



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL APPEAL Nos 612, 613 & 618 OF 2004

JOHN IHUTHIA NGAO..... 1ST APPELLANT

RICHARD MAINA WAICHA.....2ND APPELLANT

JULIUS NGURU KAMAU.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgement of Chief Magistrate Mr. Nyakundi dated 8th December, 2004 in Criminal Case No.74440 of 2002 at the Makadara Law Courts)

JUDGEMENT OF THE COURT

The three appellants had been charged with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The 3rd appellant had been charged separately with the offence of being in possession of a firearm, contrary to s.89(1) of the Penal Code, and being in possession of ammunition, contrary to s.89(1) of the Penal Code. On another count, the 1st and 2nd appellants were charged with the offence of consorting with a person in possession of a firearm, contrary to s.89(2) of the Penal Code.

The basic facts were that on 28th March, 2002 at Uhuru Estate in Nairobi, the appellants were armed with a dangerous weapon, namely a pistol, when they robbed **John Irungu** of cash in the sum of Kshs.60,000/= and at, immediately before, or immediately after the time thereof, they threatened the use of actual violence. Police officers received a report and came to the scene, pursued the robbers (who were the appellants), and recovered a firearm and two rounds of ammunition.

PW1, **John Irungu** was in his milk-shop on 28th March, 2003 and was counting moneys received from sales, when he was confronted by four people wielding firearms. The 1st and 2nd appellants seized the money, as another robber pointed the gun at PW1. Thereafter the robbers left in a cloud, with an alarm raised, and as they shot into the air to scare people away. The robbers entered a vehicle which they tried to start, but without success. The robbers jumped out and began to flee on foot. At that moment, Police officers came along in a motor vehicle, and ordered the robbers to stop, whereupon the 3rd appellant dropped a firearm, while the 2nd appellant cast away some of the moneys robbed, and fled towards the river. The sum of Kshs.40,500/= was recovered, and produced in Court as exhibit. PW1 testified that the crowd gave chase, he among them, and arrested the three robbers.

On cross-examination by the 1st appellant, PW1 testified that he had clearly seen the robbers as they attempted to start an escape motor-vehicle, but it wouldn't ignite; and that he was present as members of the public responded to the alarm, and helped to arrest the robbers.

PW2, **Monicah Nyambura**, was in her bathroom at Uhuru Estate at 11.45 a.m. on 28th March, 2002 when she heard a shuffling of papers, a commotion, and a barking of dogs next to the complainant's neighbouring shop. She at first thought it was the rattling, shuffling and commotion normally caused by garbage-clearing teams with their lorries. Then she heard a strange voice declaiming "*Ona hii!*" ("You see this!"). As she looked through her window, she saw two men in a bent position, inside the shop; one of these two was by the door leading to the shop, wielding a gun. PW2 could see her brother-in-law, who operated the said shop; he also saw her, and signalled to her that thieves had invaded the shop. PW2 tried to run to the gate and to lock it; but one of the gun-men had seen her, and ordered her to return to the house, or risk being shot. It was the 3rd appellant, and PW2 pleaded with him not to shoot her; and during this interaction a stranger passed by, drawing the attention of the 3rd appellant, and in the meantime PW2 escaped into the house while her husband locked the shop's door from the outside and switched on the alarm. The two robbers who were trapped inside the shop, broke the door open and attempted to escape; but members of the public gave chase, caught them, battered them and delivered them to the Police.

On cross-examination by learned counsel **Mr. Etole** PW2 testified that she had not seen the faces of the robbers, except for the one who came out of the shop wielding a gun. This gunman was wearing a cap. Of the identity of this gun-wielding robber, PW2 testified: "I am sure of the identity of the gunman because I [saw] his face properly. I can't forget that face. I am sure of what I am talking about. I gave a statement to the Police after three weeks. I told the Police that I recognised the gunman."

PW3, **Njuguna Njorohio** testified that on 28th February, 2002 at 12.00 noon he was in his house at Uhuru Estate, when he heard footsteps into PW1's shop, followed by the commanding voice of a man: "*Weka yote chini!*" (i.e., "Lay it down, all!"). PW3 later realised this was a robbery attack. The robbers ran out and entered a motor vehicle which, however, wouldn't start. The robbers panicked, and one of them began shooting in the air. They got out of the vehicle and took off on foot. A commotion began, with members of the public chasing the robbers. The 1st appellant ran towards the river and entered the water. He was carrying money, and he threw some of it in the water. The other two accused were arrested with the assistance of members of the public.

PW4, **Mburu Njoroge**, was a resident of Uhuru Estate, and worked as a car-washer. He recounted how a commotion took place spreading to the car park, following the robbery which had taken place at PW1's shop, at about 11.30 a.m. on 28th March, 2002. As the four robbers headed in the direction of the car park, the irate crowd chased and threw stones at them. The four robbers tried unsuccessfully to start a cream-coloured car which was parked, and they took off on foot. The crowd (including PW4) gave chase, towards Uhuru Secondary School, and they met Police officers who now accompanied them. The 3rd appellant was armed with a gun, and he was ordered to surrender and was arrested. The 1st appellant who reached the Nairobi River and was crossing, threw some of the money he was carrying, to distract attention. He was, however, arrested. The second appellant was arrested inside the river, by members of the public. The first to be arrested was the 3rd appellant, followed by the 1st appellant, and then the 2nd appellant. Members of the public were throwing stones at the 1st appellant while he was in the water. They removed him from the water and brought him out to the river-bank. The 2nd appellant had immersed himself inside the water, and was noticed only afterwards. The appellants were then arrested by Police officers who were present, by the river. PW4 testified that the 3rd appellant is the one who carried a gun, a sub-machine gun.

On cross-examination by the 1st appellant, PW4 testified that he had taken a keen interest in the arrest of the appellants because he had heard that thieves had just robbed his brother's shop. On cross-examination by learned counsel **Mr. Etole**, PW4 said he had followed in pursuit of the 1st and 3rd appellants particularly; and he was present when the 1st appellant was arrested by the Police. He saw each of the appellants being beaten up by members of the public; and he saw the 3rd appellant being

arrested, and also surrendering the gun this appellant had.

PW6, **Johnstone Mwongera**, is a firearms examiner attached to the Firearms Laboratory in Nairobi. He had recovered from one **Police Constable Ruto** certain exhibits, these being sub-machine gun serial No.8343, marked Exhibit Z1, and one round of ammunition marked Exhibit Z 2 – which were accompanied with exhibit memo forms. PW6's findings were: Z1 was a Stalin Mark 4 sub-machine gun, calibre 9mm. Visual examination showed a bullet lodged in the gun's barrel. This bullet was found to be in good condition, and capable of being fired. PW6 formed the opinion that exhibits Z1 and Z2 were firearm and ammunition within the meaning of the Firearms Act (Cap.114, Laws of Kenya).

PW7, **Sgt. Elias Kibeti** was one of the two Policemen who met the crowd chasing the robbers on 28th March, 2002; they joined the crowd, and in the end arrested the suspects. One of the robbers, the one who had a sub-machine gun, was arrested before he entered the waters of the Nairobi River. PW7 was able to identify the sub-machine gun in question, in Court. The other suspects were attempting to cross the river, but members of the public pelted them with stones, and helped to arrest them. The 1st appellant was casting money away into the river, but members of the complainant's family helped to retrieve the same. The sum of Kshs.40,500/= was recovered from the robbers.

On cross-examination by the 1st appellant, PW7 said this appellant was arrested in his presence, through the co-operation between the Police and the members of the public. On cross-examination by learned counsel **Mr. Etole**, PW7 said he was present on the banks of the river, when his colleague **Police Constable Kyule** was arresting the 1st appellant. PW7 confirmed the evidence of PW4, that the robbers had been four in number, and one of them died, after being beaten by the irate members of the crowd. PW7 testified that the money recovered from the robbers, was from the 2nd appellant.

PW8, **Police Constable Edward Kyule**, testified that, on 28th March, 2002 he was in the company of other Police officers, driving in the direction of Buru Buru, when they were informed about the robbery which had just taken place at the nearby Uhuru Estate. Three members of the gang were running towards the Nairobi River, with a crowd of people in hot pursuit. PW8 pursued the suspected robber who brandished a gun; and he forced this gang-member, the 3rd appellant, to surrender and hand over the gun. The 1st and 2nd appellants were arrested at the river. The sum of Kshs.40,500/= was recovered, in a paper bag – from the 2nd appellant. The suspected robbers were so badly beaten up by members of the public, they had to be taken to hospital for treatment.

PW9, **Inspector of Police Mary Adenyi**, in cross-examination by 1st appellant, testified that this appellant was arrested just after the robbery was conducted. As the Investigating Officer, PW9 had found that the total number of the robbers had been four, and that the fourth member of the gang died. Those chasing the suspected robbers, PW9 testified, had followed the robbers in hot pursuit, and did not stop until the robbers, who were the appellants herein, were arrested, held and taken away by the Police officers; the distance covered was short, and the members of the public had kept the suspects in sight continuously.

Although the appellants had informed the Court that they would give sworn defences, in the end each one of them made an unsworn statement.

The 1st appellant said that he had just brewed liquor, and was now strolling along the river, when unfortunately he became a victim of the chase of robbers. He said he did not know the co-appellants, and that he had not been one of the robbers at the complainant's shop, on the material day.

The 2nd appellant, in his unsworn statement, gave a similar account. He said he lives near Buru Buru, where he keeps goats and chickens, and on the material day he had gone by the river, in search of feed for his livestock, when a group of people chasing a thief fell upon him and arrested him.

The 3rd appellant, again in an unsworn statement, said he was a Police officer working with the

General Service Unit Headquarters at Ruaraka in Nairobi. He said he was off-duty and was travelling in a mini-bus, and when this mini-bus reached Uhuru Estate, he heard the sound of gunshot, and, according to him, what was taking place was a commotion between two outlawed groups known respectively as *Mungiki* and *Taliban*. He says he wanted to keep clear of the said commotion, so he left the mini-bus; but when he tried thereafter to re-enter the mini-bus, he was attacked by a group of young men. The 3rd appellant said he knew nothing about the robbery which was the basis of the charge brought against him.

On the basis of the evidence given on both sides, the learned Chief Magistrate came to the following conclusions: robbery had taken place at the complainant's Uhuru Estate shop; the material time was 11.00 a.m. – 12.00 noon, in broad daylight; gunshots were heard at the scene; the appellants were armed with firearms, in the terms of the Firearms Act (Cap.114); it was a question for determination whether the three appellants were part of the gang which attacked and robbed the complainant.

The learned Magistrate then considered the question of identification. He noted that PW1, PW3, PW4, PW7 and PW8 were all eye witnesses; they stated that the robbery incident took place in broad daylight; that they did see the accused persons; that they were part of the group of people who pursued the robbers from the shop, within Uhuru Estate. Evidence was tendered that the robbers had in their possession a sub-machine gun, which one of them was shooting in the air, as irate members of the public cast stones at them. There was evidence that the 1st and 2nd appellants had run towards the river, and all the three of them were arrested soon after the robbery. Testimonies were given that immediately after the robbery, the robbers entered a motor vehicle, registration No. KUK 470, but they failed to start the motor vehicle. As the robbers rushed out of the said vehicle to escape on foot, the witnesses saw them, chased them, as members of the public threw stones at them, and this went on until all the three were arrested and placed in custody. A photograph of the said motor vehicle, registration No. KUK 470 was taken and exhibited in Court. The sub-machine gun was recovered at the scene, from one of the robbers (3rd appellant).

From the foregoing findings of fact, the learned Chief Magistrate held:

“I hold that there was no mistake as regards the identity of the accused [persons]. I am fully conscious that there was no identification parade conducted in respect of the accused persons. But I am satisfied that they were adequately seen and identified in the full light of day. There was hot pursuit of the robbers. There was no doubt that the witnesses never lost sight of the accused persons at any given time. The accused on leaving the vehicle, followed a particular route of escape towards Nairobi River. The witnesses had [a] first opportunity of seeing and identifying the accused when running after them.”

The foregoing assessment led the learned Chief Magistrate to the finding that the evidence tendered by the prosecution witnesses was “cogent and truthful”, and to the further finding that the evidence of the accused persons was “a fabrication”. He concluded that the burden of proof had been discharged beyond reasonable doubt on all counts against each of the appellants. He found them guilty as charged, and sentenced each of them to suffer death, as provided by law. The 3rd appellant was further sentenced to seven years' imprisonment on the 2nd and 3rd counts of the charge. The 1st and 2nd appellant were each sentenced to a prison term of five years, in respect of the fourth count of the charge.

In their petitions of appeal, the appellants contested the manner in which they had been identified as suspects. They asserted that the prosecution evidence had been contradictory, and conviction should not have been arrived at, on that basis. They stated that the charge sheet was defective, and was not a proper basis for the trial. They asserted that the trial Court had not taken their evidence into account. They contended that the sentences imposed upon them were manifestly harsh and excessive.

Learned State Counsel **Ms. Gateru**, contested the appeal, as regards both conviction and sentence. She urged that the prosecution had proved their case on all the counts. Four people, the appellants being three among them, had robbed PW1; the offence took place in broad daylight when lighting conditions very well favoured identification, and the appellants were identified as the robbers. One of the robbers

(3rd appellant) was wielding a gun, and they threatened to shoot PW1 if he did not “co-operate”. The 1st and the 2nd appellants executed the robbery, while the 3rd appellant gave them cover through the might of his menacing sub-machine gun. The said sub-machine gun and ammunition were tested and found to fit the description of firearms and ammunition in the Firearms Act (Cap. 114), and the 3rd appellant had no lawful authority to bear these items.

In his submissions, the 3rd appellant has also raised objections regarding the language used in the conduct of trial. But **Ms. Gateru** asked this Court to take judicial notice that the 3rd appellant, from the manner in which he conducted his appeal, was fluent in both *English* and *Kiswahili*, which showed that he was not prejudiced when the two languages were used during trial. As for the other appellants, they had an advocate (**Mr. Etole**) on record, and so, Counsel urged, they were not prejudiced on account of the language used in the trial Court. The 1st appellant in particular had conducted lengthy cross-examination, which proved that he fully understood the proceedings in the trial Court.

We have reviewed in detail the evidence as it was placed before the trial Court. We are inclined to agree with the findings of the learned Chief Magistrate: clear and cogent evidence was placed before the Court, through several witnesses, showing that all the three appellants had attacked the complainant at his shop in Uhuru Estate, while they were in numbers and were dangerously armed, and robbed him of his money, in broad daylight, on 28th March, 2002. There is consistent testimony that the appellants, after committing the robbery, unsuccessfully attempted to escape in a parked motor vehicle, and upon failing and being observed in their state of distress, they took to their heels, being chased relentlessly by a crowd which included key witnesses, only to come to a sticky end, as they were arrested with their booty as the 1st and 2nd appellants desperately plunged into the waters of Nairobi River. So desperate were the 1st and 2nd appellants they dumped wads of currency notes into the water; and so helpless was PW3 he threw his gun at one of the witnesses (PW8).

We find that proof-beyond-reasonable-doubt was made before the trial Court, by the prosecution, and the Court rightly convicted and sentenced the appellants. We uphold the conviction on all counts, confirm sentences and dismiss the appeals. However, in the light of the capital punishment meted out against the appellants, we order that the several terms of imprisonment imposed, shall remain in abeyance.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 14th day of June, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Huka

Erick For the Respondent: Ms. Gateru

Appellants in person

