



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 42 OF 2017

AND

CRIMINAL APPEAL NO 43 OF 2017 (CONSOLIDATED)

1. NAHASHON KARIUKI MUTHAMI.....(1ST ACCUSED BEFORE TRIAL COURT)

2. ANTONY MWANGI KARANJA (2ND ACCUSED).....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Criminal Case No 1005 of 2015 – Lucy Mutai, CM)

J U D G M E N T

1. The Appellants herein, **NAHASHON KARIUKI MUTHAMI** and **ANTONY MWANGI KARANJA**, were convicted after trial of **robbery with violence** contrary to **sections 295 and 296(2)** of the **Penal Code**. Their two co-accused were acquitted of the charge. The 2nd Appellant was also acquitted of a second count of **rape** contrary to **section 3(1) & (3)** of the **Sexual Offences Act, 2006**. The Appellants and their co-accused were acquitted of the third count of **demanding property with menaces** contrary to **section 302** of the Penal Code.
2. For the conviction of robbery with violence, the Appellants were on 20/04/2017 sentenced to death. They have appealed against both conviction and sentence. The various grounds of appeal advanced by the Appellants amount to the complaint that the evidence presented by the prosecution did not prove the offence against each appellant beyond reasonable doubt, and that their conviction is therefore unsafe.
3. Learned counsel for the Respondent supported the conviction of each appellant.
4. The 1st Appellant was represented by learned counsel in his appeal. The 2nd Appellant was not. Learned counsel for the 1st Appellant, and also the 2nd Appellant, filed written submissions which they highlighted. Learned counsel for the Respondent orally submitted. I have considered all the submissions, including the cases cited.
5. I have also read through the record of the trial court in order to evaluate the evidence presented and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses testify, and I have give due allowance for that fact.
6. The complainants in this case, ASK (PW1) and his niece CG (PW7) endured a long and harrowing experience with robbers in the night of 30th June and 1st July 2015 that lasted over four hours. In the course of it they were abducted from the compound of PW1, bundled into his car by at least four men and driven off into the night. After about 20 minutes they found themselves in a farm where they were bundled out of the car and held captive while the robbers stole PW1's mobile phone, extracted information and PINS for PW1's M-Pesa and bank accounts, and some of them proceeded to the bank and made several attempts to withdraw money from PW1's bank account through an automated teller machine (ATM). In the course of all this PW7 was raped by one of the robbers.
7. The trial court found that the prevailing conditions were not conducive to good and positive visual identification of the robbers by the complainants, and further, that the various identification parades conducted to verify the claimed identifications by the complainants were faulty and did not meet the thresholds for scrupulous fairness as required by law.
8. The trial court also found as a matter of fact that nothing stolen during the robbery was recovered from any of appellants at the time of

their arrest. I shall now consider the conviction of each appellant separately.

2ND APPELLANT

9. The 2nd Appellant (2nd accused) was charged as **ANTONY MWANGI KARANJA** (alias “MREFU” alias “SIMON GITONGA”). The trial court noted that throughout the trial he never challenged those aliases. During the robbery PW1 had been ordered to produce money; he had only KShs 3,000/00 in his M-Pesa account. He was ordered by the robbers to call up his relatives and ask them to send money to his M-Pesa. He did so, and PW2 (his brother-in-law called M) sent KShs 10,000/00 to his M-Pesa on mobile No xxxx using his (PW2’s) mobile No xxxx. The sum of KShs 13,000/00 was then promptly transferred by the robbers from PW1’s M-Pesa to mobile No xxxx which was in the name of SIMON KARIUKI GITONGA. Relevant M-Pesa statements were produced in evidence to verify all these transactions and details (Exhibits 18 and 19). At the time of his arrest the 2nd Appellant was in possession of a handset from which the sim card of the mobile No xxxx had been used. This was the mobile number that received the KShs 13,000/00 from PW1’s M-Pesa account in the course of the robbery, leading to the inescapable conclusion that the 2nd Appellant was part of the gang of robbers.

10. The connection of the 2nd Appellant to the money stolen from PW1’s M-Pesa through mobile No xxxx which was being used in a handset found in his possession, and which mobile number was in his names, was of itself powerful circumstantial evidence that did not require corroboration. In any case, such corroboration could not be found in evidence that itself required corroboration (such as that found by the trial court in the 3rd and 4th accused persons informing the police respectively that the mobile number belonged to the 2nd Appellant and that he was also called “Mrefu”). The evidence of a co-accused is the weakest kind of evidence which will normally require corroboration. It cannot itself be used to corroborate other evidence.

11. For circumstantial evidence to properly found a conviction, it must irresistibly point to the guilt of the accused and no one else, and be capable of explanation upon no other hypothesis but the guilt of the accused. Upon my own evaluation of the evidence, I find that the fact that the money stolen from the M-Pesa account of PW1 was immediately transferred by the robbers to a mobile number that belonged to the 2nd Appellant irresistibly points to his guilt; it is incapable of explanation upon any other hypothesis. His defence was a mere denial. He was properly convicted and his conviction is safe. There is no merit in his appeal against conviction, which is hereby dismissed.

1ST APPELLANT

13. As for the 1st Appellant, **NAHASHON KARIUKI MUTHAMI**, he was convicted upon the basis of images in black and white photographs, which were themselves prints from colour photographs that were not produced in evidence. The images were said to have been captured by a security camera at an ATM when attempts were made to withdraw money from PW1’s bank account in the night of the robbery. PW4 (Caroline), a bank manager, identified the image in the photographs as being that of the 1st Appellant. It is to be noted that she did not testify as an expert in photography. It is also to be noted that the relevant legal requirements for admission of photographic evidence under **section 78** of the **Evidence Act** were not met.

14. For such a serious offence as the 1st Appellant faced, to found a conviction upon the opinion of a lay person regarding the images seen in black and white photographs which were themselves copies of colour photographs that were not produced in evidence, would be to do grave injustice to him. Even the trial court’s opinion regarding such images would be of little assistance in the circumstances.

15. Upon my own evaluation of the evidence, the 1st Appellant’s conviction was based upon faulty and inadequate evidence. It is not safe and cannot be allowed to stand. It is hereby quashed and the sentence imposed set aside. The 1st Appellant, Nahashon Kariuki Muthami, shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

16. Regarding sentence for the 2nd Appellant, whose appeal against conviction has been dismissed, the sentence of death was imposed before the declaration by the **Supreme Court of Kenya** in the now notorious **Muruatetu** case that the mandatory nature of the death sentence for the offence of **murder** is unconstitutional. By parity of reasoning the same declaration must apply to the mandatory nature of the death sentence for the offence of robbery with violence under section 296(2) of the Penal Code. This court can therefore re-look at the sentence imposed upon the 2nd Appellant.

17. I have noted the circumstances of the offence and the harrowing ordeal that PW1 and PW7 went through. I also note that the 2nd Appellant was a first offender. He deserves another chance at life. I will therefore set aside the sentence of death imposed upon him and substitute therefor imprisonment for fifteen (15) years, effective from the date of his sentencing by the trial court. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 30TH DAY OF JUNE 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 1ST DAY OF JULY 2021