REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 631 of 2004

JOHN NJEHIA GACHANJA....………...……..APPELLANT

VERSUS

REPUBLIC…………………………..………....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 118 of 2003 of the Chief Magistrate's Court at Nairobi (J. O. Oseko – PM)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 632 OF 2004

DANIEL KURUMA KANIU....……………..…...……..APPELLANT

VERSUS

REPUBLIC………………………………...……....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 118 of 2003

of the Chief Magistrate's Court at Nairobi (J. O. Oseko – PM)

J U D G M E N T

JOHN NJEHIA GACHANJA and **DANIEL KURUMA KANIA** the 1st and 2nd Appellants respectively were jointly tried for two counts of offences. Count 1 **ROBBERY WITH VIOLENCE** contrary to **Section 296(2**) of the Penal Code and count 2 **ESCAPE FROM LAWFUL CUSTODY** contrary to **Section 123 of** the **Penal Code**. After a full trial, both were convicted for both offences and sentenced to death in the capital charge and to 2 years imprisonment each on second count. The learned trial magistrate correctly suspended the sentence in the second charge pending execution of the sentence in the first count. It is against their convictions and sentences that they now appeal to this court.

The Appellants have raised similar grounds of appeal as follows: -

One, that the learned trial magistrate erred in law and fact in convicting the Appellants for offences which were not proved,

Two, there were irregularities during the trial of this case in that Section 200 of the Penal Code was not adhered to as required, and;

Three that the learned trial magistrate erred in law and fact by rejecting their defences without giving their due consideration.

We shall deal with the second ground first being a technical point which if found to be correct, could dispose of this appeal. The Appellant's contention was that **Mrs. M. W. MUIGAI** heard only one witness and thereafter **MRS. OSEKO** took over the case. That at page 16 line 5 of the proceedings they indicate that on 4/8/03 when **Mrs. Oseko** took over the case, she did not inform them of their rights under **Section 200** of the **Criminal Procedure Code** and instead just proceeded with the case. We have perused the record of the proceedings and find that the provisions of **Section 200** of the **Criminal Procedure Code** were dully complied with. At page 17 of the proceedings, the learned trial magistrate directed that the hearing of the case was to start *denovo* and proceeded to hear the first prosecution witness. There is therefore proof that even though the record does not show that the provisions were explained to the Appellants, the 1st Appellant applied to re-call the witness heard by the preceding trial magistrate while the 2nd Appellant applied for the case to start afresh. All these were said before the order for hearing *denovo* was made. There is therefore no merit in this ground and we accordingly dismiss it.

The facts of the case are as follows;

PW1 PC Edwin told that court that he and other Police Officers including PW2 PC Isaac and PW3 PC (driver**) Andrew** were escorting the two Appellants and other 50 prisoners from Thika Law Courts to Kamiti Prison on 3rd January 2003 while on the way the prisoners cut the police lorry in which they had been locked and managed to get to where he, PW1 was. The 2nd Appellant tried to take the rifle he was armed with and during the struggle Edwin fell onto the tarmac still holding his rifle. **PC Isaac** however was over powered by other prisoners and they took his gun and started firing before escaping. In total 11 prisoners escaped. **PC Andrew** said that the incident occurred at a rough section of the road where he was driving slowly. The rifle belonging to **PC Isaac** was recovered it was exhibit 2.

PW4 one **Hadi** on 9th January 2003, with one **CPL Otieno** arrested the 2nd Appellant and another at Polysack industries one week after his escape from Police custody. PW5 was **Dr. Kamau** who examined **PC Edwin** and **PC Isaac** on 21st February and 28th January 2003 respectively and assessed that each has suffered harm.

PW6 **CIP Muchai** told the court that he recovered the rifle AK 47 stolen from **PC Isaac**, exhibit 3, from a bush near Mirema drive, Thika on 15th February 2002 after members of public saw it in a bush and reported the matter to them. **CIP Muchai** told the court that he had learned of the robbery of the rifle on the date it happened and had visited the scene and transferred the remaining 42 prisoners from the damaged lorry to another. **CIP Muchai** told the court that on the same day of the incident, the 1st Appellant was arrested at Zimmerman by himself and other Police Officers who were conducting a search in the area.

SGT. NGOTARI, PW7 received the 1st Appellant at Kasarani Police Station and opened an investigation file for him for the two offences now before court. He said that he later received the 2nd Appellant after his arrest and charged both with the two offences. **SGT. NGOTARI** also produced the remand warrants for prisoners who had escaped from the lorry on the material day, identified earlier by PC Isaac. They were exhibits 3(a) to 3(d), and exhibit 4(a) to 4(g). He also produced an extract ammunition movement register exhibit 5 showing that the rifle exhibit 2 had been issued to **PC Isaac** on 3rd January 2003 with a magazine exhibit 2(b) and ammunition including the 3 rounds, exhibit 2(c).

The 1st Appellant in his defence stated that he jumped out of the lorry on the material day to save his life when he noted that the lorry had stopped and that some prisoners were injured and that there was no police officer who had been guarding them in site. He then entered a bush but through help from a member of public he went with him to Kasarani Police Station where he took himself the same day.

The 2nd Appellant in his sworn defence stated that he escaped from the lorry when he saw a prisoner bleeding after the lorry stopped. He said that nine days later he was stopped by Police Officers and arrested.

The State was unrepresented during the hearing of this appeal. We have carefully analysed and evaluated afresh the evidence adduced before the lower court as required of us as a first appellate court. See **OKENO vs. REPUBLIC [1972] EA 32**. In this appeal, the Appellants contend that the evidence adduced against them was insufficient to prove the charges against them and that their defences were rejected without being considered.

The evidence adduced by the prosecution clearly shows that 10 prisoners facing various robbery with violence charges escaped from a police lorry as they were being escorted from Thika Law Courts to Kamiti Prison. That is the general evidence. The evidence of **PC Edwin** is very clear that as **PC Andrew** was driving the lorry at a rough stretch at low speed, he all of a sudden saw the 2nd Appellant having come out of the compartment he and other prisoners had been locked in.

That the 2nd Appellant managed to enter where **PC Edwin** was and started struggling to wrestle the rifle from him. **PC Edwin** said it was about 6.30 p.m. and therefore it was bright and he could see clearly. **PC Edwin** said he was thrown out of the lorry but he held on to his rifle. He used it to fire in the air to warn the lorry driver to stop which he did. By then the 2nd Appellant and few other prisoners had escaped. One of them with the rifle which **PC Isaac** was using. **PC Isaac** said he could not identify the one who took the rifle from him.

The issue is whether the evidence discloses the offence charged. We find that the facts disclose that two offences were committed, that of robbing the police officer Isaac, PW2 of his official firearm, exhibit 3 and escape from lawful custody. The three police officers who testified concerning the incident could not tell who cut the wire mesh part of the lorry to enable the prisoners to get access out of the compartment that **PC Isaac** had locked them in. The evidence of the three PW1, PW2 and PW3, is however clear that there were 10 or 30 people shouting and chanting political statements about change of government to 'Rainbow' and 'Narc'. We take judicial notice of the fact that on the day of the incident, 3rd January 2003, there was a new government in place in this Republic which was 3 days old, and further there was ecstatic euphoria in the air. The chanting outside the lorry on the material day was therefore not a surprise. Having said that we still note that we still find that there is no clear evidence concerning the incident, whether indeed the people shouting outside had any connection with the cutting of the lorry and the escape that day.

We find that an incident took place in which some prisoners escaped first by overpowering the police officers who were guarding them. **PC Edwin, PC Isaac** and one deceased **CPL. Mbugua**. In the processes of overpowering them, PC Isaac lost his rifle to some whom he is unable to identify.

The prosecution had a duty to show that the Appellants acted in concert and that they had formed the necessary '*mens rea'* to escape. This can be determined by the conduct of the Appellant's both at the scene just before the escape and after. On the 1st Appellant's part we are not satisfied that he is proved to have formed the necessary '*mens rea'* to escape.

That also puts to question whether he acted in concert with those who robbed **PC Isaac** of the rifle. **PC Isaac** could not tell who took his rifle. The most telling evidence however is that of PW6 and PW7. PW6 **CIP Muchai's** evidence was to the effect that the 1st Appellant was arrested the same day of the escape at Zimmerman. PW7 on the other hand said he received the 1st Appellant at Kasarani Police **Station.**

CIP Muchai did not himself arrest the 1st Appellant. He just said "we arrested him". In cross-examination by the 1st Appellant **CIP Muchai** disclosed that he was not where the 1st Appellant was arrested neither could he have any one who arrested him. Likewise PW7 did not say how 1st Appellant

went to his police station. He only said he received him but could not name who, if any one took him to the police station.

We find that the 1st Appellant's defence that he jumped out of the lorry to save his life upon seeing some prisoners bleeding, and on seeing that none of the police officers who had been guarding them in sight. The 1st Appellant defence that he sought help and took himself to Kasarani police station the same day is also unchallenged. We find that the 1st Appellant's escape from the lorry was not intended to be escape within the meaning and spirit of Section 123 of the Penal Code. The fact that he took himself to the nearest police station the same evening of the incident is proof that his motive was never to escape from lawful custody. The 1st Appellant's explanation is sufficient defence for both counts and he ought to have been acquitted for this offence.

The evidence of the 2nd Appellant was different. It was he who tried to forcefully take the rifle from **PC Edwin** and in the struggle; he threw him out of the running lorry. The 2nd Appellant escaped from the lorry and was not seen again until his arrest by PW4, **Police Officer Hadi** on 9th January, some one week after his escape. We are satisfied that the evidence adduced against the 2nd Appellant clearly establishes that he acted with a common intention which was to disarm the police officers guarding them by robbing them of their rifles and escape from their (lawful) custody. Even though the 2nd Appellant did not succeed to rob **PC Edwin** of his rifle, the act of his accomplice to rob **PC Isaac** of his rifle was his act since they were acting with one common intention.

The 2nd Appellant's defence was considered by the learned trial magistrate and properly rejected as the evidence against him was overwhelming. In fact the 2nd Appellant's defence was an admission of the offence. We find that the conviction entered against the 2nd Appellant was safe. We uphold the conviction and confirm the sentence accordingly.

The upshot of this appeal is that the appeal by the 1st Appellant succeeds, the conviction is quashed and the sentence set aside. The 1st Appellant should be set free unless otherwise lawfully held. The appeal by the 2nd Appellant fails, conviction is upheld and sentence confirmed.

Dated at Nairobi this 3rd day of May 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellants present

CC: Tabitha/Eric

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LESIIT, J.

<u>JUDGE</u>

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DULU

<u>JUDGE</u>