



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEALS NOS 533, 534 & 535 OF 2013 (CONSOLIDATED)

**(From original Convictions and Sentences in Gatundu PM Criminal Case No 324 of 2012 – A R Ireri,
Ag PM)**

1. WALTER MUGAYA NGOTI

2. STEPHEN NDERI MURUNYU

3. FRANCIS MBUGUA NDUNG'U.....APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

1. The three Appellants (who were respectively the 1st, 2nd and 3rd accused before the trial court) were on 13/11/2013 convicted after trial of two counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. They were each sentenced to death. They have appealed against the convictions and sentences.

2. By a ruling dated and delivered on 07/03/2014 (Ngaah, J) the Appellants were admitted to bail pending disposal of their appeals. Learned prosecution counsel did not oppose the application for bail.

3. In their grounds of appeal, as argued by their learned counsel, Mr. Kebongo, the Appellants complain that the evidence placed before the trial court was contradictory and unreliable; that the evidence disclosed a scenario where the complainants were attacked by a large mob of people and that there was no evidence of any specific role played by each appellant in that mob; that material witnesses were not called to testify and no reasons were given for failure to call them; that the trial court failed to properly consider the Appellants' defenses; and that the charges were not proved against each appellant beyond reasonable doubt.

4. Learned prosecution counsel, Mr. Njeru, did not support the convictions, upon grounds that crucial witnesses were not called by the prosecution; that there was evidence of a prior grudge between the Appellants and the complainants and their families; that the complainants did not explain how they were able to identify the Appellants in a large mob of people that attacked them; and that in the circumstances the charges of robbery with violence were not plausible at all and in any event were not proved to the required standard.

5. I have read the record of the trial court in order to evaluate the evidence placed before it and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. However, I have borne in mind that I neither saw nor heard the witnesses testify, and I have given due allowance for that

fact.

6. Six witnesses testified for the prosecution - the two complainants (PW1 and PW3), PW1's wife (PW2), a neighbour to the complainants (PW4), a doctor (PW5) who testified as to the complainants' injuries, and the investigating officer (PW6), who also arrested the 1st and 2nd Appellants. All the three appellants gave unsworn statements in their own defence and did not call any witness.

7. The scenario disclosed by the evidence placed before the trial court was as follows. PW1 and his wife (PW2) and also PW1's brother (PW3) worked for gain in Nairobi. On 9th April 2012 they proceeded to their rural home at Kiamwangi Village in Gatundu South District. PW2 was driving their car. At the local trading centre they decided to buy some drinks at a pub to take home. It was then about 8.30 p.m. When PW1 went into the pub to buy the drinks some five or so men came to the car and demanded that PW2 gives them KShs 10,000/00. She asked what for, and they started insulting her. Just then PW1 came from pub and as he was placing the drinks in the boot of the car the men made the same demand of him, and he similarly asked them what the money was for. There followed an exchange upon which the men started assaulting him. In the process the pub operator came out and ushered PW1 in the pub and hid him there to save him from further beating. There were many patrons in the pub, including an Administration Police officer and an assistant chief. None of them were called to testify, notwithstanding that it was PW1's evidence that the police officer came out and calmed the people who were demanding money and assaulting PW1. The pub owner was also not called.

8. After PW1 had rushed to the safety of the pub, PW2 and PW3 drove home and parked the car. They came back to the pub on foot to check on PW1, who had in the meantime called his friend Joram to come and assist him. Joram came in his car and he took PW1, along with PW2 and PW3, to their home. This Joram was never called to testify.

9. The further evidence of PW1, PW2 and PW3 was that a crowd of about 15 to 20 people followed them home on motor cycles. They blocked Joram's car from exiting the compound. In the meantime they called for PW1 and PW3 to come out or they would burn Joram's car. PW1, PW2 and PW3 came out. PW2 ran and hid in the banana plantation from where she could not see what was happening. The crowd set upon PW1 and PW3. The crowd accused PW3 of arranging for their motor cycles to be stolen. They assaulted them and stole from them the money and mobile phones named in the charges.

10. PW1 and PW3 stated that their home did not have electricity, but that they were able to identify the Appellants from the light emitted by the headlights of the many motor cycles that the crowd had come by. They said this second incident (at their home) lasted between 45 minutes and an hour. A neighbour (PW4) came out of his house and approached the complainants' house to find out what was happening. He found PW1 on the ground bleeding and PW3 also beaten up. He said he was able to see and identify the three Appellants and another man from the crowd by the motor cycle headlights. The 1st and 2nd Accused insulted him and told him to go back to bed.

11. The entire cumulative incident (from the demands for money from PW1 and PW2 at the pub to the assault of PW1 and PW3 at their home, strongly reeks of a prior grudge between PW1 and PW3 on the one hand and members of the local boda boda (motor cycle taxi) community. It would appear that the boda boda riders suspected that PW3 was arranging for the theft of their motor cycles. The demands for money from PW2 and PW1 were mere excuses to pick a quarrel with PW1 and PW3 and thus afford an opportunity to assault them. There was no intention at all disclosed by the evidence to rob them.

12. The attack upon PW1 and PW3 at their home by a large crowd of boda boda riders was furtherance of this intention to assault them, not to rob them. There is no doubt that the Appellants were part of this crowd; they were clearly seen and recognized by PW1 and PW3 who knew them well. There was sufficient light both outside the pub and later at their home from the head lamps of the many motor cycles to enable them to see their assaulters. They were also identified by PW4.

13. However, capital robbery, as serious an offence as can be, was not the appropriate charge in these circumstances. I have already found that the only intention that was manifest in the crowd was to assault

PW1 and PW3. No intention to steal from them was established by the evidence.

14. Apart from that there were at least three witnesses (the Administration Police officer, the assistant chief and Joram) who could have provided useful and independent corroborative evidence. They were not called, and no reasons were given for the failure to call them. The inference to be drawn from this is that their testimonies would not have been supportive of the prosecution case.

15. Another disturbing aspect of this case is that the trial court in its judgment clearly shifted the burden of proof to the Appellants contrary to law. I can do no better than quote the last page of the learned trial magistrate's judgement –

“In the defence, I find it noteworthy to make a finding especially on the scanty and or very economical evidence given by DW3 who states that he is a caretaker in Lang’ata Nairobi. I thought nothing would have been easier than for him to come with his boss to confirm his whereabouts on the date of the alleged incidence his defence.

Accused 2 and Accused 1 also ought to have at least an independent witness who can justify their whereabouts on the evening of 9th of April 2012.

In the upshot, I wish to find that the prosecution has proven its case beyond a reasonable doubt which is the required standard in that the three accused persons were in the group of assailants that violently robbed and injured the complainant at Kiamwangi Shopping Centre and at their homestead.

Accused 2 has also not proven how PW4 has a grudge against him.”

16. In a criminal trial the burden never shifts to the accused, unless such shift is mandated by some statute. Otherwise it is always the prosecution's burden to prove the guilt of the accused beyond reasonable doubt. The accused is never required to prove his innocence or anything else, not even an alibi he might plead. He only needs put it forward, and it then becomes the prosecution burden to disprove the alibi.

17. Upon my own appraisal of the evidence placed before the trial court, I am not satisfied that any of the two charges of capital robbery was proved against any of the Appellants beyond reasonable doubt. The convictions cannot stand, and learned prosecution counsel properly conceded the appeals.

18. I will allow the three appeals in their entirety. The convictions are hereby quashed and the sentences imposed set aside. The Appellants if in custody, shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 30TH DAY OF SEPTEMBER 2016