



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 9 & 237 OF 2011

LEONARD NGUGI MUNENE.....1ST APPELLANT

MOSES GITHINJI MAINA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants namely, Leonard Ngugi Munene and Moses Githinji Maina were charged with seven (7) counts of robbery with violence before the Chief Magistrate's Court, Nakuru. Counts 4 and 5 were withdrawn on 15/11/05. The appellants were convicted of counts 1, 2, 3, 6 and 7 and were both sentenced to death. Being aggrieved by the conviction and sentence, they filed separate appeals i.e. Criminal Appeal No. 9/07, **Leonard Ngugi Munene v Republic** and Criminal Appeal No.237/11, **Moses Githinji Maina v Republic** which were consolidated. The 1st appellant is Leonard Ngugi Munene while the 2nd appellant is Moses Githinji Maina (Accused 1 & 2). The 1st appellant was represented by Ms Muthoni while the 2nd appellant by was represented by Mr. Maragia. The appeal is based on grounds found in the petition of appeal filed in court on 23/1/07. They are as hereunder:-

1. **That the magistrate relied on contradictory evidence on identification;**
2. **That the magistrate relied on a flawed identification parade;**
3. **That the magistrate shifted the burden of proof on the appellant;**
4. **That the court wholly relied on circumstantial evidence;**
5. **That the court erred by admitting evidence on the appellant's age after close of prosecution case;**
6. **That the court erred by failing to consider the appellant's age;**
7. **The court erred by referring the case to the High Court for revision.**

The second appellant was represented by Mr. Maragia and he relied on the supplementary grounds filed in court on 22/2/2012. Though they were listed as 10 grounds, they can be condensed into the following:-

1. **That the appellant was not properly identified;**
2. **That the court failed to warn itself on the dangers of relying on evidence of a single identifying witness;**
3. **The ingredients of recent possession were not proved as against the 2nd appellant;**

4. **Section 198(1) of the Criminal Procedure Code was not complied with;**
5. **The prosecution failed to call essential witnesses;**
6. **The motor vehicle was not produced in court as an exhibit.**

The appellants urge the court to allow their appeals, quash the convictions, set aside the sentences and set them at liberty.

The appeals were opposed. Mr. Marete, the Learned State Counsel submitted that the appellants were properly identified because they were seen with the use of the motor vehicle lights; that the police stopped the appellants as they drove the motor vehicle, they refused to stop, were chased and caught red handed and the complainants' documents and properties were recovered in the vehicle. He further submitted that the offence of robbery with violence was proved and the appellants' defences were considered by the trial court. He only asked the court to review the court's order on sentence because the court erred by sentencing the appellants to death severally.

This is a first appeal and it behoves this court to review and re-evaluate the evidence afresh, and arrive at our own independent determinations. As we do so, we do bear in mind that we did not have the opportunity to see the witnesses in order to assess their credibility. See **Okeno v Rep (1972) EA 52**.

The prosecution called a total of eight (8) witnesses.

Charles Macharia Mwangi (PW1) was the driver of motor vehicle KAN 866W on 26/8/04 it was ferrying passengers from Nakuru Town towards Kiamunyi. They passed the Nakuru Provincial General Hospital about 7.30 p.m. The vehicle was full. One passenger alighted at the Provincial General Hospital gate, another who was seated next to the driver said he wanted to alight soon thereafter. PW1 slowed down to stop and it is then the person pulled out a gun, hit PW1 on the forehead and shouted at PW1 to leave the vehicle. The person moved on to the driver's side and PW1 the passenger whom they had dropped at Golf stage came, opened the door of the vehicle and asked him to move, and asked him to lie on the floor of the vehicle. He heard them demand money from the passengers. The vehicle was turned and driven away. After sometime, the vehicle was stopped, they were ordered out and abandoned. Passengers were robbed of their phones and money but one person had been left with his phone. One of the passengers, PW2 Teresia Anyango Odero, the secretary to the OCPD Nakuru, called him for help and police went to their assistance. The passengers later recorded statements at Central Police Station, Nakuru. PW1 lost Kshs.300/-, Nokia phone 3510 and driving licence. The next day when he reported back to the Police Station, he was informed that the motor vehicle had been recovered in Kikuyu Police Station area and 2 suspects arrested. He later inspected the vehicle on 30/5/04 and found the radio, speakers and two bags of cement missing. He also found things scattered on the vehicle. The vehicle was photographed. PW1 said that the 1st appellant is the person who had alighted at the Golf Course Stage but later caught up with the vehicle when it stopped. Things were scattered in the vehicle including driving licence for Charles Mwangi and PSV badge and licence, Identity Card for Chelangat and a shoe. He later attended a parade at Bondeni Police Station where he identified the 1st appellant as the person who took over driving of the vehicle. PW1 also said he saw the 2nd appellant as he sat with him at the front and when he was alighting, the lights in the vehicle came on.

PW2 also testified as to how she boarded a matatu on 26/8/04 to go to Kiamunyi. She recalled that at the Showground area, one passenger who was seated with the driver alighted and one asked to alight at the bumps. The person who was seated next to her peeped through the window as another shouted that they should take out their money and mobile phones. The person who had alighted at the junction went to the driver's side, the vehicle turned and was driven to another direction. PW2's Siemens C35 mobile, Seiko 5 watch, cash Kshs.1,050/- were stolen. PW2 identified the 1st appellant as the person who had alighted at the Showground and she was able to identify him on an identification parade.

Simon Mauni Kapima (PW6) was the conductor in the said motor vehicle. He recalled that when they arrived near the Golf Stage, one of the two passengers seated with the driver alighted and after 10-15 metres, the 2nd one wanted to alight but before he did so, he took out a gun, another opened the driver's door and ordered him to move. They took over the vehicle and turned it. They commandeered everyone

to take out money and mobiles. The passengers lay down till they were abandoned in a bush and were later rescued. He said he lost his identify card, jacket, wallet and Kshs.3,000/-. He later identified both appellants on an identification parade.

PW7, **John Kariuki Kiguta** was a passenger in the ill fated vehicle on the night of 26/8/04. He said that after they passed the Provincial General Hospital, the person seated next to the driver requested to alight. It is then he heard a person tell the passengers to lie down and take out everything. The vehicle was turned and driven off in a different direction. His computer, shoes, Kshs.1,000/- were stolen. He did not see any weapon but he heard of threats to shoot. After the vehicle was recovered, he identified his left foot shoe in the vehicle. He was not able to identify any of the carjackers.

PW8, **Wanyama Muhuri**, was a passenger in the said vehicle. He was going home to Kiamunyi. He recalled that at Provincial General Hospital a person alighted. At Moi Primary School, another person alighted then he heard screams, the vehicle was turned and driven to the opposite direction. They were ordered to lie down and produce money and cell phones. He gave his wallet, Kshs.1,400/-, ATM cards, Identification Card and voter's card, receipts, shoes, and watch. They were later abandoned in a bush. He later learnt that the vehicle was found, his shoes were recovered, PEx.7. He did not see any of the robbers.

PC Victor Jumamosi of CID Kikuyu (PW3) recalled that on 26/8/2004, he was on patrol on Nairobi/Nakuru Highway together with Sgt. Warambu and Edward Kinyura when they saw a white matatu driven in very high speed of over 120 k.p.h. It raised suspicion and they decided to chase it. They tried to flag it to stop but it did not. They managed to block it at Kamandura. They found three men inside with the 1st appellant as driver while 2nd appellant was in the co-driver's seat and the 3rd person was in conductor's seat. The 1st appellant did not have his badge, license and uniform. The one who posed as conductor escaped. They found many documents scattered all over the vehicle including driving licence for Charles Mwangi, PSV, Conductor's badge, 2 pairs of shoes, one shoe, rubber shoes and three watches and identification card for Kepter Chelangat. (Ex.1-18) They suspected there may have been a robbery they took suspects to the police station. PC Linyamu Lihanda, (PW4) of Provincial CID Nairobi, while at CID Nakuru, photographed the motor vehicle KAN 866W, and produced booklet of photographs as PEx.1.

PW5, **IP Leonard Lutte**, conducted an identification parade on 25/8/2004 where PW1, PW2 and PW7 identified the 1st appellant as one of the robbers. He conducted another parade where PW1 and PW7 identified the 2nd appellant

When called upon to enter his defence, the 1st appellant said on oath that he was a student in Makuyu Secondary School. He came to visit his sister at Ol Kalou on 24/8/04. On 26/8/2004, the brother in law asked him to go with him to Nairobi. On the same evening, he was told to go back to school. He alighted at Mai Mahiu Narok at 7.10 p.m. and boarded a Nissan Matatu KAN 866W which had 6 passengers. The driver ran off on seeing police. He heard shouts of stop, he stopped, by then they were 3, they were taken to Kikuyu police station and asked where they got the vehicle. He told police he was a passenger but he was charged.

DW2, **Julius Ndugua**, a brother in law to DW1 said that he came back to his home on 21/8/04 and found DW1. On 26th they went to his business at Narok and while in the vehicle, DW1's mother called and asked him to give DW1 fare to go back to school. He left him at the stage at Mai Mahiu. He could not tell where he went after that.

DW3 (2nd appellant) said that on 20/8/04 he went to assist his aunt with work at Naivasha. After the function, he was escorted to the stage. He boarded a vehicle to go back to Kikuyu. He sat in the front seat. They were stopped by a police officer. The driver alighted to go and talk to police but he ran away. He was interrogated, taken to Kikuyu Police Station where they were locked up. He was then taken to Nakuru Police Station, beaten up and later attended a parade where two people identified him which was surprising.

Having analysed the evidence adduced before the trial court and having considered the testimonies of PW1, PW2, PW6, PW7 and PW8, we have no doubt that an offence of robbery with violence was committed as against the said witnesses. An offence of robbery with violence is committed if:-

1. **The offender while armed with any dangerous or offensive weapon or instrument uses or threatens to use violence against any person or property or immediately before or after any manner of the act of stealing or;**
2. **If the offender commits robbery while in company of one or more other person or persons or;**
3. **If the offender immediately before or immediately after the time of robbery wounds, beats, strikes or uses any other violence to any person.**

In **Ajode v R (2004) 2 KLR 81** the Court of Appeal stated that any one of the above ingredients constitute an offence of robbery with violence. (See also **Mneni Ngumbao v Rep CRA 141/2005**. In this case, the complainants were attacked by three people; One of them was said to have been armed with a gun; the robbers used violence on PW1; They then drove away motor vehicle registration KAN 866W and stole various items from the complainants and other passengers.

The next question is whether the appellants were the robbers and whether they were properly identified: The offence was committed at about 7.30 p.m. in a moving vehicle. No doubt the conditions were not favourable to identification and the trial magistrate should have warned himself of that fact. PW1 who was the driver of the vehicle recalled that they had dropped off a passenger at the gate of the Provincial General Hospital. At Golf stage, near the showground, a passenger who had been seated at the front, next to the driver alighted. 50 metres ahead, another person wanted to alight and the driver was slowing down that the person pulled out a gun and hit him on the forehead. He then noticed the passenger who had dropped at Golf stage, had caught up with them, opened the door and asked him to move. He is the person who took over as the driver and PW1 identified this person as the 1st appellant. He said he saw him earlier using motor vehicle lights and the lights in the vehicle when he opened the door to the vehicle.

PW2 corroborated PW1's evidence to the effect that it is the 1st appellant who had alighted at the showground and when the vehicle slowed down for another passenger to alight, he arrived where the vehicle was and took over the driving of the vehicle. PW2 also said that the lights were on inside the vehicle and she had earlier seen him using lights from passing vehicles.

PW6 who was the conductor also corroborated the evidence of PW1 and PW2 that it is the 1st appellant who had alighted at Golf Stage but followed the vehicle. PW6 had collected fare from him earlier which vehicle lights were on. PW6 also said that it is the 1st appellant who took over as the driver.

The police officer (PW3) who intercepted the motor vehicle KAN 866W later on the same night also testified that the driver of the vehicle was the 1st appellant. In the case of **James Otieno Nyangito v Rep CRA 22 of 1991**, cited in **Samuel Kipkemoi Mbei v Rep CRA 17/2000**, the Court of Appeal stated as follows:-

“There is abundant authority to the effect that where the only evidence against an accused person is evidence of identification or recognition, a trial court is enjoined to treat it with caution, examine it carefully after dully warning itself as to the dangers inherent in acting on such evidence and to act on it to found a conviction only upon being satisfied that the circumstances favouring a correct identification were good and free from the presence of error.”

We are alive to the fact that under such an attack, the witnesses were in a state of fear and shock coupled with the fact that it was at night. However, when the 1st appellant alighted at Golf Stage and paid his fare to PW6, there was no robbery therefore no fear or shock. We are persuaded to find that there is overwhelming evidence from PW1, PW2 and PW6 that the 1st appellant was one of the robbers and not

only was he identified during the robbery, but he was found in possession of the stolen vehicle about 5 hours after the robbery. We find that the 1st appellant was properly identified as one of the robbers.

Whether the 2nd appellant was properly identified: PW1 said that he was able to see the 2nd appellant who was seated at the back near the conductor as he demanded for change. He saw him because there were lights in the vehicle although he admitted they were not very bright, except when somebody was alighting and the doors to the vehicle were opened. PW6 who was the conductor told the court that the 2nd appellant sat near him and he had seen him as he collected the fare from passengers. When collecting fare the vehicle was not yet under attack and in our view, it was possible for the conductor to see the person who sat next to him for quite a while and from whom he collected fare. The 2nd appellant was one of the 3 occupants of the stolen vehicle when the vehicle was intercepted by PW3. Just like the 1st appellant, he was in recent possession of a stolen vehicle, it had been stolen about 5 hours earlier. In the case of **Isaac Nganga Kahiga** alias **Peter Nganga**, CRA 272/2005 the Court of Appeal set out the elements necessary to finding a conviction based on recent possession. The court said:-

“There is abundant authority to the effect that where the only evidence against an accused person is evidence of identification or recognition, a trial court is enjoined to treat it with caution, examine it carefully after dully warning itself as to the dangers inherent in acting on such evidence and to act on it to found a conviction only upon being satisfied that the circumstances favouring a correct identification were good and free from the presence of error.”

The appellants’ explanations are not convincing in light of the evidence of PW1, PW2 and PW6 on identification. The 1st appellant claimed to have boarded the vehicle at Mai Mahiu about 7.30 p.m. while the 2nd appellant boarded it at Naivasha about 8.00p.m. At the time of being intercepted they were only 3 in the vehicle. If indeed the one who escaped was the driver, was one of them a conductor? It is also unbelievable that they had left Mai Mahiu about 7.30 p.m. and they were still on the road about midnight or 1.00 a.m. when they were intercepted. The appellants’ explanation as to the how they came to be in recent possession of the vehicle stolen in a robbery about 5 hours earlier is not plausible and we reject their defences. DW2 must have testified just to try and help his brother-in-law (appellant) to get out of trouble.

Both appellants were identified on parades conducted by PW5, IP Leonard Lutte of CID, Narok. Although PW5 said that he got other parade members of same physical built, PW1, PW2 and PW6 who identified both 1st and 2nd appellants told the court that the members of the parade were all made up of different sizes. PW6 said members were tall, short, old and young. PW1 said likewise. The **Police Force Standing Orders** require that as much as possible, members of the parade appear the same. In the circumstances, it would have been easy for one to pick out a suspect because we are not told how many members were old, short or tall. The parades as conducted were flawed.

It was the 1st appellant’s contention that the trial court failed to consider his assertion that he was a minor at the time he was charged and should have been tried as a minor. The 1st appellant also faulted the court for enquiring into his age after a judgment had been written. The court in its ruling clearly explained why it was necessary to take evidence on the appellant’s age. The 1st appellant had lied to the court about his being a minor yet documents produced confirmed that he was an adult. It was important for the court to confirm the appellant’s age for purposes of sentence. In that respect, the court acted cautiously and fairly and there was no miscarriage of justice otherwise it would have been a grave injustice and an illegality if a minor was sentenced to suffer death.

Mr. Maragia, faulted the proceedings before the trial court for reason that they offend **Section 198(1)** of the **Criminal Procedure Code** for want of interpretation and that interpretation was only done as respects evidence of PW1, PW2 and PW3. We have perused the record and notice that PW1, PW2, PW5, PW7 and PW8 are recorded as having testified in Kiswahili and so did the appellants. On the other hand, PW4 and PW5 are recorded as having testified in English. It is not indicated which language PW6 testified in. However, nowhere did the appellants complain that they did not understand the proceedings. The

appellants cross examined both witnesses. Even if the language of the court as respects the three witnesses is not recorded, it is clear the appellants understood the language of the court when PW4, PW5 and PW6 testified and the omission to state the interpretation cannot vitiate the proceedings. The appellants have a constitutional right to an interpreter if they do not understand the language and it is expected that if interpretation is lacking, they raise it immediately and not wait for determination of the matter and complain later. Breach of fundamental rights have to be raised at the earliest opportunity. We find no miscarriage of justice committed.

It was alleged that the trial court erred in that although counts 4 and 5 were withdrawn, the trial magistrate went ahead and convicted the appellants on them. On 15/11/05, the prosecutor applied to withdraw counts 4 and 5 under **Section 87(a)** of the **Criminal Procedure Code** because the two complainants had not been traced. The defence had no objection. We have read the trial court's judgment. At line 2 of page 54, the court convicted the appellants of counts 1, 2, 3, 6 and 7. It is incorrect for the appellants to allege that they were convicted of charges that were withdrawn.

The appellants also complained that material witnesses were not called and that out of the many people in the vehicle, only 5 were called. As noted above, some of the witnesses could not be traced. Besides the prosecution could only call witnesses who were relevant to this case. There is no requirement that the prosecution call a superfluity of witnesses who will not be helpful to the fair determination of the case. This being a public service vehicle, it is unlikely that all the victims of the robbery were even able to see the robbers. The appellants have not singled out any key witnesses that should have been called and yet he was not. In **Ahmed Ramson v Rep (1955)EA**, the court said as follows:-

“It is the burden of the prosecution to avail all the material evidence to the court to enable the court arrive at a fair and impartial decision. The prosecution must summon all the material witnesses and avail or furnish the court with all facts even these whose evidence may have been unfavourable for it.”

We agree with the findings. In our view, all material witnesses were called.

Mr. Maragia faulted the prosecution for failing to produce the motor vehicle, the subject of the robbery in evidence. The said vehicle was photographed by the scene of crime personnel who testified, produced photographs and a certificate. It is common practice that vehicles or other bulky exhibits will be photographed and released to the owners if there is no dispute as to the ownership because there is insufficient storage facilities both at police stations and in the courts. Such exhibits, if stored in the court/police compounds, they are likely to be wasted. The appellants did not state why they wanted the vehicle physically produced in court. They did not lay any claim to the vehicle nor have they referred to anything that they intended to bring to the court's attention on the vehicle. Infact the appellants had counsel, no application was made to have the vehicle brought to court. This ground lacks substance and must fail.

The appellants also allege that the trial court shifted the burden of proof on them. In criminal cases, the burden of proof always lies with the prosecution to prove their case beyond any doubt. We have read the judgment of the trial court and we find nowhere that the court shifted the burden of proof onto the appellants. The trial court did not believe the testimony of the appellants and believed the prosecution evidence, for reasons given in the judgment.

After carefully analysing and evaluating the evidence before the trial court, we come to the same conclusion as did the trial magistrate. We find the convictions to be sound. We confirm them.

As regards the death sentence, we do agree that the trial court erred by sentencing the appellants severally. Each appellant has only one life and could only suffer death once. We adopt the words of the Court of Appeal in the case of **Abdul Deban Boye & Another v Rep**. CRA 19/2001:-

“We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the

counts and leave the others in abeyance, including any sentence of imprisonment. The reasons for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In the case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term”

Further to the above in view of the recent Court of Appeal decision CRA 5/08, **Joseph Njuguna Mwaura & Others v Rep.** where the court held that the decision in **Godfrey Ngotho Mutiso v R** , CRA 17/08, was decided per in curiam in so far as it granted discretion to the court in sentencing with regard to capital offences. We hereby set aside the order of the trial court sentencing the appellants to death severally, instead we sentence each appellant to death in respect of 1st count. Counts 2, 3, 6 and 7 will remain in abeyance. It is so ordered.

DATED and DELIVERED this 16th day of April, 2014.

R.P.V. WENDOH

JUDGE

A. MABEYA

JUDGE

PRESENT:

Mr. Maragia holding brief for Mr. Karanja for the 1st appellants

Mr. Maragia for the 2nd appellant

Mr. Rugut for the State

Both appellants present

Kennedy – Court Clerk