



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL 66, 68, 67 & 54'A' OF 2010

DUNCAN MWANGI NGATIAAPPELLANT

Versus

REPUBLICRESPONDENT

*(Appeal arising from judgment of Principal Magistrate's
Court at Karatina criminal Case No.343 of 2007)*

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 68 OF 2010

ELIJA GICHANA GITHINJIAPPELLANT

Versus

REPUBLICRESPONDENT

*(Appeal arising from judgment of Principal Magistrate's
Court at Karatina criminal Case No.343 of 2007)*

AND

CRIMINAL APPEAL NO. 67 OF 2010

PETER MUREITHI WARUIAPPELLANT

Versus

REPUBLICRESPONDENT

(Appeal arising from judgment of Principal Magistrate's

Court at Karatina criminal Case No.343 of 2007)

AND

CRIMINAL APPEAL NO. 54'A' OF 2010

DAVID KINYUA MBAYIA.....APPELLANT
Versus

REPUBLICRESPONDENT

(Appeal arising from judgment of Principal Magistrate's

Court at Karatina criminal Case No.343 of 2007)

JUDGMENT

The appellants herein DUNCAN MWANGI, ELIJA GICHANA, PETER MUREITHI and DAVID KINYUA were charged, tried, convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 7th April 2007 at Ngandu village in Nyeri District within Central Province jointly with others not before court being armed with dangerous or offensive weapons namely axes robbed JOHN WACHIRA NDEI one panga and axe all valued at Ksh. 500/- and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said JOHN WACHIRA NDEI.

They all pleaded not guilty of the said charge before the trial court and being dissatisfied with the said conviction and sentence lodged these appeals which we consolidated for the purposes of this trial.

The appellants who appeared in persons before us each filed an amended grounds of appeal and written submissions which they relied upon.

The State through Miss Maundu conceded to the appeal against the 4th Appellant on the basis that in his defence he stated that he was only accompanying Zipporah who was not called as a witness to 2NK stage and that the alleged phone was never produced.

The appellant's grounds of appeal for the purposes of this judgment can be stated as follows:

- a. The Learned trial magistrate erred in law and in fact in applying the doctrine of recent possession to found a conviction which according to evidence on record was not safe and sustainable.***
- b. The charge sheet was defective.***
- c. Their defences were not given consideration.***

The prosecution case before the trial court was as follows:

P.W.1 John Wachira Ndei testified that on 7th April 2007 at 2.00 a.m. He was told by his wife to wake up since there were people in their compound. He opened the door curtain and saw two people who asked him for money and when he told them he did not have money they broke the door using heavy objects. He asked them if they would take mobile phones. He thereafter threw to them through the window his wife's Nokia phone. They then threatened to burn his motor vehicle Reg. No. KPT 050 whose windows they broke. That the attackers had disconnected electricity at the meter box. They broke into the kitchen and

stole panga and axe. He was unable to identify any of the attackers and that after some months they were asked by the police about the phone which they found at the police station together with the panga.

P.W.2 Susan Wangu Githinji testified that on 7th April 2007 at 2.00 a.m. she woke up looked through the window and spotted two people. There was electricity through her mother's house. She woke up her husband who threw her phones to the attackers. She stated that she did not see what the attackers had but that they were many. That she later on found her phone and panga at Karatina police station.

P.W.3 Eva Njeri Kariara also testified that on 7th April 2007 at 3.00 a.m she was asleep with her husband when there was a knock at their bedroom window and heard the people outside demanding for money. That her husband went to the sitting room and started screaming while P.W.3 locked herself with her 10 month baby in the bedroom.

The attackers broke the kitchen door and gained entry to the house and two of the attackers entered the bedroom where she was asking for money. They took Ksh. 150 from on top of cupboard, her phone Panasonic GD SS and that the attack took about 50 minutes but she was unable to identify anyone. She was later called by a Mr. Musyoka a police officer from Karatina who told her that her phone had been found which she later on identified.

P.W.4 James Thuku Ndei testified that on 7th April 2007 at 2.00 a.m. he heard his mother screaming and saying there were thieves and when he attempted to get out of his house he realized that the same was closed from outside. He opened his door and spotted 2 men but could not identify them. That he saw them breaking Wachira's (P.W1's) window. After 30 minutes the police came but at that time the attackers had left.

P.W.6 James Kariero Ndirangu also testified that on 7th April 2007 at 3.00 a.m. he was sleeping when he heard people knocking his bedroom window demanding money. That he declined to open the door but they broke the kitchen door and two of them gained entry into the house. There was no light as they had disconnected the electricity from the metre. He testified that the attackers had torches and wore hooded hats. He gave them his wife's phone GD SS Panasonic and Ksh. 155.

P.W.7 Christopher Ndegwa police officer then stationed at Karatina Police station testified that on 8th April 2007 at 2.30 a.m. got a call from members of the public who informed him of the robbery at Mathaithi. The informer had his motor vehicle they rushed to the scene of the alleged robbery and found the main gate to the compound locked with a padlock. They jumped into the compound and the thugs fled towards the coffee farm and when they realized that there were more thugs in the house so they entered the house and heard a man saying

“you woman stop being foolish and add money”.

They asked for reinforcement and in the process the 2nd and 3rd appellant jumped from the ceiling while the 1st appellant was found trying to enter the toilet. They were searched and in the pocket of the first appellant Ksh. 3600 was found Ksh. 600 in the pocket of the 2nd appellant and Nokia 3310 belonging to the owner of the house.

He testified that he did not know why the 4th appellant was arrested.

When put on their defences the appellants gave unsworn evidence. The first appellant stated that on 5th April 2007 he went to work and came back home at 6.00 p.m. On 6th April 2007 was good Friday he stayed at home. On 7th April 2007 he went to Karatina Catholic Church at 9.00 a.m he stayed there until midnight when he started to go home and about 400 meters met a vehicle and sgt Musyoka came out of it and asked him where he was from and what he had in his pocket and he took his documents Id card and Ksh. 3600/-

2nd appellant testified that on 7th night he was sleeping with his three year old child as his wife had died in January of 2004. He woke up and left the child with his sister. He thereafter went to Karatina and at 11.30 p.m. decided to go to express house to shop when he met police land cruiser stopped and Ksh. 600/- taken from him.

4th appellant testified that he was a driver and on 6th July 2007 was at work at midday. When they reached Karatina a passenger asked him to show her 2NK offices where she had a parcel there. She was told that there was no parcel. He told her to call the person who had informed her of the parcel when two men emerged and asked her about the phone she was using. She gave them the phone and they were both arrested.

The 3rd appellant testified that on the evening of 7th April 2007 at around 1.30 a.m. he heard the door being knocked after he was shown an Id card by the police he opened the door and was arrested.

We have looked at the evidence tendered before the trial court and the submissions of the appellants herein together with the submission by Miss Maundu for the state. We note that the 1st, 2nd and 3rd appellants were actually arrested at the scene of the robbery we therefore find no merit on the appellants appeal herein and hold as a fact that the prosecution case against the 1st, 2nd and 3rd appellants were proved beyond any reasonable doubt. The trial court rightly held that the phone was found where the 2nd and 3rd appellants were and therefore the doctrine of recent possession was correctly applied by the court.

We agree with the submission by Miss Maundu for the state that there was no evidence connecting the 4th appellants with the robbery herein. We note from record that P.W.8 NJUGUNA MBUGUA testified that he saw the 4th appellant and Ziporah Wambura and as he was calling then they responded and he arrested them and under cross examination confirmed that Zipporah is the one who was holding the phone. It is therefore clear to our mind that the 4th appellant was wrongly charged with the offences herein.

In the final analysis we allow the appeal by the 4th appellant quash his conviction and set aside the sentence herein and order that the same be set free forthwith unless otherwise lawfully held.

We find no merit on the appeal by the 1st and 2nd and 3rd appellants herein uphold the conviction and sentence in respect of the same.

Dated and delivered at Nyeri this 30th day of May 2012.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE