



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.61 OF 2011

MARY WANJIRU KIBE *alias* WAGATHEE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in the Senior Principal Magistrate's Court at Nyeri in Criminal Case No.892 of 2010 by J. KIARIE – SPM)

J U D G M E N T

The two appellants were charged with the offence of Attempted Robbery with Violence contrary to Section 297(2) of the penal code.

The evidence adduced at the trial court was comprised of the testimony of eight witnesses.

The first witness was **Peter Nderitu Githithu** was the chairman of Rutuma Farmers Co-op. Society Limited at Mathira West. On the night of 8th and 9th September 2010 at about 3.00am he got a telephone call from the secretary/manager of Rutuma Farmers Factory and society, Mr. Wambugu that there was a robbery at Ruthagati factory which he represented. He went there at about 4.00 am and found that the police had been at the scene and had arrested one man. He established that the outer fencing wire surrounding the factory had been cut but the robbery was not successful.

The second witness Mr **Francis Waheire Mbutia** was a watchman with the factory who had worked for five years. He recalled that on the night of 9th – 9th September 2010 at about 2.30 am he was at work at Ruthagati factory with his colleague a fellow watchman when some men entered the factory and tied him and robbed him. His colleague heard the commotion and ran to seek for help. The neighbours raised alarm using a whistle and the robbers took off. He managed to untie himself and pressed the alarm bell that prompted the police to come to the scene of the crime. 20 or 30 minutes after the incident, a white lorry came to the gate whose registration number was KAZ 473H. The policemen who were at the scene asked the watchman to open the gate and inquired what the persons in the lorry wanted. He did as instructed by police but instead of entering the lorry turned and sped off. The watchman noted that there were about 4 people in the lorry. The 2nd appellant was amongst the people in the lorry. He alighted before the lorry sped off. He attempted to flee but was arrested. While under arrest by the public his phone rang and Moses a farmer picked it and a woman caller told him that things had gone bad. The appellant was taken to Kiamachi police station where he recorded a statement. The watchman was treated and discharged and later filled a P3 form.

On cross-examination he states that the appellant was in the lorry which came at about 2.30pm and had four occupants and that the robbers were not the ones in the lorry.

The third witness **Moses Maina Mureithi** was in the house asleep when a watchman at the neighbouring factory known as George Maina woke him up at 2.00am and informed him that there was a robbery at the factory. He got a panga and whistle and headed to the factory blowing whistle and raising alarm. He telephoned neighbours who got there and found a police vehicle inside and while still at the factory a white lorry came towards the gate whereupon two people alighted and one ran into darkness whilst the 2nd appellant was arrested. The lorry turned and sped off. While being held by the villagers and the police, the 2nd appellant's phone rang and **PW3** picked it but it was immediately switched off from the other end. The phone rang again and on looking at the screen of the phone the caller had been saved as Wagathee. She asked whether the appellant had passed Kiamacihi police and PW3 answered in the affirmative. She further inquired where they were and the PW3 responded that they were at the factory. She said **"you go back because things had gone bad"**.

PW3 answered **"sorry I am a coffee farmer and we have held the coffee thieves"**. She immediately disconnected.

PW3 stated that the 2nd appellant had said that the woman that called had put diesel in the lorry. He had been hired as

a turn boy and had not even been paid for the job.

On cross-examination by the 2nd appellant he stated that when the appellants reached the factory the other robbers had left. He was at the factory when the lorry came. This was at least one hour after he had been called. He managed to hold the 2nd appellant when the alighted.

On re-examination he stated that the lorry stopped at the gate, the 2nd appellant alighted and attempted to flee but was held however another person escaped into darkness.

PW4, George Maina Muraguri was a watchman at the coffee factory for four years. He reported on duty on 8/9/2010 at 5.00 pm. At 2.00 pm the robbers came and held his fellow watchman Mr. Wachira. He heard them question him and he decided to flee and seek help. He went to Moses Maina (PW3) who responded by coming towards the factory while blowing a whistle. At the factory they heard that the robbers had disappeared. The neighbours and police came and as they were at the gate, a lorry came its registration number was KAV (he could not remember the numbers) but before reaching the gate the driver turned and sped off. The 2nd appellant came out of the lorry and attempted to run but was held by Maina. He was arrested and taken to the police station. The lorry driver fled with the others in the lorry.

Police constable David Gathambi was stationed at Kiamacihi police station and was assigned general duties. On the 9/9/2010 at about 3.22 am he was on normal patrol duties at Kiamichici trading center with CPL Kaindi, P.C Odera in police a patrol car. Corporal Kaindi got a telephone call from the manager Ruthagati factory that robbers were breaking into the factory. They went and found that the robbers had already escaped. Farmers went to the factory and as they were assessing the situation on the scene of crime a lorry appeared at the gate, it had four occupants in the cabin. He guessed that the lorry had gone to collect coffee. The lorry stopped at the gate. He asked the driver where they were going and he stated that they had been instructed to go to the factory. He was instructed to enter the factory but he reversed, turned and sped off however before turning and speeding off, appellant 2 alighted and was arrested by the public. One person also alighted and fled into darkness.

Somebody telephoned the 2nd appellant while under arrest and a member of public took his phone and talked to the caller. He heard the other person saying that things had gone wrong. The 2nd appellant was taken to the police station. The PW5 guessed that it was the 1st appellant who spoke to the 2nd appellant.

PW6 was the Senior Clinical Officer at Karatina District Hospital who filled the P3 form and prepared the treatment notes. He saw PW1 who was limping on the front leg. He had a fracture on

metatarsal left foot. The object used to inflict the injury was blunt. The injury inflicted was maim.

The Investigations Officer C.I.P Stephen Muli Mutua testified as PW7. He was attached at Othaya Division C.I.D Office as the D.C.I.O and his duties included investigating criminal cases, analyzing evidence and presenting it to court.

On the 12/9/2010 while in his office at Othaya he received a call from Mr. Wandera the then Deputy P.C.I.O Central Province requesting him to assist in recording a charge and caution statement for a suspect held in Nyeri police station. He was requested to keep in touch with CPL Ndikira whom he met and the latter informed him that he was investigating this case. He was introduced to Mary Wangare Kibe alias Wagathee. He recorded the statement which she offered voluntarily. She was cautioned which caution she understood and signed the statement and the same was also countersigned by PW7. He prepared a certificate that the statement was without influence, duress, threat or influence. She never informed him that she was unwell.

PW8 was the Investigating Officer in this case who states that on the 9/9/2010 at about 12.30pm he was in office when he was called by the then Deputy P.C.I.O Mr. Wandera and asked to take over investigations of a case from Kiamachihi police station Mathira. He was given a prisoner by the name George Kinyua who had been arrested at the scene.

He was informed that thugs had stormed the factory armed with pangas and rungas on 8/9/10 tied the watchman and demanded to be shown where coffee was in the factory. They informed the watchman but in the process, members of public came and the thugs ran away. They called police and while the police were present a lorry registration No.KAV 473H appeared with four occupants, a woman and three men. Two men alighted but the driver sensed danger and took off and left the two men behind. They started to run away but one was held by the member of public and handed over to the police.

On interrogation, it emerged that he was a loader hired by a man and a woman to load coffee at Ruthagati coffee factory and that the man and woman came from Thika.

The 2nd appellant was handed over to him with the mobile phone P/Ex.3 and the trousers P/Ex.4.

On the 10/9/2010 PW8 in the company of the accused and PC Murithi went to Ngoigua, Thika and was shown the 1st appellant and arrested her.

According to PW8 the 1st appellant said that the 2nd appellant went to her home with one Maina alias councilor but the 1st appellant did not know where this person lived.

2nd appellant took them to Kiganjo area in Thika to the house of Maina but he was not there. The two appellants were escorted back to Nyeri and 1st appellant recorded a statement under inquiry. They were charged with the offence of robbery with violence.

He visited the crime scene and later issued the complainant with a P3 form. He wrote to the Registrar of motor vehicles for information on vehicle registration No.KAV 473H, a Mitsubishi canter. The Registrar of motor vehicles responded by giving information for the motor vehicle Registration No.KAV 473 as a Honda C.R.V car, chassis No.RBI-1221-224, engine No.B20B-132 226 registered in the name of Monica Njeri Kihoro and Equity Bank. He could not trace the Mitsubish canter and concluded that the canter was used to commit a crime and so the registration number was faked to conceal identity and had intention to commit crime.

He stated that the 1st appellant referred to the 2nd appellant as Baba Mary in her statement. Maina was not found to date.

PW8 testified that the 2nd appellant was from Karatina area. 1st appellant and the others went to Karatina in the lorry with the 2nd appellant and Maina followed them later. The appellants were in the canter lorry and went up to the crime scene. The 2nd appellant alighted but the 1st appellant and driver

remained in the lorry and sped off leaving the 2nd appellant at the scene and was arrested.

PW8 further stated that there was a matatu that was initially used by Maina to transport the loaders who attacked and tied the watchman and were to load the coffee in the lorry. He did not know how many people were in the matatu and he did not get its registration number.

In her defence the 1st appellant stated that she was not at the act as she was at home and did not know anything about the attempted robbery.

The honorable court found that it was established beyond reasonable doubt that each of the two appellants were part of a gang that attempted to rob PW2, Francis Waheira Mbutia of coffee beans he was guarding and used violence in such attempted robbery. He convicted them and were sentenced as prescribed by law.

The 1st appellant has appealed on the following grounds.

1. ***That the Honourable trial magistrate erred in law and facts in finding a conviction based on violation of Section 198(1) c.***
2. ***That the Honourable trial magistrate erred in law and facts in convicting based on violation of Section 198(4) CPC.***
3. ***That the Honourable trial magistrate erred in law and facts in basing my conviction on violation of Section 169(2) CPC.***
4. ***That the Honourable trial magistrate erred in law and facts in basing my conviction on violation of Section 48 of the Evidence Act.***
5. ***That the Honourable trial magistrate erred in law and facts in conviction founded in violation of Section 25(a) of the Evidence Act.***
6. ***That the Honourable trial magistrate erred in law and facts in founding a conviction based on violation of Section 137(D) CPC, and also unproved prosecution evidence.***
7. ***That the Honourable trial magistrate erred in law and facts in founding a conviction grounded on violation of Section 169(1) CPC.***

The 1st appellant filed written submissions. When the appeal came up for hearing, **Mr. Gori** appeared for the appellants whilst **Mr Cheboi** appeared for the state.

Mr. Gori applied for the consolidation of the two appeals which order was granted and therefore the appeals proceeded in criminal appeal No.61 of 2011. He argued that the evidence available was circumstantial and not favourable to the prosecution and pointed out that PW7 on page 7 line 5 stated that he was told by the watchman that the robbers came in a Nissan matatu whilst the appellants herein were alleged to be in the lorry. The 2nd appellant alighted from the lorry and was held immediately but the magistrate found that he attempted to flee.

On this point, we have analyzed the evidence on record and do find that the evidence of Mr. Peter Nderitu Githithu(**PW1**) on the use of matatu was hearsay as he narrated what he had been told by the watchman. The matatu theory was told during cross-examination by the PW1 who was the chairman of the factory and who was not at the scene of the robbery at the time of the robbery. Surprisingly, the watchman did not mention any matatu. PW2 only stated that while he was on duty, some men came tied him and robbed him of his property, they were about 10 robbers and later a white lorry came. He does not mention any other vehicle. PW2 was at the scene of crime when the lorry appeared at the gate. He says that at the gate, which was locked the police officer told him to open for the lorry and ask the occupants what they wanted which he did. The driver, told him that they had lost their way and turned the lorry and drove off very fast. The appellant tried to open the door of the lorry and get in and flee but

he was held before the lorry turned.

On this issue, PW3 stated that a person opened the passenger door of the lorry and two people got out, he held one and the other one fled in darkness. The one that was held is the appellant.

PW4 stated that the 2nd appellant came out of the lorry and was held by PW1 and PW3 and police took him to the Kiamacihi police station. However the evidence of PW1 was that he went to the scene of robbery at 4.00 am and found the police had been at the scene and went to the police station. Nowhere does he state that he was at the scene and arrested the 2nd appellant. On cross-examination he states the 2nd appellant came out and was held. The driver turned the lorry and fled.

PW5 was a police officer stationed at the Kiamacihi police station. He was at the scene of robbery when the lorry appeared at the gate. The 2nd appellant alighted from the lorry and was held by the members of public. Others alighted and fled into darkness. PW2, PW3, PW4 and PW5 were the eye witnesses at the time of the arrival of the lorry at the gate. According to the PW2, the appellant tried to get into the lorry and flee, however the evidence of PW3, PW4, and PW5 was that he was held when he alighted. After analyzing the evidence of the eye witnesses, this court finds that there was no evidence that the 2nd appellant attempted to flee away, however, there is evidence that he attempted to get back into the lorry after realizing that there was a problem on the ground. There is a reasonable doubt that the 2nd appellant was aware of what was happening and therefore cannot be connected with the attempted robbery with violence .

The 2nd appellant stated in defence that he was a turn boy of the motor vehicle. He was picked by the driver at the place called labour where they wait for jobs. One person in the lorry was familiar to him. He was hired to load the lorry at Kshs.1000. They went to load the lorry in Nyeri. He was asked whether he was afraid of the job but the 2nd appellant said that he could load. They left for Nyeri and passed through a petrol station.

The man who was familiar to him and called councilor alighted and they proceeded to Nyeri. They stopped at Karatina at about 10.00pm. They were later woken and drove on to a wreath road. A police officer with a torch stopped the vehicle and they were told to alight. He was on the other side and came out but the driver did not. He was immediately attacked by a mob and the lorry sped away.

Weighing the evidence of the 2nd appellant against the evidence of PW1, PW2, PW3, PW4 and PW5, this court finds that 2nd appellant's defence was plausible and was not properly considered by the trial magistrate and the trial magistrate misdirected himself in finding that the appellant attempted to escape as there is no evidence that the appellant attempted to escape but there is evidence that he attempted to re-enter the lorry which sped off after he was held by members of public. The 2nd appellant could have attempted to re-enter the lorry after being attacked on the ground by members of public. It is the evidence of PW5 that there were people scattered all over the place and the mob wanted to kill the 2nd appellant but he prevailed upon them not to. In this circumstances it is doubtful whether the 2nd was party to the who scheme to rob the PW2 of the 106 coffee bags. we do find that the magistrate erred by failing to seriously analyze the evidence of the 2nd appellant had he done so he could have reached a different verdict.

The 1st appellant was arrested in Thika as she had given Kshs.7000 to a person called Maina. The 2nd appellant led the police to the 1st appellant as he had seen her giving him the money. The 1st appellant was arrested in Thika town. She signed a cautionary statement when she was asked to sign it although she had told the police that she did not even know the registration number of the vehicle.

This court finds that other than the cautionary statement, the prosecution did not have tangible evidence against the 1st appellant as she was not arrested at the scene of crime but the police were led to her place by the 2nd appellant as the person who gave money for the fueling of the lorry. In her defence she states that she loaned Mr. Maina the money to take a child to school as it was re-opening time. She knew the 2nd appellant as she used to see him but did not know his name. He was with Maina when Maina went to get the money.

Moreover, the evidence produced by the prosecution is contradictory and not reliable as PW2 said that after the lorry left, a woman called on the second appellants phone and told him to go back as things had gone bad. PW3 also states that a lady called on the 2nd appellants phone, her name was saved as Wagathee and told the 2nd appellant to go back as things had gone bad. PW5 a police officer who was patrolling when he was called to help said at page 18 of the proceedings that “*I see the accused No.1 in the dock now and guess she is the one who spoke to the accused number 2's phone*”.

The import of the above is that it is not clear whether the 1st appellant was at the scene of the crime. If she was the woman in the lorry, then why would she call the 1st appellant to inform him that things were bad and yet she left him in the hands of the mob when the lorry driver turned of and sped off with her in the cabin. In the alleged confessionary statement under inquiry, the 1st appellant did not state that she was aware that Maina was on a mission to steal coffee from Ruthagate coffee factory.

The second issue is whether there was an attempted robbery with violence at Rugathati factory on the 9th September 2010 by the appellants contrary to section 297(2) of the Penal Code .The prosecution did not give evidence to the effect that the appellants assaulted anybody with intend to still the coffee and immediately before or after the time of the assault used or threatened to use actual violence to any person or property in order to steal the coffee and that they were were armed with any dangerous or offensive weapons or instrument

This court ultimately finds that the evidence adduced by the prosecution is full of contradictions and was not sufficient to convict the appellants and therefore the charge was not proved beyond reasonable doubt and consequently the conviction is quashed and appeal allowed.

Dated, signed and delivered at Nyeri this 22nd day of November 2013

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE