



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

Criminal Appeal 386 of 2003

SAMUEL NGIGI MBURU
APPELLANT

Versus

REPUBLIC
.....RESPONDENT

(An appeal from the judgment of G.K. Mwaura, Senior Resident Magistrate dated

14th October, 2003;

In

Criminal case No. 1095 of 2002 of the Senior Principal Magistrate's Court, Muranga.)

JUDGMENT

The Appellant was charged jointly with five other persons with the offence of robbery with violence contrary to Section 296(2) of the Penal code in two counts. Particulars of the first count were that on the night of 20th and 21st August, 2002 at Kahatia Market in Muranga District, Central province, the Appellant jointly with his co-accused persons as well as others who were not before court, while being armed with dangerous weapons, namely firearms, pangas and axes, robbed Jim Geoffrey Gatimu one portable computer lap top, two mobile phones make Erickson T 28 S/No. 9567312802 and Siemens C 35 Serial No. 449191562829339, all valued at Kshs. 130,000/- using personal violence to the said Jim Geoffrey Gatimu .

In count two the victim of a similar robbery on the same date at the same market was Nelson Kimani who was robbed a wrist watch, make, G.K. Calvin Klein valued at Kshs.1,500/-.

There was an alternative count of handling stolen property contrary to Section 322 (2) of the Penal Code concerning the Siemens Mobile Phone, but the Appellant was convicted of robbery in each of the two main counts which the Magistrate reduced from Section 296(2) to Section 296(1) of the Penal Code and therefore sentenced the Appellant to ten years imprisonment on each count and ordered that the sentences run concurrently. His co-accused were each acquitted. Appellant appealed against his conviction and sentence and although warned of the danger of proceeding with his appeal because if unsuccessful the sentence could be enhanced, the Appellant decided to go on with his appeal. He was represented by Mr. Mwangi, Advocate, while the State was represented by Mr. Orinda, the Provincial State Counsel.

The evidence which led to the conviction of the Appellant was possession of the Siemens Mobile phone which possession, in itself is not in dispute. What is in dispute is the place at which the mobile phone was found and ownership of the said phone. Otherwise the learned trial Magistrate considered the rest of the evidence and rejected it. That was why she acquitted all the other accused persons. Briefly the evidence was as follows:

Jim Geoffrey Gatimu, who gave evidence was P.W.1, was on duty as a night watchman at the premises of Equity Bank at Kahatia when the robbers struck. The robbers first went to the place where Joseph Chege was guarding at about 1.00 a.m. They were in a white Nissan matatu and two other motor vehicles. As Joseph Chege who was suspicious was informing some other watchmen about the presence of the vehicles, he was approached by five people from the motor vehicle three of them in police uniform and two of them in civilian clothes. The later pretended to be under arrest by the three people in police uniform, who seemed to be on duty, trying to deal with a robbery they claimed was taking place in the town and wondered why the watchmen did not know anything about it.

The three men in police uniform gave instruction for all watchmen in the area to gather, asking specifically for watchmen at a near by Equity Bank. That instruction having been obeyed, the three men in uniform commanded the watchmen to lie down facing down as the two men in civilian clothes now joined the three in police uniform, to tie and confine the watchmen. That was at Equity Bank which the five men broke into by the use of a wielding flame and after a while they dragged the watchmen into the bank and drove off. The watchmen untied themselves and the matter reported to the Bank Manager and Kahuro police station. A group of police officers visited the scene and found the robbers had broken the bank's main door and the inside doors. They had attempted to break the safe but were not able. The bank Manager reported that two mobile phones and a lap top computer were missing.

Nelson Kimani who resided at a house that neighbours the bank had heard the breaking in going on and when he went outside his house to check what was happening, was caught by the robbers and taken to the bank joining the watchmen. That was when his Calvin Klen watch was taken by the robbers.

Joseph Chege managed to have noted the registration number of the Nissan matatu and gave the number to the police who circulated that number to other police stations as KAG 583 P.

At 5.00 a.m. Corporal John Mwangi who was manning a police road block at Kabati received the robbery report and at 7.00 a.m. the suspect Nissan Matatu arrived at the road block and he stopped it and arrested the accused persons. At the time of that arrest the Appellant is said to have been in possession of two mobile phones, a Nokia and a Siemens C 35 and Cash Kshs. 4,000/- . Also a charger for the Siemens mobile phone. The matatu had two gas cylinders and a police badge. The siemens C 35 mobile phone was later identified by employees of Equity Bank as one of the two stolen phones.

The watchmen having told the police that they saw the robbers and identified the robbers, the investigating team organized identification parades in which the Appellant was one of the suspects identified before he was charged jointly with other suspects as stated earlier.

In his defence the Appellant told the trial magistrate that on 20th August, 2002 he travelled to Karatina Market where he purchased green grocers. He began his journey back the following morning and boarded a matatu which was eventually stopped at Kabati road block by police officers. He told the court that when he spent the night at Karatina, he had given his goods to a lorry to transport them to Nairobi as he came from Kiambu where he was a businessman.

At the road block at Kabati the police took him to Kabati Police Station where the driver and the conductor were placed in police cells before the police did the same to him after questioning about what he was doing. Subsequently taken to Muranga Police station and Sagana Police Station where he was when the police wanted him to take them to his house in Kiambu District and they had to take him to Muranga Police Station to take his house key from his wife who had been left in the police cells at Muranga.

He got the key and he took police officers to Kiambu where his house was. The police searched the house and took a phone handset and its charger. The phone was siemens mobile phone. The Appellant was returned to Muranga Police station. That was on 22nd August, 2002.

He said he was held at Muranga Police Station for about 10 days during which period his wife was released by the police. She went home and brought the siemens phone receipt which the Appellant gave to the investigating officer who told the Appellant that it was not his job to take that receipt as the Appellant had to show it to the court himself. The Appellant said he was talking about the siemens mobile phone then exhibit 8 before the trial Magistrate. He told the court he had bought it on 5th May, 2002 from Excellent Mobile Telecommunications at Trade centre. He said the receipt showed the serial number was 449191562829339. He said he bought it for Kshs.7,950/- . But he had not acquired a line for the phone as he had only bought the handset.

The Appellant had the receipt in court and showed it to the court with the serial number 449191562829339 recorded. But it was not produced as an exhibit as counsel defending the Appellant somehow decided not to produce it. As the Appellant made his defence unsworn, he was not cross examined.

Corporal John Mwangi under whose command the police stopped the Nissan matatu vehicle KAG 583 P at Kabati did not search on the spot the six people he said he arrested . He ordered them out of the matatu and locked them in a police land rover which took them to Kabati Police station where they were searched and the recoveries made. He gave evidence as P.W.12 and told the court that he searched the six people he had arrested from the suspect matatu after he had taken them to Muranga District C.I.D. office and recovered the items recorded against each suspect. From the Appellant, he searched and recovered two mobile phones, a Nokia and a Siemens C 35 and Kshs.4,000/-. The two phones were in court reflected in an inventory list P.W.12 said had prepared and produced it as exhibit 21. It contained what P.W.12 said was recovered from each accused person and according to that evidence, other mobile phones and amounts of money were recovered from other accused persons in the case.

By the time of the trial , the motor vehicle and two cylinders claimed to have been on the motor vehicle under the seats were at Muranga Police Station and became exhibits 38 and 39 respectively. Also the badge and four torches – the badge from the floor too.

Serial numbers which each cylinder had was not recorded in P.W.12's inventory list exhibit 21. Numbers not also in the OB report written by P.W.12. The OB report said the search was done by Report Personnel at the police station.

Concerning the Siemens phone and the charger attributed to the Appellant, P.W.12's record in the OB did not give number of the phone and did not give descriptions of the charger.

This witness did not admit having seen another matatu Reg. No. KAK 279 G at the road block on that day at the same time he stopped and detained the matatu he alleged the accused persons were found on. He said that apart from the search he did after being asked to do so at the Police Station, police officers on duty at the report office did another search. But the OB record said the search was by officers at the report office.

What P.W.10, Andrew Njake Karuri ,told the court is worthy noting too. He told the court that he was a brother in law of one Stephen Macharia Muriuki, a branch manager of Equity Building Society at Kabati; and that on 21st August, 2001 as a visitor of his said brother in law, the brother in law sent him and he went and bought a siemens mobile phone C 35 for Kshs.8,500/- . He bought it in his name and was issued with a receipt . But took the phone to his brother in law same day with connection documents at Kabati having bought it at Nairobi where he had bought it from a stall known as FONETECT Communication. This witness did not agree with the suggestions that by then such a stall was not in existence at that place.

The then Equity Bank, Kabati Branch Manager gave evidence as P.W.11 saying his name was

Stephen Macharia Mwangi. He supported what P.W.10 had told the court but could not give the serial number. The phone was given to him and used it until he left it to the incoming Branch Manager as P.W.11 went on transfer to Nairobi in February, 2002. He did not explain why he had to send his brother in law, apparently not an employee of Equity Bank then, to buy the phone and buy it in his (P.W.10's) name, instead of sending a co-employee in the bank to buy the phone. Evidence therefore came out that the phone was bought by the bank and belonged to the bank in disregard of the fact that the phone was bought in the name of P.W.10.

The mobile phone in question was not in possession of P.W.1 Geoffrey Gatimu who did not even seem to have known it. He only learned after the robbery that some mobile phones were among the things that the attackers had taken away from the bank premises. Hence claim to identification of the phone found in the evidence of P.W.10, P.W.11 only the latter mentioning marks P.W.10 did not seem to have seen as P.W.10 relied on his name in the cash sale receipt which was not produced in the evidence after the defence counsel wanted the maker of the receipt to produce it and the prosecution failed to bring the maker to give evidence to produce the receipt.

Going back to the defence case, the evidence of D.W.1 Stephen Mwangi Murimi, prison warden No. 21513 from Muranga G.K. Prison, is worthy noting. He came as a defence witness and told the court that on 21st January, 2003, he was allocated to go to the police car park to supervise cleaning of the park by prisoners. He took prisoners to the car park and at 10.00 a.m. a police CID officer requested that they assist to push a Nissan matatu Reg. No. KAG 583 P to an open area and they did so. An hour later at the request of another police CID officer, the witness and his prisoners assisted the CID officer to move gas cylinders from a store to where the Nissan matatu was. The prisoners were asked to place the gas cylinders on the matatu sliding door and they did so before a camera man went and took some photographs.

Thereafter prisoners were asked to place the cylinders on the floor lying down and once more some photos were taken. Prisoners were then asked to lay down the cylinders in front of the vehicle and they did so and photographs taken. After that, they took the gas cylinders back to the store.

This witness identified the Nissan matatu in photograph before the court and were also photos of gas cylinders produced as exhibits 1 to 7 although given the date 21st August, 2002 instead of 21st January, 2003; and in that connection we note the evidence of police constable Albert Kiaru of the DCIO'S Office Muranga who gave evidence as P.W.9. He was the photographer and told the court he had taken the photographs on 21st August, 2002 at Kabati police station, not Muranga police station. This witness told the court during cross examination that he took some photographs at Muranga police station on same date. This was after defence counsel had put him to task and shown that some photographs had buildings at Muranga Police Station.

Although he had said in his evidence in chief that he found gas cylinders in the motor vehicle, during cross examination he said it was accused persons who were told by the police to put those cylinders in the motor vehicle for photographing and that it was the DCIO who was directing what was to be done. The DCIO was the investigating officer in this case.

Photos did not show any marks on the two cylinders. The witness who started by saying that all photographs were taken at Kabati police station came, in the middle of cross examination, to talk as if all photos were taken at Muranga Police station and ended up in re-examination talking as if some photographs were taken at Kabati and others at Muranga. He gave no explanation why that had to be so, the same motor vehicle and cylinders being moved between those two police stations.

Although more may be said in this case the position, as we find it is that the Appellant was convicted on the basis of the evidence relating to the Siemens mobile phone only. That is why he was the only person, out of six accused persons, convicted. He was convicted after the learned trial Magistrate had rejected the rest of the evidence. Concerning the evidence of identification, the magistrate said:

“ I have already found that the

evidence on the circumstances that favoured a good identification is not good enough. The descriptions given were also not very helpful. Looking at this evidence very objectively there is serious doubt whether the watchman could identify the robbers later as they stated in court. Identification parades were carried out later by 4 police inspectors. ----- I have carefully and cautiously evaluated the testimonies of the inspectors. Each of them went to the police station where they were to carry out the parade and met the exercise already organized by officers from the D.C.I.O.'s office Muranga. I have noted that the suspects had been in cells for about one week. Two of them have complained that the parade witnesses were made to see them before the parades. This complaint regarding the unfairness of the parades was actually supported by P.W.8 who said that he was told the person he was to go and pick in the parade. He stated that they were taken to the various police stations in a police land rover. They were all along on those trips with a CID officer known as Kariuki who was directing them on who they were to pick in the parade.”

The learned Magistrate quoted P.W.8 as having said:

“ I agree that on the way we discussed what was to take place. Kariuki told us about the persons we were to see. He told me that I was to pick a dark person. I knew that I was to pick a black man and I did so.”

The Magistrate concluded:

“ This evidence casts serious doubts on the propriety of the parades. I must absolve the police inspectors who were involved from any blame as they met everything already arranged by the CID team. I however find that the identification evidence has been discredited and is absolutely worthless.”

Concerning what went on at the robbery scene, the trial Magistrate rightly observed that there was no evidence that the matatu registration number KAG 583 P sighted in Kabati town on the night of the robbery was driven to Equity Bank or drove away with the robbers. That vehicle seemed to have been engaged in normal matatu movement and business of picking and dropping passengers until it was stopped. The magistrate rightly thought the police badge and the two gas cylinders may have been with people who had alighted before the matatu was stopped. He held the view that there was nothing to tie the matatu with the robbery.

With regard to identification of the robbers at the scene of the robbery, the Magistrate also considered the fact that it was at night and that the evidence about light at the scene was not elaborated by witnesses who were frightened as they were being frog matched without the opportunity to even flash their torches and subsequently ordered to lie on the ground with faces on the ground. People who could not pin point the robbers who were in police uniform and the robbers who were in civilian clothes and could not also know colours of the clothes those people had. But it was easier to remember cloth colours than to remember human faces.

All that was rightly said with respect to all the accused persons including the Appellant. But when it came to the evidence relating to the Siemens mobile phone, the learned trial Magistrate believed what Corporal Mwangi, Corporal Anjelo, the former Equity Bank Kabati Branch Manager Mr. Stephen Macharia Mwaniki and his brother in law Andrew Njage Kariuki said. Although the Magistrate considered the defence of the Appellant, we feel he did not consider it sufficiently.

This is a case where the Magistrate from what he had said earlier, must have seen that the credibility of prosecution witnesses was questionable especially police officers who would go as far as instructing civilian witnesses what to say and do. An inventory register from Equity Bank containing an entry about the cell phone may have been before the court as an exhibit and mobile telephone number 072871669 may have been assigned to the Bank. But bearing in mind prosecution witnesses had a credibility question, what was there impossible for them to accomplish if they wanted a conviction? If the bank had a phone number for that phone, yet the phone had been bought in the name of Andrew Njage Kariuki a private person not even employed by the bank, why should that particular phone not belong to the Appellant simply because the Appellant did not have a phone number for that phone?

If the seller of the phone was not brought in the court to give evidence whether or not his stall existed during the time that phone was sold, the burden of proof was upon the prosecution and not upon the Appellant as the trial Magistrate made it to be.

This is a case where Corporal John Mwangi did not only arrest the six accused persons, but also arrested other people like the wife of the Appellant, but the prosecution presented the case in court ,in the way they did for the case to appear as if the accused persons were the only people found in motor vehicle Reg. No. KAG 583 P and therefore the only people arrested in connection with the alleged robberies.

In our view, the prosecution did not succeed in proving this case against the Appellant beyond reasonable doubt and the Appellant ought not to have been convicted.

Accordingly, we do allow this appeal. Quash the conviction of the Appellant on each count and set aside the sentences imposed. The Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 26th day of September, 2006.

J.M.KHAMONI

JUDGE

H.M. OKWENGU

JUDGE