



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 30, 32, 33, 34 & 35 OF 2012

EMMANUEL EMMARSON KHAYO.....1ST APPELLANT

KEVIN NDEGE MUNGE.....2ND APPELLANT

ERICK OTIENO OMONDI.....3RD APPELLANT

ERICK KIBET TANUI.....4TH APPELLANT

PAUL MWENDWA NJOGU.....5TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4570 of 2009 in the Chief Magistrate's Court at Makadara – T. Ngugi (PM) on 20th January 2011)

JUDGMENT

1. The appellants, **Emmanuel Emmarson Khayo, Kevin Ndege Munge, Erick Otieno Omondi, Erick Kibet Tanui** and **Paul Mwendwa Njogu** were convicted on four counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It had been alleged that on the 4th November 2009, at Don Holm Estate in Nairobi while armed with dangerous weapons, namely a pistol, Somali sword and a toy pistol they robbed Abraham Nzioka Makau of one mobile phone make Nokia 1110, and cash Kshs.1,300/= in **count 1** and Joseph Mwanja Kituka of cash Kshs.8,700/= in **count 2**.
2. It was also alleged that on 16th October 2009 at the same place while armed as stated above, they robbed Samwel Mbula Kasee of cash Kshs.6,500/=, mobile phone Nokia 1110 all valued at Kshs.8,600/= in **count 3** and Stephen Nzomo Mue of one company jacket, two communication radios, one personal Coat, cash Kshs.6,400/=, mobile phone make Darado T 800 all valued at Kshs.67,500/= in **count 4**.
3. In all four instances it was alleged that, at or immediately before or immediately after the time of such robbery they threatened to use actual violence against each of the 4 complainants. At the close of trial they were convicted and each sentenced to death as by law prescribed.

4. A summary of the prosecution case is that on 4th November 2009 at about 10.00 p.m. **PW1** was driving PSV motor vehicle registration No. KBD 631 W a bus belonging to Double M Transport Company ferrying passengers on Komarock route No. 34. When he reached Outering road, the bus was carjacked by persons who posed as passengers. They robbed the passengers who were in the bus. **PW1** was ordered out of the driver's seat to the back seat at gunpoint.
5. The robbers took control of the bus and robbed **PW1** of cash Kshs.1,300/= and phone Nokia 1110 valued at Kshs.3,000/=. The bus was driven into a slum where it ran into a ditch and got stuck. They were rescued by the police. **PW1** later identified the third and fifth appellants in an identification parade.
6. **PW5** a Manager and Inspector with Double M, Transport Company was in a staff bus registration No. KAM 370J when he spotted bus No. KBD 631 W being driven along Outering road towards Kariobangi in a careless manner. He became suspicious and reported to their office of a suspected carjacking as he followed the bus. The Ruaraka Police officers caught up with the bus at a place where someone was directing the bus driver from the rear of the bus. The police shot in the air and caused the person who was directing the bus run into the darkness.
7. When put on their defence each of the five appellants denied the offences and gave an account of the day they were arrested. Each denied knowing anything about the robberies.
8. Upon conviction and sentence the five appellants filed separate appeals which were consolidated during the hearing. In their grounds of appeal all five appellants complained that vital witnesses were not called to testify, and that their defences were not considered. In addition they stated that identification was doubtful either because there was only a single identifying witness as in the case of the 5th appellant, or no description accompanied the first report as in the case of the first and fourth appellants, or that parade rules were flouted as in the case of the first and third appellants or that there was no parade evidence at all as in the case of the second and fourth appellants.
9. Mr. Dawoud Hamoud Farrah, learned counsel for the first appellant filed written submissions in which he urged that there was no evidence to connect the first appellant to the two robberies. That identification was not positive, that the possibility of his being an innocent visitor was not explored, that none of the stolen property was recovered from him, and that his defence was not given due consideration.
10. Learned counsel Mr. Achach filed written submissions on behalf of the second, third, fourth and fifth appellants and sought determination on the following:

Second Appellant: Whether the contradictions in the trial court's judgments were fatal, and whether there was sufficient evidence to warrant his conviction.

Third Appellant: Whether the identification parade was properly conducted in his regard and whether there was sufficient evidence to warrant his conviction for the offence of robbery with violence.

Fourth Appellant: Whether there was positive identification, whether the identification parade was properly conducted and whether there was sufficient evidence to warrant his conviction for the offence of robbery with violence.

Fifth Appellant: Whether there was positive identification and whether there was sufficient evidence to warrant his conviction for the offence of robbery with violence.
11. The State opposed the appeal through learned counsel M/s. Ndombi. **On the question of identification**, Miss Ndombi submitted that the **first appellant** was positively identified by **PW3**, as having participated in the robbery that occurred on 16th October 2009, involving a Double M bus KAZ 202G and was the person who issued commands. Further that the **third appellant** took

- control of the motor vehicle with respect to the robbery that occurred on 4th November 2009.
12. That **PW3** testified that he was able to identify the **first, second and third** appellants through the light in the vehicle, while **PW4** identified the **third appellant** by appearance as he boarded the subject motor vehicle on 16th October 2009. That **PW3** who was in the bus registration No. KAZ 202 G informed the court that the lighting was good and enabled him to see the second appellant remove a gun and frisk passengers.
 13. **On whether or not the fourth appellant was positively identified**, Miss Ndombi submitted that there was enough light according to **PW1** who saw the appellant leave the vehicle. That the appellant was arrested a day after the incident by the police after a tip off and was identified by prosecution witnesses, although the money stolen was not recovered.
 14. Miss Ndombi conceded the **fifth appellant's** appeal because he was only identified by **PW5** who was in a vehicle behind the bus that had been carjacked and the circumstances may not have been conducive for positive identification.
 15. Miss Ndombi urged that the contradictions in the judgment were curable under **Section 382** of the **Criminal Procedure Code** and that the inconsistencies referred to by the 2nd appellant may have been a typographical error. She urged the court to refer to the original record from the trial court. She argued that there was sufficient evidence to warrant the second appellant being convicted because the circumstances leading to his identification were conducive.
 16. **On whether or not the identification parade was properly conducted**; Miss Ndombi contended that the **third appellant** was informed of his rights prior to the exercise. That he was placed between position 3 and 5 which the appellant consented to, and that he was identified by **PW1** and **PW2** by his facial appearance. That there was also evidence that he was the one who took **PW1's** phone and cash and then ordered him to move from the driver's seat.
 17. From the record there were two robberies. One robbery occurred on 16th October 2009 and involved bus registration No. KAZ 202G, and the other occurred on 4th November 2009 and involved bus registration No. KBD 631 W. Both buses belonged to the Double M Transport Company.
 18. The third appellant was purportedly identified by **PW1** the bus driver and **PW2** his conductor as the one who took control of the bus KBD 631 W in the first robbery. **PW2** recalled that the third appellant passed him inside the bus and went to the front of the bus. He was also purportedly identified by **PW3** the Double M Supervisor of bus No. KAZ 202 G in the second robbery as the one who failed to give up his seat when **PW2** boarded the bus. He was further purportedly identified by **PW4** the conductor of the bus KAZ 202 G as the one who was last to board the motor vehicle. **PW1** told the court that he looked at the third appellant thinking the carjacking was a joke until he saw the gun in his hand.
 19. The fourth appellant was purportedly identified by **PW1** as the person whom he saw leaving the motor vehicle and also while he stood outside the bus. The **fifth appellant** was purportedly identified by **PW5** as the person who was directing the driver of bus registration No. KBD 631W from the rear at the scene where it got stuck.
 20. We note that the witnesses were ordered to lie down as they were being robbed and in addition the lights in the buses were put out. It is therefore not clear how the witnesses were able to see and identify the assailants in the bus in those circumstances. There is no evidence as to how long the lights remained on before they were extinguished after the attack commenced. **PW2** testified that the lights were already off by the time the robbers were frisking and robbing the passengers and that he was only able to identify the third appellant because of a spotlight the appellant himself held.

21. We find that if the third appellant was holding the spotlight, logically the light was shining away from him and it is not clear how this aided **PW2** to see and identify him. Furthermore, we note that whereas **PW1** said it was the third appellant who robbed him of the phone and cash and also took control of and drove the bus registration No. KBD 361W, **PW2** said it was the same third appellant who was moving in the bus with a spotlight frisking and robbing the passengers.
22. We also observe that the witnesses and their carjackers were strangers to each other and that the offence occurred at night. We considered this together with the evidence of the first report to the police in which none of the witnesses gave any description of the appellants to the police. On its own this ground would not be a fatal omission but in the circumstances of this case it added to the doubt in the identification.
23. The appellants were arrested following a tip off that there was a house inhabited by idlers who harassed the neighbourhood in Kariadudu. Nothing was however, recovered from any of them to connect them to the offence and the officers who arranged the identification parades could not remember the appellants in respect of whom they arranged those parades.
24. **PW6** who escorted the fifth appellant from Muthaiga Police Station and had him charged with the others, said he only did so on the orders of his superior and did not know the connection between the appellant and the offences herein.
25. **PW5** who gave the only evidence to connect the fifth appellant to the case could only tell the court that the fifth appellant resembled the man he saw directing the carjacked bus registration No. KBD 631 W, at Kariobangi on 4th November 2009. Although this witness purported to see and identify the fifth appellant we note that the time was 11 p.m. and the witness was in another bus behind the carjacked bus.
26. **PW3** who was the witness in the robbery concerning KAZ 202G also purported to identify the first appellant as the one who was issuing commands to the rest of the gang, the second appellant as the one who was frisking and robbing passengers, and the third appellant as the one who refused to give up his seat for the inspector. All these, he was able to see by the light emanating from a torch said to be in the hand of the fourth appellant.
27. After subjecting the evidence to fresh scrutiny as is our mandate as the court of first appeal, it is our considered view the circumstances of identification were not conducive for positive identification. We find that the possibility of error exists and the benefit of doubt arising therefrom should have been accorded the appellants.

Reasons wherefore the appeals succeed. Each appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **15th day of July 2014.**

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A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE