



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 162 OF 2009

DAVID KIARIE MWANGI..... 1ST APPELLANT
PETER NJUGUNA NYORO.....2ND APPELLANT
JAMES KIARIE MUCHOKI.....3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in criminal case Number 3105 of 2007 in the Chief Magistrate's Court at Makadara – Mrs. Usui (SRM) on 15th April 2009)

JUDGMENT

The appellants **DAVID KIARIE MWANGI, PETER NJUGUNA NYORO and JAMES KIARIE MUCHOKI** were convicted for the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code**. Each of them was then sentenced to death, as by law prescribed.

In their appeal, the appellants submitted that the trial court denied them a fair trial.

Secondly, they contended that the identification by the complainant was not positive.

The circumstances prevailing at the time the offence was committed, were described by the appellants as having been unfavourable for positive identification.

The incident may have taken place during day-time, but the appellants argued that the victim of the attack was shocked and scared when he was confronted by 3 armed men.

After the complainant was robbed, there was a lapse of time which allowed the assailants to get away, suggested the appellants. Therefore, when the complainant later came across a lorry which was about 100 metres away from the scene and by the time he explained to the occupants of the lorry about what had happened to him, the appellants believe that the complainant ended up pointing out at the wrong persons.

The 1st and 2nd appellants also submitted that there was inconsistency in the evidence concerning the manner in which they were arrested. As far as they were concerned, it cannot be true that those who arrested them had pursued them whilst on a lorry, whilst one of the witnesses involved in the alleged pursuit said that they had run after the assailants.

Meanwhile, both the 2nd and 3rd appellants submitted that the evidence concerning the mode of the 3rd appellant's arrest, was inadmissible.

The prosecution had led evidence to indicate that the 2nd appellant led the police to the 3rd appellant, from whom the police recovered the phone that had been stolen from the complainant.

As the 2nd appellant had not been cautioned that the evidence which was obtained through his co-operation could be used against him, the appellants submitted that the said evidence was inadmissible.

In any event, the appellants believe that the person who was found in actual possession of the phone, was an essential witness in the case. As he did not testify, so as to inform the court how he got possession of the phone, the appellants asked this court to conclude that had that person testified, he would have given evidence that would have been adverse to the case of the prosecution.

In answer to the appeal, Ms. Maina, learned State Counsel, submitted that the convictions of the 3 appellants were sound.

The Respondent pointed out that the complainant did identify all the appellants positively.

Secondly, the complainant positively identified, as his, the phone which was recovered from the 3rd appellant. The complainant produced the receipt given to him when he purchased the phone; and the serial number on the receipt matched the serial number on the phone.

Being the first appellate court, we have re-evaluated all the evidence on record, and have drawn our own conclusions.

We note that the robbery incident took place at about 9.00 a.m. It was thus in broad daylight.

The complainant was walking along a road, in the Ruai area. He saw 3 people seated beside the road. After he passed them, the 3 people followed the complainant.

When the men caught up with him, the complainant greeted them. They told him that they were members of 'Mungiki', and ordered him to give them all that he had.

The complainant lost Kshs.500/= and his Motorola mobile phone, to the 3 men.

As they robbed the complainant, one of the 3 men was armed with a panga.

Immediately after they robbed the complainant, the 3 men ordered him to leave. They then

“went to the place where they were sitting.”

In effect, the robbers did not run away. They were so confident, that they simply went and sat at the place where **PW1** had first seen them.

Meanwhile, **PW1** walked off, as he had been ordered to do. A few metres away, the complainant came across a lorry that was parked. Inside the lorry, there were many people. **PW1** told those people about what had happened to him.

PW1 pointed out the 3 men to the people who were in the lorry. He then boarded the lorry, which turned

around and followed the robbers.

They caught up with the 2nd accused, who surrendered, and was put inside the lorry.

Thereafter, the lorry continued pursuing the other 2 men. They found the 1st accused, who had been apprehended by some people, who had seen him running.

When the 1st accused was arrested, a panga was recovered from him. **PW1** identified the panga as the one which the robbers had when they were robbing him.

It is clear from the evidence on record that the 1st and 2nd appellants were arrested shortly after they had robbed **PW1**. The complainant pointed out the 3 robbers, and the lorry then pursued them.

PW1 testified that the area where they pursued the robbers was generally flat, so that he (PW1), was able to see the robbers all along. However, the 3rd appellant was not arrested immediately.

PW2 corroborated the evidence of **PW1**.

He said that although those in the lorry did not witness the actual robbery, they pursued the 3 men after **PW1** pointed them out.

However, the appellants argued that the testimony of **PW1** and that of **PW2** were inconsistent concerning the mode of arrest. It was suggested that **PW1** said that the pursuit was by way of the lorry, whilst **PW2** said that the pursuit was on foot.

We have carefully analysed the said evidence. We found no inconsistency at all. We say so because both **PW1** and **PW2** said the lorry turned around.

Both of them said that the first person to be apprehended was the 2nd accused. According to **PW1** the lorry almost ran over the 2nd accused. He then surrendered. They arrested him, and put him in the truck.

Clearly therefore, the truck must have stopped, for those in it to apprehend the 2nd accused, and for them to put him inside the truck.

Thereafter, the truck continued its pursuit of the other two men.

However, **PW2** said that the 1st accused was pursued on foot, after the 2nd accused was apprehended.

To our minds, that simply means that after the 2nd accused was put inside the lorry, some people pursued the 1st accused on foot, whilst the lorry was also being driven along.

PW3 is a police officer attached to the Ruai Police Station. About 4 days after the robbery, the 2nd accused told him about the whereabouts of the phone which they had stolen from **PW1**.

It was the evidence of **PW3** that the 2nd accused led the police to the 3rd accused. Thereafter, the 3rd accused led **PW3** to Peter Kanyore aka Rantu, from whom the complainant's phone was recovered.

The recovery of the phone connected the 3rd accused to the incident.

But, we also note that **PW3** did not appear to be clear about his evidence. He first said that he did not know how the 3rd accused was arrested.

At that stage, the prosecution sought an adjournment, so as to give time to the witness to refresh his

memory.

When **PW3** resumed his testimony, he now said that the 2nd accused led the police to the 3rd accused. Thereafter, the 3rd accused led the police to Peter Kanyore aka Rantu.

Surely, if **PW3** arrested the 3rd accused, after the 2nd accused led the police to him, the witness cannot have said that he did not know how the 3rd accused was arrested.

We also note that although the police recorded the statement of Peter Kanyore, that person did not give evidence in court. His evidence would have enabled the court to verify how he got possession of the complainant's phone.

That verification would have been very useful, considering that **PW3** had first testified that it is the 2nd accused who had given the phone to the person at Joska, yet the 2nd accused was arrested shortly after the robbery. He therefore could not have given the phone to anybody, as he was already in custody.

We also note that the 3rd accused was arrested in the absence of the complainant. In those circumstances, an Identification Parade may have been useful, in enabling **PW1** to demonstrate that he had positively identified the 3rd accused. Had **PW1** identified the 3rd accused at an Identification Parade, that may have strengthened the case against the 3rd accused.

As there was no identification Parade, and also because it is not clear how the 3rd accused was arrested, we hold the view that it would be unsafe to uphold the conviction against him.

However, we are satisfied that the evidence against the 1st and 2nd appellants was overwhelming. They were positively identified by the complainant, and were arrested within a short time after they robbed him. We therefore uphold the convictions and sentences against the 1st and 2nd appellants.

However, the conviction against the 3rd appellant is quashed. We also set aside the sentence, and order that he be set at liberty forthwith unless he is otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi in open court this 2nd day of October 2013.

F. A. OCHIENG

L. A. ACHODE

JUDGE

JUDGE