



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 106, 107 & 108 of 2005

STEPHEN NGUGI MURIGI.....1ST APPELLANT

CALEB SINO HARRISON.....2ND APPELLANT

BENARD ADRIANO NABALI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**From original conviction and sentence of the Chief Magistrate's Court at Nakuru in
Criminal Case No. 2040 of 2004 –G. C. Mutembei [S.P.M.]**

JUDGMENT OF THE COURT

The appellants, Stephen Ngugi Murigi (*hereinafter referred to as the 1st appellant*), Caleb Sino Harrison (*hereinafter referred to as the 2nd appellant*) and Benard Adriano Nabali (*hereinafter referred to as the 3rd appellant*) were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 28th August 2004 along Bahati-Nakuru road in Nakuru district jointly with another not before court, while armed with a dangerous or offensive weapon namely imitation of a firearm homemade pistol robbed Benson Kahiga Wainaina of his motor vehicle registration No. KAE 868X Isuzu Canter valued at Kshs 500,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Benson Kahiga Wainaina. The appellants were further charged with being found in possession of an imitation firearm contrary to Section 21(2) of the Firearm Act. The particulars of the offence were that on the 28th August 2004 along Bahati-Nakuru road in Nakuru district, the appellants jointly with another not before court were found in possession of one imitation firearm (*homemade pistol*) without a firearm certificate. The appellants pleaded not guilty to the charges and after a full trial were found guilty on the two counts as charged. On the first count, they were each sentenced to death as is mandatorily provided by the law and on the second count they were each sentenced to serve three years imprisonment. The appellants were aggrieved by their conviction and sentence and each appellant filed a separate appeal against his said conviction and sentence to this court. The three separately filed appeals were, at the hearing of the appeals, consolidated and heard as one.

In their petitions of appeal, the appellants presented more or less similar grounds of appeal. They were aggrieved that they had been convicted for the theft of a motor vehicle which was not produced as an exhibit in evidence by the prosecution. They were further aggrieved that they had been convicted based on the evidence of identification by a single witness which was made in difficult circumstances and which raised doubt that the said witness had identified them. They were further aggrieved that the trial

magistrate had convicted them based on insufficient evidence of the prosecution which had not established their guilt to the required standard of proof. They faulted the trial magistrate for failing to consider the fact that the prosecution had failed to call crucial witnesses who could have raised doubt on the prosecution's case. They faulted the trial magistrate for failing to consider the fact that the prosecution witnesses who testified before the said court offered contradictory and uncorroborated testimony as to the circumstances of the robbery that should have been decided in their favour. They were further aggrieved that the trial magistrate had failed to consider the fact that the alleged imitation gun which was found in their possession was not dusted for fingerprints so as to establish who was actually in possession of the same. They were finally aggrieved that their defences were not considered before the trial magistrate arrived at the said decision convicting him.

At the hearing of the appeal, the appellants, with the leave of the court, presented to this court written submissions in support of their appeals. They further made oral submissions in support of the appeals. They urged this court to allow the appeal and acquit them of the charges. Mr. Koech for the State made oral submissions urging this court to uphold the conviction and sentence of the trial magistrate. He submitted that the prosecution had proved its case against the appellants to the required standard of proof beyond reasonable doubt. He urged the court to disallow the appeals. We will revert back to the submissions made and give reasons for our judgment after briefly setting out the facts of this case.

PW3 Mwangi Kibuchi is a businessman. He sells animal feeds in Nakuru and Nyandarua districts under the business name Kaya Farm Supplies. For the purposes of supplying the said animal feeds to his customers, he owns a motor vehicle registration number KAE 868X Isuzu Mini-lorry. PW3 employed PW1 Benson Kahiga Wainaina to drive the said motor vehicle and PW2 Wilfred Onyienko Omangi to be his turnboy. On the 28th August 2004, PW3 sent PW1 and PW2 to deliver animal feeds to his customer at Menengai called Jane Njau. At about 3.30 p.m., while PW1 was returning from Menengai, he was stopped at a place called Kokoto along the Nakuru-Bahati road by an employee of PW1 called Geoffrey Muhuru. The said employee wanted to be given a lift to Nakuru. PW1 stopped the motor vehicle. PW2 alighted from the motor vehicle to allow the said Geoffrey Muhuru to sit in the middle of the cabin.

While PW2 was standing outside the vehicle, a person whom PW1 later identified to be the 1st appellant pointed what appeared to be a gun at him and ordered him to move from the driver's seat onto the passenger seat. PW1 hesitated and was hit on the face. He complied with the order and moved to the passenger seat. He testified that another person entered the motor vehicle from the passenger's door. He later identified the person as the 2nd appellant. He was sandwiched between the two. The motor vehicle was then driven off by the 1st appellant. PW2 was left standing by the roadside. He however screamed to alert the members of the public as to what had transpired. PW2 corroborated the testimony of PW1 in so far as it related to the circumstances under which they were stopped by their fellow employee and later the hijacking of the motor vehicle. He testified that he identified the 1st and the 3rd appellant as the persons who assaulted him and forcefully removed him from the motor vehicle. He testified that after they had succeeded in removing him from the motor vehicle, the 1st appellant entered the front cabin of the motor vehicle while the 3rd appellant entered the rear part of the motor vehicle.

PW1 testified that the 1st appellant drove the motor vehicle towards the Nakuru direction before he branched to an off-road. While driving the said motor vehicle, the 1st appellant had placed what appeared to be a gun on his laps. He demanded that PW1 give him money. PW1 told him that he did not have any money. According to PW1, the 2nd appellant relieved him of the watch that he was wearing. At some point during the journey, the 1st appellant passed what appeared to be a gun to the 2nd appellant. It was at that point that PW1 saw that what the appellants touted to be a gun was in fact an imitation gun. PW1 saw a chance to end the hijacking. He immediately grabbed at the imitation gun. A struggle ensued between PW1 and the 1st and 2nd appellants. In the course of the struggle, the 1st appellant lost control of the motor vehicle and the same veered off into a farm and stopped. The 1st and 2nd appellant jumped off from the motor vehicle in a bid to make good their escape. PW1 chased the 2nd appellant and managed to apprehend him when he attempted to jump over a fence. He restrained him and was assisted by the members of the public to subdue him. PW1 managed to get back his watch from the 2nd appellant.

Meanwhile, the members of the public responded to the cries of help by PW1 and PW2. When the 1st and 3rd appellants attempted to escape from the motor vehicle, they were apprehended by the members of the public. Some members of the public attempted to administer 'mob justice' on the 1st and 3rd appellants but the said appellants were rescued by traffic police officers who were near the scene and who included PW6 PC Joel Indimuli. PW4 PC Andrew Mathu was assigned to investigate the case. He produced the imitation pistol and the watch as an exhibit in the case. PW5 PC Livingstone Lihanda, a scene of crime officer took the photographs of the motor vehicle which had been hijacked and produced the same as exhibits in the case before the trial court.

When the appellants were put on their defence, they denied that they had been involved in the robbery. Each appellant testified that they were victims of mistaken identity who had been arrested at the scene of crime by the members of the public while they were going on with their normal daily activities. They denied that they had robbed PW1 and PW2 of the motor vehicle.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See Njoroge -vs- Republic [1987] KLR 19*). We have carefully considered the submissions made by the appellants and the response thereto made by Mr. Koech on behalf of the State. We have re-evaluated the evidence that was adduced before the trial magistrate's court as we are required to by the law. The issue for determination by this court on this appeal is whether the prosecution proved its case on a charge of robbery with violence against the appellants to the required standard of proof beyond reasonable doubt.

This appeal turns on the evidence of identification that was adduced by the prosecution witnesses. The prosecution did not adduce any other evidence in support of its case on the charge of robbery with violence against the appellants. According to PW1 and PW2, they were accosted by robbers when they had stopped at Kokoto area along the Bahati-Nakuru road at about 3.30 p.m. It was in broad daylight. According to PW1, their motor vehicle registration number KAE 868X Isuzu Canter was hijacked by the appellants after they had threatened him with an imitation pistol. PW1 testified that the 1st appellant pointed the imitation pistol at him and ordered him to move to the middle seat of the front cabin of the motor vehicle. The 1st appellant entered the motor vehicle and sat on the driver's seat. The 2nd appellant entered the motor vehicle and sat on the passenger seat.

PW1 was sandwiched between the 1st and the 2nd appellants. The 1st appellant then drove off the motor vehicle. As the motor vehicle was being driven, the 2nd appellant relieved PW1 of his watch. As the 1st appellant was driving the hijacked motor vehicle, he put the imitation pistol on his laps. PW1 observed the imitation pistol keenly and realised that it was a fake pistol. As the 1st appellant was passing the said imitation pistol to the 2nd appellant, PW1 took his chance. He grabbed the said pistol from the 1st appellant. The 1st appellant resisted the attempt by PW1 to take the imitation gun from him. In the course of the struggle, the motor vehicle lost control and veered into a farm. The 1st and 2nd appellant realising that their mission had been thwarted, ran out of the vehicle. PW1 followed the 2nd appellant and managed to arrest him as he was attempting to jump over a fence. The members of the public who had been attracted by PW1's cry for help came to the scene and managed to apprehend the 1st appellant. The police who were manning a nearby roadblock, arrived at the scene and arrested the 1st and 2nd appellants. The 1st and 2nd appellants were positively identified by PW1 during the course of the robbery.

PW2, the turnboy positively identified the 1st and 3rd appellants. PW2 testified that after the motor vehicle was hijacked, he followed it on foot. Fifteen minutes later he found the vehicle had been driven into a farm. He testified that he found the 1st and 3rd appellants had been apprehended by the members of the public. PW2 recognised the 3rd appellant as the robber who jumped onto the rear cabin of the motor vehicle. He positively identified the 1st and 3rd appellant.

We are aware that to convict the appellant based on the sole evidence of identification such evidence must be watertight. As was held in the case of Republic -vs- Eria Sebwato [1969]EA 174,

"...when the evidence alleged to implicate an accused person is entirely on identification that evidence must be absolutely watertight to justify a conviction...."

Similarly in the case of Kavete and Others -vs- Republic CA Criminal Appeal No. 63 of 1986 (unreported) the Court of Appeal stated;

"...where the evidence is based on identification the court should closely examine the circumstances in which the identification by each witness came to be made...."

In the present appeal, it is clear that PW1 and PW2 positively identified the appellants as the persons who robbed them. The conditions favouring positive identification were present. The robbery took place at 3.30 p.m. It was in broad daylight. As regard the 1st and 2nd appellants, the two were together with PW1 from the moment they hijacked the said motor vehicle, to the time that the said motor vehicle was driven off the road, to the time the 1st and 2nd appellants were arrested. PW1 did not lose sight of the 2nd appellant. In fact he was the one who chased the 2nd appellant and arrested him. He removed the watch from the possession of the 2nd appellant which had been robbed from him. The 1st appellant was chased by the members of the public and arrested immediately after attempting to run away from the motor vehicle. PW1 positively identified him as the one who drove the motor vehicle. PW2 ran after the motor vehicle and reached where the motor vehicle had been immobilised fifteen minutes later. He positively identified the 3rd appellant as the robber who entered the rear cabin of the motor vehicle after the hijacking incident.

We have therefore reached the inevitable conclusion, that taking into account all the circumstances of this case, that PW1 and PW2's evidence on identification of the appellants was watertight. We carefully analyse the evidence adduced by the appellants in their defence. We find the same to be without merit in view of the cogent, consistent and credible testimonies of PW1 and PW2. In the said defences, the appellants admit that they were at the scene when the robbery occurred but they denied that they were the robbers. We find their explanation of the circumstances of their arrest to be a futile and misguided attempt to exonerate themselves from criminal liability.

The upshot of the above reasons is that the appeals filed by the appellants lack merit and is hereby dismissed. The conviction and the sentences imposed on the appellants by the trial magistrate are hereby confirmed. The sentence imposed on the firearm charge shall be kept in abeyance.

It is so ordered.

DATED at NAKURU this 15th day of March 2007

M. KOOME

JUDGE

L. KIMARU

JUDGE