REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal No. 352, 353, 354 & 355 of 2002

PATRICK MAKAU NZISI…….……
APPELLANT

Versus

REPUBLIC…….……
RESPONDENT

CRIMINAL APPEAL 353 OF 2002

JOSEPH WANJALA MUNDI alias WANGAI Alias JOSEPH WANJALA MWAI .....APPELLANT

Versus

REPUBLIC…….……RESPONDENT

CRIMINAL APPEAL NO. 354 OF 2002

RAPHAEL GITONGA Alias RAPHAEL GITONGA MUKURIA ……...……..APPELLANT

Versus

REPUBLIC…….……..RESPONDENT

CRIMINAL APPEAL NO. 355 OF 2002

DAVID GITAU WANJIRU…….…….……..APPELLANT

Versus

REPUBLIC…….……..RESPONDENT

(Being appeals from the judgment of N. M. Kiriba,

Senior Resident Magistrate, dated 22nd July, 2002,

In the Principal Magistrate's Court, Kerugoya,

Criminal Case No.1963 of 2000)

JUDGMENT

The four appellants together with the fifth person who unfortunately died before his appeal was heard, were jointly convicted of eight counts of robbery contrary to section 296(2) of the Penal Code and each was sentenced to death on each count. They all appealed and appeal No.356 of 2002 filed by Geoffrey Atsaba Kikutoi (deceased) having abated, the appellants herein will be referred to as the first appellant to fifth appellant in the order in which their names are written on the first page of this judgement. The appellants faced six alternative counts but were not convicted of any of those alternative counts because of having been convicted of the main counts.

In the first count it was alleged that on the 11th day of July, 2000 at Supper Mambo Bar Ngurubani township in Kirinyaga District the appellants jointly with others not before court and being armed with dangerous or offensive weapons, namely, toy pistols, pangas, rungus and Somali Swords robbed Isaac Gitari Gakuya of Khs.5000/-, one wrist watch make Philip Pession, two radio cassette compacts, four packets of Sportsman cigarettes all valued shs.6000/- using personal violence.

In the second count it was alleged that on the 11th day of July 2000 at Super Mambo Bar Ngurubani in Kirinyaga District the appellants jointly with others not before court and being armed with dangerous or offensive weapons namely toy pistols, pangas, rungus and somali swords robbed Richard Murimi Ndau of sh 50/=, a wallet, a driving licence and a P.S.V. licence using personal violence.

The remaining acts of robbery were alleged to have taken place at Mwea Family Life Centre staff quarters in Kirinyaga District each on the same date 11th July, 2000 by the same people the appellants using the same weapons and personal violence on the victims,

Dr. Lilian Njeri Mutugi, Samuel Mwaura Njoroge, Jane Wangari Mwaniki, Trizah Kiarie Njine, Alice Kirigo Mutulo and Hellen Wanjiru Gacoka.

During the hearing of the appeals, the learned Principal State Counsel, Mr. Orinda told us that while he was conceding the appeals of the First to Third Appellants, he was not doing the same to the appeal of the Fourth Appellant. With respect to the appeals conceded, he said that the exhibits were very important because they were recently stolen property recovered within hours of the alleged stealing, yet the recorded evidence does not show that the exhibits were produced. Although they seem to have been marked for identification, they were not produced except for the motor vehicle which was said to be exhibit 16 without showing how it came to be number 16. He said that from the record it is apparent the Prosecution's case was closed prematurely before the witness to produce the exhibits gave evidence and also before the police officer or officers who conducted identification parades gave evidence.

Our reading of the recorded evidence confirms what Mr. Orinda said with regard to the exhibits and evidence of identification parade. The problem therefore is that since the robbers in this case were not people previously known to the victims, whatever evidence of identification witnesses may claim to have from scenes of crimes at Supper Mambo Bar, Ngurubani or at Mwea Family Life Centre staff quarters needed the support of evidence of identification from police identification parades. That is more so in this case where evidence of identification recorded by the court from witnesses is either too brief to convince the court or is an awkward mixture of what the witness says was at the scene of crime and what the same witness says happened at the police identification parade; and some may say they identified a suspect even when they failed to do so or never went to the parade in question.

On the other hand, failure to produce exhibits, in our view, amounts to a serious defect in the prosecution case where those exhibits are alleged to have been recovered from the accused especially where there are more than one accused person and more than one exhibit Evidence ought to come out clearly that a particular exhibit was recovered from a particular accused person and was positively identified by the victim owner. In this particular case, for example, the sum of money the robbers took from the victims was far more than 20,000/= and if the accused persons were arrested in circumstances given in the evidence of PW8, P.C. Michael Njuguna of Muranga Police, a substantial part of the sum robbed ought to have been recovered for production as exhibit.

Mr. Orinda mentioned one interesting point and indeed we find it admitted in the learned trial Magistrate's judgment, that in addition to the evidence adduced before him in the Court, he also read and considered

"all the evidence……..in the police file and noted that each of the accused persons made statements under inquiry"

We find that to have been a serious misdirection on the part of the learned magistrate. Did he go to the police station to read that file? He did not say where he was when he read that file. We hope he no longer reads such files as the correct position is that the police have the duty to bring such evidence in the court and have the evidence adduced by a witness before the trial court so that the witness is subject to cross-examination by the Accused person or his advocate. Where the police do not do so, the trial magistrate, or judge for that matter, has no business getting hold of the file to read it to use the information so obtained as evidence against accused persons.

Among the appellants before us, it is the Fourth Appellant only whose statement under inquiry is in the evidence adduced before the trial magistrate. The rest did not. Yet the magistrate in his judgment said that every accused person in this case made such a statement and the magistrate made it clear that he was relying on those statements. We hold that was wrong, prejudicial to the accused persons especially those whose statements if any, had not been admitted in the evidence and it was unfair to them resulting into injustice. The judgment was therefore written in general terms such that it would appear the robbers were acting in unison in the same place at the same time.

Further more, the magistrate considered the prosecution's evidence separately from the defence and went ahead to convict all the Accused persons before he moved to consider the defence and having already convicted the accused persons the learned trial magistrate shifted the burden of proof from the prosecution to the defence insisting that the accused persons had the duty to prove their innocence but had failed to prove it.

Another serious defect the learned trial magistrate caused in his judgment was that there was no evidence in support of count two, yet the magistrate convicted accused persons of the robbery alleged in count two.

That leads us to what Mr. Orinda said about the appeal of the Fourth Appellant, that he supported the conviction of the Fourth appellant because that Appellant had made a confession which in addition to other evidence, made the conviction of the Fourth appellant safe. He said that the victims were robbed and there is the evidence of the arrest of the Fourth Appellant and what the victims said.

We note that the confession was retracted by the Fourth Appellant and was admitted in the evidence only after a trial within a trial. As such, that confession needed corroboration in order to sustain a conviction and make that conviction safe. From what we have said above, it is difficult to find good evidence to provide the corroboration needed to sustain a conviction. True there is evidence that robberies took place. But the important question is whether the Appellants, or the Fourth Appellant for that matter, were the robbers involved in those robberies. We have not found good evidence of identification and we have already stated this elsewhere in this judgment. We may add that going through the evidence, it is difficult to see clearly the role the Fourth Appellant played because one witness would say saw the Fourth Appellant play a particular role while another witness will claim he at the same time either at the same place or at a different place, saw the fourth Appellant play a different role. One witness would say he saw the Fourth Appellant armed with a pistol while another witness would say that Appellant had a toy pistol and another witness would come up saying the Fourth Appellant had a stick, while a third witness would say the Fourth Appellant had a stick and iron bar. In short that is the kind of evidence, which destroys corroboration completely. Evidence of witnesses talking about somebody simply because they were seeing him in the dock.

There was recovery of motor vehicle Reg. No. KYR 179 but evidence on that recovery is contained in a brief one sentence statement which leaves a number of questions, unanswered,

Take all that together in the light a background with the several defects we have said the trial magistrate caused, a situation prejudicial to the Appellants was created resulting into the trial being unsatisfactory.

The above being the position, we hold that the conviction of the Fourth appellant is not also sustainable. Accordingly we will and do hereby allow the appeal of each appellant in this matter. Quash the conviction of each appellant and set aside the sentence imposed on each appellant in respect of each count. Each appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated, delivered and signed at Nyeri this 31st day of March, 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE

Present:

All Four Appellants present.

Mr. Orinda for the Republic.

Martin Mwangi – Court clerk.