REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 194 OF 2011

SAMUEL KANYUA MUKUNA.....1ST APPELLANT

EDWARD GITHINJI WANYOIKE.....2ND APPELLANT

HARRISON KEMEMIA NJOROGE.....3RD APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Sentence of the Chief Magistrate's Court

at Narok Hon. W. N Njage - Senior Principal Magistrate

delivered on the 3rd day of August, 2011

in CMCR Case No. 393 of 2010)

JUDGEMENT

The three appellants namely **SAMUEL KANYUA MUKUNA** (hereinafter referred to as the 1st accused), **EDWARD GITHINJI WANYOIKE** (hereinafter referred to as the 2nd appellant) and **HARRISON KIMEMIA NJOROGE** (hereinafter referred to as the 3rd appellant), heave all filed this appeal challenging their conviction and sentence by the learned Principal Magistrate sitting at the Narok Law Courts. The three appellants had been arraigned before the trial court on 14/4/2010 jointly charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 10th day of April, 2010 at Narok Township in Narok North District within Rift Valley Province jointly with others not before court while armed with dangerous weapon namely knives robbed HARRISON NGUGI KARIUKI of a motor vehicle Reg No. KBB 417Z make Toyota Corolla NZE and two mobile phones make Nokia 1202, Nokia 5220 all valued at Ksh 761,000/= and immediately after the time of such robbery killed the said HARRISON NGUGI KARIUKI"***

In addition 1st and 3rd appellant each faced an alternative charge of **HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE**.

The three appellants all pleaded **'Not Guilty'** to the charges they faced. Their trial commenced on 13/10/2010. The prosecution led by **CHIEF INSPECTOR KINGI** called a total of ten (10) witnesses in support of their case **PW1 STANLEY SHINA YAILE** told the court that he was the owner of the motor vehicle Registration Number KBB 417Z Toyota Corolla NZE saloon which he uses for taxi business. **PW1** confirmed that he had employed two drivers namely **'Harrison Ngugi'** the deceased herein and **'Joseph Mburu' PW2** to run the taxi business for him.

On 11/4/2010 at about 12.30 am **PW1** was sleeping in his house when his driver **'Joseph Mburu'** came and woke him up **PW2** informed him that the deceased had left Mudrock area with the vehicle and efforts by **PW2** to raise the deceased through his mobile phone number were unsuccessful.

PW2 JOSEPH MBURU NDITIKA told the court that on 10/4/2010 at 10.00pm he was at Mudrock Club in Narok Town. The deceased asked to borrow his mobile phone make Nokia 5320 to enable him call a customer **PW2** gave deceased his phone and the deceased left to pick a client at Kaiki area but delayed in returning. **PW2** tried to call the deceased on his own mobile number and using the phone he had lent to the deceased but there was no response. At that point **PW2** decided to report the matter to their employer.

After receiving the report **PW1** went together with **PW2** to report the matter to the police station. The police indicated that they would circulate the information about the stolen vehicle.

The same night police called **PW1** to inform him that his vehicle had been recovered in Olasit area. **PW1** and **PW2** went to the Olasit Road Block where they found the vehicle in question. They also found the three appellants at the Road Block having been apprehended by police as the persons who were found in possession of the vehicle. Later on the body of the deceased with his throat having been slit was recovered beside the road in Ilmashariani area.

PW9 PC PAUL KIMUTAI YEGON told the court that on 10/4/2010 at about 11.00pm he and four other officers were on duty at Olasit road Block. They received communication from the police controller that a motor vehicle Registration No. KBB 417Z had been stolen in Narok. After a few hours the said vehicle arrived at their road block. The police officers stopped the vehicle which had three occupants. **PW9** identifies the 3 appellants as the ones who were inside that vehicle. The 3rd appellant was driving the vehicle whilst the 1st and 2nd appellants were seated together in the back seat. **PW9** searched the vehicle and recovered a pen-knife, sisal rope and mobile phones. He detained the appellants and later handed them over to officers from Olasit Police Station. Upon conclusion of police investigations into the matter all three appellants were arraigned in court and charged.

At the close of the prosecution case the three appellants were all ruled to have a case to answer and were placed onto their defence. All three denied having robbed and killed the deceased. They explained that on the material day they were engaged in transporting charcoal. The lorry they had hired overheated and stalled near Nairagu Enkare. They left the driver inside the lorry and decided to walk to Duka Moja to seek help. As they walked they came across the police road block where there was an abandoned saloon vehicle. The police at the roadblock arrested the 3 appellants and claimed they were in the possession of the abandoned vehicle. They were beaten by a mob and were later taken to the police station and charged.

The appellants all of whom were unrepresented during the hearing of their appeal opted to rely on their written submissions which had been filed in court. **MR. CHIGITI** learned State Counsel opposed the appeal.

This being a first appeal this court is required to re-examine and re-evaluate the evidence afresh and to draw its own conclusions on the same. In this case there was no eyewitness to the robbery incident. The victim of the robbery one **'Harrison Ngugi'** is unfortunately deceased. Neither **PW1** nor **PW2** witnessed the Robbery. All they are able to tell the court is that the vehicle belonging to **PW1** Registration No. KBB 417Z went missing and was later recovered at Olasit road block allegedly with the three appellants as occupants.

Out of the ten (10) witnesses called by the prosecution only one of them being **PW9** purports to link the three appellants to this robbery incident. **PW9** told the court that he was one of the officers on duty at the Olasit road block when the stolen vehicle was driven there. He claims that the 3rd appellant was driving the vehicle whist the other two were seated in the back seat. **PW9** told the court that on the night in question there were five (5) police men manning the road block. It is curious that out of five policemen only one **(PW9)** was called to testify in this case.

The evidence regarding recovery of the vehicle and in whose possession the stolen vehicle was recovered was critical to the case. The five police officers were all crucial witnesses. They were all police officers they therefore ought not to have been any difficulty in securing their attendance to testify. No reason is given why the other 4 police officers did not testify in this case.

As it is the only identifying witness is **PW9**. **PW7** and **PW8** were also police officers and told the court that the three appellants were arrested at the Olasit road block. However neither **PW7** nor **PW8** was present or on duty at the said road block when the appellants were apprehended. They were only called **after** their arrest. **PW7** under cross-examination says

> ***"I was not at the road block where the accuseds were arrested*** [own emphasis]

Likewise **PW8** says

> ***"I was not at the road block. I do not know how they were arrested".***

In the circumstances neither **PW7** nor **PW8** is able to corroborate the testimony of **PW9** regarding the circumstances of arrest of the 3 appellants.

Whilst it is trite law that a fact, in issue may be proved by the evidence of a single witness, in such a case where the crucial witnesses were all known, they were all police officers and could easily be bonded to appear in court to testify, the failure to call these officers to testify is a serious omission in the prosecution case. Such an obvious omission leads this court to draw an adverse inference. Could it be that these officers would have given evidence which may not have corroborated the story given by **PW9** and thus their appearance was dispensed with. The prosecution is obliged in any case to call all essential witnesses to prove their case. To call one out of five key witnesses fell way below the mark. As stated earlier this court draws an adverse inference from the failure to call the other four police witnesses who were in any event easily traceable.

Aside from the testimony of this sole witness the other evidence the prosecution sought to rely upon to implicate the appellant was the blood-stains found on their clothes and inside the back seat of the stolen vehicle. The suggestion is that the victim of the robbery was attacked and cut inside that vehicle leading to the blood stains found therein. All the clothes and swabs as well as samples of blood of all the three appellants, as well as a sample from the deceased were forwarded to the Government Chemist for analysis.

PW3 JOSEPH KAGUNDA KIMANI the Government Analyst testified in court. He told the court that he examined and conducted an analysis on all the exhibits and samples which he received. His findings were documented in his report dated 7/1/2011 and produced in court as **P. Exb 3**. A careful look at the findings of the Government Analyst show that the findings do not in any way link any of the appellants to the vehicle or the blood found therein. The penknife (believed to be the murder weapon) was found to be lightly stained with human blood. The DNA profiles generated from the penknife as well as the swab obtained from the back seat of the vehicle all matched the DNA profiles of the deceased himself. This shows that this was the penknife used to cut the deceased and the deceased bled in the back seat of the car. This pen knife was according to **PW9** recovered on the 1st appellant. However there is no corroboration that this penknife was in fact recovered on the 1st appellant. The other officers who were at the scene and who therefore must have witnessed that recovery were not called to testify. Further **PW9** did not explain where on the person of the 1st appellant, he recovered this pen-knife. Was it in his hands, in a pocket and if so which pocket? **PW9** was a police officer. It is not enough for him to lamely state that

"From accused I recovered a pen-knife. This is the pen-knife"

Much more information and detail would be required regarding such recovery. Further whereas **PW9** claims to have recovered the penknife from the 1st appellant and the mobile phones from the 1st and 3rd appellants, **PW2** in his evidence claims that when they got to the scene the penknife and the mobile phones were **inside** the vehicle. This is an inconsistency in the prosecution case which remained unresolved.

With respect to the remaining exhibits the DNA profile generated from the blood-stains on the clothes recovered match the blood samples of the appellants themselves. This indicates that the appellants bled onto their own clothes. Given that **PW1** and **PW2** testified that a mob of taxi drivers beat up the appellants this is not surprising.

In his evidence **PW9** stated that he arrested the 3 appellants inside the stolen vehicle. He claimed that the 3rd appellant was driving whilst the 1st and 2nd appellants were in the back seat. If the 2nd and 3rd appellants were seated in the back seat where blood of the deceased was found, then that blood ought to have gotten on their clothes. This was not the case. According to **PW3** the Government Chemist, although the deceased's blood was found on the swab collected from the back seat of the car, no blood stains matching the DNA sample of the deceased was found on the clothing of the 1st or 2nd appellants.

If the appellant's had robbed and killed the deceased, then it is more than likely that some of the deceased's blood would have been found on their persons or their clothes. The absence of such a finding raises a doubt about their involvement in this robbery.

In his evidence **PW10 CORPORAL SIMON SIMIYU**, the investigating officer stated that out of the 6 mobile phones recovered from the appellants, one belonged to the deceased and another belonged to **PW2**. From the evidence it is not clear which appellant was found with which phone. **PW9** who made the actual recovery of the mobile phones only stated that he recovered 3 mobile phones from the 1st appellant and 2 mobile phones from 2nd appellant. **PW9** gave no description of the mobile phones he had recovered, from each appellant by colour, make, model or serial number. **PW10** also gave no description of the six mobile phones he received as exhibits. He did not describe their colour, make models or serial numbers. This although **PW2** did in his evidence identify a Nokia 5320 **P. Exb 2** as his own phone and a Nokia 1202 as the deceased's phone there is no evidence that these were part of the phones recovered from the appellants. The chain of evidence is broken. Additionally **PW9** and **PW10** failed to specify exactly which phone was found on which appellant. The court therefore cannot tell and cannot be certain which appellant had the phone allegedly belonging to the deceased and which had the phone which **PW2** alleged was his. The evidence is unclear in this regard.

The police appear to have started off on the premise that the appellants were guilty and therefore saw no need to prove that fact in law. It is a principle tenet of the law that the burden lies at all times on the prosecution to prove its case beyond reasonable doubt. At no time does the burden ever shift to require a suspect to prove his/her innocence.

In his evidence **PW10** told the court that the appellant **"admitted that they had killed the driver (deceased) and dumped the body at Ilmasharuani area in Narok".** This statement is troubling in several regards. Firstly **PW10** did not specify exactly which appellant told him this. Was it the 1st, 2nd or 3rd appellants who made this alleged admission?

Secondly and more importantly such an admission if made would have amounted to a confession. The law regarding the recording and admissibility of confessions is clearly set out in Section 25A of the **Evidence Act, Cap 80 Laws of Kenya**. **PW10** did not comply with the law in receiving this alleged confession nor did he record and seek to produce it in court. Thus evidence of any admission allegedly made by the appellants was therefore inadmissible in the trial.

In his judgment at Page 104 line 3 the learned trial magistrate states as follows

"On interrogation the three [appellants] volunteered information that they had killed the driver of the saloon car and dumped the body at Ilmasharuani area ....."

It was a grave error for the trial magistrate to take and put into consideration, evidence regarding a confession which had not been properly and lawfully admitted into evidence by the court.

The learned trial magistrate also took issue with the fact that the appellants failed to call as witnessed certain persons whose names they had mentioned in their defence. This ought not to have been taken as a factor to negate and/or weaken their defence. As stated earlier the onus lies squarely on the prosecution to prove their case. The accused has no burden in law to prove any fact at all.

All in all I find that the prosecution approach to this case was laissez – faire. The appeared to be under the illusion that they only needed to avail a minimum of evidence to prove their case. The case was not in my view proved beyond reasonable doubt. I therefore allow this appeal and quash the conviction of the three appellants. The death sentences imposed upon them are also set aside.

All three appellants are to be released forthwith unless they are otherwise lawfully held.

Dated and Delivered in Nakuru this 31st day of March 2017.

All 3 appellants in person

Mr. Motende for State.

Maureen A. Odero

Judge