



IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: GICHERU, OWUOR & KEIWUA, J.J.A.  
CRIMINAL APPEAL NO. 7 OF 2001

BETWEEN

AYUB KARIUKI WAMAE.....1ST APPELLANT  
PAUL KIMATHI M'ITONGA.....2ND APPELLANT  
JOSEPH KITHEKA MUINDI.....3RD APPELLANT  
JACKSON KIMATHI MARETE.....4TH APPELLANT  
JOSEPH KANYITHIA BAARIU .....5TH APPELLANT  
ALEXANDER KIOKO MANGUU .....6TH APPELLANT  
AND  
REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Meru (Etyang' & Juma, JJ.) dated 27th November, 1998

in

H.CR. APPEALS NO. 203, 202, 206, 205, 201, & 204 OF 1996)

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JUDGMENT OF THE COURT

The 1st appellant died before the hearing of this appeal. Hence, his appeal to this Court abated under **rule 68(1)(a)** of the Court of Appeal Rules.

The 2nd, 3rd, 4th, 5th and 6th appellants who were respectively the 11th, 12th, 14th, 16th and 15th accused persons in the court of first instance were each convicted of the offence of robbery with violence contrary to **section 296 (2) of the Penal Code** and were each sentenced to suffer death in the manner authorized by law. Their conviction by the aforesaid court was principally founded on the identification evidence of **SARAH NAITORE KIRUNJA (P.W.1)** and the 3rd and 6th appellants' inquiry statements under caution. The latter statements had been repudiated and were admitted in evidence after trial within a trial. They therefore required corroboration in order to be relied on.

On the night of 23rd November, 1993 at about 3.00 a.m., a gang of robbers descended on the house of the late **JUSTUS KIRUNJA** armed with axes, "simis" and "rungus", broke into it and robbed him of K.Shs. 1,200/= and in the course of the robbery fatally wounded him. According to **P.W.1**, the wife of the late **JUSTUS KIRUNJA**, the robbers had torches which they flashed inside and around the house including the ceiling and through the light emanating from these torches, she was able to identify the appellants. She had initially hid herself under the bed in the children's room and when forced out of her hiding place by the robbers and told to sleep the way she slept with her husband and one of them said "weka chupa", she refused. A "simi" was then placed on the waist-band of her skirt and with one stroke it was ripped open to the hem and she was left naked. At this juncture she became so frightened that she

defecated and urinated on herself. She was then told to rise by the robbers and was thereafter led to the kitchen where she was locked from outside by them as they left the scene of the robbery. Her son, **GEORGE MUGIRA KIRUNJA (P.W.2)** opened the kitchen door for her from the outside. Both P.W.1 and P.W.2 subsequently realised that a radio cassette, two novels, a black hat and a seiko quartz watch had also been stolen in the robbery. These articles were recovered and identified by **P.W.1, P.W.2** and **CATHERINE NKATHA KIRUNJA (P.W.3)**, a daughter of the late **JUSTUS KIRUNJA** .

In the identification parades conducted at Meru Police Station by **I.P. WILMOT MWAKIO (P.W.19)** and **I.P. SIMON ONDEGO (P.W.8)** on 16th February and 16th March, 1994 respectively, P.W.1 identified the appellants as some of the robbers who raided their house and robbed them of K.Shs. 1,200/= and in the process killed her husband. According to her, the torch light from the robbers' torches enabled her to see and therefore identify the appellants.

In his repudiated inquiry statement under caution which was admitted in evidence by the trial court after a trial within a trial, the 3rd appellant stated that the 6th appellant with whom he was working in the business of selling old tyres had approached him with a view to staging a robbery at the house of the late **JUSTUS KIRUNJA** who he alleged to have had a lot of money as he was operating two hotels both at Gakoromone and in Meru Town within the Municipality of Meru. The 3rd appellant contacted the 2nd appellant in this regard who together with another person accompanied him to the house of the 6th appellant who had strategised on the robbery but was unwell to participate in it but after explaining the same to the 3rd appellant, the latter clearly recognised the house of the late **JUSTUS KIRUNJA** . His companion then went to call some other people who were members of the group that had committed another robbery in the house of one **AYUB MUKULIMA**. The people included the now deceased 1st appellant, the 2nd appellant, the 3rd appellant, the 4th appellant, the 5th appellant and others who were armed with one big axe, three small axes and two "simis". They had been told of the mission to the house of the late **JUSTUS KIRUNJA** and therefore there was little discussion about it. They just set on their mission. On the way they cut two stems of coffee tree, one for the big axe and the other for the 2nd appellant who was unarmed. They had torches and arrived at the house of the late **JUSTUS KIRUNJA** at about 2.30 a.m. They climbed the gate which was locked but the 3rd appellant was left behind breaking the gate padlocks with the small axe which he had. He then joined his companions in breaking into the house of the late **JUSTUS KIRUNJA**. Before entering into this house, the 4th appellant who was armed with the big axe used it to strike the dog which was barking at them on the head and the dog fell down. Thereafter they entered into the house and committed the robbery the subject-matter of this appeal in the course of which they killed the late **JUSTUS KIRUNJA**. Out of the proceeds of this robbery which amounted to K.Shs. 6,800/=, three wrist watches one of which was a Seiko Quartz, a radio cassette, a black hat and a spear, the 6th appellant received K.Shs. 1,200/= for obviously having master-minded the robbery while the other members of the gang received K.Shs. 800/= each. Two of the three wrist watches were given to the 3rd appellant while the third wrist watch was given to the 4th appellant.

The inquiry statement of the 6th appellant under caution which was also repudiated and admitted in evidence before the trial court after a trial within a trial was to the effect that sometime in November, 1993 he and the 3rd appellant were discussing about robberies and in the process started planning how to rob the late **JUSTUS KIRUNJA** whom he thought had a lot of money as he owned a pick-up and a hotel besides being a teacher. On the day of the robbery, he was unwell and therefore did not participate in it but after the robbery, the 3rd appellant gave him K.Shs.100/- saying that they did not get much money from the house of the late **JUSTUS KIRUNJA**. Later, the 3rd appellant sold to him a Seiko quartz wrist watch which he told him was one of the items stolen from **KIRUNJA's** house. He bought it at K.Shs. 650/- and later sold at K.Shs.700/-.

He learnt of the death of the late **JUSTUS KIRUNJA** in the course of the robbery but did not report the same to the police.

As indicated earlier in this judgment, the foregoing resumé of the evidence available before the trial magistrate was the basis of the appellants' conviction of the offence of robbery with violence contrary to **section 296(2) of the Penal Code**. Their consolidated first appeals in the superior court were on 27th November, 1998 dismissed after that court evaluated the evidence before the learned trial magistrate and

holding that the torch light from the torches the robbers had and which were lit everywhere in the house of the late **JUSTUS KIRUNJA** was sufficient for **P.W.1** to see what the robbers were armed with and to enable her identify them. Indeed, she identified them at the identification parades held at Meru Police Station on 16th February and 16th March, 1994. Besides, the 3rd appellant's inquiry statement under caution implicated all the appellants while the 6th appellant not only implicated himself in his inquiry statement under caution but also implicated the 3rd appellant in the offence for which they were charged, tried, found guilty, convicted and sentenced to suffer death in the manner authorized by law. Against the dismissal of their appeals to the superior court, the appellants now appeals to this Court their chief complaint being the insufficiency of the visual identification evidence against them and the reliance on the repudiated inquiry statements under caution of the 3rd and 6th appellants implicating all of them in the commission of the offence of robbery with violence contrary to section 296(2) of the Penal Code. Indeed, this was the burden of counsel for the appellants when this appeal came up for hearing on 29th October and 2nd November, 2001 at Nyeri.

As we recently observed in the case of **JACKSON KIMATHI MARETE V. REPUBLIC**, Criminal Appeal NO. 31 of 2001 (unreported):

"Where the conviction of an accused person is predicated on the eyewitness identification, evidence in that regard must conclusively show that the conditions favouring his correct identification were satisfactory."

In the present appeal and according to **P.W.1**, she was able to identify about 8 robbers who broke and entered into their house on the night of 23rd November, 1993 at about 3.00 a.m. and robbed and killed her husband, **JUSTUS KIRUNJA**. Just before the robbers entered into the house, she heard of their dog's cry as if it had been hit, which is consistent with the 3rd appellant's inquiry statement under caution in this regard. Inside the house, several of these robbers had torches which they flashed around the house including the ceiling. Through the light of these torches, she was able to see that the robbers were armed with "pangas", axes and "simis". Indeed, when she gave the robbers her hand bag containing K.Shs. 1,480/-, she was able to see that money through the same torch light when the robbers emptied the contents of that hand bag on the floor of the house. It was through this same torch light that she was able to see the appellants whom she identified at the identification parades referred to in this judgment. If that light was sufficient for **P.W.1** to see what weapons the robbers were armed with and the money emptied from her hand bag onto the floor of the house, it cannot selectively be said to have been insufficient for her identification of the appellants in the absence of any evidence of their attempts to disguise their identity. Indeed, the wanton flashing of the torches all over the house including the ceiling was a manifestation of their reckless audacity in the robbery at the house of the late **JUSTUS KIRUNJA**. **P.W.1** may have been terrified when the robbers threatened to put a bottle into her private parts so as to get more money from her. She may also have been in a shock when the robbers ripped off her skirt with a single stroke of a "simi" from the waist band to the hem leaving her naked as she lay on the floor of the house. But this was after she had full opportunity to see and identify the appellants. This subsequent state of her condition had no bearing on her correct identification of the appellants.

As regards the propriety of the identification parades at Meru Police Station as are referred to above in which **P.W.1** identified the appellants, we can only say that an identification parade should be held according to the instructions in **Order 6.(iv), (v) and (vi) of Chapter 46 of the Kenya Police Force Standing Orders**. There was no demonstrable breach of these instructions in the conduct of the identification parades aforementioned. It therefore appears to us that the visual identification evidence of **P.W.1** conclusively show that the conditions favouring the appellants' correct identification were satisfactory. This identification evidence corroborated the 3rd and 6th appellants' repudiated inquiry statements under caution which implicated all the appellants in the robbery at the house of the late **JUSTUS KIRUNJA** on the material date and time. There is therefore no merit in the appellants' appeal and the same is dismissed.

**Dated and delivered at Nairobi this 21st day of December, 2001.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

**M. KEIWUA**

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**JUDGE OF APPEAL**