



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NOS. 645, 641, 642, 639 & 646 OF 2006

FRANCIS WAWERU NGARUIYA.....1ST APPELLANT
PETER KAMANDE WAINAINA.....2ND APPELLANT
FRANCIS CHEGE KAMAU.....3RD APPELLANT
SAMUEL MBUVI MWANZIA.....4TH APPELLANT
JAMES MUTHAMIA NGAI.....5TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 2508 of 2005 of the Chief Magistrate's Court

at Thika by S. M. Mokuu - Senior Resident Magistrate)

JUDGEMENT

The appellants were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. In count one, the particulars are that on 30th day of March 2004 at about 11.00 p.m. at Kiandutu village in Thika District of the Central province jointly with others not before court while armed with pistols and pangas robbed Jane Njeri Muho cash Kshs.20,000/= and a radio make stereo all valued at Kshs.24,000/= and immediately before the time of robbery used actual violence to the said Jane Njeri Muho.

In count 2 the particulars are on the 31st day of March 2004 at about 1.00 a.m. at Kiandutu village in Thika District jointly with others not before court while armed with dangerous weapons namely pistols and pangas robbed Julius Karuiru Wanjiru cash Kshs.4,400/= and one torch all valued at Kshs.4,500/= and immediately after the time of such robbery used actual violence to the said Julius Karuiru Wanjiru. The 2nd appellant faced a third count of being in possession of two ammunitions of firearms contrary to

section 2 (1) of the Firearms Act Cap 114 Laws of Kenya. The prosecution called 9 witnesses who gave testimony regarding the offences herein while the accused persons gave unsworn defences and denied committing the offences charged.

PW1, PW2, PW3 and PW5 gave a detailed testimony as to how they were attacked during the night of 30th and 31st March 2004 by a group of people who were armed with dangerous weapons. It is the evidence of PW1, PW2, PW3, and PW5 that the attackers were armed with pangas and pistols. PW1 was not able to identify any of the robbers. The person who connected the appellants to the commission of the offences is PW3 who was able to recognize the 1st and 2nd appellants. The matter was reported to the police station immediately after the incident wherein PW3 mentioned the names of the 1st and 2nd appellants. The evidence of PW3 was corroborated by PW6 who confirmed that PW3 mentioned the names of the 1st and the 2nd appellants in the first report at the police station. Police officers then proceeded to the houses of the 1st and 2nd appellants where they recovered a panga with fresh blood stains and toy pistol.

It is the evidence of PW1 and PW2 that immediately after the incident PW3 informed them that she was able to identify two of the attackers because they struggled with him and that he was able to see them with the help of spotlights. It is also alleged that the 5th appellant threatened to kill PW3 during the time of robbery. PW3 shared the information that he was able to recognize the attackers with PW1, PW2 and PW5. It is on the strength of the information given by PW3 that led to the arrest of 1st and 2nd appellants. It is also clear that the other appellants were arrested after they were mentioned by the 1st and 2nd appellants as part of the group that attacked the complainants during the night of 30th/31st March 2004.

From the evidence tendered by the prosecution, it is PW3 who was able to identify two of the attackers. He was able to identify the 1st and 2nd appellants because there was sufficient light and that there was struggle before he was robbed of the money indicated in the charge sheet. PW6 and PW8 testified that they were taken to the house of the 1st appellant where some recoveries were made. Among the items recovered was a radio which was positively identified by PW1 as the one earlier stolen from her house. It is also clear that police recovered panga with fresh blood stains and a toy pistol from the premises of the 1st and 2nd appellants. The 4th appellant was positively identified by PW3 and PW5 in an identification parade conducted as by the requirement of the law by PW4. It is also that the 5th appellant refused to participate in the ID parade, however, PW3 in her testimony said she saw him cut her husband during the time of the robbery. The failure or refusal of the 5th appellant to participate in the parade is alleged to be a clear indication that he was involved in the subject robbery. Mr. Murithi learned counsel for the State submitted that the refusal should be taken as an act of guilty. We think there is considerable merit in the submission by the learned State Counsel.

We have re-evaluated the evidence and in our view it is obvious from the sets of descriptions given by PW1, PW3, PW4, PW5, PW6 and PW8 that the appellants were the ones who committed the two robberies subject of this appeal. The trial court, in our view, correctly applied the correct test to the facts that identification and/or relevant evidence clearly proved that the appellants were the ones who robbed the complainants during the nights of 30th and 31st March 2004. The trial court, we think, correctly analyzed all the evidence in detail and came to the firm conclusion that the identification, recognition and possession evidence was compelling leaving no doubt of the involvement of the appellants in the two robberies. We think that was a correct conclusion. The findings of recognition, identification and subsequent arrest of the appellants was reinforced by the recovery of some of the stolen items from the 1st and 2nd appellants. From the circumstances narrated by the nine prosecution witnesses and the defences by the appellants, it is clear that the prosecution proved its case beyond reasonable doubt and that the appellants were convicted on cogent and credible evidence. We think there is no basis to interfere with the decision by the trial court since no misdirection either in law or facts was committed. We agree with the trial court that the evidence by the prosecution is credible and watertight. We also agree that the appellants committed and/or participated in the subject robberies.

The upshot of what we have said are that all the appellants were properly charged, tried, convicted and sentenced by the lower court. All the appeals by the appellants are hereby dismissed.

On Sentence we affirm the death sentence imposed by the trial court. The sentence in count two shall remain in abeyance for all the appellants since a person cannot suffer death twice.

Dated, signed and delivered at Nairobi this 11th day of October 2010.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE