REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 318 OF 2002

JOHN WAMAE WANJOHI……....APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

CRIMINAL APPEAL NO. 319 OF 2002

PETER NGARIUKO MIANO…….…….APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

CRIMINAL APPEAL NO. 228 OF 1999

JAMES IRUNGU WANJIKU……..……APPELLANT

VERSUS

REPUBLIC……..…..…….RESPONDENT

((Appeals against conviction and sentence dated 20th May 1999 i n Criminal Case No. 1872 of 1998 in the Principal Magistrate's Court at Muranga, (F. F. Wanjiku, Principal Magistrate))

JUDGMENT

As indicated in the headlines, there are three appeals before us and have been consolidated for hearing. Mr. Gacheche Wa Miano is representing Appellants in the first and second appeals**, JOHN WAMAE WANJOHI** and **PETER NGARIUKO MIAN**O respectively while the Appellant in the third appeal JAMES **IRUNGU WANJIKU** is unrepresented and appeared in person. Each Appellant has appealed against his conviction and sentence of eight years imprisonment plus four strokes of the cane on count one which the trial magistrate reduced from robbery with violence under Subsection(2) to a simple robbery under Subsection(I) of Section 296 of the Penal Code. They were all acquitted on count two which was also robbery with violence contrary to Section 296(2) and the trial magistrate said nothing about the alternative charge which alleged handling stolen property contrary to Section 322(2) of the Penal Code.

Particulars respecting count one in which the Appellants were convicted are that on the night of 4th and 5th November, 1998 at Karurumo Coffee Factory in Maragua District, Central province, the Appellants together with others not before the court and while armed with dangerous weapons, namely pangas, rungus and iron bars robbed Irungu Njuguna 42 bags of dry coffee partchments valued at Ksh360,000/- and at or immediately before or immediately after the time of such robbery wounded Irungu Njuguna a watchman who was guarding Karurumo Coffee Factory.

Briefly the three Appellants were all arrested during the night of 4th and 5th November, 1998 at Kutus Mjini in Kirinyaga District while off-loading coffee which had just been robbed that morning at Karurumo Coffee Factory in Maragua District. There is sufficient evidence that the Appellants were not just found there off-loading but they had been at Maragua where the robbery took place and were present in the robbery and subsequently carried the robbed coffee, 42 bags of dry coffee parchments valued at Kshs.360,000/-, to Kutus Mjini where they were off-loading the coffee when they were arrested.

Assistant Chief of Kutus, Andrew Githinji, who gave evidence as P.W.9 and A.P. Corporal Mark Kigundu who gave evidence as P.W.8 told the court that they found a number of people off-loading the coffee from a motor vehicle registration number KYB 481 and when those people saw the Assistant Chief and the A.P., approaching them they left off-loading and started running away. The Assistant Chief and the A.P. arrested the three Appellants plus another suspect who was acquitted on the ground that he was found sleeping in the motor vehicle where he claimed to have been sick and was therefore given the benefit of the doubt.

The Appellants in their defence did not accept that they were robbers. They claimed that they had only been hired by the people who escaped arrest by running away at Kutus at the time the Appellants were arrested. They told the court that they were hired to transport maize bags from Maragua to Kutus and went together with the hirers during the night of 4th and 5th November, 1998 and loaded the coffee thinking it was maize bags and took the bags to Kutus Mjini that same night when they were arrested as they off-loaded the bags. Their defence therefore was that they were innocent hired transporters who had nothing to do with the alleged robbery. The learned trial magistrate rejected that defence because from the totality of the evidence adduced before him, the Appellants and the attackers went to Karurumo Coffee Factory in Maragua District at night. They had a motor vehicle whose engine they seem to have put off so that the vehicle reached the factory without the two watchmen who were there noticing it. Outside the factory gate a Section of the group found P.W.2 Samson Irungu Ng'ang'a at his kiosk and ordered him to lie down threatening to cut him as they were armed with pangas. They tore his coat and tied his hands and legs. Carried him to the factory gate which they broke open and carried him into the factory where they put some clothes in his mouth, covered him with some empty sacks and kept him under guard as the others went for the two watchmen, ordered them to lie down and keep quiet, tied them and threw them into drying shades where the watchmen were also covered with empty sacks as the attackers - the robbers loaded the 42 bags of dry coffee partchments in their motor vehicle and left for Kutus Mjini.

The coffee bags had clear identification marks and were subsequently identified when they were recovered at Kutus mjini at the time the Appellants were arrested and taken over by Kerugoya Police station who informed the police at Maragua Police Station that the coffee which had been reported stolen that night at Karurumo Coffee Factory had been recovered.

Under those circumstances, even if the Appellants had been hired, we doubt whether they continued to think that the 42 bags they loaded at Karurumo contained maize. Further we do not see how the Appellants could continue to think they were involved in a normal lawful journey lawfully transporting goods for law abiding hirers, yet in their respective defences none of the Appellants seems to have noticed anything unexpected.

It means that all the events that took place that night in the eyes of the Appellants concerning the robbery of those 42 bags of coffee from Karurumo Coffee Factory was expected by the Appellants. They participated and we come to no conclusion other than the conclusion that the Appellants were some of the robbers who robbed that coffee.

True none of the robbers was identified at Karurumo Coffee Factory during the robbery but there is no dispute in the evidence before the court as a whole that the Appellants who were arrested off-loading the coffee which had just been robbed at Karurumo Coffee Factory, had been at that factory participating in the robbery of that coffee that night. The connecting chain is not broken and we do not think failure by witnesses to identify any of the robbers at the factory vitiates the prosecution's case nor do we think the prosecution's case is all circumstantial evidence and that that circumstantial evidence has no corroboration.

Further we find a common intent in the voluntary participation of the Appellants in the crime of robbery and the question of lack of mensrea does not therefore arise.

As to the ingredients of the offence of robbery in Section 296(1) of the Penal Code as defined in Section 295 of the Penal code the same were proved when evidence was adduced showing that the robbers who were armed with pangas, rungus and iron bars, having threateningly and forcefully tied and confined P.W.2, with some clothes stuffed into his mouth, forcefully broke into the coffee factory, ordering watchmen therein to lie down and utter no word; tied them up and bundled them into drying shades covering them with empty sacks and confining them there until all the robbery was over. In our view, that was sufficient use of actual violence and it is only when reality is not accepted that what happened may be termed mere threats to use actual violence. Either way, the ingredients of the offence of robbery under Section 296(1) of the Penal Code are satisfied. The offender need not be armed and personal injury to a victim is not a necessary ingredient.

On the whole therefore, we are satisfied there was sufficient evidence before the learned trial magistrate to sustain the conviction and we find no reason to interfere with that conviction.

That leads us to the sentence. We note that no notice or warning had been given to the Appellants with regard to the intention of the State to enhance the sentence. We do not therefore grant Mr. Oluochi's request for enhancement of the sentence.

On Mr. Miano's submissions that the sentence of eight years imprisonment plus four strokes of the cane and five years police supervision is harsh, we note that at the time the sentence was imposed, the maximum sentence was 14 years imprisonment plus 28 strokes of the cane together with mandatory police supervision for five years. Although today corporal punishment and police supervision have been repealed, as at 20th May, 1999 when the Appellants were sentenced, the sentence imposed upon them was lawful. We do not consider that sentence harsh bearing in mind that apart from the maximum sentence, to which the Appellants were liable under Section 296(1), they were lucky that the trial magistrate had reduced the charge from the charge under Section 296(2) where the Appellants faced a mandatory death sentence.

They have now been in custody for five years since their arrest on 5th November 1998 although the sentence they have served is less than five years; and exercising our discretion in the spirit of the recent amendments of the law removing corporal punishment and police supervision, we feel it may be justifiable to remove part of the sentence imposed upon the Appellants relating to corporal punishment and police supervision.

In conclusion therefore, the appeal of each Appellant in respect of his conviction is hereby dismissed. The sentence of eight years imprisonment imposed upon each Appellant up-held and the award of four strokes of the cane plus five years police supervision against each Appellant set aside.

Dated this 12th day of November, 2003.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE