



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 33 OF 2011**

**MUGENDI MICHEMI ..... 1<sup>ST</sup> APPELLANT**

**PATRICK MWANDIKI NDWIGA ..... 2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellants MugendiMichemiMurianki, hereinafter the 1<sup>st</sup> appellant and Patrick MwandikiNduiga, the 2<sup>nd</sup> appellant were the first and second accused in the judgment before the lower court. They were charged with one count of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 2<sup>nd</sup> day of January, 2011 at Chogoria town within Tharaka Nithi county jointly with another not before court while armed with dangerous weapons namely Rungu robbed Stella KathomiMiriti Kshs. 2,500/- and one mobile phone make Nokia 1208 valued at kshs.2,700/- both the total of Kshs.5,200 and at, immediately before or immediately after the time of that robbery instituted violence to the said Stella KathomiNduiga.

After full trial the learned trial magistrate convicted all the two appellants and sentenced them to suffer death. The appellants aggrieved by the conviction and sentence imposed upon them by the lower court filed the appeals. The appeals have been consolidated and were heard together since they arose from the same trial in the lower court.

We have looked at the grounds of appeal raised by each of the appellants and find them to be similar. The grounds can be summarized as follows:-

1. The learned trial magistrate erred in law and facts in failing to make a finding that the alleged identification /recognition were not from possibility of error.
2. That the learned trial magistrate erred in law and fact in failing to observed that the presentation of exhibited items fall short of the required standard.
3. The learned trial magistrate erred in law and facts in not noting that the prosecution failed to summon vital witness mentioned during the trial for just decision.
4. That the trial magistrate erred in law and fact in not observing that the prosecution witness tendered invariably contradicting evidence.

5. That the trial magistrate and in law in conducting the trial partially and irregularly.

6. That the trial magistrate erred in both law and fact in dismissing and disregarding the preferred summary defence without giving any cogent reasons.

When the appeal came up for hearing the appellants appeared in person the state was represented by Mr. Moses Mungai, learned state counsel.

When the appeal came up for hearing each of the two appellants gave written submissions and reasons to allow their appeal.

Mr. Mungai, learned state counsel conceded the appeal on the following grounds. That this identification of the appellants not proper for there was no sufficient light for identification especially that of the 1<sup>st</sup> appellant. He submitted that the source of light was from a nearby garage and the complainant was attacked from behind. The complainant further testified she was able to recognize the 1<sup>st</sup> appellant through the light of a passing motor cycle. That in her first report she did not mention the name of the appellant.

On 2<sup>nd</sup> appellant he was arrested and charged on being implicated by the 1<sup>st</sup> appellant. He submitted evidence by co-accused must be tried with certain. He concluded that the evidence was insufficient. The brief facts by the prosecution case is that PW1, the complainant Stella Kathomi Miriti, was on 2<sup>nd</sup> January, 2011 in the evening going home in company of Mark Kiruja, PW2 but before reaching her home she asked PW2 to go back that at a bend near her home she met 3 men. That she moved aside to let them pass but was held by neck and pulled to the ground. It was at night and she heard them talk. That PW1 was able to see the 3 as there was electric light from a garage which was about 75 metres away. PW1 was not able to recognize the attackers by then. PW1 screamed for help and PW2 retreated. That two of the boys frisked PW1 and turned to PW2. PW1 lost her mobile phone and money. That at that moment a motor cycle appeared suddenly and with the help of the head light PW1 managed to identify 1<sup>st</sup> appellant. PW1 testified that 1<sup>st</sup> appellant hit her on the left shoulder with a club. PW1 testified she managed to identify the 2<sup>nd</sup> appellant but he ran away. She stated that the robbers was Gitari who ran away.

PW1 went to Chogoria police post and made a report. She was referred to Chuka hospital for treatment. That on 4<sup>th</sup> January, 2011 police officer arrested 2<sup>nd</sup> appellant from his home.

PW 2 testified that on 2<sup>nd</sup> January, 2011 at about 10.30 p.m. he was escorting PW1 home and on nearing her home retreated. That after a short distance he heard screams and went back only to find 3 young men who had attacked PW1. He testified there was electric light from nearby garage. PW2 intervened and held one of the attackers by the hand. That suddenly motorcycle appeared from opposite direction and with one of its light PW2 managed to recognize the 2<sup>nd</sup> appellant as one Gitari.

PW3 testified that at around 10.00 p.m. the 1<sup>st</sup> appellant as one Gitari took supper at his hotel and left. That the following day she received a report that her hotel had been broken into that she also learnt PW1 had been attacked. That she went to Chogoria and was shown a jacket as that which she identified as the one worn by the appellant that night. On instant the appellants were prime suspects.

PW 4 evidence is on account of the appellant after he had been instructed by DCIO Meru South that a search of 1<sup>st</sup> appellant they recorded hereby PW 5 the investigating officer explained how he was instructed on this matter by his DCIO that on 5<sup>th</sup> January, 2011 he preferred the present charge against the appellants. He produced jacket and Marvin and left behind when assailants were assaulting PW 1.

He also identified PW 1's P3 form.

The 1<sup>st</sup> appellant gave a sworn defence. His defence is of alibi he averred n the day he was at Kionyo.

The 2<sup>nd</sup> appellant gave in sworn statement. He gave a defence of alibi he stated that on 25<sup>th</sup> December 2010 he went to Marimanti to by ground nuts and returned on 3<sup>rd</sup> January, 2011. That he was arrested on 4<sup>th</sup> January, 2011.

In the instant case the prosecution relied on identification and recognition of the appellants by PW1 and PW2. We have dwelled our mind in the case of Francis Kariuki Njiru and 8 others v Republic (criminal case No. 6 of 2001) uses in which this court state as follows:-

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We have also directed our minds to the case of Paul Etole and another v Republic CRA No. 24 of 2000 (VR) were the courts directed as follows:-

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We have closely examined the identification/recognition of the appellants by PW1 and PW2 the incident took place at night. That at the time of the attack the complainant did recognize the assailants, the complainants testified she was able to identify the applicants with the help of electric light which was 100 metres away and also with help of motorcycle headlights. PW2 testified he was also able to recognize the appellants with the help of headlight of a motor cycle that was passing by. The complainant PW1 and PW2 did not however give any details of the basis of identifying the appellants. They did give any description of the appellants to the police and neither did they give any in their evidence in court. The complainant and PW2 did not state in intensity of the electric light or that of the motorcycle. How long the assailants were under their observation. The position the assailants were facing as to the relation of the motorcycle headlights on the speed at which the motorcycle was moving and the conditions of the road as in rough road the motorcycle light which tend to shake or not and if such situation one cannot see clearly leave alone identifying any one.

On evaluating in presentation evidence as a whole we find the circumstances of identification of the appellants were not safe. The complainant and PW2 at some stage in that evidence they claimed to have recognized the assailants as the appellants; yet at the police station they did not find the appellants names on description. We are not persuaded that the complainant and PW2 recognized and/in identifies the assailants.

On the appellants defence of alibi the 3<sup>rd</sup> count state that the appellants defence found to shake the prosecution case. The accused person who puts up a defence of alibi does not assume the burden of proving a defence of alibi but the burden has severity on the prosecution, exceed in those cases where this section creating the offences especially places some burden on the accused to establish a fact to prove a criminal charge beyond any reasonable doubt. The prosecution in such defences of alibi has the duty to disapprove any alibi defence an accused puts forward unless it applies to the court that the alibi cannot be sustained. We have carefully considered the trial courts judgment and note burden of describing the defence of alibi by prosecution was not discharged. The court did not consider the defence and further it ..... (page 14) the prosecution did not even challenge the appellants defence of alibi.

We have considered this appeal and one in agreement with our Moses Mungai who conceded the appeal.

In conclusion we have carefully considered the appellants appeals and find them merited. We consequently allow the appeals, quash the conviction and set aside the sentences. The appellants are set at liberty unless otherwise lawfully held.

**DATED AT MERU THS 3<sup>rd</sup> DECEMBER, 2013.**

**J. A. Makau**

**G. GIKONYO**

**JUDGE**

**JUDGE**

Delivered in open court in presence of:-

1<sup>st</sup> appellant in person – present

2<sup>nd</sup> Appellant



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