



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 124, 125, 126, 127, 128, 129 of 2001**

JAMES MUTURI KURIA (WAMUTHONI).....1ST APPELLANT

Versus

REPUBLICRESPONDENT

CRIMINAL APPEAL NO. 125 OF 2001

NAFTALI MUMO MWANGI2ND APPELLANT

Versus

REPUBLICRESPONDENT

CRIMINAL APPEAL NO. 126 OF 2001

MAINA GACHAU (Alias) PILOT3RD APPELLANT

Versus

REPUBLIC RESPONDENT

CRIMINAL APPEAL NO. 127 OF 2001

DAVID KIRAGU THUO (Alias) RASTA4TH APPELLANT

Versus

REPUBLICRESPONDENT

CRIMINAL APPEAL NO. 128 OF 2001

STEPHEN WACHIRA GITUNDU5th APPELLANT

Versus

REPUBLICRESPONDENT

CRIMINAL APPEAL NO. 129 of 2001

JOHN MWANGI KINOGA.....6th APPELLANT

Versus

REPUBLICRESPONDENT

(An appeal from the Judgment of F.F. Wanjiku , Senior Principal Magistrate, dated 5th April, 2001;

In

Criminal case No. 839 of 1999, Senior Principal Magistrate's Court, Murang'a).

JUDGMENT

The appellants were charged in thirteen counts of robbery contrary to section 296(2) of the Penal Code. Facts alleged that on 10th April, 1999 at Kayahwe area along Murang'a Kahuro main road in Murang'a District, the appellants while armed with dangerous weapons namely home made pistols, and pangas, jointly robbed James Kariuki Mwangi of a motor vehicle Reg. No. KAE 077 Y Toyota Matatu valued at Kshs.700,000/- , car radio and cash Kshs. 6,800/-, all to the total value of Kshs. 711,800/-. They also robbed Stephen Muchiri Kshs.5,000/-; Wainaina Mwangi two pairs of shoes, two handbags, seven Kenyatta University borrowing library cards and cash Kshs.300/- all to the total value of kshs.4,500/- ; Paul Murimi Wanjiru of cash Kshs.500/-; Patricia Mugi Kshs.800/-; Catherine Wairimu kshs.1150/-; Patrick irungu Gichuhi Kshs.1850/-; John Mwiako Kshs.4,000/-; Loise Wanjiru Mwangi kshs.4,800/- and a wrist watch all to the total value of Kshs. 4950/- ; Rachael Wambui Mwangi Kshs.250/-; Sophia Muthoni Wachira a handbag and clothing valued at Kshs.10,000/-; Paul Irungu Kshs.220/-; James Maina Kshs.1800/-; and at or immediately before or immediately after the time of such robbery used personal violence to the said complainants in counts one to thirteen.

The fifth Appellant alone faced count fourteen possession of ammunition without a firearm certificate contrary to Section 4(1) of the Firearms Act while the First appellant was charged alone in an alternative count of handling stolen goods contrary to Section 322 (2) of the Penal Code. The two were each acquitted in the alternative count in which they were so charged.

Each one of the six appellants was convicted and sentenced to a term of imprisonment on each of counts one to thirteen, the sentences being ordered to run concurrently. Each appellant has appealed against his conviction and sentence and we consolidated the six appeals for hearing. We, however, warned the appellants of the danger of proceeding with hearing of their appeals because if the appeals are dismissed we would enhance the sentences to impose the mandatory death sentence which the trial Magistrate avoided to impose when he reduced the offence from those under Section 296(2) to Section 296(1) of the Penal Code. Appellants elected to proceed with hearing of the appeals each appellant appearing in person as Mr. Orinda, the Provincial State Counsel, appeared for the Republic Respondent.

From the evidence, motor vehicle Reg. No.KAE 077Y Toyota Hiace was a matatu and had left Nairobi at about 4.00 p.m. for Mugoiri carrying passengers who included the Appellants. The driver of the vehicle was James Kariuki Mwangi who gave evidence as P.W.1. He told the court he had been employed by the owner of that motor vehicle as a driver for nine months operating between Nairobi and Mugoiri. Having left Nairobi at 4.00 p.m. for Mugoiri on 10th April, 1999, one of the passengers said was alighting at Kayahwe River and therefore P.W.1 stopped the vehicle for the passenger to alight at about 6.00 p.m. Instead of seeing that one passenger alight, P.W.1 saw more than one person standing at the rear with pistol and pangas ordering other passengers to give whatever they had and P.W.1 handed over the driving of the motor vehicle to one of the people standing who started driving towards Muchungucha. The conductor jumped out and run away as the vehicle turned towards Gatundu into a path where it got stuck. The rest of the passengers were left there as the Appellants carrying their loot, abandoned the motor vehicle and walked away. P.W.1 told the court the six men took Kshs.6,800/- from him. They also took radio cassette. P.W.1 said he saw them well and identified them. Other people went to assist the victims and they reported the matter to the police at Kahuro. P.W.1 added that after he recorded his statement he later heard the appellants were arrested. He

claimed to have identified the appellants “in various times”. He said the first accused, now the fourth appellant, was the driver. He said a radio cassette was recovered and he identified it (MFI 1).

After this witness saying he saw the robbers well, he went ahead to say

“I had not seen them before. I did not see them well but they were with this pistol MFI 11, panga (MFI 111) Another MFI 1. panga MFI V.”

The last part is not clear but during cross examination by the Fourth Appellant, the witness claimed that the Fourth Appellant had told them – the victims- to look at him- the fourth Appellant. This witness gave a similar statement against the third accused, now second Appellant and that raises in our mind, a question whether P.W.1 is not a loose talker. How could robbers be instructing victims to look at the robbers during the course of the robbery? We however realize it is possible depending on the mood of an individual robber in a particular situation.

A look at the evidence of P.W.1 during cross examination would tend to confirm he was a loose talker. After telling the court that the Fourth Appellant took over the driving of the motor vehicle during the robbery, he (P.W.1) later told the second accused, now the Third Appellant, during cross examination, that he saw the Third Appellant go to take over the vehicle. But at that time he, P.W.1, was moving from his side to the left side yet the Third Appellant, according to P.W.1, was originally seated next to P.W.1 from Nairobi.

When cross examined by the Third Accused, now second Appellant, P.W.1 said he did not realize the second appellant was on the vehicle until the vehicle got stuck in mud at Muchungucha and the conductor ran away. That is the time P.W.1 was able to turn to look behind and therefore saw the second appellant as he had not been seeing all passengers from Nairobi. We would have thought that when P.W. 1 was displaced as a driver, he was free and in a position to turn and see every corner of the motor vehicle as the vehicle was driven by one of the robbers as there is no evidence that robbers prevented him from freely looking around. He said the incident took about 25 minutes and that the motor vehicle had 18 passengers.

Although he had said in his evidence in chief that none of the victims shouted and mentioned no incident of beating, during cross examination he claimed people were being beaten. He said that in his report to the police, he did not give a description of the robbers and when he went as a witness at police identification parade, he was made to stand at the report office from where he saw the suspects passing.

P.W.2 was Paul Wainaina Mwangi, a Kenyatta University student who was traveling from the University to his home at Kahuro during the holidays. He was one of the passengers on the matatu and was on a seat behind the driver. He said the vehicle stopped at Kayahwe bridge for one passenger to alight but instead of that passenger alighting P.W.2 heard a command in Kikuyu from among the passengers behind him ordering the rest of the passengers to look down and keep quiet and as P.W.2 was responding he saw a gun being pointed at the driver who was being told to surrender the motor vehicle. One of the two passengers in the driver’s cabin took over the driving and the vehicle made a U turn and was driven towards Muchungucha, then towards Kahuro as victims passengers, on command, surrendered what they had to the robbers. The robbers took a pair of shoes from P.W.2, his two handbags with eight University Library Cards having the name of P.W.2. He also gave the robbers Kshs.300/- . They left his clothes, from the bags, on the floor. Subsequently the motor vehicle got stuck and the robbers left their victims on the motor vehicle and went away. The library cards were hidden inside a side pocket of the handbag.

This witness, like P.W.1, claimed that before the robbers left, they asked victims to look at them properly. Those were robbers who had initially commanded their victims to look down and keep in that position.

P.W.2 claimed to have been able to identify the robber who was seated next to the driver in the driver’s cabin and told the court he picked that person at the identification parade and was in the trial the second accused, now third appellant.

After P.W.2 recorded his statement with the police, he was later informed his two bags, pair of shoes and University cards were recovered. He identified them at the police station and in the trial court.

P.W.3 was the motor vehicle conductor who ran away before anything was robbed from him. But told the court how one of the passengers claimed he wanted to alight and P.W.3 caused the driver to stop for the passenger to alight. Instead of alighting, there was hijacking of the motor vehicle and P.W.3 had to run and escape later. He went and reported the matter to Kahuro Police Station. He said he subsequently went to the identification parade but his evidence is not clear whether he identified one suspect only or identified all the suspects. He appears to have been one person the third accused, now second appellant.

P.W.4, Stephen Muchiri, another passenger victim told the court that three of the robbers had pistols and one a panga when they took Kshs. 5,000/- from him before the motor vehicle he referred to as Nissan got stuck and the robbers abandoned the motor vehicle. He said he identified the Third Accused, shows Second Appellant, on the identification parade. But did not connect that identification with the one he said he had of the person who took his money and struck him.

P.W.5, Paul Murimi Wanjiru, also a passenger victim, explained what happened as the motor vehicle was hijacked before it got stuck into a ditch and his money taken and he subsequently identified the second accused, now third Appellant, and the First accused, now Fourth Appellant, at police identification parade. He talks as if the Fourth Appellant had what he described as “**rasta**” hair and that the Third Appellant had an ear cut but it is not clear whether the witness was saying these because he was seeing the Appellant in court.

The above five witnesses were the only witnesses who were on the hijacked motor vehicle and gave evidence in the trial. Out of the five witnesses P.W.3, Peter Ithigu Mwangi, the vehicle conductor was not robbed anything and therefore was not a complainant. It follows that only complainants in counts one to four gave evidence. The six remaining witnesses therefore gave evidence either as arresting officers or officers conducting police identification parades or officers recording statements from accused persons.

Starting with arresting officers, Inspector Francis Kamande, then at Murang'a Police station, gave evidence as P.W.7. He told court that on 10th April, 1999 he was at Murang'a police station when he received information concerning the hijacking of motor vehicle Reg. No. KAE 077 Y and that the hijackers were driving it towards Kahuro. In the company of Inspector Njoka, Sergeant Mwaura Corporal Koech and Corporal Muriithi took a landrover and went towards Kahuro. While on the way they received information the vehicle had been abandoned at Gatundu. They went to Gatundu and having seen the motor vehicle, they went for a police dog handler from Murang'a.

They subsequently received information the suspects had been seen going to the home of one Thuo. They were taken to that home and saw some four people sitting outside smoking. By then there was darkness but Inspector Kamande's team could see fire on lighted cigarettes although it was raining as the suspects were sitting next to a house wall.

The police officers having taken positions to enable them arrest the suspects, confronted the suspects in that home, first firing in the air to command respect as the suspects outside the house were ordered to lie down in the presence of a police dog – the officers converging towards the suspect house as pre-arranged. They confined the four suspects outside the house, and entered with the suspects into the house as the officers looked for the missing two suspects the information they had being that the suspects had been six.

In the house there was a tin lamp and inside a bedroom the officers found one other suspect covering himself under a mattress on a bed. The suspect with "a rasta" was ordered to uncover himself and obeyed and was apprehended and found in possession of a home made toy pistol. The suspect was tied like the first four had been and was taken to where the four were as the police continued to look for the sixth suspect whom they found under a bed in a table room. The suspect was struggling to cling on the bed so that he remains hanging under it to avoid being seen but unfortunately he lost the grip and as he fell down with his plastic home made toy pistol, he was discovered and apprehended. This suspect was said to be the Fourth Accused, now First Appellant, while the one found hiding under a mattress was said to have been the First Accused, now Fourth Appellant. The four suspects who were found outside the house were also found in possession of another toy pistol.

All those pistols were produced as exhibits during the trial. Inspector Kamande told the court that he saw three bags but did not know the contents as he did not check the bags as he subsequently left the case with CID personnel after the suspects were taken to Murang'a Police Station.

Corporal Joseph Koech, then of the CID personnel at Murang'a, gave evidence as P.W.9. Apart from repeating what Inspector Kamande told the court added that among the recoveries were Kenyatta University Library cards and a pair of shoes which had been marked MFI 9 and 8 respectively when P.W.2 was talking about them telling the court he had identified them after they had been recovered. Corporal Joseph Koech produced them as exhibits.

Among the recoveries Corporal Joseph Koech produced as exhibits was a radio cassette which P.W.1 had identified as MFI 1 he said had been taken from the hijacked motor vehicle.

On the evidence of officers conducting identification parades, there was Inspector Mutuku of Kahuro police station who said that on 4th April, 1999 at about 4.40 P.M. he conducted identification parade having been requested by Sergeant Mwaura to do so. This witness was P.W.8 and although he said conducted the parade on 4th April, 1999 and the identification parade forms he produced as exhibits 13 and 14 have the date 12th April, 1999, and bearing in mind that the offence of robbery is said to have been committed on 10th April, 1999, no effort was made either by the prosecution or the trial Magistrate to remove the anomalies thereby leaving us with no reliable evidence from identification parades conducted by Inspector Mutisya Mutuku.

Another problem we find concerning the evidence of identification parade is that another police Inspector Joseph Gitonga was on the same date, at the same time, apparently at the same police station Muranga conducting another identification parade and it is not clear from the evidence how the police managed to conduct all those parades smoothly and correctly.

Further we note that the issues raised before us by appellants during the hearing of these appeals were not raised by the appellants before the trial Magistrate. But reading the evidence of P.W.1 and P.W.3, it is apparent that witnesses were being given the opportunity to see suspects before the witnesses went to the parade to identify the suspects also suspects were made to look easily identifiable. That may explain why no witness failed to identify the suspect the witness was sent to a parade for.

From the above short comings therefore, we find the evidence concerning police identification parades useless in these appeals.

We now move to the evidence from statements recorded from some of the Appellants as by then the law governing admission of such statements in the evidence at trials had not been repealed. First, was the a charge and caution statement recorded by Inspector Zablou Shitanda, P.W.6, on 15th April, 1999 from the second Accused, now Third Appellant. That statement was admitted in the evidence following a trial within a trial. It was a confession in which the Third Appellant clearly admitted having been one of the robbers in this case. He said he was the one who took over the driving of the hijacked motor vehicle from P.W.1 and drove it upto the place where they robbed victim passengers before the robbers abandoned the motor vehicle and proceeded with their loot to a home where the police found and arrested them after they had shared out the money they –robbers-had robbed.

Having been retracted, that confession needs corroboration.

The other statement to consider is the one recorded by Inspector Daniel Musao who gave evidence as P.W.11. Recorded on 15th April, 1999 from Naftali Mumo Mwangi the Third Accused now Second Appellant. The statement was also admitted in the evidence following a trial within a trial as the Appellant had retracted it. It was a confession in which the Second Appellant clearly admitted having been one of the robbers in this case. Having been retracted that confession also needs corroboration.

With that, we end our overview of the prosecution's evidence. We now turn to the defence evidence starting with the First Appellant –James Muturi Kuria Wamuthoni. He was the Fourth Accused and defended himself on oath.

His defence was very brief talking of an incident on 10th April, 1999 when he was arrested by the Police while taking traditional liquor in the evening at the home of the First Accused. Although he said "We were arrested" he did not reveal the other people arrested and taken with him to the police station Muranga. He said he had gone to that home at about 1.00 p.m. . He said that what Inspector Kamande said about him was not true.

The Second Appellant who was the Third Accused denied that he committed the offence. He said that on 10th April, 1999 he had gone to the home of his aunt and was with the Sixth Accused. They found the First Accused who entertained them with beer. As they continued taking beer till 7.30 p.m, police officers went to the place and arrested him and his, co-accused as they did not run away when other people run away. During cross examination he said they were many people where they were drinking but it was only six people who did not runaway and were arrested. Rasta was arrested from inside the house. He said the First Accused was his cousin and their witness was their aunt.

The Third Appellant who was the Second Accused told the Court, also on oath, about his arrest on 10th April, 1999 from the house of Kiragu when taking traditional liquor. He was with the Fourth and Fifth Accused and they were there until about 7.30 p.m. when they were arrested by the police and taken to Murang'a Police station. The Third Appellant denied having participated in the robbery arguing that the whole day he was at Kahuro and never boarded any vehicle. The arrest was at the home of the First Accused.

The Fourth Appellant who was the First Accused told the court that on 10th April, 1999 he was at his home at Mugoiri with people who were taking traditional liquor until about 7.30 p.m. when police officers came and customers who were outside started running away. He entered the house to hide the liquor. He heard a gun shot and as he was getting out, he met police officers who arrested him and took him to Muranga Police station . During cross examination, he told the court that the house in which he was found was his. He did not accept he was arrested while in bed hiding under a mattress. He said nothing was recovered from him. He added that what witnesses said against him was lies. He accepted that by then he had "Rasta".

The Fifth Appellant who was the Sixth Accused defended himself saying on 10th April, 1999 he went with Mumo to his aunt's home where they were welcomed by the First Accused who gave them traditional liquor and they started drinking many people. About 7.30 p.m. he heard gun shots and saw people run away as he remained because he had seen nothing. Police found him and arrested him taking him to Muranga Police Station together with his co accused.

The Sixth Appellant who was the Fifth Accused told the court that on 10th April, 1999 he went to take traditional liquor with Muturi and Maina Gachao and that Kiragu was selling the liquor. They were there by 12.30 p.m. . At 7.30 p.m. police officers went and arrested them and took them to Muranga police station. He also claimed some people run away. No body was shot. Nobody was caught by police -dog which was present with the police. He did not accept he was in Nairobi and became a passenger on the hijacked motor vehicle.

Joyce Muthoni Thuo gave evidence as a defence witness after attending court sessions and listening as prosecution witnesses gave evidence against the appellants. She told the court she was the mother of the Fourth Appellant and that the Second Appellant was a son of her sister and that the First Appellant was a person who had supplied her with building material and that the Fifth Appellant was a friend of Mumo . She did not know the Third and Sixth Appellants.

She said that Naftali Mumo went to her home on 10th April, 1999 at 10.00 a.m. with the Fifth Appellant and the Fourth Appellant found them there when he came from shamba work. They ate and took liquor and were joined by the First Appellant who was with other people. It started raining at 4.00 p.m. and no customer left and nobody went to her home. At 7.30 p.m. police officers came and asked her whether she could tell them the owner of the home. She told them that was the home of Thuo Ngecha. When she saw more police officers come in a landrover ,she ran away and police shot in the air. She said she was one of those taken to Muranga Police Station. Spent the night there and was released the following day.

She claimed some people run away at the time of the arrest and that all the accused persons were in her house. The dog was not released and no body was shot. She said what the police told the court was lies. She said the accused were in Nairobi.

That concluded defence evidence where all accused persons were sworn and therefore got cross examined by the prosecutor as was their single witness.

That over view puts us in a better position to move to the conclusion bearing in mind what has been said on each side during the hearing of these appeals. Perhaps it is better to point out at this stage that in the circumstances of this case, it was not necessary for the prosecution to prove ownership of the hijacked motor vehicle. What the prosecution needed to do was to prove the robbery and further

prove that Appellants were the robbers. Further, we find nothing wrong with the way the said motor vehicle was produced as an exhibit.

Otherwise this was robbery which took place during the day motor vehicle Reg. No. KAE 077 Y having left Nairobi at about 4.00 p.m. with 18 passengers who included the suspected robbers. The hijack incident at about 6.00 p.m. by six out of the 18 passengers who had been freely mingling a short while earlier. The ordeal did not take more than one hour as within a duration of less than one hour the robbers carried away their loot abandoning victim passengers on the motor vehicle which was by then struck in a ditch. As the robbers walked away, they were being seen by victim passengers and the legitimate driver and some of these victims told the trial court that some of the robbers were even asking the victims to look at them properly at the time the robbers were leaving although during the process of robbery victims were commanded to look down and some have claimed were ordered to lie down and were beaten.

Police subsequently messed up the evidence of identification which we therefore find difficult to use as we cannot improve that evidence. But there is evidence that as information concerning the robbery quickly spread around the area of the robbery, police got information concerning the whereabouts of the suspects whose number six became known. We have found nothing to show that police begun acting on that information after they had been contacted by victims. It looks like the police took action before they met victims as that was the same evening between 7.30 p.m. and 8.00 p.m. when all the six suspects were arrested by the police at the home of the Fourth Appellant and taken to Murang'a Police Station with recovered weapons and exhibits as evidence of the hijacked motor vehicle was there for everybody who went to the scene to see.

Details concerning the arrest, for example, what Inspector Kamande said as compared to what Corporal Koech said as to where the First Appellant was in "Rasta's" compound at the minute of his arrest and whether or not "Rasta" was in or on or outside bed with or without mattress at the minute of his arrest, do not matter-in the circumstances of this case. What is important, in our view, is that among the recoveries the arresting police made, were not only dangerous weapons but also a car radio cassette which had been removed from the hijacked motor vehicle and was subsequently identified by the then regular driver, P.W.1, and the conductor P.W.3, of that motor vehicle. Also so recovered were two handbags and a pair of shoes belonging to P.W.2 a Kenyatta University student who subsequently identified the items. Moreover one of the bags had the student's University Library Cards each with his name on—kept inside a side pocket which the robbers seem to have had no time to check and throw out the contents as they had done with the cloth contents of the bags P.W.2 said the robbers poured on the floor of the motor vehicle before taking away the bags.

We think the recovery of the radio cassette, the two handbags, the pair of shoes and the University Library Cards provided a strong connecting link between the Appellants and the robbers. That link is more strengthened by the fact that recovery was made within a matter of only a few hours from the time of robbery. With respect to the Second and Third Appellants, the aforementioned evidence corroborates the confession of each of those two Appellants. Although each of the six appellants, in his defence, has tried to distance himself from the robbery, it is our view that none of them has succeeded in distancing himself.

There is no evidence that the money robbed was recovered although some may have been recovered but nobody simply wants to talk about it, and it is apparent to us that Appellants sat down to work out water tight defence to defeat, together with their witness Joyce Muthoni Thuo, the prosecution's case. Each therefore avoided mention of recovered robbed exhibits which were found in the house where the Appellants were.

We hold that the defences advanced were framed defences to defeat the course of justice as none of them was a truthful defence. We are strengthened in that decision bearing in mind that even the Second and Third Appellants, who confessed to the robbery, came out with the type of defence each put on record. These cannot, be truthful people. We reject the defence advanced by each appellant.

We must however point out that the robberies proved during the trial were robberies as set out in counts one, two, three and four only. Counts five to thirteen were not proved the victim or complainant in each count having failed to give evidence in support of what the robbers are alleged to have done against her or him. Appellants should not have been convicted in counts five to thirteen and in that respect we do hereby allow each appellant's appeal with respect to counts five to thirteen. Quash his conviction and set aside the sentences on each of counts five to thirteen.

We dismiss the appeal of each appellant with respect to counts one to four.

But as we said at the beginning, the appellants were convicted and sentenced under Section 296(1) instead of Section 296(2) of the Penal Code. The robbers were six. They were armed with dangerous weapons. They used violence during the robbery although the violence used did not result into injury, which was not necessary in any case. Rightly, conviction and sentence ought to have been under Section 296(2).

We warned appellants against the danger of proceedings with prosecution of their appeals. They elected to proceed with prosecution of the appeals and have to face the consequences as the learned Provincial State Counsel also submitted that the conviction and sentence be under the correct law.

Accordingly, we do hereby quash the conviction of each appellant under Section 296(1) of the Penal Code on counts one to four and set aside the sentence imposed in each count thereof.

We do hereby substitute the conviction of each appellant in counts one to four with a conviction under Section 296(2) of the Penal Code respecting each count.

In the circumstances, each appellant is hereby sentenced to suffer death as mandatorily provided by Section 296(2) of the Penal Code and other enabling Provisions of the law in respect of count one. Sentences on counts two, three and four be in abeyance.

Dated this 27th day of September, 2006.

J.M.KHAMONI

JUDGE

H.M.OKWENGU

JUDGE