



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1364 of 95 & 149 OF 1996

FRED WAFULA WAMINILA.....1ST APPELLANT

ANDREW NYONGESA WANYONYI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 3881 of 1994 in the Chief Magistrate's Court at Nairobi – Mrs. J. W. Lesiit (SPM) on 11th July 1996)

JUDGMENT

Introduction

1. These criminal appeals no **1364 of 1995** and **149 of 1996** arose out of Nairobi **Cm Cr. Case no. 388 of 1994** in which the two appellants, **Fred Wafula Waminila** and **Andrew Nyongesa Wanyonyi**, jointly with two others **Alfonse Mirimu Shikoli** and **Michael Chuma Chesoli** were convicted for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**.

Brief Particulars of the case

2. It had been alleged that on the 1st day of September 1994 along Shinyalu road, Loresho Estate within Nairobi Area, jointly with others not before court and being armed with pistols and simis, they robbed Samuel Githuka (deceased) of one motor vehicle registration number KAA 151X, make Mercedes Benz, one television set, one video and other assorted goods and at or immediately before or immediately after the time of such robbery used personal violence to the said Samuel Githuka.

Summary of the Case

3. **PW2**, the deceased's ex-wife testified that she had left their home on 4th March 1994 and moved with their three children to South 'C' after a falling out with the deceased. That on 1st September 1994 her younger son **PW11**, called and informed her of his father's death at 11 a.m. They got

together with other relatives and reported the matter to Spring Valley Police Station and thereafter to Gigiri Police Station before they identified his body at the City Mortuary. That the body of the deceased had cuts on the face, and marks on the back of the neck and was shirtless.

4. A summary of the prosecution case is that on the date of the offence, **PW1** a police sgt who was on duty at night, received a call from the control room directing him to the scene of the robbery at house no. 85 along Shinyalu road in Loresho Estate. He and his colleague went to the scene and found the deceased tied up and had already died. Next to the body of the deceased was the second Appellant who was his watchman, he had also been tied up. They called the scenes of crime personnel who photographed and dusted the scene for finger prints. The second appellant told them that they had been attacked by seven strangers, three of whom were armed with pistols, while the rest were armed with knives.
5. Subsequent investigations led to the arrest and arraignment of the two appellants together with two others.
6. In his defence, Fred Wafula Waminila the first appellant testified without oath and stated that he was at a hotel waiting for a debtor to bring him money when three men entered the hotel and ordered him to come with them. They took him to the police station, where he was locked up without any information. One evening a week later, one of the officers called him out of the cells and took him to an office where his finger prints were taken, and the charges read to him. On the date of hearing his case was consolidated with those of people whom he did not know. He denied the offence.
7. Andrew Nyongesa Wanyonyi, the second appellant also testified without oath and stated that he was in his sentry box from where he discharged his duties as a watchman, when he heard a knock at the gate. On moving closer he found that it was the cook who was knocking. He opened the gate to let him in but before he could lock the gate, people emerged from the sides of the gate, held him and took him behind the house, where they tied him up to a shrub and guarded him.
8. The men later removed him from where he had been confined and took him inside his employer's house. There he found his employer lying on the floor. He did not know who had let him in. Both men were tied up and left there as the strangers went away. The second appellant screamed for help, but the cook did not respond. It was the police officers who came to the scene who untied him, and took his photographs and those of his employer.
9. Following a full trial all four accused persons were convicted and sentenced to suffer death as provided by law. Upon conviction and sentence all four men filed appeals.

Brief History of The Appeal

10. To understand why this appeal has had such a protracted sojourn in the criminal justice system, a brief history is necessary. The four appeals filed by the four men were consolidated and heard together. The superior court allowed the appeals of **Alfonse Mirimu Shikoli** and **Michael Chuma Chesoli** and dismissed those of the two appellants herein. The appellants filed their second appeal to the Court of Appeal, being **Cr. App No. 434 of 2007**.
11. At the Court of Appeal the High Court appeal records were found to be missing and could not be traced. The appellants however had a copy of the proceedings upon which they wished to base their appeal. The Court of Appeal directed Ms Wamae, the Principal Deputy Registrar Criminal Division to inquire into the matter and file a report in court, regarding the authenticity of the record of proceedings in the appellants' possession.
12. The Principal Deputy Registrar, in her report dated 4th November 2008, explained that she obtained a copy of the skeleton file of the original record from Nairobi Chief Magistrate's Court archives and placed it together with the copy of proceedings obtained from the appellants, before

- Lesiit J who had presided over the trial in the lower court, as a Senior Principal Magistrate.
13. Lesiit J confirmed that the accurate record of the lower court proceedings in **Nairobi Cm Cr. Case No. 3881 of 1994** was the one contained in the copy of skeleton file and not the proceedings in the appellants' possession. The Principal Deputy Registrar made a certification to that effect in her report to the Court of Appeal. The Court of Appeal remitted the appeal back to the High Court for it to be heard *de novo*.
 14. On 23rd April 2012 the two appellants appeared before the High Court and their appeals **No. 1364 of 1995** and **149 of 1996** respectively, were consolidated to proceed as **High Court Cr. App No. 1364 of 1995**. When the appeal came up for the hearing before Ochieng and Achode JJ, it was found that the record of appeal held by the appellants differed from that which was in the possession of the learned state counsel.
 15. The court directed Miss Ngenye the Principal Deputy Registrar then, to compare the two records and file a report as to which was the authentic record. On 24th April 2012 the Principal Deputy Registrar reported that she was unable to distinguish from the two records which one was authentic, but that she had learnt that the skeleton file of the original record of the proceedings was in the safe custody of the then Principal Judge.
 16. Certified copies of the proceedings in the skeleton file were served upon both the appellants and the respondent and the appeal set down for hearing. On 7th May 2012 when the appeal came up for hearing, the two appellants maintained that they would only proceed on the basis of the record served upon them in the Court of Appeal, and not the copy of the skeleton file served upon them in the High Court.
 17. Pursuant thereto the first appellant brought an application dated 21st May 2012 under certificate of urgency, seeking orders of court that would allow them to proceed on the basis of the proceedings which had been served upon them in the Court of Appeal on 23rd November 2007 and 12th March 2008 respectively. These were the proceedings which had been determined to have been tampered with.
 18. The said application was heard by Kimaru and Nyamweya JJ on 15th October 2013 and in their ruling dated 12th November 2013 they ordered that the appeal should proceed on the basis of the proceedings which had been confirmed to be authentic and not the proceedings served upon the appellants in the Court of Appeal. On 17th February 2014 the appeal finally came before us for hearing, hence this judgment.

Analysis

19. We have anxiously re-evaluated the evidence on record bearing in mind that an appellant on a first appeal 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. We have weighed the conflicting evidence and drawn our own conclusions. See - **Kiilu and Anor v Republic [2005] 1 KLR pg 174**.
20. In their appeals the appellants basically attacked the weight of the evidence adduced by the prosecution and the manner in which the evidence as a whole was evaluated. In response Mr. Kabaka learned state counsel opposed the appeal in its entirety. He urged on behalf of the respondent that the prosecution had discharged the burden of proof and proved the ingredients of the charge. Further that exhibits had been produced to corroborate the prosecution evidence.
21. We considered the specific grounds pertaining to each appellant separately but combined those which were similar for purposes of evaluation.

22. In his **first ground**, the **first appellant** argued that the police arbitrarily forwarded only his finger prints to the Finger Print Expert excluding those of the other three co-accuseds, yet the charges were preferred against all four of them. In rebuttal Mr. Kabaka contended that the Scenes of Crime personnel dusted the scene of crime and the motor vehicle that was the subject of the robbery and found finger prints which later matched those of the first appellant's middle finger. That the Finger Print Expert, **PW16** testified that no two finger prints would be similar in the same sequence as was in this case.
23. We have examined the record and it is evident that **PW16**, who was a gazetted Finger Print Expert, received five photographic prints from the Scenes of Crime Officer on 9th September 1994. Subsequently on 29th September 1994 he received finger prints of the first appellant recorded on C24 forms and marked as Exh. 17. On comparison of the outlined portion in the form C24 and the lift from print no.2 found at the scene, he found them to be identical in the same sequence of their ridge characteristics. In particular **PW16** found Exh 16(b) to be similar to the middle finger print of the first appellant's control sample, submitted to him in form C24 Exh 17 (a).
24. In the expert opinion of **PW16**, it was improbable that this should be a coincidence, and he was satisfied beyond reasonable doubt that the print was made by one and the same finger, which was the right middle finger of Fred Wafula Waminila, the first appellant. During cross examination the first appellant did not raise this issue and there is no evidence on record to controvert the expert opinion. There was no other plausible explanation for the presence of his finger prints at the scene of the crime. We find that no prejudice was occasioned the appellant by failure to submit finger prints from the co-accuseds since this did not increase or decrease the chances of the recovered print being matched to him.
25. In the **second and fifth grounds** the **first appellant** also complained that the officer who lifted the finger prints and the arresting officers namely, Koech and Idewa, who were mentioned by **PW17** during cross examination, did not testify. He seemed to suggest that he was not arrested for this offence. In this ground he was joined by the second appellant who argued that essential witness testimony was not taken and hence the case was not proved beyond reasonable doubt.
26. Mr. Kabaka answered that the prosecution was not bound to call any specific number of witnesses unless expressly provided by law. That the prosecution calls the number of witnesses sufficient to prove their case.
27. We have perused the record and observed that the officer who lifted the finger prints at the scene of crime did testify as **PW15**. He prepared five films which were developed under his supervision and sent them to the Finger Print Expert for identification. The films were marked as Exh 16 (a) (b) (c) (d) and (e). We find that there was no prejudice occasioned to the appellants by the failure of the two arresting officers to testify since the fact of the appellants' arrest was not contested and other arresting officers did testify.
28. As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. See - **High Court Cr. App No. 54 of 2011 Martin Ochieng Opiyo vs The Republic**. (unreported), which is of persuasive nature.
29. In his **third ground** the **first appellant** retracted the statement comprised in Exh 7, said to have been taken from him under inquiry by **PW3** after his arrest. His position was that **PW3** ought to have given him a pen to write his own statement so as to lend credence to his confession. In this ground he was united with the **second appellant** who also complained that the learned trial magistrate erred in admitting exhibit 13 which is a statement under inquiry taken by **PW13** from him. The second appellant objected to the confession attributed to him by **PW13** and the signature thereon.
30. Mr. Kabaka countered that their objections were noted by the trial court, which conducted a trial

within a trial to test the admissibility of the confessions. That the trial court found that the confessions were valid and therefore admissible.

31. From the judgment of the trial court we have summarized here below the confession statements obtained from the 1st, 3rd and 4th accused, in so far as they implicate the two appellants herein.
32. The first appellant's statement, Exh 7, dated 4th September 1994, alluded to a plot which was hatched before he entered the scene. He stated that the murderous gang comprised of six members and he gave details of what was taken from the scene of crime and how they exited.
33. The first appellant also confirmed in his statement, that the gang member known by the alias of "Madefu" gave him a brown jacket to wear, when he disembarked from the car at Kawangware stage No.56, as they fled from the scene of robbery. Both the brown jacket and the car from which he was disembarking had been stolen from the deceased during the robbery.
34. From the statement of the first appellant he was still wearing the jacket in question when the police arrested him a day later. This tallies with the evidence of **PW17** S. P. Ohanyo, that when the first appellant was presented to him at the station after his arrest, he was wearing the said jacket which is Exh 6. Exh 6 was identified by **PW6** and **PW13** the brother and sister of the deceased respectively, as belonging to the deceased.
35. Exh 9, the statement taken from the 3rd accused person was silent on the third Accused's person involvement in the robbery. It however corroborated that of the first appellant in so far as there was a plot to attack and rob the deceased. The 3rd accused person went further to provide motive for the attack which was to rob and kill the deceased, because he was troubling his estranged wife. The 3rd accused person also confirmed that it was one Andrew Wanyonyi (second appellant), a watchmen at a house in Loresho (the deceased's residence) who disclosed the nefarious plot to him.
36. Upon re-evaluating his evidence, we find that it was cogent and in tandem with the statements of the co-accused persons. Further that it was the third Accused person who led to the identification and arrest of the 2nd accused person from whom the deceased's coat, Exh 8 was recovered.
37. The second appellant in his confession, Exh 13, stated that the plan to attack the deceased was made over a period of two days. His part was to ensure that he was the watchman on duty to admit the other perpetrators on the night of infamy. He confirmed that the gang of robbers arrived and lay in wait for the deceased and that when he arrived at 10 p.m. he was attacked before he entered the house. He also confirmed that the deceased was dead by the time the gang left with assorted property from the house. That he only screamed for help after the gang had left.
38. We have tested the voluntariness of those statements because if they were not proved to be voluntary and true they would not have been admissible. We are also alive to the fact that these statements having emanated from co-accused persons and having been retracted, provide evidence of the weakest kind against the appellants who were implicated. See- **Karukanya & 4 others v Republic 1987 KLR pg. 459** in which Kneller, Hancox JJA and Chesoni Ag JA said:

“Extra-judicial confessions by one accused cannot be corroborated by a similar confession of another accused.”

Other corroborative evidence is therefore required.

39. Having warned ourselves as above we find as follows: The record indicates that **PW3** I P, Sarah Njoki Kamau and **PW13**, I.P Peter Mobeia recorded the cautionary statements from the two appellants respectively. This according to these two witnesses was done voluntarily without any threat, intimidation or inducement. We observe that each respective statement was signed by each

appellant and the officer before whom it was recorded.

40. During cross examination the first appellant did not raise any issue with the signature attributed to him, appearing on each of the 7 pages, other than to deny the fact that he agreed to a statement being taken on his behalf. There is no indication on the record that the first appellant requested for a pen to write the statement for himself. The second appellant on the other hand stated that he did record a statement but that it was before a Mr. Makabadio and not **PW13**. Further that he signed it by thumb print and not a pen.
41. We found no evidence to suggest that the two witnesses on their own accord maliciously concocted the 7 page statement, in respect of the first appellant and the 13 pages statement in respect of the second appellant signed them and attributed them to the two appellants. We therefore find it difficult to believe that any of the two witnesses created a confession out of their own imagination. In any case both witnesses are on record as stating that they did not know the appellants before. **PW3** also stated that she knew nothing about the case before the first appellant came to her for charge and caution.
42. We further observe that none of the appellants complained of having been assaulted or coerced into signing the statement. The statements themselves were too detailed and similar in material facts to have been figments of the fertile imaginations of the officers who recorded them, and the said officers played no part in the arrest of the accused persons or in the investigation of the case. They held no apparent stake in the outcome of the case and every statement was recorded by a different officer in respect of each appellant.
43. We also note that the trial magistrate considered the objections of the appellants and interrogated the said statements by conducting trials within the trial. The trial magistrate found that the statements were voluntarily made, hence the confessions were valid and admissible. For the foregoing reasons we find no merit in this ground, in regard to any of the appellants.
44. In his **fourth ground** the **first appellant** contended that the allegation that he was found and arrested while in possession of exh 6, a jacket belonging to the deceased, was not true. He disputed this finding by the trial magistrate saying that it was not supported by the evidence on record which showed that the jacket was recovered from the second accused person who is not before the court. Mr. Kabaka did not address us on this ground.
45. We have perused the record and found that indeed there exists some confusion pertaining to the recovery of the said jacket. We note that **PW7** in his testimony properly assigned the coat, Exh 8 to the 2nd accused person at the time of recovery as did **PW4** and **PW8**. He however went on to state that the jacket, Exh 6 was recovered from the 3rd accused person.
46. **PW17**, S P Ohanyo on the other hand told the court that in furtherance of the investigations, he called officers from the Flying Squad Unit to assist with transportation of the fourth accused person (second appellant) to a place where he was to identify his cohorts. Upon their return **PW17** had this to say:

“The officers came back with Tyson. He is here (identifies 1st accused). He was wearing this jacket. – MFI6. He told me that his name was Fred Wafula.”

47. We also note the 1st appellant's own admission in his confession that the said jacket was handed to him by the robber known by the alias of “madefu” We therefore find that this error in the evidence of **PW7** on its own was not fatal to the prosecution case, having regard to the rest of the evidence on record.
48. Interestingly, the first appellant also submitted that he had since reformed as a person and was ready to re-integrate back into society as a responsible citizen. He stated that he had acquired

expertise as a brigade member with St John ambulance and as a fire man in fire rescue. He had also learnt how to make soaps and antiseptics besides having acquired a certificate in peer education in HIV and Aids. These he submitted put him in good stead as he sought readmission back into the society. These we note, though laudable, are not factors that go into consideration on whether or not the conviction entered against him is sustainable or not.

49. The **second appellant** in his **first ground** submitted that the learned trial magistrate convicted him without a valid copy of the charge sheet and erroneously sentenced him under **Section 207** of the **Criminal Procedure Code**. Mr. Kabaka argued that the absence of a copy of the charge sheet did not render the conviction defective, since the court record indicated that a consolidated charge sheet had been introduced into the proceedings at page 8. That the charge had been read over to the appellants and that they had pleaded afresh to it.
50. Indeed, the record indicates that on 27th March 1995 the Prosecutor applied to consolidate the cases of the four accused persons namely, **Cm cr. case Nos. 111/95 and 4427/94** respectively. The prosecutor stated that he had a new charge sheet for substitution. The court allowed the substitution of the new charge sheet, to which all the accused persons pleaded afresh. Both copies of the charge sheet are in the skeleton court file. The first bears the prosecution stamp and is dated 7th October 1994, while the second bears the trial magistrate's signature and is dated 27th March 1995. We find therefore that this ground is not valid.
51. The trial magistrate began her judgment by stating that the appellants faced a charge of robbery with violence contrary to **Section 296(2)** the **Penal Code**. She analysed the evidence before her and in the end found that the prosecution had proved its case beyond reasonable doubt against all four accused persons. She found that the defence comprised of made up stories in the appellants' attempt to escape reality and lay blame upon on other persons not before the court. She rejected the defence statements. In the end she found each of them guilty of the charge and convicted them accordingly. There is no indication that she convicted them under **Section 207** of the **Criminal Procedure Code**. We therefore find no error in the manner in which the trial magistrate convicted or sentenced the appellants.
52. On the **second ground** the second appellant submitted that the proceedings were conducted in the English language which he did not understand, hence he was prejudiced.
53. We observe from the record that of a total of 17 witnesses who testified for the prosecution, 13 testified in Kiswahili language while one testified in kikuyu language with both English and Kiswahili interpretation. Three witnesses **PW10**, **PW11** and **PW16** testified in English language and there is no indication on record that there was provision for interpretation.
54. We have therefore, analysed the evidence to establish whether the appellants were prejudiced. We find that there was no prejudice suffered. The appellant actively participated in the proceedings and cross-examination of the prosecution witnesses. The current proceedings before court are going on in English language which the appellants have agreed that they understand and none has indicated that they have any difficulty following them.
55. The testimony of **PW10** the second widow of the deceased pertained to how she received the news of her husband's death. She testified that she and other family members made funeral arrangements and laid his body to rest, and that the deceased had lived in fear of being killed by his first wife. She did not touch on the robbery or any of the appellants and none of them cross-examined her.
56. **PW11** a son to the deceased testified in relation to the information he received that his father had been killed. That he contacted other family members, and made burial arrangements. He too did not touch on the robbery or on any of the appellants. He however stated that on 22nd July 1995 he was waiting outside the court when the first appellant who was being escorted into the court room threw a note at him. The note was produced in court and the first appellant did cross-examine him.

57. **PW16** was the Gazetted Finger Print Expert from the Bureau of Identification at CID Headquarters. His evidence touched only on the first appellant and again the first appellant did cross-examine him.

58. We find therefore that the appellants were not prejudiced by the lack of interpretation with regard to these three witnesses. That they were able to follow the proceedings as they participated in the proceedings and did not raise any complaint or objection. The first appellant upon whom the evidence touched was able to cross-examine **PW11** and **PW16**. Our finding is fortified by the proceedings before us in which the two appellants confirmed that this appeal should proceed in the English language which they understand.

59. The recalling of "**PW18**" would appear to be a typographical error, since both the proceedings and the list of witnesses indicates that **17** and not **18** witnesses testified for the prosecution. The record is also clear that **PW17** who was inadvertently referred to as **PW18** when he was recalled testified in Kiswahili language.

60. On the offence itself, although not forming a ground of appeal we assessed the evidence to establish whether the ingredients of **Section 296(2)** of the **Penal Code** had been satisfied. There was evidence that the appellants were in a group of six when they set upon the deceased and bartered him to death in the process of robbing him. That they did rob him of the property set out in the charge sheet. We therefore find that the ingredients of the offence of robbery contrary to **Section 296(2)** of the **Penal Code** were satisfied.

61. The upshot of the foregoing is that this appeal lacks merit and we accordingly dismiss it in its entirety. We uphold the conviction and sentence.

SIGNED DATED and DELIVERED in open court this 25th day of March 2014.

A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE