



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 67 of 2005

FRANCIS MAINGI MWAURAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.68 OF 2005

PETER KIBERU MUGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

HIGH COURT CRIMINAL APPEAL NO.69 OF 2005

PETER KAMAU KANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Form original Conviction and Sentence of the Senior Principal Magistrate's Court at

Murang'a in Criminal Case No.704 of 2004 by G.K. MWAURA – PM)

J U D G M E N T

As it appears from the intitulement, these three appeals were consolidated by this court for ease of hearing and as they arose from the same trial in the subordinate court. Both the appellants and **Ms Ngalyuka**, were not opposed to such an order.

Francis Maingi Mwaura, Peter Kaberu Mugo and **Peter Kamau Kanyi**, hereinafter referred to as the 1st, 2nd and 3rd appellants respectively were together with **Robert Ngugi Muhoro, Benson Mugo Muthoni and James Kariuki Mwangi** jointly charged with three courts of robbery with violence contrary to *section 296 (2)* of the Penal Code. All the accused persons denied the charges and their trial

ensued before **G.K. Mwaura, Esq**, the then Principal Magistrate at Murang'a law courts. At the conclusion thereof, the learned Magistrate found the three appellants guilty on all the charges preferred and sentenced each one of them to suffer death on each count as prescribed by the law. He also found **Robert Ngugi Muhoro** guilty as charged. However due to his age (*he was said to be between 15 – 17 years following age assessment by Dr. J. Kerena*), the learned Magistrate committed him to serve 3 years at Shimo la Tewa Bostal Institution. Whether the trial in the lower court, the conviction thereof and subsequent sentence passed on this accused person was in accordance with the law is something we would have ventured into had the said Robert Ngugi Muhoro preferred an appeal against the conviction and sentence. He did not and therefore it would be an exercise in futility if we were to enter that arena.

At the close of the prosecution case, the learned Magistrate found **James Kariuki Mwangi** (6th accused) had no case to answer and proceeded to acquit him under *section 210* of the Criminal Procedure Code. In his judgment the learned Magistrate also entertained some doubts with regard to the prosecution case against **Benson Mugo Muthoni** (5th accused) and proceeded to acquit him as well. This same accused person alone had been charged with refusing to have finger prints taken contrary to *section 21 (3)* of the Police Act. However the charge was subsequently withdrawn under *section 204* of the Criminal Procedure Code.

With regard to sentences of death imposed on the appellants we would observe that the learned magistrate having convicted the appellants on the three counts, and since the only sentence provided by law for each of the three counts was death, the Magistrate ought to have sentenced the appellants only on one count and need not have imposed other sentences of death on the remaining two counts as it is not possible to hang a convict thrice over. We shall revert to this issue again at the end of this judgment.

The appellants were aggrieved by the conviction and sentence aforesaid. Accordingly they each preferred an appeal which as we have already stated at the commencement of this judgment we ordered for their consolidation.

The appellants have more or less raised similar grounds of appeal in their respective petitions of appeal. They all revolve around contradictory prosecution evidence, doctrine of recent possession, mode of arrest and circumstantial evidence.

From the record the brief facts of the case were that on the night of 30th March, 2004 at Kenya Railways, Murang'a station in Murang'a district there were a spade of robberies masterminded by a gang of robbers in which **Harison Mathu** (PW1) was violently robbed of ksh.1020/= and a jacket, **Joseph Gakangi Kanyenje** (PW6) was robbed ksh.1,500/=, a torch, a wrist watch, 3 hens and cockerel and finally **Bernard Mwangi** (PW2) was robbed of Ksh.2,000/=. In both instances, the two complainants (PW1 & 2) were violently assaulted. PW1 sustained a fracture of the petela which was displaced according to **John Maina Kanjira**, a clinical officer (PW7) who completed his PW3 form. The same clinical officer testified on behalf of his fellow colleague **Julius Njuguna Chege** and produced the P3 form in respect of PW2. PW2 it was noted sustained a cut above the right eye and a fracture on the left leg.

Soon after the robberies, a report was made to the Kenya Railways Police Post in the same neighbourhood. PW8, **Charles Maina Kibuchi**, a neighbour of the complainants, PW11 P.C. **Justin Muriithi** and PW12, P.C. **Charles Mutisya**, Police Officers from the police post came to the victims' houses and noted footprints of the thugs as it had heavily rained. They traced the foot prints towards Makuyu market. They followed the footprints all the way to a compound with several house units. The prints led to two doors. At the first door, the said police officers knocked and a man opened. The police encountered a woman with a child. There were further foot prints which led to another door. The police officers proceeded to the other door knocked but the occupants refused to open. The police forced open the door and therein found 4 people. The four people were the 1st appellant (1st accused during the trial), the 2nd appellant (2nd accused during the trial) **Robert Ngugi Muhoro**, 3rd co-accused and the 3rd appellant (4th accused during the trial). **Benson Mugo Muthoni** (5th accused) was however fished from another room and or house and joined with the four aforesaid. On searching the house they came across

wet clothes amongst them a green jacket, panga and muddy shoes. The wet clothes and panga were taken in by the police. The police also recovered a cockerel in the compound adjacent to the 1st room they had visited. The woman in the room who went by the name Grace told the police officers that the cockerel had been brought to her by the five men in the other house that they had raided. Both the five men and Grace were arrested and taken to the police station. The man who had been initially with Grace during the encounter had apparently fled the scene. Police also took possession of the cockerel. The green jacket was subsequently positively identified by PW1 as belonging to him and that it had been stolen during the robbery. Similarly the cockerel was positively identified by its owner PW6. The panga recovered was also positively identified by its owner, PW4, **Antony Mwaura Chege**. Apparently he had marked the panga with initials "HM".

Following these recoveries, the appellants were then charged. Put on their defence, the 1st appellant testified on oath that on 31st march, 2004 in the morning he went to Makuyu bus Stage to wait for a vehicle. Whilst there a person came and looked at his legs since it had rained heavily the previous night. He asked him where he came from and on being answered a landrover came. The person who was with the appellant then declared that he had arrested him. He took him to the landrover and he was taken to Murang'a police station where he was held for 7 days before he was charged with the instant offences.

The 2nd appellant similarly gave a sworn statement of defence. He claimed that on 31st march, 2004 he woke up at around 5a.m and left for the Mwioko shop where there was a workshop in which had been employed. He was working on a coffin which had to be delivered by 8 a.m. On the road he met police officers who stopped him. They asked him for his identity card which he did not have. Whereupon a police landrover came by and the appellant was made to board the same. He was then taken to Murang'a police station and locked up. Seven days later he was charged with the instant offences.

Finally the 3rd appellant, in his unsworn statement of defence stated that on 31st march, 2005, he woke up at about 5 a.m. and went to his father's place of business where he sells charcoal and firewood. He then went to have tea. On his way back he met 2 police officers. Suddenly a police vehicle appeared and he was forced into it. He was driven to Murang'a police station and seven days later he was charged.

At the hearing of the appeal, the appellants applied to have their appeals argued by way of their written submissions. **Ms Ngalyuka**, learned state counsel, not objecting, we allowed the application. Accordingly each appellant tendered written submissions which we have carefully read and considered.

In opposing the appeals, the learned state counsel submitted that the conviction of the appellants was based on the unchallenged evidence of the appellants being found in possession of stolen items. With regard to the evidence of the cockerel allegedly found with Grace, counsel submitted that it was not found with Grace but was found outside her house. That the cockerel having been in the compound where the appellants were 30 minutes after the robbery, the court was right in holding that the appellants were in possession of the cockerel as well. The items stolen during the robbery were positively identified by PW4, 5 and 6. Finally counsel submitted that the defences advanced by the appellants were considered and rightly dismissed.

At it is a first appeal, the appellants are entitled to expect from us that we shall subject the evidence on record to a fresh and exhaustive examination, weigh the conflicting evidence, and ultimately make our own finding and draw our own conclusions in the matter. We must nevertheless remember, and make allowance for it, that we did not have the advantage of hearing and seeing the witnesses. **See Okeno V Republic (1972) EA. 32.**

The conviction of the appellants was predicated upon the doctrine of recent possession. This was so because the complainants who testified in support of the charges all stated that they were unable to identify any of the robbers during the robbery. The reason being that the robbers had bright torches which they turned on the victims' eyes and blinded them thereby. Accordingly the evidence tending to link the appellant is premised on the fact that they were found in possession of recently stolen items to wit, a green jacket belonging to PW1, a panga belonging to PW4 and a cockerel belonging to PW6. This

was so soon in fact immediately after the robberies had been committed.

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property. See Isaac Nganga Kahiga, Criminal Appeal No.82 of 2004 (unreported).”

There is ample evidence on record that robberies were committed upon PW1, PW2, PW3, PW4, PW5 and PW6. There is evidence that apart from money taken from the victims during the robberies; the robbers also took some items from the victims. For instance from PW1, they took a green jacket, from PW4 and PW5 they stole a jembe and a panga. The panga had initials “HM” inscribed on. And from PW6 they took a wrist watch, a torch, three hens and a cockerel. All these items save for the cockerel were subsequently recovered from a house in which the appellants were found sleeping. This was immediately after robberies. The cockerel was however recovered in the same compound next to the house of one Grace. All these items were positively identified by their respective owners. For PW1 he identified his jacket by a stitch mark he had made on it during repairs. For PW4 and PW5 they identified their panga because of the initials “HM” that they had inscribed thereon. As for the cockerel, PW6 knew it as his as he had reared it. The fact of PW1 owning the green jacket was supported by the evidence of PW7 and PW8 who had been seeing him wear the same in the neighbourhood. The evidence regarding the ownership of the cockerel by PW6 was further boosted by the evidence of PW8 and PW12 who claimed that they had been seeing the cockerel in the railways compound.

The appellants from their written submissions do not agree that they were found in possession of the stolen items aforesaid. They all allege that the ownership of the house from which the items were recovered was never determined. They also claim that it is not clear from the evidence which items were recovered from whom and who among the appellants was found in possession of the items or any one of them. Finally they also contend that from the evidence it is not clear from which house the appellants were arrested.

It is true that in course of cross-examination of the witnesses, the appellants did raise the question of ownership of the house in which the items were recovered. For instance under cross-examination by the first appellant on the issue PW8 had this to say; “.....**I don’t know who the owner of that room..... I don’t know the registration number of the plot where you were we did not invite neighbours of the where you were to witness the recovery....**” Similarly PW12 had this to say on the issue under cross-examination by the same appellant “..... **I saw no need to ask who were the owners of the house.....**” Much as the ownership of the house was an important issue to be explored, we do not think that failure to establish the owner of the house was fatal to the prosecution case. According to the evidence, the police using the footprints traced the house in which the appellants were. When ordered to open, they refused to open voluntarily. The police forced open the door of the house where the appellants were. None of the appellants claimed ownership of the house. None of the appellants claimed to have been a visitor therein either. Nor did anyone of them claim to have been a tenant of the same. Since none of them owned up to the ownership of the house, and having regard to the fact that the robberies complained of had just been committed by a gang of people the same night, it was safe to assume that these people who were found in the house in which items stolen during the robbery were recovered and were positively identified by the owners must have been the gang or part of the gang. It mattered not that the ownership of the house was not attested to in evidence. In any event what difference would it have made when the appellants were all found in the same room. They were part of the gang and acted in concert. It is immaterial who owner of the house or room was. In any event this line of defence is completely at variance with the defences advanced by the appellants during the trial. On the evidence we are satisfied and persuaded that either one or all of them were the owner(s) of the house. We are satisfied further that in committing the offences, the perpetrators were acting in concert so that it does not really

matter who the owner of the house from which they were arrested was.

With regard to the recovery of items it is the evidence of PW8 that the recovery was in the house which had 5 men. PW11 corroborated this evidence. PW12 according to the appellants however claimed that the recovery was in a room with 7 occupants, and that is the entry he entered in the OB. We have carefully considered the answers given by PW12 in cross-examination by the appellants and we are satisfied that there are no material contradictions at all. And even if they are, they are inconsequential as they do not go to the root of the prosecution case. There is no doubt at all that this witness testified as to the arrest of various suspects including the appellants.

Still on the issue of recovery of items, there is evidence that the clothes and panga were recovered in the house in which the appellants were and the cockerel was recovered next to Grace's house. Accordingly the appellants cannot be heard to complain regarding the discrepancy as to where the items were recovered.

However we have misgivings as to how the evidence of the recovery of the cockerel was treated by the learned Magistrate. The cockerel was recovered next to Grace's house. When confronted by the police regarding the presence of the cockerel, she claimed that it had been brought by the men from the house in which the appellants were arrested. The said Grace was arrested but subsequently released without any charges being preferred against her. It is also noteworthy that prior to Grace's arrest she had been in the company of another man who upon seeing the police fled. Grace indicated that given time who could avail the man. This was not to be. The said Grace was never again called to testify. Accordingly, what Grace told the police officers linking the appellants to the cockerel ought to have been disregarded by the learned Magistrate, as being hearsay.

How many people were arrested alongside the appellants? On the evidence, the appellants contend that there are serious contradictions on the issue. Were they four or five people who were arrested from the same room? Our reading of the evidence is that when the police forced open the door in which the appellants were, they found four people standing. Subsequent thereto another person was fished from another room and or house by **P.C. Mureithi** thereby making the number five. It cannot therefore be said that there is any contradiction regarding the number of persons arrested. It is precisely for the reason that this fifth person had been fished from another room and joined with the appellants and who was the 5th co-accused that led to his acquittal as the learned Magistrate was in doubt as to whether he could have been with the appellants during the robberies.

This fact leads us to consider the appellants' contention that they were discriminated against by the learned Magistrate when he acquitted this 5th co-accused. They take the view that since the learned magistrate entertained some doubts as to this 5th co-accused mode of arrest the same doubt ought to have been extended to them, after all it was based on the same evidence as that adduced by the prosecution against them. We would have agreed with appellants' submissions had it been that the appellants had been found in the company of the 5th co-accused when the police forced open the door of the room in which they were found. However it does appear to us as indeed was the case with the learned Magistrate that the 5th accused may have been in another room and or house. He may not therefore have been a member of the gang. The learned Magistrate held and we agree with him that the fifth accused may have been in another house which the suspect's foot prints did not lead to. He therefore deserved the benefit of doubt extended to him by the learned Magistrate.

In the house in which the appellants were arrested a green jacket and a panga recovered. These items were positively identified. However the recovery of the panga may not be all that important since it was not the subject of a separate charge. However it may be treated as good circumstantial evidence linking the appellants to the crime. We may say the same of the recovery of the cockerel but disregarding what Grace told the police officers regarding who had brought the cockerel next to her house.

These circumstantial evidence taken together with the evidence of recovery of the green jacket belonging to the PW1 in the room in which the appellants were so soon after the robberies would place

the appellants at the scene of robbery.

We may repeat here again that due to several contradictions in the testimonies of various prosecution witnesses, the appellants have questioned whether such witnesses can be treated as credible. The contradictions they have in mind are the age of PW1 as indicated in the P3 form produced in evidence and his oral testimony, the value of the green jacket recovered, their arrest whether they were five or four, entries in the occurrence book regarding the incident, where the cockerel was recovered, and house number from where they were arrested. To our mind, and as already stated these contradictions are minor pitted against the entire evidence marshalled by the prosecution against the appellants. They were not fatal and did not go to the root of the prosecution case. In any event they are curable.

In the circumstances of this case we are satisfied that the green jacket belonging to PW1 a panga belonging to PW4 were found in possession of the appellants the same night that they had been stolen from the owners. The possession was therefore recent. It does not matter that the items were not found in physical possession of any particular appellant. Indeed they were found on the floor. However since on the evidence the robbers were many and acted in concert, they had common intention. They are therefore equally guilty notwithstanding that none of them was found in physical and personal possession of the items. The items were positively identified by owners. The evidence on record taken together also with the recovery of the cockerel in the same compound in which the appellants were and which cockerel was positively identified by the owner coupled with further circumstantial evidence of trailing the foot prints upto the house where the appellants were arrested, with muddy shoes which had similar prints as those in the foot prints leads to the irresistible conclusion that the appellants were the authors of the spade robberies on the night. It is also not lost on us that the appellants were all arrested in the wee hours of the morning (about 5a.m.) were all bundled in a police landrover, taken to Murang'a police station where they were all held for seven days before they were charged. Was this mere coincidental? We do not think so.

The appellants have of course raised the issue of their defences not being considered. They claimed that they were not involved in the robberies and that the police merely framed them with the case. We discern no reasons at all from the record why the police would have ganged up to frame the appellant. Nothing on record suggests that there was any grudge between the appellants or any one of them and the complainants or one of them or even with the police or any one of them. Further we do not think that some of the complainants' would have injured themselves that much merely to frame the appellants. Finally, where would the police have got all the items they allegedly recovered from the house in which the appellants were arrested so as to frame the appellants?

The appellants having been found in possession of the items were duty bound to explain how they had come by them. They did not leading to the irresistible conclusion that either they were the thieves or received the goods knowing them to be stolen. In our case the items have been recovered so soon after the robberies, a rebuttable presumption arises that indeed they were members of the gang. The presumption was not rebutted. In invoking the doctrine of recent possession, to find a conviction against each appellant, the learned Magistrate was therefore right and cannot be faulted.

Having re-evaluated the evidence and considered the issues raised in this appeal and the submissions of the learned state counsel as well as the appellants, we are satisfied that the appellants were convicted on credible evidence. We see no reason to disturb the findings of the learned Magistrate.

Consequently, the three appeals are hereby dismissed in their entirety.

However as the appellants cannot be hanged three times over we do hereby set aside the sentences of death imposed by the learned Magistrate on counts two and three. The sentence of death on count one, however, remains. Those shall be the orders of this court in this appeal.

Dated and delivered at Nyeri this 7th day of May, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE