



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 126 of 2006

[From Original Conviction and Sentence in Criminal Case No. 1799 of 2004 of the Chief Magistrate's Court at Nakuru – M. W. Onditi - S.R.M]

TIMOTHY KARUIRU NGUGI1ST APPELLANT

PAUL THIONGO KIMANI2ND APPELLANT

SAMUEL KAMAU KARANJA 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The three appellants; Timothy Karuiru Ngugi, Paul Thiongo Kimoni and Samuel Kamau Karanja. The 1st, 2nd and 3rd appellants respectively were charged with the offence of **robbery with violence** contrary to **Section 292 (2)** of the **Penal Code**. The particulars of charge stated that on the 20th day of July, 2004 along N B road Nakuru in Nakuru district within Rift valley province, jointly and while armed with dangerous weapons namely; pistol robbed **RWM** of cash Kshs.412,000/-, two mobile phones valued at Ksh.33,000/=, all valued at Ksh.445,000/= and at or immediately before or immediately after the time of the said robbery threatened to use actual violence to the said **RWM**.

The appellants also faced a second count of robbery with violence contrary to **Section 296 (2) of the Penal Code**, and particulars of the charge are stated as follows:

That on the 20th day of, 2004 alone N B road in Nakuru District within Rift Valley province, jointly and while armed with dangerous weapons namely; a pistol robed **DANIEL CHEPKONGA** of cash Ksh.18,000/= and at or immediately before or immediately after the time of the said robbery used actual violence against the said **DANIEL CHEPKONGA**.

The appellants were tried before the Senior Resident Magistrate; they were found guilty of both counts, convicted and sentenced to the mandatory death sentence. Being dissatisfied with both the conviction and the sentence, the appellants appealed to this court. The first appellant was ably represented by learned counsel **Mr. Githua** and in his petition of appeal; he raised the following grounds of appeal:

- 1. THAT the Learned Magistrate erred in law in failing to address herself to the basic ingredients of the offence of robbery with violence.**
- 2. THAT the Learned Magistrate erred in law in misapprehending the provisions of the Penal**

Code and more particularly Section 21 thereof.

3. THAT as a consequence of the wrong application of the law, the Learned Magistrate came to a totally erroneous conclusion as to the criminal culpability of the accused person.

4. THAT the Learned Magistrate erred in law when she totally misapprehended the Ratio decidendi in RAMANLALA TYRAMBAKLAL BHATT VS REPUBLIC (1957) EA 332 and as a consequence of the misapprehension found out that the accused person had a case to answer.

5. THAT the Learned trial Magistrate erred in law in finding that the prosecution had proved that the accused person was guilty of the offence of robbery with violence on the basis of the evidence which was adduced.

6. THAT the Learned trial Magistrate erred in law in finding that the accused/appellant had a common intention to commit the offence for which they were charged.

7. THAT the Learned Magistrate erred in law and fact in arriving at a finding not supported by evidence.

The 2nd and 3rd appellants were not represented, each relied on their petitions of the appeal, they also tendered written submissions which were duly admitted. On the part of the 1st appellant, he faulted the conviction which was based on the evidence of a single identifying witness and the evidence of an identification parade which he contended was conducted contrary to the rules. The 2nd appellant also challenged the conviction which he argued was based on insufficient, contradictory and uncorroborated evidence. He challenged the conviction that was based on the prosecution's evidence and faulted the trial court for failure to consider his defence which would have entitled him an acquittal.

On the part of the 3rd appellant, he similarly challenged the reliance by the trial court on evidence of a single identifying witness and evidence of dock identification which he contended was worthless in law. The other grounds of appeal are similar and there is no need of reiterating each of them.

On the part of the state, this appeal was opposed. The Learned Senior State Counsel, **Mr. Koech** supported both the conviction and the sentence of the three appellants. He urged the court to find that there was overwhelming evidence against the three appellants in a robbery which was well organized. **Mr. Koech** submitted that it is clear from the evidence that the robbery took place in broad day light. The complainant who was **PW 1** was in the company of the 1st appellant who was her regular taxi driver on the material day. The 1st appellant drove **PW 1** to the bank where she withdrew part of the money that was robbed. While on the way to the destination for which **PW 1** had requested the 1st appellants to take her. The 1st appellants chose to use a different route for unexplained reasons. **PW 1** had also requested the appellant to carry another passenger on the way and the appellant declined for unexplained reasons. She also told the court that the 1st appellant kept on making many calls and sending short messages on the mobile telephone. Four kilometres while traveling on the murrum road, two strangers who appeared drunk staggered on the way. **PW 2** told the appellant to turn the vehicle to avoid those two who appeared like robbers. However the appellant who was driving at a very slow speed, twenty kilometers per hour suddenly braked and the vehicle stopped. He opened his door and the passenger door where the **PW 2** was sitting. That is when the two assailants attacked **PW 1** whom they bundled in the car. They also attacked **PW 2** from whom they stole Ksh.18,000/= and injured him on the back. They took the mobile phone from the 1st appellant. Somehow the mobile phone for **PW 2** was not taken and after a while **PW 2** was able to call the police. He managed to speak to **PC Rotich Songoh**. **PW 2** asked the 1st appellant the registration number of his vehicle so that he could circulate to the police and the appellant gave him KAK 086Y which was not the correct registration of the vehicle.

From the above evidence, **Mr. Koech** submitted that there was circumstantial evidence to show that the 1st appellant was part and parcel of the robbers who planned the robbery in conjunction with the 2nd and

3rd appellants. Further, **Mr. Koech** urged this court to find that the 1st appellant for unexplained reasons chose to use a different rough road to reach the destination for which he was hired in furtherance of the arranged robbery. The 1st appellant also refused to carry a 3rd passenger despite instructions and request from **PW 1** who had hired the taxi. Similarly, the 1st appellant kept making telephone calls on the mobile phone and sending messages. The 1st appellant also drove the vehicle at a very slow speed of about twenty kilometres per hour when the thugs appeared. He also stopped the car instead of trying to escape. More revealing was the fact that the 1st appellant was not attacked by the robbers. The robbers only targeted **PW 2** from whom they stole Ksh.18,000/= and they also did not injure the 1st appellant when **PW 2** was injured. The robbers also seemed to know that **PW 1** was carrying money in an envelope and the 1st appellant when **PW 1** was trying to make a report to the police; the 1st appellant allegedly gave the **PW 2** the wrong registration number of the vehicle in order to confuse the police.

As regards the evidence of identification, the 2nd appellant **PW 1** told the court that she was able to identify both the 1st appellant and the 2nd appellant because they had taken about three hours from the time she was car jacked to the time she was abandoned at the free area, Nakuru.

During the ordeal, **PW 1** testified that there was a scuffle between her and the 2nd appellant and while in the vehicle, the 2nd appellant was the one who was armed with a gun and he even threatened to rape her, while the 3rd appellant was the one who was driving the vehicle. **Mr. Koech** thus argued that the identification of the 2nd and 3rd appellants by the 1st respondent was safe from any error. The evidence of **PW 2** also corroborated that of **PW 1** regarding the identification of the 2nd and 3rd appellant.

On the part of the counsel for the 1st appellant, he urged the court to find that the 1st appellant should not have been put on his defence, let alone a conviction.

Mr. Githui challenged the quality of evidence that was adduced before the trial court by the prosecution witnesses which he argued lack credibility and contravened the set principles in Criminal Law which are enunciated in the celebrated case of **Bhatt Vs. Republic 1957 EA at page 334** where the court of appeal explained what is a *prima facie* case as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends only on whether there is ‘some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weightily enough to prove the case conclusively: that that determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’ but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

Besides, counsel for the appellant submitted that the 1st appellant was hired as a taxi driver on the fateful day. **PW 1** went to a bank and withdrew some money but the 1st appellant was not aware how much money was withdrawn. It is also not disputed that the 1st appellant was outside of the car when **PW 1** paid **PW 3** some money. As regards the allegations that the appellant kept on making several telephone calls, no evidence was tendered to show that the telephone calls were made to the accomplices. It is also clear from the evidence that the 1st appellant was driving the motor vehicle slowly on a rough road because the shock absorbers of the vehicle were not in good condition. Both **PW 1** and **PW 2**'s evidence

confirmed that the 1st appellant braked and stopped the vehicle suddenly. This clearly shows that the 1st appellant must have braked because he did not want to hit the persons who were on the road. Counsel argued that placing the 1st appellant on his defence was shifting the **burden of proof** to the 1st appellant to prove his innocence. The circumstantial evidence was not proved and he therefore urged the court to quash the decision of the lower court and acquit the 1st appellant.

This being the first appeal, this court has a duty of re-evaluating and reconsidering the entire evidence and to arrive at its own independent determination as to whether or not uphold the conviction. This court has to bear in mind that it never saw or heard the witnesses as they testified in the lower court and give due regard to that. See the case of **Njoroge vs. Republic {1987} KLR page 19**. We therefore briefly set out the summary of the evidence before the lower court.

RWM, the complainant and **PW 1** in this matter told the court that she used to hire the taxi services of the 1st appellant who owned motor vehicle registration number KAK 086Y for a period of about 7 months prior to this incidence. On 20th July, 2004, **PW 1** requested the 1st appellant to pick her from her house and drop her to E. They went to E and went back to Nakuru town. **PW 1** went into a bank and withdrew Ksh.500,000/= and paid **PW 3** Ksh.100,000/= while in the 1st appellant's car but at the time the appellant was sitting outside the car reading a newspaper. **PW 1** put Ksh.390,000/- in an envelop and placed it under the seat while they were on the way to Njoro. She gave the 1st appellant Ksh.500/= which he said he needed to give his wife. She also fueled the vehicle. When they set out for the destination, **PW 1** requested the 1st appellant to give a lift to one **Daniel Chepkonga, PW 2** who was also traveling to the same destination. It is while picking **PW 2** that **PW 1** requested the 1st appellant to similarly give a lift to another young man called **Karanja** but the appellant refused and so they set out for Orokuruto forest from Njoro. The 1st appellant chose to use a different road from the usual and he was traveling at a speed of about twenty kilometres when all of a sudden two people emerged from the bushes while staggering on the road, this was about four kilometres while traveling on this murram road, when two strangers who appeared drunk staggered on the way. **PW 2** told the appellant to turn the vehicle to avoid those two persons who appeared like robbers. However the appellant who was driving at a very slow speed, 20 kilometers per hour suddenly braked and the vehicle stopped. He opened his door and the passenger door where the **PW 2** was sitting. That is when the assailants attacked **PW 1** whom they bundled in the car. They also attacked **PW 2** from whom they stole Ksh.18,000/= and injured him on the back. They stole the mobile phone from the 1st appellant. Somehow the mobile phone for **PW 2** was not stolen and after a while **PW 2** was able to call the police. He managed to speak to **PC Rotich Songoh (PW 6)**. **PW 2** asked the 1st appellant the registration number of his vehicle so that he could circulate to the police and the appellant gave him KAK 086Y which was not the correct registration number. **PW 1** told the court that during the ordeal, she was able to identify the 2nd appellant with whom they had engaged in a scuffle immediately the robbers ordered the car to be stopped. The 2nd appellant is the one who was armed with the gun and he sat with her when demanding for the money and he kept on asking for the money in the envelope which he took while the 3rd appellant was driving the vehicle. **PW 1** was abandoned at the free area in Nakuru where she requested the help of a Good Samaritan who assisted her with a mobile telephone which she used to call her sister. Her sister came for her and they reported the matter to the police. The police confirmed that the matter had already been reported from the Njoro police station.

Meanwhile, **PW 2** who was abandoned with the 1st appellant recollected himself and called **PW 6** and informed him about the robbery and that **PW 1** had been car jacked. It is at this point when **PW 2** asked the 1st appellant the car registration number but he told him the car registration number was KAK 086Y which was circulated by **PW 6** who also tried to intercept the car but due to the misdescription, he confirmed that indeed vehicle registration KAK 068Y passed them on the way. **PW 1** went to Njoro police station and it is while at the police station that the 1st appellant gave the correct registration number, that is KAK 068Y. Upon interrogation by the police at Njoro police station, the 1st appellant was arrested and then rearrested by the CID Nakuru and charged with the present offences. **PC Thomas Kingoo, PW 9** was the one who arrested the 1st appellant and he told the court he did so after interviewing him and finding that he had given the wrong registration number of the motor vehicle in

order to cause confusion.

The 2nd appellant was arrested following a tip off by an informer and an identification parade was organized by Chief Inspector **Henry Ndombi, PW 7** when **PW 1** identified the 2nd appellant and 3rd appellants. On 30th July 2004 and 16th April 2005 respectively **Dr. Paul Gachonga** produced a medical report to show that **PW 2** was examined for an injury that he had suffered two months prior to the examination and the doctor certified the injury as harm.

Put on their defence the 1st appellant give a sworn statement of defence and denied having had anything to do with the robbery. He said in his defence that he only made one telephone call to his wife and he had no idea how much money **PW 1** was carrying. He also denied having given **PW 2** the wrong vehicle registration number of his taxi. He also said he was driving slowly because the road was rough and he refused to give the 3rd passenger a lift because **PW 2** had carried a heavy metal in the boot and the shock absorbers of his car were defective. **PW 2** gave unsworn statements of defence and similarly denied having taken part in the robbery. He said that he was arrested on 27th July, 2004 at Nakuru town after he had been involved with a physical fight with one Stephen Karanja who owed him Ksh. 6,000/=. He was escorted to the central police station and on 29th July 2004 an identification parade was mounted by the DCIO.

Similarly the 3rd appellant denied having had anything to do with the robbery and said that he was arrested on 11th April, 2005 at free area when he was looking for the house of a cousin of his who had relocated. He also called and relied on the evidence of **Peter Warutere Ngige, DW 4** who said that he met the appellant at the prison and knew nothing about the charges that the 3rd appellant was facing. **Carlos Wambugu Ng'ang'a** was **DW 5** and he told the court that he met the 3rd appellant on 11th April 2005, at free area, Nakuru and he was looking for direction and the vehicle to take him to Green Estate, that is when **DW 5** was arrested with the 3rd appellants. He however told the court that he was arrested of an offence of assault which occurred on the same day.

The above is the summary of the evidence upon which the appellants were convicted.

The Learned trial magistrate after considering the above evidence and submissions by the defence arrived at the conclusion that there was direct and circumstantial evidence against the appellants for which she convicted them and sentenced them to death. Upon the evaluation of the above evidence, it is clear that this appeal turns on two issues namely;

The evidence of identification of the 2nd and 3rd appellants and secondly the circumstantial evidence against the 1st appellant. When dealing with the evidence of identification especially of a single identifying witness, the Court of Appeal has on numerous occasions guided the courts to caution themselves. In the case of **Maitany vs. Republic [1986] K.L.R, the Court of Appeal** had the following to say;

“Although it is trite law but a fact may be proved by the testimony of a single witness. This does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.”

The issues in this case turn on the evidence of identification of the 2nd and 3rd appellant and whether the 1st appellant committed the offence with the 2nd and 3rd appellant as a joint enterprise and whether the trial court erred by inferring the guilt of the 1st appellant by relying on circumstantial evidence to link him with the offence of robbery with violence.

On the issue of identification by **PW 1** who attended an identification parade in respect of 2nd and 3rd appellant, it is clear from the evidence that this robbery took place in broad daylight. **PW 1** remained in

the company of the two assailants for about three hours when she was driven around robbed. According to **PW 1**, she sat with the 2nd appellant in the vehicle who at one point even threatened to rape her. She told the court that she gave the description of the robbers to the police and she was able to identify each of the 2nd and 3rd appellant by their distinctive features. The 2nd appellant was identified ten (10) days after the robbery and the 3rd appellant was identified almost ten months later on 16th April 2005. **PW 1** was able to identify the 3rd appellant due to his teeth which she had noted during the robbery.

We are satisfied that the identification by **PW 1** was free from error because the robbery took place during the day and she was with the 2nd and 3rd appellants for three hours which gave her ample time to note their distinctive features. Her evidence was corroborated by that of **PW 2** who was also a victim of robbery.

Learned Counsel for the 1st appellant put forward several authorities in particular the persuasive case of **Hearther Stewart Barry John Schofield [1995] 1 Cr. App. R. 441** to show that there was no evidence that the 1st appellant was part of a joint enterprise. It was held in that case;

“Where the criminal liability of any given defendant depends upon the further proof that he had a certain state of mind, that state of mind must be proved against that defendant. Even though several defendants may, as a result of having engaged in a joint enterprise, be each criminally responsible for the criminal act of one of those defendants done in the course of carrying out the joint enterprise, their individual criminal responsibility will, in such a case, depend upon what individual state of mind or intention has been proved against them. Thus, each may be a party to the unlawful act which caused the victim’s death. But one may have had the intent either to kill him or to cause him serious harm and be guilty of murder, whereas another may not have had that intent and may be guilty only of manslaughter.”

It was the first appellant’s case that the trial court failed to prove its intentions and in particular that he acted in preconcert with the 2nd and 3rd appellant. Counsel for the 1st appellant also discounted all the circumstantial evidence that was adduced by **PW 1** and **PW 2** to disprove that the 1st appellant drove the vehicle at the material time at a slow speed on a murrum rough road and stopped suddenly in furtherance of a common purpose or design. Counsel submitted that the circumstances of this case does not point to the guilt of his client. For this preposition he put forward the case of **Sawe Vs Republic [2003] K.L.R page 375** where the Court of Appeal held as follows;

“If that be the case, then the evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of R v Kipkering Arap Koske & Another 16 EACA 135 where it held, inter alia, that: -

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

We gratefully accept this accurate exposition of the law. We now turn to consider whether the inculpatory facts are inconsistency of any other hypothesis other than that of the guilt of the 1st appellant. From the evidence adduced before the trial court, the prosecution pieced the following facts to show that the 1st appellant was part and parcel of the robbery with violence against **PW 1** and **PW 2**.

Firstly, the 1st appellant refused to give a lift to a third passenger despite the request by the **PW 1** who had hired the vehicle of the 1st appellant. This was meant to reduce the likelihood of resistance during the planned robbery.

Secondly, the 1st appellant chose to use the murrum road which was rough to the destination.

Thirdly, the 1st appellant drove the vehicle at a very slow speed of about 20km/h and when two strangers

staggered on the road and the 1st appellant was warned by **PW 2** to turn the vehicle as the strangers were robbers, he suddenly braked and stopped the car and opened his door and that of the passenger seat where **PW 2** was seated.

Fourthly, although **PW 2** was injured and robbed of money, the robbers did not hurt the 1st appellant and when they drove away with the vehicle with **PW 1**, they seemed to know she had money put in an envelop which they demanded. More fundamentally, when the **PW 1** and the 1st appellant recollected themselves and **PW 1** placed a call and was speaking to a police officer about the robbery, the 1st appellant gave the wrong description of the vehicle registration number which was meant to confuse the police should they mount a road block to intercept the robbers.

In our judgment, we are satisfied that the circumstances of this case show that the 1st appellant was a principle offender. Under **Section 20 (1)** of the **Penal Code Cap 63**

“When an offence is committed, each of the following persons is deemed to have ‘taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

- (a) every person who actually does the act or makes the omission which constitutes the offence;*
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*
- (c) every person who aids or abets another person in committing the offence;*
- (d) any person who counsels or procures any other person to commit the offence;*

and in the last-mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.”

We have also re-evaluated the defence evidence and we are in agreement with the trial court that the same did not dent the prosecution’s evidence, we find no merit in this appeal which we dismiss. The convictions of all the appellants and the sentence imposed by the trial magistrate are confirmed.

Dated and delivered at Nakuru this 14th day of February 2007.

M. KOOME

JUDGE

L. KIMARU

JUDGE