REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 128, 129 & 130 of 2008

MOSES KINOTI NKOROI.....APPELLANT

Versus

REPUBLIC .....RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.129 0F 2008

MISHECK MBOGO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

HIGH COURT CRIMINAL APPEAL NO.130 OF 2008

BENARD KARANJA MWANGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court

at Kerugoya in Criminal Case No.232 of 2005 by J.N. ONYIEGO – SRM)

J U D G M E N T

The appellants, **Moses Kinoti Nkiroi, Misheck Mbogo Mureithi** and **Benard Karanja Mwangi** whose respective appeals we have consolidated for ease of hearing and as they arose from the same trial in the subordinate court were together with **Mercy Njeri Mugo** and **Danson Mundia Nyamu** *alias* **Mbanya** charged with the offence of robbery with violence contrary to *Section 296 (2)* of the Penal Code. Appellants' co-accused, **Mercy Njeri Mugo** was further charged in counts two and three with being found in possession of a firearm and ammunitions without firearm certificates contrary to *section 4(1) 2(a) 3(b)* of the Firearms Act. They all pleaded not guilty to the charges. On 4th May, 2005 the case against **Danson Mundia Nyamu** *alias* **Mbanya** was however withdrawn under *section 87 (a)* of the Criminal Procedure Code and was turned into a prosecution witness. For the rest, their trial ensued but after a full hearing, the learned Senior Resident Magistrate (**J.N. Onyiego**) found the appellants guilty as

charged, convicted them and sentenced them to death as required by law. He however acquitted **Mercy Njeri Mugo** for want of evidence pursuant to *Section 215* of the Criminal Procedure Code.

The appellants were not satisfied with their conviction and sentence and so they appealed to this court against both conviction and sentence. They all raised the following in their respective petitions of appeal; that the prosecution case was not proved beyond reasonable doubt, their identification was not free from possibility of mistake and or error, the learned Magistrate relied on the evidence of PW6 which had been discredited, essential witnesses were not called, *Sections 85 (2)* of the Criminal Procedure Code and *77 (2) (b)* of the Constitution were violated and finally that their defences were not given due consideration.

Brief facts of the case as can be deciphered from the record are that; the victim PW1 **Stella Wagatu Ngare** on 16th February, 2005, was with other members of Kimunye Self Help Group. They met outside her shop at Kimunye to contribute money as was the normal practice every Wednesday. At that time she was the Groups treasurer. When they met they raised ksh.92,157/= and tasked her to take the same to Kenya Commercial Bank, Kerugoya branch for banking. She was carrying Ksh.6,800 separately being the groups savings. As she left for Kerugoya vide a matatu she tied the 92,157/= in a black paper bag and 6,800/= in an envelope. Enroute and at a place known as Kibau area, a person flagged down the matatu. That would be passenger was subsequently identified as the 3rd appellant. As the driver stopped for the would be passenger to board the matatu, the man hesitated abit. Suddenly another man appeared from the other side of the road armed with a gun. The man with the gun then ordered the driver to park the matatu by the road side. That man was subsequently identified as the 1st appellant. He ordered the 3rd appellant to go round the motor vehicle as though inspecting it. The 1st appellant then pointed a gun at PW1 and ordered her to surrender her bag in which she had put the money. As she hesitated, the 3rd appellant jumped at her and got hold of the bag with the money. The 1st and 3rd appellants then left for the taxi that had been parked nearby. They entered the said taxi. Before that, the 1st appellant threw back the matatu keys to the driver as he had taken them earlier on. Immediately the two appellants entered the taxi, it sped off. Inside the taxi however was the 2nd appellant. As they drove off, the driver of the matatu (PW2) turned back towards Kimunye police station and reported the incident to **Corporal Fabian Wanjohi** (PW.10). PW10 and two other police officers using the same matatu decided to pursue the robbers. On reaching Kianguenyi area they enquired about the whereabouts of the taxi and were told the direction the taxi had taken. They pursued and found it on a feeder road re-fueling. When the occupants of the taxi saw the oncoming matatu they sped off again. The police officers pursued them and opened fire on the taxi but missed. One of the occupants of the taxi, who turned out to be the 2nd according to this witness appellant suddenly jumped out of the taxi. He was however pursued and apprehended. He was immediately identified by the conductor of the matatu **Robert Kinyua Mwangi** (PW5) as having been part of the gang that had just robbed PW1 of her money. The others in the taxi however made good their escape.

PW6 **Danson Mundia Nyamu** *alias* **Mbanya** testified that on 16th February, 2005, he was operating his taxi registration No.KAD 377W. Whilst at the taxi bay within Kerugoya town the 3rd appellant approached him at about 7.00am and asked him where the driver for another taxi registration No.KAA 866Q was. PW6 told him that the said driver was not available then. The 3rd appellant then left. He came back later in the company of the 1st appellant whom the witness knew as police officer based in Kerugoya. The duo told him that they wanted to go and arrest somebody peddling bhang in Kimunye area. The 1st appellant promised to pay him Ksh.1000/= for the taxi. They left Kerugoya for Kimunye at about 8.30 am. PW6 thereafter informed his parents that he had left for Kimunye. After Miringa-iri the duo told him to pass through a place known as "block" where they picked the 2nd appellant.

They then proceeded towards Kimunye. On reaching mugomo area he was suddenly ordered to stop and park the taxi but without moving out of it. The 1st appellant was by then armed with gun. The 2nd and 3rd appellants then got outside. He stayed behind in the taxi with the 1st appellant for about 30 minutes waiting for 2nd and 3rd appellants. The 2nd appellant later resurfaced carrying a pistol and told him to obey the orders. He was ordered to drive towards Kimunye. As they drove slowly they

encountered the 3rd appellant who told the 1st and 2nd appellants that the lady they were waiting for was about to arrive in a matatu. They drove further to Kibao area where he was ordered to park the taxi by the road side. The 3rd appellant left the taxi and when the matatu arrived he stopped it. The 1st appellant got out with his gun and confronted the driver. The 2nd appellant remained in the taxi and ordered him (PW6) to obey instructions. After a short exchange he saw 1st and 3rd appellants emerge with black handbag. When they entered the taxi he was ordered to drive off at high speed. He drove towards Gitumbe. At Gitumbe the motor vehicle ran out of fuel. The 2nd appellant left with a jerrican to buy fuel which he did. While re-fueling however he saw the matatu approaching them at high speed. Appellants ordered him to drive off very fast. As he drove away the 2nd appellant jumped out of the taxi. The rest ordered him to speed towards Baricho. On reaching Baricho the 1st and 3rd appellants fled on foot and they abandoned him. That is when he reported the incident at Kagio police station and explained all that had happened to him. He was locked up nonetheless and later charged. The charges were subsequently dropped as already stated.

PW7 **Sgt. Tabitha Rwamba** the incharge of armoury at Kerugoya police station stated that on 16th February, 2005 at 7.00am she issued an AK.47 rifle S.No.1170920 to the 1st appellant with 30 rounds of ammunition. The 1st appellant was to proceed for duties as court orderly at Kerugoya Law Courts. She identified the gun produced in court as exhibit as the one she had issued to the 1st appellant on the material day. In the evening the 1st appellant did not return the gun nor the 30 rounds of ammunition and he was no where to be seen. On 17th February, 2005 her informer told her that the 1st appellant, who had since disappeared without permission had a girlfriend within Kerugoya town. She traced the girlfriend at the police canteen. The girlfriend turned out to be the 4th co-accused, **Mercy Njeri Mugo.** She took the officers to her house where they recovered the AK.47 rifle hidden on the bed under a mattress. The gun was the same one that the 1st appellant had been issued with the previous day in the morning. They did not recover rounds of ammunition and the magazine though. The girlfriend was arrested and later charged with the others. PW8 **PC Murigu Kahiga** was at the time attached to Divisional C.I.D Kirinyaga. On 30th March, 2005 he received information that the 1st appellant who was being sought in connection with a case of robbery was at his home in Meru. Acting on the information he proceeded to Meru in the Company of **P.C. Kariuki** and **P.C. Kirimi.** With the assistance of the local Assistant Chief, they traced the 1st appellant's home and arrested him thereat and brought him to Kerugoya police station.

PW9, **P.C. Francis Karimba** was on 16th January, 2005 at about 12.30pm in his C.I.D offices, Kirinyaga performing general duties when he received information to the effect that people armed with A.K. 47 rifle and a pistol had robbed a lady. In the company of corporal **Gitonga, P.C. Musyoka** and **PC Abyeka** they drove towards Kibingo area in a police landrover. On the way they met with police officers from Kianyaga police station having arrested 3rd appellant. The 3rd appellant volunteered information that led to the arrest of the 2nd appellant. Apparently this witness knew the 2nd appellant very well as he had arrested him over another offence. So on 17th March, 2005 at 8.00am while coming from Kerugoya town he met with the 2nd appellant at Kerugoya Law Courts and arrested him.

The 3rd appellant was subjected to police identification parade subsequently conducted by PW11, **I.P. Njemiah Kiplagat.** PW1 was able to identify him. Similarly, the conductor of the matatu, PW5 was able to identify him.

The 1st appellant too was subjected a police identification parade conducted by PW12 **I.P. Evin Chemoleak**. He was positively identified by PW1 and PW2, the driver of the matatu as well as the conductor.

On being charged with the offences and after the prosecution witnesses had been heard, the appellants in their sworn statements of defence denied having committed the offence. For the 1st appellant he stated that he was a police officer. On 16th February, 2005 he was assigned duties to escort prisoners to Embu G.K. prison. He was assigned a gun for that purposes. He performed the duties until 5 p.m. He was

unable to return the gun to the armoury as the officer in charge was absent. So he went away with it. The following day he proceeded to Nairobi to follow up his Sacco Loan. On receiving the loan cheque, he called the OCS for permission to take a patient to hospital which apparently was granted. He travelled home and picked the patient and brought him to Kenyatta National Hospital where he was operated upon. He took more off days. Whilst at home however he was arrested and later charged for an offence he knew nothing about. The 1st appellant called two witnesses, **Mercy Njeri Mugo** and **Moses Kaberia Macharia,** police officer, then facing criminal charges to back up his story.

For the 2nd appellant, he testified that on 17th March, 2005 he had gone visiting a friend, **Sgt Ndegwa** of D.C.'s Office. As he approached Kerugoya Law Courts, he met a police officer whom he had differed with earlier over a woman at Diplomat Bar. The police officer had sworn to have him jailed. He there and then arrested him. After six days he was charged with the offence.

For the 3rd appellant, his story was that on 16th February, 2005 at about 8a.m. he proceeded to Githambi to look for fruits to buy. He found the fruits and agreed with the owner on the day he will come to collect them. On the way home, he came across a parked taxi. The driver asked him to assist him get fuel. He gave him a jerrican and he went and bought him the fuel. He thereafter offered to give him a lift to Kangaita. On the way a matatu approached them with full lights on. The driver of the matatu waived them down, however the taxi driver accelerated. He then heard gunshots. He decided to jump out of the taxi. He met with members of the public who interrogated him. Soon thereafter the matatu stopped and PW4 pointed him out to the police officers as having been part of the robbers. He was then arrested and charged.

The above facts were analysed and evaluated by the learned magistrate who reached the conclusion that the appellants were guilty of the offence as charged.

In support of their appeals, the appellants with the permission of the court tendered written submissions which we have carefully read and considered.

The appeals were opposed, **Mr. Omwenga**, learned Senior State Counsel in opposing the appeals submitted that the evidence against the appellants was simply overwhelming and well corroborated. He paid special regard to the evidence of PW1, PW2, PW3, PW4 and PW6 who gave detailed account as to what transpired between them and the appellants. PW6 knew the 1st appellant and was with him over a long period of time. The incident occurred at 11 a.m. in broad day light. The appellants were identified in the police parades. The 1st appellant after the incident disappeared from Kerugoya police station where he was stationed until he was arrested. To the learned Senior State Counsel, the appeals had no merits and ought to be dismissed.

In a first appeal the court is under a duty to consider all the evidence tendered at the trial, re-evaluate the same, draw its own conclusion of course without overlooking the findings of the trial court and also bearing in mind that it, unlike the trial court, did not see or hear the witnesses testify as to be in a position to fully assess their credibility. It is a duty the court must perform and the appellant is entitled to such analysis and re-appraisal of the evidence. As stated by the court of appeal in the case of **Jacinta Njoki Ndirangu V Republic NBI Criminal Appeal number 262 of 2007**, "…..**It will be considered a denial of justice if such a duty is not performed…."** See also **Okeno V Republic (1972) E.A.32.**

We are of the firm view that the appellants were properly identified by the witnesses at the scene of crime. The offence afterall was committed in broad day light. The driver of the taxi, **Danson Mundia Nyamu** *alias* **Mbanya** had been with the appellants in his motor vehicle for a long time. Indeed he had been with them between 8.30 a.m when he picked them up until about 11.30 a.m when the offence was committed. This is a period in excess of 3 hours. This witness knew the 1st appellant as a police officer in Kerugoya and indeed he was such a police officer. The 1st appellant does not dispute that fact. He concedes that much in his own statement of defence. The witness too seems to have known 3rd appellant very well going by the exchanges they had when the 3rd appellant came looking for the taxi. This witness drove with them over a long period of time. There is nothing on record to suggest that they had

disguised themselves as to make it difficult to be identified. There is also nothing on record to suggest that this very witness was so harassed during the period so that his capacity to observe the appellants sufficiently as to be able to subsequently identify them was impaired. Finally there is nothing on record to suggest that these particular witness had bones to pick with the appellants or anyone of them as would have spurred him to falsely testify against them. We are of course not oblivious of the fact that the said witness had initially been treated as a suspect and infact charged alongside the appellants. Accordingly his evidence has to be treated with a lot of circumspection. We have done so and looked for corroboration.

Apart from PW6, the 1st appellant was positively identified at the scene of crime by PW1, PW2, PW3, PW4 and PW5 which corroborates the evidence of PW6. They all saw him carrying the gun. Indeed it would appear that he was the one in charge of the operations. These witnesses spent sometime with him as he issued orders whilst outside and inside the matatu. The fact that this appellant had a gun received further support from the evidence of PW7 **Sgt Tabitha Mwamba Mureithi**, the incharge live armoury. She had issued a rifle to the appellant early on that same day for official duties. The rifle issued to the 1st appellant as aforesaid was an A.K. Rifle. The 1st appellant concedes that much. He also concedes that he never returned the rifle to the armoury on the pretext that the officer incharge was absent. However that cannot possibly be true in the light of the evidence of the armoury officer herself. The appellant sought to rely on the evidence of DW5, **P.C. Hamprey Muriithi** whom he called as a witness to claim that the gun referred to by the witnesses was not the one issued to him as aforesaid. According to this witness he had stated that he had received a report whilst at Kimunye police station of robbery. The report had been filed by one **Naomi Wangechi Munene** (PW3) to the effect that she had "**lost cash belonging to the group amounting to Ksh.98,957/= in her bag. The group was of our (sic) men. There were of medium size brown and five feet tall. They also had a gun suspected to have been a G3 according to the reporter…"** From the foregoing it is obvious that the reportee did not say that the gun was a G3. Rather she stated she suspected the same to be a G3. Further the reportee was a person not versed in guns. It is possible therefore that she could not tell a G3 from an A.K.47. To our mind nothing much turns on this complaint.

The appellant too claimed that the charge sheet is defective in that though in the particulars thereof it is claimed that the money was stolen from **Stella Wagatu Ngare** (PW1), it is infact, one **Naomi Wangechi Munene** (PW3) who claimed to have lost the money to the robbers. Nothing much in our view also turns on this contention. The evidence on record clearly shows that it was PW1 who lost the money to the robbers. In any event under cross-examination by 1st appellant, PW1 explained why PW3 made the report. She stated that "**it was Naomi who reported the incident first. We were in the M/V….. I was scared and when we reached the station she gave the report…"**

Still on the question of identification of the 1st appellant, there is evidence that during the police identification parade he was positively identified by PW1, PW2 and PW5. We have looked at the identification parade forms in respect of the appellant and the evidence tendered in support thereof. We have no doubt at all that the identification parade was properly conducted.

Following the commission of the offence, the 1st appellant suddenly deserted duties between 16th February, 2005 until 30th March, 2005 when he was arrested by PW8 from his home in Meru. According to the appellant he had sought permission to be away from duty to pursue Sacco loan and attend to his ailing relative. We find this evidence incredible. In his testimony, the appellant claimed that having failed to surrender the gun issued to him the previous day, he left for Nairobi to pursue the Sacco loan. However that is not what he told his "*wife*" **Mercy Njeri Mugo**. He had told her that he was going to Nairobi to attend to his sick brother. Again we do not think that police affairs are handled that casually. That a police officer can simply leave a police station without permission from his superior, leave a gun in a house which is not even in the police lines, travel to Nairobi, process a loan in a day and once he has it, calls the O.C.S for permission to go home to attend to some other matters. Yet this exactly what the 1st appellant wants us to believe. It is simply incredible. In our view the 1st appellant having participated in the robbery opted to desert duty in order to avoid imminent arrest as he suspected that he had been recognized by PW6 and visually identified by PW1, PW2 and PW5. As was held in the case of **Malowa**

V Republic (1980) KLR 110, when accused person disappears after an offence has been committed, the fact of his disappearance can lead the court to an inference that the accused disappeared to escape being arrested for committing the offence. We are satisfied in the circumstances of this case that the 1st appellant deserted duty in abid to avoid being arrested having committed the offence. We are further satisfied that the visual identification of the 1st appellant coupled with recognition by PW6 and supported by strong circumstantial evidence of his desertion from duty leads us to no other conclusion than the 1st appellant was a participant in the crime.

How about the 2nd appellant. According to PW3 she saw him seated in the taxi parked nearby as the 1st and 3rd appellants went about their business. She even described him to the police as having overgrown beards. PW2 & PW3 too saw him in the taxi. The same goes for PW5. Besides these witnesses, PW6 who had been with him over a long period of time as they waited to commit the robbery also identified him. The totality of the foregoing is that all these witnesses could not have mistakenly identified the 2nd appellant in such broad daylight. In particular PW6 could not have mistaken the 2nd appellant for someone else considering the length of time that they were together in taxi.

With regard to the 3rd appellant, what we have said above equally applies. His role in the robbery was vividly captured by PW1, PW2, PW3 PW4 PW5 and PW6. According to PW4, it would appear, that 3rd appellant was responsible for the ground work for the robbery. He did the reconnaissance work for the other robbers. He gathered information through a member of the women group, Jane Gakuo as to whether their meeting was on and who would take the money to the bank. He was the one who approached PW6 with a view to hiring a taxi. He is the one who pretended to be a passenger bent on boarding the matatu in which the victim was and caused it to stop. He was the same person who snatched the bag containing the money. As they escaped through the taxi ran out of fuel at Gatonye area. According to PW6, this appellant left with a jerrican and came back with the fuel. As they were refueling, a matatu drove by. He was ordered to drive off. As he was driving off the 3rd appellant jumped out. However he was unsuccessful in his bid to escape as he was soon thereafter arrested and positively identified by PW5. This appellant was arrested so soon after the incident. There can be no possibility of mistaken identity therefore. His story of being a good Samaritan and a victim of circumstances does not appeal to us. He only jumped out of the moving taxi in abid to avoid arrest having seen the matatu in which they had committed the robbery approach them. Much as there is apparent contradiction between same witnesses as to who between the 2nd and appellant jumped out of the speeding taxi, that contradiction in the light of the evidence on record is actually immaterial. The robbery was in broad daylight PW6 was in the company of the appellant for along time and saw them.

The appellants questioned the reliance by the learned Magistrate on the evidence of PW6 to convict them. They claim that the said evidence was discredited. We do not see how. The appellants themselves have not shown how the said evidence was discredited. The mere fact that the said witness had initially been a suspect in the crime does not itself mean that his evidence is not worth of consideration. In any event, the learned Magistrate did not solely rely on the said evidence. There was evidence of other eye witnesses as well as identification parade.

With regard to crucial witnesses not being called we do not see what those so called crucial witnesses would have added to the strong prosecution case. What matters is not the quantity but quality of witnesses called. Not every possible witness need to be called to prove a fact. In our view the evidence tendered without more, was more than sufficient to nail the appellants. There were no loose ends left in the prosecution case that these witnesses would have tied up.

Section 85 (2) of the Criminal Procedure Code deals with power to appoint public prosecutors by the Attorney General. We do not see how that provision of the law was violated in so far as the appellants are concerned.

Finally, we come to the problematic area of *section 72 (3) (b)* of the constitution. This issue was principally raised by the 1st appellant. He claims to have been held in police custody in excess of 33

days. However this fact is not discernable from the record. The charge sheet is silent as to when the appellants were arrested. What is certain is that the appellants were arraigned in court on 28th February, 2005, 12 days after the commission of the offence, assuming that they were arrested on the same day that the crime was committed. That being the case the appellants cannot claim that their constitutional rights were violated. They had committed a capital offence, for which the police were entitled to hold them in custody for at least 14 days. Instead they would appear to have been held for roughly 12 days going by the record. Accordingly there is no merit in this complaint.

The upshot of the foregoing is that we find no merit in the appeals. Accordingly they are all dismissed and sentence of death imposed on the appellants confirmed.

Dated and delivered at Embu this 28th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE

WANJIRU KARANJA

JUDGE