REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEALS NOS 412 AND 413 OF 2013 (CONSOLIDATED)

(FORMERLY NAIROBI HC CRIMINAL APPEALS NOS 199 AND 198 OF 2012)

(Appeals from original Conviction and Sentence in Thika CM Criminal Case No 2901 of 2009 – D A Orimba, PM)

1. **COSMAS MUTUA MBITI**
2. **SAMUEL MUTUNGA MAKAU……..……..APPELLANTS**

VERSUS

REPUBLIC ……...……...……...……RESPONDENT

J U D G E M E N T

1. The Appellants, **Cosmas Mutua Mbiti** (who was 1st accused) and **Samuel Mutunga Makau** (2nd accused), were convicted after trial of ***capital robbery*** contrary to **section 296(2)** of the ***Penal Code***. The particulars of the offence as set out in the charge were that in the night of 12th and 13th June 2009 at Kambiti area along Thika/Sagana highway in Murang'a South District within Central Province, jointly with others not before court, and while armed with dangerous weapons, namely pangas, rungus and metal bars, they robbed one **Tony Munene Ruanjau** of various items that he was carrying on his person and in his motor vehicle, and also cash KShs 400/00, all valued at KShs 100,000/00, and that at the time of the robbery they threatened to use actual violence to the said complainant. They were each sentenced to death as by law provided.

2. The Appellants have appealed against their respective conviction and sentence. They filed their petitions in person though at the hearing of their appeals they were represented by counsel. We cannot find on the record any amended petition of appeal. Their grounds of appeal are similar. Those grounds are to the effect –

i. That the evidence adduced by the prosecution was contradictory, uncorroborated and unreliable.

ii. That the trial court shifted the burden proof to the Appellants.

iii. That the trial court erred by relying upon the retracted evidence of a co-accused.

3. We have considered the submissions of the learned counsels appearing. Learned Prosecution Counsel for the Respondent does not support the convictions.

4. We have read the record of the trial court in order to evaluate ourselves the evidence placed before that court and arrive at our own conclusions in respect to the case against each Appellant. This is our

duty as the first appellate court. However, we have borne in mind the fact that we did not see and hear the witnesses testify, and have given due allowance for that fact.

5. There is no doubt at all that the complainant (PW1) was indeed attacked and robbed in the night of 12/06/2009 at about 11.00 p.m. It was a highway robbery on the Nyeri-Nairobi highway when he was forced to stop his pick-up motor vehicle after it ran over something deliberately placed on the road which destroyed both tyres on one side (front and rear). No sooner had he stopped than his passenger window was smashed, his driver's door opened and he was dragged out of the vehicle. He was roughed up and various items and money stolen from his person, and also from his motor vehicle.

6. After the thugs had gone, and after unsuccessful attempts to stop other motorists for assistance a police vehicle came by and stopped. He reported the robbery to them, and his motor vehicle was towed to ***Makuyu Police Station*** where his report was booked. He then slept in his vehicle to await daylight.

7. Early the following morning he was shown at the police station various items which he identified as his own personal belongings and some of the items stolen from his motor vehicle. He was never able to identify his attackers and did not know how the Appellants had been arrested.

8. All the other prosecution witnesses (three of them) were police officers. The sum total of their testimonies was that after PW1's report of the robbery was received, road blocks were immediately mounted on the Thika-Nyeri highway. All vehicles were stopped and passengers ordered to alight with their luggage. From one such vehicle, a matatu, the Appellants alighted. The 2nd Appellant (2nd accused) had a black bag which was found to contain products similar to those stolen from the complainant. He pointed out to the 1st Appellant as his companion. Both were then taken to the police station. Both subsequently led the police to recovery of more of the items stolen from the complainant.

9. The Appellants were then charged. The trial court convicted them upon the doctrine of possession of recently stolen goods.

1st Appellant

10. Apart from his co-accused pointing to him as his companion, there was not much other evidence against him. He was not arrested with any of the stolen items. However, the police said that they recovered some items from his house. This alleged recovery was highly suspect. PW2 stated that the 1st Appellant led the police to his home on 14/06/2009 when nothing was recovered. But on the following day they went back to the same house and recovered various items! No evidence was tendered as to the circumstances that led the police to go back to the same house on the 15/06/2009. The house itself was incomplete and other people had access to it.

11. More baffling however, the same items allegedly recovered from the house on 15/06/2009 had already been identified by the complainant on 13/06/2009 at the police station! So, how did they come to be in the 1st Appellant's house two days later?

12. The 1st Appellant's conviction was entirely unsupported by the available evidence and cannot stand. Learned Prosecution Counsel properly conceded his appeal.

2nd Appellant

13. The case against the 2nd Appellant was much stronger. However, there were many gaps that ought to have been filled by appropriate evidence. These gaps raised reasonable doubt. The complainant stated that the bag that was stolen from him was brown. The one that was recovered from the 2nd Appellant was black. PW2 stated that the bag was opened at the scene of its recovery – that is, at the road block. His colleague, PW3, however, stated that the bag was opened at the police station. Again, just as in the case of the 1st Appellant, some of the items from the bag that the complainant (PW1) allegedly identified at the

police station on the morning of 13/06/2009 were also recovered two days later on 15/06/2009 at the house of the 1st Appellant!

14. There were other persons who could have been called but were not called, and no reasons were given for failure to call them. For instance, there were the matatu driver and conductor. They could have given the circumstances in which the Appellants had boarded their matatu. They could also have lent credence to the police testimony of recovery of the stolen items from them.

15. The 2nd Appellant may well have been one of the robbers who robbed PW1. But the chain of the evidence adduced by the prosecution was not complete and had many gaps. The case against him was badly investigated, put together and/or prosecuted. His conviction is also not safe.

16. In the event, we allow the Appellants' appeals in their entirety. Their convictions are hereby quashed and the sentence passed against each of 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 24TH DAY OF NOVEMBER 2015

H P G WAWERU

JUDGE

A MSHILA

JUDGE

DELIVERED AT MURANG'A THIS 27TH DAY OF NOVEMBER 2015