



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEALS NOS 6, 5 AND 7 OF 2018
(CONSOLIDATED)

1. JOSPHAT MAINA GITHINJI (3rd accused before trial court)
2. JACKSON MURIUNGI MAINGI (2nd accused)
3. DOUGLAS MURIUNGI MUTHAMA (1st accused).....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Convictions & Sentences dated 10/08/2017 in Nanyuki CM Criminal Case No 1133 of 2016 – L Mutai, CM)

J U D G M E N T

1. The 3rd Appellant **DOUGLAS MURIUNGI MUTHAMA** (1st accused before the trial court), 2nd Appellant **JACKSON MURIUNGI MAINGI** (2nd accused) and 1st Appellant **JOSPHAT MAINA GITHINJI** (3rd accused) were jointly charged with **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. The particulars of the charge were that on 15/09/2016 at Muthaiga Estate in Laikipia County they jointly robbed one **Ronald Kipkoeh Ronoh** of one Infinix mobile phone, one bag, one thermos flask, one dark-brown wallet and cash KShs 17,500/00, all valued at KShs 33,500/00, and that immediately before the robbery they used personal violence upon the said complainant. After trial they were each convicted of that charge and sentenced to death.
2. Douglas Muriungi Muthama also faced an alternative charge of **handling stolen goods** contrary to **section 322 (2)** of the Penal Code.
3. All the Appellants have appealed against both conviction and sentence. In their various amended grounds of appeal and written submissions the following grounds of appeal are raised.-
 - (a) That they were not positively identified.
 - (b) That the evidence placed before the trial court was contradictory and could not properly found the convictions.
 - (c) That the trial court improperly rejected the Appellants' defences without giving reasons.
4. Learned prosecution counsel supported the conviction of each Appellant. He submitted that the case against each Appellant was proved beyond reasonable doubt.
5. This being a first appeal, it is the duty of this court to evaluate the evidence laid before the trial court and arrive at its own conclusions regarding the same. In doing so the court must remember that it neither saw nor heard the witnesses themselves, and give due allowance for that fact.
6. The complainant (PW1) was attacked on 15/09/2016 sometime between 5 and 6 p.m. He had spent the day in Nanyuki town hawking thermos flasks and had sold all but one. As he was proceeding towards *Sportsman Arms Hotel* he met two men. One of them expressed an interest in buying the remaining thermos flask and a price was agreed upon. PW1 then agreed to go with the two men to collect the money, and they all set off.
7. At some point at a bridge one of the two men suddenly hit him on the forehead with his hand. He was thrown down and made to face the flowing water, and was then robbed of the items listed in the charge. He was then kicked into the river and the robbers escaped.

8. PW1 then ran to the main road where he met a man who introduced himself as “OCS Nanyuki”. He told the man what had happened. The man advised him to first report the matter to *Safaricom Customer Care* shop so that his phone could be traced by Safaricom. At the Safaricom shop he was advised to report the robbery at the police station. He did so.
9. PW1 further testified that on 23/09/2016 at a time he did not state, he was passing near *Nanyuki Primary School* when he saw and recognised the two men who had robbed him on 15/09/2016. He was behind them. He called by phone his colleague, **Kelvin** (PW2), who came and was left watching the two men while PW1 rushed to the police station to seek assistance. PW1 went back with two police officers. PW2 then directed them to a house where he said the two men had entered.
10. In the house, PW1, PW2, and the two police officers (one of whom was **PW3**) found three men. PW1 said he identified two of them as the men who had robbed him on 15/09/2016, and the third one as the man who had introduced himself to PW1 and “OCS Nanyuki”.
11. PW1 also testified that the three men were arrested and searched. His wallet was recovered. On 24/09/2016 he recorded his statement with the police.
12. Each Appellant gave a sworn statement in defence. They did not call any witness. They all denied the offence and stated they were elsewhere at the time of the alleged offence. Their various accounts of arrest were also different from what had been laid before the court by the prosecution.
13. It is clear from the judgment of the trial court that each of the Appellant was convicted upon the sole visual identification evidence of the complainant. The court relied on no other evidence, not even the recovery of PW1’s wallet from the 3rd Appellant. There was good reason to ignore this evidence of recovery of the wallet. In his report to the police immediately after the robbery and on the days following before the Appellants were arrested, the complainant never reported the wallet as one of the items stolen from him during the robbery. It also appears from the testimonies of one of the two police officers (PW3) who arrested the Appellants and recovered the wallet from one of the Appellants in the presence of PW1, that he appeared not to recognise the wallet as his and did so only later at the police station. It was never explained at all why the complainant had not reported that the wallet had also been stolen.
14. As for the visual identification of the 3rd and 2nd Appellants (1st and 2nd accused) by PW1 at the time of the robbery, the trial court was persuaded that the prevailing circumstances, (broad daylight, adequate time spent with them) were conducive to a good and positive identification. However, it must be noted that one of the two arresting police officers (PW3) stated in cross-examination that there was no report entered “*to the effect that the suspects could be positively identified by the complainant*”. That can only mean that he never told the police that he could identify his attackers if he saw them again. It also means that he never gave descriptions of his attackers to the police; the police appear not to have taken any step at all to go about town with a view of apprehending the attackers, most likely because the complainant gave them no descriptions that they could work with.
15. Considering the very grave offence that the Appellants stood charged with, the rather fortuitous alleged identification of the Appellants by PW1 some 8 days after the robbery should have been treated with a lot of caution by the trial court, particularly because it could not have been (and was never) tested at appropriate identification parades, and given that he appeared not to have told the police in his initial report immediately after the robbery that he could identify his attackers if he saw them again.
16. Upon my own evaluation of the evidence placed before the trial court by the prosecution, I am not satisfied that the convictions of the 3rd and 2nd Appellants (1st and 2nd accused) are safe. The same cannot be allowed to stand.
17. As for the 1st Appellant (3rd accused), even if it was to be accepted that he was the man who had advised the complainant to report the matter to Safaricom instead of the police, surely that alone could not properly found his conviction for such a grave offence! He was not at the scene of the robbery, and the complainant found him on the main road after he ran there from the scene of the robbery. Secondly, to remove any doubt, the proper “OCS Nanyuki” at the time ought to have been called to deny that he met the complainant and gave him such misadvice.
18. The evidence against the 1st Appellant laid before the trial court was absolutely not sufficient to convict him for the very grave charge of robbery with violence.
19. In the result, I will allow these three appeals. The Appellants’ convictions are hereby quashed and the sentences of death imposed upon them set aside. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 25TH DAY OF SEPTEMBER 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 26TH DAY OF SEPTEMBER 2019