



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 7, 8, & 9 OF 2011

RUFUS NGUGI MAINA1ST APPELLANT

BONIFACE KURIA KARANJA2ND APPELLANT

STEPHEN KARIUKI CIRA3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1855 of 2009 in the Chief Magistrate's Court at Thika – B. A. Owino (SRM) on 7th January 2011)

JUDGEMENT

Introduction

1. The appellants, **Rufus Ngugi Maina, Boniface Kuria Karanja** and **Stephen Kariuki Cira** faced three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, in **Thika CM Cr. Case no. 1855 of 2011**, before B. A. Owino, Senior Resident Magistrate. They were convicted in all three counts and sentenced to suffer death as by law prescribed.

Particulars of the Charge

2. They had denied that on the 13th day of April 2009, at Toll Stage in Ruiru township within Central Province, jointly with others not before court, while armed with a pistol they robbed Julius Obanda Arani of cash Kshs.7,000/=, two mobile phones make Nokia, one calculator, laptop bag, national identity card, employment card, (certificate of appointment), two ATM cards, payslips and business cards all valued at Kshs.35,000/= in **count I**; Leonard Kimemia Kariuki of Kshs.4,000/= and one mobile phone make Nokia valued at Kshs.10,000/= in **count II**, and George Gitau Ndungu of cash 2,700/=, motor vehicle registration number KBF 584 D, Identity card and drivers badge in **count III**, and that at, or immediately before, or immediately after the time of such robbery used actual violence against the victims.

Grounds of Appeal

3. The three appellants filed similar grounds of appeal which were that:

- i. *The evidence of identification was not free from error.*
- ii. *The evidence as a whole was not credible or sufficient to discharge the burden of proof.*
- iii. *Critical witnesses were not summoned.*
- iv. *Provisions of Section 169 of the Criminal Procedure Code were flouted.*
- v. *The appellants' defences were not given adequate consideration.*

Submissions

4. Learned counsel Ms. Rashid appeared for the first and third appellants and relied on their written submissions and grounds which she amalgamated and urged together. She submitted that the constitutional rights of the two appellants were violated because they did not receive a fair trial. In this regard she submitted that the court allowed **PW1** to give prejudicial evidence that amounted to confessions by the first and third appellants. She argued that the evidence of identification was not free from error or mistake; that their defences were disregarded and that vital witnesses were not summoned.
5. The second appellant in his written submissions which were similar to the other two appellants' argued first, that no evidence was led as to the intensity of light by which he was identified. Second, that **PW2** did not give a description of his assailants in his first report. That witnesses who were at the scene of the accident were not summoned to testify and that the injuries found on him were not proved to have been "caused by a crash". He submitted lastly, that the reasons provided by the learned trial magistrate to dismiss his defence were very remote and inferior.

Response to Grounds of Appeal

6. The state opposed the appeal through learned counsel Miss Njuguna, who submitted that the judgment does not show that conviction relied on any confession. She further urged that the defence statements were considered and the court found them to lack merit and that all the appellants were positively identified.

Summary of The Case

7. The case presented before the trial court was that on 13th April 2009 at about 7.30 p.m, **PW2** was driving a matatu registration No. KBF 584 D ferrying passengers from Nairobi via Ruiru to Thika when at Toll area, Ruiru, some men numbering about five, who had posed as passengers turned on them and carjacked the motor vehicle. **PW2** fought off his attackers and jumped out of the motor vehicle. He fled while raising alarm and reported at a police post nearby. Meanwhile, one of the 2 men jumped into the driver's seat and sped off with the motor vehicle and the passengers.
8. The people in the motor vehicle who included **PW1** and **PW4** were robbed of cash and other valuables then abandoned along the road. They got help from good Samaritans and went to report at Gatundu Police Station. They were taken to Gatundu District Hospital for treatment as some of them were injured. The appellants were identified and arrested when they too were brought to the same hospital, following an accident in which they were involved.

Defence

9. Each appellant gave an unsworn statement of defence in which each denied any involvement in the incident. Each appellant claimed to have been involved in separate accidents that evening. The first appellant claimed to have cycled into a speeding matatu that did not stop. The second appellant said he cycled into a handcart, while the third appellant fell off a ledge in a valley. Their evidence was that a good Samaritan rushed the first and third appellants to hospital, while the second appellant last woke up to find himself in police cells. That is how they ended up in hospital.

10. We have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court, is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion but to draw our own inferences and reach our own conclusions. See **Kiilu and Anor v Republic [2005] 1 KLR pg 174.**

Identification and The Weight of Evidence

11. The evidence of identification came from **PW1, PW2 and PW4**. **PW1** who was also the first complainant testified that the robbery occurred at 7.30 p.m. **PW1** who was seated in the second to last row in the rear of matatu registration number KBF 584 D, became aware of a commotion in the driver's cabin when the vehicle stopped at Toll area to drop a passenger. He noticed that two people, one of whom was sitting next to the driver was attempting to throttle the driver, aided by the passenger who had wanted to alight.

12. **PW1** further testified that at that moment the first appellant rose and ordered everyone to remain in their seat and keep quiet. The driver managed to jump out and one of the robbers took control of the vehicle. The first appellant and another ordered everyone in the vehicle to produce valuables. **PW1** was robbed of the property listed in **count I**. Shortly thereafter the motor vehicle stopped and the conductor and one of the passengers were ejected. The vehicle drove on and stopped a second time to eject the five passengers who included **PW1**, then it sped off with five occupants.

13. They reported the incident at Gatundu Police Station where they learnt that the said motor vehicle had been involved in an accident at Kiamwangi area. They were taken to Gatundu hospital where they came upon three accident victims who had been brought in by a good Samaritan. **PW1** said that he identified all three men as their assailants. He recalled that the first appellant was seated in his row, the second appellant sat behind the conductor while the third appellant and another sat in the driver's cabin. From the matatu which was in the accident the police recovered **PW1's** bag which was stolen in the robbery. It still had his documents.

14. **PW2** was the third complainant and the driver of the ill-fated matatu. He was plying his usual route of Nairobi-Ruiru on the evening of 13th April 2009 when one passenger who was seated in the driver's cabin asked to disembark at Toll area. **PW2** stopped the vehicle to let him off but suddenly, the passenger seated next to **PW2** grabbed his neck and held him in a "Nelson" grip while the passenger who had asked to be let off joined in and tried to subdue him. **PW2** opened the driver's door and jumped out.

15. The passenger who had asked to disembark jumped out of the vehicle, ran to the driver's side and took control of the vehicle. He drove off at high speed with the other passengers who were still on board screaming for help. **PW2** left his half-coat containing the property listed in **count II** in their hands. He reported the matter to a police post nearby and they put out a police alert on the motor vehicle, as he went on to Ruiru Police Station to file a report.

16. He testified that he identified the second appellant as the one who sat in the seat behind the driver. He was able to identify him because **PW2** was standing at the door waiting for passengers and had seen all the passengers as they boarded. **PW2** said that the first and third appellants boarded the motor vehicle and sat towards the rear. He learnt that of the two robbers who physically attacked him in the vehicle, one died following the subsequent accident while the other was not arrested.

17. **PW4** who was the third complainant was the conductor of the motor vehicle which was carjacked. His evidence corroborated that of **PW1** and **PW2**. He stated that as the motor vehicle neared Toll stage, he heard a passenger shout "shukisha Toll". (disembark at Toll); that suddenly he heard a commotion in the driver's cabin and when he looked he realized that the driver was under attack. The driver struggled to free himself and then he jumped out of the motor vehicle and fled.

18. **PW4** was hit on the head with a blunt object, frisked and all the property listed in count II taken from him. The passengers too were robbed. He and another were pushed out of the moving vehicle 10 minutes later. He reported to Gatundu Police Station and was taken to Gatundu Hospital. While in hospital the passengers he had left in the vehicle arrived to say they too had been abandoned by the roadside.

19. **PW4** was able to identify the first and second appellants. When cross-examined by the first appellant, he had this to say:

“You took a seat at the rear of the motor vehicle. Another one of your friends sat within the same area. I did not check to confirm exactly what seat you took. I can only recall well that accused 2 sat behind me. While two others were in the driver’s cabin”.

20. The vehicle had covered a considerable distance having moved from Nairobi to Toll Stage with the lights on inside it. It was the testimony of **PW4** that someone smashed the light bulbs when the commotion started in the vehicle.

21. **PW5**, CPL Maitha of Ruiru CID received the report of the carjacking from police at Toll station, between the hours of 8 p.m. and 9 p.m. on 13th April 2009, while on duty. Shortly thereafter Gatundu Police called and informed him that some of the victims of the carjacking were with them at Gatundu Police Station. Later still Gatundu police called to inform him that the said motor vehicle had rolled and the suspected gangsters had been rushed to Gatundu District Hospital by good Samaritans.

22. **PW5** found the victims of the carjacking at Gatundu Police and they confirmed to him that they could identify some of the robbers if they saw them again. He confirmed that they did subsequently identify the three appellants to him at Gatundu Hospital.

23. **PW3** the officer from the Scenes of Crime Section of CID Thika produced photographs that he took of motor vehicle KBF 584 D at Gatundu Police Station, as proof that the motor vehicle was involved in an accident on the evening in question.

Procedural flaws

24. It is not clear why **Section 169** of the **Criminal Procedure Code** was cited in the grounds of appeal. The said section is with regard to the manner of writing judgments. We have considered the judgment of the lower court and we do not believe that this ground has any merit. The court set out the charge facing the appellant, the evidence presented before it by both the prosecution and the defence, the analysis of it and the decision and sentence. We are satisfied that the said section was not flouted.

25. The appellants also complained that critical witnesses were not summoned. **Section 150** of **Criminal Procedure Code** empowers the court to summon a witness or examine any witness at any stage. In **High Court Criminal Appeal Number 54 of 2011 Martin Ochieng Opiyo vs The Republic**, the court had this to say:

“As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. Those witnesses called were able to establish the prosecution case.”

We agree with those views and find that they apply in the case before us.

Evaluation of the appellants’ defences

26. The learned trial magistrate considered the defence statements of the appellants and did not believe them in light of the strong unchallenged identification evidence of **PW1**, **PW2** and **PW4**.

We too have perused the record bearing in mind that this being a criminal trial the burden rests without shifting on the prosecution to prove their case and not upon the appellants to prove their innocence.

27. **PW4** testified as follows regarding what he saw at the hospital:

“after sometimes, a saloon, car brought in some 4 men. The 4 men were taken to casualty. The 4 men were seriously injured. It is then one of the passengers was able to identify accused 2 as one of the gang members who had attacked us. It is then I also identified the 4 as they had been passengers in the motor vehicle. I was able to identify accused 1. I recalled that accused 1 was in the motor vehicle.”

We too find that it would be stretching the realms of credibility too far, to believe, as the appellants would have us believe, that they met their accidents on the same evening, in different unrelated circumstances, in different locations, but that one good Samaritan picked all of them and took them to the same hospital together.

Findings

28. We have anxiously scrutinized and re-evaluated the evidence in totality and find that **PW1, PW2** and **PW4** were travelling together from Nairobi towards Ruiru in motor vehicle registration KBF 584 D when they were carjacked at Toll Stage, on the evening of 13th April 2009; that there were lights in the vehicle during the journey before the bulb was smashed when the attack commenced; that **PW1, PW2** and **PW4** placed all three appellants in the ill-fated matatu on the fateful night. They also identified them at Gatundu Hospital for purposes of arrest; that there were contradictions as to the sitting positions of the appellants in the vehicle, but we deemed those to be so insignificant as not to shake the prosecution case; and lastly that none of the witnesses knew the appellants before the attack and there was no basis for us to conclude that any of them had been framed.

29. In sum, we have considered the appeal at length and find that the evidence on record was sufficient to sustain the convictions against the appellants on each of the charge.

30. We therefore find that the appeals are lacking in merit and dismiss them. We uphold the convictions and the sentences imposed.

SIGNED DATED and DELIVERED in open court this **11th day of December 2013.**

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MUMBI NGUGI

JUDGE

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L. A. ACHODE

JUDGE