



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.326 & 327 OF 2011

PETER KIAMA KARIUKI *alias*

ALEX MAINA KARIUKI.....1ST APPELLANT

GEOFFREY KINYANJUI MIRARA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. G. W. Ngenye-Macharia - PM delivered on 7th November 2011 and 28th November 2011 in Nairobi CM CR. Case No. 922 of 2009)

JUDGMENT

Peter Kiama Kariuki (1st Appellant) and Geoffrey Kinyanjui Mirara (2nd Appellant) were jointly charged in the 1st Count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 9th and 10th May 2009 along Mai Mahiu-Nairobi Highway, the Appellants, jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed Alex Mwangi Njama of a lorry registration No. KBA 898H Mitsubishi FH, loaded with timber all valued at Ksh.3,450,000/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Alex Mwangi Njama.

The Appellants were jointly charged in the 2nd Count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 9th and 10th May 2009 along Mai Mahiu-Nairobi Highway, the Appellants, jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed Geoffrey Kinyua Wanjohi of a mobile phone make Nokia valued at Ksh.6,000/- and cash Ksh.3,800/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Geoffrey Kinyua Wanjohi.

The 1st Appellant was charged in the 3rd Count with the offence of **making a document without authority**. The particulars of the offence were that on an unknown date at an unknown place with intent to deceive or defraud, the 1st Appellant without lawful authority or excuse made a certain document namely identity card No.20398631 purporting to be an identity card issued by the Registrar of Persons.

The 2nd Appellant was charged in the 4th Count with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the 10th May 2009 at Buruburu Area within Nairobi Province, otherwise than in the course of stealing dishonestly, retained a motor vehicle registration No.KBA 898Y Mitsubishi FH lorry loaded with timber knowing or having reason to believe it to be stolen.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged on the 2nd, 3rd and 4th Counts. The Appellants were acquitted of the charge in the 1st Count. They were each sentenced to death with regard to the 2nd Count. The sentences with regard to the 3rd and 4th counts were suspended. The Appellants were aggrieved by their conviction and sentence. They have each filed separate appeals to this Court.

In their petitions for appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that the trial magistrate adopted submission prepared by counsel who failed to consult them on the same, thereby contravening the provisions of **Section 213** and **Section 310** of the **Criminal Procedure Code**. The 1st Appellant asserted that his conviction on Count 3 was unsafe as the same was based on a defective charge. They faulted the trial court for relying on the evidence of identification yet the same was not proved to the required standard of proof beyond any reasonable doubt. They took issue with their convictions stating

that investigations were done after they were arrested and the charges were therefore fabricated. They were of the view that the evidence of the prosecution witnesses was full of contradictions. They were aggrieved that the trial magistrate failed to acknowledge that their mode of arrest was unsafe. They were further aggrieved that their conviction was based on mere suspicion. They asserted that the prosecution failed to prove their case to the required standard of proof beyond any reasonable doubt. They complained that the trial court failed to consider their alibi defence in arriving at its decision. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentence that was imposed on them.

For the purpose of the hearing of the appeal, the two separate appeals were consolidated and heard together as one. During the hearing of the appeal, the Appellants presented to court written submission in support of their respective appeals. The 1st Appellant urged this court to allow his appeal. This court heard oral submission made by Mr. Otieno for the 2nd Appellant and by Mr. Momanyi for the State. Mr. Otieno submitted that the charge in Count 3 was not drafted in accordance with **Section 134** and **Section 137(a)** of the **Criminal Procedure Code**. He asserted that the circumstances in the present appeal were not favourable for positive identification. He submitted that the identification parade was not properly conducted. The complainant had already seen the Appellants before the said parade was done. He pointed out that the prosecution witnesses were not credible. He was of the view that the prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. He therefore urged this court to allow the 2nd Appellant's appeal.

Mr. Momanyi for the State opposed the appeal. She made oral submission to the effect that the prosecution had proved its case against the Appellants to the required standard of proof beyond any reasonable doubt. He averred that the identification parade was properly conducted. PW1 identified both Appellants. PW2 identified the 1st Appellant. He stated that the descriptions of the Appellants were given to the police prior to the identification parade. **The** Appellants did not raise any objections during the identification parades. He maintained that the Appellants' identifications were safe. He submitted that evidence adduced by the prosecution linked the Appellants to the current offences. He was of the view that elements of the aggravated offence of robbery were established by the prosecution. In the premises therefore, he urged this court to dismiss the Appellants' appeals on conviction. With regard to the Appellants' appeal on sentence, Learned State Counsel averred that the Appellants' death sentence be substituted with a custodial sentence of twenty (20) years each since no one was injured during the robbery.

The facts of the case according to the prosecution are as follows: PW1 and PW2 were driving motor vehicle registration No.KBA 898Y from Kisii to Mombasa. PW1 was the driver and PW2 was the conductor. The vehicle was transporting timber. On the material night, they had parked the lorry at Mai Mahiu. It was late. PW1 booked a room at a motel while PW2 slept in the said lorry. At about 12.30 a.m., PW1 heard a knock at the door of his hotel room. Two men were at the door. PW1 stated that there were security lights outside his door. They identified themselves as police officers. One of them showed PW1 what seemed like a police identification card. He was informed that he was under arrest. They asked him to accompany them to where he had parked his lorry. When they arrived at the said lorry, PW1 woke PW2. PW2 was asleep in the lorry. PW1 informed PW2 that the police had arrested him. One of the men left. After a few minutes, he came back in a saloon car. There was another man with him in the saloon car. PW1 and PW2 were asked to enter the saloon car. The two men took their phones. One of the men drove PW1's lorry. Two men were with PW1 and PW2 in the saloon car. The two vehicles were driven to Nairobi. The two men informed PW1 and PW2 that they were taking them to Central Police Station. They were however driven past the said police station. The vehicles joined Thika Road. The saloon car made a U-turn at Kenyatta University. It was now heading back towards Nairobi. The saloon car joined Mwiki Road at the Kasarani Round about.

When they arrived at Mwiki, the two men alighted. After a few minutes, two different men came to the vehicle. They slapped PW1 and PW2 and accused them of trading in unlicensed timber. PW1 and PW2 were ordered to lie down inside the vehicle. They were tied down using ropes. The men started the car. After driving for a while, PW1 and PW2 were dumped at a forest. They managed to untie themselves. They did not know where they were. They met a watchman who informed them that they were at Githurai 44 Area. He gave them a phone. They called their employer at Mombasa and informed him of their ordeal. They proceeded to Kasarani Police Station where they reported the robbery.

Meanwhile, PW5 PC Kirama Timothy Gathiari then based at Buruburu Police Station was on 10th May 2009 at about 2.30 a.m. on patrol with PC Mungai. They were on patrol at Umoja Estate. PW5 testified that at that time, he saw a Mitsubishi Canter motor vehicle being driven along a rough road. Since they were on foot, they followed the vehicle. They found that it had stopped outside some houses. Timber was being offloaded from the vehicle. They asked the persons who were there to produce a permit. They were shown a permit which indicated that the timber was to be transported to Mombasa. They were four people at the scene. Two managed to escape. They arrested the remaining two. One of the persons arrested is the 2nd Appellant. PW5 informed PW6 Inspector Geoffrey Musomba then working as a duty officer at Buruburu Police Station. He arrived at the scene and caused the motor vehicle to be towed to Buruburu Police Station. While on the way, he received information from the police radio call reporting that the motor vehicle that they had recovered being Registration No. KBA 898Y had been robbed from the driver along Naivasha-Mai Mahiu Road. The report of the robbery was made at Kasarani Police Station. PW6 informed the police officers at Kasarani Police Station that the motor vehicle had been recovered and was being taken to Buru Buru Police Station.

Meanwhile, at the said Kasarani Police Station, PW1 and PW2 were informed that their stolen lorry had been recovered. The lorry was at Buruburu Police Station. They went to Buruburu Police Station and identified the lorry. On 11th May 2009, PW1 and PW2 were asked to attend police identification parades held respectively at Kilimani Police Station and at Shauri Moyo Police Station. In the first identification parade held by PW4 IP Francis Njeru Nyamu, PW1 and PW2 were able to identify the 1st Appellant. In the second identification parade, PW1 identified the 2nd Appellant. PW2 was unable to identify anyone in the said parade.

Photographs of the recovered motor vehicle were taken by PW8 PC Edward Muhia, a Scene of Crime officer attached to Nairobi Area. The photographs were taken on 14th May 2009. They were produced into evidence. The case was investigated by PW10 Sgt Nathan Njoroge of the Special Crime Prevention Unit, Nairobi. He told the court that after completing his investigations, he came to the conclusion the Appellants were involved in the robbery. He told the court that the Appellants, with others hijacked the motor vehicle driven by PW1 at Mai Mahiu, after subduing him using a pistol. They had the vehicle driven to Nairobi where they dumped PW1 and PW2 before driving the motor vehicle to Umoja Estate. The 2nd Appellant and others were found unloading timber from the motor vehicle. They were found by police officers on patrol. The police were informed that the owner of the timber was the 1st Appellant. He was called to the police station where he

was arrested. A police identification parade later confirmed the identity of the Appellants as the persons who robbed PW1 and PW2. The fact that the motor vehicle that was robbed from PW1 and PW2 was recovered in their possession was another piece of evidence that connected the Appellants to the crime.

The 1st Appellant was put to his defence. He stated that on 10th May 2009 at about 3.15 a.m., he received a call from his neighbour, a Mr. Kiplagat. Kiplagat informed him that his brother Matete had been arrested. He needed his help to bail him out. The 1st Appellant stated that the police officers requested for Ksh.10,000/- in order to release Kiplagat's brother. Kiplagat promised to refund him the money. He withdrew Ksh.20,000/-. He proceeded to Buruburu Police Station where Kiplagat's brother was being held. He arrived at the said station at about 5.30 a.m. At the reception, one of the officers requested for Ksh.10,000/-. He gave him the money. He was asked to wait in a different room. He was later taken to the OCS who requested for Ksh.10,000/-. He informed the OCS that he had already given the money to the police officer at the reception.

The said police officer denied receiving any money from the 1st Appellant. They had an argument about the money. He was arrested and locked in a police cell. At about 2.00 p.m., he was ordered to accompany police officers to his house. They took his national identity card, his military identity card and photographs from his house. Back at the station, he was subjected to an identification parade. Eight people from his cell were included in the parade. He stood between the 3rd and 4th person. A witness was brought in. He identified the first person on the parade. He left the room. The said witness later came back and touched him. A second witness came in and touched him. He stated that the witnesses had seen him at the report office before the parade was conducted. He was later charged with the present offences. The 1st Appellant denied all the charges against him.

The 2nd Appellant was put to his defence. He stated that he worked as a driver. On 10th May 2009, he left for work at about 4.30 a.m. Before arriving at the bus station, he met two police officers. They asked for his identity card. He had however left it at home. He gave them his driving licence. The police officers declined to accompany him to his house where his identity card was. They arrested him alongside another man. He was taken to Buruburu Police Station. He was later transferred to Shauri Moyo Police Station. The following day, an identification parade was conducted. Two witnesses came. They did not identify him during the parade. He was later charged with the present offences. He denied any involvement in the same.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot make any comments with regard to the demeanour of the said witnesses. (**See Njoroge vs Republic [1987] KLR 19**). In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by the parties to this appeal. It was clear from the evidence adduced that the Appellants were convicted on the basis of the evidence of identification and the recovery of the robbed motor vehicle. As regards the evidence of identification, PW1 and PW2 testified that they were robbed of the motor vehicle on the night of 9th May 2009 where they had stopped at Mai Mahiu for the night. PW1 had slept in a hotel while PW2 slept in the lorry. PW1 testified that he was woken up by people who claimed to be police officers. They persuaded him to open the door to his room after they had showed him a police identification card. He was escorted to where the lorry had parked. He woke up PW2 and told him that he had been arrested by the police. The people told them that they were arresting them because they were unlawfully transporting timber. PW1 attempted to call his employer. The phone was snatched from him. It was then that they realized that they had been kidnapped. One of the men was armed with a pistol. They were then bundled into a car and driven to Nairobi. The lorry was driven by one of the men who had kidnapped them. They were abandoned at Mwiki area in Nairobi. They reported the incident to Kasarani Police Station.

From their testimony, it was clear that they closely interacted with their assailants during the entire ordeal from the time they were bundled into the car to the time they were abandoned at Mwiki area in Nairobi. They were able to identify their assailants. The condition favouring positive identification was present because there was security light at the scene where PW1 and PW2 were kidnapped. PW1 and PW2 confirmed the identification of the 1st Appellant in an identification parade which was conducted a day after the robbery incident. PW1 was able to point out the 2nd Appellant in another identification parade which was held on the same day.

That being the case, this court was not persuaded by the submission made by the Appellants to the effect that they had not been properly identified during the robbery incident. On re-evaluation of this evidence, this court finds that the evidence of identification was watertight and placed the Appellants at the scene of robbery. They were positively identified. The finding reached by the trial court cannot be impeached. The trial court held thus:

“I would find that the long period taken by the assailants coupled with the help of security lights could constitute favourable environment of proper identification. However, bearing in mind the time of the robbery, it was imperative that an identification parade be conducted to eliminate any doubts that the complainants properly identified the accused persons...Effectively I concluded that both accused persons were positively identified as person who robbed PW1 of the motor vehicle. Although 2nd Accused was not identified at the parade, I do note that both PW1 and 2 were together all along during the horrifying ordeal. The identification by one of the witnesses to me is sufficient corroboration of the evidence of the other witness. I do find that both accused were the robbers of both PW1 and 2 at Mai Mahiu and that their defence cannot bail them out.”

Even if this court were to ignore the evidence of identification, the recovery of the motor vehicle connected the Appellants to the robbery. The motor vehicle was recovered by the police who were on patrol at Umoja Estate a few hours after the robbery incident. The 2nd Appellant was found in the motor vehicle. He had the keys to the motor vehicle. Investigations revealed that the timber was being off loaded in the premises belonging to the 1st Appellant. The police were told that the timber '**belonged**' to the 1st Appellant. The 1st Appellant went to the police station after he was summoned on information given by the 2nd Appellant. The recovery of the motor vehicle, a few hours after the robbery, therefore connected the Appellants to the robbery. The doctrine of recent possession applied in their case. The Appellants did not give a reasonable explanation how they came to be in possession of a robbed motor vehicle a few hours after the robbery incident. This court

came to the conclusion that the defence put forward by the Appellants was a mere diversion and did not dent the otherwise strong, cogent and overwhelming evidence that was adduced by the prosecution witnesses.

In the premises therefore, it is clear from the foregoing that the Appellants' respective appeals against conviction cannot be allowed. They lack merit. They are hereby dismissed.

With regards to the sentence, following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, the Appellants' robbed the complainants after subduing them using a firearm. They subjected them to a horrendous ordeal from the time they kidnapped them to the time they abandoned them in Nairobi. Violence was meted out on the complainants. This court can only imagine the psychological torture that the complainants experienced during the ordeal. The court has also taken into account that the Appellants have been in lawful custody for a period of ten (10) years. The court also took into account their mitigation. However, taking into account the entire circumstances of the case, this court formed the view that the death sentence is not called for. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellants to serve ten (10) years imprisonment with effect from the date of this judgment. This court has taken into account the period that the Appellants were in pre-trial custody and the period that they have been in prison since their conviction. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF APRIL 2019

L. KIMARU

JUDGE