



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 128 OF 2005

PETER KIRAGU KERI.....1ST APPELLANT

DAVID MAINA MACHARIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants Peter Kiragu Keri and David Maina Macharia (1st and 2nd appellants respectively) were charged together with three others with nine counts; the 1st -6th counts of the offence of **robbery with violence** contrary to **section 296(2) of the Penal Code**, 7th count of **attempted robbery with violence** contrary to **section 296(2) of the Penal Code**, 8th count of **being in possession of imitation firearm** contrary to **section 34(1)(3) Cap 114 Laws of Kenya** and 9th count of **being in possession of a firearm without a firearm certificate** contrary to **section 4(1) of the Firearms Act Cap 114 Laws of Kenya**.

The particulars of offence of the **Count 1** state that on the 16th March 2003 at Gathundia Trading Centre in Nyandarua District of Central Province, jointly with another not before court being armed with dangerous weapons namely one mark 3 sporting gun, 22 rifle, one home made gun, two semis and pangas robbed **Jane Njeri Murage** cash Kshs 8,760/- and ten bottles of beer all valued Kshs 8,760/- and at or immediately before or immediately after the time of such robbery used actual violence to the said **Jane Njeri Murage**.

The particulars of offence of **count II** state that the appellants on the 16th March 2003 at Gathundia Trading in Nyandarua District of Central Province, jointly with another not before court, being armed with dangerous weapons namely Mark 3 sporting gun, 22 calibre, one homemade gun, two semis and pangas robbed **John Nderitu Muna** cash Kshs 3,000/=, one identity card and employment card and at or immediately before or immediately after the time of such robbery used actual violence to the said **John Nderitu Muna**.

The particulars of offence of **count III** state that the appellants on the 29th March 2003 at Gwakingo/Olgoro-orok road at Charagita in Nyandarua District of Central Province, jointly with another not before court, being armed with dangerous weapons namely Mark 3 sporting gun, 22 calibre, one homemade gun, two semis and pangas robbed **Charles Murimi Rubira** cash Kshs 35,000/=, one jacket and one watch valued Kshs 39,800/= and at or immediately before or immediately after the time of such

robbery used actual violence to the said **Charles Murimi Rubira**.

The particulars of offence of **count IV** state that on the 29th March 2003 at Gwakiongo/Oljoro-orok road at Charagita in Nyandarua District of Central Province, jointly with another not before court, being armed with dangerous weapons namely Mark 3 sporting gun, 22 calibre, one homemade gun, two semis and pangas robbed **Simon Kibari Waithaka** cash Kshs 3,000/= and one jacket valued Kshs 5,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Simon Kibari Waithaka**.

The particulars of offence of **count V** state that on 29th March 2003 at Gwakiongo/Oljoro-orok road at Charagita in Nyandarua District of Central Province, jointly with another not before court, being armed with dangerous weapons namely one Mark 3 sporting gun, 22 calibre, one homemade gun, two semis and pangas robbed **Zacharia Kuria Muchemi** one camera make Yashica valued Kshs 6,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Zacharia Kuria Muchemi**.

The particulars of offence of **count VI** state that on the 29th March 2003 at Gwakiongo/Oljoro-orok road at Charagita in Nyandarua District of Central Province, jointly with another not before court, being armed with dangerous weapons namely Mark 3 sporting gun, 22 calibre, one homemade gun, two semis and pangas robbed **Godfrey Gachoka Mwaniki** cash Kshs 3,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Godfrey Gachoka Mwaniki**.

The particulars of offence of **count VII** state that on the 6th April, 2003 along Olkalou/Nyahururu road in Nyandarua District of Central Province jointly with another not before court, being armed with dangerous weapons namely one mark 3 sporting gun 22 calibre, one home made gun, two semis and pangas **attempted** to rob **James Mwangi Ndungu's** motor vehicle Reg. No. KZM 999 valued Kshs 250,000/= and at or immediately before or immediately after the time of such attempted robbery used actual violence to the said motor vehicle.

The particulars of offence of **Count VIII** state that on the 7th April 2003 at Passenga Village in Nyandarua District of Central Province were found being in possession of imitation firearm namely M.P. 5 gun.

The particulars of offence **Count IX** state that on the 7th April 2003 at Passenga village in Nyandarua District of Central Province, were found in possession of a firearm namely mark 3 sporting gun S/No. 26678 22 calibre without a firearm certificate in force.

Out of the original five accused persons two of them escaped while in remand while awaiting trial. The 3rd accused person who was a minor was found guilty of the offence stated under count 9 that is **being in possession of a firearm without a firearm certificate** which is contrary to **section 4(1) of the Firearm Act Cap 114 of the Laws of Kenya**. He was sentenced to 3 months imprisonment. This appeal therefore relates to the 1st and 2nd appellants who were convicted for the offences stated in count 2-6 in the charge sheet. The two appeals were consolidated during the hearing and they were heard together. The appellants also handed in written submissions which we have also taken into consideration while dealing with this appeal. The appellants challenged the charge sheet which had a multiplicity of charges and the overall effect the appellants were prejudiced in preparing their defence. The appellants also challenged the identification parade which was conducted against the set rules on parade in particular the 1st appellant had a broken leg and the members of the parade were ordinary people without any injury therefore the witnesses were able to pick him up. The appellants also contended that the exhibits that were produced were recovered from other people's houses. There was nothing to connect the exhibits especially the gun with the appellants. Finally, the proceedings by the trial magistrate were not totally conducted because the appellants were not given an opportunity to cross examine one of the key witnesses namely PW3 who was stood down because of time. When the hearing resumed on 7th July 2004 the witness was not offered for cross examination especially by the 2nd appellant who had not had

an opportunity to cross-examine him before the witness was stood down.

On the part of the State this appeal was opposed. The learned State Counsel **Mr. Mugambi** submitted that the conviction of the appellant was based on the doctrine of recent possession as well as identification by the victims who were robbed. It was the 1st appellant who led the police to the arrest of the 2nd appellant and other co-accused persons. On the 16th of March 2003 PW1 found a roadblock that had been mounted at Gatundia Trading Centre in Nyandarua District. He managed to go over the roadblock and he called the Police. The following day on the 17th March 2003 the 1st appellant was found writhing in pain near the said roadblock. He was taken to the Police Station by PW1 and the Chief of Area. Upon interrogation he led the Police to a place where they recovered a gun and the arrest of the 2nd appellant and the other accused persons. There was a spate of other robberies on 29th March 2003 when PW10, PW11, PW12 and PW13 were robbed on a roadblock on their way to Ol'joro-orok. They were however not able to identify their assailants. The only witness who was able to identify the appellants was PW3. Counsel therefore urged the court not to interfere with the conviction.

As required of this court by law we set out briefly in summary form the evidence that was before the trial court. On 16th March 2003 at about 9.00 p.m. John Nderitu Muma testified that he was drinking with other patrons at Good Hope Bar at Gathundia Shopping Centre when a gun of six robbers attacked them. They were armed with a gun and everybody was told to lie down and while lying down he was robbed Kshs 3,000/=, his identity card and job card. He testified that there was light which was illuminating from a lantern that remained on throughout and that is what enabled him to identify the 1st appellant. The 2nd appellant was also identified because he hit him with a panga and warned him not to look at him. He was able to identify the appellants at an identification parade which was conducted by **IP Nathan Wekesa [PW8]** on 10th April 2003 at Ol'joro-orok Police Station. Perhaps before we go further in the evaluation of this evidence it is noteworthy that PW3 did not complete his evidence. He testified on 6th January 2004. He was stood down on account of time. The record shows that when he was stood down he was being cross-examined by the 1st appellant. The record does not show whether the 1st appellant had finished cross-examination. The next time the hearing proceeded, PW3 was never recalled therefore he was not cross-examined by the 2nd appellant. On the 7th July 2004 the hearing proceeded with PW4 giving her evidence. Without going through the other grounds of appeal it is obvious that the evidence by PW3 which was crucial as he was the only identifying witness was not subjected to cross-examination. The outcome of this trial clearly shows that the appellants were prejudiced during the trial. We allow the appeal on this ground. We have also considered the entire evidence especially the issue of whether the prosecution proved the case to the required standard. The only evidence of identification was by PW3. The other evidence was pieced together by the Police namely Cpl. Ibrahim Kinyua PW2, who received a report from James Ndungu Mwangi PW1 that there was a roadblock illegally mounted near Kahi Stage by six people. He visited the scene but did not find anything but on the 7th April 2003 PW1 with the Chief of the Area brought in the 1st appellant who claimed that he was injured when the vehicle he was travelling in was attacked. He was injured with a stone and sustained a broken leg. Upon interrogation the 1st appellant admitted that they had mounted an illegal roadblock the previous night. He agreed to take the Police to the homes of his accomplices. They recovered a gun from the home of the 3rd appellant which was positively identified as the one the 1st appellant was armed with. They also recovered other items that had been stolen from other victims who were robbed earlier on. The Police were able to call the victims of the robbery within the bar which had occurred on 16th March 2004 and they were able to identify the appellants. This trial which had so many witnesses started on 22nd April 2003 and the judgment was pronounced on 21st June 2005. On further evaluation of this evidence we find the evidence of identification by a sole identifying witness unsafe to sustain this conviction. It is trite that when a court is relying on the evidence by a sole identifying witness sufficient caution should be taken and consideration of other circumstances which points at the guilt of the appellant. See the case of **Maitany Vs Republic [1986] KLR** it was held that

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single

witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted from the possession of error.”

The police testified that the 1st appellant led them to where the gun was recovered after confessing that he was one of the members of the gang that had mounted a roadblock. This evidence is inadmissible. The confession was not properly taken. The gun was not recovered with the 1st appellant or even at his house. Therefore in this case the doctrine of recent possession cannot form the basis of the conviction. The appellant gave a defence and detailed how he was a victim of an attack. While he was looking for help the Chief of the area took him to the Police Station where the Police framed him up with the present charges and brought other co-accused persons whom he did not know. Several police officers gave evidence in this case. We find the evidence by the area Chief who arrested the 1st appellant was crucial. However the Chief did not give evidence.

Taking the totality of the entire evidence and the conduct of the proceedings we find this appeal has merit. We allow the appeal, quash the conviction and set aside the death sentence against the 1st and 2nd appellants. Unless the 1st and 2nd appellants are otherwise lawfully held they are to be set at liberty.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE