



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 179 OF 2012**

**CONSOLIDATED WITH CRIMINAL APPEAL NO.180 OF 2012**

**CHARLES OMONDI ..... 1ST APPELLANT**

**JAMES NGAMAU KIMANI .....2ND APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Appeal from the judgment of the Hon. D. K. Mikoyan, Principal Magistrate, Naivasha dated 20th August, 2012 in Criminal Case No. 3721 of 2011)

**JUDGMENT**

1. The Appellants, **Charles Omondi** and **James Ngamau Kimani**, were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the charge were that on the 21st day of December, 2011 at Kijiko village in Nyandarua County within the Central Province, jointly with others not before the court, while armed with G3 Rifle serial no. A6593334 and pangas, robbed m/s Amani Winner Self Help Group cash in the sum of Kshs.613,385/= and at or immediately before of immediately after the time of such robbery, used actual violence to Nelis Waithera Mburu.

2. The 1st Appellant was charged with a second count of being in possession of firearm without certificate contrary to **Section 4(2)** as read with **Section 4 (3)(a)** of the **Firearms Act**. The particulars of the second charge are that on the 21st day of December, 2011 at Kijiko village in Nyandarua County was found in possession of G3 rifle serial number A6593334 without a firearms certificate.

3. Judgment was delivered on 20th August 2012 by D.K. Mikoyan, Principal Magistrate. He convicted the Appellants on the charge of robbery with violence and also convicted the 2nd Appellant on the second count of possession of firearm without a firearm certificate. The Principal Magistrate sentenced each Appellant to life imprisonment on the main count and 10 years for the 1<sup>st</sup> Appellant on the second count. The sentences were to run concurrently.

4. The Appellants being aggrieved by the decision of the Principal Magistrate each preferred an appeal. The two appeals were consolidated by this court on 27th March 2014. The grounds raised in both Petitions of Appeal and Supplementary grounds of appeal can be summarized as follows:

- a) That the trial magistrate erred in relying on the contradictory evidence of the prosecution witnesses;
- b) That the trial magistrate erred in finding that the charge was proved beyond reasonable doubt;
- c) That the trial magistrate erred in finding that the 1st Appellant was not identified at the scene but in court;
- d) That the trial magistrate erred in failing to find that the 2<sup>nd</sup> Appellant was a victim of circumstances.

5. The facts of the case as recorded by the trial court are that on 21st December, 2011, members of Amani Winner Self Help Group had assembled at one Mama Grace's home for a meeting. Amongst the members present were Josiah Mwangi Muchiri (**PW1**), Ann Nyakio Wambui (**PW3**), Teresia Wangui Kathendi (**PW5**), Esther Njeri (**PW 6**), Nelius Waithera Mburu (**PW7**) who all testified to the effect that at around 11am whilst the meeting was proceeding a gang armed with a gun and pangas stormed into the meeting room and ordered everyone to lie on the floor. They robbed the members of Kshs. 613,385/= and mobile phones.

6. Esther Wanjiku Kinyanjui (**PW2**) was working the field nearby when she noticed a motor vehicle turn towards Mama Grace's gate. Seven men alighted and the motor vehicle then drove closer to her. It stopped approximately twelve metres away. **PW2** noticed that the vehicle's number plate was smeared with mud. The driver then alighted washed his hands and smeared more mud on the front number plate of the motor vehicle. Thereafter there were screams from Mama Grace's house and the driver then sped off. **PW2** saw a group of men who were armed walking from the homestead. She took refuge in her house and was later informed of a robbery at Mama Grace's home.

7. James Njiri (**PW9**), an Officer Commanding Kinangop Police Station got information about a robbery and that the motor vehicle used by the suspects was headed toward Engineer Town. He intercepted motor vehicle registration number KBN 197Y and the 2nd Appellant was the driver therein, he identified himself to the police and told them that he was heading to a police station. The officer however was not convinced by the story and he arrested the 2nd Appellant. Further, **PW9** testified that the motor vehicle number plate was smeared with mud on the rear number plate.

8. Police Constable Jinata Gathoni (**PW10**) who is attached to Munyaka Police Post received a call from one Mr. Muturi, the area assistant chief, reporting the incident. He proceeded together with one Police Constable Nguruge towards the scene where they met a mob giving chase to the robbers. **PW10** fired into the air and the gang returned fire. After a chase in the fields the armed robber then surrendered to the officer. He was unarmed at the time. **PW10** retraced his steps and was able to find the rifle in the maize plantation. The police arrested the 1st Appellant herein.

9. Rose Mbuzi (**PW11**), the deputy Officer Commanding Njabini Police Station conducted an identification parade of the 1st Appellant. He was positively identified by **PW1** and **PW3**. The 1st Appellant however stated during the parade that **PW1** was present on his arrest and that he was driven in the same motor vehicle with **PW3** to the Police Station.

10. The 1st Appellant in his Defence gave unsworn statement and called one witness. He testified that his wife runs a chips store in Kayole area in Nairobi County. On the material day he left for Njabini to purchase potatoes for her business. However there were heavy rains at Njabini market holding up the farmers at their homes. He thus proceeded to Kijiko village to purchase the produce from one Maina Njuguna. However he encountered a mob and was arrested on suspicion of robbery with violence. He denies any knowledge or involvement in the robbery.

11. The 2nd Appellant also denied committing the offence. He testified that he was called by Samuel Karori (**PW8**) to transport people to Njabini. He picked one Harrison Kimani an elderly man at Nairobi.

They then stopped at Flyover area where a third man who had luggage got in the vehicle. He drove the passengers to a homestead at Kijiko village. As he was parking the vehicle, he heard screams from the homestead. He sped off from the area and drove and sought directions to a police station. He however got stuck in the mud and got assistance from a stranger. He met oncoming police Landrover. He stopped them, identified himself and reported the commotion he had heard from the homestead. He was held in custody in order to assist the police officers identify the passengers. However the police preferred the charge against him.

12. The appeal was canvassed before us on 27th March 2014. The Learned Prosecuting Counsel, Mr. Chirchir appeared for the State, Mr. Njuguna appeared for the 2nd Appellant and the 1st Appellant was present in person.

13. The 1st Appellant sought to rely on his written submissions filed on 27th March, 2014. It was his submission that the charge sheet was defective and could not sustain a conviction because the amount alleged to be stolen as per the charge sheet was Kshs. 613,385/- whilst the breakdown given by **PW1** in his testimony is Ksh. 713,385/-.

14. Further, the 1st Appellant submitted that the conditions were not conducive for a positive identification. The victims were scared and were lying on the ground. He further contends that the Identification Parade was in contravention of the Police Standing Orders because **PW1** and **PW3** had witnessed his arrest at Kijiko village. Further upon his arrest he was ferried to the police station in the same motor vehicle as **PW3**.

15. The 1<sup>st</sup> Appellant prayed that his appeal be allowed in its entirety.

16. Mr. Njuguna submitted on behalf of the 1st Appellant on two grounds. Firstly he submitted that the evidence presented before the trial court was contradictory and unreliable. It was the 2nd Appellants evidence that the area was muddy and that he was rubbing mud off the car. Counsel contends that it was illogical for the Appellant to first wash his hands then apply mud to the car. Further he would not have sped off if he was part of the plan to commit the offence. For this reason there was doubt in the prosecution case.

17. Counsel further stated that the testimony of **PW9** was inconsistent and unreliable. According to Counsel the evidence on record only leads one to infer that the 2nd Appellant was looking for a police station. **PW9** testified that the 2nd Appellant identified himself and had not passed any police station by the time he was incepted.

18. Counsel submitted that the 2<sup>nd</sup> Appellant in his defence had explained the role he played. That there was no other evidence connecting the 2<sup>nd</sup> Appellant to the offence and the trial court therefore misdirected itself by relying on circumstantial evidence as a basis of conviction. Counsel urged the court to quash the conviction as it was unsafe and to set the 2<sup>nd</sup> Appellant free.

19. Prosecuting Counsel in response to the 1<sup>st</sup> Appellants written submissions submitted that the incident occurred at 11.30am during day light and the 1st Appellant was positively identified as the one with the gun and when police arrived he exchanged fire with them. Counsel further submitted that the 1st Appellant was arrested at the scene of the crime and that he voluntarily took the police to where the gun was hidden.

20. As for the 2nd Appellant, the Prosecuting Counsel submitted that the 2nd appellant had common intention with the robbers as he was the one who conveyed the robbers to the scene of crime and left them there. He smeared mud on the number plates of the vehicle that had conveyed the robbers with an intention of hiding the number plates.

21. The Prosecuting Counsel further submitted that when **Chief Inspector Njeru, (P.W.9)** OCS Kinangop answered the distress call, he met the 2nd Appellant on the way and upon interrogation, he

pretended to be looking for a police station while he had actually passed the nearest police station and was looking for escape route. The Prosecuting Counsel prayed that the appeal be dismissed and conviction and sentence be upheld as both Appellants were robbers.

### **ISSUES FOR DETERMINATION**

22. Whether the 1<sup>st</sup> Appellant was positively identified through an Identification Parade and whether the parade conducted was flawed?

23. Whether the element of possession of a firearm, its propriety and usage had been proved beyond reasonable doubt by the prosecution?

24. Whether the prosecution established common intention?

### **ANALYSIS**

25. This being the first appellate court it is incumbent upon us as we re-assess and re-evaluate the evidence on record so as to reach our own independent conclusion, that we bear in mind that we did not have the benefit of seeing or hearing the witnesses. Reference is made to the case of **Okeno V. Republic (1972) EA 32.**

26. The first two issues relate to the 1<sup>st</sup> Appellant and the issue of common intention shall be addressed in relation to the 2<sup>nd</sup> Appellant;

### **1<sup>ST</sup> APPELLANT**

27. On the issue of identification, the 1<sup>st</sup> Appellant contends that he was not properly identified and that the identification parade was conducted in a manner that grossly contravened the Police Force Standing Orders.

28. The incident occurred at 11.30 am and it was in broad daylight. P.W. 1 recalled that he attempted to block the door to prevent the robbers from entering and this struggle lasted for 20 minutes. He stated that he remembered the face and deformed ear of the 1<sup>st</sup> Appellant with whom he had struggled with at the door and was able to identify him at the identification parade conducted by **PW11** on the 28<sup>th</sup> December, 2011.

29. We find that the conditions for identification for this witness were favourable. The incident occurred during the day and only a door separated this witness from the 1<sup>st</sup> Appellant and this witness was able to observe the 1<sup>st</sup> Appellant for a period of twenty (20) minutes. He was able to pick out the 1st Appellant at the Identification Parade by his peculiar feature.

30. **PW1** stated that he did not witness the arrest of the 1<sup>st</sup> Appellant nor did he use the same vehicle to Njabini Police Station.

31. We note that the 1<sup>st</sup> Appellant was arrested by members of the public who then handed him over to the police. That the arrest was effected near the scene of crime and that the arrest was not based on description. We are satisfied that the Identification Parade was not flawed and that **PW1** positively identified the 1<sup>st</sup> Appellant.

32. The evidence of **PW3** was that she obeyed the robbers' instructions to lie down and from this position she was not able to see them properly. That she did not witness the arrest of the 1<sup>st</sup> Appellant but saw him immediately after the arrest inside the police vehicle and a gun was also in the police vehicle.

33. From the evidence of **PW3** we are satisfied that the circumstances and conditions for identification of

the 1<sup>st</sup> Appellant were not favourable. She claims to have been lying down and admits she was frightened and was not able to see the robbers properly. The act of seeing the 1<sup>st</sup> Appellant in the police vehicle immediately after arrest and the subsequent identification at the Identification Parade does not add any probative value to the issue of identification. In the light of the above we are not satisfied that **PW3** positively identified the 1<sup>st</sup> Appellant.

34. The evidence of **PW10** was that with the help of members of the public he gave chase to the 1<sup>st</sup> Appellant who ran and entered into a maize field. At that point in time, the 1<sup>st</sup> Appellant sported a white T. Shirt and was armed with a gun. After a short time the 1<sup>st</sup> Appellant emerged from the other side of the maize field. This witness testifies that he was approximately five (5) metres away from the place where the 1<sup>st</sup> Appellant emerged from the maize field and P.W.10 was able to see and identify the 1<sup>st</sup> Appellant as he was dressed in the same white T-shirt. He also witnessed the arrest of the 1<sup>st</sup> Appellant by members of the public and saved him from being lynched. All this happened in Kijiko Village and approximately 800 metres from the scene of crime.

35. After re-evaluating the evidence of **PW1 and PW10** we are satisfied that the two witnesses positively identified the 1<sup>st</sup> Appellant as being one of the robbers and his conviction on count 1 is found to be based on sound evidence.

36. On possession of the firearm, the evidence of **PW10** was that the 1<sup>st</sup> Appellant was chased by members of the public into a maize plantation. He later emerged from the plantation unarmed and upon retracing the 1<sup>st</sup> Appellant's steps into the maize plantation the rifle was found. What emerges from the evidence of this particular prosecution witness is that the 1<sup>st</sup> Appellant was not found in actual or physical possession of the firearm at the time of arrest.

37. Upon perusal of the court record we find that there is no evidence by any of the prosecution witnesses that the gun was dusted for fingerprints to prove that it was the one used by the 1<sup>st</sup> Appellant. Further there was no evidence adduced to show that it was only the 1<sup>st</sup> Appellant who had access into the maize plantation and that no other persons particularly the members of the public were precluded or did not have access into the maize plantation. This being the case we are of the opinion that exclusive access by the 1<sup>st</sup> Appellant and exclusive possession was not proved by the prosecution.

38. Crucial witnesses were not called by the prosecution was one of the grounds of the 1<sup>st</sup> Appellant's appeal. Usually the prosecution is at liberty to summon the witnesses it so chooses to testify on its behalf. But in this case, upon perusal of the court record, we find no evidence to support the fact that the prosecution had called any ballistic expert to confirm and produce a report that the weapon found in the maize plantation was indeed a firearm. Neither was there any evidence to show that the firearm had been dusted for fingerprints, particularly those of the 1<sup>st</sup> Appellant. Further, no evidence was adduced to demonstrate that investigations were carried out to verify that the firearm had recently been used.

39. This ground of appeal is found to be meritorious and is hereby allowed.

## **2<sup>ND</sup> APPELLANT**

40. The evidence of **PW 8** confirmed that the 2<sup>nd</sup> Appellant was his employee. That **PW8** was the one who had made the arrangements for the car hire and he had been paid Kshs. 3,000/= by the hirers. **PW8** then assigned the 2<sup>nd</sup> Appellant the duty of driving the motor vehicle and the customers from Nairobi to Njabini on that material day. The evidence of **PW8** supports the fact that the 2<sup>nd</sup> Appellant was not privy to the agreement for the hiring of the motor vehicle and that he only picked and ferried the customers as instructed by his employer.

41. The 2<sup>nd</sup> Appellant gave sworn testimony in defence and narrated how he picked the passengers, who then fuelled the vehicle and he proceeded to take them to their destination. When they got to the house the

passengers alighted and went about their business.

42. Upon hearing screams the 2<sup>nd</sup> Appellant fled the scene of crime and drove away, alone, and went in search of a police station. This evidence is corroborated by the evidence of his employer **PW8** who stated that the 2<sup>nd</sup> Appellant called him when the screaming begun and **P. W. 8** advised him to leave the scene and to go and make a report at the nearest police station.

43. It is noteworthy to note that the 2<sup>nd</sup> Appellant fled the scene of crime alone leaving his passengers behind, had they been his partners in crime he would not have abandoned them.

44. Whilst looking for a police station to report the incident he encountered and identified himself to **PW9**, who was a police officer and enquired from **PW9** the directions to the nearest Police Station. Under cross-examination **PW9** confirmed that at that point of their encounter the 2<sup>nd</sup> Appellant was alone and had not passed any Police Station.

45. From the evidence adduced and from the conduct of the 2<sup>nd</sup> Appellant, it does not appear to this court to be of someone looking for a route to escape. It appears that he was indeed following his employer's instructions to look for a police station.

46. The trial court in its judgment found that the deliberate actions of smearing the number plate with mud incriminated the 2<sup>nd</sup> Appellant. The evidence of **PW2** was that the Probox was parked about 12metres away and she saw the 2<sup>nd</sup> Appellant first wash his hands and then he smeared the front number plates with mud. The evidence of **PW9** was that when they apprehended the 2<sup>nd</sup> Appellant only the rear number plate was smeared with mud.

47. Firstly, we have noted that the evidence of these two prosecution witnesses contradicts the other as one stated that the rear number plates had mud and the other testified to the front number plates being smeared with mud. Secondly, we concur with Counsel for the 2<sup>nd</sup> Appellant's submissions that the sequence as narrated by **PW2** defies logic. In fact from this evidence an inference can be drawn that the Appellant's actions as narrated by **PW2** were done in an attempt to clean the front number plates as **PW9** confirmed that only the rear number plate had mud.

48. Nevertheless based on the evidence of **PW2 and PW9**, we find that there is doubt raised on whether the actions of the 2<sup>nd</sup> Appellant amounted to smearing of mud so as to cover up or it amounted to washing to clean up the front number plates. It is trite law that where there is doubt, the benefit of doubt will always tilt in favour of the accused who in this instance is the 2<sup>nd</sup> Appellant. The evidence of smearing of mud is found to be insufficient to incriminate the 2<sup>nd</sup> Appellant.

49. After re-evaluating the evidence on record it is clear that there is no cogent evidence on the role the 2<sup>nd</sup> Appellant played in the commission of the offence of robbery with violence. What comes out clearly from the evidence adduced is that the purpose for which the 2<sup>nd</sup> Appellant went to Kijiko Village was to only ferry the customers who had hired the motor vehicle from his employer.

50. It was incumbent upon the prosecution to provide evidence to prove that the 2<sup>nd</sup> Appellant and the other robbers had formed a common intention to go out and commit the offence of robbery with violence. There is no cogent evidence that demonstrates that the 2<sup>nd</sup> Appellant was a participant in the robbery.

51. We find that the trial magistrate erred in law and in fact in failing to evaluate and consider the 2<sup>nd</sup> Appellant's defence and further find that the prosecution's case against the 2<sup>nd</sup> Appellant was below the desired threshold for capital offences. Refer to the case of **Bukenya & Anor V. Republic (1972) EA 549.**

## **FINDINGS**

52. We find that the identification parade conducted for **PW1** was not flawed and find that the 1<sup>st</sup> Appellant was positively identified by **PW1 and PW10** as being one of the robbers.

53. We find that the prosecution failed to prove beyond reasonable doubt the element of possession, in particular that the 1<sup>st</sup> Appellant had actual and or exclusive possession of the firearm.

54. We further find that the prosecution failed to call any expert witness to prove the propriety of the firearm and its usage.

55. We find that the prosecution failed to establish that the 2<sup>nd</sup> Appellant had a shared or common intention with the others to go out to commit the offence of robbery with violence and therefore the conviction in the absence of such common intention is unsafe.

### **CONCLUSION**

56. The 1<sup>st</sup> Appellant's appeal is partially successful on Count II and the appeal on Count 1 is found to be lacking in merit.

57. On Count II the conviction is hereby quashed and the sentence set aside. On Count 1, the conviction and sentence for the 1st Appellant is hereby upheld.

58. As for the 2<sup>nd</sup> Appellant the appeal is found to be meritorious and is hereby allowed in its entirety. The conviction is hereby quashed and sentence set aside. The 2nd Appellant to be set at liberty, forthwith, unless otherwise lawfully held.

It is so Ordered.

**Dated, Signed and Delivered at Nakuru this 18th day of July, 2014.**

**R. P. V. WENDOH**

**JUDGE**

**A. MSHILA**

**JUDGE**