



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

Criminal Appeal 137, 140, 142 & 143 of 2003

JOHN GAITHO WAGOCHO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 140 OF 2003

DAVID MUGAMBI WAITHAKA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 142 OF 2003

STEPHEN WAGATHIMA GATUTHU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 143 OF 2003

JOSEPH MUCHINE WACHIRA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeals, consolidated, from the judgment of M. R. Gitonga,

then Senior Resident Magistrate, dated 19th and delivered

on 20th March, 2003, in the Chief Magistrate's Court, Nyeri,

Criminal Case No. 2125 of 2002)

JUDGMENT

The four appeals were consolidated for hearing and in this judgement we shall be referring to the appellants as the first appellant, second appellant, third appellant and fourth appellant in the respective order in which their names are listed on the first page.

All the appellants were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the penal Code. Each was convicted of that offence and sentenced to death.

When their appeal came up before us for hearing, the learned state counsel M/s Ngalyuka, told us that she was conceding to all the appeals because the prosecutor, Senior Sergeant Kigera, was not a prosecutor qualified in terms of section 85 (2) of the Criminal procedure Code. She, however, asked for a retrial on the ground that there was sufficient evidence to support the convictions, the appellants having been identified both at the robbery scene and at police identification parades.

While supporting the fact that the State Counsel was conceding the appeals, the appellants opposed the State Counsel's application for retrial pointing out that they have already been in custody for a long time and that the evidence of identification was not reliable and the police identification parades were not conducted properly.

We had therefore to look at the facts and circumstances of the case in relation to each appellant.

Relating to the First appellant who was the First accused in the trial, the victim Josphat Wandahi who gave evidence as PW1 told the court that the First Appellant emerged from a bedroom and cut him in the sitting room. He said the first Appellant, and the second accused whose appeal we do not have, were well known to him. PW1 said there was electricity light in the sitting room where he was when he saw the First Appellant as the other robbers were leaving. After the robbers had gone, PW1 was taken to hospital and was admitted and his son reported the incident to the police. PW1 was admitted in hospital for five days the robbery having taken place during the night of 11th and 12th August, 2002.

PW1 went on to say that later on a date he did not disclose, he learned that the Appellant and the Second accused were looking for a buyer to whom to sell a car jack. PW1 investigated and learned the car jack was kept by the Second Accused. PW1 informed the Appellant's Assistant Chief and the Second Accused's Assistant Chief and as a result both Assistant Chiefs got an Administration police officer from the chief's camp and the three went with PW1 to the home of the Second Accused where they recovered the car jack which PW1 identified as his. They arrested the Second Accused and proceeded to the home of the First Appellant and arrested the First Appellant. They went and handed the first Appellant and the Second Accused to Mukurweini police station. But PW1 also talks of having given the two suspects to Flying Squad Personnel from Karatina.

PW1 said that while there were 20 to 30 robbers, he had not seen the Second accused among the gang. The evidence of PW1's wife, Sophia Wachuka Wandahi who was in their house when she saw her husband being attacked outside the house by a gang of people, is that she saw and recognised the First Appellant. Like her husband, she did not say that she saw the Second Accused. She was PW3.

The evidence of Assistant Chief Benard Wachira, PW4, and Assistant chief Ephantus Wanjohi, PW5, is to the effect that while patrolling their areas together they received information from an informer they did not disclose that the First Appellant and the Second Accused were trying to sell a jack. They subsequently received a report from PW1 that the Second Accused was selling a jack. They got an administration police officer from the chief's camp. They went to the home of the Second Accused and recovered the jack before they went and arrested the First Appellant and took both suspects to the police. From the evidence of the two Assistant Chiefs, it would appear as if the Second Accused had not made a report to any of them concerning the car jack.

But according to the sworn defence of the Second Accused, he said he was going to his place of work when he saw a jack by the road side. He picked it and went with it to work. He then took it to his home and kept it there. He went to check with one Njagi Waihura to find out whether the jack was his. But when Njagi Waihura told the second Accused that he had lost no jack, the Second Accused asked Njagi

Waihura to tell anyone who has lost a jack to go and see him, the Second Accused. Later his assistant chief went to see him. They went to the Chief's camp where they met the complainant who told the Second Accused that he was looking for his jack and as a result the Second Accused took the Chief, the Assistant Chief, the complainant and the Administration Police Officer to his home to show them the jack he had. After the Second Accused showed them the jack and they took it, they went to the house of the Complainant on their way to Karatina police station. He denied he was trying to sell the jack.

From the sworn defence of the First Appellant, those who arrested him were with the Second Accused who was left in their motor vehicle as they went to search the house of the First Appellant before they arrested him. In the search, nothing was recovered. They were taken to the house of PW1 before they were taken to the police at Karatina. That was on 21st August, 2002.

From the evidence of A.P.C Jackson Njogu, who was PW6 but was recorded as PW5 again, the two assistant Chiefs went to the Chief's camp where he was when they were with the Second Accused who told him he had a jack at his house. APC Jackson Njogu joined the group and they all went to the house of the Second Accused who gave them the jack which PW1 identified. They then went and arrested the First Appellant from whose house they recovered nothing. This witness didn't say where PW1 joined them.

Police Constable Njeru Lammick, who was recorded as PW6 when he should have been PW7, introduced something new in prosecution's case when he told the court that it was on 12 February, 2002 when he received a report, at Mukurweini police station, that a group of about 20 armed people had violently robbed PW1 at his house injuring him and stealing the items in the charge sheet. They visited the scene.

On 21st August, 2002 P.C. Njeru Lammick was with Flying Squad at Mweru village when the two assistant Chiefs, PW4 and PW5, handed over the First Appellant and the Second accused to P.C. Njeru Lammick's team who also took the car jack exhibit. The Flying Squad took away the suspects and the jack.

That is the evidence concerning the First Appellant. The question is: what is the date of the offence? According to the evidence of police Constable Njeru Lammick, the date was 12th February 2002 or thereabouts because that is the date on which a report concerning the robbery was made at Mukurweini Police station and as a result officers from that police station including P.C. Njeru Lammick himself, visited the scene of the robbery. But according to the charge sheet, the robbery took place during the night of 11th and 12th August, 2002, a period six months after the robbery had been reported to Mukurweini Police Station. During the hearing it was the evidence of PW1 only which mentioned the date in the charge sheet. The trial court therefore had the evidence of PW1 against the evidence of P.C. Njeru Lammick as to the date of the offence. No effort was made to reconcile those two different dates. Yet in a criminal trial the date of the offence is very important and must be clear to the Accused persons affected.

Moreover, it is not made clear as the person who reported the robbery to the Police. P.C. Njeru Lammick did not disclose it in his evidence. PW1 said during his evidence in chief that it was his son who reported the robbery to the police. During cross examination by the First Appellant, PW1 talked as if he himself made the report to the police. That part of the prosecution's case is therefore not consistent. There is evidence PW1 was taken to hospital and admitted immediately after the robbery but the injuries he sustained were assessed by PW2, a clinical officer, as harm and there is no evidence that he at any time lost consciousness or was unable to talk. On the contrary, the evidence shows that he was fully conscious and was talking throughout from the time of the robbery to the time he was discharged from the hospital where it may be said he was for six days. In any case, the contents of the report which was made to the police were not revealed to the trial court.

Another point we note is that although PW1 and his wife told the court that the First Appellant was a person they had known very well for many years and that they saw him very clearly among the 20 to 30 robbers, the contents of the report to the police having been kept away from the court, there was no

evidence to show whether the name of the First Appellant was mentioned in the report as it ought to have been. In any case, prosecution evidence does not explain why it took nine days, assuming the robbery took place during the night of 11th to 12th August, 2002, to arrest the first appellant and why that arrest had to come only after the two assistant chiefs had received information from an undisclosed informer, and PW1 had also received information, separately, from an undisclosed informer, that the first Appellant and the Second Accused, who were local people, were looking for someone to buy a jack. In our view, if the First Appellant had been seen and recognised by PW1 and PW3 in the robbery, he ought to have been arrested the following day, or soon thereafter, before the issue of selling a jack arose. The First Appellant was locally known and there has been no evidence that there had been any problem on the part of the police in tracing him for immediate arrest.

Also, while we recognise the fact that the learned trial magistrate had the opportunity, not only to hear the witnesses, but also to see them and observe their demeanour, the evidence on record, looked at closely, seems to us to bring into focus the issue of the veracity of prosecution witnesses as there is the tendency to leave out some information useful to the court but for some reasons the prosecution did not want it revealed. A good example is the fact that the Second Accused was in the company of the two assistant chiefs when they went to collect A.P.C Jackson Njogu from the chief's camp. That fact cannot be seen in the evidence of PW1 and the evidence of the two assistant chiefs as each of those witnesses tries to give the impression that the visit by the assistant chiefs, PW1 and A.P.C. Jackson Njogu was a surprise visit to the Second Accused who would not otherwise have shown them where the jack was. In fact the three witnesses go on to give the misleading impression that the Second accused did not show them where the jack was until they searched for it and discovered by themselves where it was. One has to read the evidence of A.P.C. Jackson Njogu and the defence of the Second Accused for one to realise that the impression P.W.1. and the two Assistant chiefs were giving the court concerning the situation may not have been so. In the circumstances, the defence of the second Accused could be true and the evidence against the First Appellant weakened.

Things are not better with regard to the evidence of PW3 who seems to be seeing almost everything that happened during the robbery through the eye of her husband, PW1. She is in bed asleep at midnight, for instance, and she is woken up by someone's voice screaming outside her house, and by the time she realises that it is her husband screaming within the homestead and jumps out of her bed to pip through the window, she sees a gang of people already surrounding her husband in a confusing manner. But because her husband claims that the person who confronted him first was the Second Appellant (then 4th Accused) alone pointing a pistol at him, PW3 also says that by the time she first saw those people beating her husband, the Second Appellant was pointing a pistol at her husband. So that the evidence is to the effect that when her husband saw the 3rd Accused do something, PW3 also saw the same accused do the same thing at the same time, the same happening in respect of the 4th Accused, and the 5th Accused. But following closely, the evidence otherwise suggests that while one group of the gang was busy with PW1 in one area of the compound or house, another group was at the same time busy with PW3 in a different area of the compound or the house. They could not therefore have been together all the time seeing the same things and the same persons.

From that trend of things therefore it is not surprising to find that in respect of police identification parades, PW3 is saying that she identified all the three suspects just as PW1 said he identified all the three suspects. These were the Second, Third and Fourth Appellants who were the Fourth Accused, the First Accused and the Third Accused respectively. The correct position according to the evidence of Chief Inspector Julius Mwilu Nthenga, PW7, who should have been PW8, is that the Second Appellant is the only one who was identified by PW1 and PW3. The Third Appellant was identified by PW3 only, while the Fourth Appellant was identified by PW1 only.

The Second, third and Fourth Appellants who remained in police cells for nine days before police identification parades were held, felt the two identifying witnesses may have seen them before the parade as they were being moved several times between Karatina and Mukurweini police stations.

In any case, the evidence is clear that Chief Inspector Julius Mwilu Nthenge used the same six remandees from Mukurweini police cells in all the parades with the exception of one parade where two

new remandees were added to make the number eight. The effect was that since in virtually each parade the suspect to be picked was the only new face, it was easy for PW1 and PW2 to pick the suspect and that, in our view, ought not to have happened. Moreover, Chief Inspector Julius Mwilu Nthenga agreed that he did not use members who looked like the suspects.

One important factor to note is that the Second, Third and Fourth Appellants were not arrested within those 14 days after the robbery (if we rely on the date 11th to 12th August, 2002) because of a report mentioning or describing them, made to the police by any witness identified by the prosecution to the trial magistrate. According to P.C. Njeru Lammick, the police at Karatina acted on information from an undisclosed informer to arrest the three appellants and therefore it is only this evidence of identification which is linking these three appellants to the robbery. From what we have said, we hold the view that this evidence is weak, unreliable and therefore insufficient.

From all the foregoing therefore we hold the view that none of the appellants ought to have been convicted in this case because the evidence on record was weak, unreliable in many important aspects and therefore insufficient. Further, the trial was defective because the different dates of the offence revealed in the evidence were left by the prosecution unreconciled.

That being the position, this is a case where the interest of justice will not be served by ordering a retrial bearing in mind also that the prosecutor was unqualified and the appellants have now been in custody for virtually four years and it is very doubtful whether even half of the witnesses will be available especially those who were in Government service.

Finally therefore, we do declare the trial of the four appellants herein a nullity. Allow their respective appeals. Quash the conviction of each appellant and set aside the sentence imposed upon him. We refuse to order retrial and do order that each appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated at Nyeri this 3rd day of May, 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE