



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.109-112 OF 99**

JAPHETH KHAEMBA AND THREE OTHERS APPELLANTS

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

RAJENDIR SANGHANI alias RAJU (PW 6) is the Chairman of Real Group of Companies. He lives off Spring Valley Road Nairobi with his family. At all material time to this case in the month of July, 1996 he had several employees at his residence. There was the house help PAUL MBINDYO (PW 8) and a watchman CAITANO MUTSOTSO CHITUI (5th accused). There was also his driver DANIEL MACHARIA MWANIKI (PW 4). Among the vehicles which he owned included a Nissan Sammy KAE 321 G, a Range Rover Registration No. KAD 392 W another Range Rover Reg. No. KAE 328S and Mitsubishi Lancer Reg. KAG 578 S. He also owned an assortment of electronics and an abundance of clothes.

On the 23rd July, 1996 PW 6 left his offices after work in the evening and drove to his residence in the Nissan Sunny Reg.KAE 321 G. He was with a visitor in the car. Following immediately behind them was PW 4 driving a Range Rover Reg. No.KAD 392W. Upon arrival home the watchman (5th accused) opened the gate. The time was about 7.40 p.m. PW 6 drove past it. But as PW 4 was driving past the same gate the 5th accused released the gate shutters too soon and they banged against the body of his vehicle. The 5th accused apologised to PW 4 and he drove into the compound and parked. It was soon thereafter that both PW 4 and PW 6 were attacked by thugs within the compound of their residence, who tied both their hands and legs and took them into the main house through the back door. PW 4 and PW 6 were then subjected to physical Violence and harassment throughout a greater part of that evening up to about midnight. The thugs robbed PW 6 of KShs.20,000 in cash, virtually all the electronic equipment and clothes from the house. They took his suits, his wife's dresses, shoes, socks, jewels and virtually everything of value which they laid their hands on. All these clothes were parked in special bags. Then the thugs locked up PW 4, PW 6, PW 8 and their friends in the servants' quarters, parked the bags into the Range Rover KAD 392W and Nissan Sunny KAE 321 G and drove away. This robbery was reported to the police and investigations started leading to the arrest and prosecution of the appellants on a joint charge of Robbery with Violence contrary to Section 296(2) of the Penal Code. The 2nd appellant was, in turn, charged alone in counts 2 and 3 with being in possession of a Firearm and ammunition contrary to Section 4(2)(a) of the Firearms Act. They were tried and convicted by the learned Chief Magistrate Mr. P. N. Mugo and convicted. Appellants were sentenced to death for the capital Robbery while the 2nd appellant was sentenced to two years imprisonment in counts 2 and 3, to run concurrently. All the appellants have now appealed against their respective convictions and sentences. We shall now deal with the appeal of each appellant.

JOSEPH KHAEMBA (1st APPELLANT) was the 6th accused. The prosecution set out to prove that this appellant was positively identified by PW 6 during the robbery. We have, however, established from

the records of the lower court that PW 6 did not in fact, in his evidence-in-chief, purport to identify this appellant. It was only while he was under cross-examination by this appellant that he purported to identify him, but even then this was only a dock identification since PW 6 did not know this appellant before and did not attend any identification parade, both in respect of this appellant and of all the other appellants.

The prosecution then relied on the evidence of PW 8 who had told the trial court that it was this appellant who had tied both his hands and legs and was giving him the telephone receiver to answer incoming calls whenever that telephone rang. There was of course no evidence led that there was a telephone installed in PW 6's house. PW 8 attended an identification parade and purported to identify this appellant. This is confirmed by the parade officer (PW 13). We note, however, that PW 8 did not give the description of this appellant's physical features and mode of dress, both in his police statement and in his evidence in court. We are of the considered view that a visual identification of a stranger without description of his physical features is of little evidential value. This applies equally to the evidence of the complainant's driver (PW 4).

The prosecution then led evidence of recovery of certain stolen properties which were allegedly found in the possession of this appellant. The prosecution called CPL Peter Omosa (PW 5) and IP Johnath Loki (PW 3). It is the evidence of PW 5 that he arrested this appellant from a house within the main GK Prison Kitale on 6.8.1996 and that two bags containing an assortment of some clothes, believed to be part of the stolen property, were recovered. We have again noted flaws in the prosecution case. Ownership or occupancy of that house was not proved. Persons found with this appellant in that house were also not called. Besides, we have perused the evidence of PW 6, and we find he did not identify the two bags and its contents as his stolen property.

It is also the evidence of PW 3 that he travelled to Kitale Police Station on 8.8.1996, and collected this appellant. After interrogation this appellant allegedly told him that some stolen properties were kept at Matunda Police Station. That evidence implicated this appellant in the commission of the offence which PW 3 was investigating. There is no evidence to show that PW 3 administered the usual caution before he started that interrogation. Quite clearly whatever this appellant may have told PW 3 was inadmissible in evidence as it contravened the Judge's Rules.

It is further the evidence of PW 3 that this appellant led him to Matunda Police Post where an assortment of stolen properties had been kept. These properties allegedly included a bag (Exhibit 11(a) and its contents (Exhibit 11(b) to 11(g)). Thereupon PW 3 said he brought this appellant to Gigiri Police Station, Nairobi along with the recovered properties, and booked him in. For some strange reasons, no witness was called from Matunda Police Post to give evidence as to the circumstances leading to the recovery of that bag and the clothes; no OB from Matunda Police Post and from Gigiri Police Station were produced as exhibits to verify the evidence of PW 3; and PW 6 did not also identify Exhibit 11(a) and 11(b) – (g) as part of his stolen property.

For the above reasons we hold that the conviction of the first appellant for the offence of Robbery with Violence c/s 292(2) Penal Code was unsafe.

CHRISTOPHER SHIVONJE KUMBWA (the 2nd appellant) was the 2nd accused in the Lower Court. The prosecution set out to prove that he was identified during the robbery by PW 4, PW 6 and PW 8. We have already observed herein above that PW 4 and PW 8 did not give any description of the persons they purported to identify during the robbery and that PW 6 did not also attend any identification parades, so that his purported identification of the 2nd appellant was a dock identification. The learned Chief Magistrate did not also warn himself of the inherent dangers of relying on evidence of identification when conditions favouring a positive identification were difficult.

There was evidence which was led through PW 2 to the effect that, on the 25th July, 1996, the 2nd appellant was arrested in a house at Kawangware where a suit case and some clothes were allegedly recovered. It was alleged that a woman, believed to be the 2nd appellant's girl friend and another man called KARIUKI, were found in the same house. These people were not called to give evidence. The ownership and occupation of that house was also not established.

The 2nd appellant allegedly led the police to a spot outside his house from where a firearm (subject of count 2) and ammunition (subject of count 3) were found. That evidence of recovery of these firearm and ammunition would have been verified by the 2nd appellant's girl friend and Mr. Kariuki who were present. But this was not to be. The fact that the prosecution failed to call them as witnesses entitles us to draw an adverse inference against the prosecution. The credibility of PW 2 was therefore put in question. The learned Chief Magistrate did not resolve this inconsistency in favour of the 2nd appellant or at all.

The 2nd appellant allegedly after that led the police to the residence of the 3rd appellant from where an assortment of clothes identified by PW 6 was recovered. The 2nd and 3rd appellants, the recovered firearm and ammunition and the assortment of clothes allegedly recovered from their respective residences, were taken to Gigiri Police Station, where the 2nd and 3rd appellants were booked and placed in the cells.

When the OB entry No.27 of 26.7.96 Gigiri Police Station was produced as an exhibit and checked it transpired that there was no entry reflecting that the 3rd appellant was found in possession of any stolen clothes. Entry made reflected that the 3rd appellant was booked in as a person. We would have expected to find an elaborate entry in the OB (Defence Exhibit 1) reflecting the recovery of the firearm, Ammunition and clothes from the 2nd and 3rd appellants residences. Going by the entries in the OB 27 of 26.7.96 the 2nd and 3rd appellants were not found in possession of anything of anything relevant to this case. The learned Chief Magistrate did not, in his judgement, resolve these glaring inconsistencies in the evidence laid before him.

For the above reasons we hold that the convictions of the 2nd appellant for Robbery with Violence contrary to Section 296(2) Penal Code, and for being in possession of a firearm and ammunition contrary to Section 4(2) (a) of Firearms Act, were unsafe.

CORNEL WANDIBA EGONDI (3rd appellant) was the 4th accused. We have already observed above that the prosecution alleged that the 2nd appellant led the police investigation team to the residence of the 3rd appellant and that an assortment of clothes, identified by PW 6 as part of his stolen property, was recovered. We have already demonstrated that the OB entries at Gigiri Police Station do not support the prosecution's contentions.

There was also evidence to the effect that PW 4, PW 6 and PW 8 had identified the 3rd appellant during the robbery. But we have demonstrated hereinabove that the evidence of PW 4, PW 6 and PW 8 was unreliable.

For the foregoing reasons we arrive at the inescapable conclusion that the conviction of the 3rd appellant for the offence of Robbery with Violence c/s 296(2) Penal Code was also unsafe.

HUMPHREY MAKOLO WAMBOSO (4th appellant) was the 1st accused. We were informed that he has died. We do not doubt this. Consequently the 4th appellant's appeal has abated pursuant to the provisions of Section 360 of the Criminal Procedure Code.

For the foregoing reasons we hereby allow the appeals of the 1st, 2nd and 3rd appellants, quash their respective convictions and set aside the sentences of death imposed by the learned Chief Magistrate. We order that these appellants be released forthwith from prison custody unless they are otherwise lawfully held.

Dated this 19th July, 2001.

MBOGHOLI MSAGHA

JUDGE

A.G.A. ETYANG'

JUDGE