



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 139 & 140 of 2011

KEVIN MAINA NJERI ..... 1<sup>ST</sup> APPELLANT

PETER GITHUKA CHEGE ..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from the judgment of Hon. V.W. Wandera, SPM,*

*dated 12<sup>th</sup> July, 2011 in Kisii Criminal case No.1148 of 2010*

### JUDGMENT

#### Introduction

1. The two appellants herein, Peter Githuka Chege and Kevin Maina Njeri were the 1<sup>st</sup> and 2<sup>nd</sup> accused respectively in Kisii PMCC Criminal Case Number 1148 of 2010. They were charged with 2 counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. They were jointly charged with others not before the court.

2. The particulars on Count I are that the two appellants being armed with dangerous weapons namely, pangas and rungus robbed FRANCIS MOGIRA OTUKI assorted text books, 60 pairs of games kits, 3 volley ball balls, 1 volley ball net, 10 pairs of socks, 6 pairs of boots (puma) and 1 whistle all valued at Kshs.110,000/= and immediately before the time of such robbery used actual violence to the said FRANCIS

**HCCRA (KISII) NOS. 139 AND 140 OF 2011**

**(CONSOLIDATED)**

**NO.725**

MOGIRA OTUKI at St. Catherine Iranda Secondary School, Kisii Central District within Nyanza Province on the night of 3<sup>rd</sup> and 4<sup>th</sup> June 2010.

3. On Count II the particulars are that the two appellants jointly with others not before court and being armed with dangerous weapons namely pangas and runkus robbed JOSEPH MOGIRE OGETO assorted text books, 6 dozens of writing pens, 15 pieces of spoons, 1 whistle and cash Kshs.54655/= all valued at Kshs.184,631/= and immediately before the time of such robbery used actual violence to the said JOSEPH MOGIRE OGETO at Iranda D.O.K. Primary School in Kisii Central District within Nyanza Province on the night of 3<sup>rd</sup> and 4<sup>th</sup> June 2010.

4. In the alternative, the two appellants were charged with the offence of handling stolen goods contrary to **section 332 (2)** of the **Penal Code** namely that otherwise than in the course of stealing they dishonestly retained 248 pieces of assorted text books, five dozens of writing pens, 15 pieces of spoons, 2 whistles and 28 pieces of games kits knowing or having reason to believe them to be stolen at Kisii township within Kisii Central District in Nyanza Province on 4<sup>th</sup> June 2010.

**HCCRA (KISII) NOS. 139 AND 140 OF 2011**

**(CONSOLIDATED)**

**NO.725**

The Facts and the Evidence

5. We restate the facts of the case in summary as follows:-

On 3<sup>rd</sup> June 2010 PW5 FRANCIS MOGIRE OTUKI a watchman at St. Catherine Iranda Secondary School, reported on duty at the said school at 6.00 p.m. and took over from the day watchman CHARLES NYAMBARIGA. While on night duty at about 1.30 a.m. he saw torch lights flashing from behind him. More than fifteen people were standing on a line in front of him flashing two torches. He was confronted by the 15 persons, two of whom grabbed him and placed him on the ground and tied him with a rope. They demanded for his phone but he told them he did not have one. The two persons who tied him spoke in Kiswahili and Kikuyu. They demanded to be given his whistle, the keys to the Principal's office and money from him. These he told them that he did not have. So the two robbed him of his whistle, torch and keys to his house. He was carried to a classroom some 25 metres away from the Principal's office

where they placed him on the floor and used a piece of cloth to cover his mouth. Whilst inside the classroom PW5 (Francis) heard them break into the Principal's Office and the store which was about ten meters away from the classroom.

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

6. After the suspects completed the task of breaking into the Principal's Office and the store, 4 of them went to the classroom where Francis had been left and untied his legs. He was then taken to Iranda Primary School about one and a half kilometers from St. Catherine Iranda secondary School and on reaching there, he was taken to an office that was under construction where JOSEPH MOGIRE OGETO (PW6) the watchman for Iranda Primary School was. PW6's hands and feet were tied and both PW5 and PW6 were left together in the office under construction.

7. The 4 suspects left a torch on the table in the said building flashing at Francis and PW6 who remained in the building under construction until 6.00 a.m. when JOSEPH ORWARU NYAGOKA (PW8) went to Iranda Primary School to collect his vehicle which he normally parks at the school parking. PW8 alerted members of the public when he found Francis and PW6 tied up in the office that was under construction. PW8 alerted members of the public by ringing the school bell and the members of the public responded to PW8's distress call.

8. PW6 JOSEPH MOGIRE OGETO (Joseph) testified that he reported on

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

duty as a night watchman at Iranda Primary School on 3<sup>rd</sup> June 2010 at 6.30 p.m. and took over from the day watchman MR. CHRISTOPHER OIRA OMAYO. While on night duty between 1.00 a.m. and 2.00 a.m. many people approached him from behind, grabbed him and covered his head using the overcoat he was wearing and started beating him. He was then ordered to lie down. He obliged by lying down. His hands, legs and back were then tied by the attackers who were armed with pangas and knives. They also covered his mouth with a piece of cloth.

9. It was Joseph's further evidence that after half an hour the suspects took Francis to where he was lying. Joseph then heard the attackers break into the offices of the headmaster and deputy headmaster. He

told the court that the suspects robbed him of his torch, whistle, walking stick and a spear.

10. Joseph also stated that the attackers remained in the School compound for about three hours. He said the suspects placed a lit torch on the wall with the torch light flashing at him and Francis. At about 6.00 a.m. he and Francis were untied by members of the public who went to the school to answer the pupils' screams.

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

11. In the morning of 4<sup>th</sup> June 2010 INNOCENT BICHAGE SIRO, PW2, the deputy principal of St. Catherine Secondary, ISHMAEL OITUMBE, PW1, the Deputy Principal of St. Catherine Iranda Secondary School and the Headmaster of Iranda Primary School MR. MARK MAGARA ROSANA PW3 were informed of the robbery. PW1, PW2 and PW3 rushed to their respective schools where they confirmed that their offices, stores and class rooms had been broken into and school property enumerated in the charge sheet stolen from therein. The two head teachers, PW2 and PW3 reported the robbery to the police after they visited their schools early in the morning of 4<sup>th</sup> June 2010. The report was made to Number 64048 Police Constable John Kinyua Kamoche who testified as PW4.

12. On 4<sup>th</sup> June 2010 at about 5.00 a.m. JOEL MUTIRO OGENDI, PW7 (Joel), was travelling aboard motor vehicle Reg. No. KBL 092 K as a passenger from Chabera to Kisii. On reaching Nyamataro, the two appellants and another not before court stopped the matatu at the junction leading to Kamanda primary school and boarded the same while in possession of luggage contained in three manila sacks. It was Joel's evidence that EVANS ONTIRI, PW10, (Evans) the matatu

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

conductor on seeing the 2 appellants commented in Ekegusii that the two appellants and another not before the court looked suspicious as the shoes and clothes they were wearing were full of mud. On hearing this, the suspect not before court escaped from the matatu through the window. The appellants herein also attempted to escape from the matatu but Joel used a rope to tie their hands. Joel further testified that he telephoned police constable John Kinyua Kamoche, and reported the matter to him. The two appellants were later handed over to PW4 at the Kisii Municipal stage who handcuffed them and bundled them into a police vehicle which escorted them to the Kisii police station. PW4 was also the investigating officer in this case.

13. Joel accompanied Evans and the driver of the matatu to the Kisii Police station where they delivered the luggage belonging to the appellants. PW4 opened the said manila sacks and found text books, school games kits, pens and spoons. Joel stated that the text books found in the manila sacks bore the rubber stamp of Iranda Primary School. Joel, Evans and the matatu driver thereafter recorded their statements with the police before they left.

14. DENNIS OMURWA, PW9, a clinical Officer from Kisii Level 5

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

testified that on 21<sup>st</sup> June 2010 he examined Francis and Joseph and filled in their P3 forms. He assessed the degree of injury sustained by the two as harm. He produced the P3 forms in evidence marked as **Exhibits 17** and **18** respectively.

15. PW4 testified that on 4<sup>th</sup> June 2010 between 4.00 a.m. and 5.00 a.m. his colleague Corporal Wabomba received a telephone report that robbers had broken into Iranda Primary School and St. Catherine Iranda Secondary school. He stated further that while they were preparing to visit the scene another call came through, informing them that some suspects travelling aboard a Nissan matatu registration number KBL 092 K heading to Kisii Municipal main bus stage from Nyakoe had been found in possession of three manila sacks and a travelling bag containing some suspect luggage.

16. Later, PW4 rearrested the two appellants and took them to Kisii police station. At the CID offices together with colleagues PW4 unpacked what was contained in the manila sacks. The contents in the manila sacks were 242 assorted text books bearing the stamp of St. Catherine Iranda Secondary School, one text book bearing the name Sospeter A. Ogoka, while another bore the name of Lilian Murekas

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

Morah and yet another bore the name of Elizabeth Kemunto. All these books were produced as evidence in court and they were marked as **P. Exhibit 1**.

17. PW4 further testified that the luggage contained in the black travelling bag comprised fifteen games t-

shirts, ten sports shorts, three pairs of red and white stripes sports socks, fifteen table spoons five dozens of ball pens and two whistles. These he produced as **Exhibits 2, 3, 4, 9, 10, 15, 16 (a) and 16 (b)** respectively. PW4 also produced the three manila sacks, the two sisal and manila ropes used to tie the manila sacks in evidence as **Exhibits 7 and 19** respectively. It was PW4's evidence that they prepared an inventory of the items they recovered from the 3 sacks in the presence of the appellants and the public who included Bernard Momanyi Jackson Okeyo and Joel Mutiro Ogendi. The inventory was signed by his colleagues and thumb printed by the appellants. It was produced in evidence as **Exhibit 13**.

18. PW4 further testified that PW2, PW3, Francis and Joseph went to the CID Office on 4<sup>th</sup> June 2010 and positively identified the text books, games kits, ball pens, table spoons, and whistles as property stolen from their institutions. PW2 handed over to PW4 two school

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

attendance registers for form 1 and form 2 bearing the names of his students Sospeter Ogwoka and Lydia Zadoki which he also produced in evidence as **Exhibits 6 (a) and 6 (b)**.

19. PW4 testified that he visited the schools and confirmed that indeed the offices of PW2 and PW3 were broken into; the laboratory and drawers were also broken into. PW4 was informed by PW3 that Kshs.54,655/= had been stolen from his drawer. He also produced the list of items stolen from St. Catherine Secondary School and Iranda Primary School as **Exhibits 5 and 8** respectively. PW4 stated that he issued P3 forms to Francis and Joseph which they returned to him after they were filled in. Subsequently PW4 charged the two appellants with two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code** and the alternative charge of handling stolen property.

The Appellants' case

20. The 1<sup>st</sup> appellant on his part gave sworn testimony in which he testified that on 3<sup>rd</sup> June 2010 together with 2<sup>nd</sup> appellant had travelled by bus from Nairobi to Kisii to visit his cousin one Peterson Kigo Githua who was sick. They arrived in Kisii town at 6.00 p.m. and boarded a matatu to Nyamataro where his cousin lives. They stayed at

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

their cousin's house during the night of 3<sup>rd</sup> and 4<sup>th</sup> June 2010 without leaving for any other place. On 4<sup>th</sup> June 2010 in the morning he and his co-accused left his cousin's house at 6.00 a.m. and went to the bus stage at Nyamataro Trading Centre where they found members of public and boarded the same matatu to travel to Kisii town with the view of catching a bus back to Nairobi.

21. He told the court that while travelling by matatu two passengers seated on the rear seat started making noise speaking in a language he could not understand. When the matatu reached Kisii town bus stage he and his co-accused alighted from the matatu and started walking towards the bus park so as to board a bus to Nairobi. After walking for a short distance the matatu conductor called them and asked them who they were. When they said they were Kikuyus he asked them whether they had luggage inside the matatu. They told him they did not.

22. Suddenly some people who were standing near the matatu held them and wanted to beat them but the driver and conductor of the matatu they had travelled in prevented the people from doing so and instead handed them over to the police who were passing by in a police motor vehicle. The 1<sup>st</sup> appellant testified that he and his co-accused

### ***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

were not in possession of anything when the police escorted them to the police station but on reaching the police station the police took them to an office where they were searched and thereafter placed in police cells.

23. On 5<sup>th</sup> June 2010 they were removed from the police cells in the morning and escorted to an office where they were beaten and asked if they knew anything about the things which were inside the said office. They denied any knowledge of those things. He further told the court that their finger prints were taken on the 10<sup>th</sup> June 2010 and they were subsequently charged with the offences of which they were tried, found guilty and convicted by the trial court.

24. The 2<sup>nd</sup> appellant also gave sworn testimony which was similar on all fours to the testimony given by the 1<sup>st</sup> appellant. It is therefore not necessary to reproduce the same here.

### **Findings of the trial court**

25. After carefully considering all the evidence that was adduced by the prosecution, and after considering the law, the learned trial magistrate returned a verdict of guilty on the strength of the evidence of recent possession. The appellants were convicted on both counts I and

**(CONSOLIDATED)**

**NO.725**

II and sentenced to suffer death as by law provided. We note that the trial court did not make an order suspending the sentence on Count II pending execution of the death sentence on Count I, for indeed no man dies twice.

The Appellants' case

26. Both appellants were aggrieved by both conviction and sentence. The 1<sup>st</sup> appellant PETER GITHUKA CHEGE has set out the following home-made grounds of appeal:-

- 1) *That the learned trial magistrate erred in law and fact by not considering that the appellant's rights under the new constitution were violated.*
- 2) *That the learned trial magistrate based his findings on wrong principles of law.*
- 3) *That the learned trial magistrate erred in both law and fact in failing to consider that the prosecution case was marred with many contradictions and inconsistencies.*
- 4) *That the learned trial magistrate erred in both law and fact by failing to appreciate the true meaning of the appellant's defence and therefore came to a wrong conclusion in the matter.*

27. The appellant prays that his appeal be allowed, conviction quashed and the sentence of death set aside.

28. The 2<sup>nd</sup> appellant put forth similar grounds of appeal. The 2 appeals were therefore consolidated on 7<sup>th</sup> November 2012 for purposes

**(CONSOLIDATED)**

**NO.725**

of hearing and determination.

29. At the hearing of this appeal, we received written submissions from each of the appellants and also heard submissions from Mr. Majale, counsel appearing for the Respondent. The appellants' submission revolved around the prosecution's evidence of identification which they said was wanting. The appellants also faulted the learned trial court's sentence in that the sentence of death on the second count should have been left in abeyance pending execution of the sentence on the first count. With this second concern of the appellants we agree because the law is that where an accused person is convicted of more than one capital charge, the sensible thing a court can do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. See **Mururi & others -vs- Republic [1976-80] 1 KLR 1581.**

30. Finally, each of the appellants contended that the investigations into the allegations against them were badly done and that the same ought not to have formed a basis for a conviction on such a serious charge as robbery with violence and further that when the appellants were arrested, they were not promptly informed in a language that they

**HCCRA (KISII) NOS. 139 AND 140 OF 2011**

**(CONSOLIDATED)**

**NO.725**

understood of the true ground for their arrest. It was submitted that failure by the police to so inform them was a violation of their rights as enshrined under **Article 49 (1)** of the **Constitution of Kenya 2010**. The 1<sup>st</sup> appellant also contended that his defence of alibi was not displaced by the prosecution and that in the circumstances, he should have been given the benefit of the doubt.

The Respondent's case

31. In response to the appeal, counsel for the Respondent submitted that the charges against the appellants were fully proved. That the evidence by both Francis and Joseph to the effect that they were attacked by a big group of people who were armed with pangas and Somali swords was not shaken by the alibi defences set up by each of the appellants. It was also submitted that the testimonies by Joel and Evans confirmed beyond any reasonable doubt that the 2 appellants in the company of another boarded a matatu Reg. NO. KBL 092 K with 3 manila sacks which were stuffed with books that were identified to belong to St. Catherine Iranda Secondary School and Iranda Primary School the 2 institutions at which Francis and Joseph worked. That Francis and Joseph told the court they were attacked by an unknown

**HCCRA (KISII) NOS. 139 AND 140 OF 2011**

**(CONSOLIDATED)**

**NO.725**

gang of people tied up as the schools offices and stores were broken into and items enumerated in the charge sheet stolen. Counsel also submitted that the appellants' complaints that their constitutional rights were violated were not supported by the record nor did they demonstrate how and in what manner the learned trial magistrate applied the wrong principles in determining their case. Counsel urged us to dismiss the appeal for want of merit.

The duty of this court

32. This appeal is before us as a first appeal. Our duty as the first appellate court is to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. We appreciate that we do not have the opportunity to see and hear the 10 witnesses who gave evidence before the trial court, but we are under a duty to subject the whole of that evidence to a thorough scrutiny before we can determine whether or not to support the findings of the learned trial magistrate. We are also under a duty to consider and carefully weigh the judgment of the trial court with a view to determining whether the findings made by the court were sound in law. See **Pandya –vs- R.[1957] EA 336** and **Okeno –vs- Republic [1972] EA 32**.

**HCCRA (KISII) NOS. 139 AND 140 OF 2011**

**(CONSOLIDATED)**

**NO.725**

Our findings and conclusions

33. We have now carefully reconsidered and evaluated the evidence adduced by the prosecution in this matter. We have also carefully considered and weighed the judgment of the learned trial court. From all the above, it is clear to us that the prosecution case was anchored on the doctrine of recent possession of goods stolen in a robbery. So the question we stop to ask ourselves at this stage is: Did the prosecution prove beyond any reasonable doubt that St. Catherine Iranda Secondary School and Iranda Primary School were broken into and goods stolen therefrom? And secondly, did the prosecution prove beyond any reasonable doubt that the two appellants were the ones who were found in possession of the 3 stolen goods stuffed in manila sacks comprising books and other goods belonging to the 2 institutions?

34. From an analysis of the evidence on record, and especially the evidence by Francis and Joseph we are satisfied that an unidentified gang attacked Francis and Joseph, tied them up and broke into the school offices and stores and carried therefrom an assortment of goods. The attack took place between 1.00 a.m. and 4.30 a.m. on 4<sup>th</sup> June 2010.

**(CONSOLIDATED)**

**NO.725**

35. At about 5.00 a.m. the same morning, the 2 appellants and another who is not before court boarded motor vehicle KBL 092 K while heavily loaded with the 3 manila sacks containing items that were later confirmed by PW1 and PW2 the Deputy Principal, Principal of ST. Catherine Iranda secondary School and PW3, Mark Magara Rosana, head teacher, Iranda Primary School to belong to the said schools.

36. Joel was categorical in his testimony, and we see no reason to doubt him, that the appellants herein, and a third man who escaped from the vehicle boarded the matatu loaded with the manila bags. Joel stated as follows in part of his evidence in chief:-

**“I recall on 4<sup>th</sup> June 2010 at about 5.00 a.m. I was at Nyamataro. I was**

**travelling aboard a motor vehicle KBL 092K as passenger from Chabera to Kisii. When we reached Nyamataro three men stopped the matatu at the junction leading to Kamunda Primary and Secondary school. The matatu driver stopped the motor vehicle. I was seated on the left side on the seat behind the conductor’s seat. The 3 men were on the left side of the road as one faces Kisii direction.**

**After the driver stopped the motor vehicle, the 3 men who had luggage contained in manila sacks boarded motor vehicle KBL 092K. The conductor, the 3 men and I carried the luggage into the matatu. -----The matatu set off after we loaded the luggage into the matatu and after the 3 men boarded the matatu. We placed the luggage contained 3 manila bags on the passenger’s seat immediately behind the driver.**

**Before we reached the junction at Nyamataro, Evans who was seated on the 3<sup>rd</sup> seat behind the driver on the right side said the 3 men were looking suspicious as the shoes and clothes they were wearing were full of mud. He spoke in Ekegusii.**

**Two among the three men sat on the seat on the right of the**

**(CONSOLIDATED)**

**NO.725**

**conductor's seat and the 3<sup>rd</sup> man sat on the rear seat on the right side.**

**After Evans finished saying the 3 men looked suspicious the man who was seated on the rear seat escaped from the matatu through the window ---- when the driver slowed down to join the road leading to Kisii town.**

**We told the driver to stop ---- the matatu conductor and I alighted and went to the rear of the matatu but we did not trace the man who had alighted through the window. The conductor and I returned inside the matatu where we found the 1<sup>st</sup> and 2<sup>nd</sup> accused struggling with the passengers in a bid to escape, ----. I took the sisal rope inside the matatu behind the driver's seat and used it to tie the accused persons' hands. ---- I telephoned a police officer by the name Kinyua at Kisii police station and informed him that we had arrested two suspects and requested for reinforcement.”**

37. Joel stated further that he asked PC Kinyua, PW4, to meet them at Kemera petrol station. That is what PC Kinyua did and at the said petrol station, the 2 appellants together with their luggage were handed over to PC Kinyua.

38. In short therefore we are satisfied that the 2 appellants had the 3 manila sacks when they boarded motor vehicle KBL 092K and that from the point of entry until they were handed over to PC Kinyua, they did not get away from Joel's sight and that of Evans who corroborated the testimony given by Joel.

39. As rightly observed by the trial court, the appellants did not, and have not explained how they came into possession of the items enumerated in the charge sheet so soon after the St. Catherine Iranda

**HCCRA (KISII) NOS. 139 AND 140 OF 2011**

**(CONSOLIDATED)**

**NO.725**

Secondary School and Iranda Primary School were broken into. In our view, the doctrine of recent possession was correctly applied by the trial court in convicting the appellants. We see no reason to depart from the trial court's findings. See Isaac Nanga Kahiga alias Peter Nganga Kahinga –vs-

**Republic Criminal Appeal No.272 of 2005** (unreported). In our view all the ingredients of recent possession namely that the goods were found with the appellants, the goods were positively identified by PW1, PW2 and PW3 and the same had been stolen only some few hours before. We have also carefully considered the appellants' alibi defences but find the same wanting and displaced by the testimonies of Joel, Evans and PW4.

40. In the premises, we find and hold that this appeal lacks merit on both conviction and sentence. We dismiss it altogether except to say that the sentence of death on Count II shall remain in abeyance pending execution of the death sentence in Count I. The appellants have a right of appeal to the Court of Appeal within 14 days from today.

41. It is so ordered.

**Dated and delivered at Kisii this 09<sup>th</sup> day of May, 2013**

**RUTH NEKOYE SITATI**

**E.M. MURIITHI**

**JUDGE.**

**JUDGE.**

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***

***NO.725***

**In the presence of:**

Both present in person for Appellants

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**E.M. MURIITHI**

**JUDGE.**

**JUDGE.**

***HCCRA (KISII) NOS. 139 AND 140 OF 2011***

***(CONSOLIDATED)***