



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 103 of 2004

(Appeal originating from the original conviction and sentence in Criminal Case Number 202 of 2003 in the Senior Resident Magistrate’s Court at Karatina by J. N. Nyagah – S.R.M.)

PATRICK MWANGI WERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Patrick Mwangi Weru hereinafter referred to as the appellant was tried together with 3 others on 7 counts of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, 2 counts of attempted robbery with violence contrary to section 297 (2) of the Penal Code, and Arson contrary to section 332 (b) of the Penal Code, one of the other persons was also tried of two offences under the Firearms Act. The appellant was the 3rd Accused person, Joseph Maina Gicheru alias Kihii the 1st Accused, Patrick Maina Muriuki alias Bagio 2nd Accused and Victor Waweru Gichuni alias Mukirinyaga 4th Accused. The trial commenced before the Chief Magistrate Nyeri who heard a total of 26 witnesses after which upon being challenged to disqualify himself by one of the Accused persons he transferred the case to the Senior Resident Magistrate Karatina Court. The Senior Resident Magistrate Karatina recalled three witnesses and heard 4 more witnesses after which He delivered a ruling in which He acquitted the 2nd and 4th

Accused persons but ruled that the appellant and the 1st Accused had a case to answer.

After hearing the defences of the two, the trial magistrate acquitted the 1st accused person of all counts. He also acquitted the appellant of 5 counts but convicted him of 5 other counts and sentenced him to death, thereby provoking this appeal.

The particulars of the offences of which the appellant was convicted were as follows: -

Count IV – Attempted Robbery with violence contrary to Section 297 (2) of the Penal Code.

On the 13th day of April 2001 along Nanyuki/Nyeri road at Barguret River bridge in Nyeri District of the Central Province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 assault rifle and a Barretta Pistol, attempted to rob Charles Mbithi Mulinge of a motor vehicle registration number SNA 1, make Mercedes Benz valued at Ksh.10,584,919/= million and at or immediately before or immediately after the time of such attempted robbery used actual violence to the said Charles Mbithi Mulinge.

Count V – Attempted Robbery with violence contrary to Section 297 (2) of the Penal Code.

On the 13th day of April 2001 at Mwichuiri village in Nyeri District of the Central Province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 assault rifle and a Barretta Pistol, attempted to rob Benard Wanjohi Mundia of a motor vehicle Registration Number KAM 647L make Mitsubishi Canter valued at Kshs.2.5. million and at or immediately before or immediately after the time of such robbery fatally injured Peter Mwenda M’Kioo.

Count VI – Robbery with violence contrary to Section 296 (2) of the Penal Code.

On the 13th day of April 2001 at Kariokoh Market in Nyeri District of the Central Province jointly with others not before court, while armed with dangerous weapons namely an AK 47 rifle and a Barretta Pistol robbed Peter Maina Kinyua of a motor vehicle registration number KAA 431E make Toyota Hilux matatu and cash Kshs.750/= all valued at Kshs.350,750/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Maina Kinyua.

Count VIII – Robbery with violence contrary to Section 296 (2) of the Penal Code.

On the 13th day of April 2001 along Mwichuiri/Narumoru road in Nyeri District of the Central Province, jointly with others not before court while armed with dangerous weapons namely an AK 47 assault rifle and a Barretta Pistol robbed Peter Mungai Kamau of a motor vehicle registration number KAJ 293B make Toyota Corolla saloon valued at Kshs.250,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Mungai Kamau.

Count IX – Robbery with violence contrary to Section 296(2) of the Penal Code.

On the 13th day of April 2001 at Sagana Scheme in Nyeri District of the Central Province, jointly with others not before court, while armed with dangerous weapons namely an AK 47 assault rifle and a Barretta Pistol robbed George Warobia Home of motor vehicle registration number KAL 558J make Toyota Hiace and cash Kshs.2,100/= all valued at Kshs.252,100/= and at or immediately before or immediately after the time of such robbery used actual violence to the said George Warobia Home.

The evidence which was adduced before the trial magistrate which was relevant to these counts were as follows: -

On the 13th April 2001, at about 5.00 a.m. Charles Mbithi Mulinge (P.W.21B) who is a driver of the speaker of the National Assembly left Nanyuki in the official vehicle Registration No.SNA – 1. When He reached between the Airstrip and Bantu Lodge He saw a group of about 10 people waving him down. He noted that they had guns and rungu. He did not stop but drove through. The men shot at his vehicle twice but He managed to pass. He drove upto Nairobi and reported the matter at the police post at Parliament Building. The next day Cpl. Fredrick Simiyu Sirengo (P.W.22) took photographs of the vehicle showing the bullet holes. The photos were produced in evidence.

On the same day of 13th April 2001 at about 8.00 a.m. Bernard Wanjohi Mundia (P.W.3) the driver of a canter Registration No. KAM 647L and Paul Kioko Nzioka (P.W.4) the manager employed by Nancy Wangari Robert the owner of the Canter vehicle were in Mwichuiri area near Narumoru. Their vehicle had developed a problem and P.W.3 was in the process of checking the vehicle when a group of 6 people passed by. They claimed their vehicle which was carrying potatoes had got stuck somewhere in the forest and they needed to have it towed. P.W.4 informed the men that their vehicle also had a mechanical problem. P.W.4 identified the person who talked to him as 4th Accused. One person volunteered to show the men where they could find a tractor and they left.

At around the same time Lawrence Mwangi Gichogu (P.W.6) who is a Matatu tout of motor-vehicle KAA 431E a Toyota Hilux was at the Kariokor Market stage in Narumoru when he saw a group of 6 men. One man who was ahead of the others asked P.W.6 to wait for his colleagues. When the others

arrived, one of them produced a gun and demanded keys to the vehicle. The driver gave him the keys and got out of the vehicle. The 6 people then drove off with the vehicle. P.W.6 identified the person who asked him to wait for the others as the appellant whom He swore He saw clearly. The vehicle was later found abandoned near Kwa Marete Shopping Centre where it had ran out of petrol.

In the meantime P.W.3 and P.W.4 had managed to get their Canter vehicle on the road. They were going round looking for cabbages when they saw some vehicles on the road. As they were driving by a man who was squatting outside shot at their vehicle and a passenger in the vehicle was injured. They did not however stop but drove to Naru-Moru Police Station where they reported the matter.

SP. Peter Mungai Kamau (P.W.I) was driving his motor – vehicle Registration Number KAJ 293B Toyota Corolla when the Canter Registration Number KAM 647 L passed him and P.W.3 alerted P.W.1 that there were robbers coming. P.W.I followed the Canter vehicle. After about a kilometre, He saw a Matatu Registration Number 804 Mazda come at a high speed. It overtook P.W.I and stopped about 20 Metres ahead. P.W.1 having seen a man inside the vehicle armed with an AK 47 Rifle got out and started running backwards. Two men came out of the vehicle and shouted at him to stop, one threatening to shoot him but P.W.I continued running. They gave up and went back to P.W.I's motor – vehicle where P.W.I noted there were 4 other men standing near the vehicle. The 6 men got into the motor vehicle KAJ 29B and drove off.

George Karobia (P.W.10) the driver of a Matatu Registration Number KAL 558J which plys between Nanyuki – Karatina – Kabaru was another victim. He was stopped by two children. He stopped and the two children got into the vehicle. He was then surprised when a man placed a gun on his neck and ordered him to get out of the vehicle. All the passengers in the vehicle including Shelmith Gathigia (P.W.11) and Patrick Ngari (P.W. 12) were ordered out of the vehicle and robbed of their valuables. The robbers who were 6 in number drove off in the Matatu.

Cpl. John Ringera (P.W.16) of D.C.I.O. Nyeri received information on the robbery and proceeded to the scene. They found Matatu Registration Number KAL 558J having been abandoned. They saw some people running towards Hombe forest. They followed them but the people disappeared. As they continued to comb the area, P.W.16 received information as a result of which together with Sgt. Joseph Gitonga (P.W.28) they arrested the 1st Accused who was in a shamba pretending to be digging. The officers searched the 1st Accused and recovered a Beretta pistol. Following interrogation 1st Accused led the officers to the 2nd Accused who in turn led the officers to Mjini Estate in Meru town where they found and arrested the appellant.

On the same day at about 4.00 p.m. the appellant made a statement under inquiry to Inspector Benson Njeru Mucheke (P.W.24). In the statement which was admitted in evidence after a trial within trial, the appellant gave a detailed account of how the offences were committed.

On 27th April 2001 at 10.45 a.m. Inspector George Mutonya (P.W.26) conducted an identification parade at Naru-Moru Police Station during which P.W.6 identified the appellant, 3 other witnesses were however unable to identify the appellant.

When put to his defence the Appellant gave a sworn statement in which He explained that on the 14th April 2001 at 6.00 a.m. He was asleep in his house when the police went to his house searched his house and arrested him together with his wife. His wife was booked in at Nanyuki Police Station whilst He was taken to Naru-Moru Police Station from where He was taken to Kiganjo Police Station. On the 17th April 2001, He was taken to the office of Inspector Njeru where He was tortured and forced to sign a statement.

On 27th April 2001, a parade was conducted. He was denied an opportunity to call a relative to witness the parade. He maintained that He was dirty and was not similar to the other members of the parade. He was later charged with these offences which He denied and complained to the court. He maintained that the charges against him were a frame up.

In his judgment the trial magistrate found that the appellant was properly identified as one of the robbers and convicted him as aforesaid.

The appellant has filed a memorandum of appeal raising 11 grounds but which in reality boils down to the following issues: -

- ***That the evidence of identification was not conclusive and the court ought not to have relied on an identification parade which was conducted unlawfully.***
- ***That the evidence adduced by the prosecution was contradictory uncreditworthy and insufficient to prove the case against the appellant.***
- ***That the trial magistrate wrongfully rejected the appellant's defence.***

We have carefully reconsidered and evaluated the evidence which was adduced before the Lower Court. There is no doubt that 13th April 2001, was a dark day in Naru – Moru area as several people fell victim to violent robberies some losing their lives. Apart from P.W. 21B all eye witnesses to the robberies of which the appellant was convicted of talked of 6 robbers. From the time in which the robberies were committed, the proximity of the area and the manner in which the robberies were committed it was evident that it was the same gang of robbers that unleashed terror to the motorists and people in the area. The fact that P.W.6 and the driver of motor vehicle KAA 431E were robbed shortly after P.W.3 and P.W.4 had seen the 6 robbers. The fact that an attempt was made to rob P.W.3 of motor-vehicle KAM 647L in Kwa Marete area where motor vehicle KAA 431E was abandoned after running out of fuel and the fact that P.W.1 was pursued and robbed of his motor-vehicle KAJ 293B shortly after motor-vehicle KAM 647L had passed him and P.W.3 had alerted him of the robbers and the fact that P.W.10 was robbed of motor-vehicle KAL 558 by a gang of 6 men and the motor-vehicle later found abandoned at Hombe forest all lead to the conclusion that it was the same gang that robbed all these people. The question is whether the appellant was proved beyond doubt to be one of the 6 robbers.

The evidence basically implicating the appellant is that of identification as P.W.6 purported to have seen him among the group of 6 people who robbed them of motor-vehicle KAA 431E. The driver of the motor-vehicle KAA 431E was not called as a witness and P.W.6 was therefore the only identifying witness. The need for treating such evidence with caution has been emphasised by the court of appeal in many decisions following the well known case of ***Abdulla Bin Wendo and Another vs Reg. [1953] 20 EACA 166*** wherein it was stated as follows: -

“Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially where it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

In this case it was around 8.00 a.m., so the issue of lighting did not arise. P.W.6 swore that he saw the appellant well and could recall his face because appellant was the one who came ahead of the others and asked P.W.6 whether their matatu was the one leaving first and upon confirmation asked them to wait for his colleagues. The evidence of P.W.6 that the appellant was one of the robbers was fortified by his identification of the appellant at the identification parade conducted by P.W.26 wherein P.W.6 successfully identified the appellant. We have considered the appellant's claims that the parade was not properly conducted and that the officers assisted the identifying witnesses by telling the appellant not to change positions and also instructing him to smile and that P.C. Muriuki an investigating officer participated in the parade. We note however from the parade form that the appellant was only dissatisfied with the parade wherein he was identified but had no complaint with the parades in which the witnesses failed to identify him. There is however no reason why the police officers would have assisted only one of the identifying witnesses and not the three others. We believe and accept the evidence of P.W.26 that

the parade was properly conducted and find the appellant's complaints nothing more than a mere afterthought.

Apart from the identification of the appellant by P.W.6, there was a statement under inquiry which was made by the appellant to P.W.24. This statement which was a confession was admitted in evidence as P Exh. 14 by the trial magistrate on 4th March 2003 after a trial within trial. In his judgment the trial magistrate made no reference to this statement.

In an earlier ruling delivered on 8th January 2004, the trial magistrate had made reference to similar confession statements made by the 2nd and 4th Accused person and ruled that the same were not admissible in the light of section 25 of the Evidence Act. This perhaps explains why he made no reference to the appellant's confession.

We believe the trial magistrate must have had in mind the Criminal Law (Amendment) Act 2003 (No. 5 of 2003) section 99 which inserted section 25 A to the Evidence Act Cap. 80. That section states as follows:-

25 A. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court.

In addition to inserting section 25A, Act No. 5 of 2003 also deleted sections 28, 30 and 31 of the Evidence Act which allowed a police officer of above the rank of an Inspector to receive a confession.

The date of commencement of the Criminal Law (Amendment) Act 2003 is 25th July 2003. That means that section 25A as reproduced above came into effect on the 25th July 2003 from which date no confession or statement made by an Accused person was admissible in evidence unless made in court.

In this case the confession statement was alleged to have been made on 14th April 2001. It was admitted in evidence as Exh. 14 on 22nd May 2003. By the time the Criminal Law (Amendment) Act 2003 came into effect on 25th July 2003, the statement made by the appellant herein already formed part of the court record and the law could not act retrospectively so as to make what had already been admitted in evidence inadmissible. We have considered the evidence relating to the trial within trial and are satisfied that the statement was made voluntarily and was properly admitted in evidence in accordance with S. 28 (b) of the Evidence Act Cap. 80 which was the law then applicable. The confession statement is therefore admissible evidence as against the Appellant. Although retracted, we find that the confession made by appellant was so detailed and consistent with the evidence of the prosecution witnesses such as P.W.1, P.W.3, P.W.4, P.W.6, P.W.10 and P.W.28 that in all the circumstances of this case the confession could not but be true.

We have considered the sworn defence of the appellant that he never participated in the commission of the offences as he was asleep in his house in Nanyuki, but we find that in the light of the evidence of P.W.6 which is fortified by his picking out the appellant at the identification parade, and the detailed confessionary statement made by the appellant, the appellant's alibi cannot hold and we accordingly reject his defence. We find that the appellant was indeed one of the 6 robbers.

We have considered the particulars of the charges and note that as regards count VI, it is evident that Peter Maina Kinyua the driver who was alleged to have been robbed of motor vehicle KAA 431 E was not called to testify. There was also no evidence of the alleged theft of Kshs.750/=. The evidence of P.W.6 was nevertheless sufficient to prove that the robbery occurred in so far as motor vehicle KAA 431E was concerned. We are only concerned that contrary to the particulars of the charge there was no evidence that actual violence was used on the said Peter Maina Kinyua. This inconsistency was however not prejudicial to the appellants as there was other evidence confirming that the robbers were more than two and that they were armed and threatened the driver with a firearm. There was sufficient evidence in proof of the ingredients of the charge. The charge was therefore proved.

Similarly in count IX, there was no evidence of actual violence being used on P.W.10 and therefore to that extent there was inconsistency between the particulars and the evidence, but again, there was sufficient evidence establishing other ingredients of the offence and therefore there was no prejudice to the appellant as the charge was proved.

With regard to count VIII, there was evidence that the robbers tried to hit P.W.1 with a stone, however the stone did not hit him and therefore there was no actual violence. We are however satisfied that sufficient ingredients of the offence of robbery with violence contrary to section 296(2) were established.

We notice further that in respect of all the offences, no evidence was adduced in proof of the alleged values of the motor vehicles subject of the robbery charges. Again we find this not to have occasioned any failure of justice to the appellant.

We came to the conclusion that there was sufficient evidence in support of the appellant's conviction in respect of all the 5 counts of which he was convicted. We accordingly dismiss his appeal against conviction.

As regards the sentence, the trial magistrate imposed one sentence but did not specify which offence it was for. We now correct this anomaly by sentencing the appellant to death in respect of all the 5 counts but order that the sentences in respect of counts 4, 5, 6 & 9 will remain suspended.

Dated signed and delivered this 16th day of October 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE