



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 57 OF 2009

[Consolidated with H.C. Criminal Appeal Number 58 of 2009]

BETWEEN

SIMON NDUNG’U WAINAINA 1ST
APPELLANT

PAUL NDUNG’U KARIUKI..... 2ND
APPELLANT

AND

THE REPUBLIC OF KENYA
RESPONDENT

[An Appeal from the Judgment of Mrs. R.A.Mutoka, Chief Magistrate, dated 4th February 2009 in Chief Magistrate’s Court Criminal Case Number 524 of 2007]

Appeal before Justices Monica Mbaru and James Rika

Both Appellants appearing in person present

Mr. O’mirera Senior Assistant Director of Public Prosecutions for the Respondent

JUDGMENT

1. The two Appellants were charged alongside two other persons – Rodrick Muhoro Ngigi and Dominic Mbugua Gachungwa - in the Chief Magistrate’s Court, with three counts of robbery with violence, contrary to Section 296 [2] of the Penal Code. Rodrick and Dominic were acquitted on all the three counts, while the two Appellants were found guilty on all counts, and sentenced to suffer death. They filed two separate Appeals, which the High Court consolidated, with Appeal Number 57 adopted as the reference file.

2. The three counts were detailed as below-:

Count 1

On the 27th day of January 2007 at Uthiru in Nairobi within Nairobi Area, while armed with

dangerous weapons namely AK47 assault rifles, jointly with others not before the Court robbed Zelda White of Motor Vehicle Toyota Prado registration number 29 CD 305 K, valued at Kshs. 2.5 million and at or immediately before or immediately after the time of such robbery used actual violence which caused the death of Zelda White.

Count 2

On 27th day of January 2007 at Uthuru in Nairobi within Nairobi Area, while armed with dangerous weapons namely AK47 assault rifles, jointly with others not before the Court robbed Sylvia Moller one mobile phone Nokia 3310 valued at Kshs. 4,000, and at or immediately before or immediately after the time of such robbery used actual violence which caused the death of Loise Anderson.

Count 3

On 27th day of January 2007 at Uthuru in Nairobi within the Nairobi Area, while armed with dangerous weapons namely AK47 rifles, jointly with others not before the Court robbed Loise Anderson of one bag containing assorted clothes valued at Kshs. 10,000 and at or immediately before or immediately after the time of such robbery used actual violence which caused the death of the said Loise Anderson.

2. The prosecution called 20 witnesses and produced 21 exhibits. The 1st Appellant gave an unsworn statement and called no witness, while the 2nd Appellant gave a sworn statement and called no witness in defence. Sylvia Anderson Moller [PW4] testified she worked as a Nurse at the US Peace Corps. On 27th January 2007, she and her son, her two parents, her brother and her sister were scheduled to take lunch at the house of their family friend Humphrey Johana. The family met at the house of Sylvia's sister Zelda White. The group left Zelda's house, in Zelda's blue Toyota Prado, registration number 29 CD 309 K. Zelda drove, while their mother sat in the front passenger's seat, and Sylvia sat at the back with her father and her son. They were to be met by their host Humphrey, at Uthuru flyover.

3. Traffic was heavy, and the group decided to use a slip road, to meet Humphrey who had communicated he was on the way to meet the visitors. He was walking to the rendezvous. It was around 2.10 p.m. Suddenly, a cream Isuzu car came from behind and pulled in front of the group's Prado. A short person who was wearing a white cap and carrying a machine gun on his right arm, confronted Sylvia and her family. The family realized they were being carjacked. Zelda locked the Prado's doors, as the gunman aggressively banged the Prado's windows with the gun. Sylvia saw the face of one of the attackers. Other attackers were shooting. Zelda released the lock and the two front doors were opened. There was more shooting, which Sylvia assumed was directed in the air. That was until she heard her mother say the family car had been shot at from the back. All the doors were flung open. Sylvia's mother told Sylvia she had been hit and could not move. Sylvia tried to reach her mother and release her from the seat belt, but was prevented from doing so by one of the attackers who gun-butted her on the right arm. Her phone was stolen. Sylvia saw a hand lift a black bag her dad was carrying.

4. Sylvia frantically attempted to help her dad who was being ejected by the robbers from the moving car. Her mother was half hanging, with her arm dragging on the ground. Sylvia put her mother on the ground, and realized her mother had no pulse and was not breathing. The robbers took off with the family's car, and soon it was clear to Sylvia that her sister Zelda was lying on the ground near the cream Isuzu vehicle, breathless and heavily bleeding on her chest. Her father was standing next to her mother. After 5 minutes, the Prado drove back and away from the scene. The robbers drove off along Waiyaki Way, with guns pointed in all directions, as the crowd scattered in different directions. A police car soon appeared and made a run after the robbers. Sylvia called her husband and requested him to call Zelda's husband, and also, call the American Embassy for an ambulance. After 45 minutes a police pick-up car came took Zelda and her mother to Nairobi Hospital where they were pronounced dead. Subsequently, Sylvia was called on 23rd March 2007 at Rongai Police Station. She testified that groups of people, each group with 9 men, were paraded. She positively identified the short gunman who wore a cap during the

attack. She was able to identify him on the dock also, at the hearing. She testified she had noted his light skin and small head. She was not able to identify other attackers.

5. Earlier on the day of the attack at around 12.00 noon, Edwin Kinyatti was driving his Toyota car registration KAR 186 A. He had arranged to visit his grandmother at Kikuyu. He saw 4 men who drove a Toyota double cabin car, and who wielded AK 47 rifles. One man stopped PW5 [Kinyatti], and demanded for his wallet and phone. The robber was dark, of average height, and wore a baseball cap. PW5 surrendered his wallet and phone as ordered. He was then thrown in the boot of his car. Shortly, the car stopped, and one of the attackers came and asked for his ATM pin code. Kinyatti was confused, and the attacker thought he had lied about the pin code. He was later abandoned and called the Police, who recovered his car the following day. Inside his car was his Brother Michael Rweria's driving license. He was later called at Gigiri Police Station where he was able to identify the 1st Appellant as the man who carjacked him. He recognized the 1st Appellant by his facial appearance and by his voice.

6. About 1.p.m. on the same day, the 27th January 2007, PW3 Michael Kamau Mathini was driving his vehicle a Pajero KAM 286 A, from his church to his home. He was ferrying bags of food home. After driving for a kilometre, he heard a vehicle hooting from behind. He slowed down and pulled off the road. 4 men approached him. They had guns. They ordered him to sit in the back seat between two of the assailants, while one of them drove Mathini's car. He was robbed of cash, mobile phone make nokia 2100, and a watch. The robbers then ordered PW3 to lie in the rear of his car, whereupon they loaded the sacks of potatoes on him. His wrists were tied. He was disoriented as the robbers drove on. After sometime the car stopped, and PW3 heard gunshots, and the voice of a woman screaming. He could hear vehicles pass by. There was calm after sometime and he heard people say one person had been killed. He shouted for help, and was retrieved from underneath the bags of potatoes. He saw two white women lying near his car. He was dazed, and unable to identify his attackers.

7. Around 2.35 p.m. on 27th January 2007, a dark blue Toyota Prado drove to Kenya Agricultural Research Institute at high speed. A guard Kipkoech Amos [PW2] was manning the gate. He gave the registration number of the car as 29 CD. The windows were tinted. The driver lowered the window slightly. Amos asked him to sign the visitor's register and show his identity card or driving license. There were other occupants in the car, but Amos could not see the rear well as the windows were all tinted. The driver told him they had come to KARI to visit the driver's sister Njeri. The driver signed the register, gave his license, and said he would pick it later on his way out, as he was in a hurry. Amos left work at 5.55 p.m. after his shift was over. He was questioned later by Kenyan and American detectives when he resumed work. He was able to identify in Court the driving license left to him by the visitors at the KARI entrance on 27th January 2007. The driving license was confirmed by PW8, Sergeant Oyugi William Ochieng' to belong to Kinyatti Michael Rweria, brother to PW5 Edwin Kinyatti. PW5 as seen in paragraph 5 above told the Court his brother's driving license was in PW5's car earlier that day, when 4 men armed with AK47 assault rifles, carjacked him.

8. On 27th January 2007, PW7 PC Daniel Odhiambo of Diplomatic Service was informed by duty officers that Zelda's car, registration number 29 CD 305 K, had been spotted at Limuru. He went to the scene accompanied by two detectives from the American Embassy. They found the abandoned car at Limuru and advised members of the public not to touch the car. Scene of crime officers joined PW7 and took photos of the car. The car was towed to the American Embassy. It was not dusted for fingerprints at Limuru as the hour was late. Fingerprints were lifted from the car by Jeremiah Arodi, PW12, on the following day 28th January 2007 at the American Embassy. He made a total of 8 lifts from the car. He forwarded the lifts to the CID Laboratory. On 7th March 2007 PW13 Patrick Ngando, fingerprint expert with 25 years experience, received a set of thumbprints on C 24 Form, bearing the name Simon Ndungu Wainaina. He compared Wainaina's thumbprints with those lifted from the scene of crime. The lifts and Wainaina's thumbprints matched. He was convinced the two prints were from the same person Simon Ndungu Wainaina.

9. Following these spate of aggravated robberies, the two Appellants were arrested. The 2nd Appellant was initially arrested on 10th February 2007. He escaped from Gigiri Police Station on 16th February

2007. He was rearrested in the company of the 1st Appellant at Bulbul. This evidence was given by the District Criminal Investigations Officer Ngong', IP Kenneth Njoroge [PW14]. On 20th March 2007, 2nd Appellant pleaded guilty to the offence of escaping from lawful custody. He was sentenced to serve six months imprisonment on 26th April 2007. The 2nd Appellant was positively identified by Sylvia Moller. Sylvia had reported the loss of her Nokia 3310 during the robbery, to the Police. Her mobile phone number was 0722232899. PW9 Chief Inspector of Police enquired from service provider Safaricom, if this number was in use; he found it was not. He took the phone Serial Number 35376006257720. He wrote to both Safaricom and the other service provider Celtel. He received a response from Celtel that indeed, the phone was in use on 28th January 2007. The calls were traced to the 2nd Appellant, leading to his initial arrest on 10th February 2007.

10. An AK47 rifle was on 23rd September 2007, recovered by Sergeant Francis Njuguna [PW11] of CID Kikuyu, from two robbers at Ndenderu area, one of whom was shot dead by the Police Officers. The firearm was forwarded to PW10 Emmanuel Lagat, a Forensic Firearm Examiner. He carried out ballistic tests, and reported back to PW11 that the gun was used at the robbery subject matter of this Appeal.

11. The trial Court was persuaded this chain of evidence was enough to warrant placing the Appellants on their defence. The 1st Appellant testified he was called by his cousin the 2nd Appellant, on 3rd March 2007. 2nd Appellant told him he was looking for a residential house. The cousins got a two bed-room house. At the house, they found about 6 to 7 persons, who told them to wait for the caretaker. As they waited Police Officers came and arrested them. Later their fingerprints were taken. 1st Appellant was identified at a parade, by a witness who claimed he had robbed him. The witness alleged he recognized the 1st Appellant by voice. The 1st Appellant signed the parade form, commenting the exercise was not fair. Police Memo of 28th January 2007 indicated there were lifts found on the car when dusted, yet later on 15th March 2007, another report surfaced affirming that dusting yielded lifts. The two reports were produced as D exhibits 1 and 2. 1st Appellant also produced a newspaper cutting, for 28th January 2007, where Investigating Officer Ali was quoted as saying the involved motor vehicle was red. 1st Appellant testified that the investigation diary said the vehicle was black, while witnesses described it as blue. 2nd Appellant stated he called his cousin 1st Appellant on 27th January 2007. The 2nd Appellant had a sick child and wished to be lent money by the 1st Appellant. The 2nd Appellant was lent the money by his cousin, after he handed the 1st Appellant a sewing machine as security. On 3rd March 2007, the 2nd Appellant met his cousin at Bulbul. The 2nd Appellant wished to have the help of his cousin the 1st Appellant, in securing a residential house. They found a house and as they waited for the caretaker, they were arrested by Police Officers. An identification parade was held, where Sylvia Moller identified 2nd Appellant as one of the attackers. He testified that she had not given a description matching with his person, at the first report. He claimed his picture was in the newspapers on 3rd March 2007, and he was also photographed by the FBI agents during investigation.

12. The trial Magistrate concluded that the robberies occurred in broad daylight. Circumstances during the robbery were conducive to positive identification. PW5 Edwin Kinyatti was robbed by a group of 4 men 30 minutes before Sylvia Moller and her family fell victim to the robbers. Kinyatti identified the 1st Appellant as the person who robbed him. PW5 was also able to identify the 1st Appellant by his voice. Invoking the ***Court of Appeal of Kenya decision of Choge v. Republic [1985] KLR***, the Court found that PW5's visual and voice identification of the 1st Appellant, was reliable and convincing evidence. The 1st Appellant was not able to shake PW5 during cross-examination. Evidence of fingerprints placed the 1st Appellant's fingerprints in Zelda's car. The trial Court was convinced this was scientific evidence, which could only be rebutted by scientific means. The reports made on 28th January 2007 and 15th March 2007 [D exhibits 1 and 2] did not support the contention of the 1st Appellant. The trial Court likewise rejected the defence of the 2nd Appellant. It was noted that the 2nd Appellant had escaped from police custody after arrest. He did not account for that escape during his defence. He was positively identified by Sylvia Moller. Following the principle laid down in the ***Court of Appeal of Kenya decision of Munuhe and Another v. Republic [1986] KLR at page 356***, the learned Magistrate concluded that Sylvia Moller was

honest and unmistakable about her identification of the 2nd Appellant. The two Appellants were thus convicted, and sentenced to death.

13. The Appellants filed their respective Petitions of Appeal on 13th February 2009. They also filed additional grounds at the hearing of their Appeal, together with submissions highlighting these grounds. The grounds for both Appellants are similar and may be summarized as below:-

[a] The trial Court erred in failing to find that the Appellants were held in custody for more days than stipulated by the law before they were charged in Court, and therefore their constitutional right under Section 72[3] of the retired Constitution was violated;

[b] Identification evidence was improperly gathered by the Police and wrongly accepted by the trial Court;

[c] Evidence of fingerprints was flimsy and inconsistent;

[d] Arrest, Prosecution and Conviction of the Appellants were based on mere suspicions;

[e] Crucial exhibits and witnesses were not produced at the trial; and,

[f] The trial Court failed to adequately consider the Appellant's defence.

14. The Appeal was heard on 14th October 2013. Both Appellants adopted the grounds set out in their Petition. They submitted they were not properly and fairly identified. According to the 1st Appellant, a vehicle which had been out in the cold at Limuru for two days was not capable of yielding fingerprints upon being dusted. He claimed he was sick during his trial, and hampered by this illness in conducting his defence. He called for re-examination of certain witnesses but was not facilitated by the trial Court. According to the 1st Appellant, the crime was committed by a person whose name he gave to us during hearing of the Appeal, as Simon Matheri, 'most wanted'. Senior Assistant Director of Public Prosecutions explained to the Court that the conviction of the Appellants was based on strong identification and forensic evidence. There was no doubt the complainants were violently robbed. The Appellants were identified by witnesses. Identification was confirmed by the police witnesses. PW5 engaged the 1st Appellant in a talk during the robberies, and PW5 was able to identify his voice at the parade. The two Appellants were not able to displace the strong and credible evidence marshaled by the prosecution. The State asked the Court to reject the consolidated Appeals.

15. The High Court, as the first Court to which the Appeal is submitted, has a duty to re-evaluate the evidence from the lower Court and draw its own conclusions [*see Shantilal M. Ruwala v. Republic [1975] E.A. 570*]. It is not our function to merely scrutinize evidence, to see if there was evidence to support the lower Court's findings and conclusions; we must make our own findings and make our own conclusions. In doing so however, we must warn ourselves that the trial Magistrate always has the advantage of hearing and observing the witnesses [*Peters v. Sunday Post [1958] E.A. 424*].

16. There is no doubt a spate of aggravated robberies were committed on 27th January 2007 within the area between Kikuyu in Kiambu, and Uthiru in Nairobi. Edwin Kinyatti [PW5] was carjacked and robbed of personal items by 4 men who were armed with AK47 rifles. It was around 12.00 o'clock. One of the attackers engaged him in a conversation. He was able to identify the 1st Appellant visually and vocally. One hour later, at around 1.00 p.m. Michael Kamau Mathini was robbed of personal items and his car registration KAM 286 A. The attackers were 4 armed men. They bundled him under the sacks of potatoes he was ferrying in his car. He was disoriented. When the car stopped, he heard the sound of gunfire and heard the screams of a woman. He was rescued by members of the public. On rescue, he saw two white women lying near his car. He was honest enough to say he was disoriented, and unable to identify his attackers. This chain of events and timelines, corroborated the evidence of Sylvia Moller, who told the Court their attack occurred around 2.10 p.m. The attackers drove what Sylvia described as a cream Isuzu Car. She was able to identify the 2nd Appellant as the attacker who jumped out of the car

totting what she said was a machine gun on his right arm. Two people were killed at Uthiru; Sylvia's sister Zelda and mother Loise Anderson.

18. The chain of evidence after 27th January 2007 is worth noting. Zelda's Toyota Prado was driven to KARI. The driver left a license with the guard at the gate [PW2]. The license was in the name of Michael Rweria Kinyatti, brother to PW5, and had been stolen from PW5's car during his carjacking of 27th January 2007. Zelda's car was found abandoned at Limuru. It was towed to the American Embassy in Nairobi, and dusted for fingerprints. The lifts were compared to samples taken from the 1st Appellant, and matched. The 2nd Appellant was arrested while using Sylvia's mobile phone Nokia 3310, Serial Number 35376006257720. The phone was in use on 28th January 2007, a day after the robbery. The Safaricom line used by Sylvia 0722232899 had been discarded for Celtel line 0736859198. The calls on this line were traced to the 2nd Appellant who was arrested at his house in Waithaka Nairobi, on 10th February 2007. After arrest, the 2nd Appellant was placed in custody at Gigiri Police Station. He escaped from lawful custody on 16th February 2007. On 3rd March 2007, the 2nd Appellant was rearrested at Bulbul, in the company of his cousin the 1st Appellant. PW 14 testified, and was not subjected to any questioning by the Appellants, that whereas the other persons at the narcotics den in Bulbul where the arrests were made surrendered to the Police, the two Appellants ran away and were only apprehended after the police pursued them. Zelda's car was photographed and a report produced at the trial by PW12. The car was observed to have embedded bullet head on its body. PW11 recovered an AK 47 rifle from two other robbers on 23rd September 2007, at Ndenderu Kikuyu in a shootout where one of the robbers was killed. The weapon was subjected to ballistic examination by Forensic Firearms expert PW10, who concluded the gun, was used at the robbery where members of Sylvia's family were robbed violently and killed.

19. In the view of this Court there was strong circumstantial evidence to link the two Appellants to the robbery. They were convicted and sentenced against the background of strong testimonial and real, physical evidence. The oral witnesses were consistent, corroborated each other, and were not seriously challenged in their reconstruction of the events by the Appellants. The evidence was so graphic, that it assisted the trial Court, and the High Court in recreating the crime scene, and establishing a sequence of events in which the two Appellants were not innocent bystanders. The 1st Appellant was identified properly by PW5 visually and vocally. The trial Court correctly applied the decision of the ***Court of Appeal in Choge v. Republic [1985] KLR*** on voice identification. The 2nd Appellant was correctly identified by Sylvia Moller and the trial Court applied the law properly in finding Sylvia's evidence on identification honest and unmistakable, relying on the Court of Appeal of Kenya decision in ***Munuhe and Another v. Republic [1986] KLR***. There is nothing on the record before the Court, which would suggest the police disregarded the standing orders on identification in either case. Robbery took place at high noon, and the Appellants were seen and heard by the identifying witnesses from close proximity. There was sufficient time and light during the attacks to enable the witnesses identify the attackers.

20. The point that the Appellants were kept in police custody before arraignment in Court for more than the stipulated period of 14 days was taken up by the two Appellants at the trial Court. They made an application for their release, based on violation of Section 72[3]. The Investigating Officer was called to testify and explain why there was delay in charging the Appellants. He explained that the robbery took place on 27th January 2007. He arrested the 2nd Appellant on 10th February 2007. The 2nd Appellant escaped from police custody on 16th February 2007 and was rearrested on 3rd March 2007. The 1st Appellant was arrested with the 2nd Appellant on 3rd March 2007. They were charged on 20th March 2007, after 17 days. The Officer explained that the Appellants were implicated in other robberies and were taken away from Gigiri Police Station to CID Ngong' where the other cases were being investigated with the aid of the ballistics laboratory. The period of 17 days was reasonable, considering the intricacies of the investigations. The Court upheld the explanation of the Investigating Officer ruling that in the circumstances, a period of 17 days was not inordinate. This Court does not think that the trial Magistrate misdirected herself on the facts and the law with respect to Section 72[3] of the old Constitution. In ***Court of Appeal Criminal Appeal Number 120 of 2004, Albanus Mwasia Mutua v. Republic***, it was held that it is the duty of the police to explain to the Court in a satisfactory manner, delay in charging criminal suspects. Where the fundamental rights of an accused person are violated, the criminal proceedings are

nullified. We do not think that a delay of 3 days in bringing the Appellants to Court resulted in violation of Section 72[3] of the old Constitution. They were implicated in multiple robberies. We have already concluded that on 27th January 2007 alone, the Appellants were involved in no less than three violent robberies. There were allegations of their involvement in other attacks outside the 27th January 2007. More than one police station was conducting investigations in a complicated web of criminal activities. The Investigating Officer was able to explain the delay of 3 days to the lower Court quite satisfactorily. This ground of appeal is rejected.

21. The 1st Appellant did not persuade us that evidence of fingerprints was flimsy and inconsistent. He propounded a theory at the hearing that it was impossible to have any fingerprints on Zelda's car after two days in Limuru as the place is cold. The lower Court found, and we agree that evidence of fingerprints was based on sound, time-tested scientific principles, and could only be rebutted by scientifically explainable counter-evidence. The 1st Appellant did not provide any material to back up his theory of vanishing fingerprints. Every time someone enters an environment, something is added, or removed from it. Every contact leaves a trace. Criminologists call this the 'Locard's Exchange Principle.' Paul Kirk in ***Crime investigation: physical evidence and the police laboratory – Interscience Publishers, Inc: New York 1953***, explains this principle in the following words:

“wherever he steps, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints, but his hair, the fibres from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects. All these and more bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be wrong, it cannot perjure itself, and it cannot be wholly absent. Only human failure to find it, study it and understand it can diminish its value.”

We are persuaded that the 1st Appellant entered an environment, which was Zelda's car. He added something to that environment which was his fingerprints. He also left that environment with the lives of two innocent women, a mother and her daughter. His challenge of the evidence of fingerprints is rejected.

22. The other grounds of appeal were generalities, and do fault the conviction and sentencing in any way. The Appellants' respective testimonies in defence were given adequate consideration. None of the Appellants accounted for their behaviour at Bulbul when arrested on 3rd March 2007. The 2nd Appellant did not explain why he escaped from police custody, an offence which he admitted and was convicted of, or why he was in possession of the mobile phone that belonged to Zelda. Both Appellants confirmed they were together at Bulbul on 3rd March 2007. Bizarrely the 1st Appellant submitted at the hearing of the Appeal that the offence was committed by one Simon Matheri 'most wanted.' They took issue with the witnesses and exhibits produced in their trial. They did not explain to the Court which exhibit they wished to have produced, and was omitted. They did not inform the Court which witnesses were omitted by the prosecution, and how this affected their case. There was no reason why the 1st Appellant did not apply for summons to issue during the trial, against the person he named as Simon Matheri to give evidence that would extricate the 2nd Appellant from the crime. We are convinced the two Appellants were convicted and sentenced in a fair trial, and on very strong physical and testimonial evidence, grounded on sound legal reasoning of the trial Magistrate. We Order:-

[a] The Appeal is dismissed in its entirety.

[b] The decision of the lower Court is sustained

Dated and delivered at Nairobi this 18th day of November 2013

