



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 83 OF 2011

[Consolidated with Criminal Appeal Number 86 of 2011]

BETWEEN

FRANCIS WAINAINA MUNGAI.....1<sup>ST</sup> APPELLANT

PETER IRUNGU MWANGI.....2<sup>ND</sup> APPELLANT

AND

THE REPUBLIC OF KENYA .....RESPONDENT

[An Appeal from the Judgment of the Learned Senior Resident Magistrate Mr. P.M. Ndwiga, dated 23rd March 2011, in Nairobi Chief Magistrate's Court Criminal Case Number 118 of 2010]

Appeal before Justices Monica Mbaru and James Rika

1<sup>st</sup> Appellant Francis Wainaina Mungai in person

2<sup>nd</sup> Appellant Peter Irungu Mwangi in person

The State represented by Mr. Kadebe, Prosecution Counsel

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**JUDGMENT**

1. The two Appellants were charged, tried, convicted and sentenced for the offence of robbery with violence contrary to Section 296[2] of the Penal Code. The details of the offence were as follows:-

**On the 14<sup>th</sup> day of January 2010 along Utawala Road in Nairobi Area Province, jointly being armed with a dangerous weapon namely a pistol, robbed Samuel Mureithi Ngunyi a motor vehicle registration number KBA 502 M, Toyota 110 grey, valued at Kshs. 500,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Murithi Ngunyi.**

2. The State called five witnesses and produced seven exhibits. The Appellants gave sworn statements in their defence and called no witnesses.

3. Samuel Mureithi Ngunyi [PW1] testified he was a taxi driver. He operated at City Cabanas along

Mombasa Road. He was in his taxi at his base on 14<sup>th</sup> January 2010 at around 6.00 p.m. The car was registration number KBA 502 M, Toyota 110 grey in colour. The car was registered in the name of Michael Ojwang. A man approached PW1 and told him he wished to be transported to the Administration Police Camp in Utawala. He identified the man in Court as the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant told the complainant they would pick someone else at the Nakumatt Supermarket. This other man turned out to be the 2<sup>nd</sup> Appellant. The two Appellants agreed they would pay the complainant Kshs. 800 as the cost of hire. They paid him Kshs. 300 to enable him fuel the car. The complainant fueled at a Petrol Station near Embakasi Police Station. The 1<sup>st</sup> Appellant also bought a Krest Soda at the stopover. The Appellants changed their sitting positions, with the 1<sup>st</sup> Appellant moving to the back seat with his soda, while the 2<sup>nd</sup> Appellant moved to the front passenger's seat.

4. Around the General Service Unit Training School Area, the 2<sup>nd</sup> Appellant told the complainant he had forgotten his gate pass for the AP Camp. He gave the complainant an additional cab hiring fee of Kshs. 200 to be driven back to a house within Utawala estate to collect his gate pass. As the complainant drove to Utawala, the 1<sup>st</sup> Appellant hit him with the empty soda bottle on the top of his head. The bottle broke into piece and was exhibited in Court. The complainant opened the door to his car, switched the engine off, left the ignition keys in the car, and attempted to run away. The 1<sup>st</sup> Appellant reached for him and strangled him. The Appellants bundled the complainant in the back seat and forced him to lie down on the floor of the car, between the seats. The car battery was low. The 2<sup>nd</sup> Appellant secured the assistance of motorists passing by and jumpstarted the car, with the complainant still lying low at the back seat. The robbers drove off towards Utawala, with the 2<sup>nd</sup> Appellant at the wheel. The complainant heard the 1<sup>st</sup> Appellant say to the 2<sup>nd</sup> Appellant that there were two bullets left in the 2<sup>nd</sup> Appellant's gun. The complainant could see the 2<sup>nd</sup> Appellant pointing a black thing at him. The 1<sup>st</sup> Appellant had some drugs in a tin which he forcibly administered on the complainant. The complainant began to fall dizzy.

5. When he came to, GSU Officers were roughing him up trying to wake him up. He was still lying at the back seat, covered in the jacket the 1<sup>st</sup> Appellant wore. The jacket was availed to the trial Court as an exhibit. The jacket was bloodied from the complainant's injury. He narrated to the GSU Officers what had befallen him. They called his manager Bernard Amindo. PW1 explained again what had happened. It was at this stage that he saw the two Appellants lying on the ground under the watchful eyes of the GSU Officers. The GSU Officers, Amindo and the complainant referred the matter to the Embakasi Police Station where the complainant recorded a statement. He remembered the Appellants well as it was not yet dark. 1<sup>st</sup> Appellant wore the jacket, nice jeans and army boots. The 2<sup>nd</sup> Appellant wore a smart suit and safari boots. The complainant kept glancing at the 2<sup>nd</sup> Appellant as he made numerous calls during the attack.

6. PW2 Michael Omwanda Ojwang is a Revenue Officer. He owned the car registration KBA 502 M, which operated as a taxi cab. He employed Samuel Mureithi as its driver, and Ben Ongwaro as the manager. The car operated at City Cabanas Hotel. He acquired the vehicle on 14<sup>th</sup> May 2008 from one Josiah Safari Nzioki. PW2 produced as exhibits the sale agreement, transfer of motor vehicle form and the log book. He received a call from his manager on 15<sup>th</sup> January 2010 about 8.00 a.m. informing him that his car had been stolen the previous day. He was informed the car had already been recovered at a road block in Embakasi. He later identified his car and recorded a statement with the police.

7. PW3 Cpl Peter Kyalo was on patrol at the GSU Training School on 14<sup>th</sup> January 2010. He was accompanied by GSU Officer PC Nickson Sambachi and driver Njagi. On the way back to camp at around 8.00 p.m. they noticed a car parked off the road near the airport area. The area was prohibited to members of the public. It was also near the GSU camp. The windows were completely rolled up. The Officers armed themselves and approached the car. They opened the back door and found a man on the floor of the car bleeding. There were two other men in the car that PW3 identified in Court as the two Appellants. The 1<sup>st</sup> Appellant was in the back seat stepping on the man on the floor. The Officers removed the Appellants from the car and searched them. They recovered a toy pistol tucked under the 1<sup>st</sup> Appellants belt. The pistol was exhibited before the trial Court. They also found a broken Krest Soda

bottle in the car, and a bloody jacket which covered the injured man. PW3 called for reinforcement from his camp, and more Officers arrived. The Chief Inspector came and advised they report the matter to Embakasi Police Station. The victim's car had stalled after its battery went low. PW2 saw the two Appellants well and could recall their sitting positions in the car. The Officers used torches when searching the Appellants.

8. PW4 Nixon Kiprotich Sambach accompanied PW3 on the material day. He confirmed the evidence of PW3, that while on their way back to base from routine patrol, near the GSU gate, they noticed a Toyota AE 110 grey in colour, registration KBA 502 M parked in a prohibited area near the airport. The Officers inspected the car and found three men in it. The 2<sup>nd</sup> Appellant was on the driver's seat. The 1<sup>st</sup> Appellant sat at the back seat. The 3<sup>rd</sup> man was in the back seat tied up with a wire. This alerted the Officers that something was amiss. The tied up man was unconscious. The Officers carried out a search and recovered a toy pistol from the 1<sup>st</sup> Appellant. They also recovered a broken Krest Soda bottle. They untied the injured man, called their boss Chief Inspector Rotich, who engaged the Embakasi Police. PW4 recorded a statement with the police thereafter. He identified both Appellants well, having used flash lights while searching the Appellants. He stayed with the Appellants for about two hours.

9. PW5 Cpl Magiri Mbaabu from the CID Special Crime Prevention Unit in Nairobi Area took over investigations on 15<sup>th</sup> January 2010. The two Appellants were handed over to him. PW5 took the statement of the complainant and those of the other witnesses. He was fully briefed by the DCIO Embakasi. He took custody of the exhibits and finally charged the Appellants with the offence of robbery with violence. He produced the stolen car Toyota 110, KBA 502 M.

10. The Appellants were called upon to defend themselves on 3<sup>rd</sup> November 2010. The 1<sup>st</sup> Appellant testified on oath that he worked as a waiter at a roadside food kiosk. On 14<sup>th</sup> January 2010, he left work at 1.00 p.m. and was to report back to work at midnight, as the kiosk operated for 24 hours. He went and worked up to 6.00 p.m. He had an appointment with a customer who wished to have a birthday cake on 18<sup>th</sup> January 2010. The lady escorted him to an area near Embakasi roundabout. Near the GSU Training School, he found a car parked with its lights off. He walked past the car. He noticed a police car pass by and stop near the stalled car. He had seen people ahead of him, but he could not say where they disappeared to. Police ordered him to stop, and ordered him to lie down while pointing a gun at him. Other officers came and beat him up, while asking him where his friends had disappeared to. In front of the stalled car he saw a man lying on the ground unconscious. Police beat both the 1<sup>st</sup> Appellant and the unconscious man. The unconscious man later told the Police that he had been carjacked. The 1<sup>st</sup> Appellant was arrested and referred to Embakasi police, where he found the 2<sup>nd</sup> Appellant. He did not know the 2<sup>nd</sup> Appellant. He was charged with the offence of robbery with violence, an offence he knew nothing about.

11. The 2<sup>nd</sup> Appellant stated on oath he worked as a hawker. On 14<sup>th</sup> January 2010 in the evening, he was on his way home when he met police on foot patrol. It was 7.15 p.m. They stopped him and alleged he was a car robber. They beat him for 15 minutes. He was then arrested and booked at Embakasi Police Station. While being booked he heard the Officers say his accomplice was in the cells. He did not know the 1<sup>st</sup> Appellant and knew nothing of the robber

12. The trial Magistrate rejected these defence narratives, and upheld the case for the prosecution. The Court found that the complainant gave direct evidence linking the Appellants to the offence. The complainant's evidence on the circumstances of the offence was not discredited by the Appellants. The fact that motor vehicle KBA 502 M, operated as a taxi at City Cabanas, was robbed of the complainant on 14<sup>th</sup> January 2010 was not disputed. It was not disputed that the car was recovered a few hours later while stalled at a prohibited area near the airport. The ingredients of the offence of robbery were established. The complainant testified his two passengers turned on him and violently robbed him. They hit him with a soda bottle, threatened him with a pistol-like gadget, and eventually fed him on illegal drugs. The soda bottle was turned into an offensive weapon. The trial Court was satisfied that PW1's evidence was corroborated by PW3 and PW4 the GSU Officers. They recovered the stolen car with three occupants

inside. The evidence of PW3 and PW4 was not discredited. All three elements required in establishing the offence of robbery with violence were shown by the evidence of PW1, PW3 and PW4.

13. The lower Court was not in doubt that it was the Appellants who robbed the vehicle from PW1. It was 6.00 p.m. when the 1<sup>st</sup> Appellant hired the taxi cab. The 2<sup>nd</sup> Appellant boarded at Nakumatt Supermarket. The complainant was clear on the position occupied by the Appellants in the car, their shifting sitting positions, their conversations and the clothes they wore. PW1 was consciously with the Appellants for over 40 minutes. He recalled the exact attire the Appellants wore. This evidence was not discredited by the Appellant on cross-examination or on further cross-examination. The defence of the Appellants, weighed against the overwhelming case by the prosecution, was unpersuasive, sham and afterthought. The Court concluded there was sufficient evidence to convict the Appellants.

14. The Appellants filed the following grounds of appeal:-

- a. **The trial Court relied on identification evidence that was not free from error;**
- b. **The charge sheet was defective;**
- c. **The evidence by the prosecution was inconsistent, uncorroborated and contradictory; and**
- d. **The Appellant's respective evidence in defence was not considered**

15. The High Court has a duty to re-evaluate the evidence, weigh competing evidence and draw its own conclusions as established in the cases of *Okena v. the Republic [1972] and Shantilal M. Ruwala v. the Republic [1975] E.A. 570*. The function of the first Appellate Court is not merely to scrutinize evidence to see if there was some evidence to support the Lower Court's findings and conclusion; it must re-evaluate evidence and make its own findings and conclusions. In doing so, the High Court must always note that the trial Court had the advantage of hearing and seeing the witnesses, as stated in the case of *Peters v. Sunday Post [1958] E.A. 424*.

16. There was enough evidence led by the prosecution that PW1 was dispossessed by two robbers of his employer's car Toyota 110 registration KBA 502 M, on 14<sup>th</sup> January 2010. Around 6.00 p.m. PW1 was hired by a passenger to transport him to Utawala AP camp. The man instructed PW1 that they pick a second passenger at Nakumatt Supermarket. They stopped at Nakumat Supermarket and picked the second passenger. The complainant identified in Court, the first passenger as the 1<sup>st</sup> Appellant and the second passenger as the 2<sup>nd</sup> Appellant. He observed the two Appellants well as he drove them, stopped to fuel, buy a Krest soda and also stopped for the 1<sup>st</sup> Appellant to relieve himself.

17. The Appellants agreed to pay the complainant Kshs. 800 for the journey. At the GSU Training School gate, the 2<sup>nd</sup> Appellant informed the complainant that he had forgotten to pick his gate pass to the Utawala APs camp. He requested they detour to a house in Utawala to retrieve the gate pass. The Appellants would pay the complainant an additional Kshs. 200 for the detour. As they headed for Utawala, the 1<sup>st</sup> Appellant hit the complainant on the head with the empty Krest soda bottle injuring him. The complainant opened the door, switched off the engine, and attempted to free himself. He was strangled by the 1<sup>st</sup> Appellant and bundled on the floor of the car at the back seat. The car battery had a problem and could not restart. Eventually the Appellants secured the assistance of motorists who were driving by and restarted the car. The 1<sup>st</sup> Appellant was stepping on the complainant on the floor of the car at the back, while the 2<sup>nd</sup> Appellant was driving. The 1<sup>st</sup> Appellant forcibly fed the complainant on some drugs. PW1 started to fall dizzy. Before he passed out, he heard the 2<sup>nd</sup> Appellant ask the 1<sup>st</sup> Appellant how many bullets were left in the gun. PW1 saw a black thing pointed at him by the 2<sup>nd</sup> Appellant. PW1 then passed out from the effect of the drugs

18. He regained consciousness to find himself still in the car, covered with the 1<sup>st</sup> Appellant's jacket, and in the company of GSU Officers [PW3 and PW4]. He explained to the Officers what had taken place. They called his manager Bernard Amindo to the scene. The complainant then saw both Appellants lying on the ground under the guard of GSU Officers.

19. The evidence by the complainant was forthright, direct, clear, and reliable. This evidence was corroborated by that of the GSU Officers PW3, PW4 and PW5. There was no chance of the Appellants being mistakenly identified as the passengers who hired the complainant's car on 14<sup>th</sup> January 2010, and who violently robbed him. PW1 saw the 1<sup>st</sup> Appellant clearly at 6.00 p.m. as the 1<sup>st</sup> Appellant hired his taxi cab at City Cabanas. He observed the 1<sup>st</sup> Appellant in detail as they drove on to pick the 2<sup>nd</sup> Appellant at the Nakumatt Supermarket. PW1 saw the 2<sup>nd</sup> Appellant as he boarded the taxi at Nakumatt Supermarket. He observed the two Appellants as he drove them on towards Utawala, as they made stopovers to fuel, buy soda, and for the 1<sup>st</sup> Appellant to relieve himself. He was with the Appellants in the car while conscious for at least forty minutes. He observed them as they changed sitting positions in the car. He saw them while they were arrested. The GSU Officers were positive they found the Appellants and their injured victim in the car. They arrested the Appellants in the stolen car. The GSU Officers were with the Appellants for about two hours. There was no need for an identification parade at the Police Station, the chain of evidence leading to the arrest of the Appellants having been unbroken throughout. In ***Peter Irungu Kinuthia v. the Republic [2011] e- KLR***, the Court held that it was absolutely unnecessary to conduct an identification parade where the Appellant was arrested in one sequence of events. We reject the ground that the Appellants were convicted on erroneous identification evidence.

20. The testimonial evidence was amply boosted by the recovery and production of strong physical evidence which helped recreate the crime scene and establish the sequence of events. The prize physical evidence was the motor vehicle, which was recovered barely hours after being hired by the Appellants. The 2<sup>nd</sup> Appellant was found on the driver's seat, and the 1<sup>st</sup> Appellant at the back seat. The Appellants did not explain what they were doing in this car which had a few hours been violently taken from the complainant. A search was carried out which yielded a toy pistol in possession of the 1<sup>st</sup> Appellant. This physical evidence corroborated the testimonial evidence of PW1 who saw a black thing pointed at him by the 2<sup>nd</sup> Appellant during the attack, as the two Appellants discussed the number of bullets left in their gun. Also recovered, and corroborating the evidence on PW1, was a broken Krest soda bottle. Not only did the complainant witness the 1<sup>st</sup> Appellant buy a Krest soda as they journeyed to Utawala earlier in the day; the complainant was hit on the head with a Krest soda bottle when the robbers wrested control of the car from his hands. Physical evidence was likewise contained in the form of the 1<sup>st</sup> Appellant's jacket which he wore when he hired the complainant. The jacket was recovered from the car by the GSU Officer. It had been used to cover the bleeding complainant. All the pieces of physical evidence were produced in Court.

21. The prosecution evidence was not inconsistent, contradictory or uncorroborated. It was strong evidence with both reliable testimonial and unshakeable physical components. It was strong enough to enable any Trier of facts recreate the crime scene and establish the sequence of events that led to the arrest, trial, conviction and sentencing of the two Appellants. In the context of the circumstantial evidence, corroborative evidence strengthened the inference of the Appellant's guilt, closing up other possible explanations. The testimonial evidence of the five prosecution witnesses corroborated the physical evidence, and the testimonial evidence of each witness, closing up the possibilities of testimonial error. There was no material defect in the framing of the charge. The use of 'and' 'at' 'or' in the charge sheet did not mislead the Appellants in the conduct of their defence, or in any way occasion failure of justice. It was absolutely not necessary for ballistic experts to examine the type of weapon used by the Appellants in inflicting fear and physical injury on the complainant in the course of the robbery. A toy pistol or even the Krest soda bottle used by the Appellants in robbing the complainant properly fell within the meaning of dangerous weapons. The elements comprising the offence of robbery with violence under Section 296 [2] of the Penal Code were established through cogent evidence. As stated by the trial Court quoting the decision of ***Kimemia and Another v. the Republic [2004] 2 KLR 46***, "It is clear that the offence of robbery with violence is proved if the prosecution proves any of the three elements which constitute the charge of capital robbery."

22. The Appellants denied being in the taxi car and raised defence of *alibi*. The trial Court took the approach recommended in handling such defence in the case of ***Ganzi and two Others v. the Republic KLR 52*** which is: where the defence of *alibi* is first raised in the Appellant's defence and not when he pleaded to the charge, the correct approach is to weigh the defence of *alibi* against the prosecution's

evidence. The Court restated the evidence of PW1, PW3 and PW4 weighed against the possibility that the Appellants were absent from the scene of the crime, and concluded the defence of *alibi* to be an afterthought. A person who raises a defence of *alibi* does not have the burden of proving it as found in the case of ***Seki Toleko v. the Republic of Uganda [1967] E.A. 531 and in Kiama v. the Republic of Kenya [1984] KLR 759***. This position has frequently been abused by accused persons who ambush the prosecution with a ‘hip pocket’ defence, or in plain language a fabricated *alibi*. This type of defence is problematic to the prosecution as it emerges at the last minute, when the prosecution has closed its case and has no adequate opportunity to investigate the truth or falsity of the *alibi*. There is need to introduce legislation to require accused persons who intend to rely on *alibi*, to notify the prosecution in good time, giving details of the place they were at when the offence took place, and the names of witnesses who saw them at such places. This can be done within the confines of the constitutional guarantees and in particular the right of the accused person to a fair trial. A reasonable demand for accused persons to supply the prosecution with information which they intend to introduce in the trial, without violating the rules against self incrimination, would assist the Courts in arriving at the truth without compromising the right of a fair trial. Left to freely raise all manner of *alibi* defences there is always a likelihood accused persons at the very least succeed in raising a reasonable doubt as to their guilt in the mind of the Court, through ‘hip pocket’ defence.

23. In the case of the Appellants they did not call any witnesses to support their *alibi*. They needed not have watertight alibi as stated in the case of ***Kiama v. the Republic***; they however needed to offer credible evidence that disentangled them from the scene of the crime. They did not do so, particularly considering the evidence given by PW1, PW3 and PW4 and the strong physical evidence marshaled by the prosecution. The 1<sup>st</sup> Appellant stated in his defence that he left his place of work at 1.00 p.m. and was to report back to work at midnight. He at the same time stated he worked up to 6.00 p.m., without explaining what compelled him to go back to work before the scheduled time of midnight. He confirmed he was at the scene of the crime and saw a car whose lights were turned off. He also mentioned seeing an unconscious man at the scene. Equally important is that he stated he was arrested at the scene of the crime. He admitted on cross-examination that the complainant would not have a grudge against him. The 2<sup>nd</sup> Appellant similarly denied having been in the complainant’s taxi cab, stating he was on his way home after doing his hawking job, when he was arrested by the police. He confirmed he was arrested by police who were on patrol and taken to Embakasi Police Station. He also alleged he was beaten and cut on the head by the police at the time of the arrest. He admitted on cross-examination that he did not raise the issue of his beating with the Court, or show the injury to the Court when he was arraigned in Court six days after the arrest on 20<sup>th</sup> January 2010. We find the defence of *alibi* mounted by the Appellants to have been fabricated. They did not come out as truthful witnesses. Theirs was a ‘hip pocket’ *alibi* defence. They were properly tried, convicted and sentenced. ***The Appeal is rejected and the Judgment of the Lower Court upheld.***

Dated and delivered at Nairobi this 20<sup>th</sup> day of November 2013

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Monica Mbaru

Judge

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James Rika

Judge