



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYERI**

**Criminal Appeal 212 of 2002**

**ALEX MWANGI MUGETHI.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**Criminal Appeal 214 of 2002**

**CHRISTOPHER MURIITHI NJOGU.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**(Being appeals from the judgment of M. R.**

**Gitonga, Principal Magistrate, delivered on 9th**

**April, 2002 in the Chief Magistrate's Court at**

**Nyeri, Criminal Case No. 70 of 2002)**

**JUDGMENT**

These two appeals were consolidated for hearing, Alex Mwangi Mugethi being referred to as the First Appellant while Christopher Muriithi Njogu is referred to as the Second Appellant.

The two appellants were respectively the first accused and the second accused before the trial magistrate. They faced two counts of robbery with violence contrary to *Section 296(2)* of the Penal Code and the Second Appellant alone faced an alternative count alleging the handling of stolen goods contrary to *Section 322(2)* of the Penal Code.

They were each convicted and sentenced to death in respect of count one while each was acquitted on counts two and the Second Appellant acquitted also on the alternative count.

Each has appealed against his conviction and sentence on count one – and during the hearing of the appeals before us, the learned Provincial State Counsel, Mr. Orinda conceded the appeals on the ground that the Prosecutor, Sergeant Njagi, was not qualified to prosecute in terms of *Section 85(2)* of the Criminal Procedure Code. He, however, asked for re-trial on the ground that there was sufficient evidence. He said that there was conclusive evidence of identification by P.W.1 and P.W.4 arguing that the identification parade was properly conducted by P.W.6. Mr. Orinda added that there was also a

confession taken by P.W.7 from the First Appellant. The learned State Counsel went on to point out that the circumstances under which the Second Appellant was arrested brings out the issue of common intention with the First Appellant.

Each appellant while welcoming the fact that Mr. Orinda conceded the appeals opposed retrial pointing out that they have already been in prison for a long time. The First Appellant added that he had also been sick in prison and urged us to look on both sides.

We have looked at the evidence on record. While there may be sufficient evidence that a motor vehicle registration No. KAK 186K Nissan Sunny Saloon driven by the Complainant; John Gitari (also written Gitahi) Wamburi (also written Wamburu) was carjacked on 27th December 2001, questions may be raised with respect to other parts of the Prosecution's evidence.

An example is the evidence concerning P.W.1 John Gitari (Gitahi) Wamburi (Wamburu). He told the court that having been bundled into the motor vehicle's boot, he escaped by opening the boot and jumping out of the motor vehicle as the vehicle was moving slowly at a section of the road. He added that having jumped out of the vehicle:

***“I ran for my life. I noticed the vehicle stop, but I kept running until I entered some homestead. When I told what had happened. They tried their mobiles to reach the Police but were not able. We went to the Petrol Station at Skuta and a good Samaritan took me to Nyeri Police Station. I reported. The robbers had taken my money Kshs. 2100/= and a motorolla mobile phone. The mobile phone is one before court. The Police and my fellow taxi drivers took action immediately. Next morning my vehicle was recovered. The person I saw and identified well is the one who hired me. It is the 1st accused. My mobile phone was also recovered.”***

Firstly, P.W.5 Police Constable Charles Asiyo was the officer to whom P.W.1 reported the incident at Nyeri Police Station. He said:

***“I received a reportee who was handcuffed. He told me he had been carjacked and his motor vehicle KAK 486K was stolen at Kamakwa area. I removed the handcuffs. I booked the report and issued him a note to go for treatment. I kept the handcuffs they are before court (PEX4).”***

That is all that P.W.5 told the court. There is nothing in the evidence of P.W.1 concerning handcuffs. The impression P.W.1 gives is one of a prisoner in a motor vehicle's boot who was physically free to break the boot open and jump out to run and did break open and run for his dear life meeting other people who assisted him, apparently, not noticing any handicap from handcuffs.

Secondly, from the only report P.W.1 made to the Police, there is no mention of money or a motorolla mobile phone having been robbed from him. That should have been in the evidence of P.W.5. The fact that P.W.1 mentioned those two items in his evidence suggests he may as well have come to talk about them after seeing or after learning of the recoveries P.W.3, the arresting officer Corporal Joel Mwenda, claimed to have made from the two appellants on their arrest about 6.30 a.m. on 28th December 2001. Otherwise why did P.W.1 not include those two items in his report to P.W.5?

Thirdly look at the circumstances of the arrests. Two passengers picked from other passengers in a public transport motor vehicle without the assistance of P.W.1 or P.W.4. Searched and perhaps found in possession of the things P.W.3 claimed to have found on them. Subsequently taken to Police Identification Parade which P.W.7 is the only witness claiming his two witnesses identified the appellants. The two witnesses themselves, in their respective evidence, do not seem to know anything about the alleged identification parades.

Moreover, the time was between 7.00 p.m. and 8.00 p.m. when P.W.1 and P.W.4 are said to have seen the First Appellant. No attempt made to show the court what light was there for P.W.1 and P.W.4 to

use.

Last but not the least, the learned State Counsel banked very much on the confession he said was recorded from the First Appellant without remembering first, that the confessions, in the form then available to the Police, had been repudiated and secondly that such confessions are no longer admissible in the evidence even if a retrial were ordered. The law on confessions as amended today is the law to apply.

From the foregoing therefore, we do not agree that there was sufficient evidence to convict each appellant. But even if it is found that at the time of that trial there was sufficient evidence, we hold the view that to-day because of the amended law, there would be no sufficient evidence and a retrial may merely be providing the Respondent with the opportunity to improve on its case against the appellants. Moreover the appellants have been in custody for four years now. How is that period to be compensated if justice is to be administered in this matter in the face of a retrial?

The above being the position, we do hereby declare the trial of the two appellants a nullity. Allow the appeal of each appellant. Quash his conviction and set aside the sentence imposed on each appellant.

In our considered view, and with all due respect, we do reject the request for retrial. Accordingly each appellant be released forthwith unless lawfully detained in some other cause.

**Dated this 15th day of December 2005.**

**J. M. KHAMONI**

**JUDGE**

**H. M. OKWENGU**

**JUDGE**

**Present:**

The Two Appellants In Persons

M/S Ngalyuka for the Republic

Court Clerk Gikaria