



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 550 of 2002

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE

NO. 3090 OF 2000 OF THE PRINCIPAL MAGISTRATE'S COURT AT THIKA)

ALEX MUSYOKA MAKAUAPPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 551 OF 2002

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE

NO. 3090 OF 2000 OF PRINCIPAL MAGISTRATE'S COURT AT THIKA)

JOHN MUSYOKA MUTHENGIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 552 OF 2002

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE

NO. 3090 OF 2000 OF PRINCIPAL MAGISTRATE'S COURT AT THIKA)

PETER MUTHUI MWENGA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The 3 appellants **Alex Musyoka Makau** (Cr. A. No. 550 of 2002); **John Musyoka Muthengi** (Cr. A. No. 551 of 2002) and **Peter Muthui Mwenga** (Cr. A. 552 of 2002) were charged with three counts of robbery with violence, contrary to **Section 296(2)** of the Penal Code as follow:

COUNT NO. 2

That on 22nd day of May, 2002, at Kiganjo Village, Thika District of Central Province; jointly while armed with a G.3 Riffle and pangas robbed PRICILLA WANJIRU MBUTHIA of K.Shs.3,500/= cash, and immediately before or immediately after the time of such robbery threatened to use actual violence to the said PRISCILLA WANJIRU MBUTHIA.

COUNT NO. 3

On the 22nd day of May, 2000 at Kiganjo Village, Thika District of Central Province, jointly while armed with a G.3 Riffle robbed DAVID JUMA ONYANGO one mattress valued at K.Shs.1,850/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said DAVID JUMA ONYANGO.

COUNT 4

On 22nd day of May, 2000 at Kiganjo Village in Thika District of Central Province, jointly while armed with a G.3 Riffle robbed DOROTHY ACHIENG ODHIAMBO, two bed sheets, one shirt, one trouser and two cassettes all valued at K.Shs.1,100/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said DOROTHY ACHIENG ODHIAMBO.

The three appellants were convicted of the offences as charged and were sentenced to death as mandatorily provided by law, and being aggrieved by both the conviction and sentence by the Chief Magistrate's Court at Thika, in Criminal Case No. 3090 of 2000, have appealed against both the conviction and sentence to this Court.

The prosecution case is that on the night of 22/5/2000, at about 2 a.m., PC Mohamed Hawaii, PW1, reported that some members of the public went to report at the Police Base that there had been an attempted burglary at Kabati Market, and among those who reported was one Wanjohi. PW1 called Sergeant Jacob Kwitu and they interrogated the said Wanjohi. PW1 (PC Halaki) then went to his house accompanied by PC Konde. He, PW1, left with a G3 gun at the Police Station. He went to his house whilst armed with a pistol, locked his house and put off the lights. He and PC Konde then went to the market which is next to the Police Post. On arrival at the Reportee's house, he called the occupant, but no one answered. There was an alarm raised and the Officers dashed to the place where someone was screaming.

On arrival at the scene they found an old man who told them that thugs had attacked and robbed him of K.Shs.3,000/- and his wife had been injured on the head. While still at the scene, the Officers heard more screams in the direction of the Police Base and they headed there. Before reaching there, PW1 (PC Halaki) saw a group of people who were armed with spears and other assorted weapons, blocking the road. He asked them why they were not answering to the scream alarm and they informed him that they had heard a gun-shot.

PC Halaki told the group to follow him. As they approached the Police Post, he realized that the door to his house was open and the lights were on. He inquired from the members of the public which direction they had heard the gun, and they showed him. He proceeded to his house and found that the G3 rifle plus 20 rounds of ammunition 7.62 mm and his radio cassette – National Panasonic- and his raincoat were gone. The Officer headed towards the direction where the gun shot had come from.

On the way, ten metres from his house, PC Halaki found his National I/D card and he requested

Sergeant Kivuti to report to the District Criminal Investigation Officer (DCIO) and the OCPD Thika, and ask for help.

That night, they did not recover anything else other than his ID card.

On 14/6/00, he was summoned to Thika CID by the DCIO and shown a G3 Rifle No. 6698657 and a magazine with a few rounds of ammunition of 7.62 mm caliber. There was another round of ammunition with damaged head. It is his evidence that the G3 Rifle had been allocated to him for duty. He was also shown a radio cassette, but his initials on the front face had been erased. He was also able to identify his rain coat which had his force No. 17523 at the collar. The DCIO showed him these items and he was able to positively identify them. When the G3 rifle was stolen, it had 20 bullets, but only ten were recovered.

PC Halaki did not know any of the (accused) appellants.

PW2 Priscilla Wanjiru Mbuthia lives in Kiganjo and is a business woman and on 22/5/2000 at about 3.00 a.m. she was asleep in her house with her husband. While in bed, she heard somebody command them: “toa pesa, toa pesa haraka” (produce money, produce money quickly).

They were three people, and she told them that the money was in her husband’s clothes. They took the money and she identified the person who took the money as the 2nd appellant. It was K.shs.3,500/. The appellant was holding the door open.

From their house, the robbers went on to other houses. At about 5.00 a.m. Police came and on 13/6/2000 Police informed them that their attackers had been arrested and she was asked to go to the Police Station for an identification parade and was able to identify 1st, 2nd and 3rd appellants. She knew them even before as they used to be her customers at her kiosk and she could recognize their voices. It is her evidence that the appellants were armed with knives and a gun. Appellant No. 3 had a knife which he used to threaten her husband.

The appellants also had torches which they were shining on the house. PW4 – SGT Jacob Kivuti of Nyasabi Patrol Base testified that on 21/5/2000 at 9.00 a.m. he left for Thika Police Station and returned at 3.00 p.m to the base. About 1.00 a.m. some people who were drunk arrived and reported an attempted burglary in Nyasabi Town. They were five of them. He then instructed (two Officers) PW1 and PW2 to visit the scene, and returning at 3.00 a.m., they informed him that PW1’s house had been broken into. PW4 visited PW1’s house and confirmed that a gun; 20 bullets, radio cassette and a police raincoat and personal documents had been stolen. PW4 identified the G3 gun which was stolen.

PW5 who lives at Kiganjo says that on 21/5/2000 she was at her mother’s house at Kiganjo. When she returned to her house the following day, she found it broken into and bed sheets; a shirt and one trouser had been stolen. However, she has not identified any items in Court. PW6 who lives in Kiganjo said that on 22/5/00 at 5.00 a.m. she was in her house when thieves invaded. She was with her husband in bed. She heard some people outside and informed her husband. Her husband opened the door to go and check and she saw 2nd appellant enter into their house. He had a Police raincoat and a gun. She used to see him in Kiganjo. In total five people entered into the house and she identified 1st, 2nd, and 3rd appellants as being among them. They demand money from her husband.

1st Appellant ordered her to remove her underwear and when she refused pulled it, tearing it and he had sexual intercourse with her as he put the gun on her neck. Her husband was on the floor. Then the 2nd appellant had sexual intercourse with her, followed by the 3rd appellant. They then went away without stealing anything from the house.

Later she came to Thika Police Station and reported the matter and was issued with a P3 Form. Later still, she was informed that the appellants had been arrested and she was called to the Thika Police Station and invited to identification parades, and she was able to identify (1st accused), 2nd appellant (2nd accused) 3rd appellant (3rd accused) 4th appellant (4th accused) and 5th accused. She was able to identify

them as they were lying on her and raping her – each one of them would have his face next to her as he raped her and they had torches.

PW7 testified that on 22/5/00 at 5.00 a.m. while in bed with his wife, there was a knock on the door and when he asked who it was, the reply was “the Police”. He looked through the window and saw one had a gun, a Police rain coat and a “kofia”. He asked them to wait for him to put on the lights so as to open. He put on the hurricane lamp and when he opened. One of them pointed the gun on his face, and he identified him as appellant No. 2. He also identified the gun as resembling the gun appellant No. 2 had.

2nd appellant forced PW7 to sit down and ask for ID card and receipt for a mattress he had purchased. They – appellants – took the mattress, which he identified in court, and asked for money. He had only 120/-. The 3rd Appellant (accused No. 4) was called from outside and told to punish PW7 as he had no money. The 3rd appellant fumbled with the gun and it made a click sound.

He asked PW7 to produce more money or he would be shot. The 2nd Appellant came with a metal bar and slapped PW7 with it. PW 7 told them he had no money and begged them to spare his life. Meanwhile, the others were harassing his wife to produce money. When satisfied that the couple had no money they left, locking them inside the house, from the outside. A neighbour opened for the couple.

The three appeals, all arising from the conviction and sentence in Criminal Case No. 3090 of 2000 of the Principal Magistrate’s Court at Thika, were consolidated.

The grounds of appeal for the three appellants fall into three points. First, they challenge the identification at the scene of the robbery; then the sufficiency of the evidence leading to their conviction and subsequent death sentences; and finally, that the lower Court rejected their defences.

We have carefully reviewed the evidence on record from the lower court on each of the three main grounds of appeal. We hereby give our findings and conclusions on each of them as follows:

The prosecution gave evidence that on 22/5/00, burglary occurred in the house of PC Mohammed Halaki from where G3 Rifle, with 20 rounds of ammunition; a radio cassette; a police raincoat were stolen. On the same night, at his house, David Onyango, was robbed by three people one of whom had a G3 rifle, who broke into his house and threatened actual violence on the said David Onyango. On the same night, a group of people with a G3 rifle robbed one Wanjiru Mbuthia of K.Shs.3,500/=. All the three applicants were implicated.

PW2 was able to identify the 1st appellant (2nd accused) because he was her customer and there was enough light from the hurricane lamp which her husband lit when the robbers knocked at the door and said they were Police Officers. The robbers also had bright torches which they were flashing during the incidence. Both the 2nd and the 3rd appellants were identified by PW2 because apart from the light, which in our view was sufficient, they were customers of the PW2’s Kiosk. Further, PW2 explained and this is on record, the role played by each of the attackers, including, for our purposes here, the appellants.

PW7 – David Onyango – identified the 1st appellant as the one who wore the Police rain coat; and he also picked the appellants at the identification parade.

PW10 testified on how his recovery team was led by the 1st and 3rd appellants to Makongeni where he recovered the G3 rifle at the Kenya Army fence. PW10 testified that it was the 2nd appellant who took them to Kitui where the radio was recovered.

After recovery of the Police rain coat, it was circulated to all the other Police Stations and they discovered that the said rain coat belonged to PC Halaki.

In light of the above prosecution evidence, we have no doubt that the appellants were positively

identified as the attackers who robbed the complainants while armed with dangerous and offensive weapons on the material night.

The facts enumerated herein above go a long way in support of the sufficiency of the prosecution evidence.

The third limb of the appellants case that the Learned Magistrate did not consider their respective defences, especially that of alibi and that given their detailed explanation of their whereabouts at the material time and dates, not enough weight was given to their defences.

Our reading of the lower courts record and the judgment leaves no doubt in our minds that the defences were duly considered but rejected as unbelievable. This is borne out by the lower courts analysis of the evidence at pages J9 through J 12.

Particularly at J 12, the Learned Magistrate finds and concludes that there was sufficient evidence to sustain the conviction and sentence as provided by the law. For instance at J 12, at line 28, the Learned Magistrate found and concluded that “on count 2 there is sufficient evidence to sustain the conviction against 1st; 2nd and 3rd appellants.”

Accordingly, 1st; 2nd and 3rd appellants were convicted on count 2, while the 1st and 3rd appellants were also convicted on count No. 3, both of which counts, under Section 296(2) of the Penal Code, carry mandatory death sentence.

All in all therefore, we confirm both the conviction and sentence of the lower Court. Needless to add, the appeal are hereby dismissed.

DATED in Nairobi this 15th day of March, 22005.

O. K. MUTUNGI

JUDGE

FRED OCHIENG

JUDGE

Read, signed and delivered in the presence of

O. K. MUTUNGI

JUDGE

FRED OCHIEG

JUDGE