



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 71 of 2008

JOHN MWANGI MUTHOGA..... APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

John Mwangi Muthoga, the appellant herein, with Stephen Maina Mwangi and Francis Maina Njoroge were jointly tried on a charge of two counts of robbery with violence contrary to section 296(2) of the Penal code. Stephen Maina Mwangi and Francis Maina Njoroge each faced a separate count of handling stolen goods contrary to section 322(2) of the Penal code. At the close of the prosecution's case the appellant was placed on his defence in count I and acquitted in count II while his co-accuseds were acquitted. At the end of the trial, the appellant was convicted and sentenced to death in count 1.

Being dissatisfied, the appellant is now before this court seeking to have the aforesaid decision overturned on appeal.

On appeal the appellant has listed the following grounds in his petition:

1. *That the learned trial magistrate erred in both points of law and facts in finding a death sentence upon the inference of the evidence pertained in the motor vehicle without analyzing and examining that:*

- i. The said motor vehicle did not prove my finger prints had existence therein.*
- ii. There were no photographs produced said was taken (been at the scene)*
- iii. No any member of public summoned*
- iv. No recorded statement s obtained from myselfin compliance with amended section 25(a)evidence act Cap 80.*

2. *That the learned trial magistrate erred and misdirected himself in finding the evidence of leading to arrest of the co-accused as truthful but failed to observe that the police did not produce any cautional statement leading to arrest and subsequent recovery.*

3. *That the learned trial magistrate erred in accepting to proceed with the police case while there was infringements of my constitutional right in being detained in police cells for more than the time commanded by section 72(3) (b) of the constitution (a space of more than 3 months)*

4. *That the learned trial magistrate erred in both points of law and fact in finding credence upon the prosecution evidence where as police had isolated total evidence of identification at the scene and police station.*

5. *That the learned trial magistrate erred in both points of law and facts in not analyzing and*

evaluating the entire evidence impartially and thus became obliged to reject my defence which remains true.

Miss Ngalyuka, learned State Counsel vehemently opposed the appeal on the basis that the appellant was convicted on the basis of the doctrine of recent possession.

Before delving into the merits or otherwise of the appeal, we wish to set out the case that was before the trial court. The prosecution's case was supported by the evidence of four witnesses. The particulars of the offence in court 1 are that on the 20th day of February 2001 at about 11.30 p.m. at Witima village in Nyeri District of the Central province, jointly with others not before court and while armed with dangerous weapons namely, pangas and a pistol robbed Geoffrey Kagiri Gicheru of motor vehicle registration No. KAG 965Y Datsun P/up, 3 radio cassettes, 1 sewing machine motor and its controller, 2 wall Arabic style clothes, 2 external radio speakers, 1 telephone head set, 1 intercom receiver, 1 black suit, 1 light grey suit, 1 light grey jacket, 2 heavy ladies sweaters, 5 small table clocks, 1 wall clock make Quartz, 2 wrist watches, 1 racing bicycle red in colour, 2 hats, 1 electric shaver, 1 brown ladies hand bag and cash Kshs. 2000/- all valued at Kshs. 600,000 and at, or immediately before or immediately after the time of such a robbery used actual violence to the said Geoffrey Kagiri Gicheru.

Frasier Wangui Gicheru (P.W.1) told the trial court that on 20/2/2001 she was at home when at a round 11.00 p.m. her husband arrived home. She heard a bang at the door. She said she saw the appellant armed with a panga followed closely by two other people enter her kitchen. P.W.1 said she was assisted by solar lights. P.W.1 said the two took about 15 minutes to ransack her house. They loaded the household goods on motor vehicle registration KAG 695Y. At that time P.W.1 noticed her husband lying unconscious by the door. The assailants drove off with the aforesaid motor vehicle after placing P.W.1's husband in the bathroom. P.W.1 said she sought for the assistance of a neighbour to take her husband to hospital. The police were informed of the incident. Sgt James Wanyonyi (P.W.2) told the trial court that the flying squad officers received a report of the robbery of motor vehicle registration No. KAG 695 Y at about 3.00 p.m. P.W.2 said that the police had received a report that the aforesaid motor vehicle had been involved in an accident. The person who got injured was said to be the appellant. Upon his arrest. P.W.2 said the appellant led the police to arrest his two co-accuseds. P.c. Alloyce Muriuki (P.W.3) narrated to the trial court

how the police traced motor vehicle registration KAG 695Y. He accompanied the appellant to Nairobi. Mwiki estate where they recovered the stolen items listed in count which were later identified by P.W.1. p.c. Gerishon Kirema (P.W.4) said that on 21/2/2001 at 3.00 a.m while on duty at Murang'a police station he received a report of an accident involving motor vehicle KAG 695Y. He visited the scene and found the aforesaid having motor vehicle rolled several times and that members of the public had assisted the injured occupant (appellant).

The appellant denied being involved in the robbery in his sworn testimony. He also denied having led the police to where his two co-accuseds were arrested. He alleged that no medical report nor photographs were produced to prove that he was injured.

This being the first appellant court, we are enjoined by law to re-evaluate the evidence tendered and come to our own conclusion. It is the evidence of P.W.1 that the appellant with two of his accomplices forced her to open their motor vehicle KAG 695Y wherein they drove off. P.W.1 said she was with the robbers for 15 minutes and that she recognized the appellant with the assistance of lights emanating from a solar panel. P.W.1 said the appellant was armed with a panga. There is no doubt that the aforesaid motor vehicle was robbed from P.W.1 and taken away. The same was involved in a road accident as per the report from Kangema police station. That evidence was tendered by P.W.3. The appellant was the person found injured. We have carefully analyzed the evidence. The evidence of P.W.4 indicates that the appellant was pulled out of the aforesaid motor vehicle after the accident. None of the members of the public was called upon to testify. None of the police who took the appellant to hospital testified save for P.W.3. It is unfortunate that the treatment notes nor the P3 form was produced to prove that the appellant was injured. We are satisfied that due to the prosecution's lapse in producing the medical reports, some doubt has been raised in our minds. We shall give the appellant the benefit of this doubt. Those medical reports were critical to establish the fact that the appellant was injured in the accident. We are aware that P.W.1 had told the court that she had seen the appellant the night of the robbery. There is no evidence

that P.W.1 knew the appellant prior to that date.

In the end we allow the appeal. We quash the conviction and set aside the sentence of death. The appellant is set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

M.S.A. MAKHANDIA
JUDGE

In open court in the presence of Mr. Makura learned State Counsel and the appellant in person.

J.K. SERGON
JUDGE

M.S.A. MAKHANDIA
JUDGE