



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 206 of 2002

FRANCIS MAINA NJOROGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(Appeal from original Judgment and Conviction in Chief Magistrate’s Court at Nyeri
Criminal Case No. 581 of 2002 by Mr. C. D. Nyamweya – S.R.M. – Nyeri)**

STEPHEN MAINA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JOHN MWANGI MUTHOGA APPELLANT

VERSUS

REPUBLIC RESPONDENT
**(Appeal from original Judgment and Conviction in Chief Magistrate’s Court at Nyeri
Criminal Case No. 581 of 2002 by Mr. C. D. Nyamweya – S.R.M. – Nyeri)**

J U D G M E N T

(Consolidated)

Francis Maina Njoroge (hereinafter referred to as the 1st appellant) is the appellant in High Court Criminal appeal No. 206/2002, whilst Stephen Maina Mwangi (hereinafter referred to as the 2nd appellant) is the appellant in High Court Criminal Appeal No. 207/2002 and John Mwangi Muthoga (hereinafter referred to as the 3rd appellant) is the appellant in High Court Criminal Appeal No. 241 of 2002. The three were jointly tried together with one Joyce Kanuthu Muchori (hereinafter referred to as Joyce) before the Senior Resident Magistrate Nyeri. The three appellants were convicted on two counts of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to the mandatory death sentence. Being dissatisfied, they have each appealed against conviction and sentence which appeals have been consolidated for purposes of hearing.

During the trial in the lower court the 1st Appellant was the 3rd Accused, 2nd Appellant the 2nd Accused, 3rd Appellant the 1st Accused and Joyce the 4th Accused. The particulars of the offences of which the appellants were convicted were as follows:

Count I – On the 20th day of February 2001 at about 11.30 p.m. at Witima Village in Nyeri District of the Central Province, jointly with others not before court and while armed with dangerous weapons namely pangas and a pistol, robbed Geoffrey Kagiri Gicheru of a motor vehicle Reg. No. KAG 965Y Datsun Pickup, 3 radio cassettes, 1 sewing machine mortar and its controller, 2 wall Arabic style clothes, 2 external radio speakers, 1 telephone head set, 1 intercom receiver, 1 black suit, 1 light grey suit, 1 light grey jacket, 2 heavy lady's sweaters, 5 small table clocks, 1 wall clock make quarts, 2 wrist watches, 1 racing bicycle red in colour, 2 hats, 1 electric shaver, 1 brown lady's hand bag and cash Kshs.200/= all valued at Kshs.600,000/= and at, or immediately before or immediately after the time of such robbery used actual violence to the said Geoffrey Kagiri Gicheru.

Count II – On the 20th day of February 2001 at about 1.30 p.m. at Witima Village in Nyeri District of the Central Province, jointly with others not before court and while armed with dangerous weapons namely pangas and a pistol, robbed Frashia Wangui Kagiri of cash Kshs.600/= and at, or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Frashia Wangui Kagiri.

The evidence adduced before the lower court by the prosecution was as follows: On the night of 20th February 2001 at 11.30 p.m. Geoffrey Gicheru Kagiri (hereinafter referred to as the complainant) arrived at his home in Waitima Village in Othaya. He opened the gate, drove into the compound and parked his motor vehicle Registration No. KAG 965Y. He then locked the gate, put on the security light and went to the verandah to open the sitting room door. Before he could enter however, he was confronted by 3 people who were armed with pangas, a pistol and torches. The man who was armed with a pistol cut the 1st complainant twice on the head with a knife. One of the men then snatched his wallet and pulled off his wrist watch. They also took his car-keys and electric shaver. The 1st man who had cut him, hit him on the face and as he was bleeding threw him on the floor and tied up his hands and legs. The complainant was able to clearly see his assailants with the aid of the security light. In the meantime, the complainant's wife Frazier Wangui Kagiri (P.W.2). Who had heard her husband arrive was surprised by people who accosted her in the kitchen where she was. Threatening her with pangas, the men demanded money from her. She pleaded that she had only Kshs.600/= which she gave them. She opened all the drawers and wardrobe for the men to take what they wanted. The men carried a number of things including a radio and a clock. They loaded the things onto the complainant's aforementioned motor vehicle. They tried unsuccessfully to start the motor vehicle, then got P.W.2 to start the vehicle. They then drove off leaving P.W.2 in the house having tied up her hands and legs.

After the men left P.W.2 managed to untie herself and her husband. She thereafter sought help from a neighbour who took the complainant to Othaya police station where they made a report. Thereafter they took the complainant who was seriously injured to Mathari Hospital where he was admitted for a week.

On the same night of the robbery P.C. Gerishon Kirima (P.W.4) who was on beat duties received a radio report of the robbery. At about 3.00 a.m. he received information acting on which he proceeded to Kangaine junction where he found motor vehicle KAG 695Y which was subject of the robbery. The motor vehicle had been involved in an accident and was extensively damaged. The 3rd appellant who was injured was beside the road. P.W.4 arrested the 3rd appellant and had the motor vehicle towed to Kangema police station. On the same night Sgt. James Wanyonyi (P.W.6) and P.C. Alloys Muriuki (P.W.7) interrogated the 3rd appellant who named his accomplices and led the officers to the house of Joyce where 2 speakers and a lady's sweater was recovered and she was arrested.

On 23rd February 2001 the 3rd appellant led the officers to the house of 2nd appellant where a radio cassette, a wall mart, wall clock one handbag, record player Sanyo and a mortar machine were recovered. The 3rd appellant then led the officers to the house of the 1st appellant where one black suit and a blue suit, one jacket, a wall mart, lady head veil, and 10 hats were recovered. Inventories of the recovered items were prepared and the appellants who were all arrested each signed for the goods recovered from his house.

The items were all later identified by the complainant and P.W.2 as the items stolen from their house

during the robbery.

On 22nd February 2002 Cpl. Hudson Kiboi (P.W.8) of scenes of crime took various photographs showing the accident damage to motor vehicle KAG 695Y a Datsun pickup which was at Kangema police station. The same were produced in evidence.

On the 26th February 2001, IP Joseph Gitonga (P.w.9) took a charge and caution statement from the 1st appellant. The statement was repudiated but admitted in evidence after a trial within trial.

On 27th February 2001 Inspector Onesmus Mulwa (P.W.5) obtained a statement under charge and caution from the 3rd appellant. The statement was repudiated by the 3rd appellant but admitted in evidence after a trial within trial. In their defence each of the appellants gave an unsworn statement and called no witnesses.

The 1st appellant explained that he was arrested from his place of work on 2nd February 2001. He was taken to Karatina where he was seriously beaten. He was then taken to his house which was searched and a camera, album and a sewing head taken. He was placed in the police cells for 2 weeks after which he was charged with an offence of which he knew nothing about.

The 2nd appellant also explained that police officers went to his house on the 22nd February 2001, they searched his house but recovered nothing. He was taken to Karatina police station where he was placed in the cells. Three days later he was called and shown some items which he knew nothing about. He was later charged. He maintained that nothing was recovered from his house.

The 3rd appellant explained that he was arrested and charged because of a grudge between him and police officers Mulwa and Kagiri who had a bone to pick with him because he objected to his father selling land to them.

From the above it is evident that the evidence led before the trial magistrate was quite straightforward and could probably on a proper construction sustain the charge against the appellants. Of concern to us however is the manner in which this evidence was received. Although all the prosecution witnesses are indicated as having been cross examined by the defence, the record does not show whether any of the prosecution witnesses gave evidence on oath. This is a fatal omission as section 151 of the Criminal Procedure Code provides that every witness in a criminal trial must be examined upon oath. We repeat again what we recently stated in **High Court Criminal Appeal 384 & 385 of 2001, Dabaso Wako Jaldesa & Another v/s Republic** concerning section 151 of the Criminal Procedure Code:

“This is a mandatory provision which any court handling a criminal cause or matter must comply with. Such compliance must be apparent on the face of the record, with the witness faith (i.e. Christian, Hindu, Muslim, aetheist etc.) being ascertained before the oath is administered accordingly.”

It follows therefore that the trial before the lower court was a nullity as section 151 of the criminal procedure code was not complied with. Although neither the State Counsel nor the Appellants addressed their minds to this issue, this is fundamental irregularity which this court cannot ignore. We come to the conclusion that the trial before the lower court was vitiated by this irregularity.

In considering whether to order a retrial we have sought guidance from the following authorities: ·

Ahmedi Ali Dharamsi Sumar v/s Republic [1964] E.A 481 ·

Fatehali Manji v/s Republic [1966] EA 343. ·

Mwangi v/s Republic [1983 KLR 522.

We note that each case must depend on its own facts and circumstances, generally however the following factors need to be established before an order for retrial can be made: ·

That the original trial was illegal or defective

· That on a proper consideration the admissible evidence or potentially admissible evidence can sustain a conviction and is not wanting or having gaps to be filled. ·

That it is in the interest of justice that an order for a retrial be made. ·

That the order for a retrial is not likely to cause an injustice to the Accused person.

We have already established that the appellants trial was defective. We have also shown that the evidence adduced against the appellant was prima facie sufficient to sustain the conviction. It is further evident that the charge against the appellants was a serious charge attracting the mandatory death penalty. The complainant sustained serious injuries and had to be admitted in hospital.

Although the offence was committed over 4½ years ago, the court has not been informed of any difficulty in securing the attendance of witnesses. We concede that there is likely to be some delay in concluding this matter, nonetheless weighed against the need to arrive at a fair and just conclusion, it cannot be said that an order for a retrial would cause injustice to the Accused. In the circumstances we are satisfied that it is in the interest of justice that a retrial be ordered.

We do therefore allow each of the appellant's appeals, quash the convictions and set aside the sentence imposed. We order that each of the appellant shall be remanded at Nyeri police station to be produced without undue delay before the Chief Magistrate Nyeri for a retrial in respect of count 1 & 2 set out above.

Dated signed and delivered this 6th day of December 2005

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE