



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 622 OF 1998

(From original conviction and sentence in Criminal Case No. 2021 of 1997
of the Chief Magistrate’s Court at Thika: (E.O. Owino (Esq.))

PETER KAMAU MACHARIA Alias MACHA.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 623 OF 1998

(From original conviction and sentence in Criminal Case No. 2021 of 1997
of the Chief Magistrate’s Court at Thika: (E.O. Owino (Esq.))

SAMUEL MWANZIA MBUVI.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 624 OF 1998

(From original conviction and sentence in Criminal Case No. 2021 of 1997
of the Chief Magistrate’s Court at Thika: (E.O. Owino (Esq.))

JOSEPH KINYANJUI KINUNGI alias Kinya.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 625 OF 1998

(From original conviction and sentence in Criminal Case No. 2021 of 1997
of the Chief Magistrate’s Court at Thika: (E.O. Owino (Esq.))

PAUL NGEI KATINGI alias MAJOR.....APPELLANT

-VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The four appellants were jointly charged with 4 counts of robbery with violence contrary to section 296(2) of the Penal Code. They were all convicted after a full trial and each sentenced to the mandatory sentence of death. These appeals arise from the said conviction and sentence.

The appeals are consolidated and all the appellants have handed in their written submissions. For purposes of this judgement the appellants shall be referred to as appellant number one to four in the sequence of the numbers herein.

The learned counsel has also made his submissions herein. As the first appellate court, it is our duty to evaluate the whole evidence afresh and make independent findings. This we have done.

The key prosecution witness PW1, PW2, PW3, PW4 and PW5 were all in their respective houses when some people attacked a shop outside that belonged to PW1. All those witnesses lost or were robbed of some valuables of personal nature.

PW1 is said to have identified the 2nd appellant herein Samuel Mwanzia Mbuvi alias corporal who had been left behind and there was sufficient light that aided the said identification.

Later, the same witness was able to identify the second appellant at an identification parade conducted by PW8.

On the other hand PW2, was able to identify the first appellant herein, Peter Kamau Macharia alias Macha and the appellant number three Joseph Kinyanjui Kahungi alias Kinya. He was not able however to pick them at identification parade.

PW4 who was also present was not able to identify any of the attackers but accompanied the police who arrested the fourth appellant herein Paul Ngei Katingi alias major. There was a pair of shoes recovered which the PW2 allegedly identified as his. Recovery was in the presence of PW4.

It is the submission of the learned counsel for the Republic that the evidence of PW4 was corroborated by that of PW5 and for who were both present when appellant number four was arrested and led them to the course of the appellant number one herein Peter Kamau Macharia.

In the house of Peter Kamau Macharia a pair of jeans was recovered. This was identified by PW5 as his alongside a table cloth.

The learned trial magistrate and the State Counsel before us believed there was ample evidence that placed appellants Nos. 1,2, and 4 at the scene of the robbery. But not so appellant No. 3 whose appeal the learned counsel for the Republic conceded.

The concession of the appeal by the 3rd appellant was based on the fact that the helmet that was said to have connected him with the robbery was a common item, worn at night and in any case PW2 was not able to identify him at the identification parade.

As for appellants numbers 1,2, and 4, corroboration was found in the items found with them, stolen only three days before and without any explanation by the appellants as to their possession.

We have given very anxious consideration to the evidence on record. It is true that some items were recovered that the complainant claimed to belong to them.

The charge that the appellants faced was serious and as it is, attracts a mandatory death sentence. We emphasize here that proof must be such that no reasonable doubt is left to cloud the prosecution case before a conviction is entered. We have asked ourselves, if the only corroboration is the finding of the goods belonging to the complainants, did the prosecution discharge the duty bestowed on it to prove that the said goods belonged to the complainants? We think not.

PW1 said she was able to identify the jeans by their stickers. When the subject matter was shoes, PW5 just said they were safari boots. The other items like table clothes or jeans with a hole were variously claimed by the victims of the robbery.

With profound respect, these were common items which may be owned by any common person. There is no special feature in a jeans sticker, a hole there on or common pair of shoes like a safari boots. The prosecution ought to have gone a step further to require that the complainants established that the said goods belonged to them beyond any reasonable doubt.

The second appellant Samuel Mwanzia who was the first accused in the lower court was alleged to have been identified by PW2. This appellant gave a sworn statement of defence and was cross-examined at length by the prosecutor. He remained firm in respect of material particulars and that alone added to his credibility.

All in all, we are not satisfied that the charges were proved beyond any reasonable doubt. The learned counsel conceded the appeal of the third appellant and with respect we agree.

In the end therefore these appeals are allowed, convictions quashed and sentences set aside. The appellants shall all be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Delivered and dated Nairobi this 25th day of March, 1999.

A. MSAGHA MBOGHOLI

JUDGE

R. KULOBA

JUDGE