REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 47 of 2003 & 517, 518, 519 & 520 OF 2001

(From original conviction and sentence of the Senior Principal Magistrate's Court at Naivasha in Criminal Case No. 1615 of 2001 – M. M. Muya [SPM])

GRACE WAMBUI NJOROGE…….....…..1ST APPELLANT

JOSEPH NJUNGE GIKONYO…….....…..…..2ND APPELLANT

SAMUEL MWANGI RUKWARO…….....……3RD APPELLANT

FRANCIS WAITHAKA MUYA…….....……..4TH APPELLANT

SAMMY MWANGI KINYUA…….....…….5TH APPELLANT

VERSUS

REPUBLIC…….....……...…….RESPONDENT

JUDGMENT OF THE COURT

The appellants, Grace Wambui Njoroge (*hereinafter referred to as the 1st appellant*), Joseph Njunge Gikonyo (*hereinafter referred to as the 2nd appellant*), Samuel Mwangi Rukwaro (*hereinafter referred to as the 3rd appellant*), Francis Waithaka Muya (*hereinafter referred to as the 4th appellant*) and Sammy Mwangi Kinyua (*hereinafter referred to as the 5th appellant*) were charged with various offences under the **Penal Code**. They were charged with seven counts of robbery with violence contrary to **Section 296 (2) of the Penal code**. The particulars of the offence were that at various dates between the 19th of February 2001 and the 3rd of August 2001, the appellants robbed various complainants of their motor vehicles and goods as stated in the charge sheet which were in the said motor vehicles and in the course of the said robberies used actual violence or threatened to use actual violence to the said complainants. The 3rd appellant was alternatively charged with two counts of handling stolen goods contrary to **Section 322(2) of the Penal Code.** The particulars of the offence were that on the 9th of August 2001 at Engineer in Nyandarua District otherwise than in the course of stealing the appellant dishonestly handled several hardware items which were listed in the charge sheet knowing or having reason to believe them to be stolen goods.

The appellants pleaded not guilty to the charge and after a full trial were acquitted of one count of robbery with violence. The 1st, 2nd, 4th and 5th appellants were however convicted of the six counts of robbery with violence. They were sentenced to death as is mandatorily provided by the law. The 3rd appellant

was however convicted on the alternative charge of handling stolen property. He was sentenced to serve ten years imprisonment on each of the two counts. The sentences were however ordered to run concurrently. The appellants were aggrieved by their convictions and sentences and filed separate appeals to this court.

At the hearing of the appeals, the separate appeals filed by the appellants were consolidated and heard as one. In their petitions of appeals, the appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted based on the evidence of identification that was made by the complainants in difficult circumstances that were not conducive for positive identification. They were further aggrieved that the trial magistrate had relied on the evidence of police identification parades which had not been conducted in accordance with the rules. They faulted the trial magistrate for convicting them based on the evidence of retracted confessions which confessions were obtained from them after they had been tortured or threatened. They were further aggrieved that the trial magistrate had not properly evaluated the evidence adduced and therefore reached a decision convicting them on the insufficient evidence that was adduced by the prosecution witnesses. They further faulted the trial magistrate for convicting them without considering the evidence that they had adduced in their defence.

During the hearing of the appeals the 1st, 2nd, 4th and 5th appellants, with the leave of the court, presented to the court written submissions in support of their appeals. They further made oral submissions urging this court to allow their appeals. The 3rd appellant however abandoned his appeal against conviction. Instead, he pleaded with this court to consider reducing the sentence that was imposed upon him. He submitted that he had reformed and had learnt from the mistakes that he had committed. Mr. Koech, learned State Counsel opposed the appeals. He submitted that the trial magistrate had properly considered the evidence that was adduced and arrived at the right decision that the prosecution had proved its case against the appellants to the required standard of proof beyond reasonable doubt. We shall consider the said submissions made after briefly setting out the facts of this case.

PW1 Francis Otieno Olando, PW3 Morris Ndundi Odhiambo, PW8 Boniface Oluru Lihanda, PW13 Samson Ochero Kengele and PW11 Geoffrey Waruru Kuria all gave similar testimonies. All of them were drivers of lorries which were ferrying goods from Nairobi to Western Kenya. All of them narrated how they drove from Nairobi on various dates having loaded hardware goods in their lorries. All of them testified that they left Nairobi late in the evening and arrived at Mai Mahiu trading centre between 7.00 p.m. and 8.30 p.m. As they drove past Mai Mahiu, they were stopped by a couple who requested them to give them a lift. The couple comprised of a man and a woman. The said witnesses testified that they gave lifts to the man and woman after they informed that two would alight at Naivasha. When their vehicles reached the railway crossing near Longonot Township, the woman requested them to stop their vehicles as she had reached her destination. At that point, other robbers pounced on them, assaulted them, hijacked their vehicles and abandoned them in the bush. Later their motor vehicles were recovered but the goods which they were carrying had been unloaded from their motor vehicles.

The above witnesses including their turn boys, PW2 Lawrence Shirumu, PW4 Paul Otieno and PW6 Daniel Kiriathi Wathura, all testified that they were able to identify the woman and the man who stopped their vehicle and the requested lift. They identified the 1st and 2nd appellant as the man and woman who stopped them at Mai Mahiu requesting for a lift and who hijacked them with the assistance of the 4th and 5th appellants when they reached Longonot. Although the said robberies took place at night, the said witnesses testified that they were positive about their identification of the 1st, 2nd, 4th and 5th appellants because as they were being robbed the lights in the cabin of their vehicles had been put on. Later they confirmed the identification of the appellants when they pointed out the appellants in identification parades which were conducted by PW14 Inspector Florence Kariuki, PW15 Inspector Morris Nzioka, PW16 Inspector Daniel Obwonyo and PW17 Inspector Dorcus Akinyi.

The prosecution further adduced evidence of confessions which was made by the 5th appellant before PW19 Inspector John Ndungu and by the 1st appellant before PW20 Chief Inspector Clement Githuku. In the said statements made under inquiry, the 1st and the 5th appellants confessed that they had participated in the said robberies of the complainants. During the hearing of the case however, the 1st and 5th

appellants retracted their confessions. They claimed that they had been tortured or threatened before the said statements under inquiry were written. However when PW20 testified, he stated that the statement which was made under inquiry by the 1st appellant was self recorded. After trials within trials, the trial magistrate admitted the said confessions in evidence.

PW18 PC Richard Marangu acting on information received laid an ambush on the Mai Mahiu - Naivasha road. This was after several reports of robberies had been made by drivers of lorries who had been hijacked. On the 6th of August 2001, PW18 arrested the 1st and the 2nd appellants when he saw them boarding a lorry. He arrested them based on the information he had received of their descriptions. PW21 Cpl. John Njeru was the investigating officer in this case. He testified that the police had received reports of seven highway robberies whose *modus operandi* were the same. He testified that a man and woman would ask for a lift, after which they would hijack the vehicle and steal the contents therefrom. He recalled that the victims of the robbery gave the description of the robbers. On the 6th of August 2001, the 1st and 2nd appellants were arrested. The 1st appellant was interrogated and confessed to the crime. The 1st appellant disclosed her accomplices and later led the police to Engineer trading centre in Kinangop where they were able to arrest the 3rd appellant. Several items which had been robbed from PW1 and PW2 were recovered in the house of the 3rd appellant. The said items which were recovered and were listed in the charge sheet were identified by PW1 and PW2. He testified that his investigation established that it was the appellants who were the robbers of the complainants in this appeal. PW21 further testified how he interviewed PW10 Rachel Nduta Nganga and PW9 David Njuguna Mwaura and established that the goods which were robbed from the lorries which had been hijacked were later transported to the house of the 3rd appellant.

When the appellants were put on their defence, they all denied that they had participated in the robbery. They further denied that they had been identified by the complainants in the said robbery incidences. The appellants who are said to have confessed to the robberies denied that they had given the statements under inquiry voluntarily. They both testified that they were tortured or threatened by the police before the said statements were written. Some of the appellants gave alibi defences in a bid to establish that they were elsewhere when the said robberies were being committed.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987]KLR 19**). We have carefully considered the submissions that were made before us by the appellants on this appeal. We have also considered the response made thereto by Mr. Koech on behalf of the State. We have also re-evaluated the evidence that was adduced before the trial magistrate's court as we are required to in law. The issue for determination by this court is whether the prosecution proved to the required standard that it is the appellants who participated and who committed the said robberies in question.

In the instant appeals, the prosecution relied on basically three pieces of evidence to secure the conviction of the appellants. The first piece of evidence is that of identification. The complainants in this case, i.e. PW1, PW2, PW3, PW4, PW5, PW6 and PW11 all testified that they were approached by a man and a woman who asked them for a lift. They were approached when they had just passed Mai-Mahiu. They were approached between 6.30 p.m. and 8.00 p.m. They testified that after a few kilometres, at a place near Longonot trading centre, the woman invariably requested them to stop because she would allege that she had reached her destination after which other robbers came by the roadside and robbed them. The complainants testified that they were able to identify the man and woman who robbed them. They gave their physical descriptions. They testified that they were certain of the identity of the two because when they gave them the lift it was still early in the evening. They further testified that when they were inside the vehicles the lights in the cabin enabled them to identify the two. The man and woman were identified to be the 1st and 2nd appellants.

When they stopped their motor vehicles, they testified that they were attacked by robbers whom they

identified to be the 4th and 5th appellants. They described the role the 4th and 5th appellants played in the said hijacking and robbery. The said complainants later confirmed their identification of the said appellants when they were called by the police at Naivasha to identify the said appellants in identification parades which had been mounted by the police. We have carefully re-evaluated this evidence of identification and we are satisfied that the complainants properly identified the 1st, 2nd, 4th and 5th appellants. Further, we find no truth whatsoever in the allegation made by the appellants that the identification parades which were conducted by the police at Naivasha police station were flawed. We further find no credence in the submissions made by the said appellants that the circumstances favouring positive identification were absent when they were identified by the complainants. From the evidence adduced by the said complainants, it is clear that the 1st and 2nd appellants were in close proximity with the said complainants when they were given the lifts. Further, in some instances the 1st and 2nd appellants were given the lifts during day time. When the said complainants were hijacked, some of them withstood the ordeal of the hijack for several hours. They were therefore able to identify the 4th and 5th appellants. In the circumstances of this case therefore, we do not find merit with the grounds of appeal by the appellants that they were not properly identified.

The second piece of evidence that the prosecution relied on to secure the conviction of the appellants is the evidence of the confessions by the 1st and the 5th appellants. PW19 and PW20 testified that they were requested by the investigating officer to take the statement under inquiry from the 1st and 5th appellants. They testified that they complied with the judges rules when they recorded the said statements under inquiry. In the case of the 1st appellant, she opted to write her own statement in Kikuyu language. In the said statements, the 1st and 5th appellants admitted to have participated in the said robberies. Although the said appellants retracted the said confession during trial, the trial magistrate admitted the said confessions after a trial within trial. The 1st and 5th appellants challenged the decision of the trial magistrate in admitting the said confessions even when they had testified that they were either tortured or threatened before the said statements were taken. It should be noted that the said confessions were admitted in evidence by the trial magistrate before **The Criminal Law (Amendment) Act of 2003 (Act No. 6 of 2003)** came into effect on the 25th of July 2003. The admission of the said evidence was therefore lawful at the time. The law as regard the admission of retracted confessions is well settled. The court of appeal held in **Tuwamoi –vs- Uganda [1967]EA 84** at page 89;

"***The present rule then as applied in East Africa in regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."***

In the present case, the confessions made by the 1st and 5th appellants were of such a detail that it was obviously true. In the case of the 1st appellant her confession led to the recovery of items which were robbed from some of the complainants in the possession of the 3rd appellants. In the circumstances of this case therefore, we are satisfied that PW19 and PW20 complied with the judges rules when they took the said statements under inquiry. The 1st appellant was under no pressure at all because she wrote the statement under inquiry by herself in the Kikuyu language. We find no merit therefore with the submissions made by the 1st and 5th appellants challenging the admission of the said confessions in evidence. In any event, even if we were to disbelieve the truth of the said confessions, we are satisfied that the facts stated in the said confessions were sufficiently corroborated by the evidence of identification and the evidence of the recovery of the items which were robbed from some of the victims of the highway robberies.

The third piece of evidence that the prosecution relied on to secure the conviction of the appellants is the recovery of some of the items of the robberies which were particularised in the alternative charge to count 2 and count 3 of the charge sheet. The said items which were recovered in the possession of 3rd appellant were produced in evidence as *prosecution's exhibit No. 1-19.* The complainants produced invoices and delivery notes which established that they were in possession of the said goods which were

recovered from the 3rd appellant from the information given by the 1st appellant. When the said items were produced in evidence, none of the appellants claimed the said items and the same were released to the complainants. In the circumstances of this case therefore, the recovery of the said stolen items in the possession of the appellants implicated them in the robbery of the same from the complainants. In the circumstances of this case, the doctrine of recent possession properly applied. The fact that the said items were found pursuant to the confession made by the 1st and 5th appellants proved that they participated in the robberies of the complainants in this appeal. In the premises therefore, having re-evaluated the said evidence, we find no merit with the grounds of appeal advanced by the appellants.

The evidence adduced by the appellants in their defence did not however dent the otherwise cogent and consistent evidence that was adduced by the prosecution witnesses. In the circumstances of this case, we were convinced that the robberies perpetrated by the appellants against the complainants were of a similar nature, and adopted the same *modus operandi* according to the evidence of the complainants. Although the robberies were committed at different times, the prosecution's evidence was consistent and clearly pointed to the appellants as the persons who committed the said robberies. All in all, we are satisfied that the prosecution proved to the required standard of proof beyond reasonable doubt that the 1st , 2nd, 4th and 5th appellants participated in the said highway robberies. In respect to the 3rd appellant, we hold that it is the ilk of the 3rd appellant who want to reap where they have not sown, that give incentive to people like the 1st, 2nd, 4th and 5th appellants to commit robberies. The 3rd appellant offered a ready market to the goods that were robbed from the complainants. He did not appeal against conviction. In the circumstances of this case, we are not prepared to interfere with the sentence of ten years imprisonment that was imposed by the trial magistrate. The 3rd appellant was in fact very lucky not have been convicted of the more serious offence of capital robbery.

We need not say more. It is clear from our reasons above, that the appeals filed by the appellants herein lack merit. The said appeals are hereby dismissed. The conviction and the sentences imposed by the trial magistrate are hereby confirmed.

It is so ordered.

DATED at NAKURU this 7th day of July 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE