



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

Criminal Appeal No. 421, 422 & 424 of 2003

JOHN MACHARIA KIMANI.....1ST APPELLANT

JOHN WAKABA WANGOI.....2ND APPELLANT

PETER WANGUCHU NDIRANGU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants were jointly charged with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal code**.

In the first count, it was alleged that on the 12th day of November, 2001 at Que Bee Clinic at Gilani Estate, Nakuru Town, the appellants, jointly armed with dangerous weapons namely pistols, robbed Dr. Dancan Maingi of Kshs.8,000/-, one mobile phone and motor vehicle registration number KXY 690, all valued at Kshs.313,000/- and at or immediately before or immediately after such robbery threatened to cause actual violence to the said Dr. Dancan Maingi.

In the second count, it was alleged that on the same date and at the same place, they robbed Francis Kinyua of Kshs.18,400/-, one mobile phone, one Parker pen, one pair of socks and one machine calculator all valued at Kshs.24,550/- and at or immediately before or immediately after such robbery threatened to use actual violence to the said Francis Kinyua.

In the third count, it was alleged that on the same date and place as in count one, while jointly armed with dangerous weapons namely pistols, robbed Joseph Muasya Owuor of cash Kshs.300/- and at or immediately before or immediately after such robbery threatened to use actual violence to the said person.

The appellants were tried and convicted of the said charges and each one of them was sentenced to death. They were aggrieved by the said conviction and sentence and each preferred an appeal against the same. The three appeals were consolidated and heard together as one.

The first appellant, John Macharia Kimani, tendered his written submissions, just like the second appellant, John Wakaba Wangui, but the third appellant, Peter Wanguchu Ndirangu made oral submissions. As the first appellate court, it is our duty to reconsider the evidence tendered before the trial court, evaluate it and draw our own conclusions, see **MOHAMED RAMA ALFANI & 2 OTHERS VS REPUBLIC** Criminal Appeal No. 273 of 2002 at Mombasa (unreported).

The prosecution case against the appellants briefly stated was as follows:-

Dancan Maingi Kiguyu, (PW2) was a medical practitioner running a clinic known as Que Bee Clinic. On 12/11/2001 at about 7.15 p.m. he was in his office with **PW3, Joseph Muasya Owuor** and **PW5, Francis Kinyua Mwangi**. He saw his clerk at the door being held by the neck by a person who was holding a pistol. Another person demanded money from PW2 and ordered him to lie down. The robbers ransacked his pockets. They also stole a mobile telephone. The robbers further demanded for car keys and quickly drove off in Dr. Kigunyu's car registration number KXY 692, Peugeot 505. Thereafter PW2 reported the robbery to Central Police Station and was informed that the car had been abandoned at Kenlands area.

On 4th December, 2001 C.I.D. Officers went to the clinic of PW2 and told him that some people had confessed to them that they robbed PW2. He was asked to go and record a statement and participate in an identification parade the following day, which he did. The witness identified the three appellants although he said that the robbery incident took a very short time. He further stated that he had not seen the appellants prior to the date of the robbery. PW2 was also shown a pistol in court and he said that it looked like the one which the robbers had in their possession.

Joseph Muasya Owuor (PW3) was working in the clinic of PW2. On 12/11/01 at about 7.15 p.m., a person went to the clinic and pretended that he was sick and as PW3 talked to him, others appeared with a pistol and ordered him to enter the office of PW2 and lie down. He obeyed and his pockets were ransacked and Kshs.400/- which was in one of his pockets was stolen.

PW3 further stated that after about two months from the date of the robbery some police officers went to the clinic and told them that they had arrested some people who had confessed that they had committed the robbery. He was asked to go to the police station and see if he could identify any of them. PW3 identified the first appellant and said that he was the one who had pretended to be sick. He said that he was able to identify his face although he had not known him before.

Inspector Daniel Muiba (PW4) testified that on 6/12/01 he was approached by the investigating officer to record a charge and cautionary statement from the second appellant. He said that the second appellant recorded his own statement in Kiswahili. The second appellant opposed the production of that statement, saying that he had been forced to sign the same after it was drafted by some unknown people. The trial magistrate ordered a trial within a trial and thereafter ruled that the statement was admissible.

Francis Kinyua Mwangi (PW5) corroborated the evidence of PW2 and PW3 and identified the first accused as being the one who hit him during the robbery.

Corporal Jeremiah Musyoki (PW6), a C.I.D. Officer attached to Nakuru said that on the night of 28/11/01 he received communication that there was a robbery at Mwariki area and when he went there with other C.I.D. Officers they met the first appellant having been arrested by a Kenya Police Reservist with a pistol and one bullet. He said that the first appellant gave C.I.D. Officers information that led to the arrest of the second and third appellants. The witness said that the second appellant confessed to having committed robberies with the first and the third appellants. The witness produced as exhibits the pistol and the bullet which were allegedly recovered from the first appellant.

Inspector Daniel Langat (PW7) was the police officer who conducted the identification parade in respect of the appellants and he testified that the same was done in conformity with the appropriate legal procedures and that the first and second appellants were properly identified.

Chief Inspector Leonard Komo (PW8) told the court that on 6/12/01 he was requested to record a statement under inquiry from the third appellant. He said that he administered the usual caution to the appellant and he agreed to record a statement in his own handwriting. The third appellant objected to the production of the said statement saying that he had been beaten and forced into executing the same. The trial court ordered a trial within a trial and thereafter held that the statement was admissible in evidence and it was therefore produced. The third appellant allegedly confessed to having robbed PW2 as stated in the charge sheet.

Corporal Samuel Sigei (PW9) was a police reservist and he testified that on 28/11/01 at about 3.00 p.m. he received information that the chief of Mwariki had reported that there were suspects who were harassing members of the public. Together with others, they went to Mwariki area and met the chief who told them that the suspects had gone. After a while they spotted two suspects and ordered them to stop but the suspects refused and instead drew a pistol and fired at PW9 and his colleagues. PW9 returned fire and they managed to arrest one of the suspects while the other one escaped. The arrested suspect was the first appellant. He was thereafter handed over to C.I.D. Officers as well as the recovered pistol which had two rounds of ammunition. The witness said that he did not know the first appellant at the time of effecting the arrest but one of his colleagues, P.C. Kurgat knew the second appellant.

Inspector Johnstone Riambiro (PW10) said that on 28/11/2001 the first appellant was taken to C.I.D. offices at Nakuru, having been arrested at Mwariki estate in possession of a firearm and two live ammunitions and three cartridges. He said that they interrogated the first appellant and he led them to the homes of the second and third appellants. He further said that the second and the third appellants led them to various places where they had committed a series of robberies including the clinic of PW2. The witness said that they went and talked to PW2, PW3 and PW5 who confirmed that they had been robbed on 12/11/01.

Each of the appellants elected to give a sworn testimony in defence. The first appellant, John Macharia Kimani said that on 28/11/01 he was going to Kenya Pipeline Co. Ltd. to pay for fuel and he met PW9 in the company of P.C. Kurgat, Gathago and one Mr. Kirui. They stopped him, kicked him and stepped on him. He also complained that they took Kshs.50,000/- from his wallet, his cell phone, receipts and an identity card. He was later taken to C.I.D. offices where he found the complainant, PW6 and PW10. Shortly thereafter, P.C. Kurgat called PW6 outside and when they returned, they started beating him up until he lost consciousness. He produced medical evidence to prove that he had been treated for injuries sustained as a result of the said assault. He alleged that he was tortured by the police officers. He further alleged that P.C. Kurgat had a grudge against him after he reported him to his seniors for having refused to refund him a sum of Kshs.20,000/- which he had earlier given to the police officer to pay for kerosene from the pipeline. He said that P.C. Kurgat planted the firearm on him. He further stated that on the date of the alleged robbery he was at Nairobi.

The second appellant said in his testimony that on 11/11/01 he left Nakuru and went to Malaba and stayed there overnight. On 13/11/01 he returned to Nakuru and continued to do business until 19/11/01 when he was arrested on allegation that he had been involved in a robbery. He produced two bus tickets to prove that he had indeed travelled to Malaba and back on the aforesaid dates.

The third appellant also gave a sworn testimony of defence and said that on 29/11/01 outside his house gate he met a Peugeot 504 pick up which stopped and reversed and he was ordered to enter. He was taken to his house where a search for a firearm was conducted and his clothes, radio and other items were taken. He was then taken to C.I.D. offices and later to Bondeni Police Station and added that he was badly assaulted. He further stated that on 5/12/01 an identification parade was done at Central Police Station and none of the complainants picked him up. On the following day, he was beaten again and forced to sign a confessionary statement, he alleged. On 18/12/01 he was treated at the prison clinic for the injuries which he had sustained in the hands of the police. He was referred to Nakuru Provincial General Hospital for further treatment and he produced his treatment chits in court.

All the appellants advanced more or less the same grounds of appeal. They said that the trial magistrate erred in law in convicting them in the absence of sufficient identification evidence which was not shown to be free from errors and mistakes.

The appellants also faulted the trial magistrate for relying on their confessionary statements which had been forcefully obtained from them after having been physically assaulted. The appellants further stated that the trial magistrate failed to give any due regard for their sworn defence testimonies and without assigning any specific reason for so doing.

Having carefully studied the proceedings before the trial court, our view is that the appellants' case stands

or falls on evidence of their identification by PW2, PW3 and PW5.

PW2 was in his office at about 7.15 p.m. Presumably there were lights in the clinic which were lit at the material time but that was not expressly stated by the witness. If so, he also did not tell the court how bright they were. PW2 saw PW3 being held by the neck by a person who had a pistol and suddenly another person jumped to the office and ordered PW2 to give them money as he ordered him to lie down. The robbers then began to ransack the pockets of PW2 as he and the other complainants lay down. PW2 was obviously in a state of shock as he admitted in his cross examination. He had not seen any of the robbers before. The incident took between five to ten minutes. After the robbers left, he telephoned the police and also went to Central Police Station and made a report. He did not give to the police detailed description of any of the robbers apart from saying that one of them was a young person who had black complexion. No report of the description was recorded by the police when the first report was made.

The identification parade was carried out 23 days later. That was after some police officers informed PW2 that some people had confessed to having robbed him and the other complainants and was asked to go and identify them.

PW2 saw the robbers very briefly because he was lying down for most of the 5 to 10 minutes when the robbery took place. He identified the three appellants and said that they looked “*close to those I saw*”. He was not entirely positive that they were the ones he saw on the material night.

In our view, the identification of the appellants by PW2 cannot be described as free from error and the circumstances under which the offences were committed were not favourable to positive identification. In **NGOYA VS REPUBLIC [1985] KLR 309** the Court of Appeal held that before accepting evidence of identification, the court has to take into consideration the circumstances that prevailed at the time and assess whether or not the same favoured accurate identification. The learned trial magistrate did not address himself to this issue and therefore the conviction of the appellants on identification evidence was unsafe.

Moreover, the value of the identification parade was considerably depreciated by the fact that police officers informed the complainants that they had arrested people who had confessed that they were the ones who had committed the robberies in question and that they were going to parade them amongst other people and so asked the complainants to go and identify them. In **OLUACH VS REPUBLIC [1985] KLR 549** the Court of Appeal held that in an identification parade it was dangerous to suggest to an identifying witness that the person to be identified is believed to be present on the parade. See also **REX VS LULATIKWA S/O KABAILE ALIAS RUTAHBA S/O KASESE [1941] 8 EACA 46**. The above holding also applied to the evidence of PW3 and PW5 insofar as their evidence regarding identification of the appellants was concerned.

The other important evidence upon which the trial court based its conviction of the appellants was the retracted confessionary statements which were allegedly made by the second and third appellants. In our view, it is clear that those statements were not voluntarily obtained. Their alleged makers told the trial court that they had been beaten thoroughly by the police and forced to confess that they had robbed the complainants. The second and the third appellants even produced as exhibits treatment chits which were issued to them by Nakuru Provincial General Hospital after their treatment following their assault. That notwithstanding, the trial magistrate held that the statements were admissible after conducting a trial within a trial. In **OKUMU VS REPUBLIC [1985] KLR 803** it was held that in assessing the propriety of a statement admitted after a trial within a trial, a court should take into account the contents of the statement in relation to the entire evidence in the case to satisfy itself that it was taken voluntarily. A court may found a conviction on a retracted confession as long as it has warned itself of the dangers thereof, provided there is other independent evidence. Evidence of retracted confessions cannot be used to sustain a conviction unless it is corroborated.

Having considered the contents of the statements in relation to the entire evidence in the case, we are of the view that the statements were not taken voluntarily but under duress and therefore should not have been admitted in evidence. We are aware that at the time of the trial, the law relating to admissibility of

extra judicial confessions and statements had not been amended but there were in place legal safeguards which had to be considered before such statements could be admitted and reliance placed on the same to found a conviction. The trial magistrate did not warn himself of the danger of convicting on the basis of such extra judicial confessionary statements. That rendered the convictions unsafe.

We now turn to the appellants' defences during the trial. It appears to us that the trial magistrate did not give them much consideration. The first appellant explained the circumstances under which he was arrested and seemed to challenge the evidence of PW6 and PW9.

PW9 said that he received a report regarding people who were harassing members of the public at Mwariki. He said that he went there with P.C. Kurgat and other police officers and were joined by the chief of Mwariki and a bar attendant. None of the other people testified regarding the alleged recovery of the gun from the first appellant. The first appellant alleged that he was arrested because of a personal grudge which existed between him and P.C. Kurgat. PW9 was a brother of P.C. Kurgat. P.C. Kurgat, the chief of Mwariki and the bar attendant should have been called to testify. If indeed the first appellant was found with a gun, the same should have been dusted for finger prints to determine if the first appellant had handled it. In ***BUKENYA & ANOTHER VS UGANDA [1972] EA 594*** it was held that the court has a right and duty to call witnesses whose evidence appears essential to the just decision of the case. That was not done by the trial court.

The second appellant gave a defence of an alibi. He produced bus tickets to prove that he had travelled to Malaba a day before the robbery was committed. The prosecution should have led evidence to disapprove his defence but it failed to do so.

All in all, we find that the appellants' conviction was not safe and hereby allow their appeals, quash the convictions and set aside the sentences that were imposed by the trial court. The appellants should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 21st day of February, 2006.

D. MUSINGA

JUDGE

21/2/2006

L. KIMARU

JUDGE

21/2/2006

Judgment delivered in open court in the presence of Mr. Gumo, Assistant Deputy Public Prosecutor and the appellants.

D. MUSINGA

JUDGE

21/2/2006

L. KIMARU

JUDGE

21/2/2006