REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 395 CONSOLIDATED WITH NO.396 OF 2010

REPUBLIC……...……....……....……..……...RESPONDENT

VERSUS

PAUL NDUNGU KARIUKI…….…....…….……1ST APPELLANT

SIMON NDUNG'U WAINAINA…..….....……..2ND APPELLANT

[Being an appeal from the original conviction and sentence by Hon. G.C Mutembei C.M. dated 13th July 2010 in Nairobi CMCCR Case No. 522 of 2007]

JUDGMENT

1. **Simon Ndung'u Wainaina** (2nd appellant) and Paul **Ndungu Kariuki** (1st appellant) were 1st and 2nd accused respectively in Nairobi Chief Magistrate's Court Criminal Case No. 522 of 2007. Their 3rd co-accused was **Patrick John Mwangi**. The prosecution case before trial court was that the appellants laid ambush to unsuspecting motorists whom they violently robbed, attempted to rob and mercilessly killed or maimed. Among those left dead were one Felista Njeri Kuria, one Lawrence Regeru Wambaa, and one Prof. Job Bwayo. Those left maimed were one Elizabeth Bwayo and Carol Briggs while the rest of the victims suffered other forms of violence and trauma. The appellants were said to have made away with a motor vehicle, money, mobile telephones and other personal effects of the victims. The incidences took place along Isinya-Kiserian road in Kajiado District within the Rift Valley Province.
2. Specifically, the appellants were all jointly charged with:-

i. 3 counts of attempted robbery with violence contrary to section 297 (2) of the Penal Code,
ii. 8 counts of robbery with violence contrary to section 296 (2) of the Penal Code,
iii. 1 alternative charge to count 7 of handling stolen property contrary to section 322 of the Penal Code and in addition, the 2nd appellant faced 1 count of attempted escape from lawful custody contrary to section 123 as read with section 389 of the Penal Code bringing the total counts to12.

3. **On attempted robbery with violence**, the particulars of counts 1, 3 and 6 are that on several dates as captured in the charge sheet, jointly with others not before court while armed with dangerous weapons namely AK 47 rifles respectively attempted to rob:

i. In Count 1 Isaak Leshao of a motor vehicle registration number KAM 827Q Toyota Surf valued at Kshs. 900,000,
ii. In Count 3 Pius Waithaka Regeru of a motor vehicle registration number KAN 714K Mitsubishi Pajero valued at Kshs.1.7 million; and, finally
iii. In Count 6 Felista Njeri Kuria of personal effects of unknown value after which they shot and killed

her. At the time or immediately after the time of such attempted robberies, they threatened to use actual violence against the said Isaak Leshao and Pius Waithaka, while they shot to death the said Felista Njeri Kuria.

4. On robbery with violence the particulars of counts 2, 4,5,7,8,9,10 and 11 are that on several dates as captured in the charge sheet, jointly with others not before court while armed with dangerous weapons namely AK 47 rifles, the 1st and 2nd appellants threatened to use actual violence and robbed the following before killing their victims in counts 2 and 8 respectively:-

i. In Count 4 they robbed Simon Njogo Nganga of cash of Kshs.3,000 and 110 dollars respectively;
ii. In Count 2 they robbed Lawrence Regeru Wambaa, of an unknown amount of money, personal effects and shot him to death;
iii. In Count 5 they robbed John Kuria Kimani of Kshs.6000;
iv. In Count 7 they robbed Sophia Kanuthu Njogo of one mobile phone make Samsung model X460 S/NO 357305/00/029027/2 valued at Kshs.11,000;
v. In Count 8 they robbed Job Bwayo of an unknown amount of money and personal effects before shooting him to death;
vi. In Count 9 they robbed Elizabeth Bwayo of motor vehicle registration number KAP 679K Mitsubishi Pajero and an unknown amount of money and wounded her;
vii. In Count 10 they robbed Elizabeth Rugara of personal effects of an unknown value;
viii. In Count 11 they robbed Carol Briggs of personal effects of an unknown value;

5. On the alternative charge in Count 7 the 1st appellant Paul Ndungu Kariuki was charged with handling stolen property. The particulars were that on the 10th February 2007 at Ruthimitu area in Kiambu District Central Province, he stole and dishonestly retained one mobilephone model X460 S/NO.357305/00/029027/2.
6. On attempted escape from lawful custody, the 2nd appellant Simon Ndungu Wainaina was charged in Count 12 with attempted escape from lawful custody contrary to section 123 as read with section 389 of the Penal Code. The particulars were that on the 19th day of March 2007, at Ongata Rongai Police Station in Kajiado district within the Rift Valley Province, while being in lawful custody at the said station after arrest for the offence of robbery with violence, attempted to escape from such lawful custody.
7. At the conclusion of the trial, both appellants were convicted on all the first eleven counts and sentenced to suffer death. The 1st accused was convicted in count 12 of attempted escape from lawful custody. The sentence was however stayed in view of his conviction on count 1 – 11. The 3rd accused Patrick John Mwangi was acquitted on all counts (Counts 1-11) for lack of evidence.
8. Aggrieved by their conviction and sentence both appellants appealed to this court by filing their respective memorandum and petitions of appeal on 20th July 2010. The two appeals 395/2010 and 396/2010 were consolidated at the hearing on 22nd October, 2010 with Paul Ndungu Kariuki and Simon Ndungu Wainaina as 1st and 2nd appellants respectively.
9. In their petitions of appeal they have set out numerous grounds which we have summarized to 5 as follows:-

a. The trial magistrate erred in law and in fact in convicting and sentencing the Appellants on the basis of weak identification evidence and an improperly conducted identification parade.
b. That, the learned trial magistrate erred in law and in fact in convicting the Appellant in total contravention of Section 77(1), 2(b)(c)(d) and (f) of the repealed constitution and sections 200 and 211 of the C.P.C
c. That the trial magistrate erred in both law and fact by failing to resolve material contradictions in the prosecution's case
d. That the evidence leading to the appellants' conviction was not adequately proven in court.
e. That the trial magistrate erred in law and in fact in failing to take into account or consider or even give reason why he disregarded the Appellant's defense.

10. At the hearing of the appeal, Mr. Muriuki learned counsel for the appellants took issue with the recovery of the firearm produced as an exhibit in the trial court. He urgued that according to

PW16's testimony, the firearm was recovered on 24th September 2007 long after the accused had been charged in court. He admitted that there was evidence of cartridges having been recovered that it was not known who collected them. He questioned the chain of custody of the weapons alleged to have been used by the appellants. Counsel also took issue with the testimony of PW17 to the effect that the accused made a confession that contravened sections 21 and 26 of the Evidence Act. Finally, he took issue with the identification of the appellants arguing that the identification parade was compromised. He concluded his submissions by arguing that the evidence before the court was not sufficient to sustain counts 1,2,4,6 & 7.

11. The appeal was opposed by Mr. Kadebe the learned counsel for the respondent. In his submissions, he fully associated himself with the lower court's finding of guilt stating that the evidence on record was sufficient to sustain a conviction.

12. Our duty as a first appellate court is to reconsider the record and re-evaluate the evidence to arrive at our independent conclusions and decision in the matter. Our duty as we understand it, is not just to see whether the conclusions of the trial court can be supported but rather to subject the evidence as a whole to a fresh and exhaustive evaluation. This duty was succinctly set out by the court of appeal in the case of **Pandya Vs. R. [1957] E.A. 336**. See also **Okeno Vs. Republic [1972] E.A. 321** and **Mwangi Vs. Republic (2004) 2KLR 28.**

13. From the grounds of appeal and submissions tendered before us, we consider the following issues as critical for our determination in this appeal:-

(i). Whether there was any violation of the accused's right to fair trial which if found would be so material as to vitiate the trial;

(ii). Whether the appellants were properly identified;

(iii) Whether or not there was proper chain of custody of the arms and ammunition recovered; and,

(iv) whether the evidence taken as a whole was sufficient to sustain a conviction on the respective counts.

We now proceed to consider each issue in the paragraphs that follow.

(i) Whether there was any violation of the accused's right to fair trial which if found would be so material as to vitiate the trial.

14. The appellants argue that they were denied their rights to a fair trial. They state as a ground of appeal that the trial court contravened Section 77 (1) 2(b), (c), (d) & (f) of the repealed Constitution and sections 200 & 211 of the Criminal Procedure Code. The 2nd appellant's complaint is that he sought time to call his defence witnesses as well as recall the 17 prosecution witnesses. However, the court declined his application for reasons that he had not demonstrated at all why his 17 witnesses were not in court and that no effort had been made by the appellant to secure them. The court viewed the application as a smoke screen intended to further delay the hearing and therefore declined it.

15. The record shows that on the 1st December 2009 the 1st appellant committed contempt in open court when he decided to scream effectively making the hearing of his case difficult. He even went ahead and declined to proceed. Consequently, the court ordered that he be placed in custody to allow the matter proceed in his absence. Having looked at the record, we find that the action to proceed in the absence of the accused was within the law and was indeed necessitated by the conduct of the accused. We note from the record that the matter had taken long to conclude and the trial magistrate who had since been transferred was recalled to hear and dispose of it. The argument that the appellant's rights to fair trial were violated therefore fails.

16. Further on the alleged denial of a fair trial, the appellants complain that the prosecution did not call all relevant witnesses. They cite that Isaac Leshao who was a complainant in Count I was not called to testify. This is not correct. In our view, this complaint arises out of a mismatch of names.

According to the records (Page 54 of typed proceedings) one Isaac Gichana testified as PW6 and in his testimony narrated how he was attacked and almost robbed of his motor vehicle KAM 827Q which he was driving at the time of the attempted robbery. The same vehicle was the subject matter of Count I in which the victim is referred to as Isaac Leshao. We are of the opinion that Isaac Leshao and Isaac Gichana refer to one and the same person and that he took part in the identification parade and identified the 2nd appellant.

17. We must observe however that there is no obligation on the part of the prosecution to call a particular witness to prove its case. Section 143 of the Evidence Act, (Chapter 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact. In Julius Kalewa Mutunga -vs- Republic, Criminal Appeal No. 31 of 2005 (Unreported), the Court held that:

"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive"

(ii) Whether the appellants were properly identified

18. On identification, it was the 1st appellants' contention that the trial magistrate erred in law and in fact in convicting and sentencing him on weak evidence of identification and that the identification parade was poorly conducted. He submitted that PW1, PW6 and PW3 took part in the identification parade. He argued that PW6 confirmed that he was indeed shown photographs before the Identification Parade and that PW2 confirmed being shown photographs thereby compromising the conduct of the Identification parade.

19. We have examined the record and observe that PW2 was able to identify the 1st appellant by his features that is "Fair complexion with red eyes." He testified of 3 identification parades that had been conducted in which he was able to identify the 1st and 2nd appellants. He identified them as the same ones who attacked them on the fateful day brutally killing his father by shooting him on the head.

20. Further we do note that whereas the 2nd appellant did not ask him a question during cross examination instead deferring his questions to another unspecified date, the 1st appellant in similar fashion limited his cross examination questions to the 3rd co-accused instead, wanting to establish whether PW2 had indeed identified the 3rd co-accused at the identification parade. It is clear from this that their focus was not on the substance of PW2's evidence in chief rather the identification of their 3rd co-accused who would later be acquitted for insufficient evidence.

21. PW3 identified the 2nd appellant as the one who shot and killed his wife. He had indicated that he would be able to identify the appellants if he saw them. He described the person who killed her as short and chocolate complexioned. He also gave a description of the 1st appellant to the police as one who had one short leg to the other. He however did not take part in the identification parade. Since the fatal robbery took place during the day, he was able to identify him. The investigating officer testified that the witness was too traumatised to attend the identification parade.

22. PW6 on the other hand was indeed shown a couple of photographs for wanted persons by the police prior to taking part in the identification parade as recorded. He had indicated that he could remember their identities if he saw them. In his evidence in chief, he stated that he was able to identify the 1st appellant as the one who chased him from behind. He however did not give any physical description. He identified both appellants at the parade even though he had indicated in his statement that he could only identify one person. On being shown the photos he was able to identify both appellants.

23. Chapter 45 paragraph 6 of the Kenya Police Standing Orders sets out the Identification Parade Rules. Standing Order No. 6 (vii) and (viii) provide as follows:-

(vii) If it is necessary to endeavor to establish identity by means of photographs, the witness will be shown

(viii) At least eight photographs of different persons of the same race as the accused /suspected person.

Care should be taken to ensure that the photographs are of the same size and type, thereby excluding any possibility of the accused/suspected person's photograph being of a distinct type.

However, it is important to note and observe here that the procedure above does not negate the need for an identification parade, and the same is still necessary as provided in Rule (IX) therein. In the instant case, and given the above provisions, it was not fatal to have

shown the witnesses the photographs. We do not find the use of photographs in this case fatal to identification of appellants and the prosecution case.

24. PW11 Force No.218928 Inspector Peter Kimani was the officer commanding Ongata Rongai Police Station. He is the one who conducted the three identification parades for the three suspects on 21st March 2007. The first parade was for Paul Ndungu Kariuki (1st appellant). He was placed against eight persons of similar height and built. The identifying witness was one Isaac Gacheru who positively identified him by touching him. On being asked if he had any comment on how the parade was conducted, he had none and on being notified of his right to have a representative at the parade, he declined to assert or even exercise the right. Instead, he elected to remain in the same position and was again positively identified by Pius Regeru Waithaka who testified as PW1 who touched him. All this while he did not object to the manner the parade was conducted.
25. PW11 conducted another parade in respect of Simon Ndungu Wainaina (1st appellant) following the same procedure and called in Isaac Leshao who positively identified the suspect. He then called the 2nd witness Pius Regeru Wambua who also positively identified the 1st appellant by touching him. It is instructive to note that after the identification parades were conducted, the suspects were asked to sign the parade forms which they duly did. The parade forms were produced in evidence as P-Exhibit No.13, 14 and 15 respectively.
26. After a careful analysis of the evidence on record we are satisfied that PW11 acted with fairness and lawfully in the parade arrangement and that the identification parade was properly conducted in keeping with the identification parade rules. We dismiss the appellants' complaints in this respect as lacking in substance.

(iii) Whether or not there was proper chain of custody of the arms and ammunition and, other items allegedly recovered from the appellants.

27. Counsel for the appellants submitted that although PW 16 testified that they recovered the fire arm on 24th September 2007 after the accused persons were charged in court, the only evidence available was that of some catridges which were collected at the scene of the crime, and further, that the identity of who collected them was not known. He pointed out that PW12 the ballistic expert had confirmed that he had collected the cartridges from Ngong. Counsel also submitted that no chain of custody was established which made the alleged recovery of firearms and ammunition suspect.
28. The learned State Counsel Mr. Kadebe submitted that the fire arm was recovered 6 months after the charges were preferred. This he argued was not fatal. It was his position that a recovered weapon need not be produced concurrently with the arraignment of the accused persons and further that the weapon may not even be produced at all if not found. On the argument that the recovered spent cartridges were the only cogent link, Mr. Kadebe urged on the contrary, that the totality of the evidence adduced clearly indicated that the appellants were rightly convicted.
29. A clear examination of the record however at page 96 line 10 indicates that a proper chain of custody was established. PW12 a forensic ballistic expert whose professional duty was to inter alia examine exhibits firearms and ammunitions, testified that he examined exhibit firearms and ammunitions presented to him by one P.C Boniface Musembi from CID Ngong, contrary to the appellants' submission that the record did not show who had collected the cartridges. The findings by PW12 revealed that all the ammunition had been fired from the same gun.
30. On this issue of firearm and ammunition we have carefully examined the testimony of PW16. PW16 stated that he was on patrol duty on 24th September 2007 at 11.00pm when he received information that two suspect people walking along the Railway were carrying a gun in a Polythene paper. He laid an ambush together with his colleagues P.O Kabiru and P.O Athenya on the

suspects who resisted arrest and even fired at them with bullets using one gun. They responded by shooting back and gunning down one of them in the process. They pursued the second one who attempted to escape and arrested him.

31. Upon searching him they recovered one gun AK 47 and three ammunitions which he identified in court as serial No.56-128117201. It was loaded with two (2) ammunitions and the same was produced as P-Exhibit No.24. They also recovered two spent cartridges identified and produced as Exhibit No.26 measuring 7.62mm special.
32. It was the further testimony of PW16 that he prepared an exhibit memo form and forwarded it together with the three live ammunitions, two spent cartridges one Magazine and the AK 47 gun to the firearms examiner who prepared the report dated 28th September 2009 and marked as P-Exhibit No.16. This report by the ballistic expert, found that the firearm had been used in several other robberies including one reported at the CID Kabete, Ngong and Kikuyu.
33. PW17 lent further credence to the recoveries when he pointed out that he had collected 4 cartridges from the scene of crime P-exhibit 7(a) which he forwarded to the firearms expert for examination. He had even prepared a memo for them and retained a duplicate copy marked as P-exhibit No 27 which he forwarded to the fire arms expert for examination. He pointed out that they maintained a data base stored in their ballistics office where exhibits of this nature were examined and stored for future reference and cross- referencing purposes. He testified that the cartridges recovered in the robbery incidents compared to the exhibits (in this case A1-A4) revealing sufficient matching according to the examiner as to form an opinion that exhibit A1-A4 was fired in firearm serial No. 28117201.
34. The testimony of PW16 and PW17 provided strong corroboration in that it is from this cross referencing and the report of the ballistic expert that the accused persons and the firearm were found to be linked to the three other robberies stated earlier namely Kabete CID Criminal register No 163/26/2007, CID Kikuyu Inquest No. 7/2007 and CID Kikuyu register number 214/136/2007. PW17 further added at page 143 paragraphs 15 and 16 of the typed proceedings that it was in one of these 3 mentioned cases that the 1st and 2nd accused had been convicted and sentenced to hang in different proceedings.
35. To sum up this ground, it is clear that the expert evidence tendered by PW12 was in no way challenged or dislodged by the defence. We are satisfied that this expert evidence provides the crucial link between the events as narrated by the victims and the two appellants. It is the evidence that clearly links the two appellants to the robberies and fills the gaps, if any in the identification of the two. The ammunition recovered at the scene of the robbery was clearly linked to the firearm which was recovered later and produced as Exhibit No. 24.
36. Regarding the mobile phone recovered from the 1st appellant by PW17, make Samsung X 460 serial No. 357305/00/029027/2 (referred MFI 6), from the records, it was discovered that it was the one reported to have been stolen from Sofia Njogo who was the complainant in Count 7 and who testified as PW4. The court record shows the elaborate effort PW17 went through in establishing a link by tracking its origin as far as the records of the shop owner who sold it to PW4 and who testified in this case. It was marked as P exhibit No.9 and the shop in reference was called Wa Wa Shuka Communications. We do note at page 149 paragraphs 18-20, that the 1st and 2nd accused persons were not in court to cross examine him ostensibly due to the fact that they had been barred after they earlier on shouted and disrupted the court proceedings and had to be taken to the cells to enable the hearing proceed uninterupted.

(iv) whether the evidence taken as a whole was sufficient to sustain a conviction on the respective counts.

37. From our independent analysis of the evidence, we have come to the conclusion that the evidence taken as a whole was sufficient to convict the appellants on each count. In count I, the 1st appellant was positively identified at the parade by one Mr. Isaac Leshao who was the victim in Count I and who testified as PW6 as Isaac Gichana. He was also able to identify the 2nd appellant on being shown the photographs.
38. In count II, the appellant's counsel urged that there was no evidence to support the particulars of the count. The trial magistrate found that though the witness did not see the actual shooting of his father there were inculpatory facts that were incompatible with the innocence of the appellants and

incapable of explanation upon any other hypothesis than that of guilt.

39. We have looked at the record and it shows that on the fateful day of 4th February 2007, PWI Pius Waithaka testified that he was able to identify the appellants since it was 5.30pm. He was able to identify the two appellants properly. He came face to face with the accused persons and was able to see them well. On 21st March 2007 he was called to attend an identification parade at Ongata Rongai Police station and was able to identify the two accused persons namely Simon Ndungu Wainaina and Paul Ndungu Kariuki. It only took him 3 minutes to identify them.
40. In counts IV and VI, we note that PW2 in count VI recorded his statement saying that he was shown ten photographs of suspects to identify and was able to positively identify the 1st and 2nd accused persons in photograph No. 3 and 9. We have extensively dealt with this issue earlier in this judgment.
41. In count VII, the mobile phone make Samsung X 460 serial No.357305/00/029027/2 was notably recovered from the 1st appellant by PW7. The phone had been stolen from Sophia Kanuthu Njogo who is the complainant in Count VII and testified as PW4. The possession of the phone directly links the appellants to the robbery. Similarly the recovery of motor vehicle Registration No.KAP 679K twenty five kilometres away from the scene and identified as belonging to the complainant goes to prove Count IX.
42. As earlier stated above, the recovery of the AK 47 rifle and ammunition and the forensic analysis of the same clearly linked the appellants to the violent robberies and the deaths of the three victims Felista Njeri Kuria (Count VI), Lawrence Regeru Wambaa (Count II) and Job Bwayo (Count VIII).
43. Finally, we deal with the issue of confession. The appellants' counsel submitted that the appellants were said to have confessed to the offences as stated by PW17 in his testimony in court. Counsel's contention was that the confession contravened Section 26 and 29 of the Evidence Act. The section states:

    "A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him"

44. From our independent analysis of the evidence before court, and the judgment of the trial court, we find nothing to suggest that PW17 produced the statement of confession nor that the court relied on such a confession in convicting the appellants. Further, even if there was such a confession and the same was struck out in toto, it would still not shake the prosecution's case against the appellants. The weight of other evidence against the appellants as analysed above would still be overwhelming. We find that this complaint lacks in substance.
45. Having carefully examined and analyzed the evidence before the trial court, we are of the firm opinion that the multiple violent robberies and attempted robberies were indeed committed, that there was sufficient evidence to link the two appellants to the said robberies and that the two were not only armed but ruthlessly executed in their mission. We find that the prosecution case was proved beyond reasonable doubt.
46. In the premises, and for the foregoing reasons, we uphold the conviction and sentence. Both appeals are dismissed.

Judgment dated and delivered at Nairobi this **3rd day** of **July,** 2014.

…….. **……..**

R. LAGAT-KORIR **D.K. NJAGE MARETE**

JUDGE **JUDGE**

In the presence of:

……..: Court clerk

……..: 1st Appellant

……..: 2nd Appellant

……..: For the 1st appellant

……..: For the 2nd appellant

……..: For the State/respondent