REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 21 of 2011

CONSOLIDATED WITH CRIMINAL APPEAL NO.17 OF 2011

JOSEPH MURIITHI KAGO.....1ST APPELLANT

ALFRED NJIRU MUNYI alias KAGO …… ……2ND APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No.9 of 2009 at the Principal Magistrate's Court at Siakago by Hon. S.M. MOKUA – PM on 14/2/2011

J U D G M E N T

JOSEPH MURIITHI KAGO & ALFRED NJIRU MUNYI the Appellants herein were charged with seven (7) counts of Robbery with Violence contrary to section 296 (2) Penal Code.

After full hearing of the case they were acquitted of count 2 to count 6 while count 1 and count 7 were reduced to Robbery contrary to section 296(1) of the Penal Code of which both were convicted and sentenced to four (4) years imprisonment on each count. There was also an order that the sentences run concurrently.

Both Appellants were dissatisfied with the Judgment and have appealed against both conviction and sentence citing the following grounds;

1st Appellant

1. That the learned trial Magistrate erred in both law and facts when he convicted the 1st Appellant relying on the evidence of PW1 yet the witness told the Court that he knew the 1st Appellant for two years yet he did not tell the police so during the initial report or his statement.

2. That the trial Magistrate erred in both law and facts when he failed to consider the fact that PW7 told the trial Court that he was not known to the 1st Appellant yet he did not give any description to the police during the initial report or in his statement to the police.

3. ***That the learned trial Magistrate failed to consider the fact that PW8, the doctor who presented the P3 forms had contradicting evidence to that of the police. PW8 told the Court that the victims alleged to have been assaulted by persons known to them a fact which was contradicted by the initial report to the police.***

2nd Appellant

1. That the learned trial Magistrate erred in both law and facts when he convicted the 2nd Appellant relying on the evidence of PW1 yet the witness told the Court that he knew the 2nd Appellant for two years yet he did not tell the police so during the initial report or his statement.

2. That the trial Magistrate erred in both law and facts when he failed to consider the fact that PW7 told the trial Court that he knew the 2nd Appellant since childhood yet he did not tell the police so during the initial report or in his statement to the police.

3. ***That the learned trial Magistrate failed to consider the fact that PW8, the doctor who presented the P3 forms had contradicting evidence to that of the police. PW8 told the Court that the victims alleged to have been assaulted by persons known to them yet the report to the police talked of unknown persons.***
4. ***The learned trial Magistrate failed to consider the fact that PW4 testified that he never saw me at the scene of cr****ime.*

The facts of this case are that PW1 and PW2 who were the driver and conductor of motor vehicle KBA 353C Toyota Dyna left the Embu stage with passengers and headed to Siakago. This was on 5/1/2010 morning. At Kamumu PW1 notified a Nissan flashing and following them from behind. The motor vehicle was motor vehicle KAS 478R which he knew well. He stopped and the motor vehicle KAS 478R reached them. Those in it pelted his motor vehicle with stones. He drove off upto Kathigagaceru but was eventually blocked by the motor vehicle KAS 478R. The occupants attacked them and took his money shs.3,900/= and also shs.4000/= of the conductor (PW2). Those who attacked them were eight and PW1 knew them. Both PW1 and PW2 were assaulted as was confirmed by the clinical officer (PW7). A report was made. PW8 P.C. James Wachira accompanied the OCS to the scene of crime along Siakago/Ugweri road. While there a motor vehicle KAS 478R emerged from the opposite direction. The driver swerved and drove into a murram road. PW8 and OCS gave chase and managed to arrest 3 persons who included the Appellants. It was also stated that PW1 and PW2 identified both Appellants at the identification parades conducted.

The 1st Appellant gave an unsworn defence and denied the charge. He said he was a passenger in motor vehicle KAS whose driver and conductor fought with the driver of motor vehicle KBA 353C. They continued with the journey when a similar incident involving motor vehicle KSK 507 took place. Their driver saw police officers and changed the route. The driver and conductor took off and he was arrested.

The 2nd Appellant in his sworn defence said he boarded the motor vehicle KAS 478R at Kamumu. At Ugweru their driver blocked a motor KSK and the driver and conductors fought. Near Siakago a police vehicle was spotted and their motor vehicle took another route. Their driver and conductor took off and that's how he was arrested.

When these appeals (now consolidated) came for hearing, the Appellants presented the Court with written submissions. They are mainly challenging their identification by the Prosecution witnesses.

Mr. Wanyonyi the learned State Counsel for the State opposed the appeal. He submitted that PW1 and PW2 knew their attackers and gave their names. The incident occurred at 8.30am and the Appellants were identified. And that the evidence of PW1 and PW2 was corroborated by that of the investigating officer.

In the case of ***NGUI –V- REPUBLIC 1984 KLR 729*** the Court of Appeal stated thus;

1. ***The first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Court's***

findings and conclusions.

It is therefore the duty of this Court as a 1st appellate Court to re-examine and re-evaluate the evidence that was adduced and make its own conclusions, while not losing sight of the fact that it did see nor hear the witnesses. I have considered the submissions by the learned State Counsel and those of both Appellants. I have dutifully re-evaluated the evidence that was adduced before the Court below.

The learned trial Magistrate after hearing the evidence of eleven (11) witnesses dismissed the charges in count 2 to count 6. He went further and reduced count 1 and count 7 to simple robbery contrary to section 296 (1) of the Penal Code on the ground that though the complainants were injured the weapons allegedly used were not recovered from the motor vehicle the Appellants were arrested from. Would this be a good reason for reducing the charge from Robbery with Violence to simple robbery? Under section 296(2) of Penal Code the following circumstances would found a conviction for Robbery with Violence;

1. ***Offender being armed with a dangerous or offensive weapon or instrument.***
2. ***Offender being in company with one or more other person or persons***
3. ***If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.***

Any of these 3 sets of circumstances is sufficient to sustain a conviction under the section (Ref: ***MUNYI alias KARAYA & ANOTHER –V- REPUBLIC [2005]1 KLR 441).***

The Prosecution must then choose and state which of these elements distinguishes the charge from the one defined in section 295. The Court of appeal in ***ODHIAMBO & ANOTHER –V- REPUBLIC CRIMINAL APPEAL NO.5/05 (MSA) – [2005]2 KLR 176*** held thus;

> ***"Where any of these elements or ingredients are proved there would be no discretion on the part of the trial Court but to convict under section 296(2)."***

In the present case the particulars in both count 1 and count 7 indicated that the attackers had used actual violence against the complainants. The learned trial Magistrate had actually found that the complainants had been injured as proved by the medical evidence of PW7. He also found that the complainants had been robbed. He did not therefore have any discretion to reduce the charge. He should have left the charge intact and proceeded to find out if indeed it is the Appellants who had committed this offence.

The learned trial Magistrate relied on the evidence of PW1, PW2 and PW8 to convict the Appellants. I would wish to refer to his finding at page 37 lines 7-8 where he states;

> ***"It was not necessary to conduct an identification parade given that the complainant knew the accused well".***

This now brings me to the next question. Did PW1 and PW2 know the Appellants? In his evidence in chief PW1 gave a list of his attackers as;

Kifaru

Wararu

Kanguu Dave

Mwiti

Phillip Kariuki

Gitonga

Mburia

On the other hand PW2 said the attackers were:

Kifaru

Gitonga

Mwiti

Kago

Mburia

PW1 further stated that those in Court were **WARARU & KANGA**. In cross-examination he stated that **WARARU** was 1st Appellant but he does not say who **KANGA** is. And in his list of the attackers the name of **KANGA** is not there. Secondly the 2nd Appellant is ALFRED NJIRU MUNYI alias KAGO so he cannot be said to be KANGA. This same PW1 as per the investigation diary told the police that KARIUKI took his money while GITONGA took him out of the vehicle. He even says in cross-examination that it's MWITI who took his money. It is therefore clear that WARARU and the so called KANGA did not do anything to him. And for sure if they had been at the scene he could have given their names to the police officers.

I now come to PW2. He stated that he knew the Appellants before this incident. He knew the 1st Appellant as WAARIA and 2nd Appellant as KAGO. Apparently even PW2 did not give the names of his attackers to the police including MWITI who took money from him. If indeed PW1 and PW2 knew their attackers prior to this incident and they saw them well as it was daytime why did they not give their names to the police?

This is what Court of Appeal had to say about such an omission in the case of ***SIMIYU & ANOTHER –V- REPUBLIC [2005]1 KLR 192***

1. ***In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of the description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.***
2. ***The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.***

I therefore find the dock identification of the Appellants in Court to be of no value. Even if the Court were to consider the identification parade where PW1 and PW2 were witnesses the same could be of no assistance at all. PW10 had several witnesses for the two Appellants. He states in his evidence at page 23 lines 25-26;

"I used same members of the parade all through"

This was contrary to the rules because it was so easy for the witnesses to pick out the new face in the parade more so the 2nd Appellant. This incident occurred against a background of a country wide strike. PW8 and the OCS arrested three persons. They were running away from the motor vehicle KAS 478R. There was nothing recovered from either of the Appellants to connect them with the robbery. The Appellants in their evidence had not denied being aboard the motor vehicle KAS 478R and being arrested from there. They claimed to have been passengers caught up in the melee. PW8 did not find any of the complainants' stolen properties on them. So what connected them to the offence? According to the evidence they ran away from the vehicle as the police gave chase. Running away in itself without any

other evidence is not sufficient proof of guilt. It was the duty of the Prosecution to prove that the Appellants were part of the gang that had robbed PW1 and PW2 and that they were not passengers in the KAS 478R vehicle.

After evaluating this evidence I am of the considered view that the Appellants ought to have been acquitted on all the counts they faced. The convictions are unsafe. I allow the appeal and quash the convictions of both Counts. The sentence of four (4) years on both counts is set aside.

Both Appellants to be set free unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

Both Appellants

Njue – C/c