



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 591 of 1997

JANE WANGUI WANYOINGI alias WANYOIKE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1300 of 1996 of the Chief Magistrate's Court at Kisii)

5.3.98

Coram: Aluoch, J

Githinji, J

Appellant in person unrepresented

Interpreter - Kaniaru

Mrs. Oduor for the respondent

JUDGEMENT

The appellant, Jane Wangui Wanyoingi, alias Wanyoike, was charged jointly with others not before court, with the offence of Robbery with violence, contrary to section 296(2) of the Penal Code, on the first count. On the second count, appellant was charged with the offence of being in possession of a Firearm without a Firearm Certificate contrary to Section 4(1) of the Firearms Act, Cap 114, Laws of Kenya, and being in possession of ammunitions contrary to Section 4(1) of the Firearms Act, Cap 114, and Laws of Kenya. The appellant was acquitted on counts 2 and 3 but convicted on count one of Capital Robbery. She appealed to this court against both conviction and sentence. She filed several grounds of appeal, as appear in the petition of appeal.

In ground 10, particularly, the appellant challenged the identification parade at which she was picked out saying that the other 5 ladies who were with her in the parade were smart and she was dirty from the banana plantation that is why she was pointed out by the complainants. The other grounds of appeal are narrative and try to explain why she could not have been involved in the robbery.

The Learned Magistrate after considering the evidence on record found that the appellant guilty of the offence charged of Robbery with violence, contrary to section 296(2) and convicted her accordingly. He sentenced her to death.

The prosecution evidence on which the appellant was convicted was to the effect that on 24th April, 1996, PW2, PW3 and PW4, all employees were in a shop in Kisii town between 5.00 - 5.10 p.m. in the evening. The owner of the shop was not in.

As it was about 5.00p.m., the 3 witnesses were working towards closing the shop. For example PW2 was just beginning to count the money when a woman appeared at the shop, followed by a man who had a pistol. They were asking for the money. PW3 on the other hand was selling in the shop when he saw the woman who went direct to PW2 and talked to him, but he did not hear what the 2 talked about. The woman went out and after 10 minutes, she returned with a man. The man raised the gun and ordered everybody to lie down. The woman pointed her pistol at PW3 and ordered him to lie down as members of the public started shouting for help. The woman and man nevertheless went to PW2 and took money from him. PW4 also watched the incident. He too was ordered to lie down.

Some of the money snatched from PW2 fell down as they were running away and members of the public started picking it. PW4 also picked some and brought it back to the shop. PW4 saw the woman clearly, and later picked her out at an identification parade. It was the appellant.

PW5 had just come to the shop. He stood at the gate and saw one person standing by the door of the shop a man, and a woman together with another man were standing by the counter. The one near the gate pushed him and PW 5 assuming he was a customer, pulled him out of the door. The man, however knocked him down, outside the shop and produced a pistol and ordered him to lie down. He obeyed. PW5 watched as others came from inside the shop carrying money in a brown bag, which he identified as Ex.5 in court. Some money fell down and was picked up by members of the public. PW5 watched as the gangsters escaped in a Toyota Saloon vehicle. He could not however read the registration numbers of the vehicle but PW3 read the numbers as KAE 278 J and gave it to the police. He was injured in the robbery and was issued with a P3 form which was completed after he had been treated. It was produced in court by PW10.

PW6 is a Security Guard who has been guarding this same shop on a daily basis from 6.00 a.m. to 6.00 p.m., for the last 4 years. On the material day, he was on duty at the gate, outside he saw the appellant get into the shop. He assumed that she was a customer. She stood in the shop for about five minutes, then went out, and after a few minutes, a motor vehicle came and was parked near the shop, about ten meters from the shop. It was a Toyota Corolla vehicle, No. KAE 278 J. Three people came from the vehicle, two men and the same woman, the appellant. They got into the shop and immediately there were shouts in the shop. PW6 went to the shop and found PW2, PW3 and PW4, all lying down in the shop. As PW6 was getting into the shop, he met the appellant brandishing a pistol, getting out of the shop. He identified Ex.1 as a pistol resembling the one the appellant was carrying as she was getting out of the shop.. The other men who were in the shop threatened PW6 with pistols. As he was getting out, he saw PW5 and the robbers struggling over money.

He ran towards the motor-vehicle which was still parked with all doors, wide open. As he neared it he was hit at the back of the head, and he fell down. By this time, he noticed that the appellant was already in the motor-vehicle. He managed to get up and he assisted in picking the money which had dropped down. He was injured on the head and was taken for treatment. He was later issued with a P3 form, which was produced as an exhibit by PW10. The following day on 25.4.96, he was called to attend an identification parade at the police station and out of the ten women who had lined up, he identified the appellant as the one who had robbed the shop. The witness was able to see her well in the shop because she was alone in the shop with no other customers for a while, before the others joined her.

PW7, PW8 and PW10 are police officers who got a report of the robbery and went to visit the shop, but found the robbers having escaped. They interviewed the workers and got a report of what happened. The money which was dropped by the robbers was finally handed over to PW8 cash Kshs.5000/= by PW4. The money was produced as an exhibit in court.

At the shop, PW7 and PW10 were given the registration number of the vehicle the robbers had escaped in. The officers also learned that the robbers escaped towards Kisumu - Migori direction. PW7 and PW10,

and other police officers started following the route the robbers followed. They got further information about the vehicle on the way, and finally they caught up with the vehicle, somewhere on the road, facing Ikoba market. The vehicle had stopped and the bonnet was opened and there were people in it, three men and a woman. The police opened fired and the occupants of the vehicle jumped out. They were all armed with revolvers, and they started firing at the police officers. The 3 men ran faster than the woman, and disappeared into the nearby sugar plantation. The woman surrendered and dropped the pistol which the police took into their possession, and unloaded it. It had 3 rounds of unused ammunition and one fired cartridge. The revolver No. 129012 model 1917 marked CSS Army, recovered from the woman was produced as an exhibit in court. Also produced were four empty cartridges.

PW8, PW10 and colleagues proceeded to the motor-vehicle which they searched. In it was a leather bag, and in the bag was an I/D card No.3645154/66, bearing the appellant's names, Jane Wangui Wanyoigi. Pw8 looked at the photograph in the I/D card and it resembled the appellant. A wallet was also recovered from the bag and other personal things, including cash, Kshs.4,600/=. The appellant was arrested and taken to Kisii Police Station. PW8 also drove the recovered motor-vehicle back to Kisii Police Station where they booked the appellant. They circulated information about the recovered motor vehicle which they discovered had been reported stolen and the matter reported to Muthaiga Police Station in Nairobi. The correct numbers of the vehicle was infact, KAA 958W. The numbers KAE 278J found on the motor vehicle during the robbery and at the time of the arrest, were therefore false.

The identification parade at which the appellant was picked out was conducted by PW9, Inspector Daniel Langat, who had 3 witnesses to identify the appellant - i.e PW2, PW4 and PW6. lie explained in court how the parade was conducted and how all the 3 witnesses identified the appellant by touching her. He also stated that the appellant was satisfied that the manner in which the parade had been conducted and he signed the parade form, which PW10 counter signed. The forms were produced in court as exhibits.

At the conclusion of the prosecution case, the appellant made a lengthy unsworn statement in defense, denying the offence charged. She stated that she had gone to Kisii on a business trip. That she left Nairobi on 22nd April 1996, and arrived in Kisii, the following day. That she conducted her business of buying bananas and on 24/4/96 about 5 p.m., she was ready to leave and was waiting at the bus stop; when a vehicle came at great speed, stopped nearby and 2 men who were in it, policemen came out and harassed her and eventually arrested her. That they searched her and found her with a wallet together with other personal effects. That they arrested her and took her to the police station where they tortured her. That the following morning she was taken to an office where she met 2 Asian men and an African. That later she was taken to an enclosed place for the purposes of an identification parade. That she begged them then to allow her to have a bath and change clothes, because she was very dirty. That the police officer refused and told her to go to the parade the way she was. The appellant said that the 2 Asian men pointed out at her from a distance. It was the African who went near to her. She was asked to sign the parade forms. The appellant said she did not know the contents of the forms because she did not read them.

The learned Magistrate after considering all the evidence on record said at p.7 of the Judgements that he had,

"Little difficulty in arriving at the conclusion that there was a Robbery on 24.4.96----- "

and further that the robbers were armed with pistols and further still, that in the course of the robbery, some of the prosecution witnesses were injured, as they testified. They were treated and issued with P3 forms.

On whether the appellant committed the offence or not, the Learned Magistrate said at P9 thirteen of the Judgment that the appellant evidence,

"it is not believable. It is too inconsistent with facts and removed from common sense. In the face of the tremendous and overwhelming Concrete and cogent evidence by the prosecution that the accused Statement fails miserably."

We have examined the record from the Lower Court and read through the evidence which was adduced by both the prosecution witnesses and the appellant. Because the appellant challenges the identification parade at which prosecution

Witnesses identified her as is already on record, we decided to examine very carefully, the evidence of Inspector Daniel Langat, who conducted the parade. His evidence appears at pages 26,27, and 28 of the record. The cross-examination starts at page 28.

The appellant claimed that she was pointed out at the parade because she was dirty.

As we read the answers given by Inspector Langat during cross-examination by the appellant it became apparent to us, that that issue was dealt with during the trial. At pg 28 lines 17, 18, 19 the witness answered as follows to questions put by the appellant

"— It is not true that there were five people who were police officers and other looked clean. You were clean. It is not true that you told me that you would like to change your clothes and I refused-----".

Turning to the Judgement particularly on this point at pg 13, the Learned Magistrate said of the identifying witnesses.

"These witnesses were subjected to thorough examination by the accused. They stood their ground very well. They talked straight answering questions without hesitation as befits people speaking the truth. They had no grudge with the accused —".

The Learned Magistrate who saw and watched the identifying witnesses give evidence, found them to be witnesses of truth. We endorse that finding by the Magistrate. We have no reason to depart from it.

On our own independent evaluation of the evidence by the Learned Magistrate, we find that he arrived at the correct verdict in this case, and we uphold his conviction of the appellant. The sentence of death he imposed is prescribed by Law, so he had no discretion over it.

We find no merit in the appeal filed and we proceed to dismiss it against both conviction and sentence.

Dated at Nairobi this 26th day of March, 1998.

JOYCE ALUOCH PUISNE

JUDGE

ZM.GITHINJI PUISNE

JUDGE

PROCEEDINGS

26.3.98

Coram: Aluoch, J

Githinji, J

Interpreter - Kaniaru translating in Kikuyu language

By Court

Judgment read in open court. Appeal against both conviction and sentence, dismissed. Right of Appeal explained to the appellant.

JOYCE ALUOCH PUISNE

JUDGE

EM. GITHINJI PUISNE

JUDGE