



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 53A AND 53B OF 2017**

**[From the original conviction and sentence in Criminal Case No. 21 of 2015 dated 26/8/2015 in Senior Principal Magistrate's Court at Narok, R. v. Julius Gitigi]**

**JULIUS MAINA GITIGI.....1<sup>ST</sup> APPELLANT**

**STEPHEN MWANGI WAIRIMU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellants have appealed against their conviction and sentence of death in respect of the offence of robbery with violence contrary to sections 295 as read with 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The state has supported the conviction and sentence recorded against Julius Maina Gitigi but conceded the appeal against Stephen Mwangi Wairimu.
3. The 1<sup>st</sup> appellant in his amended petition to this court has raised 5 grounds. In ground 1, he has faulted the trial court both in law and fact for convicting him on contradictory and unreliable evidence. In this regard, the evidence of Kennedy Mutwiri Mutie (PW 2) was that a customer went to his chemist complaining of severe headache. Following questioning of the customer, the complainant recommended that he takes Beta pain for his condition. The complainant then went to remove those drugs from the counter. As he was doing so, he saw 2 other men who posed as customers walk into his chemist making in total 3 customers. Thereafter, he saw one of his 3 customers who was wearing a sweater take out a gun from his sweater. He then proceeded to order the complainant to co-operate and lie down flat on the floor. The 1<sup>st</sup> customer who complained of severe headache asked him to show them where the money was. The complainant raised his head up and showed them where the money was in a plastic tin container. They grabbed the cash money from the container and jumped over the counter. As they were leaving the chemist, one of the robbers demanded for his mobile phone which he gave them. They then demanded that he gives them the PIN for his Mpesa transactions. He was unable to do so because he was in deep shock and terror. After sensing that the complainant was in deep shock, they hurriedly left the chemist.
4. The evidence of the complainant was that the time of the robbery was 7.40 p.m but the one roomed-chemist was well lit with 3 long tubes florescent bulbs which were very bright. Due to this bright light, he was able to see clearly the faces of these 3 robbers. He reported the matter to the police. Subsequently, he was asked to attend a police identification parade organized by Inspector Omondi (PW

5). In that identification parade, the complainant identified the 1<sup>st</sup> appellant as the person who went to his chemist and posed as a customer with severe headache. The police identification parade was put in evidence as exhibit PEX b2.

5. The complainant did not identify the 2<sup>nd</sup> and 3<sup>rd</sup> accused in the trial court. As a result, they were acquitted. It was the evidence of the complainant that they robbed him of Shs. 93,840/- and a Nokia mobile phone. It was also his evidence that the robbers used an AK – 47 rifle.

6. Furthermore, CPL Joseph Kabete (PW 3) acting on the information of an informer proceeded to Majengo Estate where he arrested the 2<sup>nd</sup> appellant Stephen Mwangi Wairimu who was in a lodging in room 4. There was a shoot-out in that lodging where one robber, Wakanene was killed during the shoot-out. After the shooting, the 1<sup>st</sup> appellant emerged at the scene and implicated the co-accused.

7. In his defence, the 1<sup>st</sup> appellant gave sworn evidence in which he described himself as a scrap metal dealer. He denied the charge and testified that on 30/12/2014, he woke up from a rented house. He then went out to a toilet and in the process, he heard a commotion on the veranda of that house. He then went to check what the commotion was all about. As a result he found 4 men in the corridor and there was one man lying dead on the floor. It is at that point in time that 2 police officers in civilian clothes pointed their pistols at him. They then forced him to lie down and was arrested. They searched him and took away his cash money. He was then given 2 options. Option 1 was that he could allow them take the money and set him free. Option 2 was for him to keep the money but then charge him in court. He took the 2<sup>nd</sup> option and as a result he was charged in court. He was then taken to police station and questioned on what he had seen in the lodging. In response, he denied witnessing anything wrong in that lodging. He testified in respect of the parade in regard to which he signed that parade under protest because the complainant had seen him prior to holding the police parade.

8. In the light of the foregoing evidence, I find that the prosecution evidence in respect of visual identification of the appellant at the scene and his identification at the police parade was cogent, credible and consistent in placing the appellant at the scene of robbery. I therefore find no merit in this ground of appeal and I hereby dismiss it.

9. In ground 2, the appellant has faulted the trial court in law and fact by failing to find that the identification parade was not properly done. I have considered the evidence of identification of the appellant at the police identification parade and I find that it was properly conducted. This is clear from the evidence of Inspector Omondi (PW 5). In the circumstances, I find no merit in this ground of appeal and hereby dismiss it.

10. In ground 3, the appellant has faulted the trial court both in law and fact by failing to summon essential witnesses for the just determination of the case. I find from the evidence of PC Leonard Chemosit (PW 3), who was the investigating officer, that the watchman in those lodgings ran away and never returned to his place of work. It is his evidence that he could not be able to trace the watchman to come and testify in court. I accept the proposition that this was an essential witness whom the court could have called in terms of section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

11. In the circumstances, I find that the trial court could not have been in a position to call the watchman as a witness since he could not be traced. Furthermore, there was potential evidence of the informer whose evidence is privileged in terms of section 133 of the Evidence Act [Cap. 80] Laws of Kenya. The court could not compel the prosecution to call this informer unless it was shown that his evidence was going to enable the appellants to establish their innocence. The issue of the informer privilege was fully analyzed by this court in the case of *Tiapukel Kuyoni and Another in Criminal Appeal Nos. 25 and 25A of 2017 (Narok)* which stands for the proposition that an informer is privileged unless his evidence is required to establish the innocence of the accused persons. In the circumstances, I find no merit in this ground of appeal and is hereby dismissed.

12. In ground 4, the appellant has faulted the trial court by shifting the burden of proof to the appellant.

Additionally, he has faulted the trial court for accepting the evidence of the accomplice as the gospel truth. I have considered the judgement of the trial court and I have found that the burden of proof was not shifted. I further find that this appellant was convicted on the evidence of the complainant who visually identified him both at the scene and at the police identification parade. In the circumstances, I find that this ground of appeal is lacking in merit and is hereby dismissed.

13. In ground 5, the appellant has faulted the trial court both in law and fact for finding that the prosecution had proved their case beyond reasonable doubt. In this regard, I find that the prosecution adduced ample evidence in support of their case which was proved beyond reasonable doubt. In addition to the evidence of the complainant, there is the evidence of Cpl Joseph Kabete (PW 3) who he arrested and recovered from him part of the stolen money in the sum of Sh.36,300/=. In the circumstance, I find that this ground of appeal is lacking in merit and is hereby dismissed.

14. In ground 6, the appellant has faulted the trial court by entering a plea of guilty. I find as I have already stated that the prosecution proved their case beyond reasonable doubt. The entering of a plea of guilty was a logical conclusion that followed the prosecution's proof of their case beyond reasonable doubt. In the circumstance, I find this ground of appeal is lacking in merit and is hereby dismissed.

15. The appeal of the 2<sup>nd</sup> appellant was conceded by the prosecution for the following reasons:

1. The complainant did not identify this appellant at the scene of the robbery.
2. The complainant did not identify this appellant at the police identification parade.
3. This appellant testified that he was with his cousin during the material night. In other words, his defence of alibi was not proved by the prosecution.

16. I have considered the reasons advanced for conceding the appeal and I find that the concession is proper. In this regard, I refer to the evidence of Cpl Joseph Kabete (PW 3) that he acted on information of an informer which led him to arrest the 2<sup>nd</sup> appellant in Majengo area. It is to be noted that the informer was not called as a witness for reasons which I have stated in the foregoing paragraph 11.

17. In the circumstances, I hereby allow the appeal of the 2<sup>nd</sup> appellant. His conviction and sentence are hereby quashed. He is hereby set free unless held on other lawful warrants.

18. This is a first appeal court. As a first appeal court according to *Okeno v. R (1972) EA 32*, I am required to scrutinize the evidence upon which the appellant was convicted and sentenced. I have done so.

19. The upshot of the foregoing is that the appeal of the 1<sup>st</sup> appellant is hereby dismissed in its entirety.

Judgement delivered in open court this 19<sup>th</sup> October, 2017 in the presence of Mr. Masikonde holding brief for Mr. Njiraini both appellants and Mr. Mukofu for respondent.

**J. M. Bwonwonga**

**Judge**

**19/10/2017**