



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 290 OF 2008

JOSEPH MURIUKI WACHIRA alias MUCHOKI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 2893 of 2005 (Hon. K. Serem, SRM) on 31st October, 2008)

JUDGMENT

The appellant together with one Stephen Marete Muriithi were charged with three counts of robbery with violence contrary to section 296(2) of the Penal Code (cap.63, Laws of Kenya). According to the particulars in the first count, on the 20th day of March, 2000 at Gatiki area Mukurweini Division in Nyeri district within central province, jointly with others not before court, being armed with dangerous weapons namely, a pistol and daggers, they robbed Frederick Muthee of a motor vehicle registration number KAG 002M valued at Kshs 450,000/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Frederick Muthee.

In the second count, it was alleged that on the 21st day of March 2000 at about 9 AM at Karatina post office in Nyeri district within central province, jointly with others not before court, being armed with dangerous weapons namely a pistol and daggers, they robbed Peter Mutahi George of a motor vehicle registration number KAG 008K Datsun pick-up valued at Kshs 700,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Peter Mutahi George.

The particulars in the third count were that on the 21st day of March 2000, at about 10:30 AM at Rutagathi area of Karatina in Nyeri district within central province, jointly with others not before court, being armed with dangerous weapons namely a pistol and daggers, they robbed Francis Nyuthe Muriithi of a motor vehicle registration number KAK 636 G DATSUN pickup valued at Kshs 700,000/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Francis Nyuthe Muriithi.

The appellant faced two other counts of being in possession of a firearm without a valid firearm certificate issued by a firearm licensing officer contrary to **section 4(1) of the Firearms Act (cap. 114, Laws of Kenya)** and being in possession of a life ammunition without a valid firearm certificate issued by a firearms licensing officer contrary to **section 4(1) of the said Firearms Act**.

The appellant was convicted of all the five counts; he was sentenced to death on the 1st count and for this reason, the sentencing on the rest of the counts was held in abeyance.

In the amended petition of appeal, the appellant relied on three grounds against the decision of the subordinate court; these grounds are, first, the learned trial magistrate erred in law by failing to hold that section 214 of the Criminal Procedure Code, (cap. 75) was not complied with; second, the learned trial magistrate erred in law and in fact by failing to hold that none of the prosecution witnesses ever identified the alleged robbers; and third; the learned trial magistrate erred in law and in fact by failing to hold that there were glaring material contradictions in the evidence of the prosecution witnesses.

The state opposed the appeal.

I must mention at the very outset that this appeal had previously been determined by this court and the Court of Appeal on two separate occasions. On the first occasion, this Court (Juma and Mitey, JJ., as they then were) upheld the conviction and sentence in its judgment delivered on 13th of August 2004. When the appellant appealed to the Court of Appeal against this decision, the court allowed the appeal on the sole ground that the prosecution of the appellant and his co-accused was conducted by a senior Sergeant; it remitted the file back to the trial court for a retrial. In taking this course, the Court of Appeal noted as follows:

“The charges against the appellants were all very serious and if properly considered, the evidence available in the record before us could well result into a conviction.”

The appellants were, inevitably, tried and convicted; and for the second time, the appellant appealed to this Court against the conviction and sentence. His appeal was, however, dismissed on 26th November, 2013.

Undeterred, the appellant appealed to the Court of Appeal and once again, by its decision dated 27th July 2016, the Court allowed the appeal on the ground that one of the two judges who heard the appeal did not have the jurisdictional competence to hear it. Accordingly, the court remitted the appeal back to this Court for the hearing of the appeal afresh before a bench of competent jurisdiction.

It is against the foregoing background that I heard the appeal on 5th of April, 2017 by which date the Criminal Procedure Code had since been amended to remove the long-standing requirement that appeals to this Court against convictions on capital offences ought to be heard by two high court judges; accordingly, I sat as a single judge.

The prosecution evidence was this: on 21st March, 2000 at about 9.00 AM, **Peter Mutahi George (PW2)**, was seated in his vehicle, Registration No. KAG 008K (Datsun Pick-up) which was parked at Karatina post office parking yard. He had just entered the vehicle and was reading one of the letters that he had picked from the post office when two strangers accosted him. One of these people pointed a gun at him and ordered him to move from the driver’s seat. As he exited the car from the passenger door, the robbers drove off in his motor vehicle leaving him behind. He then reported the robbery at Karatina police station. It was his evidence that his impression of the appellant was of a tall, black and bearded man; it was this description that he gave to the police when he reported the robbery. When an identification parade was eventually conducted, he picked out the appellant in the parade as the robber who pointed the gun at him. As for his vehicle, it was recovered abandoned at Ragati Dam, a few hours after the robbery.

Jackson Maina Gathekia (PW1), another victim of the robbery, testified that on 20th March, 2000 at around 9.30 AM he was travelling in Nissan Matatu registered as KAG 006 M (though he admitted he could not clearly remember if this was the correct registration number). He was the conductor although his main assignment on that day was the distribution of newspapers which was the job he had been employed to do by one Francis Karumwa, the owner of the vehicle he was travelling in.

When they reached Gatiki, two of the passengers sought to alight. As the driver stopped the vehicle, one of these two passengers pointed a gun at him and ordered him to lie down. The other robber took over the control of the vehicle from the driver. They drove off with **Gathekia (PW2)** but left behind the driver and

some of the passengers who were travelling in the same vehicle. The vehicle did not go far though; it stalled a short distance away. The robbers took to their heels when they saw members of the public approaching it.

This witness could not recall whether the robbers stole anything from him but he testified that they robbed his cashier, whom he identified as **Kabuga (PW5)**, of Kshs. 26,000/=.

As far as the first appellant is concerned, **Gathekia (PW2)** testified that he picked him out of an identification parade because he had been travelling in their vehicle as a passenger on several occasions in the past. He gave this information, including the description of the appellant, to the police. He attended the identification parade two days after the robbery. He was categorical that of the two robbers, it was the appellant who pointed a gun at him during the robbery.

It was also his evidence that the owner of the vehicle and police officers from Karatina police station arrived at the scene 45 minutes after the robbery; they were apparently informed of the robbery by a motorist whom this witness had tasked to inform them.

John Kabuga Muchiri (PW5) testified that he was Mr Francis Karumba Gakuru's employee; his job entailed distribution of newspapers at Othaya, Mukurweini, Karatina and Gakindu. As usual, on 20th March, 2000 he distributed the newspapers in the company of his co-salesman using motor vehicle registration number KAG 001M a Nissan Matatu which was then being driven by **Fredrick Muthee (PW4)**. After distribution of the papers, they were paid the sum of Kshs 26, 000/= as the proceeds from the sale; he was the one carrying the money.

It was customary for them to ferry passengers on their way back after distribution of the papers. On the material day, he was seated at the front with the driver when one of the passengers they were carrying sought to alight. As soon as the vehicle stopped, they were attacked. There was a commotion at the back of the vehicle and he heard his passengers say that their attackers were armed with a knife and a pistol. One of the attackers confronted him and demanded for the money. The witness saw the appellant was seated behind the driver. He was able to identify him in the identification parade.

The driver of the vehicle, **Fredrick Muthee Ndegwa (PW4)** testified that he was the employee of Francis Karuma at the material time and that he was the driver of the vehicle registration number **KAG 002M** in question. It was his evidence that they were on their way back to Karatina when they were attacked. This was on 20th March, 2000 at about 9.30 AM. One of the robbers pointed a gun at him. They were robbed of Kshs 26,000/=. They also stole Kshs 100 from his trouser pocket. The robbers pushed him and his colleague out of the vehicle before they drove off. He asked a motorist to report to the police that they had been robbed. He later identified the robbers at an identification parade three days after the incident. He identified the appellant as the person who held the pistol at his head.

Mr Francis Mureithi (PW3) testified that on 21st March, 2000, he was driving motor-vehicle registration number KAK 636G towards Karatina when he was stopped by a man standing by a parked pick-up. As he came out of the vehicle, two other people emerged from the side of the road and snatched his car-keys. The appellant pointed a pistol at him. He was ordered to lie in the vehicle with his face to the floor. The robbers then drove with him for some time before he jumped out of the vehicle and escaped. He immediately went to report the robbery at Kiamachibi police station. He was able to identify the appellant as one of the attackers on an identification parade.

Police constable Onyango Owade (PW7) testified that on 20th March, 2000, he was informed by the Officer in Charge of Mukurweini police station that there was a robbery incident at Gatiki area. He said he found the motor vehicle registration number KAG 002M where it had been abandoned. He took the driver and his co-workers to the police station where they recorded statements. His witnesses told him that if they saw the robbers they would identify them. On 21st March, 2000, the officer received information that a motorist had been robbed of his vehicle at Karatina post office. The officer together with his colleagues laid an ambush at Gatiki area but while there, they received information that the

robbers had abandoned the vehicle and had robbed another motorist of his vehicle registration number KAK 628 G at Kiamachibi area. Soon thereafter the officer saw a motor vehicle whose registration number was either KAK 628G or KAG 628G. The vehicle was being driven at a high speed and was being pursued by another police vehicle. This officer and his colleagues joined the chase. When they reached at Ichamara area, the robbers shot at them. The officers returned fire and deflated the pick-up's tyres. The occupants abandoned it and fled into the forest. The officers mounted a search and after about five minutes, they found the appellant and his co-accused hiding in a thicket nearby. The other suspect was arrested by members of the public but he was apparently acquitted.

One of the officers, Corporal Ringera searched the appellant and recovered a loaded pistol on him. This pistol was, however, not produced because it had apparently been destroyed after the conclusion of the previous trial.

Joseph Kimaru Chumo (PW6) testified that on 21st March, 2000, he was the District Criminal Investigations Officer in Nyeri District. On the material day, he received information at about 10.00 AM that there was a robbery incident at Karatina whereby a motor vehicle registration number KAG 008K (pickup) was stolen. While he was on his way to Karatina, he got information that the robbers had hijacked another vehicle registration number KAK 636G. He encountered this vehicle on the way. There were two people inside while two others were outside. The two who were outside jumped into the vehicle which then sped off towards Mukurweini. The officer and his colleagues chased the vehicle; somewhere along the way, the robbers shot at them. This officer returned fire and managed to deflate the tyres of the vehicle in which the robbers were travelling. The robbers alighted and ran away. The police chased them and managed to arrest the appellant who was armed with a loaded pistol. They also arrested the appellants co-accused.

This witness testified that he was with corporal Ringera when he arrested the appellant and found him in possession of the loaded pistol.

In his defence, the appellant gave sworn testimony and said that on 21st March, 2000, he was at his home with his wife and brothers and that he was not at the scene of crime. He also said that he was at Nyeri market selling his farm produce on the same day. He was arrested at a bus stage by an inspector of police whom he identified as Musembi and whom he alleged was the Deputy Officer in Charge of Nyeri Police station. He further testified that he was a trained police officer but that he had been sacked for desertion. He was also alleged to have stolen a gun. The appellant confirmed that he was arrested on 21st March, 2000 at 10.00AM. He alleged that the charges against him were malicious because him and Inspector Musembi had disagreed over a girl when they worked together in Kakamega. He also claimed that the pistol and the ammunition were planted on him.

It has been necessary to reproduce the evidence at the trial because it is incumbent upon this honourable court, in exercise of its jurisdiction as the first appellate court, to evaluate the evidence afresh and come to its own conclusions. While these conclusions may very well deviate from the factual findings of the trial magistrate, I am minded that it is the trial court that had the benefit of hearing and seeing the witness. The law on this question is found in **Okeno versus Republic (1972) EA 32** where it was stated that: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates’ findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.” (See page 36).

As in every criminal offence for which an accused person is tried, the first question to consider is whether that offence has been committed. As far as the accusations against the appellant are concerned, the burden was on the prosecution to prove first that the offences of robbery with violence had been

committed as alleged; second, that the appellant was in possession of a firearm without a valid licence; and third, that he was also in possession of the live ammunition.

Whether the last two offences were proved is a question that, I think, can quickly be disposed of. Proof of the two offences is, in a way, interconnected because the gun with which the appellant is alleged to have been found in possession of is alleged to have been loaded with ammunition and it is the possession of this ammunition that constituted the third count.

Both **Police constable Onyango Owade (PW7)** and **Joseph Kimaru Chumo (PW6)** were consistent that they tracked down the appellant and found him with the loaded pistol. One other police officer, who was in their company, corporal Ringera is said to have passed on before he testified though his statement was admitted in evidence.

Despite the recoveries made, neither the pistol nor the live ammunition were produced in court. Police constable Onyango Owade (PW7) testified these items were destroyed after they had been produced in the previous trial. However, even after a careful perusal of the record of the original trial I have not found evidence of an order for release of exhibits or any order for their disposal or destruction. Moreover, there was no evidence of any officer, either the ballistics expert or the arms licensing officer that he had received the items for their safe custody or had witnessed their destruction.

It may be that the pistol together with the live ammunition were produced and admitted in evidence in the original trial against the appellant; however, that trial was nullified and being a nullity, the trial court in the second trial could not make any reference to the evidence purportedly admitted in the first trial; legally speaking the initial trial never existed.

It follows that in the absence of proof of the existence of the pistol and the ammunition, the fourth and fifth counts were not proved beyond reasonable doubt. Accordingly, the appellant's conviction on those two counts is quashed and the sentences set aside.

Coming back to the first three counts of robbery with violence, I have not found any reason to doubt the testimony of each of the three complainants that they were robbed at gunpoint of their vehicles. I find the evidence by **Fredrick Muthee Ndegwa (PW1)** that he was driving vehicle registration number **KAG 002M** on 20th March, 2000 when he was accosted and robbed of the vehicle by armed robbers to have been corroborated by the evidence of **Jackson Maina Gathekia (PW1)** and **John Muchina (PW5)** who were travelling in the same vehicle. Their evidence that the vehicle stalled after the robbery was also consistent with the evidence of **constable Owade (PW7)** who testified that the vehicle was towed from the scene and taken to the police station.

The circumstances under which **Fredrick Muthee Ndegwa (PW1)** was robbed had all the necessary ingredients that constitute the offence of robbery with violence. Those ingredients are prescribed in section **296(2)** of the **Penal Code**; that section of the law states as follows:-

296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

From the evidence proffered, I am satisfied beyond doubt, and the learned trial magistrate was right to conclude, that the complainant in the first count was not only robbed of his vehicle but also that at the time of the robbery his assailants were armed with dangerous or offensive weapons; that they were more than one; and, that they used violence on him. Any of these three ingredients was sufficient for a finding that this offence had been committed but it didn't hurt that the three of them were proved to exist.

As far as the second count is concerned, the second complainant, Peter **Mutahi George (PW2)** was equally candid that he was in his motor vehicle at Karatina post office when he was confronted by strangers one of whom pointed a pistol at him. They ordered him out of the vehicle and sped off in it. He

reported the incident to the police; his vehicle was recovered, apparently on the same day. It is clear from his evidence that the robbers were armed, they were two of them and they forcibly removed the complainant from his vehicle. By pointing the gun at him, they threatened to kill or harm him. I am satisfied, as the learned trial magistrate was, that the second count of robbery with violence was also proved to the required standard.

Finally, **Francis Nyuthe Muriithi (PW3)** was also candid on how he was flagged down by a man standing near a pick-up parked by the roadside. He stopped his vehicle, registration number KAK 636 G, perhaps under the mistaken belief that the stranger was in need for assistance. It was not until two other men emerged and snatched him his car keys that he realised that he had been duped. He too was threatened with a pistol and his vehicle driven away.

His evidence was corroborated by the then DCIO of Nyeri, ACP **Joseph Kimaru Chumo (PW6)** who received information that the complainant's motor-vehicle had been hijacked. He encountered the same vehicle on his way to Karatina. The occupants were the same people who had robbed this complainant of this vehicle. He pursued the robbers and only managed to get the vehicle after he shot at the tyres and deflated them. The vehicle was towed to the police station.

With this evidence, I must agree with the learned magistrate that the ingredients of the offence of robbery with violence with respect to the third count were again proved beyond reasonable doubt.

The second equally important question is whether it was proved beyond reasonable doubt that the appellant was the perpetrator of these offences. The answer to this question largely revolved around the evidence of identification; in other words, whether the appellant was positively identified.

All the three complainants were robbed in broad daylight though on two different days. The first complainant, **Fredrick Muthee Ndegwa (PW4)** testified that he was robbed at about 9.30 AM on 20th March, 2000. He clearly saw the appellant when he pointed the gun at him. In his own words the witness testified that he spent some time with the appellant and even talked with him. He gave his description to the police and when an identification parade was conducted he easily picked him out.

The complainant in this first count was not the only identification witness. His conductor, **Jackson Maina Gathekia (PW1)** also positively identified the appellant. According to him, the appellant was their customer whom he used to see occasionally. He was also able to remember that he was the one who flagged down the vehicle and that he sat behind the driver, armed with a pistol. The witness picked the appellant out on the identification parade as one of the robbers who attacked them.

One other witness who identified the appellant in the robbery of 20th March, 2000 was **John Muchina (PW5)** who was also in the vehicle at the time of the robbery. He corroborated **Ndegwa's (PW4's)** and **Gathekia's (PW1's)** testimony that the appellant was seated behind the driver and that he was the one who was armed. He also recalled that he was the person who pointed the gun at the driver's head. Because he could remember him, he also picked the appellant in the identification parade.

I have no reason to fault the learned trial magistrate that the circumstances under which the appellant was identified were favourable for a positive identification without any possibility of error. It is for this reason that the three witnesses who saw the appellant also identified him without any problem in the identification parade that was organised for this particular purpose. They were all consistent of where the appellant was seated, what he did before and during the robbery. There is no hint that the three witnesses could have been mistaken in the identification of the appellant. I am therefore satisfied that the learned trial magistrate was correct in coming to the conclusion that the appellant was properly and positively identified as the person who, jointly with others not before court, robbed the first complainant.

The second complainant **Peter Mutahi George (PW2)** can also be said to have been robbed in circumstances that were favourable for him to positively identify the appellant. He was confronted by the appellant himself who pointed the gun at him just as he did to the first complainant. This was around 9.30 AM, in broad daylight. He attended the identification parade two or three days after the robbery

when the impression of the appellant's appearance can be said to have been still fresh in his mind. Considering that he was testifying more than seven years after the robbery, he could not recall clearly whether he gave the police the appellant's description but he was certain that it was the appellant who attacked him when he singled him out from the identification parade.

In coming to these conclusions, I am minded of the Court of Appeal's words in **Wamunga versus Republic (1989) KLR 424** where it was held with regard to a conviction based on identification that:

"...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction." (see page 426).

As noted the circumstances under which the appellant was identified were favourable, there was sufficient light, the appellant was exposed, he somehow engaged his victims and he spent some considerable time with them which, in my humble view, was sufficient enough for the appellant to leave an impression of himself in the minds of the complainants. Any possibility of mistaken identity is ruled out in these circumstances.

The third complainant's evidence against the appellant as the person who attacked him was even clearer. The appellant robbed him of his vehicle registration number KAK 636 G. He saw his face clearly and even gave his description to the police. With this description in mind, he had no problem identifying the appellant on the identification parade.

Apart from identification, the appellant and his accomplices were found in possession of the complainant's motor vehicle soon after they had robbed him. According to the evidence of **Chumo (PW6)** and **Owade (PW7)**, the appellant was one of the occupants in the complainant's vehicle soon after it was reported to have been stolen. They pursued the vehicle until they caught up with it when they shot at it and deflated its tyres. Its occupants disembarked and ran into a nearby forest. The appellant who was one of them was arrested almost immediately in a thicket.

It followed that, as far as the third count was concerned, the evidence against him was not only that of identification but he was also that of possession of the motor vehicle he had robbed from **Francis Mureithi (PW3)**.

My assessment of this evidence is that it was sufficient to prove that the appellant was guilty on all the three counts of robbery with violence. His defence that he was arrested by one Musembi with whom he had earlier differed over a woman while they were working in Kakamega was an afterthought to camouflage his mere denial. I say so because he never made any reference to this particular person when he had opportunity to cross-examine the prosecution witnesses. Apart from the appellant's own allegations, the said Musembi did not feature anywhere in the prosecution case and it is even doubtful whether such a person existed.

Although the appellant also proffered an alibi, this line of defence was inconsistent; for instance, though he initially said that he was at his home in Nanyuki on 21st March, 2000 at 9.30 AM, he again said that he was in fact at Nyeri market selling farm produce. Apart from this contradiction, he never attempted to give any explanation of his movements or whereabouts on 20th March, 2000 when the first complainant was robbed. While I am aware that the burden is always on the prosecution to prove its case beyond all reasonable doubt, I am not satisfied that the appellant's defence created any doubt in the prosecution case and the learned magistrate was right in dismissing it.

For the foregoing reasons the appellant's appeal is allowed in part only to the extent that his conviction on the 4th and 5th counts is quashed and sentences set aside. His appeal against the conviction and sentence on the 1st, 2nd and 3rd counts is dismissed.

Signed, dated and delivered in open court this 13th day of October, 2017

Ngaah Jairus

JUDGE