



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Criminal Appeal 505 & 508 of 2003**

S.K.N.....1<sup>ST</sup> APPELLANT

E.G.K.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeals from original conviction and sentence in Nakuru  
C.M.CR.C.NO.872/2003 by Hon S. M. MUKETI, Senior  
Resident Magistrate, dated 31<sup>st</sup> October, 2003)*

**JUDGMENT**

The two appellants were tried in the court below as the 3<sup>rd</sup> and 4<sup>th</sup> accused persons with four others, the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons. Apart from the appellants, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons also filed appeals which were consolidated with this appeal. However, the first accused, Sammy Mwangi escaped while the 2<sup>nd</sup> accused, Peter Mwangi died during the pendency of this appeal. Appeal in respect of the latter has for the reason of his death abated. The 5<sup>th</sup> and 6<sup>th</sup> accused persons were acquitted for lack of evidence.

The appellants (1<sup>st</sup> and 2<sup>nd</sup>) were charged with two counts of **robbery with violence contrary to Section 296(2) of the Penal Code**. According to the charge sheet, the appellants together with others robbed **Michael Chepkok Kimaiyo** and **Godfrey Waiyaki** of assorted personal items on 28<sup>th</sup> March, 2003 at Makutano along Nakuru-Eldoret road in Koibatek District. In support of these charges, the prosecution called evidence to the effect that the complainants were driving to Eldoret when upon reaching Eldama Ravine junction on the Nakuru-Eldoret road, they noticed people blocking the road with logs. The 1<sup>st</sup> complainant, who was driving, on seeing this, attempted to reverse but the car landed in a ditch, three people from the gang caught up with them and attacked them with *pangas* and a *rungu* (club).

The attackers made away with the motor vehicle as the 1<sup>st</sup> complainant ran into the bush. The 2<sup>nd</sup> complainant similarly disappeared into the bush after being robbed of cash and a watch. The two were taken to the hospital and the following day they learnt that the motor vehicle had been recovered at Timboroa. Five days later, on 9<sup>th</sup> April, 2003, the complainants were informed that some of their stolen items had been recovered and suspects arrested. Both the complainants were unable to identify their attackers, except **Peter Mwangi**, the appellant who has died. They, however, identified all the recovered items as theirs. **P.W.3, P.C. Peter Mutiso** (P.C. Mutiso) after receiving the report of the robbery, began investigations, in the process of which the motor vehicle was recovered at Timboroa. According to P.C.

Mutiso, the 2<sup>nd</sup> appellant

was arrested at Timboroa on 7<sup>th</sup> April, 2003 and that it was this appellant who led the police to arrest all the other five (5) suspects including the 1<sup>st</sup> appellant.

The 1<sup>st</sup> appellant was arrested while sleeping with another suspect in a house said to belong to the former. In that house, the police recovered four (4) jerricans, two (2) *rungu* (clubs), side mirrors, a jacket, a pair of white long trousers, a radio, perfume and a knife. **P.W.5, P.C. David Kibet**, (P.C. Kibet) related how the 2<sup>nd</sup> appellant was arrested. That on 7<sup>th</sup> April, 2003 while on patrol with one Joseph Kurgat, they went to a spot notorious for robbery attacks in Timboroa at 5.15p.m. They saw seven (7) people who ran away on seeing them. The officers shot twice as the suspects fled into the bush. In the bush they found the 2<sup>nd</sup> appellant who they arrested. The 2<sup>nd</sup> appellant was arrested with a *panga*, saw, *rungu* (club), a nut and a bag. It was also P.C. Kibet's evidence that the 2<sup>nd</sup> appellant was found hiding in a hole and pleaded with the officers not to kill him. An identification parade was conducted in respect of the deceased appellant.

The 1<sup>st</sup> appellant in his unsworn defence told the trial court that as he was taking milk to a collection point, he met police officers who asked him if he knew any of the persons whose names were in a list. When he failed to identify any, he was arrested and joined seven.

other suspects ostensibly to help with investigations. Instead he was charged with the offence, the subject to this appeal. The 2<sup>nd</sup> appellant on his part, testified that while looking for two goats that had disappeared in the bush he met police officer who arrested him for no apparent reason.

As the first appellate court, we must subject this evidence to fresh consideration and re-evaluation in order to make independent conclusion, bearing in mind that we have not had the advantage of hearing and seeing the witnesses. The appellants have raised more or less the same grounds in their respective petitions.

We may summarize those grounds as follows:

- i) that there was no proper identification
- ii) that the trial court shifted the burden on the appellants
- iii) that the prosecution evidence was insufficient to find a conviction.

The 2<sup>nd</sup> appellant who was unrepresented raised two separate/additional grounds in his written submission and in his address to us. He complained that his constitutional rights were violated in that he was detained by the police beyond the fourteen (14) days allowed by the Constitution. Secondly he submitted that at the time of his conviction, he was only sixteen (16) years old.

Whereas by dint of **section 350(2)** of the **Criminal Procedure Code**, no such ground, which is not contained in the petition can be raised, at the hearing of the appeal. That prohibition may only be applicable to the first ground as the prosecution has had no notice of it in order to avail justification, if any for holding the 2<sup>nd</sup> appellant beyond the prescribed period

However, regarding the 2<sup>nd</sup> appellant's age, it is apparent from the appendix to the charge sheet that he was sixteen (16) years old. His defence is also clear that he was a primary school pupil. For that reason, we shall consider this ground.

Clearly, from the totality of the evidence presented, the appellants were not identified, either at the scene of the robbery or at an identification parade. The only nexus between them and the robbery is the fact that the 2<sup>nd</sup> appellant was in the bush hiding in a hole with certain items suspected to have been stolen; that he had other items believed to be for use in the commission of crimes. There is also the evidence that the 2<sup>nd</sup> appellant led the police to a house where other stolen items were recovered and suspects arrested. As we consider this evidence, we bear in mind that the robbery

was at Makutano on the Nakuru-Eldoret road yet the arrest was at Timboroa. Secondly the arrest and recovery was several days after the robbery.

We start with the arrest of the 2<sup>nd</sup> appellant. It was the evidence of P.C. Kibet that they arrested the 2<sup>nd</sup> appellant in the bush. To that extent, it is common ground that the 2<sup>nd</sup> appellant was arrested in the bush. P.C. Kibet maintained that the 2<sup>nd</sup> appellant was part of the seven (7) man gang that had run into the bush. He, however, did not say how he arrived at that conclusion – whether he chased the 2<sup>nd</sup> appellant into the bush from the road without losing sight of him, remembering that there were seven (7) people being chased. He further testified that the appellant was hiding in a hole. There was evidence that the police shot twice. That alone was enough for any person in the bush for any other purpose to take cover.

It is equally incredible that the 2<sup>nd</sup> appellant would still be found in the bush in possession of items stolen over seven days prior to his arrest. We find no evidence linking the 2<sup>nd</sup> appellant to the robbery of 28<sup>th</sup> March, 2003. While still on the 2<sup>nd</sup> appellant, despite having stated in his defence that he was a pupil in S Primary School, a fact supported by the charge sheet, the learned trial magistrate proceeded to sentence him to death.

**Section 25(2)** of the **Penal Code** provides:

**“Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years but in lieu thereof the court shall sentence such a person to be detained during the President’s pleasure.....”**

Turning to the evidence against the 1<sup>st</sup> appellant, it was the prosecution's case that the 2<sup>nd</sup> appellant led the police to a house belonging to the 1<sup>st</sup> appellant where he was found sleeping with another suspect and various stolen items recovered. In view of our finding of the circumstances under which the 2<sup>nd</sup> appellant was arrested, we are of the view that the evidence that he led the police to this house is suspicious. Secondly and more significantly, two men and two ladies were found in the house in question. The 1<sup>st</sup> appellant denied ownership of the house.

It was incumbent upon the prosecution to prove beyond any doubt by calling evidence that indeed the house belonged to the 1<sup>st</sup> appellant. As was held in the case of **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Vs. Republic**, Criminal Appeal No.272 of 2005, a conviction can only be based on the doctrine of recent possession if it is proved that:

- i) the stolen property was found with suspect
- ii) the stolen property was positively identified as belonging to the complainant
- iii) the property was recently stolen from the complainant

It was imperative to prove that the stolen items were found with the 1<sup>st</sup> appellant. Without that evidence, we find, once again that there is

no evidence linking the 2<sup>nd</sup> appellant with the robbery of 28<sup>th</sup> March, 2003.

For these reasons, this appeal succeeds. The conviction is quashed and the death sentence passed on each of them is set aside with the result that the appellants will be set at liberty forthwith unless held for any other lawful reason.

**Dated, Signed and Delivered at Nakuru 30<sup>th</sup> day of April, 2010.**

**M. J. ANYARA EMUKULE**

**JUDGE**

**W. OUKO**

**JUDGE**