



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL 42, 18 & 19 OF 2009

ANTONY KINYUA MUGO1ST APPELLANT

MICHAEL MUIRURI MUCONJO 2ND APPELLANT

JAMES GITARI GATHURI 3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 218 of 2008 at the Senior Principal Magistrate's Court at Kerugoya

JUDGMENT

The 3 Appellants herein were charged with several offences of Robbery with Violence with alternative counts. The charges are as follows;

COUNT 1

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

The particulars as stated on the charge sheet were as follows;

1. ANTONY KINYUA MUGO (2) MICHAEL MUIRURI MUCHONJO (3) JAMES GITARI GATHURI: On the 18th day of October 2006 at Ng'othi village in Kirinyaga District within Central Province jointly with others not before Court while being armed with dangerous or offensive weapons namely axes, pangas, swords and rungus robbed JEMIMAH MICHERE MWANGI cash ksh.1,400/=, mobile phone make Sony Ericson, wrist watch, safari bag (Adidas), pair of shoes, a sweater, axe, identity card, 4 tins of 50 gms each butternut seeds and 2 tins of 250gms each tomato seeds all valued at ks.11,220/= and at or immediately or immediately after the time of such robbery used actual violence to the said JEMIMAH MICHERE MWANGI.

COUNT 2

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

The particulars as stated on the charge sheet were as follows;

1) ANTONY KINYUA MUGO (2) MICHAEL MUIRURI MUCHONJO (3) JAMES GITARI GATHURI: On the 18th day of October 2006 at Ng'othi village in Kirinyaga District within Central Province jointly with others not before Court while being armed with dangerous or offensive weapons namely axes, pangas, swords and rungunus robbed JANE MUTHONI WACHIRA cash ks.3,000/=, radio cassette make nakiva, two pairs of shoes, six radio cassette tapes, ten cups and 2kg beans all valued at Kshs.2,810/= and at or immediately or immediately after the time of such robbery used actual violence to the said JEMIMAH MICHERE MWANGI.

COUNT 3

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

The particulars as stated on the charge sheet were as follows;

1. ANTONY KINYUA MUGO (2) MICHAEL MUIRURI MUCHONJO (3) JAMES GITARI GATHURI: On the 18th day of October 2006 at Ng'othi village in Kirinyaga District within Central Province jointly with others not before Court while being armed with dangerous or offensive weapons namely axes, pangas, swords and rungunus robbed PIUS KARIUKI MUTUGI cash ks.1,500/=, an umbrella, and a safari bag all valued at ksh.350/= and at or immediately or immediately after the time of such robbery used actual violence to the said PIUS KARIUKI MUTUGI.

COUNT 4

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

The particulars as stated on the charge sheet were as follows;

1. ANTONY KINYUA MUGO (2) MICHAEL MUIRURI MUCHONJO (3) JAMES GITARI GATHURI: On the 18th day of October 2006 at Ng'othi village in Kirinyaga District within Central Province jointly with others not before Court while being armed with dangerous or offensive weapons namely axes, pangas, swords and rungunus robbed LYDIA NYAWIRA KANG'ARA cash ks.1,300/=, a VCD player, a pair of sport shoes, handabag, one coat, a lessa, four radio cassette tapes, ID card and a voters card and at or immediately or immediately after the time of such robbery used actual violence to the said LYDIA NYAWIRA KANG'ARA.

ALTERNATIVE CHARGE FOR ACCUSED 1

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE

Particulars as stated in the charge sheet are as follows;

ANTONY KINYUA MUGO: On the 18th day of October 2006 at Mugaa village in Kirinyaga District within Central Province, otherwise than in the cause of such a robbery with violence dishonestly received or retained two pairs of shoes, 3 radio tapes, one axe, and 2kg beans knowingly or having reasons to believe them to be stolen goods.

ALTERNATIVE CHARGE FOR ACCUSED 2

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE

Particulars as stated in the charge sheet are as follows;

MICHAEL MUIRURI MUCHONJO: On the 18th day of October 2006 at Mugaa village in Kirinyaga District within Central Province, otherwise than in the cause of such a robbery with

violence dishonestly received or retained an umbrella,safari bag handbag and a sweater knowing or having reasons to believe them to be stolen goods.

ALTERNATIVE CHARGE FOR ACCUSED 3

HANDLING STOLEN GOODS CONTRARY TO SECTION 322(2) OF THE PENAL CODE

Particulars as stated in the charge sheet are as follows;

JAMES GITARI GATHURI: On the 18th day of October 2006 at Mugaa village in Kirinyaga District within Central Province, otherwise than in the cause of such a robbery with violence dishonestly received or retained three pairs of shoes, a safari bag (Adidas), two tins of 50kgs, Butternut seeds wallet, ID card, 3 radio tapes and an exercise book knowing or having reasons to believe them to be stolen goods.

The matter proceeded to full hearing and they were all convicted on the 4 Principal Counts and sentenced to death. They were aggrieved with the Judgment and have all appealed against the convictions and sentences raising the following grounds.

1. *The learned magistrate erred in law in failing to protect the accused person\'s rights under section 77 of the Constitution as read together with section 198 of the Criminal Procedure Code.*
2. *The learned magistrate erred in failing to hold that the investigations done were unsatisfactorily.*
3. *The learned magistrate erred in relying on evidence of an identification parade when there was evidence that the complainants had contact with the Appellants before the parade and wore clothes that the complainants were familiar with during the identification parade.*
4. *The learned magistrate erred in convicting the Appellants when there was no evidence from the mob to connect the Appellants with the stolen items and no members of the public recorded statements.*
5. *The learned magistrate erred in holding that there was enough light for the complainants to see the Appellants features.*
6. *The learned magistrate erred in convicting the Appellants and giving them harsh and excessive sentences in the circumstances.*
7. *The learned magistrate erred in convicting the accused person when evidence against them was not beyond reasonable doubt.*
8. *The learned Senior Resident Magistrate erred in convicting the Appellants when there was no evidence on record that the trial was conducted in a language the Appellants understood contrary to section 77(2) of the Criminal Procedure Code.*
9. *The learned Senior Resident Magistrate erred in fact and in law in convicting and sentencing the Appellants despite the fact that their constitutional rights as enshrined in section 72(3) of the Constitution had been violated.*

When the appeal came for hearing the 1st Appellant presented written submissions. He appeared in person.

M/s Thungu for the 2nd and 3rd Appellants also filed written submissions. The main common issue is the one of identification of the Appellants.

The State conceded to the appeal saying there were irregularities in the conduct of the identification parade and contradiction in the evidence of the witnesses.

The brief facts of this case are that on 18/10/2006 at 2am when many people are asleep the people in Kianjogu Ngothi village were not sleeping. P.W.1, P.W.4, P.W.5 and P.W.7 were victims of an attack by armed robbers that night. They beat them and robbed them without any mercy. Once the place was quiet word went round over what had happened. The police were called in. P.W.1, P.W.4, P.W.5 and P.W.7 have all indicated what was stolen from each one of them and what they were able to recover. The witnesses P.W.1, P.W.4, P.W.5 and P.W.7 in their evidence stated that they were able to identify the people who robbed them. The robbers were cornered somewhere by members of the public. P.W.3 and others were on patrol on 9/10/2007 at 7am when he got information of some people at Mugaa area who were about to be lynched. The officers rushed there and found the 3 Appellants having been beaten and tied up. They had several bodily injuries and were bleeding all over. These officers rescued them. Those at the scene numbered about 50. Upon the arrest the Appellants are said to have been found with an assortment of items.

The Appellants had certain items which they confessed to as belonging to them. They were then escorted to Sagana police station. P.W.8 the investigating officer was on duty on 18/10/2006 at 2.30am doing mobile patrol rounds within Sagana when they got reports of robbers in Kianjogu and Ngothi villages. They went to the homes of the victims. Later in the day they learnt that the culprits had been arrested by members of the public and were about to be lynched. Identification parades were conducted and the Appellants were identified. The complainants identified their stolen items. The members of the public who arrested the Appellants did not testify.

In his defence the 1st Appellant while unsworn denied the charges. He said he had fought with somebody on his rice paddy on 17/10/2006. They were arrested the same day for that. He denied the charges.

The 2nd Appellant also unsworn denied the charges. He spent the whole of 17/10/2006 at home. He was arrested on 18/10/2006 from a crowd since he had no identity card.

The 3rd Appellant also unsworn denied the charges. He said he was arrested on 17/10/2010 for not having an identity card.

All of them admitted having been picked on in the identification parades.

P.W.1 testified that she followed the suspects upto Wanguru and missed them. She then went to Sagana police station where she saw the Appellants still in the same clothes they had during the attack. She then identified them by the clothes.

P.W.4 picked the 3 Appellants out of one line of men. This was on the same date of incident. P.W.5 attended the identification parades on 25/10/2006 and identified all the 3 Appellants. P.W.7 also attended 2 identification parades on 25/10/2006. Apparently they indicate that they identified the Appellants physically and by their clothes. P.W.2 is the officer who conducted the identification parades. We have perused the identification forms (EXB 14-16) and the common witnesses in the identification parades are P.W.1, P.W.5 and P.W.7. The parade members in respect of **ALL** the parades were also the same namely;

- John Mwangi Waeka
- Zakaria Gitau Ngiri
- Michael Kirira Macharia
- Julius Kibuchi Muthoni
- Isaac Mwangi Njogu
- Ibbakar Getuku Kibuchi

- Douglous Mwangi Wanja
- James Wanjohi Nyamu
- Benjamin Mwangi

It clearly comes out that in every parade the only new face was that of the suspect with his peculiar clothes that were blood stained. That is not a kind of identification parade to be relied on.

All the complainants had not known any of the Appellants before. Therefore the case for the Prosecution was anchored of this identification by the witnesses and the recovered items.

P.W.1 and P.W.4 saw the Appellants the same day they were brought to the police station. The identification parades conducted for them were just a mockery of justice. Those members of the public who arrested the Appellants were not called as witnesses. Its therefore not clear as to who was found in possession of what.

The record shows that during the hearing in the Court below there was interpretation into Kiswahili/Kikuyu language by a clerk whose name is shown in the coram. This ground fails. It's also true that the Appellants were paraded in Court about 21 days after their arrest. There was no explanation given as to the reason why they were not charged within 14 days of their arrest. The period was exceeded by 7 days. That alone could not make this Court vitiate the proceedings especially because of the nature of the offence.

The Appellants are at liberty to pick that up with the right forum.

The State has correctly conceded to the appeal citing the botched identification and the contradictions in the evidence of the prosecution witnesses.

On our part we find it unsafe to let the convictions stand. We allow the appeals. The convictions are quashed and the sentences set aside. The Appellants to be set at liberty unless otherwise lawfully held under separate warrants.

DATED AND DELIVERED AT EMBU THIS 21ST DAY OF SEPTEMBER 2012.

LESIIT J.

H.I. ONG'UDI

JUDGE

JUDGE