



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEALS NO. 52, 53 & 51 OF 2012 (CONSOLIDATED)

1. **SAMMY MUTHANGYA KATUTA**
2. **KIEMA WAMBUA**
3. **KITONGA WAMBUA MWALILI APPELLANT**

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Principal Magistrate B.M. Kimemia P.M delivered on 11/4/2012 in Kitui Principal Magistrate Criminal Case No. 411 of 2010)

(Before Beatrice Thurairaja Jaden and J.M Ngugi JJ)

J U D G M E N T

1. The 1st Appellant, **Sammy Muthangya Katuta**, the 2nd Appellant, **Kiema Wambua** and the 3rd Appellant **Kitonga Wambua Mwalili** were convicted and sentenced to death for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence were that on the 17th day of May 2010 at around 2.00 a.m. at **Majengo estate, Majengo Sub-location**, Township Location in **Kitui District** of the **Eastern Province**, jointly with others not before court while armed with dangerous weapons namely metal bar, pangas, *rungus*, hammer, bows, arrows and torches robbed **Stephen Nzioki Nzolo** cash Kshs.11,836/=, a T.V. set make **Sonymax**, 1 carton of Lakers spirit, 1 carton of Taner spirit, 2 Sony Speakers, 1 crate of beer, 4 packets of cigarettes, 1 beer keg pump, 1 mobile phone make Nokia 6020 all valued at Kshs. 38,801/= the property of **Stephen Nzioki Nzolo** and at or immediately before or immediately after the time of such robbery used actual violence on the said **Stephen Nzioki Nzolo**.

2. The prosecution case was that on the night of 17/5/2010 at about 2.00 a.m., the complainant in this case, PW1 **Stephen Nzioki Nzolo**, a watchman, was at his place of work at **Kasolina Bar** in **Majengo estate** in **Kitui town**. A gang of about seven people stormed into the compound with pangas, *'rungus'* and bows and arrows. The gang had covered their heads in paper bags. They attacked the watchman with the *'rungus'* and panga and tied him up. The watchman was robbed of his cell phone, Kshs.450/=, keys and a whistle. Some of the assailants stood guard over the watchman while the others broke into the bar.
3. A report of the robbery was made at **Kitui Police Station**. The police officers proceeded to the bar and surrounded the same. The robbers started fleeing from the bar. The 1st Appellant was, in the process, shot on the leg and arrested. All the others managed to escape. The 3rd Appellant

- who was known to one of the police officers was said to have been spotted at the scene. The 1st Appellant mentioned the 2nd and 3rd Appellant who were later arrested. The three Appellants were subsequently arraigned in court.
4. The 1st Appellant gave a sworn statement of defence. No witnesses were called. He stated that he is a businessman who sells *miraa* in **Kitui town**. That on the material day, he woke up at 3.30 a.m. and started walking to the bus stop at **Kiritine** where he was to catch the 4.00 a.m. vehicle. Before he reached the bus stop, he heard some voices telling him to stop. He did not stop because that area is dangerous. He was then shot on the leg and uniformed police officers came and took him to the hospital and later to the police station. He denied the offence and stated that he was not shot at the scene.
 5. The 2nd Appellant in his defence gave sworn evidence. No witnesses were called. He stated that he sells clothes and bhang in **Kitui town**. That on the material day at about 5.00 a.m. he was awoken by a knock at his door. When he opened the police officers entered his house and carried out a search. They recovered some bhang and arrested him and escorted him to the police station. He denied the offence and stated that he did not know the 1st Appellant. He further stated that he had a grudge with one of the police officers who arrested him because the police officer used to collect bribes from him.
 6. The 3rd Appellant in his defence gave sworn evidence. No witnesses were called. He stated that he is a tout at **Kunda Kindu** bus stage. He further stated that he was arrested from the said bus stage. He was then escorted to the police station. He denied the offence and stated that this case was framed up against him by a police officer who had a grudge against him. He further stated that he did not know the 1st and 2nd Appellant and only found them in the police cells. He further stated that the police officer who stated that he saw him at the scene did not tell the truth.
 7. After a full hearing, the trial magistrate convicted the Appellants and sentenced them to death. The Appellants were dissatisfied with both the conviction and sentence and appealed to this court. Their three separate appeals were consolidated and heard as one. This judgment is therefore in respect of each of the three Appeals.
 8. The grounds of appeal can be summarized as follows:-
 - v. **That the evidence of the prosecution witnesses was inconsistent, contradictory and unreliable.**
 - v. **That crucial witnesses were not called.**
 - v. **That the evidence of arrest was not credible.**
 - v. **That the circumstances were not favourable for positive identification.**
 - vi. **That the burden of proof was shifted to the defence.**
 - v. **That the defence cases though plausible were rejected.**
 9. Each of the Appellants relied on their written submissions. The submissions essentially expounded on the grounds of appeal. The 1st Appellant in addition stated that his defence was not recorded in full and further stated that he did not understand English language.
 10. **Ms. Abuga** for the State opposed the appeal. She submitted that the 1st Appellant was arrested at the scene of crime after being shot and that the 2nd and 3rd Appellant were mentioned by the 1st Appellant and that the 3rd Appellant was also seen at the scene. The defence cases were termed as mere denials.
 11. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
 12. The complainant (PW1) gave a detailed account of evidence on how he was robbed and injured in the process. His evidence was corroborated by that of the bar manager, PW2 **Monica Mutinda**. Both PW1 and PW2 were not able to identify the robbers but the bar manager identified the recovered goods. The evidence of PW4 the Clinical Officer confirmed that the complainant sustained injuries during the robbery.
 13. The police officers who proceeded to the scene included PW3 **P.C Omondi Tula**, PW5 **Cpl. Timothy Muya** and PW6 **APC Ali Salat**. The three police officers found the robbers inside the bar and surrounded the scene but the robbers fled in all directions. There is however no doubt that the robbery took place.

14. The question that remains to be answered is whether the Appellants were amongst the perpetrators of the offence. We propose to deal with the evidence relating to each of the Appellants individually.
15. According to the evidence of **APC Salat** (PW6), the robbers started fleeing in all directions when they sensed the presence of police officers. It is the evidence of **APC Salat** that the 1st Appellant was armed with a bow and arrow and advanced towards him and defied orders made for him to stop and **APC Salat** ended up shooting him. **APC Salat's** further evidence was that the security light aided him in seeing the 1st Appellant who was running away from the scene of crime.
16. PW5 **Cpl. Timothy Muya** who was with **APC Salat** (PW6) at the scene testified that they found the lights on both inside and outside the bar. PW5 described the light as “**enough**” and stated that he saw the 1st Appellant heading towards the road before being shot. He described the distance at which the 1st Appellant was shot as 20 metres from the front door of the shop. PW6 further described the main road as about 5 metres from the front door of the shop.
17. PW3 **PC Omondi** the Investigating Officer also testified that he saw the 1st Appellant going towards **APC Salat** before **APC Salat** fired. PW3 pointed out that there were electricity lights and he was able to see the 1st appellant.
18. The evidence of PW3, PW5 and PW6 the police officers who proceeded to the scene is corroborative and shows that there was light at the scene and they surrounded the bar before the 1st Appellant was shot at the scene while the 1st Appellant was aiming at PW6 with a bow and arrows.
19. The shooting occurred at about 3.30 a.m. The defence by the 1st Appellant that he was on his way to the bus stop is not convincing. Although the 1st Appellant stated that the people who called out to him to stop did not identify themselves, it was his evidence that the police officers were in uniform. The defence by the 1st Appellant that the bow and arrows belonged to the watchman (PW1) is not persuasive either. The watchman was attacked and tied up. The watchman's evidence was that he was armed with a bow and arrows. The robbers were also armed with bows and arrows amongst other crude weapons.
20. The evidence of the three police officers (PW3, PW5 and PW6) places the 1st Appellant squarely at the scene of crime. The defence raised by the 1st Appellant did not cast any reasonable doubts on the prosecution case in view of the strong evidence adduced against him.
21. The evidence that links the 2nd Appellant to the offence is that he was mentioned by the 1st Appellant. This is accomplice evidence which is evidence of the weakest kind and requires corroboration by other material evidence (**See Muiruri & 2 Others –vs- Republic (2002) 1 KLR**). There is no such corroboration. None of the prosecution witnesses gave evidence that connects the 2nd Appellant to the scene of crime. There was therefore no basis upon which the 2nd Appellant was placed on his defence and eventually convicted.
22. The 3rd Appellant was one of the robbers who escaped from the scene according to the evidence of PW5 **Cpl. Muya**. It was the evidence of PW5 that he knew the 3rd Appellant and saw the 3rd Appellant running towards the bush while carrying a speaker and PW5 shouted “**Mwalili stop! I know you.**” Then the 3rd Appellant dropped the speakers and ran away into the bush. According to PW5 there was light and he saw the 3rd Appellant from a distance of about five metres. We agree with the trial magistrate that there was sufficient light and that PW5's evidence is that of recognition from close proximity. As stated in the case of **Anjoni –vs- Republic “A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”**
23. The 3rd Appellant was arrested after being mentioned by the 1st Appellant. Although this is accomplice evidence, the evidence of PW5 that he saw the 3rd Appellant at the scene offers material corroboration to this accomplice evidence. Although the 3rd Appellant in his defence stated that he was framed up by PW5, there are no reasons that emerge from the record why PW5 would frame him up. As analysed above, the 3rd Appellant was also mentioned by the 1st Appellant. We have no reason to differ with the finding of the trial magistrate who had the benefit of seeing the demeanour of the witnesses.

24. With the foregoing, we reach the conclusion that the appeal by the 2nd Appellant has merit. We hereby quash the conviction and set aside the sentence meted against the 2nd Appellant, **Kiema Wambua** and he is set at liberty unless otherwise lawfully held.
25. The 1st Appellant, **Sammy Muthangya Katuta** and the 3rd Appellant **Kitonga Wambua Mwalili** were convicted on sound evidence and we uphold their conviction and sentence. The appeals by the **1st Appellant Sammy Muthangya Katuta** and the **3rd Appellant Kitonga Wambua Mwalili** have no merits and we dismiss the same.

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B. THURANIRA JADEN

JUDGE

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J.M. NGUGI

JUDGE

Dated and delivered at Machakos this 30th day of October 2013.

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B. THURANIRA JADEN

JUDGE