REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 416 OF 2013

CONSOLIDATED WITH HC CR APPEAL NO 417 OF 2013

(Appeals against original Convictions and Sentences in Thika CM Criminal Case No 4211 of 2009 – M R Gitonga, SPM)

1. PATRICK MUREGE WAMBUI

2. KENNEDY MWANGI NJERI………………………… APPELLANTS

VERSUS

REPUBLIC……………………………………...………RESPONDENT

J U D G M E N T

1. The Appellants herein, **Patrick Murege Wambui** (2nd accused before the trial court) and **Kennedy Mwangi Njeri** (1st accused), were convicted after trial of one count of ***capital robbery*** contrary to **section 296(2)** of the **Penal Code.** Each was sentenced to death as provided for by law. In addition the 1st Appellant was also convicted of possession of public stores contrary to **section 324 (3)** of the **Penal Code**. He was not sentenced for that offence. This was a mistake on the part of the trial court; a convicted person ought to be sentenced for all the offences that he may stand convicted of as the position can change in respect of any of the offences on appeal. It is not for the trial court to speculate as to what may happen on appeal. In this particular case the conviction for the capital robbery might as well be quashed while that for possession of public stores might as well be upheld.

2. The Appellants appealed against both conviction and sentence. The grounds of appeal for both Appellants are to the effect that the charge of capital robbery was not proved beyond reasonable doubt, and that the convictions for that offence are unsafe. With regard to the 1st Appellant's (2nd accused's) conviction of possession of public stores, the argument here is that the conviction was erroneous in that the 1st Appellant (2nd accused) was not even charged with that offence. He was charged only with the capital robbery. It was the 2nd Appellant (1st accused) who was charged with possession of public stores offence.

3. Learned prosecution counsel for the Respondent does not support the conviction for the same grounds as those advanced by the Appellants through their learned counsels.

4. I have read through the record of the trial court in order to evaluate the evidence placed before that court so as to arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I did not myself see and hear the witnesses testify, and I have given due allowance for that fact.

5. I will deal with the 2nd Appellant's (1st accused's) case first. The only evidence against him was that when the police went to his house they recovered a bullet-proof jacket and a pair of hand cuffs. These were not the stolen items, and there was no evidence that they were used in the robbery. These items formed the basis of the charge of possession of public stores in count 3 of which the 1st Appellant (2nd accused) was convicted.

6. So there was really no evidence at all against the 2nd Appellant (1st accused) sufficient to found his conviction for the capital robbery. His conviction for the same cannot be sustained. It is hereby quashed.

7. Let us now turn to the 1st Appellant (2nd accused). His conviction for possession of public stores in count 3 was erroneous in law as he had not been charged with that offence. It is clear from the charge sheet that it was the 2nd Appellant (1st accused) who was charged with that offence, not the 1st Appellant (2nd accused). That conviction is hereby quashed.

8. Regarding the 1st Appellant's (2nd accused's) conviction for the capital robbery, he was alleged to have been identified. However, the circumstances of his alleged identification were not conducive to a good and positive identification. The complainant (PW1) did not identify any of the robbers. It was PW2 who stated that he identified the 1st Appellant (2nd accused) during an alleged chase of the robbers. It is clear from the evidence that this chase was not hot pursuit. In any case, when PW2 purportedly identified the 1st Appellant (2nd accused) there had been a shootout between PW2 and the robbers. He could not have had a good opportunity in those circumstances to clearly observe and identify any of the persons who were shooting at him. PW2 (who was a police officer) also never told any of his colleagues that he could identify any of the robbers. It is also to be noted that no identification parade was conducted; such parade would have gone a long way into clearing any doubts regarding identification.

9. Another witness who purportedly identified the 1st Appellant (2nd accused) was PW3. However she contradicted herself on this aspect. The 1st Appellant was not a person she had known before, and there ought to have been an identification parade to clear doubts.

10. There were many gaps in the prosecution case against the 1st Appellant (2nd accused). His conviction for capital robbery is clearly unsafe and cannot be allowed to stand. It is hereby quashed.

11. In summary, the appeals of both Appellants are hereby allowed in their entirety. Their convictions are quashed and the sentence of death imposed upon them set aside. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 18TH DAY OF NOVEMBER 2016