



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 251 & 244 of 2009

JOHN KIMANI GICHIA.....1ST APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.884 of 2008 by J. Kiarie – S.P.M.)

CONSOLIDATED WITH

CRIMINAL APPEAL NO.244 OF 2009

JANE NJOKI MWANGI.....2ND APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.884 of 2008 by J. Kiarie – S.P.M.)

J U D G M E N T

John Kimani Gichia and **Jane Njoki Mwangi**, being the 1st and 2nd Appellants were jointly tried on a charge of three counts of **Robbery with Violence** contrary to **Section 296(2)** of the Penal Code. The particulars of the offence in Count I are:

On the 14th day of August 2008 at Sasini area in Nyeri District within Central Province, jointly with others not before Court and while armed with dangerous or offensive weapons namely: knives robbed Ezekiel Wainaina Karonjo of a motor vehicle Registration Number KAW 559N Nissan Matatu, a mobile phone make Nokia 1110 and cash Ksh.350/= all valued at Ksh.800,350/= and at or immediately before or immediately after the time of such a robbery used actual violence to the said Ezekiel Wainaina Karonjo.

The particulars of the offence in Count II are:

On the 14th day of August 2008, at Sasini area in Nyeri District within Central Province, jointly with others not before Court and while armed with dangerous or offensive weapons namely: knives, robbed Josphine Muthoni Ntoi of cash Ksh.2,000/= and at or immediately after the time of such robbery used

actual violence to the said Josphine Muthoni Ntoi.

The particulars of the offence in Count III are:

On the 14th day of August 2008, at Sasini area in Nyeri District within Central Province, jointly with others not before Court and while armed with dangerous or offensive weapons namely knives robbed David Wachira Mwangi of cash Ksh.4,000/=, mobile phone make Nokia 1110 valued at Ksh.4,000/= all valued at Ksh.5,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said David Wachira Mwangi.

At the end of the trial, the duo were convicted and sentenced to suffer death. Being aggrieved, the Appellants each filed an Appeal, which Appeals were ordered consolidated.

In his Petition of Appeal, the 1st Appellant put forward the following ground of appeal:

“1. The Learned Magistrate erred in the facts on the issue of identification of the Appellant by P.W.1 and P.W.2 and subsequent parade against the Appellant by the Prosecution Witnesses, evidence that raises incredibility and hence unbelievable.

2. The Learned Magistrate erred in law and in facts in holding the theory by the Prosecution that Appellant could be in the alleged motor vehicle KAW 559N that was not an exhibit but only manufactured evidence built on the Appellant by the Prosecution who only brought and produced KAN 559N.

3. The Learned Magistrate erred in law and in facts in finding that Prosecution tendered any evidence to suggest that Appellant was not and or could not be in a separate motor vehicle.

4. The Learned Magistrate erred in law and in facts not finding defence honest and truthful.”

On the other hand, the 2nd Appellant put forward the following grounds:

“1. Your Honour did not take a point that my case was heard by three Magistrates and four Prosecutors then final judgment was done relying on one witness i.e. P.W.9.

2. Your Honour did not take serious concerning the exhibit. The stolen vehicle was Nissan Matatu KAW 559N and the exhibit was KAW 599W.

3. Your Honour never took into account P.W.1 and P.W.3 since P.W.1 never reported and only came to parade and never recognized while P.W.3 testified and was not taken into account.

4. Your Honour did not put into account from the Prosecution that P.W.7 and P.W.8 were not the people who arrested me. This was another person’s testimony.

5. The Identification Parade your Honour was conducted wrongly. My Lord we had spent the whole day with the witnesses and this was said by P.W.9, thus to me was not true.

6. Your Honour, gave me defence and submissions the same day in which I was not prepared.

7. Your Lord during judgment nothing was read and I was shocked even to mitigate. I never knew what it meant.

8. Your Honour, I am a single mother with 3 children who depend on me and are young. I am HIV Positive and currently live on drugs.

When the Appeals came up for hearing, Miss Mwai, argued the same on behalf of the Appellant while Miss Maundu appeared to argue the case against Appeals on behalf of the Director of Public Prosecutions.

The case that was before the trial court appears to be short and straightforward. A total of eight (8) witnesses were summoned to testify in support of the Prosecution's Case. On 14th August 2008, at about 5.00 A.M., Ezekiel Karonjo, (P.W.1) the driver of motor vehicle registration number KAW 599N, a Public Service Vehicle together with his conductor David Mwangi (P.W.2), were on board the aforesaid motor vehicle looking for passengers. Two people entered the motor vehicle at a Petrol Station in Nyeri Township. The matatu plied the Nyeri-Nyahururu Road. The two '*passengers*' informed P.W.1 and P.W.2 that they had four other passengers headed for Nyahururu to be picked on the way. Other passengers too boarded the vehicle making a total of 9 people together with the crew. Four passengers were picked at Mweiga. The two '*passengers*' sat in the front seat. P.W.1 stopped at Sasini to pick another passenger and that is when one of the '*passengers*' seated at the front drew a knife at P.W.1 before taking over the control of the motor vehicle and drove on. P.W.1 was robbed of Ksh.300/= plus a mobile phone make Nokia 1110. Other passengers were also robbed of the valuables. P.W.2 was robbed of a Nokia 1110 together with Ksh.1,000/= while Josphine Muthoni (P.W.3) lost Ksh.3,000/=. The robbers drove the motor vehicle and upon reaching a place known as Subukia near Ndaragwa, the robbers ordered the passengers to alight together with the crew. One passenger whose phone had not been stolen called the police. The police acted on the report and managed to intercept the matatu at *Maili Inya*. The person who drove the motor vehicle managed to escape but the Appellants herein were unlucky. The motor had red ribbons tied to it to woodwink people that it was headed for a burial. The Appellants were arrested and later identified by P.W.1 and P.W.3 in an Identification Parade. When placed on his defence, the 1st Appellant denied the offence. He told the trial Magistrate that he had gone to *Maili Inya* from Nairobi with a friend to sell wares in the market. He claimed that they hired a place to store his goods before moving to the bus stage to board a matatu. He boarded a matatu which was stopped just a few metres away by the police. The 1st Appellant claimed that the police alleged that he was a notorious criminal they had been looking for, a long time. Basically, the 1st Appellant's defence is that of alibi. The 2nd Appellant on her part denied committing the offence. She told the trial court that on the fateful day she travelled from Nyeri to Nyahururu to get a motor vehicle to reach her Nakuru, to visit her sister's child who was said to be sick and admitted in a Nakuru Hospital. She admitted boarding the aforesaid matatu which was stopped at a road block. She claimed she and other excess passengers were ordered out of the matatu and asked to pay Ksh.1,000/= to secure their freedom. She claimed she was detained when she failed to pay the amount and later charged with the offence she was convicted for. The Learned Senior Principal Magistrate was convinced that P.W.1 and P.W.3 properly identified the Appellants as those who commandeered the matatu before robbing them and other passengers.

When the Appeal came up for hearing, Miss Mwai, Learned Advocate for the Appellants argued all the grounds of appeal together. In the first ground of appeal, Miss Mwai was of the view that the conditions for identification were not favourable for a positive identification free from error. It is the Learned Advocate's submission that it was dark at the time of the robbery. Miss Mwai further pointed out that if the 1st Appellant was merely identified on the basis of the shoes he wore then he should have identified while wearing the shoes. Miss Mwai raised similar arguments in support of the 2nd Appellant's case. Miss Maundu, Learned State Counsel was of the view that at 6.00 A.M., one can easily identify since there was sufficient light. We have carefully considered the rival arguments over the identification of the Appellants. There is no doubt that the case against the Appellants heavily depended on the identification of the Appellants by P.W.1 and P.W.3. It is the evidence of I.P. Allan Ogolla (P.W.5) that on 14th August 2008, at about 6.30 A.M. he received V.H.F. Radio Call from Nyahururu informing him of a hijacked motor vehicle. P.W.5 instructed his officers to mount a road-block. P.C. Guyo Gura (P.W.6) confirmed having been instructed by P.W.5 to mount a road-block at *Maili Inya*. In cross-examination, P.W.1, stated that it was dark when he was attacked. P.W.1 claimed he saw the shoes worn by one of the attackers though the same had no special marks. Josphine Muthoni (P.W.3), said she boarded the matatu at Sasini at 6.00 A.M. P.W.3 said, she was forced to cover her face using a *lesso*. In cross-examination, P.W.3 said she saw the shoes of one of the attackers. It is the evidence of P.W.1 and P.W.3 that they identified the 1st Appellant on the basis of the shoes he wore. We have been invited to rule that the conditions for

identification were not free from error. We have critically examined the evidence and we think there is some doubt raised. To start with, P.W.1 admits that it was dark when they were attacked. Secondly, he also admits that there was nothing special about the shoes worn by the 1st Appellant. P.W.3 on her part states that she was ordered to cover her head with a *lesso*. We think her sight was impaired by the *lesso* used to cover her face. The 1st Appellant has offered an explanation which is to the effect that he had merely boarded the matatu before it was stopped at a road block. It is therefore possible that he may not have boarded the matatu from Nyeri.

We shall give him the benefit of that doubt. We now turn our attention to the mode of identification attributed to the 2nd Appellant. P.W.1 merely stated that the 2nd Appellant accompanied the 1st Appellant. P.W.1 did not give specific features which made him identify her. P.W.3, said she merely saw a bit of the attackers because she had covered her face with a *lesso*. In our estimation, we think there is doubt as to the identity of the 2nd Appellant which benefit we should give to her. We think her defence was not given serious attention by the Learned Senior Principal Magistrate. We appreciate the fact that the police found the Appellants inside motor vehicle registration number KAW 559N. Had P.W.1, P.W.2 and P.W.3 together with other passengers properly identified the Appellants, we would have no hesitation but to affirm the conviction. But since we have entertained some doubt, we shall give the benefit of doubt to the Appellants.

In the end, we allow the appeal. We quash the conviction and set aside the death sentence. The Appellants are hereby set free forthwith unless lawfully held.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE

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J. WAKIAGA
JUDGE