



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 105 OF 2007**

**JULIUS MARITE.....1<sup>ST</sup> APPELLANT**

**FRED NGINYI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 14550 of 2004 in the Chief Magistrate's court at Makadara – Miss Karani (SRM) on 21/2/2006)*

**JUDGMENT**

1. The two appellants **Fred Nginyi** and **Julius Marite** filed appeals against conviction by M/s Karani the learned Senior Resident Magistrate (as she then was), for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Cr. Case no. 14550 of 2004** at Makadara Chief Magistrate's court.
2. It had been alleged that on 22<sup>nd</sup> day of June 2004 at Umoja Innercore in Nairobi, jointly with others not before court while armed with pistols, they robbed Linus Salamba Alulu of a motor vehicle registration No. KAN 674 M Toyota Corolla Salon, mobile phone make Siemens C-25 worth Kshs.8,500/= and cash Kshs.3,000/= all valued at Kshs.411,500/= and at or immediately before or after the time of such robbery threatened to use actual violence against the said Linus Salamba Alulu. They were sentenced to death in accordance with the law.
3. The two appeals were consolidated and canvassed as Cr. Appeal no. 106/2007, with the appellants filing written submissions while the state submitted orally before Khaminwa and Warsame JJ on 14<sup>th</sup> October 2010. Judgment was not however rendered in the case. On 20<sup>th</sup> May 2013 when the appellants appeared before us, they submitted that they had no wish to re-argue their appeals and expressed their wish that we should go ahead and write the judgement based on the submissions

on record. This is therefore our judgment.

4. The two appellants filed six identical grounds of appeal stating that:
  - a. *The trial court failed to rule out the possibility of error in evidence of identification.*
  - b. *Language barrier hampered their participation in the trial;*
  - c. *Their constitutional rights under section 72(3)(b) were violated;*
  - d. *Section 204 CPC was contravened;*
  - e. *The prosecution case was not proved beyond reasonable doubt;*
  - f. *The charge sheet was defective.*
5. This being the first appellate court, we are mandated to reconsider and re-evaluate the evidence that was tendered before the trial court and make our own findings and arrive at our own conclusion as to whether the appellants were rightly convicted or not, while keeping in mind that we neither saw nor heard the witnesses testify: see **OKENO VS REPUBLIC [1972] EA 32**.
6. The prosecution called a total of four witnesses the sum total of whose evidence was that, **PW1** stopped at Umoja Innercore to drop a friend at 2.00 a.m. on 21<sup>st</sup> June 2004. As he reversed out, a car blocked him from behind. Three men came out of it and approached him brandishing pistols. They bundled him into the back of his car and drove off with him. Two of the men sat in the front seats while the third sat behind with him and took Kshs.3000 and a Siemens C 35 mobile phone from his pocket.
7. They were following the car that had been used to block his but when they came to a junction, the first car turned left while his turned right. They came to a dead end and the two men abandoned him in his motor vehicle and fled. Five minutes later police officers from the Flying Squad arrived at the scene. They ordered him to drive in the direction taken by the other motor vehicle and presently they came upon the said motor vehicle. It had stopped and two young men were sitting on the ground next it, under the watch of police officers. Those two were subsequently charged at Buru buru Police Station and are appellants before the court.
8. According to **PW1** he did not identify them because they had been in the other car. The two were arrested and taken to Buru buru Police Station and he was only able to pick the 2<sup>nd</sup> appellant at a subsequent identification parade because he had been able to see him as he sat on the ground beside the car.
9. The learned state counsel Mr. Muriithi, opposing the appeal on behalf of the state, submitted that the evidence on record was overwhelming in support of the conviction and sentence of each appellant. He argued that the appellants were arrested late in the night, and could not explain what they were doing at the scene, and that the defence was inadequate, and not persuasive enough to dislodge the prosecution case. He termed it as an afterthought. The learned state counsel's submission had the effect of shifting the burden of proof onto the appellants. This being a criminal trial there is no such burden placed upon the appellants by law.
10. The evidence of P.C Sang, the Arresting Officer appeared to throw a spanner into the works in a manner of speaking. He testified that upon hearing his neighbours shout that a car had been car-jacked, he alerted his Flying Squad colleagues whose car was within the estate. Together they pursued the two cars and came upon them 1 kilometre down the road. He testified that the complainant was in the driver's seat of his car with a female passenger who had also been robbed of a handbag and that the other car which had been used to block him had two passengers who are the appellants.

- 11.This evidence differed from that of the complainant who did not mention the presence of any other passenger in his car at the time of the robbery. Secondly he told the court that the two cars parted ways at a junction and did not re-unite until the police arrived and directed him to drive in the direction taken by the other motor vehicle.
- 12.After a careful analysis of the evidence adduced by the prosecution, we find that it was not sufficient to sustain a conviction against any of the appellants.
- 13.For the foregoing reasons we find that the appeal is meritorious. We quash the conviction and set aside the sentence imposed on the appellants, and order that the appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**SIGNED DATED and DELIVERED in open court this 24<sup>th</sup> day of July 2013.**

**A.MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**