



**COURT OF APPEAL AT NYERI**

**CRIMINAL APPEAL 272 OF 2005**

**ISAAC NG'ANG'A KAHIGA *alias* PETER NG'ANG'A KAHIGA.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ.) dated 1<sup>st</sup> day of March, 2002*

**in**

**H.C.C.R.A. NO. 451 OF 1999)**

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**JUDGMENT OF THE COURT**

The appellant in this second appeal, *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga* was after trial convicted by the Principal Magistrate, Muranga, of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Nyeri (Juma and Mitey, JJ.) was dismissed on *18<sup>th</sup> March, 2002*.

The facts which gave rise to this appeal are indeed brief and may be stated as follows. The complainant, *Michael Thuku Mwangi (PW2)* in or about 1999, ran a small grocery shop at Kiangaga village in Murang'a District of the Central Province. On *11<sup>th</sup> June, 1999*, at about 6.30 p.m. while watching TV within his shop a man walked in and asked to be sold cigarettes. Before *PW2* could hand them over to the supposed customer, that man, instead of producing the money suddenly whipped out a pistol and pointed it at *PW2* and commanded him to lie down and produce all the money he had collected that day. Within no moments two other gunmen joined the first one and they ransacked the shop collecting various shop goods and putting them into sacks. Their mission apparently accomplished, the gunmen sat down to drink sodas and watch TV while *PW2* lay down on the floor.

At about 7.30 p.m., unaware of what was happening in the shop, *PW2's* daughter *Susan Waithera (PW3)* walked in. The gunmen held her and demanded that she show them where money was being kept. She was able to produce only some few coins. She testified that the gunmen menacingly held her and her father for well-nigh 2½ hours. She testified that she was able to identify the appellant because the shop was lit with electricity lights, and also; because of the long period the robbery took. Later she picked him out in an identification parade. It is worthy of note that *PW2* did not identify the appellant.

*Musa Murimi (PW1)* is a member of a village vigilantes group. At about **10 p.m.** of the same day

PW1 and nine of his members while on a patrol near Makuyu town came across about six people carrying some sacks. When ordered to stop those people dropped the sacks and ran away in different directions after one of them had fired a gunshot at the vigilantes. A chase resulted in the arrest of the appellant. The appellant in his defence gave an unsworn statement. He said that he was at Makuyu on the material day to buy bananas. At about 7.30 p.m. while at the bus stage he was arrested by some people who beat him up for no reason. He was led to a nearby police station where he was kept for about 20 days without being taken to Court. He denied committing the offence charged.

In convicting the appellant, the Principal Magistrate, in a somewhat perfunctory judgment said:-

***“The robbers were armed with a pistol according to the eye witnesses and also P.W.1 said those others managed to run away after they shot at one of P.W.1’s people but missed him. The accused was therefore in the company of those robbers who were armed with dangerous weapons namely a pistol and he was even aware of it as he shouted shoot shoot.”***

***The court therefore dismisses the accused’s defence as untrue, as he was not waiting for a vehicle, he was seen coming to the stage with his group and they were made to sit down on arrival where they were being waited by P.W.1. and his group.***

***The court finds the accused guilty as charged in the main court and convicts him accordingly.***

The first appellate court in the most unsatisfactory judgment did no better than to rehash the unanalytical judgment of the trial magistrate. In rejecting the appellant’s appeal it said:-

***“..... We find that the evidence against the appellant is overwhelming. He was arrested a few hours after the robbery. He was arrested with a gun.***

***The conviction was safe. We see no merit in the appeal. It is dismissed.”***

Mr. Gathiga Mwangi, for the appellant, has submitted in the main that the first appellate court erred in law and in fact in failing to evaluate afresh the entire evidence in the case.

We will now consider this ground of appeal.

It is trite that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (*i.e. a first appellate court*) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of ***OKENO V. REPUBLIC [1972] EA 32*** will suffice. In this case, the predecessor of this court stated:

***“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA VS. R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

It is plain from the records laid before us that the conviction of the appellant proceeded on the premises that the appellant was identified by PW3 as being among the robbers, and also; that he was found with the stolen shop goods.

From the passages we have quoted from the judgment of the first appellate court, it is obvious that the said court failed in its duty as is stated by ***Okeno’s*** case (*ibid*). It said nothing at all as to whether the

identification of the appellant was positive or not. The failure to consider and evaluate the evidence on identification was, in our view, a fatal misdirection.

Again, the first appellate court did not fully consider the evidence relating to the alleged possession of the stolen goods by the appellant i.e. the doctrine of recent possession. It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.

In the case before us, the shop goods were not positively proved to belong to PW2. Again the appellant denied being in possession of the sacks. Moreover, there is a serious disparity between the time PW1 was robbed and the time the appellant was arrested. This aspect of the evidence was neither considered by the trial magistrate nor the first appellate court. Further, the first appellate court did not carry out any analysis at all as is required by law.

As is stated above, the first appellate court greatly misdirected itself in failing to carry out its duty in the prosecution of the appellant's appeal before it. However, on our part, we have ourselves independently re-evaluated the evidence on record. We think that the conviction of the appellant is unsafe and we do not uphold it.

Mr. Mwangi has raised other grounds of appeal in this appeal, for example the alleged breach of the appellant's constitutional rights in not taking him to court within the time set by law, but we see no reason to consider them in view of what we have held above.

The appeal is allowed, the conviction is quashed and the sentence of death is set aside. The appellant shall be set free unless otherwise lawfully held.

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

***P.K. TUNOI***

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***JUDGE OF APPEAL***

***S.E.O. BOSIRE***

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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**