



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 191, & 192 of 2001

PAUL MURIUKI KAROKI.....1ST APPELLANT
JAMES NDERITU GICHIGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.590 of 2000 of the Chief Magistrate's Court at Nakuru – S. M. MUKETI, SRM)

JUDGMENT

PAUL MURIUKI KAROKI and **JAMES NDERITU GICHIGO**, the Appellants, were upon trial in two cases convicted of the offence of capital robbery and in each case sentenced to death. The two cases related to two robberies from the home of John Nganga Wachira of Ngata Farm within Nakuru District. The first robbery was on 31/1/2000 when the complainant was robbed of various items including a panga. The matter was reported to police but it would seem nobody was immediately arrested.

The second robbery was on 27/2/2000. The robbers stuffed the complainant's household items into his vehicle KLU 253 and drove it away. Two hours later the vehicle was found to have been involved in an accident at a Centre known as Soil about 5 km from the complainant's home in Ngata area. Police went to the scene of accident and found two people unconscious in the vehicle. They took them to hospital and put them under guard. When they recovered they were arrested and charged in Nakuru CM Cr. Case No. 589 of 2000 with the robbery of 27/2/2000. They were also charged with a similar offence in Nakuru CM Cr. Case No. 590 of 2000 in respect of the robbery on 31/1/2000. After trial they were convicted in both cases and sentenced to death.

Their appeals (Nakuru HCCCR Appeal Nos. 100 and 101 of 2002) arising from the conviction in Criminal Case No. 589 of 2000 were dismissed by Justices Apondi and Kimaru. Their lordships dismissed the evidence of identification but upheld the conviction on the doctrine of recent possession as the appellants were found in the complainant's stolen vehicle with the stolen items. The appeals before us arise from the conviction in Criminal Case No. 590 of 2000.

Paul Muriuki Karoki, the first Appellant, has since 2001 consistently complained that he was not involved in either of the robberies and that the charges were fabricated against him by one Inspector Nandas of Flying Squad. On 31st August 2001, the first Appellant, Paul Muriuki Karoki, wrote to the Chief Justice and complained that on the dates of the alleged commission of those offences he was in prison serving a five year term in Nairobi Criminal Case No. 2846/98 for being in possession of a firearm. It is not clear as we do not have proceedings in that case when he was sentenced, if at all, or when he finished the sentence in that case. In the trial of both Nos. 589/2000 and 590/2000 he

did not raise this point that he was in jail in connection with the firearms case in Nairobi. There is doubt if he was in prison at the time.

As we have said, in the letter to the Chief Justice the first Appellant claims that the charges against him were fabricated by Inspector Nandas of Flying Squad. That Inspector did not testify in either of the cases and that point was never raised in either of the courts below.

Because of that complaint, we have carefully perused the files relating to the two cases and even called for the OB entries from Nakuru and Menengai Police Stations where the two cases were reported. These are the details we have managed to establish.

In Criminal Case No. 589 of 2000 the charge sheet dated 21/3/2000 in which the 1st Appellant Paul Muriuki Karoki was charged alone shows the date of appellants' arrest as 31/1/2000. That charge was later substituted by another one dated 12/5/2000 in which both the Appellants were jointly charged with the robbery of 27th February 2000. That joint charge substituting the earlier one gives the date of arrest as 31/1/2000 and apprehension report to court as 12/5/2000. There is a third charge sheet in that file dated 12/7/2000 in which the two Appellants together with one Moses Ikinya Kamau were charged with the robbery of 27th February 2000. It gives 31/1/2/2000 as the date of arrest and apprehension to court on 26/5/2000. Both of these dates are wrong. There is no date as 31/1/2/2000. The record also shows that the two Appellants were taken to court and pleaded not guilty to the joint charge on 23/3/2000. On 12/5/2000 that case, i.e Criminal Case No. 589 of 2000 was consolidated with Criminal Case No. 893 of 2000.

In Criminal Case No. 590/2000 the first charge sheet dated 22/3/2000 in which Paul Muriuki Karoki was charged alone in respect of the robbery of 31st January 2000 gives the date of arrest as 31/1/2000 and apprehension of the report to court as 22/3/2000. Second charge sheet in that case in which the two Appellants, Paul Muriuki Karoki and James Nderitu Gichigo are jointly charged with the same robbery of 31st January 2000, also gives the date of arrest as 31/1/2/2000 and apprehension to court as 17/5/2000. Again these two dates are wrong. There is no date as 31/1/2/2000. The record also shows that the two Appellants were taken to court and pleaded not guilty to the joint charge on 23/3/2000. On 17th May 2000 is the date when their case was fixed for hearing and when that case i.e Criminal Case No. 590 of 2000 was consolidated with Criminal Case No. 894 of 2000.

As we have pointed out, because of the complaint by the first Appellant, besides perusing the court files relating to the two cases, we have also called for the OB reports relating to these cases and the details availed to us by the Nakuru OCPD are these:

1. OB No. 9/31/1/2000 at Menengai Police Station is an entry of police officers from that station leaving for Kirobon Farm for enquiries on a robbery incident reported by Ngata Police Post.
2. OB No. 16/31/1/2000 records their return from the scene of robbery at the home of John Nganga Wachira the complainant in the two above cases.
3. OB NO. 21/23/2/2000 at Nakuru Police Station records the arrest of the first Appellant, Paul Muriuki, who was identified by the complainant at Ngata area.
4. OB No. 4/27/2/2000 of Menengai Police Station is a report of the second robbery at the home of John Nganga Wachira when his household goods were stuffed into his vehicle KLU 253 and driven away
5. OB Nos. 29 & 30/28/2/2000 of Nakuru Police Station in which the suspects involved in the second robbery who were found injured in a road accident and taken to hospital were booked as well as the statement of the investigation diary are both missing.

6. OB NO. 6/19/3/2000 at Menengai Police Station relates to stock theft report.
7. OB NO. 8/19/3/2000 at Menengai Police Station states that police officers from that station went out on investigations of that stock theft case and on the way back they collected two suspects from Nakuru Police Station who were in custody there vide OB No. 21/23/2/2000.
8. OB No. 19/20/3/2000 at Menengai Police Station shows that two suspects, Michael Njuguna Chege and Paul Muriuki were collected from Menengai Police Station and taken to Nakuru by Flying Squad Officers who were investigating a robbery with violence case in which a firearm was used.

The appeal Nos. 191 & 192 both of 2001 before us now, as we have also pointed out, arise from the conviction in Nakuru Criminal Case No. 590 of 2000. That case relates to the robbery from the said complaint on 31/1/2000. The particulars of the charge in that case were that Paul Muriuki Karoki and James Nderitu Gichigo on the 31st day of January 2000 at about 12.30 a.m. at Ngata Farm within Nakuru District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely panga, rungas, simis, axes and arrows broke into the house of John Nganga Wachira and robbed him off two T.V. sets make Sony, one T.V. black and white S/No.103310, one Radio Cassette make National, three suits, four pairs of shorts, one wall clock quartz, one watch, three sets of table clothes, three sweaters, two bed sheet, two bedcovers and two blankets all valued at Kshs.92,000/- and at or immediately before or immediately after the time of such a robbery used actual violence to the said John Nganga Wachira. After trial before a different magistrate, the Appellants were also convicted and sentenced to death.

The prosecution case was that on 31st January 2000 at about 12.30 am, while the complainant, John Nganga Wachira, PW1, and his wife, Rebecca Wambui Nganga, PW2, were sleeping in their house at Kiroboni Farm, a gang of between 5 and 10 people broke into their house, beat them up and robbed them of the items listed hereinabove. As none of the robbers was able to drive the complainant's vehicle, they forced him to ferry the stolen goods to Ngata Bridge where he dropped them and after offloading the loot they let him drive away. He reported the matter to Ngata Police Post. None of the couple or even their daughter-in-law, Margaret Nyokabi Mbogo, PW3, was able to identify any of the robbers.

On 27th February 2000, robbers struck again, beat them up and robbed them of other household goods. This time round they were able to drive away PW1's pick up KLU 253 with the loot. Two hours later, IP David Otieno, PW4, of Flying Squad Nakuru found the vehicle in a self-involved accident at Soil Junction. Inside the vehicle were the two Appellants seriously injured and PW1's panga that had been stolen from him during the robbery of 31st January, 2000.

In spite of the evidence that none of the witnesses was able to identify the robbers on 31st January 2000, the learned trial magistrate nonetheless found that "PW1 says he was able to see the 1st accused very well on the 31st January, 2000." Although she dismissed that identification as unreliable, that was incorrect. PW1 said he identified the first Appellant during the second robbery of 27th February 2000 which was not the subject of the charge before her in that case. Basing her conviction of the Appellants on the doctrine of recent possession, she held:-

"The complainant's panga which he identified as EXh.1 which had been stolen during the robbery of 31.12.2000 was also recovered from the vehicle that was involved in an accident on the 27.2.2000 where the two accused persons were found—this cannot be a mere coincidence. The truth is that the 2 accused were part of the same group of robbers that accosted the complainant on the 31.1.2000."

She therefore dismissed their defences and convicted them thus provoking this appeal.

We have taken the trouble of getting the details of the OB reports of the robbery giving rise to this appeal and that of 27th February 2000. As we have stated in item 5 thereof, the OB Nos. 29 & 30/28/2/2000 of Nakuru Police Station in which the suspects involved in the second robbery who were found injured in a road accident and taken to hospital were booked as well as the statement of the investigation diary are both missing. Item 3 which is OB NO. 21/23/2/2000 of Nakuru Police Station records the arrest of the first Appellant, Paul Muriuki, on 23.2.2000. There is nothing to show that he was ever released thereafter. How then could he have been involved in the robbery of 27.2.2000 and found with the panga stolen on 31.1.2000?

After serious consideration of the whole matter, we have reached the conclusion that the first Appellant's persistent complaint is not without basis. Having been arrested on 23.2.2000, he could not have been involved in the robbery of 27.2.2000 and found with the PW1's panga which was the basis of his conviction. The OB record relating to the suspects found at the accident scene on 27.2.2000 and the investigation diary of the same accident having mysteriously disappeared and no evidence having been adduced of the Appellants' treatment for the injuries they allegedly suffered in that accident, we are unable to accept PW4's testimony that the two Appellants in this case were found unconscious in that accident. As that allegation was the basis of the these two Appellants' conviction in Nakuru Criminal Case No. 589 of 2001, we doubt if the Honouble Justices Muga Apondi and Luka Kimaru could have upheld their conviction in that case if the above OB details had been availed to them.

For these reasons, we find that the Appellants' convictions cannot be allowed to stand. We therefore allow these appeals, quash the Appellants' convictions and set aside the sentences. They are free as regards their convictions in this case but they will remain in prison and await the Court of Appeal decision on their second appeals arising from Nakuru HCCCR Appeal Nos. 100 and 101 of 2002 relating to their convictions in Criminal Case No. 589 of 2000.

DATED and DELIVERED this 26th day of May, 2010.

D. K. MARAGA
JUDGE.

W. OUKO
JUDGE.