 within the village in splitting timber with a power saw.

The trial court found the two appellants guilty, convicted them and sentenced each of them to death. In so convicting them, the learned trial magistrate stated, *inter alia*: -

“P.W.1 and P.W.2 says they were able to identify their attackers. They even mentioned their names to their rescuers immediately and also to the police officers when they went to the police station to report. This is a positive indication that they were able to identify their attackers and their identification (rather recognition) of the accused persons cannot be falluted (sic). Indeed P.W.3 and P.W.4 who are neighbours after hearing the commotion and a gun shot coming from the complainants’ home hid nearby at a fence and they saw accused persons pass and they were quite specific as to what each one of them had as there was moonlight. Their evidence further buttresses the two complainants’ evidence as to positive identification on their part of the accused persons. Accused’s defences are sham.”

The appellants’ first appeals came up before Onyancha and Sitati, JJ who after hearing the consolidated appeals dismissed them. They concluded, after a very thorough analysis of the evidence on record that:

“The evidence of identification was, in our view, free from error. We have noted that all the ingredients under section 296(2) of the Penal Code were proved beyond any reasonable doubt. ”

Mrs. Ntarangwi, for the appellants, has submitted that the appellants were not properly identified; that there were serious contradictions in evidence of the prosecution witnesses and that there was not enough light for purposes of identification during the robbery.

On the concurrent findings of both courts below, the appellants were identified by the complainant and his wife, PW 1 and PW 2; and also, by PW 3 and PW 4, their neighbours.

From the record, we are satisfied that the first appellate court had the aspect of identification of the appellants very much in their mind and gave it careful consideration. In the circumstances, we are thus faced with concurrent findings of fact, based on evidence, that the appellants were correctly identified by four witnesses. Although the robbery was of necessity attended by some degree of inadequate lighting, the source of light being moonlight, these concurrent findings of fact remove this case from the scope of such authorities as **Wendo v R [1953] 20 EACA 166** and **Roria v R [1967] EA 583** which were concerned with the dangers attend upon identification by a single

witness under conditions rendering identification difficult. This is because the appellants also were identified by voice, they had shouted to the complainant severally.

In this case, on the concurrent findings of both courts below, the appellants, were, in our view, positively identified by four witnesses and there was evidence to support those findings.

It follows that in our view, these appeals fail and must be dismissed, and we so order.

Dated and delivered at Nyeri this 4th day of August, 2006.

P.K. TUNOI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR