



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 294 & 295 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 196 of 2008 of the Senior Resident Magistrate's Court at Voi: M.S.G. Khadambi – P.M.)

BERNARD MAGANGA MJOMBO 1ST APPELLANT

GEORGE MWAKUDUA MUNA 2ND APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

JUDGEMENT

The two Appellants herein namely **BERNARD MAGANGA MJOMBO** (hereinafter referred to as the 1st Appellant) and **GEORGE MWAKUDUA MUNA** (hereinafter referred to as the 2nd Appellant) have both filed this appeal to challenge their conviction and sentence by the learned Principal Magistrate sitting at Voi Law Courts. Both Appellants were arraigned before the trial court on 20th March 2008 and were jointly charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows:

“On the 12th day of March 2008, at about 8.00 p.m. at Voi town, in Taita Taveta district within Coast Province, jointly with others not before court while armed with a dangerous weapon namely a pistol robbed JULIUS GICENGI LITHUTI of a motor vehicle registration number KBA 914K Toyota Caldina Station Wagon white in colour, the property of HARON JUMA ODIPO, one mobile phone make Nokia 1110, cash Kshs.2,100/-, one overall apron, thermos, flask, dish plate and driving licence all valued at Kshs.830,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said JULIUS GICENGI LITHUTI”

Both Appellants entered a plea of ‘**Not Guilty**’ to the charge and their trial commenced on 7th July 2008. The prosecution led by **INSPECTOR GITHOGE** called a total of nine (9) witnesses in support of their case.

The brief facts of the prosecution case are as follows. **PW2 AARON JUMA** a resident of Voi told the court that he is the owner of the motor vehicle Registration KBA 914K Toyota Caldina Station

Wagon. He further told the court that he converted his vehicle for use as a taxi and confirms that he had employed **PW1 JULIUS GICENGI** as his driver to run the taxi business on his behalf.

PW1 told the court that on 12th March 2008 at about 8.00 p.m. he was at Voi town operating the taxi business when 1st and 2nd appellants came and hired him to drive them to Vuria bar where they were to pick their boss. They drove to Vuria bar and picked a man who had a bandage on one arm which the man explained by saying that he had been involved in a road traffic accident. The men then asked **PW1** to drive them to Sisera at an agreed fee of Kshs.600/-. Upon reaching Sisera the men led him to a homestead. When **PW1** stopped the vehicle the man with the bandaged arm got out and pulled out a pistol. They beat up **PW1** tied his hands and legs and forced him to lie on the floor in the back seat. They then drove around with **PW1** and even stopped to refuel the car at a petrol station. Finally they stopped in some bushes and ordered **PW1** to get out. He was pulled out and remained in the bushes with two Appellants one of whom put on a red overall which belonged to **PW1**. The vehicle was driven away. Eventually the two Appellants who were guarding **PW1** walked into the bushes and **PW1** managed to free his legs. He walked to the main highway and flagged down a Falcon bus which stopped. **PW1** narrated his ordeal to the bus conductor who allowed him to board the bus. Inside the same bus were two passengers who were police officers. As the bus proceeded on its way two men flagged it down. **PW1** recognized them – the two Appellants part of the gang who had robbed him of his vehicle. Indeed one was still wearing the red overall they had stolen from **PW1**. The two Appellants boarded the bus and were immediately arrested by the two police officers. They were both taken to Voi Police Station and after completion of police investigations the two Appellants were jointly charged with the offence of Robbery with Violence. The stolen motor vehicle was never recovered.

At the close of the prosecution case both Appellants were found to have a case to answer and were placed onto their defence. They each gave unsworn statements in which each denied any involvement in the robbery. On 24th March 2010 the learned trial magistrate delivered her judgement in which she convicted both Appellants on the charge of Robbery with Violence and thereafter sentenced each one to death. Being dissatisfied by both this conviction and sentence the two appellants filed this appeal. **MR. JAMI** learned State counsel who appeared for the Respondent State opposed the appeal.

As a court of first appeal we have an obligation to re-evaluate and re-examine the evidence adduced during the first trial and to draw our own conclusions on the same [**AJODE –VS- REPUBLIC [2004]2 KLR 84**]. Before we delve into an analysis of the evidence on record we find it instructive to first consider the question whether the events as narrated by **PW1** did reveal the offence of Robbery with Violence as envisaged by S. 296(2) of the Penal Code. To answer this pertinent question we will rely on the Court of Appeal decision in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549** where their Lordships set out the ingredients of this offence. In that case it was held thus:

“Robbery with Violence is committed in any of the following circumstances

(a) The offender is armed with a dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person”

The use of the word ‘or’ in this definition means that the presence of **any one** of the above ingredients will suffice to prove a charge of Robbery with Violence. In this particular case **PW1** (who was the victim of the robbery) told the court that he was robbed of his vehicle by a group of four (4) men. One of the men was armed with a pistol which he used to threaten **PW1**. In the course of the robbery and as a means of ensuring compliance by **PW1** the men assaulted him leading to injuries. Proof of the injuries is provided by the evidence of **PW8 DR. WILSON CHARO** who examined **PW1** on 25th March 2008. He noted that the clothes of **PW1** were soiled with dust and debris (no doubt from his sojourn in the bushes) and upon further examination **PW8** noted that **PW1** had tenderness to his chest and scratches on his arms. He filled and signed the P3 form which is produced as an exhibit **Pexb1**. This corroborates the

evidence of **PW1** that he was beaten and tied up. From the evidence we are satisfied that indeed this incident contained all the three (3) ingredients of Robbery with Violence as set out in the **Oluoch** case.

We have carefully perused the written submissions filed by both appellants in this case in support of their appeal and note that they raise the following broad issues –

- (1) Identification
- (2) Recovery of exhibit
- (3) Failure of the trial court to consider their defence

On the question of identification **PW1** positively identified the 1st and 2nd Appellant as the men who first approached him to hire the taxi on the evening of 12th March 2008. From his evidence **PW1** spoke to the men and they even negotiated a price. He thus had ample time and opportunity to see and identify both men. At page 5 line 33 **PW1** says:

“I had parked my vehicle outside a shop where there are 2 powerful security lights so I could see clearly.”

This evidence is corroborated by **PW5 JOHN OBUON AWOTH** who was the watchman on duty at Vuria Bar on the night in question. He states that he saw the taxi being driven by **PW1** come to the bar. He confirms that the 1st and 2nd Appellant came with the taxi and identifies them both. **PW5** confirms that there was enough light outside the bar. He states at page 15 line 5:

“It was not very dark and there were security lights outside the bar”

Thus there is evidence of enough lighting at the scene which further aided identification. **PW1** spent most of that evening with the two Appellants. He drove them to Vuria bar and he later drove them to Sisera. He was in their company for sufficient period of time that he would have been able to see the men well. There is clear evidence from **PW1** on the role which each Appellant played in the incident. He states at page 5 line 23:

“A1 is the one who approached me at the stage and told me about the boss. He sat next to me on the way to Vuria. After the others entered at Vuria, he sat behind me. He is the one who tied my legs. He is also the one who remained with me in the bush and was among the two who entered the bus. “

With respect to the 2nd Appellant **PW1** states at page 5 line 27:

“A2 was with A1 at the stage when they hired me. He sat at the back seat. He kept demanding money from me and twisting my neck. He is the one who after they removed me from the motor vehicle in the bush, went back to my car and came back with my overall. He then wore my overall He is the one who entered the bus while still wearing my overalls. I had seen his face well from the stage”

The fact that **PW1** was able to give such a detailed and graphic account of the specific role played by each Appellant convinces us that he had a clear and unfettered view of the robbers and was in a position to positively identify them. After being left in the bushes **PW1** told the court that he managed to free himself and went to the road where he flagged down a Falcon bus. **PW6 JOHN MUSEO** and **PW7 JULIUS MWACHOLA** the conductor and loader of this bus both confirm that they saw **PW1** staggering on the road with his hands tied. They stopped the bus and questioned him. **PW1** told them that he had just been robbed of a motor vehicle. They then allowed **PW1** to board the bus.

Further corroboration on identification is provided by the evidence of **PW1** regarding his red overall. **PW1** told the court that the 2nd Appellant took his red overall out of the car and wore it himself. Later the two Appellants flagged down the very bus belonging to Falcon Company which had

rescued **PW1** when he managed to free himself. **PW1** immediately identified the two as amongst the men who had robbed him. The red overall was produced in court as an exhibit **Pexb2**. **PW1** has identified the overall as his property. The 2nd accused makes no claim that the overall belongs to him. The evidence that the 2nd Appellant was actually wearing this red overall is corroborated by **PW6** and **PW7** who were on the bus. Similarly **PW3 APC SENIOR SERGEANT PETER MUSYOKA** and **PW4 CORPORAL JAMES GICHANGI MBUTHIA** both police officers who happened to be on the same bus confirm that when the two Appellants flagged down the bus the 2nd Appellant was wearing a red overall which **PW1** identified as his. Indeed **PW3** and **PW4** told the court that they had to protect the two Appellants from the irate passengers who wanted to beat them up. All these witnesses identify the red overall produced in court as **Pexb2** as the overall which the 2nd Appellant was wearing.

In their written submissions the Appellants argue that there is no proof of the ownership of the red overall. This may be so but a red overall is not a common item of clothing commonly worn by people. Further it cannot be a mere coincidence that the men who robbed **PW1** take away his red overall and hardly one hour later the 2nd Appellant is found wearing a red overall. As stated earlier the 2nd Appellant did not claim that the overall belonged to him neither did he deny having been arrested wearing it. The doctrine of '**recent possession**' squarely applies in these circumstances. The possession by the 2nd Appellant of the stolen red overall inexorably and definitely links the 2nd Appellant to this robbery. From our own independent analysis we are satisfied that there has been a clear positive and reliable identification of the two Appellants as amongst those who participated in this robbery.

The Appellants argued that the trial magistrate failed to give due consideration to their defences. We find that this was not a correct assertion. The trial magistrate did consider the alibi defence raised by the 1st Appellant but dismissed the same as unreliable. As such we find that due consideration was given to the defences raised. On the whole we do agree with the trial court that the evidence against the two Appellants was indeed overwhelming. We find their conviction to have been sound and we have no hesitation in confirming the same.

Both Appellants were accorded an opportunity to mitigate after which they were each sentenced to death. This is the lawful sentence of the offence of Robbery with violence and we are not inclined to interfere with the sentence as imposed by the trial court. Finally this appeal fails in its entirety. The convictions and sentences of the trial court are hereby upheld and confirmed.

Dated and Delivered in Mombasa this 26th day of June 2012.

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M. ODERO

JUDGE

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G. NZIOKA

JUDGE

In the presence of:

Appellants in person

Mr. Gioche for State