



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 52 OF 2016

JAMES MUGAMBI KIRINYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Convictions and Sentence dated 04/04/2016 in Nanyuki CM Criminal Case No 649 of 2015 – W J Gichimu, PM)

J U D G M E N T

1. The Appellant in this appeal, **JAMES MUGAMBI KIRINYA**, was convicted after trial of three counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and one count of **being in illegal possession of an imitation firearm** contrary to **section 34(1)** of the **Firearms Act, Cap 114**.

2. It was alleged in the particulars of the robbery with violence counts that on 02/07/2015 in Gakawa Location (Count 1) and at Ichuga Village (Counts II & III), all within Nyeri County, jointly with others not before the court and armed with an imitation firearm, he robbed one **Joseph Muriuki Maina** of a motor cycle registration number KMCW 061Z make *Ranger* valued at KShs 87,000/00 (Count I); robbed one **Eunice Nyarwai Githinji** of a mobile phone make *Nokia 102* valued at KShs 8,000/00 and cash KShs 20,000/00 (Count II); and robbed one **Peter Mathenge Gatundu** of a mobile phone make *Nokia 200* valued at KShs 5,000/00 and cash KShs 12,300/00; and that at the time of such robberies, he threatened to use actual violence to the said complainants.

3. In count IV the particulars were that on the same day at Ichuga Village in Nyeri County, unlawfully and without reasonable excuse, he was found in possession of an imitation firearm in circumstances which raised a reasonable presumption that the imitation firearm was intended to be used in a manner prejudicial to public order.

4. On 04/04/2016 he was sentenced in count one to death. Sentencing in the other three counts was held in abeyance. He has appealed against both conviction and sentence.

5. The Appellant was unrepresented in this appeal. He was also undefended at his trial.

6. In his petition filed in person the Appellant has raised the following rounds of appeal -

- (i) That he was not positively identified, and that the prevailing circumstances were not conducive to a good and positive identification.
- (ii) That the trial court erred in convicting in counts I and II upon the testimonies of single witnesses.
- (iii) That the charges were not proved beyond reasonable doubt.

7. In his written submissions the Appellant raised the following additional grounds of appeal -

- (iv) That the weapon used (imitation firearm) was not an offensive or dangerous weapon.
- (v) That the trial court erred in not closely examining the circumstances under which the Appellant's alleged identification was made.
- (vi) That the trial court erred in not drawing a necessary inference regarding the absence of identification parades.

(vii) That the trial court failed to consider the Appellant's defence.

8. Learned prosecution counsel supported all the four convictions.

He submitted that the evidence adduced was ample and proved the offence beyond reasonable doubt.

9. I have considered the Appellant's written submissions and the learned prosecution counsel's oral submissions. This being a first appeal it is my duty to evaluate the evidence placed before the trial court and arrived at my own conclusions regarding the same. I must give allowance, however, for the fact that I neither saw nor heard the witnesses testify.

10. Joseph Muriuki Maina (PW3 and the complainant in court I) was on the evening of 02/07/2015 moonlighting as a boda-boda operator using motor cycle registration number KMCW 061Z in Ichuga area of Nyeri County. At about 7 pm he was approached by two men who wanted to be taken somewhere. They negotiated the fare at KShs 100/00. On the way they found a white saloon car at a junction blocking the road. The car was registration number KBD 196. He asked his passengers to alight so that he could safely pass by the car.

11. Suddenly, one of his passengers ordered him to alight from the motorcycle. He turned backwards and noted that one of his passengers had a gun. He therefore alighted from his motor cycle. This passenger took control of the motor cycle. They forced him into the car that they had found blocking the road after ordering him to remove his jacket, shoes and trousers.

12. There were already two other people in the motor vehicle. He was forced to sit with the driver and another passenger. The vehicle headlights were on.

13. PW3 then noted that one of the people who robbed him of his motor cycle was now wearing his clothes that he had been ordered to remove. The robbers then left riding his motor cycle, with the one wearing his (PW3's) jacket driving the motorcycle.

14. The motor vehicle was then reversed and took a private road leading to a ranch. It was then parked in a ditch, and they all remained there for about an hour. PW3 stated that the people who hijacked him in the car were speaking in Kimeru language.

15. One of his hijackers (not the driver) then ordered PW3 out of the car. He noted that they were near a school called *Moi Equator*. He was forced into a bush by the passenger where his hands and legs were tied using a wire. His face was then covered with a jacket. The robber left him there and went back to the motor vehicle. It was then about 9.00 pm.

16. After about 30 minutes PW3 heard the motor vehicle start. When he succeeded in uncovering his face he realised that the motor vehicle had left. He screamed and was rescued. He reported the matter to the police and eventually recorded his statement.

17. PW3 stated further that apart from the motor cycle and clothes, he was also robbed of his *Techno* mobile phone worth about KShs 3,000/00 and cash about KShs 700/00. These two items were not mentioned in the charge.

18. After 2 or 3 days PW3 received information that a motor cycle had been recovered and a suspect arrested. He proceeded to **Naromoru Police Station** where he identified the motor cycle that was robbed off of him. In the cells at the police station he also identified the Appellant as the robber who had driven off the motor cycle. He stated that he was the one he had negotiated the fare with, and that he was also the one who had the firearm. He did not know him before.

19. In cross-examination he stated that he had not given to the police descriptions of his two passengers who subsequently robbed him of his motor vehicle. He said the police did not ask him for such descriptions.

20. Eunice Nyarwai Githinji (PW1 and the complainant in count II) testified that on 02/07/2015 at about 8.20 pm she took a taxi in Nanyuki Town to go home in Ichuga area. On the way she saw a motor cycle behind the taxi. She alighted at her gate. The taxi's headlights were on.

21. As she was paying the taxi man two men jumped into the taxi through one of the front doors. Although PW1 did not state so in terms, it appeared that she was forced back into the taxi and she and the driver were squeezed in the front seats by the two men. Another man stood in front of the taxi and pointed a pistol at them. She was then robbed of her handbag which had KShs 20,000/00 in a small pouch and her mobile phone. The internal light in the vehicle was on.

22. PW1 proceeded with her testimony as follows. The two men who had jumped into the taxi then got out. The taxi driver locked the doors and told PW1 that the pistol looked fake. The motor cycle was behind the car. The taxi driver then reversed the vehicle and blocked the motor cycle which then had three men on it. But it managed to get onto the main road. The taxi chased it and caught up with it. The car hit the motorcycle which crashed. Two of the robbers then jumped and ran away.

23. PW1 then started screaming for help. She stated further that the robber who had the pistol had in the meantime hidden near the scene. When people came in answer to her screams he also took to his heels and hid. The neighbours who came and the taxi driver then managed to arrest him and brought him back to the scene where the motor cycle was. PW1 then recovered her handbag. She did not recover the money or, apparently, the phone. She stated that the pistol was recovered while the robber who had it was hiding. She identified the arrested robber as the accused in the dock (the Appellant).

24. In cross-examination PW1 stated that the Appellant was the one standing in front of the taxi holding the pistol. He also held the pistol while on the motor cycle. She stated further that the taxi's head lamps were on throughout, and that she saw his face.

25. Peter Mathenge (PW2 and the complainant in count III) was the taxi driver hired by PW1. His testimony was more or less the same as PW1's except that when the robbers struck PW1 was still in the taxi paying him. Also, as he chased the motor cycle in his taxi, the cycle crashed and two of the robbers ran away. He did not state that his taxi hit the motor cycle. PW2 and another person apparently gave chase after these two, but they got away. When they went back to where the taxi and the motor cycle were they found that the third robber had been arrested. He was the one who had the pistol, the accused in the dock (the Appellant). He had not known him before.

26. Very significantly, PW2 also stated that after the Appellant had been arrested, the crowd present said he was not a thief.

27. I have closely examined the circumstances of the arrest and identification of the Appellant. It is clear to me that when he was arrested, apparently by a crowd of people, both PW1 and PW2 were not present. PW2 had given chase to the two robbers who escaped. When he came back to the scene (where the taxi and the motor cycle were) he found the Appellant already arrested.

28. Similarly PW1 was not one of those who arrested the Appellant. She had been left in the taxi as others gave chase after the robbers.

29. So, PW1 and PW2 are not witnesses who said they gave chase to the robber who had the toy pistol and kept him in their sight throughout until he was arrested. And remember this was at night.

30. None of the persons who arrested the Appellant testified so that the trial and this court could examine the circumstances of his arrest in light of his protests of innocence; and no reasons were given for failure of these people to testify.

31. Visual identification of strangers is always a difficult thing and often mistaken, even in broad daylight. Such identification is even more difficult at night, even in the presence of artificial light like car headlights. In the present case, lingering doubts could have been removed by the testimonies of the persons who actually arrested the Appellant. When he was arrested he was not in possession of the toy pistol or any of the items or money stolen from PW1, PW2 or PW3. The protestation of the crowd present that he was not a thief was also significant.

32. As for the identification by PW3, why was a proper identification parade not conducted? It is not acceptable for a witness to be shown a suspect in police cells (who has not been arrested in his presence) 2 or 3 days after the robbery and asked to state if he was the one who had robbed him! A proper identification parade ought to have been conducted in respect to PW3.

33. After closely examining the testimonies of PW1, PW2 and PW3, there is lingering doubt whether the Appellant was one of the three robbers or was an innocent person who happened to be in the wrong place at the wrong time. He must have the benefit of that doubt. I am not satisfied that his convictions are safe.

34. Having found as I have regarding the all important issue of identification of the Appellant, I need not examine the other grounds of appeal raised.

35. I will in the event allow this appeal in its entirety. All the convictions are hereby quashed and the sentence of death passed upon the Appellant set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 14TH DAY OF AUGUST 2018

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 15TH DAY OF AUGUST 2018