



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeals 321, 320, 315 & 318 of 2006**

MOSES LIPAA SAWALA .....1<sup>ST</sup> APPELLANT

ERICK MUGAMBI MATI .....2<sup>ND</sup> APPELLANT

CHARLES MUTAHI .....3<sup>RD</sup> APPELLANT

KARORI MBOI .....4<sup>TH</sup> APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From the original conviction and sentence in Criminal Case No. 9060 of 2004 of the*

*Chief Magistrate's Court at Kibera by Mrs. Muketi – Principal Magistrate)*

**JUDGEMENT**

The appellants were charged and convicted of robbery with violence contrary to section 296(2) of the Penal Code. The facts are on 30<sup>th</sup> day of October 2004 along Latema road within the City Centre in Nairobi within the Nairobi area jointly robbed Duncan Kangeri Kaboo of cash Kshs.11,000/= and at or immediately before or immediately after the time of the robbery threatened to use violence to the said Duncan Kangeri Kaboo. The appellants were also found guilty of two other counts being personation contrary to section 105 of the Penal Code and being in possession of Government stores contrary to section 324 of the Penal Code. The basis of the appeals for our determination is against the said convictions. The facts in support of the prosecution case is that on the material day the complainant withdrew a sum of Kshs.11,000/= from his account at Cooperative Bank in order to settle his medical payments. As he was about to cross a road within the City Centre he was allegedly stopped by the four appellants who were driving motor vehicle registration No. KAK 501. It is alleged that one of the occupants was in possession of walkie talkie radio belonging to the Government of Kenya and stolen from Kenya Police. It is contended that the occupants posed themselves as police officers and allegedly put the complainant in their car and drove with him. It is then the sum of Kshs.11,000/= was removed from the complainant's pocket while inside the car. As occupants were driving together with the complainant, they were confronted by police officers who suspected them to be criminals. They were made to get out of the car and thereafter a search was carried out. It was then that the complainant shouted to the police officers that he was a victim of robbery perpetrated by the other occupants of the car who were under arrest. It is alleged the 4<sup>th</sup> appellant was the one who was driving the car while 2<sup>nd</sup> appellant is the one who posed himself as a police officer. All the four appellants together with the complainant were arrested and put in police custody. After a while the complainant was released but the four appellants were charged with various offences that are subject to this appeal. It is also alleged that the pocket phone that was recovered from the 2<sup>nd</sup> appellant was stolen from Kenya Police.

PW2 Sgt. James Musiele stated that on the material day at about 10.00 a.m. while at Kabete police station he received a report that a motor vehicle Reg. No. KAQ 626N had been vandalized. In the company of PC Kiptanui, PC Kamau and PC Musau they proceeded to the scene and found the vehicle had actually been vandalized. As they were standing at the scene they saw motor vehicle Reg. KAK 501A Toyota Corolla approaching with five occupants. The officers stopped the said motor vehicle and upon search a pocket phone belonging to Kenya Police was recovered from the 2<sup>nd</sup> appellant. It was the evidence of PW2 that one of the occupants complained to him that the other occupants had arrested

him and stolen a sum of Kshs.11,000/= from him. He allegedly searched all the occupants who are the appellants herein but did not find any money apart from four telephone phones that were in possession of the four appellants herein.

The evidence of PW3 PC Charles Kiptanui is similar to that of PW2 except that he contended that the police pocket phone was recovered under the co-driver's seat. However that evidence was contradicted by PW4 PC Benson Kinai who stated that upon arrest of the appellants they discovered one passenger seated in the co-driver's seat who was holding the police phone and that the said person said he was a police officer who was heading for a funeral.

PW5 on his part stated that he was OCS Githurai Kimbo from August 2003 to April 2005. And that on 6<sup>th</sup> October 2005 he made a routine check on all the communication equipment within Githurai Kimbo. He stated that he discovered one pocket phone Simoko was missing. He stated that after three days he received information from Thika that a pocket phone had been recovered and was lying at the Kabete police station. He then proceeded to Kabete and confirmed it was the one missing from Githurai Kimbo police station. After the close of the prosecution case each of the appellants gave unsworn testimony and denied the commission and involvement of the offences allegedly committed by them.

We have considered the evidence on record against the defence given by the appellants. In our re-evaluation it is essential and mandatory for us to weigh the conflicting evidence and draw our own conclusion after examination of the whole evidence afresh and exhaustively. The basis of the appellants' conviction is that they were found in the company of PW1 who was allegedly robbed of Kshs.11,000/=. The evidence of PW1 is that he was robbed by the appellants herein of Kshs.11,000/= a few minutes before they were arrested by police officers. The complainant did not say after the robbery that the vehicle and/or the appellants stopped anywhere to show that the money that was stolen may have been hidden or kept elsewhere. The complainant confirmed after the appellants were arrested, they were all searched but no money was recovered. From our own assessment we think the evidence given by the complainant that he had withdrawn Kshs.11,000/= from Cooperative Bank before he encountered the four appellants is rather suspicious. The prosecution did not produce any evidence to show that the complainant had an account with Cooperative Bank or that he had withdrawn the said sum from his account. It is clear the prosecution adjourned the hearing before the trial court on several occasions to call a witness from Cooperative Bank of Kenya to shed some light on whether the contention by the complainant was true or not. In the end the prosecution closed its case before such a witness was able to give evidence. The inference that can be drawn from such a failure is that if such witness would have been called he would have given evidence that would have destroyed the case of the prosecution.

It is also our view that the circumstances and the evidence by the complainant gives a great deal of doubt in our mind. It is clear that the complainant was in the company of the appellants herein at the time they were arrested by police officers on suspicion that they were criminals. We think that the evidence of the complainant amounts to an accomplice who was in the process of shifting his guilt to other persons who may have been innocent. This aspect of the evidence was not considered by the trial court thereby misdirecting itself by finding that the appellants had committed an offence of robbery with violence against the complainant. The law is very clear that suspicion however strong cannot be a basis for inferring guilt when proof of guilt cannot be inferred beyond reasonable doubt on all the evidence surrounding the case.

The second issue that led to the conviction of the appellants is that they were found in possession of the Government store namely a communication radio belonging to Kenya Police and that in the process they were impersonating themselves as police officers in the course of their duty. We have considered the evidence on record against the appellants regarding those two issues. In our firm view there is no evidence to show that the appellants jointly and severally impersonated themselves to be police officers in the course of their lawful duties. The evidence of PW1 is that it was the 2<sup>nd</sup> appellant who was holding a police radio and posing himself as police officer. There is no evidence to show that the other appellants made attempts to impersonate lawful police officers. And in any case there is no evidence to show the appellants acted jointly in the course of such personation. Further the evidence between PW2 and PW3 who were the arresting officers did not specifically indicate who was in possession of the alleged police radio phone. One thing that comes out is that one of the prosecution witnesses (PW3) stated that the radio phone was recovered from under the seat of the co-driver. In our mind there is ample evidence to show that the prosecution evidence especially the evidence of PW2, PW3 and PW4 was contradictory and disjointed.

In our re-evaluation of the whole evidence on record as tendered by the prosecution is contradictory and untenable to be a basis for a proper conviction. We therefore find that it would be unsafe to uphold the conviction of the appellants. We allow the appeal of each of the appellants, quash their conviction and set aside the sentence imposed by the trial court. We order the immediate release of the appellants unless lawfully held.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of January 2009

**J. B. OJWANG**

**M. WARSAME**

JUDGE

JUDGE