



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 431 OF 2000

DAVID GICHIRA JUDY APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court

Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 432 of 2000

PETER MUCHIRI NJAGI alias MUSA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court

Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 305 of 2000

JOHN KARIUKI MICHAEL APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 306 of 2000

PETER KARIUKI KIRII APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 303 of 2000

GEORGE KAMANDE MUIRURI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 307 of 2000

MICHAEL IRUNGU NDUNGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 308 of 2000

MICHAEL MWANGI MUGOGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 304 of 2000

DAVID KARIUKI MUGIRO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 311 of 2000

DAVID MAINA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 309 of 2000

SAMUEL GIKONGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 310 of 2000

GEORGE MAINA KAMAU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

Criminal Appeal 466 of 2000

MARGARET MUTHONI KARIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Judgment and Conviction in Senior Resident Magistrate's Court Criminal Case No. 1015 of 1999 dated 21st July 2005 by Mr. W. N. Njage – S.R.M. – Kerugoya)

J U D G M E N T

(Consolidated)

David Gichira Judy hereinafter referred to as the 1st Appellant, Peter Muchiri Njagi alias Musa hereinafter referred to as the 2nd Appellant, John Kariuki Michael hereinafter referred to as 3rd Appellant, Peter Kariuki Kirii hereinafter referred to as the 4th Appellant, George Kamande Muiruri hereinafter referred to as the 5th Appellant, Michael Irungu Ndungu hereinafter referred to as the 6th Appellant, Michael Mwangi Mugogo hereinafter referred to as the 7th Appellant, David Kariuki Mugi hereinafter referred to as 8th Appellant, David Maina Mwangi hereinafter referred to as 9th Appellant, Samuel Gikonga hereinafter referred to as 10th Appellant, George Maina Kamau hereinafter referred to as 11th Appellant and Margaret Muthoni Kariuki hereinafter referred to as 12th Appellant were jointly tried together with 3 others by the Senior Resident Magistrate Kerugoya for the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. Two of the other Accused died while the trial was still pending while the rest were all convicted of simple Robbery contrary to 296(1) of the Penal Code and each sentenced to serve a jail term of 10 years. In addition except for 12th Appellant each was sentenced to suffer 5 strokes of the cane. Being dissatisfied with the conviction and sentence each Appellant has appealed against his conviction and sentence, which appeals have been consolidated for purposes of hearing.

In the lower court, the 1st Appellant was the 1st Accused, 2nd Appellant the 2nd Accused, 3rd Appellant the 3rd Accused, 4th Appellant the 5th Accused, 5th Appellant the 6th Accused, 6th Appellant the 7th Accused, 7th Appellant the 8th Accused, 8th Appellant the 10th Accused, 9th Appellant the 11th Accused, 10th Appellant the 12th Accused, 11th Appellant the 13th Accused and 12th Appellant the 15th Accused. The 4th and 9th Accused persons died while the trial was still pending whilst the appeal in respect of the 14th Accused also abated due to his death. The particulars of the charge against the appellants stated as follows:

“On the night of 18th and 19th March 1999 at Kagumo-ini Coffee Factory in Murang'a District within Central Province jointly with others not before court while being armed with dangerous weapons namely Rungus, Pangas and iron bars robbed Dominic Ndonga Ruga and Eliud Gachira of 151 bags of dry coffee beans valued at Kshs.400,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Dominic Ndonga and Eliud Gachira.

Except for the 12th Appellant the others also faced an alternative charge of Handling Stolen property contrary to Section 322(2) of the Penal Code in that otherwise than in the course of stealing, they jointly handled 119 bags of coffee knowing or having reason to believe that the same was stolen or unlawfully obtained.

The evidence adduced for the prosecution in the lower court was briefly as follows:-

On the night of 18th and 19th March 1999, Dominic Ndonga Ruga (P.W.2), Eliud Wachira (P.W.3) and Charles Kamau (P.W.4) were guarding Kagumo-ini Coffee Factory where they were then all employed as night watchmen. There were 7 other night watchmen working at the same place. The watchmen were divided into two groups of 5. P.W.2 & P.W. 3 were in one group with three other watchmen and they were guarding the lower side of the factory, whilst P.W.4 and four other watchmen were in the second group which was guarding the upper side of the factory.

At around 3.00 a.m. P.W.2 and P.W.3 were accosted by a gang of about 30 people. P.W.2 was cut on the face whilst P.W.3 was cut on his finger. The two were tied up and bundled into a store which the robbers broke into, other watchmen had already been bundled into the same place. The robbers then started removing bags of coffee from the store and taking them to the road.

P.W.4 and his colleagues who were guarding the upper part of the factory heard noises on the lower side. As they approached the factory gate, they saw a lorry parked at the gate and two men carrying bags of coffee. They realized that there was a robbery so they raised an alarm by blowing their whistles and screaming.

Peter Maina Wagana (P.W.9), Ephantus Kimondo (P.W.12) together with other residents of the area, responded to the alarm. They heard sounds like gunshot and saw the lorry coming from the factory. They unsuccessfully tried to pelt the lorry and block it with stones, but the lorry did not stop. P.W.12 quickly drove to Kiria-ini police post where he reported the matter to P.C. Benjamin Wambua (P.W.8) who booked the report and immediately accompanied P.W.12 to Kagumo-ini factory where they confirmed that there had been a robbery and some watchmen were injured. P.W.8 circulated the information concerning the robbery and the lorry involved through 99 control room.

Sgt. Francis Mwaura (P.W.5), P.C. Jackson Kieti (P.W.7) and P.C. Samuel Mburu (P.W.13) all officers attached to Murang'a Police Station learnt of the robbery and the lorry which was suspected to be heading towards Murang'a. They rushed to the Murang'a – Kiria-ini road near the patrol office, a few minutes later they saw the lorry approaching. They attempted to stop the lorry near some bumps. The lorry slowed down but did not stop, instead speeding off towards Murang'a town. P.W.5 and his colleagues noted that the Registration number of the lorry was KZZ 339 and that there were some people inside the lorry sitting on top of some sacks. When the lorry slowed down they were able to see the Driver whom they identified in court as 1st Appellant.

IP Samuel Kariabu (P.W.6), P.C. Kasyoki (P.W.10) and other officers from Kirinyaga Divisional CID offices were on night patrol when they learnt of the robbery and the fleeing lorry. They decided to patrol along the Kutus Sagana Road, looking out for the vehicle. They saw the lorry and followed it trying to overtake it, but the driver of the lorry kept on blocking them. P.W.6 fired in the air and the lorry swerved and the police vehicle managed to overtake the lorry forcing it to stop. Two people came out of the cabin and rushed into the bushes. One of the two was identified as 3rd Appellant who was the tan-boy of the motor vehicle and the second person one Gitau who was not arrested. The 1st Appellant who was the driver of the lorry was arrested. Also arrested with him were 13 people who were found seated at the back of the lorry. At the back of the lorry there were also 119 bags of coffee, 4 pangas, two crow bars, 3 swords, one axle blade, a pair of pliers and an implement used to blast matchstick to produce a sound like a bomb. In the cabin, they also recovered, a panga, a sword and a torch.

The lorry was taken to Murang'a police station where Samuel Muraguri (P.W.1) then the factory manager of Kagumo-ini Coffee Factory identified the 119 bags of coffee through the markings on the bags as belonging to Kagumo-ini Coffee Factory. P.W.1 also confirmed that the Factory store had been broken into and 151 bags of coffee were missing.

Upon interrogation the 1st Accused claimed that they were taking the coffee to the 12th Appellant. He took P.W.10 and other officers to a store which was within the homestead of the 12th Appellant's brother in law within Kimiicha village. They did not find 12th Appellant but learnt that she was in Kerugoya. P.W.10 and other officers proceeded to Kerugoya where they found and arrested the 12th Appellant.

When charged and cautioned 1st Appellant, 4th Appellant, 6th Appellant, 7th Appellant, 8th Appellant, 10th Appellant and 11th Appellant each gave a confessionary statement to the police. The statements made by 1st, 6th, 7th and 10th Appellants were retracted but admitted in evidence after a trial within a trial. The statements made by 4th Appellant, 8th Appellant and 11th Appellant were not objected to and were produced in evidence as exhibits.

Patrick Mwangi (P.W.11) a clinical officer examined P.W.2 & P.W.3 and confirmed that they had suffered personal injuries classified as harm. He produced the P.3 forms which he duly signed in respect of the two witnesses.

In his defence the 1st Appellant gave a sworn statement denying having committed the offence. He testified that he was a transporter and that he was contracted by the 12th Appellant to collect her fertilizer at Thika and Murang'a and that 12th Appellant introduced him to one Gitau. The next morning Gitau went to 1st Appellant and told him that he had been sent by 12th Appellant to go and collect the fertilizer.

The 1st Appellant had however first to take the vehicle to the garage. Later they left for Thika. On arrival at Thika, Gitau claimed he could not trace the person with the keys to the stores where the fertilizer was kept. Gitau suggested that they go to Murang'a where there was more fertilizer. He got some casuals who were to load the fertilizer into the lorry. The vehicle developed a mechanical problem on the way and was left at Total Petrol Station undergoing the repairs whilst Gitau proceeded ahead with the casuals in a pick-up. Gitau came back at midnight. He sat with 1st Appellant and one man in the cabin and he directed 1st Appellant to a place beside the road where they found sacks covered with canvas. The cargo was loaded onto the lorry. 1st Appellant who had remained inside the motor vehicle heard sound of whistles and screams. Gitau then came and ordered 1st Appellant to drive off. He threatened to shoot 1st Appellant so 1st Appellant drove off. At Murang'a they were stopped by the police but Gitau commanded him not to stop. They were later stopped and arrested by police officers from CID Kerugoya. 1st Appellant tried to explain to the police what had happened but they did not listen to him.

2nd Appellant also gave a sworn defence. He denied the charge and stated that he spent 17th March 1999 at his mother's store where he works. He left at 7.00 p.m. and went to his residence where he spent the night. The next morning at 7.00 a.m. one Kimani (who was 14th Accused in the lower court) informed him that their vehicle had been seized in Kagio and that the occupants of the lorry were alleged to have been killed. The 2nd Appellant panicked as his brother 1st Appellant was the driver of the lorry. He telephoned his mother who told him to proceed ahead and find out. On arrival at the scene he found police officers and people lying on the tarmac. He inquired about his brother from the police but was instead arrested together with Kimani who had accompanied him. They were tortured and later charged.

The 3rd Appellant also made a sworn statement in which he explained that he was a driver. On 18th March 1999 he parked his motor vehicle KWH 845 Isuzu KB at the police Station. He collected it the next morning. At about 10.00 a.m. a police officer went to his house, searched it and took 2 radio cassettes and an adaptor. 3rd Appellant was taken to the police station where he was locked in. Police officers from Kerugoya came and interrogated him. He was taken to Kerugoya police station where he found 19 persons arrested as robbery suspects. He was later charged with an offence which he knew nothing about he denied being a tan-boy or having escaped from the lorry in question.

The 4th Appellant gave an unsworn statement. He stated that on the material day he went to Kagio town. He met a vehicle which stopped where he was. He was told to enter the vehicle. It drove towards Sagana. Before they got to Sagana they met a lorry, the police stopped it and arrested the occupants of the lorry. They were taken to Kerugoya police station. He was beaten and interrogated about the robbery. He was charged with an offence which he knew nothing about.

The 5th Appellant gave a sworn statement. He denied the charge. He explained that he works as a casual labourer in Thika. On 18th March 1999 he was recruited by 1st Appellant to go to Murang'a town to load empty sisal sacks. On arrival at Murang'a he became suspicious of the job when they arrived at their destination and were briefed to take positions. He protested to 1st Appellant, but 1st Appellant threatened him that if he did not participate in the loading he would be killed. He nevertheless sat in the cabin and refused to participate. The other people loaded bags of coffee beans onto the lorry. The 5th Appellant was beaten but he stood his ground and refused to participate. There were shouts and sound of a whistle and the lorry was driven off. At Murang'a town they were waived down by police officers but the driver refused to stop. At Sagana they were again stopped and 1st Appellant explained he was coming from delivering dry maize in Nairobi. They were allowed to proceed, but shortly thereafter the lorry was forced to a stop by gunshots. They were arrested but two people one Gitau and 3rd Appellant escaped. The 5th Appellant maintained that he was involuntarily involved in the robbery.

The 6th Appellant gave an unsworn statement. He explained that on the morning of 19th March 1999 he got a lift from a bread van. He was going to buy vegetables. On the way the bread van stopped to assist a lorry which had stalled. The lorry was towed by another lorry, the 6th Appellant was advised by the driver of the bread van to get into the lorry as the bread van was traveling to Nyeri. He boarded the lorry which was carrying bags of dry coffee. Before Kagio town the lorry was stopped by the police and they were arrested. He tried to explain to the police but they did not listen.

Likewise 7th Appellant also gave unsworn evidence claiming that he was given a lift in a lorry. It stalled on the way. They were towed by another lorry. He alighted at Kagio and went across the road to buy tomatoes. He was asked to assist in pushing a lorry which had stalled. They pushed it and it ignited. He thereafter went beside the road for a call of nature, when He came back He saw a landrover following the lorry, then heard gunshots. Some people emerged from the lorry and escaped. He was ordered to stop and was arrested together with the 9th Appellant and one Charagu. They were forced to lie down and were later taken to Kerugoya Police Station.

The 8th Appellant gave a sworn statement in which He denied the charge of robbery. He maintained that He had only obtained a lift in the lorry KZZ 339 to take him to Sagana. He knew 1st Appellant who was the driver of the lorry. He wanted to alight at B.P. Petrol Station but the driver did not stop. He was informed that the vehicle was going to Murang'a to collect some goods and would be back before long. He fell asleep on the bed in the cabin and later woke up to find himself in Thika. They took some passengers and the vehicle proceeded towards Kiriaini. The vehicle stopped somewhere in the middle of the road. It was then that 8th Appellant learnt from 1st Appellant, that they had come to load dry Coffee Beans. The 8th Appellant was asked to alight to assist in the loading but He completely refused. Some bags were loaded onto the lorry, an alarm was sounded through whistles and screams, and the loaders boarded the lorry and it took off.

The 8th Appellant, explained how the police tried unsuccessfully to stop the lorry at Murang'a. The police finally intercepted the lorry at Kagio area, and 8th Appellant, 1st Appellant, and the occupants of the lorry were arrested except for 3rd Appellant and one Gitau who managed to escape. The 8th Appellant maintained that He was taken to Murang'a against his will and that He did not participate in the robbery. He maintained that He gave his statement to the police voluntarily.

The 9th Appellant also gave sworn evidence. He testified that on the morning of 19th March 1999. He was on his way to Kagio market. He got a lift in a lorry which was going to Meru. At Mathioya they found another lorry Registration Number KZZ which had stalled in the middle of the road. The lorry which had given them a lift towed the stalled lorry. On the way 9th Appellant saw some ox-carts with tomatoes, He alighted. The 1st Appellant who was the driver of the stalled lorry asked the 9th Appellant and others to assist in pushing the lorry to ignite it. They pushed and managed to get the lorry started. The 9th Appellant got in the vehicle but soon a white landrover went past the lorry stopped turned and came back. It stopped ahead of the lorry. The lorry stopped and 3 men came from the lorry and ran into the bushes. Someone went towards 9th Appellant and Charagu across the road. The people in the lorry were also asked to alight and they were all arrested. The 9th Appellant maintained that He was not in the vehicle carrying the stolen coffee and that He had been given a lift in the Isuzu lorry. He denied having made any statement to the police.

The 10th Appellant gave unsworn evidence. He explained how He was arrested when He was on his way to Kagio to buy chicken. A police vehicle stopped a lorry just ahead of him. There were gunshots He panicked and lay beside the road. He was then searched and arrested. He was interrogated about coffee and whether He knew the other suspects. He denied but was nevertheless charged with this offence.

The 11th Appellant also gave an unsworn statement. He explained that He had spent the night at Kutus where He was buying chicken. The following morning He boarded a matatu, but it stopped just before Kagio. The driver told him to alight because He had excess passengers and the police were ahead. The 11th Appellant was then stopped by CID personnel. He was interrogated and was taken to Kerugoya Police Station. He denied having had anything to do with coffee.

Finally, the 12th Appellant also gave a sworn statement denying having committed the offence charge. She explained how the police stormed into her house on 19th March 1999. They searched her house but recovered nothing. They then took her to Gathiga where they found 1st Appellant. She was asked whether she knew him and she confirmed that she did as He was a transporter and had transported goods for her on several occasions.

The 12th Appellant explained that the home at Gathiga belonged to Timothy Muchiri. She noticed 37 bags of coffee in the store at Gathiga she knew the owner of the coffee as Peter Kehenya. She denied having been involved in the robbery and claimed to have been in Busia on 17th March 1999 and arrived back in her home on 18th March at 11.00 am. She denied knowledge of Gitau and maintained that she never introduced any person called Gitau to 1st Appellant. Each of the appellants has filed grounds of appeal. The pertinent issues raised in the respective appeals includes the following:-

- That the trial magistrate improperly admitted the extra judicial statements alleged to have been made by the appellants.
- That the trial magistrate based the convictions on retracted confessions which were not corroborated.
- That the trial magistrate erred in using evidence of Co-Accused as corroboration.
- That the trial magistrate relied on extraneous matters which were not evidence adduced in this case.
- That the appellants' conviction was against the weight of evidence. · That the trial magistrate failed to consider the defences and explanation of the Appellants and did not consider the evidence against each appellant.

- That no common intention was proved.

It is apparent from the record of proceedings of the Lower Court that the trial Magistrate made some blunders whilst considering the admissibility of the extra judicial statements alleged to have been made by Appellants.

For instance one trial within trial was held to consider the admissibility of two statements one allegedly made by 6th Appellant and the other by the 10th Appellant, while another trial within trial within trial was held to consider the admissibility of two statements, one made by 4th Accused and the other by the 14th Accused. This was irregular as the admissibility of each statement ought to have been the subject of a specific trial, such that there ought to have been four trials within trial.

Secondly the trial magistrate failed to take note of the fact that the taking of statements from two suspects on the same day by one witness was undesirable as the witness was already seized of certain facts relating to the case by the time of taking the second statement.

Thirdly, as was stated by the court of appeal in *Ezekia v/s Republic [1972] E A 427* which was cited to us.

“It is well established that where the prosecution seeks to rely on a confession the burden is entirely on the prosecution to prove that it was voluntary.”

In this case it is evident from the rulings made by the trial Magistrate in the trial within trial that the Magistrate shifted the burden to the Appellants by failing to consider whether the statements were voluntarily made, instead, ruling that no torture had been proved. Moreover the trial Magistrate ignored the undisputed evidence that one of the suspects had died in custody under unclear circumstances. The Appellant’s evidence that there was threat of torture was therefore not without foundation.

Further, the extra judicial statements having been retracted by the makers could not be relied upon to form the basis of the case against the appellants without other independent evidence to corroborate it.

On our part, we find that the statements alleged to have been made by 1st, 6th , 7th and 10th Appellants which were retracted ought not to have been admitted in evidence or relied upon. We will accordingly totally ignore these statements.

The proceedings and judgment of the Lower Court reveal that apart from the trial which was subject of this appeal, the trial magistrate also heard and determined two other trials, i.e. Kerugoya Criminal Case No.1013/99 and 1014/99 which involved the appellants in this case. It is not clear why all these trials were handled by the same magistrate. This was undesirable as it exposed the appellants to risk of prejudice. Indeed the trial magistrate used evidence which was not before him in this case to convict the 12th Appellant as is apparent from the judgment at page J8 where the trial magistrate stated as follows:-

“I have perused the defence by the Accused No.15. She denies any involvement in the theft of the coffee or handling the same. The defence is a mere denial. The court takes judicial notice that this was not the first time she had received stolen coffee from the 1st Accused and Gitau. On 10th of March 1999 a robbery had been committed at Mununga Coffee Society in Murang’a and some bags of coffee stolen. In that case No.1014/99, the 1st Accused also admitted that He was delivering the coffee to the 15th Accused. He even led police to her home and then to her store at Kimicha. The police recovered 37 bags of dry coffee beans. They were the subject of the charge in Criminal Case No.1014 in which the 15th Accused has also been convicted. The reasonable and irresistible inference to draw from the circumstances is that the 15th Accused though not physically present was involved in planning the robbery. She therefore participated in the robbery.”

It is apparent that the trial magistrate purported to take judicial notice of evidence adduced against the 12th Appellant in Kerugoya Criminal Case No.1014/99. However under Section 60(1) of the Evidence Act (Cap 80), facts of which the court can take judicial notice are listed as follows:-

“60. (1) The courts shall take judicial notice of the following facts-

(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;

(b) the general course of proceedings and privileges of Parliament, but not the transactions in

their journals;

(c) Articles of War for the armed Forces;

(d) (Deleted by L. N. 22/1965).

(e) the public seal of Kenya; the seals of all the courts of Kenya; and all seals which any person is authorized by any written law to use;

(f) the accession to office, names, titles, functions and signature of public officers, if the fact of their appointment is notified in the Gazette;

(g) the existence, title and national flag of every State and Sovereign recognized by the Government;

(h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;

(i) the extent of the territories comprised in the commonwealth;

(j) the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;

(k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

(l) the rule of the road on land or in the air;

(m) the ordinary course of nature;

(n) the meaning of English words;

(o) all matters of general or local notoriety;

(p) all other matters of which it is directed by any written law to take judicial notice.

2. In all cases within subsection (1), and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.”

The above provision does not give a court powers to take judicial notice of evidence adduced in another trial. This can only come by way of notice of a judgment of a court under Section 47A of the Evidence Act (Cap 80) which provides as follows:-

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

Suffice it is to state that it was premature for the trial magistrate to use his judgment in Kerugoya Criminal Case No.1014/99 as conclusive evidence of the 12th Appellant’s guilt, as the 12th Appellant’s appeal against that judgment remains pending in this court as High Court Criminal Appeal Number 467 of 2000.

It is evident that the trial magistrate allowed his judgment to be clouded by extraneous matters and this was prejudicial to the 12th Appellant in particular.

Notwithstanding the above short comings,, as the first appellate court it is our responsibility to reconsider and evaluate the evidence which was before the trial magistrate, for as was held by the court of appeal **in Kariuki Karanja v/s Republic [1986] KLR 190.**

“On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have decided to admit.”

The evidence of P.W.2, P.W.3, and P.W.4 is clear that a gang of about 30 people invaded the Kagumoini coffee factory, attacked and overwhelmed P.W.2, P.W.3 and other watchmen who were guarding the factory. The gang then broke into the factory store and stole bags of coffee from the store and loaded it onto a lorry. The evidence of P.W.2, P.W.3 and P.W.4 is consistent with the evidence of P.W.1 who confirmed that 151 bags of coffee were missing from the store. It is also consistent with the evidence of P.W.9 and P.W.12 who heard the alarm raised by P.W.2, P.W.3, P.W.4 and other watchmen, saw the lorry and attempted to stop the lorry using stones. It is further consistent with the evidence of P.W.6 and P.W.10 who recovered 119 bags of coffee from a lorry just hours after the robbery. The coffee bore marks positively identified by P.W.1 as belonging to Kagumoini coffee factory. On the above evidence we have no doubt that there was a robbery at Kagumoini coffee factory, during which P.W.2 and P.W.3 were injured and 151 bags of coffee stolen. We further find that a lorry Registration Number KZZ 339 was used during the robbery and that 119 bags of coffee positively identified as belonging to Kagumoini coffee factory were recovered from the lorry just a few hours after the robbery.

Noting that none of the eye-witnesses to the robbery could identify any of the assailants, the question that arises as regards each appellant is whether He or She was found in the lorry wherein the coffee belonging to Kagumoini coffee factory was recovered. If so whether the appellants were in possession of the coffee and have provided a reasonable explanation for their possession, and finally whether the doctrine of recent possession applies.

As concerns the 1st Appellant, it was not disputed that He was at the material time the person driving the lorry Registration Number KZZ 339 in which the 119 bags of coffee was recovered. In his sworn defence however the 1st Appellant maintained that He was only a hired transporter and that He was misled by one Gitau and the 12th Appellant that He was going to transport fertilizer and that He only realized the sinister nature of the undertaking when an alarm was sounded and He was forced by Gitau under threats and intimidation to drive off the lorry, and not to stop even when requested to do so by the police. In short the 1st Appellant maintained that He did not know that the goods to be transported was coffee nor did He know that the coffee was to be stolen.

Nevertheless the conduct of the 1st appellant when the police tried to stop the vehicle was not consistent with his alleged innocence. He not only failed to stop when stopped in Murang’a, but again refused to stop and tried to block the police vehicle from overtaking the lorry along the Kutus Sagana Road. The police vehicle only managed to overtake the lorry when P.W.6 fired in the air and the 1st Appellant swerved. If indeed He had been hijacked by Gitau as He alleges, He would have sought refuge from the police officers at the earliest opportunity.

Secondly P.W.6 and P.W.10 testified that a number of weapons including pangas, crowbars, swords an axle blade and a pair of pliers amongst others were recovered from the lorry. It is noteworthy that a panga and a sword were also recovered from the cabin. The 1st Appellant cannot therefore feign ignorance of the presence of these weapons in the vehicle. The 1st Appellant must have known that the weapons were intended for a robbery and were indeed used in the robbery.

Further both the 5th and 8th Appellants gave evidence on oath in which they implicated the 1st Appellant. The 5th Appellant swearing that the 1st appellant was the one who recruited him to go to Murang’a to load empty sisal sacks and that when He discovered the true nature of the work and protested to the 1st Appellant, the 1st Appellant boasted that stealing is his golden job.

Likewise the 8th Appellant swore that the 1st Appellant who was known to him gave him a lift in the lorry. He wanted to alight at Sagana Town but the 1st appellant told him they would first go to Murang’a to collect shop goods. He only became suspicious when He saw other occupants of the lorry alighting and being briefed to take positions. It was then that He was informed by 1st Appellant that they had gone to load coffee beans.

It is noted that neither 5th Appellant nor the 8th Appellant was cross examined by the advocate for the 1st Appellant who was absent on the day they testified and did not request to cross examine the two when He later attended court. In the case of ***Patrisi Ozia v/s Republic [1957] E A 36***, the court of appeal noted that while an unsworn statement by a Co-Accused is not evidence against another Accused, if the Co-Accused gives evidence on oath it may be used though such evidence must be regarded with extreme caution. In this case, the sworn testimonies of 5th Appellant and 8th Appellant taken together with the evidence of P.W.5, P.W.6 and P.W.10 regarding the conduct of the 1st Appellant in refusing to stop when stopped by the police, and the presence of the stolen coffee and weapons in the lorry, which was being driven by the 1st Appellant leaves no doubt that the 1st Appellant was a willing participant in the commission of the Robbery at Kagumoini coffee factory and his defence cannot therefore stand.

Regarding the 2nd Appellant, He denied having been present in the lorry and claimed He had merely gone to the scene to check on his brother the 1st Appellant as He had learnt that his vehicle was involved in an accident. However both P.W.6 and P.W.10 were categorical that the 2nd appellant was arrested from the lorry. The 2nd Appellant implies that the police arrested him claiming He was one of those who had escaped from the lorry, however both P.W.6 and P.W.10 were clear as to the identity of the two persons who had escaped from the lorry as Accused 3 and one Gitau. It was therefore unlikely that the police officers would mistake 2nd Appellant for the suspect who had escaped. We find that the 2nd Appellant was actually arrested from the lorry KZZ 339.

Indeed the evidence of P.W.6 and P.W.10 that 2nd Appellant was arrested from the lorry is consistent with the evidence under oath of the 8th Appellant that the 2nd Appellant was the one who cut the telephone wires just before they started loading coffee onto the vehicle, and the sworn testimony of the 5th Appellant that the 2nd Appellant attacked him when He refused to come out of the lorry to participate in the loading. We therefore reject the defence of 2nd Appellant and find that He was in the lorry wherein the coffee stolen from Kagumoini coffee Factory just a few hours earlier was recovered.

The 3rd Appellant also denied having been present in the lorry. It is evident that the 3rd Appellant was arrested from his house. It is however the evidence of P.W.6 and P.W.10 that the 3rd Appellant jumped out of the lorry Registration Number KZZ 339 just when the lorry was stopped by the police. Both P.W.6 and P.W.10 testified that 3rd Appellant was known to them. Since it was around 5.45 am when they stopped the lorry, there was sufficient light for P.W.6 and P.W.10 to clearly see the two suspects who escaped and to recognise them. There was no need for an identification parade as the 3rd Appellant was recognized and identified by name as Kimungu – Mungu which was apparently his nickname. We reject the defence of 3rd Appellant and find that He was also arrested from the lorry Registration Number KZZ 339 wherein 119 bags of coffee stolen from Kagumoini Coffee Factory were recovered.

Both P.W.6 and P.W.10 maintained that they arrested the 4th Appellant from the lorry. Although in his defence the 4th Appellant denied having been arrested from the lorry, the 4th Appellant gave a charge and caution statement to P.W.14 in which the 4th Appellant admitted having participated in the robbery and having been arrested from the lorry. This statement which was Exhibit 17 was admitted in evidence after the 4th Appellant indicated that He had no objection to its admission. Although the 4th Appellant was not represented by counsel, He cannot have failed to realize the implication of the admission of the confession statements especially since the evidence of the confession statement of the 4th Appellant came immediately after one of his Co-Accused had challenged the production of a similar statement. We therefore reject the defence of the 4th Appellant and find that He was in fact arrested from the lorry Registration Number KZZ 339 with bags of coffee which had just been stolen from Kagumoini coffee factory in a robbery.

As relates to the 5th Appellant. He gave a sworn statement in which He admitted having been arrested from the lorry which had the stolen coffee. He however explained that He was not aware of the intention of 1st Appellant and the others of robbing Kagumoini coffee factory as He was tricked by 1st Appellant into joining the group on the pretext that they were going to load empty sisal sacks. He maintained that He refused to participate in the robbery when He realized what 1st Appellant and the others were upto. We find that the explanation given by the 5th Appellant is credible particularly as it ties up with the sworn testimony of the 8th Appellant. We accept the 5th Appellant's defence and find that He did not have a common intention with the rest of the robbers therefore although present in the lorry He cannot be said to have been in possession of the stolen bags of coffee.

The 6th Appellant explained that He had merely got a lift in the lorry after the driver of a bread van which had initially given him a lift told him He was going to Nyeri and He should therefore get into the lorry which was going towards Sagana. We find this explanation not plausible as it is unlikely that the driver of the lorry which evidently was coming from a robbery mission and was still having incriminating evidence such as weapons and the stolen goods would have given a lift to an innocent passenger. We reject the explanation of the 6th Appellant and find that He was in the lorry as a loader of the stolen coffee and a willing participant in the crime.

The 7th Appellant also denied having been arrested inside the lorry. He explained how He assisted pushing the Mitsubishi lorry which had stalled and that after the engine of the vehicle ignited He went for a call of nature beside the road. While in this process a landrover appeared and He saw people emerge from the lorry and escape. He was then ordered to stop and was arrested. The explanation given by the 7th Appellant is not credible at all. There is no reason why the police would have arrested him if He was not inside the lorry KZZ 339. The police officers could not have confused him for the suspects who had escaped from the lorry since the officers had seen and identified the suspects as Kimungumungu and Gitau. It is evident that the 7th Appellant was found inside the lorry Registration Number KZZ 339 wherein the stolen coffee bags from Kigumoini coffee factory were recovered. We therefore reject his explanation.

The 8th Appellant in his sworn testimony admitted having been arrested from the lorry Registration Number KZZ 339 but explained that He did not participate in the robbery as He was tricked by 1st Appellant into going with him on the pretext that they were going to Murang'a briefly to load shop goods. The 8th Appellant's evidence was quite detailed. The same was consistent with the statement under charge and caution which the 8th Appellant gave to P.W.16, and was

produced in evidence as Exhibit 19. The evidence of 8th Appellant was also consistent with the sworn testimony of the 5th Appellant who saw the 8th Appellant arguing with the 1st Appellant and noted that the 8th Appellant sat in the cabin of the vehicle and refused to participate in the loading of the coffee. We find that the 8th Appellant has given a plausible explanation for his presence in the lorry. His conduct in refusing to participate in the loading of the coffee and his giving an explanation to the police at the earliest opportunity is a clear indication that He did not have a common intention with the 1st Appellant and the others in regard to the robbery.

The 9th Appellant also gave sworn evidence denying having been arrested from the lorry KZZ 339. He explained that He was in an Isuzu lorry which had towed the lorry KZZ 339 and that it was after they had helped push KZZ 339 and it ignited that a landrover went and blocked the lorry. Some people who were in the lorry escaped and it was then that 9th Appellant and one Charagu who were across the road were stopped and arrested. The 9th Appellant's explanation cannot hold P.W.6, P.W.10 and other officers were only interested in the lorry KZZ 339 and its occupants. It is clear that the only occupants of KZZ 339 who escaped from the lorry were two people who were identified as Kimungu Mungu and Gitau The police officers could not therefore have mistaken the 9th Appellant and Charagu if indeed they were across the road. We find that the only reason why the 9th Appellant was arrested was because He was inside the lorry KZZ 339 wherein the bags of stolen coffee from Kagumoini coffee factory were recovered.

The 10th Appellant also denied having been arrested from the lorry. He explained that He was on his way to Kagio where He was going to buy chicken when a police vehicle stopped just ahead of him and he heard gunshots fired. He panicked laid down and was arrested. Both P.W.6 and P.W.10 maintained that the 10th Appellant was arrested from the lorry KZZ 339. We find that there was no possibility of mistaken identification, nor did the police have any reason to arrest an innocent person who was just going about his own business, we reject the defence of 10th Appellant and find that He was arrested from KZZ 339.

The 11th Appellant also denied having been arrested from the lorry. He explained that He was waiting for a vehicle when CID officers stopped him and others, interrogated them and arrested them. This explanation is not plausible. There is no reason why the CID officers would have arrested the 11th Appellant and falsely accuse him of having been arrested from the lorry. Both P.W.6 and P.W.10 maintained that the 11th Appellant was arrested from the rear of the lorry KZZ 339. We accordingly reject the defence of the 11th Appellant and find that He was arrested from the lorry KZZ 339.

The 12th Appellant was not arrested from KZZ 339 but was implicated by the 1st Appellant who maintained when He was arrested that the 12th Appellant was the one who had hired him to go and collect the coffee from Thika and Murang'a. P.W.10 testified that the 1st Appellant took them to a store at Kimicha which He alleged was the store of the 12th Appellant. However P.W.10 appellant did not find anything to connect the 12th Appellant with the commission of this offence. Although the 1st Appellant gave sworn evidence that the 12th Appellant had discussed and agreed with him to hire the lorry to collect and transport fertilizer from Thika and Murang'a and that the 12th Appellant had introduced 1st Appellant to Gitau and told him they would go to him when they were ready for the transport, this has been denied by the 12th Appellant. It is evident that there was no other evidence connecting the 12th Appellant with the robbery at Kagumoini coffee factory and the evidence of the 1st Appellant cannot stand alone as it is his word against that of the 12th Appellant. There was therefore no evidence to prove the charge against the 12th Appellant.

We find that the 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th and 11th Appellants were all arrested from motor vehicle KZZ 339. The presence of 119 bags of coffee in the motor vehicle KZZ 339, which bags of coffee were positively identified to have been stolen from Kagumoini coffee factory just a few hours earlier, and the presence of weapons in the motor vehicle lead to the irresistible conclusion that the lorry KZZ 339 had been used in the robbery at Kagumoini coffee factory and that the lorry occupants who were in joint possession of the recently stolen coffee were part of the gang of robbers who had stolen the coffee.

The trial magistrate convicted the appellants with simple robbery because:

“the injuries were not so aggravated in degree as to amount to wounding as defined by Section 296(2) of the Penal Code. Again looking at the charge it is alleged that the 14 Accused were armed with clubs, runkus and iron bars. Though some of these items were produced in court as exhibits there is no evidence from any of the complaints that any of them was attacked by using a dangerous or offensive weapon.”

Obviously the trial magistrate misdirected himself as Section 296(2) is clear that the offence is committed.

“If the offender is armed with any dangerous or offensive weapon or instruments, or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

In this case there was evidence that the 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th and 11th Appellants were found in possession of weapons so they were obviously armed, they were also more than two persons and they did use personal violence on P.W.2 and P.W.3 and caused them injury.

As was stated by the court of appeal in the case of **Johana Ndungu vs Republic**, Criminal Appeal No.116 of 1995 at Mombasa which we recently applied in **Muriuki Ngure Munyi alias Karaya & Another H.C. (Nyeri) Cr. Appeal No.332 and 349 of 2002**. any of the above ingredient was sufficient to prove the charge of capital Robbery and the appellants therefore ought to have been convicted under Section 296(2) of the Penal Code.

The Appellants are however lucky in that they were not given the necessary caution by this court before the commencement of this appeal. We therefore cannot interfere with the sentence given by the trial magistrate.

We come to the conclusion that there was no evidence to sustain the conviction of the 5th, 8th and 12th appellants we therefore allow their appeals, quash their convictions and set aside the sentences imposed on them. The 5th, 8th and 12th Appellants shall therefore forthwith be set free unless otherwise lawfully held.

We find that there was sufficient evidence to sustain the convictions of the 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th and 11th Appellants, and that they are lucky to escape with a jail sentence rather than the mandatory death sentence. Accordingly, we find no merit in the appeals of 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th and 11th Appellants and do therefore dismiss their appeals.

Dated, signed and delivered this 10th day of June 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE