REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 38, 39, 40 & 41 of 2005

JOSEPH MACHARIA MIANO……1ST APPELLANT

ELIUD WANGAI GIKONYO……2ND APPELLANT

DANIEL MBUGUA WANJIRU……3RD APPELLANT

IBRAHIM NJENGA NYAGA……4TH APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT OF THE COURT

The appellants, Joseph Macharia Miano (*1st appellant*), Eliud Wangai Gikonyo (*2nd appellant*), Daniel Mbugua Wanjiru (*3rd appellant*) and Ibrahim Njenga Nyaga (*4th appellant*) were charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 14th January 2001 at Agriculture Area along Ol Joro Orok-Nyahururu road, the appellants jointly with others not before court while being armed with dangerous weapons namely a pistol, robbed Charles Githahi a motor vehicle registration number KAL 504L Toyota Hiace Matatu, a pair of shoes, a wrist watch, a driving licence, identity card and Kshs 5,000/= all valued at Ksh.730,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Charles Gitahi Gitonga. They were further charged with violently robbing James Ndumia Wanjiku, a conductor in the said motor vehicle, of his identity card, pair of shoes and Kshs 1,300/= at the same time and in the same place and in the course of the robbery they used actual violence to the said James Wanjiku Ndumia. The 2nd appellant was alternatively charged with handling stolen property contrary to **Section 322(2)** of the **Penal Code**. The particulars of the charge were that on the 17th of January 2001 at Naivasha Township, otherwise than in the course of stealing the 2nd appellant dishonestly retained a motor vehicle Artech radio cassette valued at Kshs 2,000/= knowing or having reason to believe it to be the stolen property of Anthony Mwaniki Watetu. The appellants pleaded not guilty to all the charges and after a full trial were convicted as charged. They were sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence and have appealed to this court.

In their petitions of appeal, the appellants raised more or less similar grounds of appeal. They were aggrieved that the trial magistrate had relied on the evidence of identification which was made by a single witness in circumstances that were not favourable to positive identification. They were aggrieved that the trial magistrate had convicted them based on the evidence of police identification parades which were not conducted in accordance with the law. They

faulted the trial magistrate for relying on inconsistent and contradictory evidence to convict them. They were aggrieved the trial magistrate had failed to consider their defences before arriving at the said decision convicting them. The 2nd appellant was aggrieved that he had been convicted based on the evidence of the recovery of the car radio cassette which could not connect him to the crime. They were finally aggrieved that the trial magistrate had convicted them based on the insufficient evidence of the prosecution witnesses.

At the hearing of the appeal, the separate appeals filed by the appellants were consolidated and were heard as one. The 1st and the 3rd appellants made oral submissions in support of their appeals. They urged this court to allow their appeals. The 2nd and 4th appellants presented to the court written submissions in support of their appeals. They also made oral submissions urging this court to allow their appeals. Mr. Koech learned, State Counsel submitted that the prosecution had adduced overwhelming evidence which proved the charge of robbery with violence against the appellants to the required standard of proof beyond reasonable doubt. He urged this court to disallow the appeals and confirm the convictions and sentences of the trial magistrate. Before addressing the issues raised on this appeal, it is imperative that we set out the facts of this case albeit briefly.

On the 14th of January 2001, PW1 Charles Gitahi Gitonga was driving motor vehicle registration number KAL 504L Toyota Hiace Matatu. The said matatu plied the Thika-Naivasha-Gilgil -Nyahururu route. He recalled that they carried passengers who boarded the vehicle and alighted at various stages along the route. He testified that when they reached Ol Kalou, twelve passengers who were traveling to Nyahururu, remained in the vehicle. When the vehicle reached Agriculture Area along Ol Kalou-Nyahururu road, one of the passengers who was sitted in the front seat elbowed him on the chest and ordered him to leave the driver's seat. A gun was pointed at his neck, he complied and left the driver's seat. The passenger then took control of the motor vehicle and drove them some distance into the bush.

PW1 testified that he was robbed of his driving licence, PSV licence, identity card and Kshs 3,000/=. It was his evidence that after the robbery, they were abandoned in the bush and the motor vehicle was driven off by the robbers. He testified that he was able to identity the 1st and 2nd appellant as being among the robbers who robbed them, he managed to point out the two appellants when he was called at Nakuru Police Station to attend an identification parade conducted by the police.

PW2 James Ndumia Wanjiku testified that he was the conductor of the said motor vehicle on the material day. He recalled that the appellants boarded the motor vehicle at 5.30 p.m. It was his evidence that when they reached the Agriculture Area along Ol Kalou-Nyahururu road they were robbed by the appellants after their motor vehicle had been hijacked. He testified that he was able to positively identify the four appellants because they boarded the motor vehicle during day time. He testified that after the motor vehicle was hijacked, he was robbed of Kshs 1,300/=, his identity card and shoes. He was abandoned in the bush with PW1 after the robbery. He testified that on the 18th of January 2001 he pointed out the 3rd and 4th appellants in an identification parade which was carried out by the police. He recalled that it was the 1st appellant who was armed with a gun during the robbery incident.

PW3, Anthony Mwaniki testified that he was the owner of the said motor vehicle. He recalled that on the 15th of January 2001, he was informed that his said motor vehicle had been stolen. He was later informed that the motor vehicle had been recovered at Nakuru. He identified a radio cassette which was recovered to be the one which was removed from his motor vehicle when it was stolen. PW4 Francis Mwangi Kariuki was a passenger in the said motor vehicle when it was hijacked. He was robbed of his valuables. He was however not able to identify the robbers.

PW5 Police Constable Michael Kimathi and PW8 Police Constable Samuel Lelerak attached to

the CID flying squad Nakuru received information that a motor vehicle which had been robbed from its owner in Nyahururu was being hidden at the sewage area Nakuru. The two officers laid an ambush and on the 17th of January 2001, were able to stop the said motor vehicle as it was being driven along Nakuru-Eldoret road. They testified that they arrested the 1st, 3rd and the 4th appellants who were passengers in the said motor vehicle. He testified that the said motor vehicle was being driven by the 1st appellant. It was their testimony that after their arrest the 1st appellant volunteered to escort them to Naivasha where they arrested the 2nd appellant after they had broken into his house and found him hiding inside the said house. They testified that they recovered a car radio cassette from the house of the 2nd appellant which was later identified by PW3 as the one which was removed from the said motor vehicle after the robbery.

PW6 Charles Ochieng testified that he was employed in a car wash and parking bay along racecourse road Nakuru known as Racecourse Car Park. He recalled on the morning of 15th of January 2001 at about 6.00 a.m. as he was at the parking bay, the said motor vehicle was driven into the parking bay by the 1st appellant. He testified that the 4th appellant was in the passenger seat. It was his testimony that the 1st appellant requested to park the said motor vehicle at the parking bay. He paid the requisite parking fee of Kshs 40/= for the day. He testified that the said motor vehicle remained parked from the 15th of January 2001 to the 17th of January 2001 when it was collected by the 1st, 3rd and 4th appellants. He testified that during the days that the motor vehicle remained parked at the car park, the 3rd and the 4th appellants came to the car park and paid the requisite fees. The two appellants also repaired a puncture when they discovered that one of the wheels had sustained a puncture. PW6 was emphatic that it was the three appellants who brought the motor vehicle to the parking bay and who drove it off after three days.

PW7 Inspector Moses Wechuri conducted identification parades in whichPW1 and PW2 identified the 1st appellant. He testified that the said identification parade was conducted in accordance with the law. PW8 Police Constable Dickson Mutune received the report of the robbery when it was made at Nyahururu Police Station by PW1. He testified that he partially investigated the case. He produced the identification parade forms which were conducted by Inspector David Mutahi who died before the case was heard. The said identification forms showed that the 3rd and 4th appellants had been identified by PW1 and PW2. PW8 produced the motor vehicle which was stolen in evidence. He also produced the car park entries made by PW6 in his evidence. He also produced the car radio cassette which was found in possession of the 2nd appellant as an exhibit in the case.

When the appellants were put on their defence they all denied involvement in the robbery. All of them testified that they were elsewhere during the time they are alleged to have robbed the complainants. All of them offered alibi defence. The 1st and 3rd appellants testified that they had been charged with the offences for which they were convicted by the trial magistrate because they had a disagreement with a woman police officer. The 2nd appellant denied that the car radio cassette was found in his house. He testified that he was charged with the offences for which he was convicted by the trial magistrate because he had refused to bribe a Police officer over some criminal investigation which the CID police officers from Nyahururu were conducting. He testified that he was therefore framed for the offence. All the appellants testified that the police identification parades which were conducted by the police in which some of the prosecution witnesses identified them, by particularly PW1 and PW2, were flawed.

As was held by the Court of Appeal in **George Otieno Oloo –vs- Republic Criminal Appeal No. 137 of 2004 (Kisumu)** *(unreported)* at page 4 of its judgment,

"…***it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of***

weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in that respect (See Pandya –vs- R [1957]EA 333, Ruwalla –vs- R [1957]EA 570)".

The issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the convictions of the appellant by the trial magistrate. We have considered the submissions that were made by the appellants in this appeal and the response made thereto by Mr. Koech on behalf of the Republic. We have also re-evaluated the evidence as we are required to by the law to determine if the said evidence adduced leads to the conclusive finding that it is the appellants who committed the offences for which they were charged.

Three pieces of evidence were relied on by the prosecution to secure the conviction of the appellants. In respect of the 1st and 2nd appellants, PW1 the driver of the said motor vehicle testified that he identified them during the material day of the robbery. PW2 the conductor of the said motor vehicle testified that he had identified all the appellants during the said robbery. The two witnesses confirmed their identification of the said appellants in identification parades which were conducted by the police four days after the said robbery. In their submissions before court the appellant have argued that the two witnesses could not possibly have identified them because the robbery incident took place when it was dark. They submitted that the conditions favouring positive identification were not present and therefore PW1 and PW2 could not have identified them.

We have re-evaluated the said evidence of identification. PW2 the conductor of the said motor vehicle testified that the appellants boarded the motor vehicle at Gilgil at about 5.30 p.m. He testified that the appellants sat in the motor vehicle at close proximity to him until 6.45 p.m. when they were carjacked and robbed them. The evidence of PW2 clearly showed that he could not have been mistaken as to the identity of the appellants. The appellants boarded the motor vehicle at 5.30 p.m. It was in broad daylight. The appellants were in close proximity with the two witnesses for more than one hour. The two witnesses were therefore able to identify the facial features and the physique of the appellants. PW1 and PW2 testified in detail the role each of the appellants played during the robbery. The two witnesses gave detailed evidence of the roles that were played by the 1st appellant and the 2nd appellant. Both witnesses testified that it was the 1st appellant who drove off the motor vehicle after PW1 had been threatened with a gun.

The two witnesses unhesitantly pointed out the appellants in the identification parades which were conducted by the police four days after the robbery incident. We find no merit in the submissions made by the appellants that the conduct of the said identification parades were flawed. We have carefully re-evaluated the said evidence of identification parades which were conducted by the police and we find nothing which would lead us to conclude that the said identification parades were conducted otherwise than in accordance with the law. We therefore hold that the appellants were properly identified by PW1 and PW2 as having participated in the said robbery.

The second piece of evidence that was relied on by the prosecution to secure the conviction of the appellants is that of the recovery of the stolen motor vehicle so soon after the robbery in the possession of the 1st, 3rd and 4th appellants. The prosecution also adduced evidence of the car radio cassette which was removed from the said motor vehicle after the robbery and which was found in possession of the 2nd appellant soon after the said robbery. We have re-evaluated this evidence and considered the submissions made by the appellants as regards the circumstances under which they were allegedly found in possession of the two stolen items and we are satisfied that the trial magistrate properly found that the appellants were found in possession of the said motor vehicle and the car radio cassette in circumstances that clearly suggest that they are the ones who robbed PW1 and PW2 of the said motor vehicle.

The trial magistrate applied the doctrine of recent possession to convict the appellants on the charge of robbery. As was held in the case of **Malingi –vs- Republic [1989]KLR 225** by Bosire J. (*as he was then*) at page 227,

"***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent: that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of facts is a reputable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In this case the 1st, 3rd and 4th appellants were seen in possession of the said motor vehicle barely twelve hours after the same was robbed from PW1 and PW2.

PW6 testified that he was at his place of work on the 15th of January 2001 at 6.00 a.m. at Racecourse Car Park, when the 1st appellant drove the said motor vehicle to the said car park and requested PW6 to park the said motor vehicle. PW6 saw the 3rd and 4th appellants on the 15th, 16th and the 17th of January, 2001 when the said motor vehicle remained parked at the said car park. The three appellants had conversation with PW6 including on each day when they came to pay him the requisite parking fees. The appellants made no effort to conceal their identity. They wore no disguises. In their cross-examination of PW6, they did not seriously challenge the evidence of PW6 that he had identified them.

PW5 and PW8 acting on information received, arrested the 1st, 3rd and 4th appellants in the said motor vehicle when they were driving it along Nakuru-Eldoret road. The said appellants were arrested on the 17th of January 2001. This was three days after the robbery. The evidence of PW6 connects the said appellants with the said motor vehicle twelve hours after the same was robbed from PW1 and PW2. The said appellants in their defence offered no explanation of how they came to be found in possession of the said motor vehicle. They did not therefore displace the presumption that they were found in possession of the said motor vehicle because they had robbed the same from PW1 and PW2. The doctrine of recent possession was therefore properly applied by the trial magistrate in convicting the said appellants.

As regard the 2nd appellant, PW5 and PW8 testified that after they had arrested the 1st, 3rd and 4th appellants, the 1st and 3rd appellants led them to the house of the 2nd appellant at Naivasha. They testified that the 2nd appellant, who was in his house, refused to open the door for them. PW5 and PW6 broke the door of the house. They found the appellant inside the house. In the house, they found a car radio cassette which was later identified by PW3, the owner of the motor vehicle, to be the one which was removed from his motor vehicle when it was robbed from PW1 and PW2. The said car radio cassette was recovered from the house of the 2nd appellant on the 17th of January 2001. This was three days after the robbery. In his defence, the 2nd appellant offered no explanation how he came into possession of the said car radio cassette. The presumption that he obtained possession of the said car radio cassette from the said motor vehicle after he had robbed it from PW1 and PW2 was not displaced. In the circumstances therefore, we do hold that the doctrine of recent possession applied in the case of the 2nd appellant.

Having carefully re-evaluated the entire evidence that was adduced by the witnesses before the trial magistrate, and having also considered the grounds of appeal which were put forward by

the appellants and also having considered the submissions that were made on this appeal, we are convinced that the prosecution adduced sufficient evidence that proved the guilt of the appellants on the charge of robbery with violence contrary to **Section 296**(2) of the Penal Code to the required standard of proof beyond reasonable doubt. The prosecution proved that the appellants who were armed with a dangerous or offensive weapon, namely a pistol, used violence on PW1 and PW2 and robbed them of the said motor vehicle.

The prosecution established the ingredients required to prove the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. As was held by the Court of Appeal in **Criminal Appeal No. 54 of 2002 Samuel Mwangi Muchoki –vs- Republic (Nairobi)** *(unreported)* at page 6 of the judgment,

"***This court has on many occasions, as Section 296(2) of the penal code itself states, that the offence of capital robbery is committed if during stealing any of the following three circumstances obtains;***

(i) If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) Is in company with one or more other person; or

(iii) At or immediately after the time of the robbery he wounds, beats strikes or uses any other personal violence to any person."

In this case the prosecution established all the three ingredients to prove the charge of capital robbery against the appellants. In the circumstances of this case therefore the defences which were offered by the appellants did not dent the otherwise strong prosecution case against them. The prosecution adduced overwhelming evidence which proved the charge of capital robbery against the appellants. The defences offered by the appellants were futile attempts to exonerate themselves from the serious capital charges which faced them.

We therefore find no merit whatsoever in the appeals filed by the appellants. We find no reason why we should disturb the correct decision reached by the trial magistrate who convicted the appellants for the charge of capital robbery. We therefore dismiss each of the appeal filed by the appellants in this case. We confirm their conviction by the trial magistrate. The death sentences imposed is also confirmed.

DATED at NAKURU this 31st day of March, 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE