



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.385 OF 2010**

**(CONSOLIDATED WITH CRIMINAL APPEAL NOS.386, 387, 389, 390 & 391 OF 2010)**

**JOHN MUGO MUKAYA.....1<sup>ST</sup> APPELLANT**  
**PAUL MAUA.....2<sup>ND</sup> APPELLANT**  
**MATHENGE MWANGI.....3<sup>RD</sup> APPELLANT**  
**PETER GICHIA MAINA.....4<sup>TH</sup> APPELLANT**  
**HERMAN MIKISI SOITA.....5<sup>TH</sup> APPELLANT**  
**STEPHEN CHEGE MUNGA.....6<sup>TH</sup> APPELLANT**  
**ROBERT ONGWENY MISOTA.....7<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.7061 of 2008 by Hon W. Juma, Chief Magistrate, dated 16<sup>th</sup> November, 2010]**

**JUDGMENT**

The seven appellants, whose appeals have been consolidated, were charged in the court below with the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**.

According to the charge sheet, on 14<sup>th</sup> November, 2008, the appellants, jointly with others not before court, while armed with dangerous weapons, namely *pangas* and *rungus* robbed Julius Lenyasunya of a mobile phone, Kshs.550.00 in cash, 21.89 tons of bulk wheat and immediately before or immediately after the time of such robbery used actual violence to the said Julius Lenyasunya.

From what we were able to glean from the disjointed record, there are two sides, as is usually the case in criminal trials, to the evidence presented before the lower court. It was the contention of the prosecution that three of the seven appellants (the 2<sup>nd</sup>, 5<sup>th</sup> and 7<sup>th</sup>) were night guards sourced by Lesiolo Grain Handlers (the company) from Brinks Securities Company Limited while the remaining four (appellants (the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup>) were the robbers. That the former (security guards from Brinks Securities), assisted the latter to access the premises of the company by opening the gate for them. After gaining access into the premises, the appellants jointly participated in loading one of the two trucks in which they had come with bulk wheat. Two other guards employed by the Company, P.W.5, Julius Lenyasunya (Julius) and P.W.6, Frank Lanaiyara (Frank), who were watching these events from a

distance within the premises of the company telephoned P.W.2, the Chief Security Officer of the company, Geoffrey Mwangi (Mwangi) and reported the incident. Mwangi in turn called the police and the then head of the Flying Squad Unit of the Police in Nakuru, P.W.1 Abanus Kimongo (I.P. Kimongo) who together with P.W.7, P.C. Kennedy Opiti and two other officers proceeded to the scene. Mwangi who was in the company of other employees of the company, namely P.W.3, William Lemiso Ole Saroni (Ole Saroni) and P.W.4, Emmanuel Lelesit (Lelesit), when he received the report, joined the Flying Squad officers.

At the scene, they told the court, the gate was locked from inside. Mwangi called the guards to open for them but they refused instead the guards from Brinks Securities attempted to attack him, forcing the police to shoot in the air to scare them away. Upon entering the company premises, the witnesses saw the robbers attacking the other two guards, Julius and Frank. On seeing the witnesses, the robbers ran away leaving Julius and Frank lying down on the ground. The appellants were all arrested within the premises, except one suspect who escaped.

According to Julius and Frank, the appellants attacked them and stole Kshs.550.00, a phone and a wrist watch from Julius. They also stole from Frank a watch and a wrist watch. These items were never recovered. It is also in the evidence that there were two trucks at the off-loading bay, KAA 448T and KAT 638N. The former had a fake number plate in the rear (KAA 448R). It was fully loaded with wheat, while KAT 638N was empty. That was one side of the evidence.

The other side was that the 1<sup>st</sup> appellant (John Mugo Mukaya), 3<sup>rd</sup> appellant Mathenge Mwangi), 4<sup>th</sup> appellant (Peter Gichia Maina) and 6<sup>th</sup> appellant (Stephen Chege) were on the fateful day working as loaders in Nakuru town when one Simon Sang for whom they had worked in the past offered them a job of off-loading wheat at the company premises where he worked. He had the key to the pedestrian gate which he opened and gave another key to a guard who opened the main gate. This was at 7p.m. Simon Sang asked them to wait as he went to get the implements for off-loading the wheat. No sooner had he gone than the four appellants heard gun shots. Strangers came into the compound and began to beat them claiming they were thieves.

The 2<sup>nd</sup>, 5<sup>th</sup> and 7<sup>th</sup> appellants (Paul Maua, Herman Mukisi Soita and Robert Ongweny Misota) were employees of Brinks Security Company Limited, contracted to provide security alongside Julius and Frank to the company's assets. On the night in question, having reported on duty just before 7p.m., their supervisor Simon Sang allocated them duties. At the off-loading zone, there were two trucks without drivers or turn boys. One truck was loaded with wheat while the second one had no load. Simon Sang left the premises and returned with four loaders. Shortly thereafter were gun shots and people scamping in all directions for safety as they were being attacked by, among others, the company staff, William Ole Saruni and Obadia.

That in brief constituted the prosecution and the appellants' evidence at the trial.

The learned trial magistrate, (W. Juma, Chief Magistrate) considered that evidence in its entirety and was persuaded that the appellants were involved in the robbery and upon conviction sentenced them to death.

Being dissatisfied, the appellants brought separate appeals that are now consolidated. Although in this appeal, the appellants were represented by two counsel, it is the appellants' "*home-made*" petition of appeal that formed the basis of arguments. They challenged the decision of the trial court on identical grounds which can be summarized as follows:

- i) that the conviction was against the weight of the evidence;
- ii) that the learned magistrate failed to consider the appellants' defence.

Learned counsel for the respondent conceded the appeal on the ground that the offence of robbery with violence was not proved. There was no evidence of theft of the items listed in the charge sheet and no evidence was led to prove that the appellants were armed or that they attacked and injured Julius and Frank.

We have considered the above submissions as well as those of the two counsel for the appellants. The sole issue before the trial court and before us in this appeal is whether the appellants committed robbery in the manner charged.

The acts constituting **robbery with violence** contrary to **section 296(2)** of the **Penal Code** are now well settled. Those acts are that the offender must:

- i) be armed with any dangerous or offensive weapon or instrument, or
- ii) be in company with one or more other person or persons, or
- iii) at or immediately before or immediately after the time of the robbery, wound, beat, strike or use any other personal violence on any person.

In considering this appeal and as we re-evaluated the evidence on record, we must bear the foregoing ingredients in mind. We reiterate that there were five (5) guards in the company premises just before the alleged attack, two employees of the company while three were employees of a contracted private security firm.

It is the evidence of the first two (Julius and Frank) that they witnessed as their colleagues from the security firm opened the gate to strangers and two trucks. They suspected a robbery was being planned and decided to call Mwangi, the company Security Chief, who in turn called the police. When Mwangi and the police got to the company premises they noticed the guards from the private firm and those employed by the company (Julius and Frank) fighting. The guards from the private firm refused to open the gate forcing the police to shoot in the air and jump over the gate to enter the premises. The guards from the private firm and the other four strangers ran in different directions. All but one were arrested within the premises.

The guards from the private firm and the four strangers who are the appellants herein have given their respective accounts of what they were doing at the company premises. The guards were on duty while the four had been hired by Simon Sang to off-load wheat.

From the evidence of all the prosecution witnesses, it is apparent to us that none of them was able to categorically state what role each of the appellants played in the attack. For instance which one of them robbed Julius and/or Frank of what; who had what weapon. We note that there were two charge sheets dated the same day with only one bearing the signature of chief magistrate as is the requirement of **Section 89(4)** of the **Criminal Procedure Code**. The second one appears to have also been signed by the magistrate but cancelled. It follows that the duly endorsed charge sheet was the formal charge. According to it the complainant was William Ole Saroni who was alleged to have been robbed of 21.89 tones of wheat. It is interesting to note that William Ole Saroni was a prosecution witness (P.W.3), Mwangi's assistant. He was with Mwangi in town when the latter received on his phone the report of invasion of the company premises from Julius. William Saroni in his testimony has not alleged that he was robbed on that night. The wheat in question did not belong to him but to the company. It is equally baffling as it is incredible that according to the second charge sheet, the complainant is Julius who is said to have been robbed of Kshs.550.00, 21.89 tones of wheat, a mobile telephone and a wrist watch.

The ownership of the wheat found in one truck was not established. No evidence was led to demonstrate that it was drawn from the company's silos. In other words, it was incumbent upon the prosecution to demonstrate the quantity of wheat in the Silos at the close of the day and the quantity immediately after the theft. That was an essential exercise in view of the defence evidence that the trucks were for off-loading and not loading. But more fundamental is the question of the stolen mobile phone, wrist watch and cash.

The appellants were arrested within minutes in the premise, no search was conducted. Like Julius, Frank also claimed in his evidence that he was robbed of a wrist watch and a mobile telephone which was not recovered, yet Mwangi confirmed that throughout the robbery, he was in constant communication via a

mobile telephone with Julius. We note that there was no charge in respect of the items stolen from Frank, if at all.

We have serious doubts as to the occurrence of the events as related by the prosecution witnesses. For instance, no explanation was given why Mwangi withdrew Julius and Frank from the company's Lanet depot in order to deploy them at the premises where the robbery is alleged to have occurred or why it took Mwangi and the police two hours to respond to Julius's distress call from a place it was agreed should ordinarily take 20 minutes' drive (about 2 kilometers) from the hotels where Mwangi and William, Ole Saroni were. There is equally no explanation why Simon Sang who admittedly worked for the company and who was mentioned throughout the trial in connection with his incriminating role in the events of that night was not called.

No efforts were employed to call the owners of the two trucks whose presence in the premises was questionable so as to explain that presence, yet they (the owners) were known. Instead, the learned magistrate made an order before the conclusion of the trial releasing KAA 448T to its owner, while no order at all was made in respect of the second truck.

Regarding the weapons used, we have already observed that no prosecution witness was able to say what weapon each appellant had. Julius and Frank who alleged to have been attacked were unable to explain the role played by each appellant in the attack. The evidence on record was that weapons, namely *rungus*, 4 *pangas*, 2 slashers, a *simi*, a metal bar and 2 sticks were recovered. It was conceded that all the five guards deployed at the premises ordinarily carried such weapons at work. No attempt was made to identify what weapons belonged to them in view of the claim by the appellants that the weapons belonged to Julius and Frank.

In her judgment the learned magistrate after correctly observing that the *rungus* and *pangas* were not found in the hands of any of the appellant curiously concluded that:

**“.....their presence in the compound shows that somebody was armed.”**

Thirdly, on the issue of the weapons, we note that in the charge sheet, the appellants are alleged to have been armed only with *pangas* and *rungus*. Where, we ask, did the slashers, sticks, *simis* and metal bars come from? The photographs of the weapons, which were irregularly produced without the certificate envisaged under **section 78** of the **Evidence Act**, depicted different weapons from those actually produced at the trial.

Ag. I.P. Kimongo confirmed that some of the weapons were brought to the police station days after the robbery. These numerous questions lend credence to the claims that the robbery was stage-managed by Mwangi with the sole purpose of having the contract of the private security firm with the company terminated. Mwangi admitted in his evidence that indeed after the alleged robbery he advised the company to terminate the contract. It is strange that although Mwangi was an employee of the company, the police permitted him to record statements from Julius and Frank.

For the reasons we have given, we find it unsafe not to interfere with the decision of the trial magistrate. The evidence presented did not prove the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** to the required standard. In the result, this appeal is allowed, the conviction quashed and the death sentence imposed on all the appellants set aside. They are set at liberty forthwith unless lawfully detained.

**Dated, Delivered and Signed at Nakuru this 12<sup>th</sup> day of May, 2011.**

**R. P. V. WENDOH**  
**JUDGE**

**W. OUKO**  
**JUDGE**