REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEALS NOS. 240 AND 38 OF 2011

(CONSOLIDATED)

SAMUEL MUERA MUGINI ……..1ST APPELLANT

JOHN MOI ……. 2ND APPELLANT

-VERSUS-

REPUBLIC ……..……. RESPONDENT

(Being Appeals from original conviction and sentence by Kehancha Senior Resident Magistrate's Court Hon. J. R Ndururi in Criminal Case No. 1339 of 2010 dated 27th June, 2011)

JUDGMENT

Introduction

1. The appellants herein, Samuel Muera Mugini (1st appellant) and John Moi (2nd appellant) were jointly charged as accused 1 and 2 with 4 counts of robbery with violence contrary to section 296(2) of the Penal Code. By these counts, the appellants were variously charged that on the 2nd day of April 2010 at Nyairema village in Kuria East District within Nyanza province jointly with others not before the court while armed with dangerous weapons namely rifles, pangas and other crude weapons robbed Francis Nyamagige Boke, Marenge Rioba, Protus Mwita and Jackson Mwita Kibondari a total of 16 head of cattle belonging to said victims, one long blue trouser and one Kitenge from the first complainant, all valued at an aggregate of kshs.220,000 and at or immediately before or immediately after the time of such robbery shot dead Marenge Rioba and Jackson Mwita Kibondari.

2. The prosecution's case is that a group of cattle rustlers raided Nyairema village in Kuria East District, a village about 200 metres from the Kenya – Tanzania border, during the night of 2nd April 2010 at about 1.00am and separately robbed the said persons of the said head of cattle and in the process of the robberies shot dead the said Marenge Rioba and Jackson Mwita Kibondari. PW1 Francis Nyamagige Boke, heard gunshots sound from Samwel Marenge's (his neighbour) house and he also the saw the robbers break down the gate to his cattle boma and leave with his two head of cattle. He escaped and telephoned the area District Officer (D.O.). The robbers were in a group of more than four people and he could hear others robbing his neighbours simultaneously as they headed towards Tanzania. The Kenya police contacted their Tanzanian counterparts who laid an ambush for the robbers and according to PW2, a police officer attached to Utegi Police Station in Tanzania, the robbers were in two groups of four men each; the first group of 4 men, two of them with hand guns, walking in a single file with cattle following and the

other group of four men followed. In an ensuing gun battle lasting 30 minutes, one robber was killed and an AK47 rifle recovered. Other robbers escaped with injuries. 11 heads of cattle were recovered and later returned to their owners. On the following morning, PW7 then Officer Commanding Police Station (OCS) Ntimaru Police Station, acting on information that 2 persons were being treated of gun-shot wounds in the home of one Mokiri Nyaitomo in Makararangwe sublocation bordering Nyagoge area in Tanzania, led the arrest of the two appellants who had wounds on various parts of their bodies, which clinical officer PW5 confirmed were from gunshots. The appellants claimed that they got their wounds from an attack by thugs with arrows as they returned from a wedding party in Nyasincha area of Tanzania. According to PW7, the distance from the scene of the shootout to the home where he found the appellants was about 1 km. On investigating about the wedding that the 2 appellants alleged they were returning from when they were attacked, the investigating officer, PW9 established that there had been no wedding on the material day prompting him to the conclusion that the appellants were part of the gang of robbers.

3. When put on their defence, each appellant gave an unsworn statement and denied having committed the offence of robbery with violence. The 1st appellant gave a brief unsworn statement in which he stated that on the 2nd April 2010 he left a wedding with the 2nd appellant at 5.30am, when robbers shot at them; he fell down and the robbers left. When he gained consciousness he saw that the 2nd appellant was also injured. They proceeded to a nearby home but found no one there, they entered a house and stayed upto 9.30am. The owners of the home returned, they sent one of them to go to their home and bring back a relative to take them to hospital but instead that person returned with police officers. The 2nd appellant in his unsworn statement supported 1st appellant's statement that they were together and left together from a wedding at 5.30am, they met with thieves who shot and injured them, and they went to a house seeking assistance but the owners of that house called the police.

4. After a detailed consideration of the evidence that was placed before him the trial magistrate was satisfied that even though none of the complainants positively identified the members of the gang that raided their homesteads there was however sufficient circumstantial evidence to implicate the two appellants as persons who were part of the gang of robbers. The appellants were accordingly found guilty as charged and sentenced to death.

Grounds of Appeal and Submissions

5. The appellants were aggrieved by both conviction and sentence. In his petition of appeal filed on 27th September 2011, the 1st appellant herein Samuel Muera Mugini has appealed against both conviction and sentence of the trial magistrate on grounds that the prosecution had not proved a prima facie case against him, there was no evidence on recognition, that he was not found with any offensive weapon, no recoveries were made that could link him with the said offence and that the trial magistrate failed to consider his defence statement.

6. The 2nd appellant in his petition of appeal filed on 20th September 2011 has appealed against both conviction and sentence on grounds similar to the 1st appellant's grounds but adding that the trial magistrate erred in law and in fact by failing to comply with sections 324 and 329 of the Criminal Procedure Code.

7. The appellants filed identical written submissions and in reply to the submissions by the State Counsel made supplementary oral submissions. The 1st appellant, Samuel Muera Mugini in his submissions stated that the prosecution failed to avail essential witnesses to clear onus of proof because Mr. Mokiri Nyaitimu in whose home PW7 found them was not called as a witness to attest to the fact; that they were arrested in Ntimaru 3km from Nyairema area where the offence was committed. The appellants also submitted that the trial magistrate erred when he failed to comply with sections 324 and 329 of the Criminal Procedure Code in that they were not granted an opportunity to submit in respect of sentence.

8. The appeal was opposed by the State. Mr. Majale, learned State Counsel opposed the appeals on grounds that the ingredients of the offence of robbery with violence were proved in that:

a. The appellants were armed with rifles.
b. They were in the company of others.
c. They shot the victims in the 4 counts and robbed all the victims of their head of cattle valued at kshs. 200,000/=.

9. Counsel further submitted, with reference to the injuries suffered by the appellants, that PW5 at page 12 of the proceedings confirmed that both appellants had gunshot wounds and not arrow wounds and further that if the appellants had indeed suffered arrow wounds they would have sought treatment in a public facility instead of being locked up in a house. In reference to the unsworn statements by both appellants in the trial court, he submitted that such defence was rebutted by PW5 who stated that the injuries were not arrow wounds but gunshot wounds. In conclusion, he submitted that the conviction of the appellants was safe and urged the court to dismiss the appeal. The 1st appellant in reply to Mr. Majale's submissions submitted that according to the clinical officer who treated them on 2nd April 2010, he confirmed that their wounds were arrow wounds. The 2nd appellant in reply submitted that they were treated at Ntimaru Hospital on 2nd April 2010 and that the clinical officer who treated them did not testify.

Analysis of Evidence

10. Being a first appellate court, we have a duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusion in the matter. See ***Okeno –vs- Republic*** (1972) EA 32. From the evidence, no issue arises as to whether the ingredients of section 296 (2) were fulfilled, the attackers having robbed the four victims of their cattle and other property while being in a group of at least eight persons, at least one of whom was armed with a rifle which was recovered, and having fatally injured two of their victims. (See for ingredients of the offence of robbery with violence, ***Ganzi v. Republic*** [2005] KLR 52). The prosecution's case is purely based on circumstantial evidence as correctly observed by the trial magistrate and the issue for determination in the consolidated appeals is whether the prosecution has by the circumstantial evidence presented before the court proved its case beyond reasonable doubt to convict the appellants.

11. It is trite law that while circumstantial evidence may be the sole basis of conviction, an inference of guilt from circumstantial evidence can only be justified where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt and that before drawing the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances that destroy or weaken the inference. (See ***Wambua & 3 Ors. v. Republic*** (2008) KLR 142). The latter principle calls for a narrow examination of the circumstantial evidence as observed by the Court of Appeal in ***Ndurya v Republic*** (2008) KLR 135.

12. We have reviewed the evidence presented by the 9 prosecution witnesses and weighed it against the unsworn statements of the appellants before the trial court which though not evidence in the technical sense (See ***Amber May v. Republic*** [1981] KLR 129) may properly be considered to determine whether a reasonable doubt is raised as to the prosecution's case. We find that the prosecution has proved the following facts:
    a. That on the early morning of 2nd April 2010 at about 1.00am the villagers of Nyairema village were attacked by cattle rustlers who made away with their cattle. This fact was attested to by PW1 (at page 5) PW4 (at page 11) PW6 (at page 16) who all confirmed the fact that they were robbed off their cattle with PW4 losing his father in the course of the cattle raid as confirmed by PW8 (at page 23) a clinical officer who produced post mortem forms one for Jackson Mwita Kebondari and Marenge Rioba Marwa who both died from gunshot wounds. PW1 and PW6 being two of the victims of the robbery with the assistance

of local administration and the police tracked the cattle hoof marks leading to Tanzania and later heard gunshots from the Tanzania side of the border.

b. That on the same night at 2.00am at Nyantira village, as testified to by PW2 and PW3 (at pages 8 and 10 respectively), Tanzanian police officers ambushed 8 cattle rustlers, a gun shootout ensued and one of the cattle rustlers was killed while the others managed to escape though they had suffered gunshot wounds. PW2 and PW3 once the cattle rustlers escaped recovered 11 heads of cattle which were subsequently identified by their owners who were PW1 (at page 6), PW4 (at page 11) and PW6 (at pages 16 and 17)
c. PW7 (at page 20) following a tip-off that some two persons were being treated in a certain home of gun shot wounds on 2nd April 2010 at 9.30am in the morning found the appellants with injuries which they said they had been caused by arrows following an attack on their way back from a wedding party. Clinical Officer PW5 however confirmed (at page 12) that the appellants had both suffered gunshot wounds. In addition, during PW7's course of investigation on the cattle raid at Nyairema village (at page 21) he was taken to the scene of the shootout between PW2 and PW3 (at page 8 and 10) and the raiders and realized that from there to the home where he had found the appellants was a distance of about 1km.
d. PW9 (at page 26) investigated on the appellants allegations that they were injured while coming from a wedding but he established that there was no wedding on the material day therefore suspecting that the two appellants were part of the gang of robbers.

13. When weighed against the prosecution's evidence, the two appellants alibi defence (on pages 28 and 29) that they were from a wedding when robbers shot at them and their statements in submissions on appeal that one clinical officer who was not called as a witness had confirmed that their injuries had been caused by arrows, do not destroy or weaken the circumstantial evidence. The fact that the appellants had chosen to hide in the house where they were arrested rather than seek hospital treatment for their injuries and the fact that it was established that there was no wedding on the material day indeed effectively rebuts the appellants' defence. There was also no allegation that the robbers who shot the appellants robbed anything from them: they are said to have just left after shooting at them.

14. This is how we see the evidence before the court. The effect of the circumstantial evidence set out above is to create an unbroken chain of events with nexus in time, distance, place and event as to leave no doubt that the appellants were part of the gang of robbers that attacked the villagers of Nyairema and stole their cattle, killing two of their victims in the process and driving the stolen cattle into Tanzania where on information by the Kenya Police, the Tanzanian Police laid an ambush wherein one of the robbers was killed and an AK47 rifle and 11 heads of cattle recovered, while the rest of the robbers escaped with gunshot wounds, and thereafter within 8hours after the shootout, the two appellants were arrested from a hideout with wounds confirmed by a clinical officer to be gunshot wounds but which they claimed had been inflicted by arrows shot by robbers who attacked them while returning from a wedding party, which the investigating officer confirmed had not taken place. We find that the cumulative effect of the facts proved by the prosecution measured against the unsworn statements of the appellants is to create a strong inference of guilt and there are no other facts in prosecution's case or in the appellants' alibi which weaken or negate the inference of guilt against the appellants.

15. In reaching his decision, the learned magistrate cited the Court of Appeal decisions on circumstantial evidence in ***Kariuki Karanja v. Republic*** (1986) KLR 190 and ***Mwangi v. Republic*** (1983) KLR 522 and meticulously considered the circumstantial evidence as follows:

> **"In this case, the accused persons allege that they were shot by a gang of robbers, as they headed home from a wedding party in Tanzania. Firstly, their testimonies were unsworn and uncorroborated and thus their probative value is minimal. Secondly, there is no evidence that there were other gun shots in that area other than those in Nyairema and Nyantira villages. Thirdly, they told PW7 that they had been shot with arrows. They had not reported the incident to any authority. Fourthly, it is apparent that they were hiding in the home where PW7 found them. Thus the**

likelihood that the accused persons were shot and injured by a gang of robbers is very remote.

I find that the circumstantial evidence adduced by the prosecution irresistibly points at the conclusion that both accused persons were shot and injured by PW2, PW3 and their colleagues during the said shoot out. It further leads to the conclusion that since the eleven head of cattle stolen during the said robberies, both accused persons were part of the gang of robbers which raided Nyairema village and committed the said robberies and shot dead the said Marenge Rioba and Jackson Kibondari. I find no other co-existing facts that in any way reduces these conclusions.

Under Section 296(2) of the Penal Code, an offence of robbery with violence is committed if it is proved that the accused person committed a robbery, and at the time of the robbery he was in the company of one or more persons or was armed with a dangerous or offensive weapon, or at or immediately before or immediately after the time of the robbery beat, struck or in any way used personal violence on any person. In this case, there is evidence that at the time of committing the robberies, the two accused persons herein were in a group of robbers. PW1 and PW6 saw at least four robbers. PW2 and PW3 saw at least eight robbers. There is also evidence that the robbers were armed with rifles. Both the late Marenge Rioba and Jackson Mwita Kibondari were shot dead. During the shoot-out with the gang of robbers, PW2 and PW3 were able to recover one AK 47 rifle loaded with four rounds of ammunition. It is therefore clear that the accused persons were in a group of robbers which was armed with rifle or rifles, and which shot dead the said Marenge Rioba and Jackson Mwita Kibondari. They therefore committed the four offences of robbery with violence as charged in this case."

16. As regards the appellants' complaint that the trial magistrate failed to comply with sections 324 and 329 of the Criminal Procedure Code in that they were not granted an opportunity to submit on the sentence, it is clear that the said sections apply to the proceedings before the High Court and are therefore inapplicable to the trial the subject of these appeals. The applicable provision for the taking of evidence relating to proper sentence before a Magistrate's Court is section 216 of the Criminal Procedure Code, which provides as follows:

> **"The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."**

We have noted from the proceedings that the court did give the accused an opportunity to make representations in mitigation but each accused responded that he had nothing to say and did not offer to present any evidence relevant to the sentence. Moreover, the Magistrate ordered accused to suffer the only sentence which he thought was in accordance with the law. Although the Court of Appeal decision in ***Godfrey Ngotho Mutiso vs. Republic*** Cri. Appeal No.17 of 2008 (2010) eKLR suggested that its reasoning in the case of murder under section 203 and 204 of the Penal Code that the death sentence was a maximum rather than mandatory sentence could apply to the capital robbery cases, the proposition has not been conclusively settled. In the circumstances, the learned magistrate cannot be faulted in his approach and order on sentence.

17. Accordingly, having found that there was circumstantial evidence to support an inference of guilt against the appellants, we now find that the learned trial magistrate properly convicted the appellants on the basis of the circumstantial evidence presented before the Court. We find that appellants' appeals lack merit and we therefore dismiss the same and uphold the judgment and sentence of the trial court.

Dated, signed and delivered in open court at Kisii this 30th day of May 2013.

..…… ……

RUTH N. SITATI **EDWARD M. MURIITHI**

JUDGE **JUDGE**

In the presence of: -

……..... for the 1st Appellant

……..... for the 2nd Appellant

.....for the Respondent

..... Court Clerk