



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KITUI

#### CRIMINAL APPEAL NO. 60 OF 2016

DOMINIC MALONZA MULWA.....1<sup>ST</sup> APPELLANT

PETER KYALO WAMBUA.....2<sup>ND</sup> APPELLANT

ALEX KIMEU MUTANGILI.....3<sup>RD</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in Kitui Principal Magistrate's Court Criminal Case No. 724 of 2011 by Hon. E. Boke (PM) on 22/09/16)*

#### J U D G M E N T

1. **Dominic Malonza, Peter Kyalo and Alex Kimeu**, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively were charged with **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **22<sup>nd</sup> day of October, 2011** at about **6.00 a.m.** at **Kitui Township Location in Kitui County**, jointly with others not before Court while armed with a dangerous weapon namely pistol robbed **Jackson Muchemi Kitonyo** of one leather briefcase containing unknown amount of money and at or immediately before or immediately after the time of such robbery killed the said **Jackson Muchemi Kitonyo**.

2. Upon being taken through full trial, they were found guilty, convicted and sentenced to death.

3. Aggrieved, they appeal on grounds that: **Section 200(3)** of the **Criminal Procedure Code** was not complied with; circumstantial evidence adduced was inconclusive; evidence of confession was admitted in contravention of **Section 25** of the **Evidence Act**; the criteria used to track the purported mobile phone communication between the 1<sup>st</sup> Appellant with his accomplices was not disclosed which resulted into a failure of justice therefore being in contravention of **Section 65(8)(9)** of the **Evidence Act**; Essential witnesses were not availed; the Court adopted written submissions by the Appellants' Counsel who had not consulted the Appellants therefore contravening **Section 213 and 310** of the **Criminal Procedure Code**; the mode of arrest of the 2<sup>nd</sup> Appellant was riddled with doubts such that it could not have sustained a conviction; the doctrine of common intention between the 2<sup>nd</sup> Appellant and perpetrators of crime was not established; the case was riddled with contradictions; and the plausible defence put up by the Appellants was disregarded.

4. Facts of the case were that on the **22<sup>nd</sup> October, 2011**, the Deceased was shot dead by thugs while at his place of business. The body was moved to the Kitui District Hospital Mortuary. In the meantime, the police received information and acting on it went to Kitui Airstrip area where they intercepted motor-vehicle Registration Number **KBN 075R, Toyota Corolla** which had four (4) occupants. One of them had a fresh wound that was bleeding. They directed the driver of the motor-vehicle to take them back to where they had come from. He took them to the home of **John Makau** (PW3) where they found fresh blood stains in the kitchen. They took possession of an unregistered motorcycle that had links with the robbery. Amongst the persons who were in the motor-vehicle was the 1<sup>st</sup> Appellant, who communicated with other individuals seeking help following advice from the police. The driver of the taxi was sent **Kshs. 550/=** for fuel. They agreed to meet at **Kwa Vonza** and exchanged the registration numbers of motor vehicles. They met as agreed. The police moved as instructed and arrested the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. The driver of the motor-vehicle was shot by **Corporal Kinyua** in the process. Some money, **Kshs. 259,600/=** was found in a black polythene paper. Investigations were concluded which culminated into the arraignment of the Appellants and another in Court.

5. Upon being put on their defence, the 1<sup>st</sup> Appellant stated that he was arrested while in company of his cousin **John Makau**, a taxi driver, **Simon Maithya** and his Co-Accused, **Mumo** without being given any explanation. That at the point of their arrest he was with **Mumo** whom he had knocked down with a motorcycle while riding to his aunt's place and at the time he was having abdominal pains, was unconscious therefore could not explain what happened. He claimed ownership of the motorcycle. The police took them back to **Wambua's** place where they found stains of blood and also took possession of two (2) jerricans of the traditional liquor popularly known as "karubu".

The three (3) of them were placed in the boot of the motor vehicle. He denied having rang any person to collect **Mumo** from **Nairobi** but admitted having communicated with a taxi driver whom he paid **Kshs. 500/=** and alleged that they were intercepted. Denying having killed the Deceased he stated that at **6.30 a.m.** when the incident took place he was in his house, asleep. He denied having been found in possession of money stolen from the Deceased or having known his Co-Appellants.

6. The 2<sup>nd</sup> Appellant testified that he was arrested at **Kyua** by police as he was travelling from **Nairobi**. The driver of the salon car he was travelling in was shot dead. That he had boarded the motor-vehicle after the Nissan he was travelling in from **Nairobi** broke down and he did not know either the driver or other passengers. When the driver stopped at **Kyua**, he heard gunshots and he was shot. He admitted having seen the 3<sup>rd</sup> Appellant in the motor-vehicle but denied having seen any money alleged to belong to the Deceased.

7. The 3<sup>rd</sup> Appellant stated that he was aboard a motor-vehicle where he had paid fare and on reaching **Kyua** the motor-vehicle stopped, and the driver was shot dead. On board was the 2<sup>nd</sup> Appellant. The police threatened to shoot them. They were taken to **Kitui Police Station** and it was in Court that he heard of the pharmacist's demise.

8. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

9. It is urged that there was no compliance with **Section 200(3)** of the **Criminal Procedure Code** that provides thus:

*“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”*

**Hon. A. G. Kibiru**, Chief Magistrate, heard ten (10) Prosecution Witnesses prior to his transfer. The **Hon. E. Boke**, Principal Magistrate who succeeded him acted pursuant to the law. At **page 155** of the proceedings the record reads thus:

*“Placed aside for hearing after the call over Section 200(3) Criminal Procedure Code complied with.*

....

*Accused 1 – Case to proceed from where it was reached.*

*Accused 2 – Case to proceed from where it was reached.*

*Accused 3 – Case to proceed from where it was reached.”*

Compliance with **Section 200(3)** means that the Court explained the provisions of the law which enabled the Accused person to answer as they did. In the circumstances, no prejudice was suffered which would require this Court to order a new trial.

10. The learned trial Magistrate is faulted for admitting a confession in contravention of **Section 25** of the **Evidence Act** that provides thus:

*“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”*

**Section 25A** of the **Evidence Act** provides thus:

*“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.*

*(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”*

The statement in issue was taken by an officer of the rank of Superintendent who was duly authorized to act as such. A third party of the 2<sup>nd</sup> Appellant's choice namely **David Muasya** was present and he does not deny that fact. The contention however is that the confession was procured in English, a language that the Appellant did not understand. The averment was buttressed by virtue of the fact that the trial was conducted in Kiswahili to enable him and his Co-Accused to follow proceedings.

11. Following the allegation that the statement was taken in breach of the **Evidence (out of Court confession) Rules, 2009**, a trial within a trial was conducted. On cross-examination, the witness (PW10) stated that the communication between him and the 2<sup>nd</sup> Appellant was in English language. He did not find out his education level but the Appellant was fluent in English language which was their means of communication. In his testimony the 2<sup>nd</sup> Appellant communicated in Kiswahili language.

12. The learned trial Magistrate was faulted for admitting the confession in disregard of the fact that the Appellant was tortured and had to be taken to hospital for treatment following injuries sustained. In this regard the case of **Musili Tulo vs. Republic (2014) eKLR** was cited

where the Court of Appeal held that:

***“On the face of it, the two statements were recorded in lackadaisical manner. At 4p.m. on 14<sup>th</sup> July, 2010, Chief Inspector Wafula was recording a ‘Charge and Cautionary statement’. One hour later, I.P. Kombo was recording a ‘Statement under Inquiry’. Logically, it is the statement under cautionary statement! At any rate, I.P. Kombo had no business recording the statement as it would be contrary to Section 25A(1) of the Evidence Act. There was no third party as the section requires. None of the officers followed the Confession Rules on language and the various certifications stated therein. In sum, there is considerable doubt that the statements were recorded in accordance with the law and, therefore, they are for exclusion as evidence in the case. We so find.”***

13. Further, it was urged that the 2<sup>nd</sup> Appellant was made to sign the statement at gun point. That the gun was being pointed at his mouth and legs and his face was masked. He denied knowing the individual called **David** who was allegedly his witness.

14. In dismissing the allegation of the 2<sup>nd</sup> Appellant the trial Court that heard the trial within a trial stated that he would not have known where to sign if he had a mask on his face. It noted that at the first appearance in Court the 2<sup>nd</sup> Appellant raised a complaint of having been forced to record a statement but he did not deny having recorded it as he later did during a trial within a trial. The Court was satisfied that the statement was obtained voluntarily though it was appreciated that the Appellant denied having understood English language.

15. According to the Rules once an Accused person intimates his willingness to make a confession the officer recording the statement is obligated to establish the Accused person’s preferred language of communication and where the individual does not speak Kiswahili or English, an interpreter must be availed. The officer’s testimony was silent on whether or not he complied with the Rule in that regard. On cross-examination he stated that the communication between them was in English language though he knew the Appellant was a Kamba. However, he did not ascertain his level of education. The statement having not been self-recorded, it cannot be ascertained if indeed he was fluent in the English language in which the statement was recorded. However, it is important to note that the contention was raised by the 1<sup>st</sup> Appellant but not the 2<sup>nd</sup> Appellant therefore it cannot be ruled out that the 2<sup>nd</sup> Appellant who made the confession understood the language as he clearly stated that he had formal education having been educated upto standard 7.

16. It is contended that the mode of tracking of the communication between the 1<sup>st</sup> Appellant and his accomplices was not disclosed therefore resulting into failure of justice. In this regard the Appellant relied on the provisions of **Section 65(8)(9)** of the **Evidence Act** that provide thus:

***“(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—***

***(a) identifying a document containing a print-out or statement and describing the manner in which it was produced;***

***(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;***

***(c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.***

***(9) For the purposes of this section—***

***(a) information shall be deemed to be supplied to a computer if it is supplied in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;***

***(b) information shall be deemed to be supplied in the ordinary course of business if the information was obtained, received or supplied with a view to it being processed, stored or retrieved in the ordinary course of business; and***

***(c) a document shall be deemed to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any other appropriate equipment connected to such computer.”***

17. It was the contention of the 1<sup>st</sup> Appellant that under normal circumstances a print-out would be adduced in evidence therefore the criterion used in the tracking was not explained to the exclusion of error, omission or malicious implication and ownership through proof of registration of the mobile phone was not ascertained to establish that it belonged to the 1<sup>st</sup> Appellant nor was it produced in evidence.

18. The alluded to provision of the law guides the Court and parties in how to deal with computer printout if it is to be admitted in evidence. In the instant case as correctly pointed out, no computer print-out was adduced in evidence.

19. Generally, the case was based on circumstantial evidence which the Appellants argue, was inconclusive. In the **Musili Tulo case** (supra) the Court of Appeal rendered itself thus:

***“(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

*(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused;*

*(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.” (see also GMI vs. Republic; Republic vs. Kipkering Arap Koske and Another 16 EA CA 135).*

20. In the case of **Abanga alias Onyango vs. Republic, Criminal Appeal No. 32 of 1990** (unreported) the Court of Appeal stated that:

*“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:*

*(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

*(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

*(3) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*

21. In tracking down the Appellants the police acted on information received. PW12 **No. 233371 C.I. Julius Kasiwali** was the first police officer to reach the scene of the incident. His attention was attracted by the sound of gunshots. On arrival at the scene he found the Deceased already dead but he got information which led the investigation team to the fact of the assailants having gotten away by means of an unregistered motor-cycle.

22. Further information received from informers led the police to the Kitui Airstrip area where they intercepted a motor-vehicle Registration Number **KBN 075B**. PW8 **Simon Munyao**, the owner of motor-vehicle Registration Number **KBN 075B Nissan van** got a call from the 1<sup>st</sup> Appellant, his customer who requested him to find him at the gate to the showground. He complied, drove to the area where they met. The 1<sup>st</sup> Appellant requested him to accompany him to **Tunguto** to carry a patient to **Kwa Vonza**. They proceeded to a home that the 1<sup>st</sup> Appellant identified as his cousin's. Since they were to be taken to **Kwa Vonza** he sought to be paid **Kshs. 1,500/=** but he was given only **Kshs. 500/=** for purposes of fueling the motor-vehicle at the outset. He fueled and returned and along the way he encountered the 1<sup>st</sup> Appellant the patient who was bleeding profusely and the T-shirt he wore was blood stained at the abdomen, a person he identified in Court as the 4<sup>th</sup> individual who had been jointly charged with the Appellant but passed on in the course of the trial.

23. PW3 **John Makau Wambua** a Cousin of the 1<sup>st</sup> Appellant confirmed the fact of the 1<sup>st</sup> Appellant having arrived at his home with the 2<sup>nd</sup> Appellant and another individual who was injured. The explanation he got from the 1<sup>st</sup> Appellant was that he found the two along the road, one was lying down having been injured while the second one was standing. The 1<sup>st</sup> Appellant was the driver of the motor-vehicle which they had used as means of transport. Following the 1<sup>st</sup> Appellant's request, the injured person was made to rest in the kitchen. As he went in search of a taxi that would take him to hospital. Of importance was that the 2<sup>nd</sup> Appellant was carrying a black briefcase. The 1<sup>st</sup> Appellant and 2<sup>nd</sup> Appellant left an unregistered motorcycle that was blue in colour at PW3's home. After approximately one hour, the 1<sup>st</sup> Appellant returned. PW3 sought to know where the taxi was and the 1<sup>st</sup> Appellant assured him that it was on its way to the place. The condition of the injured person was worsening, a fact that prompted PW3 seek to know from the 1<sup>st</sup> Appellant what was transpiring. The 1<sup>st</sup> Appellant was compelled to leave on foot to go and find a taxi. He returned thereafter and assured him that the motor-vehicle had gone to get fuel. Ultimately the taxi arrived and they requested PW3 to assist in taking the injured person to hospital. PW3's evidence was confirmed in material particulars by that of PW4 **Kamene Wambua Manzi**, his mother and aunt to the 1<sup>st</sup> Appellant. While on their way they were intercepted by the police.

24. The tip off received by the police led them to the Airstrip area and they lay ambush. PW9 **No. 73365 P. C. Mutia** who was in company of other officers under the command of the OCS, **C.I. Lekuta** intercepted motor-vehicle Registration No. **KBN 075R**. Inside were the 1<sup>st</sup> Appellant, the injured person (Accused 4 who later died), PW3 and the driver. They were led to the home of PW3 where they met PW4 and confirmed their explanation of the 1<sup>st</sup> Appellant having taken the injured individual on the fateful morning. From their observation and expertise, the wound the individual had sustained could not have been as a result of a road traffic accident as explained by the 1<sup>st</sup> Appellant (the injury on the abdomen had a possible bullet entry without an exit). The 1<sup>st</sup> Appellant having alleged that they were taking the injured person to **Kwa Vonza** where he could be taken to a hospital in **Nairobi** by another motor-vehicle they tagged along to confirm.

25. PW7 **No. 81298 Corporal Josphat Kinyua** was one of the police officers who boarded the taxi as it proceeded to meet the other motor-vehicle that was to take the injured person to hospital followed the communication between the 1<sup>st</sup> Appellant and the other person. They proceeded towards **Kyua Market**, along the way they encountered a Toyota caldina car, Registration Number **KBD** which they by passed. The motor-vehicle stopped, made a u-turn and followed them. They stopped and after the motor-vehicle stopped, the officers came out and ordered the occupants to disembark. The driver on seeing them attempted to drive off only to be shot. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellant came out of the motor-vehicle. Upon a search being carried out a recovery was made of cash **Kshs. 259,600/=** stashed in a black polythene paper bag.

26. PW11 **No. 49090 Corporal Painito Ingosi** the Investigation Officer following investigations carried out established that the Deceased had a briefcase and was going to purchase drugs/medicine therefore it was taken that the sum of money found in the motor-vehicle in which the 2<sup>nd</sup> Appellant had boarded was the money that had been carried in the black briefcase in the morning by the 2<sup>nd</sup> Appellant when they went to the home of PW3. This particular aspect required an explanation.

27. At the first appearance, the 3<sup>rd</sup> Appellant who was in the same motor-vehicle with the 2<sup>nd</sup> Appellant at the point of arrest told the Court thus:

***“I was assaulted and forced to record a statement and my money was taken by a police officer...”***

The 4<sup>th</sup> Accused who succumbed thereafter in the course of the trial stated thus:

***“I was shot by thugs and I wish to record a statement ... I am in hospital. I was robbed and I was taken to the equity bank to get money to get some medication.”***

28. What the 4<sup>th</sup> Accused stated regarding the injuries he had sustained was a confirmation of what the police officer (PW9) herein stated regarding the injury that he had sustained. In his defence the 1<sup>st</sup> Appellant alleged that he knocked him down with a motor-cycle while riding towards his aunt’s home though PW3 told the Court that the explanation he gave him was that he was simply assisting him (Deceased). Although the 1<sup>st</sup> Appellant denied having been with the 2<sup>nd</sup> Appellant, his assertion was disapproved by evidence tendered by PW3 and PW4 respectively, his relatives.

29. As stated, the 3<sup>rd</sup> Appellant came up with an allegation of his money having been taken at the outset. Although he did not state the actual amount, evidence led was that money was recovered from the motor-vehicle he was in. however, in his defence he was silent on the allegation of his money having been taken by the police.

30. On record is an impugned confession made by the 2<sup>nd</sup> Appellant which was retracted but admitted in evidence following a trial within a trial. The question to be grappled with is whether the confession should be acted upon? In the case of **Komora vs. Republic (1983) KLR 583** the Court of Appeal held that:

***“1. There is no rule of law or practice that requires corroboration of a retracted confession before it can be acted upon, but it is improper to act upon it in the absence of corroboration in material particulars; unless the court is satisfied of its truth after a full consideration of the material facts and surrounding circumstances.***

***2. A retracted confession occurs when the accused person admits that he made the statement recorded but now seeks to retract or to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one (Tuwamoi-Vs- Uganda [1967] EA p 84 & 88).”***

31. I have addressed circumstances in which the trial Magistrate considered the process through the trial within a trial and came up with cogent reasons for admitting the confession in evidence.

32. The confession explained in details events of the fateful morning that resulted into the death of the Deceased.

33. It was urged that the doctrine of common intention was not proved. **Section 21** of the **Penal Code** provides thus:

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

34. In the case of **Njoroge vs. Republic (1983) KLR 197** the Court of Appeal stated that:

***“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”***

35. This was an offence that was planned prior to being committed. The conduct of each Appellant was explained by witnesses who testified. Each one of them took part as a perpetrator of the offence therefore the common intention was proved.

36. From the foregoing, even if there was no direct evidence as to the individuals who took away the briefcase that contained money which was in possession of the Deceased which became possible as a result of the violence that was occasioned on his person resulting into his death, circumstantial evidence adduced unerringly pointed towards the Appellant as persons who committed the offence. Therefore, there was no misdirection on the part of the learned Magistrate when she returned a verdict of guilty and convicted the three Appellants. The Appeal against the conviction therefore fails and is dismissed.

37. With regard to the sentence imposed, in **Petition No. 15 of 2016 Francis Kairoko Muruatetu and Another vs. Republic (2017) eKLR** the Supreme Court held that the mandatory death sentence is unconstitutional. The Appellants were given the opportunity to mitigate. It was stated on their part that they maintained their innocence but the Court was called upon to consider the fact of their age, as they were young men with young families and old parents who depend on them as their source of protection.

38. I do take into consideration the nature of the offence and circumstances in which it was committed. Life was lost following the attack by a dangerous weapon. I note that the Appellants were in custody for five (5) years prior to being sentenced which I take into consideration.

39. Therefore, I set aside the death sentence imposed and re-sentence each Appellant to **twenty (20) years imprisonment** to be effective from the date of sentencing by the trial Court.

40. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of July, 2019.**

**L. N. MUTENDE**

**JUDGE**