



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 796,797 & 800 of 2008

VINCENT KAMAU Alias GOVERNOR.....1<sup>ST</sup> APPELLANT

EPHRAHIM KANIU KANOTHA .....2<sup>ND</sup> APPELLANT

MARABA CHAKA TSUMA.....3<sup>RD</sup> APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From the original conviction and sentence in Criminal Case No.1723 of 2006 of the Chief Magistrate's Court at Nairobi by T.N. Nguji (Mrs) – Senior Resident Magistrate)*

### JUDGMENT

The appellants, **VINCENT PATRICK KAMAU alias GOVERNOR, EPHRAHIM KANIU KANOTHA and MARABA CHAKA TSUMA** were each charged with offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**, and Conspiracy to commit a felony **contrary to section 393 of the Penal Code**. The 3<sup>rd</sup> appellant was also charged with the offence of Stealing **contrary to section 275 of the Penal Code**.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants were convicted for the offences of Robbery with violence and were each sentenced to suffer death as by law prescribed.

Each of them was then sentenced to suffer death on each of the two said counts.

The 3<sup>rd</sup> appellant was acquitted in respect of the 2 counts of Robbery with violence.

All the 3 appellants were convicted for the offence of Conspiracy to commit a felony **contrary to section 393 of the Penal Code**.

In respect of that offence, the appellants were each sentenced to serve 5 years imprisonment.

Finally, the 3<sup>rd</sup> appellant was convicted for the offence of stealing by servant **contrary to section 281 of the Penal Code.**

And for that offence, he was sentenced to serve 3 years in jail.

Whilst the jail terms for the 3<sup>rd</sup> appellant were ordered to run concurrently, the jail terms for the 1<sup>st</sup> and 2<sup>nd</sup> appellants was ordered to be held in abeyance.

The particulars of the offences for which the appellants were convicted were as follows;-

***(1) That on 6<sup>th</sup> September 2006 at Githurai 44 in Nairobi the 3 appellants, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed RENE POYE WICHMAN ANDREASEN of one mobile phone, cash KShs.3,500/- and an ATM Card all valued at Kshs.15,100/-.***

***(2) That on the same date (6<sup>th</sup> September 2006) the appellant robbed JANET MUTHONI GITAU of a mobile phone, Cash Kshs.700/- and a pendant all valued at KShs.9,700/-. It is alleged that when robbing the 2 complainants, the appellants threatened to use actual violence on them.***

***(3) The appellenats are alleged to have conspired jointly with others not before the court, to commit a felony, namely to demand with menaces, the sum of US Dollars 200,000 from Maersk (K) Limited.***

***(4) In relation to the offence of stealing by servant, the 3<sup>rd</sup> appellant, who was an employee of Maersk (K) Ltd., is alleged to have stolen US Dollars 2205 together with KShs.497,351/- the property of Maersk (K) Ltd., which came into his possession by virtue of his employment.***

Being dissatisfied with the convictions and sentences, the appellants filed an appeal before the High Court.

In their respective appeals, the appellants challenged their identification: the sufficiency of the evidence produced by the prosecution and the failure by the trial court to give due consideration to their respective defences.

We have re-evaluated all the evidences on record, as is expected of a first appellant court. We have also given due consideration to all the submissions made before us.

**PW 1, RENE POYE WICHMAN ANDREASEN and PW 2, JANET MUTHONI GITAU** were both employees of **MAERSK (KENYA) LIMITED.**

On 6<sup>th</sup> September 2006, **PW 1** was driving his car along Ngong Road, heading to his place of work, which is located along the Mombasa Road. **PW 2** was a passenger in that vehicle.

As they approached Adams Arcade, a vehicle overtook them and then stopped slightly ahead. Two men, who were dressed in the uniforms that looked like those used by Traffic Policemen, came to the car. After a short while, the two men got into **PW 1's** vehicle and ordered him to drive to Kilimani Police Station.

**PW 1** decided to call his boss, on phone. He therefore went onto the side of the road, in order to make the said call.

But he was not allowed to make the call. The Traffic policemen turned out to be thugs. They forced **PW 1** from the driver's seat, and onto the back seat, where one of the thugs held a gun on him.

The vehicle was then driven to Zimmerman Estate.

Whilst there, **PW 1** was robbed of KShs.3,500/- cash. His ATM card was also taken from him, and he was forced to reveal his Pin Number.

**PW 1** was forced to phone a Mr. Jens, the Finance Manager of Maersk (K) Limited. He did so, and informed Mr. Jens that he had been kidnapped.

All these events took place in the morning, from about 7.20a.m. Thereafter, **PW 1** and **PW 2** remained inside a house at Zimmerman until about 4.15p.m. when they were set free.

As **PW 1** was driving away, he discovered a police cap inside his car. It had a number 75889.

**PW 1** lost his mobile phone to the thugs. It was a Nokia, valued at KShs.12,000/-.

Later, **PW 1** found that his ATM card had been used to withdraw KShs.20,000/- from his account at NIC Bank.

About 8 days after the incident, **PW 1** picked out the 1<sup>st</sup> appellant from an Identification Parade.

**PW 1** testified that the 1<sup>st</sup> appellant was the person who drove the vehicle from which the two police officers emerged, only to kidnap him and **PW 2**.

**PW 1** also testified that the 2<sup>nd</sup> appellant is the person who received him and **PW 2** when they were taken to the house in Zimmerman.

But **PW 1** never, personally, made any report to the police.

**PW 2, JANET MUTHONI GITAU**, corroborated the evidence of **PW 1**. She said that when the vehicle had been commandeered to Zimmerman, she was robbed of KShs.700/- cash; a Nokia 6030 valued at KShs.8,000/-, and a silver pendant valued at KShs.1,000/-.

According to **PW 2**, she could identify the people who robbed them because she was with them from 8.00a.m. to 4.00p.m. But **PW 2** did not identify anybody in the 2 parades which she attended as an identifying witness.

Those two witnesses were the only persons who could have identified the persons who kidnapped them.

**PW 3, AGGREY NYAMBANE**, was a security officer at Maersk (K) Limited. He testified that the 3<sup>rd</sup> appellant came into the premises where the company (Maersk) is located at about 5.00p.m, on the material day. At that time, the 3<sup>rd</sup> appellant's own vehicle was parked within the premises.

The 3<sup>rd</sup> appellant arrived in a white vehicle which looked like a Toyota. But **PW 3** was sure that the 3<sup>rd</sup> appellant's vehicle was a Suzuki Vitara, registration number KAM 240N.

**PW 4, JUDA GURUNDA KWARIA**, was employed by KK Security, as a guard. On the material day he was on duty at the premises of Maersk (K) Limited.

In his statement, he indicated that the white vehicle in which the 3<sup>rd</sup> appellant arrived, at about 5.45p.m, was a Corolla.

**PW 5, SAMUEL WAWERU GACHUCHA**, drove a taxi registration Number KAN 548Z. On the material day, he was instructed by **PW 6** to drive the 3<sup>rd</sup> appellant. He drove him to the Grand Regency

Hotel, from where that appellant came back with a big brown envelope.

He then drove to Intercontinental Hotel, where the 3<sup>rd</sup> appellant alighted, holding the envelope. After a while, he drove the appellant back to Grand Regency Hotel. On that occasion, the envelope remained in the boot of **PW 5's** vehicle.

**PW 5** then drove the 3<sup>rd</sup> appellant to Maersk Limited, where the appellant got into another vehicle, holding the envelope. **PW 5** was instructed by the 3<sup>rd</sup> appellant to wait for **PW 6's** phone-call. Eventually, **PW 5** received the call, and was instructed to proceed to Panari Hotel. It is **PW 6** who paid **PW 5** for the services he had rendered when ferrying around the 3<sup>rd</sup> appellant.

During cross-examination, **PW 5** said that whilst he was driving the 3<sup>rd</sup> appellant to and from various places, he did not see any police or other security vehicles following his car.

**PW 6, JOHN LIM**, is a manager at Maersk (K) Limited. He was a member of the company's Crisis Management Team, which responded to the kidnapping of **PW 1** and **PW 2**.

Immediately after the team got news of the kidnap, they decided that the 3<sup>rd</sup> appellant should collect the ransom from a Forex Bureau. But because the 3<sup>rd</sup> appellant was running late, when reporting the incident, **PW 6** collected the sum of 2000 US Dollar and KShs.497,351. It is that amount which he handed over to the 3<sup>rd</sup> appellant at Grand Regency Hotel.

According to **PW 6**, there were some Flying Squad Officers present at the hotel when he handed over the funds. Even when the 3<sup>rd</sup> appellant was waiting for the kidnappers to show up at the Intercontinental Hotel, **PW 6** said that the Flying Squad officers were present, under-cover.

After the operation was called-off, the 3<sup>rd</sup> appellant was to meet the Crisis Management Team at the Panari Hotel. However, he not only failed to get there, his phone was also put-off. As a result **PW 6** was unable to contact him between 6.00p.m. and 9.30p.m.

The 3<sup>rd</sup> appellant phoned **PW 6** from Thika, saying that he had been carjacked, and that his mobile phone and the ransom money had been stolen.

During cross-examination, **PW 6** said that he never informed the 3<sup>rd</sup> appellant about the amount of money in the envelopes. In fact, the money was not counted in the presence of the 3<sup>rd</sup> appellant and **PW 6**, before the former received the two envelopes.

**PW 7, JANES PYAGESEN**, was the Finance Manager at Maersk (K) Limited.

When **PW 1** informed him, by phone, that he had been kidnapped, **PW 7** called the 3<sup>rd</sup> appellant and Mr. Somat, a Manager at Maersk. He also called the company's security manager based in Cape Town, South Africa, and the company's Managing Director.

It is **PW 7** who first received the demand for ransom. It was in the form of an SMS, demanding US Dollars 200,000. After **PW 7** had made consultations, he told the kidnapper who had phoned him, that they could not raise the ransom sum. He said that the company only raised KShs.490,000/- plus US Dollars 22,200.

The kidnapper told **PW 7** that the money should be handed over at Intercontinental Hotel.

Later, when the kidnappers failed to collect the ransom, and after the operation was called-off, **PW 7** phoned both **PW 6** and the 3<sup>rd</sup> appellant, instructing them to proceed to Panari Hotel. But the 3<sup>rd</sup> appellant never showed up.

**PW 8, INSPECTOR DAVID OTIENO NANDI**, arranged the Identification parade for the 1<sup>st</sup> appellant. The parade was at Pangani Police Station on 15<sup>th</sup> September 2006.

**PW 1** picked out the 1<sup>st</sup> appellant. However, **PW 2** failed to pick out the said appellant.

**PW 8** acknowledged that the 1<sup>st</sup> appellant expressed dissatisfaction with the parade, as he felt that the company driver could have leaked his appearance to the identifying witness.

**PW 9, PC NICHOLAS JAMES NJERU KARANI**, was a police officer based at CID, Thika. On the material day he was picked up and taken to Industrial Area Police Station, where he was required to explain the presence of a police cap bearing his Force Number, 75889.

**PW 9's** kit was examined, and everything was found intact.

It was also verified that **PW 9** had only been recently transferred from Marsabit to Thika. He had neither worked in Nairobi nor as a Traffic Policeman.

Finally, **PW 9** explained that a cap does not normally have a Force number when it is being given to a police officer. It is the officer who writes the said number.

**PW 10, INSPECTOR SIMON BOSIRE**, was attached to CID Embakasi. He recorded the statements of **PW 1** and **PW 2**, on the day after the incident.

It was his evidence that the complainants told him that they had been driven to Githurai 44.

Using the tracking devices of Safaricom, **PW 10** worked with his colleagues to trace the 2<sup>nd</sup> appellant and also the 1<sup>st</sup> appellant.

The investigations conducted by **PW 10** revealed that the 3<sup>rd</sup> appellant had reported at the Thika Police Station, that he had been car-jacked and robbed. The report was recorded in the O.B. at 9.40p.m.

**PW 10** said that **PW 1** never gave any descriptions of the robbers. Meanwhile, **PW 2** described the 2<sup>nd</sup> appellant as short, with chocolate complexion, and wearing dark glasses.

But when **PW 10** was asked if the 2<sup>nd</sup> appellant was actually short, he answered in the negative.

**PW 10** said that the 3<sup>rd</sup> appellant was charged because he never surrendered the money he was given by **PW 6**, for use as ransom.

Finally, **PW 10** said that although the 3<sup>rd</sup> appellant was under police surveillance all the time he, however, managed to evade them.

**PW 11, CHIEF INSPECTOR PETER NDUMBI**, was based in Nairobi Area Operation Duties at the material time. He was one of the police officers who were at the Intercontinental Hotel, under-cover, when the 3<sup>rd</sup> appellant was waiting to hand over the ransom to the kidnappers. He talked to the 3<sup>rd</sup> appellant, who confirmed that he had US Dollars 10,000.

After the operation was called-off, it was agreed that the people concerned would follow a specified route. However, the 3<sup>rd</sup> appellant changed route.

**PW 12, PC NICHOLAS MUTISYA**, was attached to Criminal Intelligence, Nairobi Province. Apart from investigations, his duties include the collection of intelligence on organized crime.

It is he who used his expertise in "telephone analysis" to track down the 2<sup>nd</sup> appellant. Further

investigations led him to the 1<sup>st</sup> appellant. He arrested those two appellants.

**PW 12** conceded that in the documentation which he procured from Safaricom, there is nothing to show that the 3<sup>rd</sup> appellant ever called the “suspect number” on the material day.

Learned State Counsel, Mr. Mulati conceded the appeal by the 1<sup>st</sup> appellant. He also conceded the appeal of the 3<sup>rd</sup> appellant on Count 3, which relates to the alleged conspiracy to commit a felony.

Having re-evaluated all the evidence on record, we have drawn therefrom the following conclusions:

**(a) The two complainants PW 1 and PW 2 did not identify the robbers. The circumstances prevailing were difficult. The fake police officers moved suddenly, bundling PW 1 onto the rear seat of his vehicle, as soon as PW 1 pulled to the road-side to make a phone-call. Before that, PW 1 did not take any particular interest in the appearance of either of the said fake police officers.**

**(b) The protest raised by the 1<sup>st</sup> appellant when he was picked out from an Identification Parade appears to be justified.**

**(c) None of the appellants was found in possession of anything incriminating. Their arrests were founded on nothing more than the records from Safaricom, and the failure by the 3<sup>rd</sup> appellant to hand back to the company (Maersk), the ransom money.**

**(d) Whilst it is very possible that PW 6 actually withdrew money from Chase Forex Bureau, which he then put in two envelopes, at no time did anybody else verify the contents of the two envelopes.**

**Indeed, the prosecution did not lead evidence to prove the actual amount of money that PW 6 obtained from the forex bureau.**

**(e) The 2<sup>nd</sup> appellant had very obvious marks on his face. If the complainants or either of them had identified him positively, they should have had no difficulty in describing him appropriately. The failure to describe him at all, in their first reports implies that PW 1 and PW 2 did not identify him.**

**(f) None of the prosecution witnesses identified the person or persons who demanded money from Maersk (Kenya) Limited.**

**(g) The sum of money amounting to Kshs.20,000/- was said to have been stolen from the account of PW 1, which he maintained at NIC Bank. No evidence was led to show that that sum was actually withdrawn from PW 1's account.**

**(h) If Kshs.20,000/- was indeed withdrawn from the account of PW 1, that begs the question as to whether the money stolen belonged to NIC Bank or to PW 1.**

**(i) PW 6 handed over to the 3<sup>rd</sup> appellant some two envelopes. The small envelope is said to have contained US Dollars 2,205, whilst the large envelope is said to have contained Kshs.497,351/-. At no time was the money, if any, counted in the presence of the 3<sup>rd</sup> appellant or any other person. Therefore, it was never ascertained how much money, if any, was in the two envelopes when the envelopes were given to the 3<sup>rd</sup> appellant.**

**(j) There are no particulars of the contents of either the verbal or written messages moving between any of the mobile phones which were said to have been used by the kidnappers. Therefore, of themselves, the information regarding the contacts made was inconclusive.**

**(k) If the 3<sup>rd</sup> appellant was under surveillance from the police at all times, it has not been explained when, where and how he suddenly evaded them. Thereafter, was he car-jacked, as he said in his**

***defence? That is a possibility, as it is on record that he reported the incident at Thika Police Station, and also because his vehicle was also recovered by police from Langata Police Station.***

***(l) The conspiracy theory was not established. Even though the 3<sup>rd</sup> appellant was in a position to provide information about Maersk (K) Limited to the kidnappers, there is no evidence that he did so.***

***(m) The decision by the 3<sup>rd</sup> appellant to first go to Maersk Offices, before going to Panari Hotel appears suspect. The fact that when he was using the taxi the envelopes were in the boot, but when he was alone in his car he put the envelopes on the front seat; that too is suspect. However, the said suspicion is not ground enough to conclude that he planned his own car-jacking, in order to steal the ransom.***

For all those reasons, we find that the conviction was founded on insufficient and inconclusive evidence. It cannot therefore be sustained.

Accordingly, we allow the appeals of all the 3 accused persons. We quash their convictions and set aside the sentences. We order that they be set at liberty forthwith unless they or any of them is otherwise lawfully held.

In conclusion, we wish to commend Mr. Wandugi, learned advocate for 1<sup>st</sup> appellant, Mr. Begi for the 2<sup>nd</sup> appellant, and the 3<sup>rd</sup> appellant in person for the industry that they put into the manner in which they prosecuted the appeals. Although we have not cited the numerous legal authorities which they cited to us, we wish to assure them that we did take the same into consideration. We also wish to record our appreciation to Mr. Mulati, learned state counsel for demonstrating an apt appreciation of the applicable law.

**Dated, Signed and Delivered at Nairobi, this 9<sup>th</sup> day of July, 2012.**

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**FRED A. OCHIENG**  
**JUDGE**

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**LYDIA A. ACHODE**  
**JUDGE**