



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**CORAM: KWACH, SHAH & BOSIRE, JJ.A**  
**CRIMINAL APPEAL NO. NAI. 11 OF 2000 (R)**

**BETWEEN**

**1. JOSEPH MWANGI WAMBUGU**

**2. EDWARD KAIGA GATERU**

**3. NDEREBA NDIRITU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**An appeal from a judgment of the High Court of Kenya at  
Nyeri (Juma, J) dated 19th October, 1999**

**in**

**H.C.CR. APPEAL NO. 286,287 & 289 OF 1998)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellants, Joseph Mwangi Wambugu, Edward Kaiga Gateru and Dennis Ndereba Ndiritu were charged in the Chief Magistrate's Court at Nyeri along with three others namely Karuri Wambugu Ndegwa, Jerald Wachira Kireri and John Ndereba Wahome, with the offence of robbery with violence contrary to section 296(2) of the Penal Code and the particulars of the alleged offence were as follows:

***"On the 9th day of March, 1998 at Gatunganga trading centre in Nyeri District of the Central Province jointly with others not before court robbed Wilfred Muriuki Kamita cash 7,000/=-, two wrist watches Oris and Seiko 5, one jacket, one fisher radio cassette one Sanyo radiogramme, cigarettes worth 2,000/=, Kasuku cooking fat worth Kshs.4,000/= all to a value of Kshs.30,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Wilfred Muriuki Kamita."***

All the said six accused persons were convicted of the offence charged and sentenced to death as by law provided. All six of them appealed to the High Court against the convictions and sentence. The appeals by three of them that is Kariuki, Jerald and John were allowed and the trio were set free. The appeals by the present appellants were dismissed.

The facts giving rise to this appeal are that on the night of 8th/9th March, 1998 at about 1.00 A.M. a gang of about 15 persons gained entry to the premises belonging to Wilfred Muriuki Kamita (Wilfred)

(PW1) using 'pangas' (machetes), crow-bars and a huge stone. The first person to enter was allegedly a Kahwai Muriu. He was not charged probably because he disappeared. The intruders gained entry to the room in which Wilfred was by breaking open the door of the room. They took Shs.4,000/= from Wilfred but it is not clear how, that is, in the room or through the window. Wilfred said that they were (the intruders) given the sum of Shs.4,000/= through the window. Another person, whom Wilfred could not identify, then ransacked Wilfred's room for more money and obtained Shs.3,000 and picked up a radio. Still another person whom Wilfred could not identify entered with a panga and took away Wilfred's jacket. The intruders then went away. They had broken all five doors. They broke into Wilfred's shop and stole cigarettes and containers of cooking fat. He also lost his two wrist watches, an Oris and a Seiko

5. Wilfred stated that he was able to identify the intruders on account of a high voltage security light and moonlight.

Wilfred also said that he was later told that some people had been arrested in connection with the robbery at his premises and that he told the police that he was able to recognize six of the intruders. In cross-examination by Joseph (first appellant here) Wilfred said that Joseph was the first to enter although he had earlier said that one Muriu was the first to enter. Wilfred identified Edward (the second appellant here) as the one who entered through the gate. Wilfred also identified Dennis (the third appellant here) as one who had entered through the small gate.

It must be noted that Wilfred was equally positive about his identification of Karuri, Jerald and John. He did not name the six persons (intruders) during his examination-in-chief. The identification of the six was alluded to by Wilfred during cross-examination by each of the six accused persons.

Wilfred's wife, Veronica Nyaruai Muriuki (Veronica) (PW3), stated that the six accused persons in the dock were the ones who intruded into the premises after 'cutting' the doors. She added that two others whom she could not identify also entered the room, ransacked the same and took away a radio and two wrist watches. There were others who she could not identify.

The problem with the identification of the robbers by Wilfred and Veronica is that the incident occurred at night. Although there was security light and partial moonlight it would be difficult for anyone, when there is a forcible intrusion by 15 or more persons, to positively and immediately identify six of them, when, especially when there is no indication in which direction the security light was falling. But that is not all. Veronica despite having said earlier that she knew six of the intruders, stated during cross-examination by Miss Mwai, for the third accused, that she told the police that she could identify the intruders if she saw them. These are not the hallmarks of a positive recognition.

It is well settled that visual identification must be treated with the greatest care and that a dock identification should not be accepted unless the witness has in advance given a description of the assailant and identified the suspect at a properly conducted parade. See **Amolo vs. Republic (1992) 2 KAR 254**.

The circumstances under which Wilfred and Veronica 'recognized' the six intruders leaves room for doubt whether it was free from possibility of error. The dock identification thereafter is of little or no value in view of what we have said about dock identification. In this case there is no evidence of any description given by either Wilfred or Veronica of the assailants to the police and there certainly were no identification parades held for the six assailants.

Faced with all that we have so far said Mr. Oluoch, Principal State Counsel, who appeared for the respondent, quite properly, albeit reluctantly, conceded that he could not really support the conviction of the three appellants and put forward the following points:

***1. The method of recording and analysing the evidence of the principal identifying (rather recognizing) witnesses, Wilfred and Veronica, was not upto the standards required in criminal cases.***

***2. The superior court, on first appeal, appeared to have used two different sets of standards***

***of proof, one for those whose appeals were allowed and another for the appellants here; that the superior court ought to have given the same benefit of doubt to the appellants.***

***3.The evidence of Charles Ndikwe Gitonga (PW4) identifying the present appellants as the intruders was rather tenuous as he only saw them fleeing in the dark and probably only saw their backs; that it was doubtful if he rally could have seen the appellants.***

***4.The three who were released by the High Court were also allegedly found in possession of 'stolen' goods. This would mean that if the three released ones were given the benefit of doubt the same benefit ought to go to the appellants; what is sauce for the goose is sauce for the gander.***

It still remains to be said that the appellants and the three who were released by the High Court were found in possession of goods which may have belonged to Wilfred. These are the cigarettes and 'Kasuku' brand cooking fat. But Wilfred did not positively identify the goods as his own. He stated that those were ordinary shop goods. It would, of course, be difficult, if not impossible for any shopkeeper, to identify cigarettes or cooking fat as his unless he puts distinguishing marks thereon.

Despite Mr. Oluoch's concessions we ought to look at the findings of the first appellate court. In regard to Joseph the court proceeded to dismiss the appeal on the basis that Joseph was the first to enter Wilfred's premises. However Wilfred had stated that one Kahwai Muriu was the first to enter therein. The High Court also relied on the evidence of Charles Gitonga in regard to identification when he only saw him fleetingly in the dark, and running away. We think the High Court erred in not giving the benefit of doubt to Joseph. As regards identification of Edward the High Court relied somewhat on the evidence of Charles Gitonga whose evidence as we have already said was unreliable in the circumstances. His recognition by Wilfred, was not followed up by a description and an identification parade.

As regards identification of Dennis there is yet again the question of recognition under difficult circumstances which factor was not followed up by description and identification parade. There is also the unreliable identification of Dennis by Charles Gitonga.

The High Court was aware of, in this case, the need to supply a list of suspects to the police so that thereafter the trial could be conducted in an orderly fashion. Although the High Court held that non-production of such a list was not fatal, the High Court failed to appreciate that the trial was conducted, as in fact conceded by Mr. Oluoch, in an unsatisfactory manner with regard to recording and analysing of evidence as regards identification or recognition.

Considering all circumstances of this appeal we are not satisfied that the appellants were positively identified as the persons who robbed the complainant and his wife.

This appeal is allowed and the appellants are ordered to be set at liberty unless otherwise lawfully held.

**Dated and delivered at Nyeri this 17th day of May, 2001.**

**R.O. KWACH**

.....

**JUDGE OF APPEAL**

**A.B. SHAH**

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

**DEPUTY REGISTRAR.**