



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL APPEAL NO. 37 OF 2015**

**CONSOLIDATED WITH HCCRA 38 OF 2015 AND 41 OF 2015**

*(Being appeal from original Conviction and Sentence in the Chief Magistrate’s Court at Naivasha Criminal Case No. 3115 of 2012)*

**ANTONY KAMAU MUNIU.....1<sup>ST</sup> APPELLANT**

**AMOS CHARAGU GITUKU.....2<sup>ND</sup> APPELLANT**

**PAUL MBOGO MUNYEKI.....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The 3 Appellants herein, jointly with 3 other accused persons were arraigned before the lower court for the offence of Robbery with violence Contrary to Section 296 (2) of the Penal Code. The particulars of the charge sheet stated that:

“On the 12<sup>th</sup> day of October 2012 along Naivasha – Nakuru highway in Nakuru County, jointly with others not before court, while armed with dangerous weapons, namely a pistol they robbed Joseph Kamau Njoroge of a motor vehicle registration number [particulars withheld] Trailer ZC 1268 loaded with 35,000 litres of super petrol, all valued at Kshs 17,850,000/= and immediately after the time of such robbery used actual violence to the said Joseph Njoroge Kamau.”

2. The alternative charge was Handling stolen goods Contrary to Section 322 (2) of the Penal Code. Particulars of the charge were as follows: “

“On the 12<sup>th</sup> day of October 2012 along Naivasha – Nakuru highway in Nakuru County, otherwise than in the court of stealing jointly and dishonestly retained one motor vehicle registration [particulars withheld] Trailer number ZC 1268 loaded with 35,000 litres of super petrol knowing or having reason to believe them to be stolen property.”

3. The Appellants denied the charges. Following a full trial, they were convicted on the alternative count and sentenced to 3 years imprisonment. Anthony Kamau, the 4<sup>th</sup> accused at the trial, filed an appeal HCCRA 37 of 2015 against the appeal and conviction. His co-accused in the lower court Amos Charagu Gituku and Paul Mbogo Munyeki (5<sup>th</sup> and 1<sup>st</sup> Accused) also filed their petitions of appeal being HCCRA 38 of 2015 and HCCRA 41 of 2015, respectively. The appeals were consolidated at the hearing under

one leading file being HCCRA 37 of 2015, with the respective Appellants appearing as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, according to the sequence of the filing of the appeals. They were represented by Messrs P. K. Njuguna, Gichuki and Nyakundi respectively.

4. The first Appellant has raised ten grounds of appeal, with grounds 1 - 7 attacking the quality and adequacy of the evidence upon which the conviction was based. Ground 8 was abandoned while grounds 9 and 10 challenged the sentence. Grounds 1 – 8 in the 2<sup>nd</sup> Appellant’s petition of appeal are confined to challenging the sufficiency and credibility of the evidence adduced at the trial. Similar grounds are raised in the petition by the 3<sup>rd</sup> Appellant. The Appellants, through their respective counsels, filed written submissions which were highlighted at the hearing of the appeal.

5. The common theme cutting across the submissions is that, the prosecution evidence regarding the arrest of the Appellants and recovery of the vehicle [particulars withheld] Trailer ZC 1268 was contradictory and unreliable. Secondly, and more significantly that the conviction returned in respect of the alternative charge was unsafe because the alleged property that the Appellants dishonestly handled, namely the trailer [particulars withheld] and its alleged cargo of 35,000 litres of fuel was not exhibited before the court, or otherwise proved to exist.

6. On his part, Mr. Kibellion for the Director of Public Prosecutions conceded the appeal pointing out that possession was a key ingredient of the alternative charge. And further, that neither the stolen goods described in the charge sheet, nor photographs thereof were tendered at the trial.

7. Briefly, the prosecution evidence at the trial was that the trailer in question was dispatched by an employee of a company known as Roy Transporters on 12/10/2012. On board was cargo, namely 35,000 litres of fuel destined for Kampala. The driver Joseph Njoroge (PW1) left Nairobi at 6.30am, reaching Nakuru 10.00am. At Soysambu area his vehicle was diverted by four men in police uniform and commandeered to Gilgil area. The men subsequently drugged and trussed him up before they abandoned him in a thicket.

8. Information reached police presently and the vehicle was recovered on the night of the same day by police officers, including PC Peter Kemboi (PW2) of CID Flying Squad Unit. It was the evidence of this officer that three Appellants and others were at the scene at the time of recovery. They were found in possession of paraphernalia such as pipes, a generator and were in process of siphoning fuel from the said tanker. Also at the scene was another vehicle KAU 653D into which the fuel was being siphoned. According to the original record of the trial, PW2 told the court that the two lorries were photographed and later released, presumably to the owners.

9. The latter is confirmed by the record of proceedings on 25/10/2012. With regard to motor vehicle KAU 653D the trial court ordered it to be released “to the owner Samuel Ndungu Gitau” with direction to avail it at the hearing. That however did not happen.

10. When placed on their defence, the Appellants gave unsworn statements. The Appellants claimed that they were each separately going about their various lawful business when police arrested them.

11. The duty of the first Appellate court was outlined in **Kariuki Karanja -Vs- Republic [1986] KLR 190** as follows:

**“On a first appeal from a conviction by a Judge or a magistrate, the Appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit.”**

12. I have considered the submissions made in respect of the appeals before me and also re-assessed the evidence tendered at the trial. Apart from the oral evidence by employees of Roy Transporters namely, PW1, PW4 and PW5 and the police officer PW3, the prosecution did not tender vehicle ownership

documents in respect of the trailer or any documents related to the loading of 35,000 litres of fuel into the trailer before the trip started.

13. While PW3 indicated in his evidence that the trailer was photographed before release, neither the trailer nor the alleged photographs were exhibited before the trial court. Ironically, photographs of helmets found in the trailer on recovery, which are of little probative value were produced. As noted earlier, the vehicle KAU was also never brought to court for the hearing as had been ordered. Its alleged owner Joseph Gitau had been described by the prosecutor on 25/10/2012 as a prosecutor witness. The record of the trial does, not include his testimony or an explanation for the prosecution failure to call him as a witness.

14. The Director of Public Prosecutions through Mr. Kibelion correctly conceded this appeal. In my view because of the poor handling of crucial evidence and exhibits this case was doomed to fail. The gaps in the evidence including the evidence of recovery are so glaring that I am tempted to conclude that they were deliberately introduced to defeat justice.

15. The prosecution failed to adduce evidence to establish the existence of the alleged stolen trailer and cargo being the goods stated in the charge. Equally, evidence of possession or handling of the goods by the Appellants adduced through PW3 cannot stand up to scrutiny. As Section 322 of the Penal Code implies, retention involves an element of physical or constructive possession. Possession is defined in the Penal Code as follows:

**“(a) be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;**

**(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;”**

16. PW3’s evidence was casual with regard to the actual roles played by each of the Appellants at the alleged scene of recovery. His contradictory evidence as regards whether the recovery was made at 11.30am or 11.30pm further cast doubt on the credibility of his evidence.

17. For the foregoing reasons, I do agree with the Appellants and the Director of Public Prosecution that the convictions founded on the evidence tendered against the Appellants are unsafe and cannot be allowed to stand.

18. In the circumstances the three appeals are allowed. The convictions are quashed in respect of the three Appellants and the sentence of 3 years imprisonment set aside. Unless the Appellants are otherwise lawfully held, I direct that they be set at liberty forthwith.

Delivered and signed at Naivasha, this 31<sup>st</sup> day of July, 2015.

In the presence of:-

State Counsel : Miss Waweru

For the Appellants : Mr. Njuguna for 1<sup>st</sup> Appellant

Mr. Gichuki for 2<sup>nd</sup> Appellant

Mr. Njuguna holding brief for Mr. Nyakundi for 3<sup>rd</sup> Appellant

C/C : Steven

Appellants : Present

**C. MEOLI**

**JUDGE**