REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 364 & 365 OF 2001 (CONSOLIDATED)
(From original conviction and sentence in Criminal Case No. 2352 of 2000 of Senior Resident Magistrate, Nakuru – N. M. Kiriba, Esq.)

MICHAEL NGUGI GITAU……1ST APPELLANT

JOHN SIMIYU WALIBWA……..2ND APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT OF THE COURT

The appellants being dissatisfied with the conviction and death sentence passed against them by Mr. Kiriba – Senior Resident Magistrate, Nakuru in Nakuru Chief Magistrate Criminal Case No. 2352 of 2000 in his judgment delivered on 14th August, 2001 has appealed to this Court. During the hearing of the appeal, the appellants were represented by Mr. Kiburi while the State was represented by Mr. Koech, State Counsel.

According to Mr. Kiburi, the prosecution case was of the weakest kind. He submitted that the PW1 was hired to take some passengers to the Medical Training College.

However, the said "passengers" turned out to be robbers who forced PW1 into the boot of the vehicle. Unfortunately for the robbers, the vehicle stalled due to an alarm system. At that stage, the robbers abandoned the vehicle with the complainant in the boot. Mr. Kiburi further submitted that the complainant later purported to identify the robbers and that he was of the opinion that there was no connection between the robbery and the arrest of the appellants. He further added that nothing connected the appellants with the vehicle. No fingerprints of the appellants was lifted from the crime scene and that his clients were arrested on Court Road which is far away from the scene. Apart from the above, Mr. Kiburi also lamented that the vehicle and the photographs were not produced during the hearing – and that the PW1 never mentioned the Registration Number – nor the value of the vehicle.

As far as the identification was concerned, Mr. Kiburi submitted that no identification parade was carried out. He also added that the complainant never had sufficient time and opportunity to identify his attackers. Further to the above, Mr. Kiburi also submitted that there was no evidence by the PW1 that would make the Court connect the bag with the appellants who denied any connection with the said item. On the above issue, he concluded by stating that there was dock identification. Besides the above, Mr. Kiburi also pointed out that during the Ruling of the trial Magistrate on the stage of no case to answer, the learned Magistrate had not left any doubt that he had made up his mind – even before hearing the defence case. That apart, he also repeated the same bias in the Judgment.

As far as the Judgment was concerned, Mr. Kiburi submitted that the same never complied with the rules.

The trial Magistrate did not set out the issues and also points for determination of the same. He interpreted the same to be fatal and that it fell short of what the Criminal Procedure Code requires. That apart, Mr. Kiburi also stated that the co-accused should have been given an opportunity to cross examine the accused person who made the confession implicating his co-accused. Though the appellants had complained that they had been tortured, Mr. Kiburi lamented that the same were not considered in the Judgment despite the fact that the same had been raised in the defence. In addition to the above, Mr. Kiburi lamented the fact that the learned Magistrate had introduced his evidence or theory on how the appellants were identified. In support of his submissions, Mr. Kiburi quoted the following authorities:

Okello Vs Republic [1986] KLR 219

Maitanyi Vs Republic [1986] KLR 198

Nyanamba Vs Republic [1983] KLR 599

Musyoka Vs Republic C. A. Criminal Appeal No. 38 of 1999 (Unreported)

On the other hand, the State through Mr. Koech, State Counsel has opposed the appeal and supported the conviction on the ground that the evidence was water-tight. According to Mr. Koech, the evidence can only lead to one conclusion that the appellants had committed the offence of robbery with violence in broad daylight. Mr. Koech narrated how the complainant was placed in the boot during broad daylight. Apart from the above, Mr. Koech also recalled how the PW2 was on patrol along Court Road and saw the two appellants – who on being challenged – the 1st appellant started to run away. He interpreted that conduct not to be consistent with any innocence. The PW2 later chased the 1st appellant and arrested him. On the other hand, the 2nd appellant was arrested with a gun and three rounds of ammunitions.

According to Mr. Koech, there was no need for an identification parade since the complainant was able to identify the appellants. As far as the Ruling and Judgment were concerned, Mr. Koech submitted that the confession was not considered.

This Court has carefully perused the above detailed submissions by both Counsels. We have also perused the record of appeal that contains the judgment of the learned Magistrate. We do appreciate that being the first Appellate Court, we have a duty to evaluate, examine the evidence afresh to enable us to reach our own independent conclusion. We are also alive to the fact that we never had the advantage nor opportunity to peruse the manner and demeanour of the witnesses during the trial. Besides the above, we are also aware of our duty to peruse and consider the grounds of appeal by the appellants as stated in the case of **Okeno Vs Republic [1972] E.A. 32.**

From the evidence on record, it is crystal-clear that the complainant viz, John Gichuki Gichuru was approached by both appellants on the material day so that he could take them to Medical Training Centre. On the way, the 1st appellant opened his bag – Exhibit 1 and the complainant saw the gun – Exhibit 2. Consequently, the appellants directed him to drive towards Kabarak near the Golf Club where he stopped. The appellants later directed him open the boot and enter inside. Subsequently, the appellants drove the vehicle to the town Centre. However, since the vehicle had an alarm, the same stopped and started to make noise. Sensing the above, the appellants abandoned the vehicle and hence the complainant was able to get out of the boot. Thereafter, some policemen requested the complainant to help them with the vehicle. Though the police tried to search for the suspects, the same was in vain. Later, while the PW1 was recording a statement, police officers from the Flying Squad brought the accused persons. The PW1 was able to recognize them.

In his evidence, the PW2 – PC Maurice Otieno recalled that on 23rd October, 2000 at around 9.00 a.m. while accompanied by Cpl Kemboi and IP Tirop he saw two people carrying a small bag – Exhibit 1. When they challenged them to stop, the 2nd appellant dropped the bag and the 1st appellant ran away. The PW2 chased the 1st appellant and arrested him at the Police Lines. The 1st appellant had in his possession 15 rounds of ammunition of shot gun. The police officers managed to arrest both the 1st and 2nd appellants with the shot gun and rounds of ammunition before handing them over to the Flying

Squad.

From the above evidence, it is apparent that the offence was committed in broad-daylight between 8.00 a.m. to 9.00 a.m. That means that the complainant was able to see the appellants very clearly because there was sufficient light. In addition to the above, the appellants were arrested on the same day after about an hour. That clearly gave the PW1 an added advantage of recognizing the people who had attacked him.

Besides the above, the conduct of the appellants after being confronted by the PW2 and other police officers clearly showed that they had participated in the robbery. That was later confirmed by the PW2 who found them in possession of a gun. Given the above facts, there was no need for an identification parade. We are satisfied that the overwhelming evidence showed how the appellants had committed the offence. That apart, we are of the considered opinion that the learned Magistrate had evaluated the evidence properly and reached the correct conclusion. Since the conviction is safe and well merited, we hereby uphold the same. The appeal is hereby dismissed since the same has no merits at all.

In the same breadth, we hereby confirm the death sentence that was meted out in accordance to the law. Right of Appeal explained.

1. MUGA APONDI

JUDGE

2. LUKA KIMARU

JUDGE

Judgment read, signed and delivered in open Court in the presence of the appellants and Mr. Maragia for Mr. Kiburi and Mr. Gumo, Assistant Deputy Public Prosecutor.

(1) MUGA APONDI
JUDGE

(2) LUKA KIMARU
JUDGE
1ST APRIL, 2005