



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Criminal Appeal 136 of 2011**

**CONSOLIDATED WITH**

**Criminal Appeal 134 of 2011**

**Criminal appeal 135 of 2011**

**Criminal Appeal 131 of 2011**

**(From the original conviction and sentence of the Chief Magistrate's Court at Nairobi in Criminal Case No.1492 of 2006 – K. Bidali)**

**HARRISON KARIUKI MWANGI ..... 1<sup>ST</sup> APPELLANT**

**KENNETH OTIENO JUMA ..... 2<sup>ND</sup> APPELLANT**

**JOSHUA OMOSA NYANGAU ..... 3<sup>RD</sup> APPELLANT**

**BONIFACE MUSYOKI MUTUA ..... 4<sup>TH</sup> APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT OF THE COURT**

**Ms Nyauncho – State Counsel**

**E. Ondieki – for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants**

**1<sup>st</sup> Appellant – in Person**

**4<sup>th</sup> Appellant – in Person**

1. The appellant, Harrison Kariuki Mwangi alias Karis (1<sup>st</sup> Appellant), Joshua Omosa Nyangau alias Argo (2<sup>nd</sup> Appellant), Kenneth Otieno Juma alias Teko (3<sup>rd</sup> Appellant) and Boniface Musyoka Mutua alias Bonnie (4<sup>th</sup> Appellant) were charged with five (5) counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charges were that on 6<sup>th</sup> October 2005 they robbed Walter Andaro Omollo of his property, on 13<sup>th</sup> April 2006 they robbed Mercy Macharia, Geoffrey Odhiambo Ajulu, Irene Kanini Maweu and Johnson

Ekamais of their property, all the four complainants were in Olympic Estate Kibera. In the course of these robberies the appellants together with others not before court were armed with dangerous weapons namely pistols. The appellants pleaded not guilty to these charges and after a full trial the 4 appellants were found guilty and convicted and sentenced to death as the mandatory sentence provided by the law. Being aggrieved by their conviction and sentence, each appellant filed a separate appeal against his conviction and sentence. At the hearing of these appeals, the four appeals filed were consolidated and heard as one.

## **The charge**

### **Count I**

1. Harrison Kariuki Mwangi alias Karis
2. Joshua Omosa Nyangau alias Argo
3. Kenneth Otieno Juma alias Teko
4. Boniface Musyoka Mutua alias Bonnie
5. Ibrahim Hussein Madegwa
6. Vicky Odhiambo Juma alias Vickie
7. Mauled Juma Salim alias Abdi
8. Vincent Muhanji alias osama

On the 6<sup>th</sup> day of October 2005 at Olympic Estate in Kibera within Nairobi area, jointly with others not before court and while armed with dangerous weapons namely pistols robbed WALTER ANDARO OMOLLO of a motor vehicle registration No. KAR 229H make Peugeot 406, a video machine make JVC, DVD player make Phillips, water heater, four mobile phones, six pairs of shoes, Kodak Digital Camera, iron box, three wall clocks, assorted clothes and jewellery all valued at Kshs.370, 000/= and at or immediately after or immediately before the time of such robbery used actual violence to the said WALTER ANDARO OMOLLO.

Count II, all the appellants together with others;

On the 13 day of April 2006 at Olympic Estate in Kibera within Nairobi area, jointly with others not before court and while armed with dangerous weapons namely pistols robbed MERCY MACHARIA of two finger rings, Standard Chartered Bank ATM Card, Nokia Phone, a silver wrist watch, a gold coated wrist watch and cash Kshs.3000/= all valued at Kshs.80, 000/= and at or immediately after or immediately before the time of such robbery used actual violence to the said MERCY MACHARIA.

Count III, all the appellants together with others;

On the 13<sup>th</sup> day of April 2006 at Olympic Estate in Kibera within Nairobi area, jointly with others not before court and while armed with dangerous weapons namely pistols robbed GEOFRFREY ODHIAMBO AJULU of a Motorola C200 mobile phone and cash 4,620/= and at or immediately after or immediately before the time of such robbery used actual violence to the said GEOFFREY ODHIAMBO AJULU.

Count IV, all the appellants together with others;

On the 13 day of April 2006 at Olympic Estate in Kibera within Nairobi area, jointly with others not before court and while armed with dangerous weapons namely pistols robbed IRENE KANINI MAWEU of a Nokia Phone valued at Ksh.5000/= and at or immediately after or immediately before the time of such robbery used actual violence to the said IRENE KANINI MAWEU.

Count V, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were together with others;

On the 13 day of April 2006 along Kinoo Road in Kibera in Kibera within Nairobi area, jointly with others not before court and while armed with dangerous weapons namely pistols attempted No.78884 Police Constable JOHNSON EKAMAIS of a motor vehicle Registration No. KAK 082D make Hyundai valued at Kshs.400, 000/= and at or immediately after or immediately before the time of such robbery used actual violence to the said JOHNSON EKAMAIS.

## Grounds of Appeal

2. The appellants raised more or similar grounds of appeal in their petitions, all had 8 grounds of appeal and on 16<sup>th</sup> October 2013, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> appellants filed a Supplementary Petition of Appeal. The appellants were aggrieved that they had been convicted by the trial magistrate who had relied on the prosecution's evidence which had not established their guilt to the required legal standard. That the charge sheet was defective and the trial court relied on the evidence of identification that was not free from possibility of error, the evidence adduced was contradictory especially that of PW1 and PW4 while in essence PW1 and PW2 were never recalled yet the court relied on their evidence when the trial started *de novo*, that constitutional rights were violated with regard to sections 70(a), (b),(c), 72(3)(b) of the repealed Constitution and section 77(2)(f) as read together with section 198 of the Criminal procedure Code (CPC). Other grounds were that the court relied on circumstantial evidence which did not meet the required standards and adopted the evidence of PW1 under section 34 of the Evidence Act to the prejudice of the appellants. That the court failed to analyse the defence and further failed to have the OB demanded by the appellants produced.
3. At the hearing of the appeal, the 1<sup>st</sup> appellant and the 4<sup>th</sup> appellants made their oral presentations in support of their appeals, the 2<sup>nd</sup> appellant and the 3<sup>rd</sup> appellants were represented and their advocate made his oral submissions. Ms. Nyauncho for the State opposed the appeals and urged the court to uphold the conviction of the lower court. We will consider all the arguments made before us.

## Submissions

4. The 1<sup>st</sup> appellant submitted that the conviction by the trial magistrate was wrong as the learned trial magistrate was not the one who convicted and passed sentence and therefore wrongly relied on PW4, Mercy Macharia's evidence yet she had not been recalled when hearing commenced afresh. Her evidence was the only one that pointed out to the appellant when she was called to Kilimani police Station for the identification parade and only identified 3 people who included the 1<sup>st</sup> appellant and at the hearing, PW4 said she identified the 1<sup>st</sup> appellant and also stated that the parade officer was going to confirm this to court from his records, but when this officer gave evidence, he could not state how the 1<sup>st</sup> appellant was on the parade. The parade form was not produced and finally conceded that 1<sup>st</sup> appellant was not paraded. That he was arrested on 15/5/2006 and kept for 40 days in police custody and the delay was not explained and hence the trial was unconstitutional and the appeal should be allowed.
5. For the 2<sup>nd</sup> appellant and 3<sup>rd</sup> appellant, Ondieki Advocate submitted that the charge is defective and was never cured. PW1 and PW2 were categorical that they were robbed on 13/4/2006 while in court PW4 gave evidence that the robbery was on 13/4/06 and in the charge it is indicated the offence occurred on 6/10/05. That this is contrary to the principles outlined in ***Yongo versus Republic [1983] KLR, 319***. That 3/9/09 the court directed that trial commence afresh [*de novo*] under section 200 Criminal Procedure Code (CPC), where all the old evidence is disregarded but the subsequent trial magistrate introduced the evidence of PW1 and PW2 without recalling them contrary to section 34 of the Evidence Act. There were two PW4 with regard to the same proceedings and such evidence should not have been relied upon to corroborate the evidence of other witnesses. Further that there were contradictions by the witnesses when one officer attended more than one identification parade as recorded on the forms yet PW1 and PW4 never gave any

- descriptions of the people who attacked them and relied on the case of **Wanjohi and others versus Republic [1989] KLR 415**. When trial commenced *de novo* PW1 to PW7 were all police officers and the complainants were never recalled to testify. That there was no fair trial as the appellants asked to have the OB from several police stations but were never produced and this compromised their defence. That this was a case of suspicion which cannot be a basis for conviction and there exists doubts on the conviction. The 2<sup>nd</sup> appellant is 17 years old as confirmed by the government Doctor and hence could not be sentenced to death and the appeals of the 2<sup>nd</sup> and 3<sup>rd</sup> appellant should be allowed.
6. The 4<sup>th</sup> appellant submitted that the complainant Mercy Macharia identified him but from the record, PW1 was a police officer and this was not corroborated or a parade conducted. When trial commenced *de novo*, the complainants were never recalled contrary to section 34 of the Evidence Act. That PW1 stated that the robbery was on 13/4/07, which was different from other witnesses and at a time that he had been arrested. He asked for OBs from Kabete, Rongai, Industrial Area and Kilimani for his defence but these were never produced. The 4<sup>th</sup> appellant sought to have several witnesses recalled but they were said to be in Uganda and therefore never recalled.
  7. Ms Nyauncho for the state opposed the appeals and submitted that the complainants were robbed by the appellants who were armed with dangerous weapons. They had a gun which was analysed by a firearm examiner who came to the conclusion that the firearm and bullets were capable of being used and this was recovered from the 2<sup>nd</sup> appellants [Joshua Mosa Nyangau] house. PW4, Corporal Mwangi was taken by 3<sup>rd</sup> appellant to the 2<sup>nd</sup> appellant's house and the two proceeded to lead them to the other appellants. That the charge is not defective as this was addressed by the trial court and the appellants acquitted on count 1 and count 3 and only convicted on count 2. The case started *de novo*, prosecution applied to apply section 34 of the Evidence Act which allows such evidence to be admitted where witnesses cannot be traced.

### Issues for determination

8. The 4 appellants were found guilty by the trial magistrate and their co-accused were acquitted. The issues outlined related to thee being a defective charge, identification and the witnesses called after heading started afresh. On the defective charge and the recall of PW4, the learned trial magistrate put this into consideration and acquitted the appellants of the first count and the 4<sup>th</sup> Counts. On identification, the learned trial magistrate at page 251 of the record stated;
 

*... concerning the issue of identification it is clear from the evidence of PW 1, 2 and 3 in the earlier trial that they took part in identification parades. All the 3 witnesses stated that the robbery took place around 10 in the night but they stated they spent a considerable amount of time with the robbers before they left. According to PW3 they spent about 2 hours in the house during which time they held conversations with the robbers and were able to clearly see and mark their faces. PW1 stated that the robbers attached [attacked] them at 8p.m. and finally left around 10p.m. [emphasis added]*
9. We have evaluated this evidence together with the entire record and find that, when the learned trial magistrate found and acquitted the appellants of the 1st and the 4<sup>th</sup> counts then proceeded to assess the evidence and acquitted them of the 5<sup>th</sup> Count, the only charges they faced were under the 2<sup>nd</sup> count and 3<sup>rd</sup> counts. To later rely on the evidence produced in this regard as under the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> counts, was a misapplication of the law and indeed go contrary to principles set out in **Yongo versus Republic case**. The only count where the 4 appellants were found guilty was with regard to count 2.
10. When trial commenced *de novo*, who became PW1, PW2 and PW3? PW1 is recorded to be CIP Chacha Okwach, PW2 was PC Benedict Mwendu, and PW3 was CIP Phyllis Kaniu while PW4 was CPL David Mwangi then the CID officer Kilimani Police station. On 12/1/10 when hearing commenced before a different Magistrate, the learned trial magistrate took the appellants through the various options as under section 2000 CPC and each opted to have proceedings to go on and

not to recall any witness, the next witness called after this directions were made was PW4, PC Patrick Oyalo. In this order and in reverse;

PW9 is not stated;

PW8 was P.C Ekamais Johnson the complainant in the fifth count;

PW7, William Siyanga of C.I.D. Kilimani Police Station;

PW6, CIP, Joseph Nzioka, Kilimani Police Station and conducted the identification parade;

PW5, SGT. Josiah Gichohi who said he was on the scene of crime on the night of 6<sup>th</sup> and 7<sup>th</sup> of April 2006;

PW4, CPL. David Mwangi CID Malindi and previously CID Kilimani in May and June 2006;

PW3, CIP Phyllis Kaniu of CID Headquarters and formerly DCIO Kilimani, conducted identification parade with 3 witnesses, Walter Andaro, Catherine Macharia and Mercy Macharia;

PW2, P.C. Benedict Mwendo of CID Kilimani; and

PW1, CIP. Chacha Okwach of CID office Kilimani who conducted the identification parade.

This outline is crucial in our evaluation of the grounds of appeal and the submissions made at the hearing. We note at page 110 of the record, the learned trial magistrate on 2/3/09 recorded;

*Court: some of the accused want the case to start de novo it's hereby ordered that case shall start de novo.*

...

*Prosecutor: the police officers have been transferred and some can't [cannot] be traced. The witnesses had testified when the accused asked that case start de novo. It has not been easy to trace the witnesses.*

*Court: all considered the delay in this case was caused by accused person's reference to the high Court what was disallowed. Accused requested that the matter starts de novo has contributed to the delay. While I agree that it might not be easy to trace civilian witnesses, I disagree that police officers cannot be traced. Matter adjourned for hearing on 2/4/09 for the 3 officers who are bonded.*

11. On this basis, the witnesses outlined above PW1 to PW10 were called in evidence. Apart from PW8 who was a complaint in count 5, all the others were police officers of various ranks who conducted investigations, identification parade and the arrest of the appellants. With this evidence, the prosecution closed its case and applied to rely on **section 34 of the Evidence Act** on the grounds that some witnesses travelled to Uganda and could not be traced.

12. In our evaluation of **section 34 of the Evidence Act** it reads;

*Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceedings, for the purpose of proving the facts which it states, in the following circumstances*

a. where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable.

13. In this regard, section **34 of the Evidence Act**, there are outlined circumstances that the court must be satisfied with;

- i. The witness is dead or cannot be found;
- ii. The witness is incapable of giving evidence;
- iii. The witness has been kept out of the way by the adverse party; and
- iv. Presence of the witness cannot be obtained without an amount of delay or expense.

14. The court must be satisfied that where any of the above grounds are cited, the same are not unreasonable and are not meant to prejudice the defence noting the nature of charges an accused is faced with. Great causation must be employed in this respect. In this case only one complainant was called after proceedings commenced *de novo* that is PW8, Johnson Ekamais. The prosecution made a general application to rely on section **34 of the Evidence Act**, ‘... some of the witnesses are actually in Uganda and also Investigating Officer has actually travelled to Uganda but was unable to trace the witnesses. ...’

15. There was no statement as to exactly which witnesses went to Uganda and could not be traced. From the charge sheet, there were 5 complainants, Walter Andaro Omollo, Mercy Macharia, Geoffrey Odhiambo Ajulu, Irene Kanini Maweu and Johnson Ekamais. Apart from Johnson Ekamais, none of the others were stated to be dead or could not be found, were incapable of giving evidence, were kept out by the adverse party or their presence could not be obtained without unreasonable delay. With that said, there were no complainants in this case with regard to Count 1, Count 2, Count 3 and Count 4. With regard to Count 5 where PW8 gave evidence, the learned trial magistrate upon assessment of the evidence presented before him, found the identification of PW8 of his attackers was not possible as it was in the dark when street lights were off and visibility poor and therefore to sustain a conviction in that regard was not possible and proceeded to acquit the appellants of the 5<sup>th</sup> count. The provisions of **section 200 of the CPC** are mandatory and cannot be cured by the general application of **section 34 of the Evidence Act**.

16. Considering the foregoing it is our considered view that the many police officers involved in this case should have well coordinated their work to have a better outcome in their investigations. There were several people robbed with violence, property was stolen by a consortium of people and the charges that the appellants face are grave and serious. We have considered whether to order a retrial or not bearing in mind that such an order does not mean that the appellants were not properly found guilty but the same absurdities that led to some witnesses not being found or could not be traced may as well lead to a miscarriage of justice and thus prejudicial to the appellant.

17. With these findings to go through the other grounds of appeal would be mute.

In conclusion, we allow the appeals and quash the convictions and set aside the sentences. The appellants are set free unless otherwise lawfully held. It is so ordered.

**Dated and delivered at Nairobi this 22<sup>nd</sup> Day of November 2013**

**M. Mbaru**

**J. Rika**

**Judge**

**Judge**

**In the presence of:**

**Court Clerks** .....

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