REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL Nos 3 & 4 OF 2018

(CONSOLIDATED)

1. WILSON MURIUKI WANJIRA

2. ANTHONY MWANGI KARANJA..........APPELLANTS

VERSUS

REPUBLIC..RESPONDENT

(Appeal from original Conviction and Sentence dated 12/01/2016 in Nanyuki CM Criminal Case No 775 of 2015 – E Ngigi, SRM)

J U D G M E N T

1. The two Appellants, **WILSON MURIUKI WANJIRA** (3rd accused in trial court) and **ANTHONY MWANGI KARANJA** (1st accused) were convicted after trial of two counts of ***robbery with violence*** contrary to **sections 295 and 296(2)** of the ***Penal Code***. The particulars of the offences were that on 18/07/2015 at Nturukuma Estate, Nanyuki in Laikipia County, jointly with others not before the court, and while armed with dangerous weapons, namely rifles, swords, pangas and rungus, they robbed a couple, **FRANCIS MWANGI NJAARU** (Count I) and **SUSAN KAGURI MWANGI** (Count II) of cash, computers and household goods, all valued in total at over KShs 400,000/00 and that immediately before the time of the robbery used actual violence to the two complainants.

2. On 12/01/2016 the Appellants were sentenced to death for the two offences as by law then provided.

3. The 1st Appellant (Wilson) was also convicted of ***unlawful possession of narcotic drugs*** under ***the Narcotic Drugs and Psychotropic Substances (Control) Act, No 4 of 1994*** (count IV) and sentenced to 18 months imprisonment. The 2nd Appellant (Anthony) was also convicted of ***resisting arrest*** contrary to **section 253(b)** of the ***Penal Code*** (Count III) and similarly sentenced to 18 months imprisonment.

4. The Appellants appealed against both conviction and sentence. They have challenged their convictions upon various grounds as appears in their petitions of appeal (original and amended), including **visual identification**, **circumstances of their arrest** and **lack of physical evidence connecting them to the robberies**.

5. The Republic on the other hand supports the convictions and sentences.

6. I have duly considered the very detailed written submissions of the Appellants, including the authorities cited. They were unrepresented by counsel both in these appeals and at their trial. I have similarly considered the oral submissions of the learned prosecution counsel.

7. I have also read through the record of the trial court in order to evaluate the evidence placed before that court 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 did not see and hear the witnesses testify, and I have given due allowance for that fact.

8. It was established through the testimonies of the two complainants that indeed they were robbed at their home in the night of 18/07/2015. The hour of the robbery was about 3.00 am; that was in the dead of night. The couple who were asleep, were woken up by noises in the house. The wife (PW1) got out of bed and went to the sitting room to investigate. She testified that there she was accosted by 2 robbers, one of whom was armed with a rifle. She saw about two others about. She says that when she proceeded to the sitting room she switched on the electric lights there and was able to clearly see the two robbers who led her back to the bedroom where in the meantime her husband (PW2) had switched on the electric lights in the room.

9. The two victims testified that the robbers were with them for about 25 to 30 minutes as they were robbed, with the electric lights on and that thus they had ample opportunity to observe them sufficient to positively identify them later. The trial court accepted this as proven fact.

10. Identification parades were subsequently conducted at which PW1 and PW2 picked the 2nd Appellant. The 1st Appellant is said to have refused to participate in the parades. There was confusion in the evidence tendered before the trial court as to which officer or officers conducted the identification parades. The Appellants themselves have complained that the witnesses could clearly see them before they proceeded to the parades; that the 2nd Appellant had clearly visible injuries sustained at the time of his arrest (and that he was the only one in the parades with such injuries); and that the parades were not conducted with scrupulous fairness as required by the relevant police standing orders. There was evidence that many identification parades were conducted in that period involving many suspects and witnesses in respect to several robbery cases that were under investigation at the time.

11. With the long time that PW1 and PW2 stated they spent and interacted with the robbers in good electric light, it would be expected that they should have been able to give to the police (in their initial reports or subsequent formal statements) good descriptions of the two robbers that they said they clearly saw to lead the police to their arrest. There is no evidence of any such good and specific descriptions; only general and fairly vague descriptions of height, skin tone, etc. that would at any location probably fit hundreds of men. Put another way, it was not any descriptions given to the police by PW1 and PW2 that led to the arrest of the Appellants.

12. The Appellants were actually pointed out to the police by their co-accused **(STEPHEN MURITHI WAMBUI** who was the 2nd accused). The police were in fact at that time investigating a spate of robberies in the area that they suspected were perpetrated by the same gang. They also suspected that Stephen, a boda-boda operator, was the one ferrying the robbers around. So they arrested him as a prime suspect in the robberies himself, and he agreed to point out to the police the gang members. He subsequently pointed out the Appellants, leading to their arrest.

13. In the course of the trial, the charges against Stephen were withdrawn. I have not found on the record any reasons for this action. He does not appear to have pleaded guilty to anything in any plea–bargain.

14. The visual identifications by PW1 and PW2 are further put in doubt because of what the investigating officer (PW9: **CI Jacob Murithi**) told the trial court in cross-examination by the 3rd accused –

"The witnesses say that they were able to see the attackers using the spot-lights they had."

This statement by the investigating officers puts in complete doubt the testimonies of PW1 and PW2 that they observed the robbers through electric lights in their sitting and bedrooms that were on for as long as 30 minutes as they were being robbed!

15. PW1 and PW2 never stated that they had spot-lights (or torches) themselves. So, if there were spot-lights, it must have been the robbers who had them. As usually happens in these things, the robbers would be shining the spot-lights on the faces of the victims, not the other way round!

16. So, what PW1 and PW2 must have told the police initially was that they were able to observe the robbers through the light shone by the torches the robbers had. That was what stuck in the mind of the investigating officer. They could not have initially told the police that the electric lights in their sitting and bedrooms were on during the robbery. That was not something that the investigating officer would forget!

17. The initial statement by PW1 and PW2 regarding the all-important lights that enabled them to positively identify their attackers must then have changed later. That puts in grave doubt their testimonies regarding visual identification of the Appellants in the dead of night.

18. The 1st Appellant was also allegedly connected to the robberies through calls made on a certain mobile phone number that had been used to steal mobile money from a victim in a different robbery. It was stated in the trial that the necessary data from ***Safaricom Limited*** (the network provider) had been produced in evidence in another trial. The trial court herein therefore allowed adoption of

> ***"...the proceedings in Criminal Case No. 1005 of 2015 with regard to call log from Safaricom…".***

19. The judgment of the trial court herein does not contain at all any analysis of the alleged *"call log from Safaricom"* and how it ties the 1st Appellant to the robberies herein. I was not able to see in the original trial court record any proceedings of ***Criminal Case No. 1005 of 2015.***

20. The Appellants were facing two very serious charges carrying the ultimate penalty. No stolen item was recovered in their possession. They were entitled to expect that they could be convicted only upon good and sound evidence that established the offences against them beyond reasonable doubt. That was not the case here as far as the two robbery with violence counts are concerned. Those convictions are unsafe and are hereby quashed. The sentences of death meted against them are hereby set aside. It is so ordered.

21. With regard to the charge of *illegal possession of narcotics* against the 1st Appellant, I am satisfied that the same was proved beyond reasonable doubt, and the sentence of 18 months imprisonment (already long-served) was lawful and well-deserved. Likewise in regard to the charge of resisting lawful arrest against the 2nd Appellant, I am satisfied that the same was proved beyond reasonable doubt. The sentence of 18 months imprisonment was well-deserved and long served now.

22. Having allowed the Appellants appeals regarding counts I and II in their entirety, and the sentences in Counts III and IV having been long served, the Appellants shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 14TH DAY OF OCTOBER 2020

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 15TH DAY OF OCTOBER 2020