



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 243, 244 & 245 OF 2004

(From original conviction and sentence in Criminal Case No.1998 of 2001 of the Chief Magistrate's Court at Nakuru – J. S. KABURU, SPM)

JOSIAH MAINA WANJIKU.....1ST APPELLANT

PETER KIMANI GICHUHI.....2ND APPELLANT

ESTHER WANJIKU NDERITU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants were charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the 3rd April 2001, at Kiborojo area in Nakuru district of the Rift Valley Province, the appellants jointly and while armed with dangerous weapons namely knives robbed Samuel Macharia Mukanga of motor vehicle registration number KAE 953N, Toyota Corrola, identity card, driving licence, pen knife, jacket and a bunch of keys all valued at Kshs.400,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Macharia Mukanga.

Each of the appellants denied the said charge and were tried and each was convicted and sentenced to death. They were aggrieved by their conviction and sentence and each filed a separate appeal against both the conviction and the sentence. Their grounds of appeal were more or less the same and can be summarized as follows:-

1. That the learned trial magistrate erred in law and fact in relying on uncorroborated retracted accomplice evidence to convict them.
2. That the learned trial magistrate erred in law and in fact in convicting the appellant against the weight of evidence.
3. That the learned trial magistrate erred in law and in fact in convicting the appellants when they had not been properly identified.

4. That the learned trial magistrate erred in law and fact in convicting the appellants in the absence of a crucial witness who should have been summoned from Tanzania.

5. That the learned trial magistrate erred in law by failing to consider the defence of each of the appellants.

Before we consider the above grounds of appeal, it is only appropriate that we set out the brief facts of the evidence that was tendered before the trial court.

Samuel Macharia Mukangu, PW1, was a taxi driver. He used to drive a taxi registration number KAE 953N which was owned by **Peter Nderi Wangombe, PW2**. PW1 testified that on 2nd April 2001, at about 5.30 p.m., he was at a taxi parking yard in Nyahururu town. He was approached by two people, a lady and a man, who requested him to take them to Subukia an area known as Kiboronjo. They negotiated and agreed on a charge of Kshs.3,000/-. They told him that they required to be taken to that place the following day once their colleagues arrived. The following day, PW1 met the two people whom he had talked with the previous day. They were in the company of two other people. The man and the lady recognized PW1 and told him that they had gone to the parking bay and did not see him. One of the people gave PW1 a sum of Kshs.1,000/- as an advance payment so that he could fuel the vehicle. PW1 took the money and gave it to PW2. PW2 asked PW1 to put fuel worth Kshs.600/-. PW1 and his four passengers embarked on their journey to Subukia. One of the people sat on the co-driver's seat and the other three sat on the rear car seat. When they reached Subukia, they asked PW1 to drive to Kiboronjo. On reaching Kiboronjo, they directed him to a route which was going through a forest. When they were in the forest he was ordered to stop and the person who was seated next to him held him by the neck. He was pushed to the back seat and the lady who was seated on the back seat jumped to the co-driver's seat. One of them took control of the car as the others tied the driver. His mouth was also covered and thereafter he was put in the boot of the car. After sometime, the vehicle stopped and he was removed from the boot and tied to a tree in the forest. PW1 was robbed of his driving licence, pen knife and a jacket. The robbers drove off and PW1 was left in the forest. He began to shout calling for help and some people came to his aid and untied him. He realized that it was about 2.40 p.m. He was informed by his helpers that he was somewhere in Londian forest. The robbery was reported at Londiani police station.

PW1 identified the first and the third appellants as the man and the lady who approached him on the first day. He said that the second appellant was among the people whom he had ferried to Subukia but the fourth one was missing. PW1 had earlier identified the third appellant during an identification parade at Nakuru police station.

PW2 testified that after PW1 took some people to Subukia on 3rd April 2001, he did not return. The following day he started looking for PW1 and his vehicle and when he failed, he decided to report the matter to the police. At the police station he was informed that there was a vehicle which had been reported as having been hijacked the previous day. Later he went to Londiani police station and recorded a statement and returned to Nyahururu. Sometimes in August 2001, PW2 travelled to South Africa. On 25th August 2001, PW2 was telephoned and informed that his motor vehicle had been recovered at Mwanza, Tanzania. He returned to Kenya on 3rd September 2002, and was requested to avail the log book of the vehicle. Later he learned that the vehicle was in Zaire and he traveled there and identified it. The vehicle was inspected and the engine number on the log book tallied with the one on the vehicle. The vehicle was later brought to Kenya.

Chief Inspector Absalom Monari, PW3, testified that he was requested by the investigating officer to record a statement under inquiry from the third appellant. He wanted to produce the statement but the third appellant objected to its production. A trial within a trial was ordered after which the trial court ordered that the said statement be produced. The same was produced as exhibit 3. The statement was a lengthy one and contained very minute details as to how the robbery was done.

Inspector Hilary K. Birgen, PW4, testified that he recorded a statement under inquiry from the second appellant who also objected to its production saying that he had been tortured by the police at the time of

recording the same. A trial within a trial was conducted after which the court ordered that the same be produced in evidence. The statement was produced as exhibit 4. It was also very detailed and contained minute details about the robbery.

Inspector Patrick Musyoki, PW6, testified that he recorded a statement under inquiry from the third appellant. The third appellant also objected to the production of the statement and another trial with a trial was conducted. The court ruled that the statement was admissible and the same was produced as exhibit 6. Like the other two statements, it was also a detailed and contained minute details as to how the robbery was conducted.

Inspector Jinaro Mwangi, PW5, testified that he conducted an identification parade in respect of the second appellant. PW5 said that the second appellant was properly identified by PW1.

Police Constable Bernard Irumbi, PW7, testified that on 5th August 2001, he received information that a suspect, whom they had been looking for, had been seen at Kanu street. He rushed there with other police officers and arrested the third appellant and took her to Nakuru police station. She was interrogated over a series of robberies where taxi operators had been robbed and the drivers murdered. She gave to PW7 the names of her accomplices and she said that others were living at Isebania. She informed her interrogators that one of the vehicles that she and her accomplices had robbed had been sold in Tanzania. PW7 and other police officers in the company of the third appellant, went to Tanzania and with the assistance of Tanzanian police officers, commenced investigations. The third appellant led them to the person who had bought PW2's vehicle. The person was known as Amos Gisute. PW7 said that Amos was very unco-operative and wanted his money to be refunded before he could release the vehicle and he refused to show them where the vehicle was.

On 10th August, 2001, PW7 and the others returned to Kenya and with assistance of the third appellant, the first and the second appellants were arrested. They were taken to Isebania police station where they were interrogated. The police went with the first appellant to Tanzania. The first appellant led the police to the home of Amos Gisute. Amos demanded refund of his money from the first appellant.

The police continued with the investigation and with the assistance of the first appellant, they identified five motor vehicles which were suspected to have been robbed from Kenya and sold in Tanzania. One of them was the one which was robbed from PW1. The vehicle had the correct engine number but the chassis had been interfered with. PW7 later conducted a search with the registrar of motor vehicles and confirmed that the particulars of the vehicle had been registered as KAE 953N. It had been reported as having been robbed from Nyahururu. PW7 further testified that he proceeded to Nyahururu and traced the owner of the vehicle. The owner of the vehicle accompanied the police to Tanzania and identified the same. It was thereafter brought back to Kenya and held at a Nakuru police station.

In his sworn defence, the first appellant testified he was a matatu driver and was living at Isebania. On 11th August 2001, he left his work place and parked his vehicle outside the home of his employer. He further stated that he noted that two of his employer's workers had been arrested. His employer had by that time gone to South Africa. He decided to go to Isebania police station to enquire about the two people who had been arrested. He was told that there was a vehicle at his employer's place which was suspected to have been stolen at Nakuru. The first appellant went back to his house and slept. He testified that at 2.00 a.m., he heard a knock at the door. When he opened, he saw policemen who started kicking him. They questioned him about a stolen vehicle. The police took him to a police station where they interrogated him further. He was asked about the vehicle that PW1 had been robbed of. The first appellant said that on the alleged date of the robbery he had gone to Kakamega for burial. Thereafter he was taken to Nakuru and put in an identification parade. He said he was identified by some people but not regarding this case.

The second appellant said that he was a hawker at Migori but he hailed from Nakuru. On 14th August 2001, he was sleeping in his house. At about 2.00 a.m., police officers went to the block where he was staying and conducted a search. He was asked to identify himself. He was then arrested and taken to Migori police station. He said that he expected to be charged with an offence of failing to carry with him

an identification card. Later he was taken to Nakuru CID Offices for further interrogation.

The third appellant testified that in April 2001 she was at Njoro. She said that she came to Nakuru on 15th April 2001. She admitted that she was arrested at Nakuru and taken to Central Police station where she was interrogated by police officers about a car jacking. The following day after her arrest, she was shown some other people and asked whether she knew them and she answered in the negative. She alleged that the identification parade which was conducted was not proper because she used to see the person who identified her in Nakuru.

The appellants called one witness, Peter Samson Nanderu. At the time of testifying, he was serving a prison sentence. He said he was a matatu driver. He further testified that he was working with the first appellant as his conductor. He alleged that on 30th March 2001, they carried some passengers from Kisumu to Kisii. On the same day they ferried a dead body to Kakamega and on 31st March 2001, they drove to Ahero. He further testified that they were in Kisumu upto to 6th June 2001. He learned that the first appellant and his boss had gone to Isebania sometimes in April 1991.

It is trite law that the first appellate court is enjoined on appeal to reconsider the evidence that was adduced before the trial court, evaluate it and draw its own conclusion in deciding whether the judgment of the trial court should be upheld or not; see ***OKENO VS REPUBLIC [1972] E.A. 32***. In doing, we note that the robbery took place in broad day light. Prior to the date of the robbery, PW1 had been approached by the first and third appellant when they were enquiring about the charges of hiring the vehicle to ferry them to Subukia. They met again the following day when they gave him a deposit of Kshs.1000/-. He drove them from Nyahururu to Subukia and he was able to observe them. When they reached the forest, he heard the third appellant being asked to bring ropes so that they could tie him. He was also able to see them when they were tying him as he had not been blindfolded. Although he must have been in a state of shock, because of the considerable period of time that he spent with them, we believe he was able to identify the second and the third appellants during the identification parade. He said that the second appellant was the person who tied him on the mouth and hands.

After the arrest of the third appellant, she was interrogated. In her statement under inquiry she explained how they robbed PW1 of the motor vehicle. She disclosed that she was accompanied by the first and the second appellants. The first and the second appellants also wrote their statements under inquiry. Each of the three statements were admitted in evidence after a trial within a trial was conducted in respect of each. The said statements contained detailed accounts of what took place.

In ***JOHN NDEGWA NJUGUNA & ANOTHER VS REPUBLIC, Criminal Appeal number 88 of 2003 at Mombasa (unreported)*** the Court of Appeal held that a statement under inquiry may be properly admitted where it contains a detailed account of what took place that only the accused would be in a position to provide such minute details.

As for the third appellant, she led the police to Mwanza, Tanzania, where the motor vehicle in question had been sold to a person whom she was able to pin point to the police. The person, Amos Gisute, insisted on getting a refund of his money which he had paid to the first appellant for the purchase of the motor vehicle. When the first and second appellants were arrested, the police and the first appellant went to Tanzania and the first appellant led the police to the house of Amos Gisute who again demanded a refund of his money from the first appellant. Eventually the motor vehicle that had been robbed from PW1 was recovered. Although it had Tanzanian number plates, PW7 conducted a search at the office of Registrar of Motor Vehicles and it was confirmed to have been the one.

All the evidence clearly showed that the three appellants were among the people that had robbed PW1 of the motor vehicle in question.

Although Amos Gisute was not called as a prosecution witness, the failure to call did not weaken the prosecution case in any significant way.

Regarding the defences of each of the appellants, we agree that the learned trial magistrate did not give

much consideration to them. However, we have re-evaluated the said evidence adduced by the appellants in their defence and agree with the learned trial magistrate that the defences contained very little truth, if any, and could not stand in view of the overwhelming evidence that was adduced against the appellants. We are of the view that each of the appellants was properly convicted and sentenced to death. We therefore dismiss all the appeals and confirm the conviction and death sentences that were passed against each of the appellants.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellants and Miss Opati for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE