IN THE COURT OF APPEAL
AT NYERI

CRIMINAL APPEAL 193 OF 2003

JULIUS KWIRIGA M'IBAYA ……..……..……. APPELLANT

AND

REPUBLIC ……....…….....…….…… RESPONDENT

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

in

H.C. Cr. Appeal Nos. 250 and 251 of 2001 (Consolidated))

****

JUDGMENT OF THE COURT

Julius Kwiriga M'Ibaya, the appellant herein, and Joseph Kamenchu M'Kaiba (now deceased), were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code before the Principal Magistrate's Court at Maua. The two were arraigned before a District Magistrate of the 1st Class on 6th October, 2000 but their pleas were taken before the learned Senior Resident Magistrate (M.N. Gicheru, Esq.) on 7th December, 2000 when they both pleaded "*Not Guilty*". The particulars of the charge stated as follows:

"**JOSEPH KAMENCHU M'KAIBI. 2. JULIUS KWIRIGA M'IBAYA: On the 4th day of September, 2000 at around 11.00 p.m. at Antubochu Location, in Meru North District of the Eastern Province, jointly with others not before the court while armed with dangerous weapons namely guns robbed JOSEPH MUROKI KARIITHO of cash Ksh.144,000/=, one m/v. Reg. No. KAL 569F Landrover, one wrist watch and one m/v Radio and at or immediately before or immediately after the time of such robbery used personal violence to the said JOSEPH MUROKI KARIITHO."**

It is to be noted that the appellant herein was the 2nd accused during the trial before the learned Principal Magistrate (M.N. Kimani Esq.). The prosecution called five witnesses while the appellant and his co-accused made unsworn statements when put to their defence.

The facts as accepted by both the trial court and the first appellate court were simple and straightforward. These may be briefly stated:

The complainant, Joseph Muroki Kariitho (PW 1) and his driver Humphrey Murangiri (PW 2) were

traveling in the complainant's car registration number KAL 569F on 4th September, 2000 when at about 9.00 p.m. they were confronted by a gang of five people who were armed with a gun. The complainant was robbed of his money together with the motor vehicle. It was the prosecution evidence that the complainant was able to recognize the appellant and his co-accused among the robbers. It was also the evidence of Murangiri that he recognized the appellant among the robbers.

In his judgment, the learned trial Magistrate stated *inter alia*:-

"**It is the evidence of the complainant and his driver that people who accorted (sic) them were about 5 to six in number. They were armed with guns, they did beat the complainant in this case. It thus holds that each of the three ingredients of a charge under section 296(2) of the penal code has been adequately proved in this case. The fundamental issue now for determination is whether the accused persons were a party to the perpetration of this offence. There is the evidence ot (sic) the complainant that they spotted these people on the road about 20 metres ahead. The headlights of the complainant's motor vehicle were on. Its then that they came and cut the complainant with pangas and told him to produce the money. It is his evidence that he was able to identify the two accused as 1st accused is his neighbour and the 2nd accused used to be a driver of the former chairman of the county council. There is not (sic) evidence that the robbers had musked (sic) their faces hence from the distance of 20 meters and taking into account that the motor vehicle headlights were on and that those people cut the complainant must be close quarters, (sic) and that 2nd accused took the keys from the P.W.2 (driver) and taking into account that both accused persons were known to the complainant before, it is my considered view that the state of circumstances obtaining then, indeed favoured possible identification. Indeed it was more of identification by recognition on the part of the complainant as he knew the accused persons before. There was no past grudge between them. Even the accused persons do not even remotely suggest the existence of any such past grudge hence I feel no reason why the complainant would publicate (sic) this charge against the accused persons. P.W.3 the man who was also there, also identified the 2nd accused person on the spot. He also knew him before. It is him who took the keys from the driver. 2nd accused was the same person spotted by P.W.3 A.P.C Mitu at a county council road block driving the said motor vehicle. P.W.3 stopped them and even talked to 2nd accused as he became suspicious due to the time aspect as it was around 1.00 a.m."**

Having so stated, the learned trial Magistrate convicted the appellant and his co-accused and sentenced them to death as mandatorily provided by the law.

The two appealed to the superior court but in a judgment dated 14th February, 2002, the superior court (Juma and Tuiyot, JJ) dismissed their appeals. In dismissing their appeals, the learned Judges in their judgment stated *inter alia*:

"We have evaluated the evidence adduced in the lower court and we note that PW1 Joseph Muroki Karitho the Complainant was very categorical in his evidence. He stated that out of the five people he recognized the First Accused, Joseph Kamenchu M'Kaibi, as he is a neighbour and in fact he went and reported the matter to the area chief who gave him Administration Policemen. He gave the name of the first accused and they arrested First Accused at his house. The First Accused also admitted that he was arrested by the Administration Police from his house. As regards the Second Accused, the Complainant knew him and described him as a driver to the former Chairman of County Council. In identifying the Second Accused the Complainant's evidence was supported by that of his driver PW2 Humphrey Murangiri who said that through the headlights he identified only the Second Accused as he had already known him as a driver with Maua County Council"

Being dissatisfied with that judgment of the superior court, the appellant and his colleague appealed to this Court by way of second and final appeal. When this appeal came up for hearing before this Court on 16th May, 2006 it transpired that the appellant's colleague, Joseph Kamenchu, had died on 15th January, 2006 and hence Joseph's appeal abated pursuant to **rule 68(1) (a)** of this Court's Rules. That left the appellant herein to pursue his appeal.

The appellant's appeal finally came up for hearing before us on 23rd October, 2006. Mr. H.K. Mahan appeared for the appellant while Mr. C.O. Orinda appeared for the State.

Mr. Mahan started his submissions by stating that the appellant's trial in the subordinate court was a nullity in that Cpl. Meme appeared for the prosecution. This issue of the trial being a nullity was pursuant to what was titled "**Additional Supplementary Petition of Appeal**" filed in this Court on 19th October, 2006.

Mr. Mahan then moved on to the main ground in this appeal, being identification of the appellant. Mr. Mahan pointed out that identification was at night and hence the conditions for identification were difficult. It was further submitted that the appellant's defence was not considered. Finally, Mr. Mahan submitted that the superior court did not evaluate the evidence properly.

Mr. Orinda on behalf of the State was of the view that the appellant's conviction was based on recognition and that the two courts below had come to the correct conclusion. He reminded us that the appellant's recognition was by three people - PW 1, PW 2 and PW 3. As regards the conditions of identification, Mr. Orinda submitted that these were favourable. On the issue of the appellant's defence, Mr. Orinda maintained that his defence was considered and properly rejected.

This being a second appeal, only points of law fall for our consideration pursuant to **section 361** of the Criminal Procedure Code. Mr. Mahan raised the issue of the trial of the appellant being a nullity on the ground that one Cpl. Meme appeared for the prosecution. In our view, nothing turns on that submission since the trial court's record clearly shows that Inspector Tanui appeared for the prosecution when the charge was explained to the appellant (and his co-accused) and each of them denied the charge. Mr. Mahan must have thought that Cpl. Meme prosecuted the appellant hence contrary to the law as per the judgment of this Court in **ELIREMA & ANOTHER V. REP. [2003] KLR 537**. That was not the case in the present case since Cpl. Meme never conducted any prosecution.

The main ground in this appeal relates to identification. It was submitted that the appellant was not properly identified by the witnesses as the conditions favouring a correct identification were difficult.

The complainant in his evidence in chief stated *inter alia*:

"**I was only able to identify the accused persons at the dock. 1st accused is my neighbour. My motor vehicle's head-lights were on. I also knew 2nd accused as a driver to the former Chairman of County Council. There was also Kithure and Kaberia. 2nd accused took the keys to my motor vehicle."**

On being cross-examined by the appellant, the complainant stated *inter alia*:

"I knew you as Julius Kuiriga. You used to be a driver to former chairman of county council. The robbery occurred on 4.9.2000 at 9.00 p.m. We were going home. I saw you from a distance of 20 metres away."

Humphrey Murangiri (PW 2) in his evidence in chief stated *inter alia*:

"**I was able to identify one of them. Headlights were on of that motor vehicle. I was able to identify the 2nd accused. He is the accused at the dock. …… I knew the 2nd accused as driver with Maua County Council."**

From the foregoing, it would appear that the two witnesses (PW 1 and PW 2) knew the appellant prior to the incident in question. Both courts below found so, and there was evidence to support that finding. No point of law arises there.

We have considered the evidence upon which the appellant was convicted and the submissions by Mr.

Mahan. Although the incident took place at night, the witnesses said that the headlights of their vehicle were on and that they (the witnesses) were able to recognize the appellant. As correctly pointed out by both the trial court and the first appellate court, the evidence upon which the appellant was convicted was that of recognition. In **ANJONONI AND OTHERS V. R. [1980] KLR 54 at p. 60**, this Court stated, *inter alia,* as follows:

"**Being night time the conditions for identification of the robbers in this case were not favourable. This was however a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

On our part, we are satisfied that the first appellate court re-evaluated the evidence as required of it as per the decision in **OKENO V. R. [1972] E.A. 32** and came to the correct conclusion that the appellant was properly recognized as one of the people who robbed the complainant on the material day.

In view of the foregoing, we are satisfied that the appellant's guilt was proved beyond any reasonable doubt. We find no merit in this appeal and we order that it be and it is hereby dismissed.

Dated and delivered at Nyeri this 27th day of October, 2006.

R.S.C OMOLO

…….……

JUDGE OF APPEAL

E.O. O'KUBASU

…….…….

JUDGE OF APPEAL

W.S. DEVERELL

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR