

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 170 of 2005

CHARLES GITONGA STEPHENAPPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being an Appeal against both conviction and sentence in Criminal Case No. 2303 of

2002, Before R. N. Kimingi Mrs. Principal Magistrate at Maua.)

J U D G M E N T

1. Charles Gitonga Stephen was one of the original six accused persons in Maua P.M.'S Court Criminal Case No. 2303/02 where they had been charged with the offence of robbery with violence contrary to s. 296(2) of the Penal Code. It was alleged in two counts that they, jointly, and armed with dangerous or offensive weapons to wit guns and pangas robbed in the first count, Jason Kiamba Kimbui of a pistol .38 special revolver serial No.J 619221, 29 rounds of .38 ammunition and cash Ksh.20,000/= all valued at Ksh.138,000/= in total and at or immediately before or immediately after the time of such robbery used actual violence on the said Jason Kiamba Kimbui. The Appellant was charged with a second count to the effect that on the same day i.e. 2.6.2002 he jointly with others violently robbed Loice Nyegera Kimbui of Ksh.10,000/-. The particulars are clearly set out in the charge sheet. The Appellant and his co-accused all denied the charges but in the end only the Appellant was convicted of the offences and sentenced to suffer death in respect of each count.

2. In James Moses Moustache vs R Criminal Appeal 119/2000 (unreported), the court of Appeal approved the holding in Okeno vs R [1972] E.A. 32 that a first appellate court is obligated "to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

3. In being guided as above and conscious of that duty, we note that PW.1 Joseph Kiamba, a financial consultant in Nairobi was at his rural home in Mituntu on 2.6.2002 when robbers struck at 10.00 a.m. as he, P.W.2 (his wife), one Dr. Kaibiriria and one Taliu were enjoying their breakfast. They were all ordered to lie down and then taken to different rooms. The robbers were two (2) in number. In the course of the robbery, the robbers who had a pistol and a panga took Ksh.20,000/= in a briefcase belonging to P.W.1 which briefcase also had his .38 pistol serial No.J 619221. They also took off with Ksh.10,000/- from P.W.2 Loice Nyegera Kimbui. The robbers escaped in P.W.1's Range Rover Motor-Vehicle KUR 143. Later the Range Rover was recovered having been abandoned and the briefcase had been cut up and left in the motor vehicle. A report to the police at Tigania was made and the Appellant

was arrested later. P.W.1 said that he did not know the Appellant and could not identify his assailants.

4. P.W.2 Loise Nyegera corroborated the evidence of P.W.1 save that when the police came to her home at 4 p.m. on the day of the robbery they had two suspects (none of whom was the Appellant) and she said that she did not know the Appellant.

5. P.W.3 Bishop Johana Mbogori had come to visit PW1 and PW2 at their home on the material morning and as he was driving away together with his wife, a man emerged from the coffee plantation in P.W.1's home, pointed a gun at him, and said that they wanted P.W.1's house. They entered the house (the robbers were two in number) and left P.W.3 in his car lying down with eyes closed. P.W.3 heard a shot being fired, as was also the evidence of P.W.1 and P.W.2 and in less than (ten) 10 minutes the robbers fled in P.W.1's motor vehicle. P.W.3 could not identify any of the robbers.

6. P.W.4 Edward Kaithiria M'Akwabi a public health nurse was in P.W.1's house having breakfast when a man brandishing a gun stormed the house, and demanded that everybody should lie down. He was speaking in Kiswahili but with a distinct Kimeru accent. Another emerged from the kitchen carrying a pistol and a panga and they both demanded money. As the witness and others lay down, he heard a gunshot and the robbers fled. The witness identified one of the robbers as the 4th accused and the second who covered his face with a cap and who pointed a gun at him was not easily identifiable, he said. As for the Appellant, P.W.4 said he did not know him.

7. P.W.5 Francis Taliu Mugambi was in P.W.1's house during the robbery and was hit on the left hand by one of the two robbers but he escaped and locked himself in a bathroom. He heard a gunshot and later when he came out he found P.W.3 in his car and P.W.1's car was later recovered near a river.

8. As for the Appellant, P.W.5 did not know him nor did he know the second robber. In cross-examination, he said as follows:-
"I never saw 1st accused.....at P.W.1's house."
The Appellant was the 1st Accused in the trial court.

9. P.W.6 Joel Mwitika an employee of P.W.1 recalled that at 8.30 a.m. on the material date he was with one Jackson and another, Stanley Kailemia when three(3) people came, one of whom had a green bag. They asked for P.W.1 and P.W.2 and then went away. That was at 10.00 a.m. later that morning P.W.1 sent PW.6 to a neighbouring home and as P.W.1's Range Rover vehicle was being driven out, P.W.3's vehicle was used to block the Range Rover and a man holding a pistol stepped out and shepherded the occupants of the Range Rover including P.W.6 into P.W.3's car. Shortly thereafter a shot rang out and the robbers drove off in P.W.1's Range Rover.

10. It is important to note that P.W.6 said that the robbers were three (3) in number and that he was able to identify the Appellant and the 3rd accused in the trial court as present during the robbery. He said further that the robber who was brandishing a gun was not one of the six persons charged with the offence.

11. P.W.6 attended an identification parade at Kamiti Prison on 5.9.2002 and he picked the Appellant in that parade as having been one of the perpetrators of the robbery.

12. In cross-examination, PW.6 admitted that he had not known the Appellant before 2.6.2002 but that he saw him twice that day (at 8.30 a.m. and during the robbery at 10.00 a.m.) He had the same black jacket on both occasions and also had big eyes and P.W.6 said that on both occasions the Appellant had not covered his face.

13. P.W.7 M’Kiana Kimbui gave evidence to the effect that he heard a gunshot at PW.1’s house on 2.6.2002 but he only saw the 4th accused running away past where he was heading. His evidence has no relevance to the case against the Appellant.

14. PW.8 IP Alfred Mateche conducted an identification parade in respect of two of the accused, none of whom is the Appellant and to that extent his evidence is irrelevant to this Appeal and we see no need to reproduce it merely for cosmetic purposes.

15. P.W.9 P.C.Wilborne Cheruiyot Kirui recalled that on 19.7.2002 at 8.30 p.m. he was on duty at a road block along Kangundo Road in Nairobi and was among officers conducting random searches on public service vehicles plying the road. In one of those vehicles was a passenger nick-named “Tall” who opened fire on the officers but was gunned down. A pistol was recovered from him and it was serial No.619221 with five (5) rounds of ammunition. Acting on more information during investigations into that incident, P.W.9 and five(5) other officers visited the Appellant’s house in Kayole and recovered a SMG patent gun with ammunitions and suspected stolen electrical goods. The gun was under a sofa while the bullets were beside a bed in the single room within Tushauriane area of Soweto in Nairobi.

16. P.W.10 C.I.P. Peter Njuguna Mwangi together with P.W.6 traveled to Kamiti Prison where he sought authority to conduct a parade for purposes of identification of a suspect who we now know was the Appellant. The purpose of the exercise was explained to him and he agreed to take part in it. He chose a place to stand and was picked as the suspect by PW6. The Appellant then complained that the parade was suspect as he had been in court the same day and knew the investigating officer in the present case.

17. P.W.10 produced the identification parade form together with the certificate accompanying it as is required by law.

18. In cross-examination P.W.10 denied that he had taken P.W.6 to Kibera Law Courts and pointed out the Appellant to him.

19. P.W.11 Peter Mweteli Koome did not know the Appellant and his evidence is wholly unhelpful with regard to this appeal.

20. P.W.12 Stephen Meeme a retired police officer received the report of the alleged robbery at the home of P.W.1 and later received a report of the arrest of the Appellant from Buru-Buru Police Station and was present when the identification parade was conducted at Kamiti Prison. He confirmed that the Appellant objected to the presence of P.W. 12 during the parade and P.W.12 kept away from the parade and was only called when it had been completed.

21. P.W.12 produced Exh.2, the gun allegedly recovered from the Appellant’s house and which was similar to the one that was used during the violent robbery at the home of P.W.1.

22. When put to his defence, the Appellant stated that the charges laid against him in the trial court were fabricated by police officers including one P.C. Wilson Kirimi and one Sgt. Muriuki Peter who were also witnesses in a robbery with violence case being Criminal Case No. 5831/2002 at Kibera Law Courts where the Appellant was the accused. He added that P.W.6, Joel Kirimi was taken to Kibera Law Courts on 5.9.2002 and P.W.12 pointed the Appellant out to P.W.6 and therefore the identification parade at Kamiti Prison later that day was irregular and that he pointed out the irregularity at the time that he signed the identification parade forms.

23. The Appellant denied anything to do with the robbery at the home of P.W.1 and denied being in possession of the gun allegedly used in that robbery and which was allegedly recovered at his house.

24. The trial magistrate was unconvinced by the Appellant's answer to the prosecution evidence and convicted him thus the reason for this Appeal.

25. The Appellant challenges his purported identification at the scene by a single witness, P.W.6 whose credibility he challenges on the ground that the said witness was unreliable and that the trial magistrate ought to have warned herself of the dangers of relying on such uncorroborated evidence. In support of this argument, the Appellant argues that the first report by P.W.6 to the police should have included a detailed description of the suspect and in that regard he relied on the court of appeal decisions in *Moses Munyua Mucheru vs R Cr. App. No. 63/1987 (UR)* and *Juma Ngondia vs R Cr. App. No. 13/83 (UR)* in support of this proposition

26. The other argument as regards identification is that the parade conducted at Kamiti Prison was irregular in view of the fact that P.W.6 gave no description of the suspect to enable the police properly conduct it and that where no such description as to features, clothing or anything else that would enable the witness recognize the suspect, is given then the same would be an unsatisfactory parade. The Appellant relied on the decision in the case of *Peter Njogu Kihika and others vs R. Cr. App. No. 141/1986 (UR)*

27. The Appellant also attacks the reason for his arrest and says that he was arrested on a tip off by an undisclosed person and no link was created between the robbery in question and himself as a suspect. He also states that it is unclear whether he was arrested with a "patchet" or "patent" gun or a "Taurus pistol".

28. Mr. Oluoch, learned Senior State Counsel supports the conviction and sentence and submits that the case rested on identification by P.W.6 who saw the Appellant twice on the date of the robbery and again picked him out at the identification parade which was properly conducted by P.W.10. Further, that the Appellant was arrested with a gun suspected to have been used in the robbery and all evidence against him was tight enough to sustain a conviction. He urged that the Appeal should be dismissed.

29. On our part, we wholly agree with both the Appellant and Mr. Oluoch that this Appeal should be determined on the two issues of identification by P.W.6 and the reasons for the arrest of the Appellant. We propose to start with the latter and note that what led to the arrest of the Appellant is unclear to us. The 2nd – 6th accused persons had been charged with the offence of robbery with violence against P.W. 1 and P.W.2 in Maua P.M.'s Court Criminal Case No. 1773/2002 and the Appellant was only later charged in Maua P.M.'s Criminal Case No.2303/2002. The two cases were consolidated and heard in the file relating to the latter. On what complaint was the Appellant then arrested?

30. P.W.9 P.C. Wilborne Cheruiyot Kirui had this to say in answer to that question; "I was called by the O.C.P.D IP Muga who stated that there was information that there were series of robbers (*sic*) that had occurred and there were people who were identified. We went to Kayole area with Sgt. Mureithi and we arrested one suspect who is Gitonga. He is in court (pointing to the 1st accused in this case). We were led to his house where we arrested him and upon search we found a SMG patent gun with ammunitions of 9mm and some electrical goods."

31. We should note that prior to his arrest, one man called "Tall" had been gunned down at a roadblock along Kangundo Road in Nairobi and a pistol belonging to P.W.1 recovered from him. What then is puzzling in this; if the Appellant was arrested because of suspicion that he was involved in a series robberies that had occurred in an undisclosed place and a rifle found in his house, what led the police to conclude that he was involved in the robbery at the home of PW.1 a month earlier? Granted, the robbers at the home of P.W.1 had a pistol and a gun but no witness specifically said that the gun used at the home of P.W.1 was of a particular type and to ask P.W.1, P.W.3 and P.W.4 to identify the one recovered from the Appellant's

house as the one actually used was a misdirection. A clear nexus must be created, in our view, between the complainant, the arrest of the suspect and the exhibit recovered for that nexus to have any value in evidence. It is difficult for this court to presume that possession of the gun is indicative of the presence and participation of the Appellant at the robbery when the foundation for that evidence is lacking. The Appellant may well have been a suspect in other robberies elsewhere but we see no reason why the police arrested him for the robbery now subject of this Appeal.

31. To illustrate our puzzlement with regard to the Appellant's arrest, P.W.12 Stephen Meeme had this to say;

"In July 2002, we got a report following a circulation of the complainants pistol which was J 619221 and 29 bullets of .38 special. We got the report from BB Police Station Nairobi that there was a robber who was arrested and another one shot dead and the pistol had been recovered. I and the D.C.I.O went to BB Police Station where I was shown the pistol and I identified it to D.C.I.O. It was a Taurus. I was shown the person arrested with it who is the 1st accused."

32. When one compares this evidence with that of P.W.9 reproduced above, it would be clear that P.W. 12 was saying something quite different. P.W.1's pistol was found with the man called "Tall" who was killed in a shoot-out with the police and not with the Appellant. He does not say why he arrested the Appellant in connection with the robbery at the home of P.W.1 and we maintain that there is no explanation for that arrest.

33. We should add that the missing link as regards the arrest would have been established had IP Muga been called to state the reasons why he suspected the Appellant of involvement in robberies. Other witnesses to fill in the gap would have been the person(s) who tipped the police off as well as those who led them to the house of the Appellant. Failure to call such crucial link witnesses may well lead to an inference that their evidence would have been adverse to the prosecution (see *Bukenya and another Vs Uganda* [1972] E.A. 549 as approved in *Richard Mokora Mariko vs R Cr. Appeal No. 86/2006 (UR)*).

34. We must now turn to the all-important question of identification. We have stated above that P.W.6 said that he saw the appellant initially at 8.30 a.m. and the second time at 10.00 a.m. on the date of the robbery. It is important to note that at 8.30 a.m. he said that three men had come looking for P.W.1 but at 10.00 a.m. only two came. One was tall and had a gun while the other, he said, was the Appellant. Again we would have been happy had one Stanley Kailemia and another, Jackson been called to give evidence as they were allegedly together with P.W.6 when the robbers first came. How did P.W. 6 identify the Appellant? He said that he saw his uniquely big eyes and he had seen him twice on that day. Did he make that report to the police? He stated that he told the police that the 3rd accused and not the Appellant had come in the morning to ask for P.W.1. P.W.12 who received the report of the robbery from his seniors at C.I.D. office, Maua said that "at a later date we sent an employee of the complainant who stated he could identify the suspects." To put this statement in context, it was after the arrest of the appellant that P.W.6 offered to identify him. No clear report was made to the police at the time of the robbery as regards the participation of the Appellant and we have said that the reasons for his arrest are much more unclear.

35. As regards the Identification Parade, we have no doubt that it was conducted at Kamiti Prison and that the Appellant properly also raised issue as to the presence of the Investigating Officer whom he had seen at Kibera Law Courts on the date of the parade and whom he feared would influence the witness. We have seen the proceedings in Kibera CM's Court Criminal Case No.5831/02 (D.Exh.1) and it is true that the Appellant was in court on that day. We also note from the evidence of P.W.10 that he spent the whole day in the company of P.W.6 and P.W.12 and it is more likely than not that they traced the Appellant to Kibera Law Courts as claimed by the Appellant with a view to organizing the conduct of the parade.

To that extent we are unconvinced that the parade was properly conducted and the Appellant's objection to it which was properly recorded in the parade form has to be upheld.

36. We have seen the evidence of P.W.6 and it is impossible not to find that it is incredible because of all witnesses present that day it was only he who claimed to have seen the Appellant and yet he made no report of it and gave no serious description as to his features prior to the parade. We have thus faulted the influence of P.W.12 in the conduct of parade in any event.

37. Before allowing the Appeal, we shall say one more thing; the Appellant was arrested because of suspected involvement in a series of robberies and we note that in Kibera P.M.'s court Criminal Case No. 583/02, he was actually charged with a number of counts of robberies and with possession of suspected stolen electrical goods as was stated by P.W.9. Incredibly he was also charged with an offence relating to the patchet gun produced in the robbery case subject of this Appeal. We do not see that the way to punish a suspected robber is to subject him to double jeopardy in the manner we have seen in this case.

38. On the whole therefore we find that the case against the Appellant was not proved beyond reasonable doubt and we can only agree with the court of Appeal in Suleiman Juma alias Tom vs R Cr. Appeal 181/02 (Msa) that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. The evidence of P.W.6 which was used to convict the appellant, looked at in the totality of this case is not water-tight and the trial court ought to have weighed that uncorroborated evidence before conviction.

39. The Appeal is found to be meritorious and we shall set aside convictions on both counts and set aside the death sentence imposed on the Appellant.

40. He shall be released unless he is otherwise lawfully held.

41. Orders accordingly.

Dated, signed and delivered in open court at Meru this 28th Day of September 2006.

ISAAC
JUDGE

LENAOLA

RUTH
JUDGE

N.

SITATI