



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 233 OF 2009

PATRICK NGUNJIRI KARIUKI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 231 OF 2009

DAVID KANGAITA WANJOHI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 232 OF 2009

STEPHEN KAGONGO KAHURE.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Appeal arising from the judgment of Hon L.W. Gitari

Chief Magistrate in Nyeri Cr. Case No.3458 of 2006)

JUDGMENT

1. The appellants were charged with the following counts of robbery with violence contrary to section 296(2) of the Penal Code and the particulars thereof

Count 1: On the 11th day of July 2006, at Chania Estate in Nyeri District of the Central Province, jointly with others not before court, being armed with dangerous weapons namely guns, iron bars, pangas and rungu robbed MARTIN WACHIRA MWANGI of a motor vehicle reg. No. KAU 086 M. Toyota Corolla Saloon, valued at Ksh. 600,000/- and one mobile phone make Nokia 1110, valued at Ksh. 4,200/- and at or immediately before or immediately after the time of such robbery used actual violence to the said MARTIN WACHIRA MWANGI.

Count II: On the 11th day of July 2006, at Chania Estate in Nyeri District of the Central Province, jointly with others not before court, being armed with dangerous weapons namely guns, iron bars, pangas and rungu robbed JOHN KAHINDO GITUATHI of 70,000/- Two mobile phone make Nokia 33310, both valued at Ksh. 9,000/- all to the total value of Ksh. 79,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said JOHN KAHINDO GITUATHI

Count III: On the 11th day of July 2006, at Chania Estate in Nyeri District of the Central Province, jointly with others not before court, being armed with dangerous weapons namely guns, iron bars, and rungu robbed JANE KIRIGO KINGORI of a mobile phone make Motorola, valued at Ksh. 2,800/- and at or immediately before or immediately after the time of such robbery used actual violence to the said JANE KIRIGO KINGORI.

Count IV: On the 11th day of July 2006, at Chania Estate in Nyeri District of the Central Province, jointly with others not before court, being armed with dangerous weapons namely guns, iron bars, and rungu robbed ELIJAH MAYAKA NYAMASEKE of cash Ksh. 2,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said ELIJAH MAYAKA NYAMASEKE.

2. The 1st and 3rd appellants faced alternative charges of handling stolen property contrary to section 322 (2) of the Penal code as follows:

DAVID KANGAITA WANJOHI: On the 18th day of July, 2006 at Blue Valley Estate in Nyeri District within Central Province, otherwise than in the course of stealing dishonestly received or handled three speakers knowing or having reason to believe them to be stolen goods.

STEPHEN KAGUONGO KAHURE: On the 19th day of July, 2006 at Kamakwa village in Nyeri District within Central Province, otherwise than in the course of stealing dishonestly received or handled one mobile telephone make Motorola C117 knowing or having reason to believe them to be stolen goods.

3. They pleaded not guilty were tried convicted and sentenced to death. Being aggrieved by the said convictions and sentence they each filed individual appeals which appeals were consolidated for purposes of hearing and determination.
4. When the appeals came up for hearing before us Miss Maundu for the state conceded to the appeals herein on the basis that the circumstantial evidence was not enough for conviction. She submitted that the complainants were unable to identify any of the attackers and that the 1st appellant was charged in a different court with possession of firearm while there is nothing that connected the appeal with the robbery with violence.
5. We are not bound to allow the appeal just because the state conceded to it and must reevaluate the evidence tendered before the trial court to come to our own conclusion or the same which we hereby do noting that the issue for our determination is whether the circumstantial evidence tendered herein was strong enough for the conviction of the appellants.
6. It was the evidence of P.W.1 JANE KIRIGO KINGORI that on 10th July 2006 she was in a motor vehicle registration No. KAU 086M and that when she reached her home as she was opening the car door a person emerged from the maize plantation nearby and placed a gun on her neck ordering her to go back into the car and that she saw four people and that she was not able to identify any of them while P.W.2 ELIJAH MAYAKA who was in the same motor vehicle stated that he was ordered to shut his eyes and lie down but was able to identify a gun like the one which was produced in court but did not see any of the attackers. It is therefore clear that these two witnesses were unable to identify the attackers.
7. P.W.5 who was the driver of the pleaded motor vehicle confirmed in his evidence in chief that it was dark and the light in the motor vehicle was off and that when this motor vehicle was recovered the next day the car radio and the speakers had been stolen. This evidence was corroborated by that of P.W.6 JOHN KAHINDO GATUATHI that he was not able to identify any of the attackers.
8. P.W.7 APC JOHN MWANGUKU stated that he arrested the 2nd appellant based on information which was given by an informer that he was not of good character and was involved in various

robberies within Kingongo area. P.W.8 JOSEPH KOECH then rearrested the 2nd appellant searched his house and recovered some items including three speakers and a remote control of motor vehicle together with home made gun and that he led them to the of 1st appellant where they recovered two (2) AK 47 rifles and 22 round of ammunicions. The 1st appellant was subsequently arrested and he took them to the house of the 3rd appellant. It is therefore clear that there was not direct evidence tendered by the prosecution to link the appellants to this particular robbery with violence.

9. We therefore find faults with the trial courts conclusion that the evidence tendered proved beyond reasonable doubts that the appellants were involved in the particular robbery noting that they might have been involved in other robbery cases but it was upon the prosecution to link them to this particular case which we find that the prosecution failed to do so.
10. By reason of the matters stated herein we agree with Miss Maundu that the convictions of the appellants herein was not safe and therefore set aside the conviction and quash the sentence herein. The appellants should be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered this 13th day of February 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Court: Judgment read in open court in the presence of Mr Njue for the state and the appellants.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE