



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CRIMINAL APPEAL NOS. 91A, 91B and 91C OF 2017**

**JOSEPH KAMAU SAMANDE.....1<sup>ST</sup> APPELLANT**

**JMK.....2<sup>ND</sup> APPELLANT**

**STANSLAUS KITONGA MUSEMBI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being appeals from the original conviction and sentence dated 8th August 2016 in the Chief Magistrate's Court at Naivasha in Criminal Case No 3689 of 2012, Republic v Joseph Kamau Samande, JMK, Kevin Muchiri Kariuki and Stanslaus Kitonga Musembi)*

**JUDGEMENT**

**Introduction**

1. The three appellants were convicted and sentenced to death in respect of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. Mr Omwega for the respondent conceded the appeals, but applied for a retrial of the appellants.
3. It is trite law that the appeal of each appellant has generally to be considered separately. I now turn to that of the first appellant.

**The first appellant's appeal**

4. The first appellant, Joseph Kamau Samande, has raised six grounds in his amended grounds of appeal. This appellant has in ground 1 stated the unchallengeable fact that he did not plead guilty.
5. In ground two, the appellant has faulted the trial court both in law and fact for failing to find that he was not positively identified as one of those who robbed the two complainants. In this regard, the evidence of Geoffrey Kimngetich Kosgey (Pw 1), who was the driver of the matatu vehicle that was stolen, was that the 3<sup>rd</sup> appellant hired the said vehicle to take teachers from Narok to Kericho for a seminar. The third appellant sat in front of the subject matatu, when they left Kericho at 8.30 am. Upon arrival at Narok near Ngareta forest, the third appellant told Pw 1 to turn left on a rough road. After some distance the third appellant told him to turn the motor vehicle. Pw 1 then saw the first and second appellants. It is at that point in time that the first appellant asked the third appellant as to why they had delayed. The first appellant then slapped Pw 1 in the face. The third appellant then pulled Pw 1 to his side and told him that they had come to the end of the journey. The third appellant then told him to co-operate. The second appellant pulled him down and slapped him and after struggling with him, he tied Pw 1's hands with a sisal rope.
6. Furthermore, the second appellant and another accomplice who is at large, forced Pw 1 to take some bitter liquid in a dasani bottle of water. As a result, Pw 1 lost consciousness and found himself in Narok referral hospital the following day. Pw 1 testified that it was the first appellant who was driving.
7. The evidence of PW 1 is supported by that of Sammy Kibet Melly (Pw 3), who was the conductor of the subject motor vehicle. Pw 3 accompanied Pw 1 from Kericho until they reached at Narok, when the subject vehicle was stolen by the three appellants at Ngareta forest in Narok County. Pw 3 testified that the first appellant slapped the driver. The second appellant had a knife, which he used to cut a sisal rope and he then tied Pw 3. The third appellant then searched Pw 3 and took his shs. 3,500 and some coins. Like Pw 1, Pw 3 was forced to drink some mixture of chemicals in a Dasani water bottle, a result of which he lost consciousness. Like Pw 1, Pw 3 was taken to Narok referral hospital for treatment.

8. It is clear from the foregoing evidence that Pw 1 and Pw 3 were with the third appellant for about five hours. It is also clear that Pw 1 and Pw 3 were with the first and second appellant for 30 minutes in Ngareta forest and its environs.

9. After re-evaluating the entire evidence, including the alibi defence of the first appellant, I find that the circumstances favoured the identification of the first appellant. Firstly, the offence was committed during broad day light. Second, Pw 1 and Pw 3 were with the first appellant for about 30 minutes. Third, they were in close proximity of each other. I therefore find that the first appellant was positively identified by Pw 1 and Pw 3.

10. The fact that the stolen vehicle was recovered abandoned in Suswa area, does not absolve the first appellant as the person, who along with the co-appellants was the robber.

11. Furthermore, there is evidence of No. 78491 PC Zadock Wafula (Pw 7), who was the investigating officer that the first appellant led them to arrest the third appellant. This is accomplice evidence of the weakest kind; for it is not subject to cross examination. It is nevertheless competent evidence by virtue of the provisions of **section 141 of the Evidence Act (Cap 80) Laws of Kenya**. The evidence of Pw 3 corroborates the evidence of Joseph Kamau Samande, the first appellant in respect of the arrest of the third appellant.

12. It was not necessary for Pw 7 to organize for an identification parade, since Pw 1 and Pw 2 had already identified the first appellant for 30 minutes. Furthermore, Pw 1 and Pw 3 also saw the first and second appellants at Narok referral hospital, where Pw 1 and Pw 3 were undergoing treating after they had been sedated by the appellants. The first and second appellants were also undergoing treating for injuries sustained in the hands of the members of the public who had arrested them.

13. The first appellant's defence of alibi was disproved by the positive identification of the first appellant by both Pw 1 and Pw 3.

14. Furthermore, it was a misdirection on the part of the trial court to have found that the first and second appellants were found in possession of the recently stolen subject motor vehicle. These appellants were the robbers and not possessors of the robbed subject motor vehicle. For one cannot be the robber and at the same time be in possession of recently stolen property. However, this misdirection is cured by the evidence on record. After re-evaluating the entire evidence, I find that the 1<sup>st</sup> appellant was convicted on sound evidence. I therefore dismiss his appeal against conviction.

#### **The second appellant's appeal.**

15. The second appellant, JMK, has raised five grounds in his amended grounds of appeal. In ground 1, the appellant has stated the unchallengeable fact that he did not plead guilty. In ground 2 the appellant faulted the trial court both in law and fact in convicting him for offences that were not proved beyond doubt, since his identification was not positive. This appellant was identified by Pw 3 as one of the robbers who stole their matatu vehicle. There is further evidence of visual identification by Pw 1. I have already analyzed the evidence of Pw 3 in the foregoing paragraphs, which corroborates that of Pw 1. I therefore find that the second appellant was positively identified by Pw 3 and Pw 1. This ground of appeal is without merit and I therefore dismiss it.

16. Furthermore, in ground 3 the appellant has faulted the trial court for finding that he was found in possession of the recently stolen matatu vehicle registration **No KBK O25V** Toyota shark matatu. In this regard the evidence is that this appellant along with the co-appellants took control of the subject vehicle at Ngareta forest in Narok county, drugged them and abandoned them there. They were rescued by David Ratia (Pw 4), who alerted the police that they had found persons who looked drunk with poison.

17. The appellants drove the vehicle towards Narok-Maai Mahiu road; and after encountering a police road block they took a u turn and turned right and drove on a murram road until the vehicle got stuck in a swamp. Thereafter they abandoned the vehicle and escaped on foot. They were chased by members of the public until they were arrested and charged and convicted with these offences. It therefore follows that this appellant along with his co-appellants' offence directly committed the offence of robbery. The finding that this appellant was found in possession of a recently stolen vehicle is a misdirection in law. I therefore set aside this finding of the magisterial court. The appellant and his co-appellants used violence in taking control of the subject vehicle. In doing so, they committed robbery. For robbery is aggravated stealing using violence. I therefore dismiss ground 3 for lacking in merit.

18. In ground 4 the appellant has faulted the trial court both in law and fact by failing to analyze the whole prosecution evidence properly and by introducing her own theories and hypothesis that were not supported by evidence. I have perused the judgement of the trial court in this regard and I find that in regard to this appellant the findings of that court were supported by the evidence adduced before it. I therefore dismiss this ground of appeal for lacking in merit.

19. In ground 5 the appellant has faulted the trial court in law for rejecting his defence without giving cogent reasons. In this regard, I find that the defence of the appellant was that of an alibi. The defence of the appellant was that on the material day on 15<sup>th</sup> May 2012, he had gone to see one Samson Kimuru in respect of a parcel of land he had leased from him. As the appellant was arguing with this Samson Kimuru in respect of the refund of his money for the failed lease transaction, a police vehicle arrived on the scene, who then arrested him. And he was in the end charged with this offence. He blamed this Samson Kimuru for causing his arrest.

20. It is clear that his defence was that of an alibi. In view of the positive identification by Pw 3 and Pw 1, his defence of alibi fails. I therefore dismiss it for lacking in merit.

#### **The third appellant's appeal**

21. The third appellant, Stanslaus Kitonga Musembi, has raised six grounds in his amended grounds of appeal. I will start with ground 2 in which the appellant has faulted the trial court in finding that Pw1 and Pw 2 were credible witnesses. In this regard the evidence of Pw 3, who was the conductor of the subject matatu is that this appellant hired their vehicle to ferry teachers to attend a seminar in Kericho from Narok

on 15<sup>th</sup> May 2012. The appellant was with Pw 3 for about five hours from Kericho to Narok up to the turn off to Ngareta forest within Narok County. Pw 3 has testified in detail about the hiring and the part played by the appellant during the robbery at Ngareta forest.

22. Pw 1 who was an adult male driver was not sworn, for reasons which are not recorded. He therefore gave unsworn evidence. **Section 151 of the Criminal Procedure Code (Cap 75) Laws of Kenya** mandatorily requires each witness to be sworn before he testifies. The usage of his unsworn evidence did not make the trial a nullity as submitted by the appellant. Because Pw 1 was not sworn, his evidence carries little weight, cannot form the basis of a conviction and is not worthless according to *Jamaal Omari Hussein v Republic (2019) eKLR*. His evidence is similar to that of Pw 3. In the circumstances, I find that this appellant was positively identified by both Pw 1 and Pw 3. It therefore follows that his alibi was disproved.

23. The appellant submitted that he gave notice of his alibi before the start of the trial. He cited section 235 of the Criminal Procedure Code in support of his submission. The appellant appears to suggest that the alibi was not disproved. The appellant was not required to give notice of his alibi defence. Furthermore, the provisions of that section were in relation to holding of committal proceedings by subordinate courts for offences that were triable in the High Court. Those provisions were abolished by Act No. 5 of 2003. They are not therefore applicable in the instant appeal. I therefore find no merit in this submission, which I hereby dismiss.

24. In ground 3 the appellant has faulted the trial court in misconstruing the circumstances of his arrest in relation to this appeal but failed to appreciate that he was prosecuted in many other robbery cases thus making it impossible to know which offences he was arrested for. In this regard, the evidence of the investigating officer (Pw 7) is that the appellant was arrested after he was implicated by the first appellant. The appellant was arrested on the basis of the accomplice evidence of the first appellant, which is corroborated by the conductor (Pw 3) of the subject motor vehicle. Furthermore, the appellant applied to this court to call for and peruse the file namely in Criminal Case No. 594 of 2012, in which he was acquitted under section 210 of the Criminal Procedure Code, since the trial court did not order that he be given the said file to prepare for his defence. The proceedings and judgement of acquittal in that case cannot be evidence in this appeal. I reject this submission for lacking in merit. I therefore reject ground 3 for lacking in merit.

25. In ground 4 the appellant has faulted the trial court for convicting him on uncorroborated and contradictory evidence, which was insufficient to support the convictions. In this regard, the evidence of the owner (Pw 2) of the subject matatu vehicle was that both the driver (Pw 1) and conductor (Pw 3) told him that the person who hired the matatu was Lyon, while the latter in their evidence testified that it was this appellant who had hired the matatu vehicle. I have already found the evidence of Pw 1 and Pw 3 to be credible that it was the appellant who hired the matatu. They were not mistaken on the identity of this appellant. Upon my own re-evaluation of the evidence of Pw 1, Pw 2 and Pw 3, I find that it is Pw 2 who is mistaken as to the name of the person who hired the matatu. I therefore prefer the evidence of Pw 1 and Pw 3 to that of Pw 2 in that regard. As regards corroboration of the accomplice evidence of the first appellant and that of Pw 1, I have found corroboration of their evidence in the evidence of Pw 3. I therefore find no merit in ground 4 which I hereby dismiss.

26. In ground 5 the appellant has faulted the trial court for shifting the burden of proof to the appellant by believing the hearsay evidence of Pw 7. The trial court found that the appellant had not put the prosecution on notice in respect of his alibi defence. I find that the appellant had actually put the prosecution on notice in respect of his alibi. This was therefore a misdirection on the part of the trial court. Furthermore, the trial court also found that the appellant had failed to call witnesses to support his alibi defence namely his relative, and a representative of the guest house where he spent the night on 15<sup>th</sup> May 2015. I find this too to be a misdirection. However, I find that these misdirections are curable, since there is ample evidence that this appellant was positively identified by Pw 3 and Pw 1 as one of the robbers. I find the evidence of Pw 7 is not hearsay; since he testified on what he was told by Pw 1, Pw 2 and Pw 3 in addition to what the first appellant told him in respect of this appellant. I therefore find no merit in ground 5 and is hereby dismissed.

27. In ground 6 the appellant has faulted the trial court for failing to objectively analyze his alibi defence, which was truthful. The trial court saw and heard the prosecution witnesses who testified. It also heard and saw the appellant testify on oath. Thereafter it considered the entire evidence and found the prosecution version of what happened to be truthful. It disbelieved the appellant's alibi defence, that is, that he was not at the scene of crime. There is evidence on record to support the findings of the trial court. Upon re-assessment of the entire evidence as I am required to do as a first appeal court, I find no basis to interfere with those findings of fact. I therefore find that the conviction of the appellant was sound. I therefore confirm the convictions that are recorded against him. I therefore dismiss ground 6 for lacking in merit. I also find that it was not necessary to hold an identification parade in respect of the third appellant since Pw 1 and Pw 3 had positively identified him.

28. It is for the foregoing reasons that I do not agree with Mr. Omwega that the appeals cannot be supported. I therefore find no basis for ordering a re-trial.

#### **The appellants appeal against sentence.**

29. All the appellants were sentenced to death. The first appellant had nothing to say in his mitigation. The second appellant told the trial court that he was HIV positive and had high blood pressure. He also told the court that his wife developed high blood pressure after he was arrested and that his mother had breast cancer. Finally, he told the court that he was the sole bread winner of his family and urged the court to have mercy upon him.

30. The third appellant had nothing to say in mitigation. In this court, the third appellant has urged the court to alter the sentence of death which he says was declared unconstitutional by the Supreme Court in *Francis Karioko Muruatetu & Another (2017) eKLR*.

31. I have considered the mitigating factors and the aggravating factors. I find that the appellants drugged their victims, who then became unconscious. I find that this was life threatening. They also assaulted their victims. I therefore find that the death sentence was merited. I therefore dismiss their appeals in their entirety.

Judgement dated, signed and delivered in open court at Narok on this 11<sup>th</sup> day of July, 2019 in the presence of the three appellants and Mr.

Omwega for the state.

**J. M. Bwonwonga**

**Judge**

**11/07/2019**