REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 209 OF 2013

(CONSOLIDATED WITH CRIMINAL APPEALS NOS. 210, 272 AND 273 OF 2013

PHILLIP KAVITA MUTINDA…..…..…...……1ST APPELLANT

JOSHUA OCHIENG OBWAI…..…..……...…….…….2ND APPELLANT

LILIAN WANJIKU KAGERA…...…….....3RD APPELLANT

MARY WANJIKU NDUTA……..……...4TH APPELLANT

VERSUS

REPUBLIC ……...…….....……..RESPONDENT

(Being an appeal from the original conviction and sentence in Kangundo Ag. Senior Principal Magistrate's Court Criminal Case No. 487 of 2012 by Hon. I.M. Kahuya Ag. SRM on 21/6/2013)

JUDGMENT

1. The appellants, **Phillip Kavita Mutinda, Joshua Ochieng Obwai, Lilian Wanjiku Kagera and Mary Wanjiku Nduta** (hereinafter the 1st, 2nd, 3rd and 4th Appellants respectively) were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** Particulars thereof being that on the **29th** day of **September, 2012,** at **Mbiuni** area within **Kangundo District** in **Machakos County,** jointly, while armed with dangerous weapons namely a knife and a toy pistol robbed **Dancan Muthama Mutiso** a motor-vehicle registration number KBN 667W Toyota Probox white in colour valued at Kshs.720,000/= and at or immediately before or immediately after the time of such robbery killed the said **Dancan Muthama Mutiso.**
2. In the alternative count the appellants were charged with the offence of handling stolen goods contrary to **Section** 322(2) of the Penal Code. The particulars of the offence being that on **29th** day of **September, 2012**, at **Mbiuni** area within **Kangundo District** in **Machakos County,** jointly, otherwise than in the course of stealing dishonestly retained one motor-vehicle registration number KBN 667W Toyota Probox knowing or having reason to believe it to be stolen.
3. Facts of the case were that on the **29th** day of **September, 2012**, **Dancan Muthama Mutiso** (*now deceased*) was operating/driving motor-vehicle registration number KBN 667W Probox (motor-vehicle). At about 4.30pm PW1, **Joseph Kyalo** saw the 1st appellant call the deceased aside. His co-appellants then entered the motor-vehicle. The deceased fuelled the motor-vehicle and drove away with the four appellants. At about 5.00pm, PW3, **Redempta Mbithe Mbiuni** was by the

roadside when the motor-vehicle passed and stopped by the river. The 2nd appellant came out of the car and inspected it. Three of the occupants of the motor-vehicle came out. The deceased's hands were bound. The 1st and 2nd appellants stabbed the deceased severally. They abandoned him, entered the motor-vehicle and drove off. Another motor-vehicle stopped by and she (PW3) notified its occupants what she had witnessed.

4. At about 5.30pm, PW4 **Grace Masila** was at her clinic when persons identified as the 3rd and 4th appellants were taken there for treatment as they had sustained some injuries. She treated them. Information was received that they had killed someone. People wanted to lynch them but they were rescued by the police.
5. After the accident the 1st and 2nd appellants escaped on foot but were arrested by the police; investigations were carried out and the appellants were charged.
6. When put on their defence, the appellants denied having committed the offence in question. The 1st appellant said he was arrested after he alighted from a matatu and was on his way home. He met his co-appellants at **Mbiuni Police** Post.
7. The 2nd appellant testified that he was in a matatu going to **Mbiuni**. He alighted at about 6.00pm only to be arrested by the police.
8. The 3rd appellant stated that she was arrested as she came from her place of business at **Mbiuni.**
9. The 4th appellant stated that she encountered police officers who arrested her without telling her the reason why.
10. The trial court having evaluated evidence adduced found the appellants guilty. They were convicted and sentenced to death. Being aggrieved with the decision of the court they appealed on grounds that:-

i. Article 50(2)(g) of the constitution was contravened hence the appellants rights being violated;
ii. Accepting evidence of PW9 who was not a Doctor was erroneous and in contravention of **Section 48** as read with **77(1) (2)** of the **Evidence Act.**
iii. Circumstances that prevailed did not favour positive identification
iv. The charge was not proved to the required standard.

11. At the hearing of the appeal the appellants relied upon written submissions that we have duly taken into consideration.
12. The State opposed the appeal. Learned State counsel **Mrs Saoli** stated that the appellants were seen by PW2 going off in the motor-vehicle. PW3 saw the 1st and 2nd appellants stabbing the deceased. The 3rd and 4th Appellants sought treatment after being involved in the accident. The 1st and 2nd appellants escaped but were captured. DNA samples carried out matched the 1st appellant. She prayed for dismissal of the appeal.
13. This being the first appellate court, we are required to re-consider and re-evaluate the evidence adduced before the trial court and reach our own conclusions on whether or not to uphold the conviction of the appellants (***see Gabriel Njoroge versus Republic [1987] KLR 19).***
14. Alleging that **Article 50(2) (c) (g) (k)** of the Constitution was violated is an insinuation that the appellants were not accorded a fair trial. The alluded to paragraphs of **Article 50** provide thus:-

> "***2. Every accused person has the right to a fair trial, which includes the right-***
>
> c) ***To have adequate time and facilities to prepare defence;***
>
> ***g) To choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> k) ***To adduce and challenge evidence"***

15. The appellants were arraigned in court on the **1st October, 2012.** The charges were read to them on the **17th October, 2012,** two weeks later. The case was fixed for hearing on the **6th November 2012.** The case could not proceed as scheduled because the appellants had not been furnished

with the prosecution witnesses' statements. An order to that effect was made and they were also granted bail. The case did not proceed until the **8th** of **January, 2013.** The appellants had adequate time to prepare for their case. They even had sufficient time to instruct advocates if they needed to. They participated in proceedings, cross-examined all witnesses who testified and adduced evidence when put on their defence. Consequently, their rights to fair hearing were not violated as alleged.

16. With regard to the second ground of appeal, it is alleged that accepting evidence of PW9 was erroneous on the part of the court. **Section 48** of the **Evidence Act** provides-

> ***"(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.***
>
> ***(2) Such persons are called experts".***

17. **Section 77 (1)** and **(2)** of the **Evidence Act** provides:-

> ***"(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it".***

18. PW9, **Anne Wangechi Nderitu** testified in her capacity as the Government Analyst. She carried out analysis of specimen received, made a report thereof which she signed. It was the report that she produced in evidence. At the point of production of the report that she authored no objection was raised by the appellants. Her qualifications are challenged by the appellants who stated thus:-

> "***Ann Wangechi Nderitu Government Analyst evidence is inadmissible in law… Nowhere on record is said that Ann Wangechi held…any qualifications though she worked for 15 years…?"***

19. We have re-looked at the report that was produced by PW9. It specifically states that **Anne Wangechi Nderitu,** is a holder of MSC and is a Government Analyst at the Government Chemist Department and she acted pursuant to **Section 77(1)** of the **Evidence Act.** PW9, the author of the report duly signed and produced it in evidence. Although the witness did not specifically state her qualifications in her testimony in court, the same is stipulated in the report and not challenged. **Section 77 (2)** of the **Evidence Act** is very clear. The court is granted the discretion to draw a conclusion of qualifications professed being held at the time of signing of the report. The Lower Court having accepted the report did believe that PW9 was indeed seized of the qualifications required by a Government Chemist. In the circumstances the law was complied with. Evidence adduced was admissible.

20. This brings us to the issue whether identification of the appellants was cogent? It is argued that circumstances that prevailed did not favour correct identification of the appellants by PW2. It is submitted that PW2 was busy directing people to his motor-vehicle therefore could not have found time to observe the appellants. It is also stated that the first report to the police was silent on the description of the identity of the 1st appellant.

21. In the case of ***Wamunga versus Republic [1989] 424*** it was held:-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that***

the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction"

22. PW2 was in company of the deceased when the four (4) appellants went to hire the motor-vehicle. It was during the day, between 3.30pm –4.30pm. On cross-examination he denied having identified them at any identification parade prior to identifying them in court. In the case of ***Muiruri and 2 Others versus Republic [2002] 1 KLR 275)*** the court of Appeal held:-

"It cannot be said that all dock identification is worthless. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification".

23. The witness (PW2) having identified the appellant in court was subjected to cross-examination. His evidence was not shaken.
24. Other than PW2 there was evidence adduced by PW3 who saw a motor-vehicle stop near the river. She became curious as a result. She witnessed persons she identified as the 1st and 2nd appellants stabbing the deceased. They abandoned the deceased. When they got back into the motor-vehicle it could not ignite. The two (2) came out looked around prior to entering the motor-vehicle. The incident occurred at 5.00pm. It was in broad daylight. The witness having watched the unfolding events was able to identify the people. She saw PW5 a motorcycle rider encounter the motor-vehicle. PW5 on seeing the deceased assumed that he had been involved in an accident. Believing that the motor-vehicle driver was taking off from the scene to avoid being held responsible for the accident he (PW5) telephoned the police. He rode on in an attempt to catch up with the motor-vehicle. It hit a wall. He found people rescuing the occupants. He identified two (2) of the occupants as the 1st and 2nd appellants. People dispersed when a person scared them that the motor-vehicle was about to explode. He moved to get the police. While carrying the police Officer, **Oscar Ombati** they learnt that the occupants of the motor-vehicle had taken the Mwala route. They pursued them and caught up with the 1st and 2nd appellants. The 1st appellant was bleeding from the mouth.
25. PW8**, P.C. Ombati** confirmed having effected arrest as a result. He moved to the clinic where the 3rd & 4th appellants had been taken after the accident. PW4, the nurse confirmed having attended to the 3rd and 4th Appellants after the accident. They were rescued by PW10, **PC Kurgat** from members of the public who wanted to lynch them.
26. Evidence adduced confirmed that the DNA profile generated from the bloodstain obtained from the air bag cloth from the motor-vehicle matched the one generated from the blood sample indicated as for the 1st appellant. This evidence confirmed the fact that the 1st appellant was indeed inside the motor-vehicle at the time of the accident.
27. Further, the evidence adduced confirmed the link of chain of circumstances from the time the motor-vehicle was hired upto the time the deceased was murdered as adduced by PW2, PW3, PW4, PW5, PW8 and PW10.
28. Although the appellants denied having committed the offence in question and claimed having been arrested while on their way home, the prosecution discharged its burden of proof by proving beyond any reasonable doubt that all the four (4) appellants were together when they hired the motor-vehicle. All of them were inside the motor-vehicle at the point of taking it away from the deceased and prior to doing so; the 1st and 2nd appellants stabbed him.
29. A knife used to stab the deceased was recovered in the motor-vehicle. DNA profile generated from the stains of blood that were found thereon matched the DNA profile obtained from the deceased's blood sample. This was evidence of actual violence having been used upon the person of the deceased prior to the motor-vehicle being stolen. He was wounded and thereafter, pronounced dead by the doctor who examined him and later conducted the postmortem on his body. He died as a result of multiple penetrating stab wounds with multiple internal organ damage, including the lungs, the heart and intestines.

30. From the foregoing, the charge was proved to the required standard. We have no basis of

interfering with the findings of the Lower Court. In the result the appeal lacks merit. The conviction and sentence meted out is confirmed. Accordingly, the appeals are dismissed.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **OCTOBER, 2014.**

L.N. MUTENDE **B. THURANIRA JADEN**

JUDGE **JUDGE**