



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 306 & 307 of 1997

**(From original Judgement in Nyeri CRIMINAL Case No. 1187/96 heard by Mr. Muga
Apondi, CM.)**

JAMES MAINA NDIRANGU

PETER NDUNGU MWANGI.....APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

27/7/98

Coram: Mwera, Juma J J

Miss Mwai Adv. for 2 appellants

Kabitu - Learned State Counsel for Republic

Gikaria, Njiru c/clerks Swah/Eng

Both appellants in court

JUDGEMENT

The two appeals herein were consolidated heard and disposed of together. They arose from NYI CM CR.C. No. 1187/96 wherein James Maina Ndirangu was accused 2. His appeal before us is NYI HC CR.C.A. No. 306/97. The other appellant Peter Ndungu Mwangi was accused 1 in the lower court. His appeal here is NYI HCC CR.A. No. 307/97. These two were charged with a third man John Kariuki Munyeria. But after their trial the learned trial magistrate acquitted Kariuki and went on to convict James Maina and Peter Ndungu as we now set out the charges.

Count 1 read that c/s 296 (2) Penal Code, the 3 men aforementioned on 23.5.96 within Gatundia area of Laikipia district jointly armed with a dangerous weapon, a gun, robbed Daniel Nderitu Thuthwo of his motor vehicle reg. No. KAA615 B Nissan Urvan worth shs. 830,000/- and immediately before or immediately after the time of such robbery killed the said Daniel Nderitu.

Count 2 also c/s 296 (2) Penal Code was to the effect that the trio on 24.5.96 along NARO MORU NYERI RD, Nyeri jointly armed with a dangerous weapon namely a firearm robbed James Mwai Githeiya of his motor vehicle reg. No. KND456 Datsun Saloon valued at shs. 120,000/- and immediately before or immediately after the time of the robbery used actual violence on the said James Mwai.

There was a 3rd count again against all the 3 accused persons. It stated that c/s 296(2) P.C. on 24.5.96 at Marua along KIGANJO-KARATINA RD Nyeri, the three jointly armed with a dangerous weapon, namely a gun they robbed one Christopher Morris of his motor vehicle reg. No. KAC 9711, a Citroen, plus cash shs. 20,000/-, all valued shs. 1.4 m. That immediately before or immediately after the time of such robbery killed the said Christopher Morris.

Pleas of guilty were taken and recorded on 17.6.96 while the actual trial got under way on 9.9.96 before the Senior Principal Magistrate. As stated above the accused 3 in the lower court was acquitted but then these 2 appellants were found guilty on all the 3 charges of robbery.

Miss Mwai filed a petition of appeal for each of them. She argued them together because the appeals were consolidated. The thrust of her arguments centred on two broad aspects: IDENTIFICATION of the appellants and the CONFESSIONS they allegedly made.

We heard that as regards count I, the alleged identification of Peter Mwangi (2nd appellant) was not without fault. That the only witness Ephantus Wanjohi (P.W.I), a watchman at a Caltex Filling Station at Kiamba who fuelled a NISSAN motor vehicle at 6:30 a.m. on 24.5.96 and did not know the appellant before. He had said that he saw that motor vehicle arrive at the station and he saw 3 people in it. He then added that he identified Peter Mwangi at an identification parade on 15.6.96 at Ngarua Police Station - some 21 days later. But much as the learned state counsel argued that the police coming back to this filling station to get P.W. 1 as a witness was as a result of Peter Mwangi's statement of confession, this was greatly watered down by what P.W.I said in cross examination by Peter Mwangi:

"After the parade I ate meat with you at Kinamba Trading Centre in company of police officers. I never ate meat with you before the parade."

This should be seen in the light of Peter's evidence that:

"On 11th June, 1996 I was taken to Kinamba Trading Centre in the "company of 6 police officers. While there I was taken to a butchery where P.W.6 brought P.W.I. Thereafter P.W.6 stated to P.W.I that

"This is the person that I was telling you about..... " Though P. W. 1 denied seeing me, he was told about the reasons for my arrest. Ultimately we ate meat with police officers and P.W.I. Eventually I and the police officers went to Sufiri leaving P.W.I behind.

..... On 15.6.96 I was taken back to Kinamba Police Station by P.W.7. P.W.I came and identified me during the identification parade. The said parade should have been carried out before we ate the meat with P.W.I."

Now for all that it takes to investigate crimes and in some conduct identification parades, what in the name of heaven was P.W.6, who appears in the record as P.C. Julius Kaimenyu, doing feasting with a suspect Robert Mwangi, with a prospective witness Ephantus Wanjohi (P.W.I) on meat at Kinamba trading centre whether before or after the identification parade of 15.6.96? At least that comes from P.W.I himself in cross-examination. Can it thus be said that P.W.I whenever knew Peter Mwangi before and who saw him only for 5 minutes at a filling station at Kinamba on the morning of 24.5.96 was able to identify him on a parade without some "help" from P.W.6 or indeed any other police officers? Not at all. Yet that is the only evidence which connects these appellants to the offence in Count I because the owner of the NISSAN was killed. Indeed this court entertains a strong feeling that Peter Mwangi and his mates could have something to do with this incident but is the evidence of identification by P.W.I worth much with the feasting with Peter and police officers involved in investigating the offence? We do not think so. The police do not expect us to commend them for carrying out investigations in this manner. What P.W.I

presented on identifying Peter Mwangi in regard to Count I was the most worthless type of evidence in the circumstances. Feasting with suspects and police officers whether before or after an identification parade or indeed as long as a crime is on the table is never the way police should do their duties. We conclude that the appellants ought not to have been convicted on count 1 with this type of evidence. In any case P.W.1 did not speak of identifying James Maina, the other appellant herein or the co-accused who is acquitted. So with this kind of evidence on this charge the appeal is allowed conviction quashed and the sentences set aside.

At this point we may as well dispose of count 2, the appeal against which the learned state counsel had nothing to put forward but to concede. We think this was right because there was no evidence to support it. And it goes this way.

James Mwai, (P.W.4) the owner of the Datsun reg. No. KND 456 was on the road from Naro-Moru to Nyeri on the morning of 24.5.96. He was flagged down by a man with a jerry can near a stationary NISSAN. He stopped to give the jerry can man a lift to go and fetch petrol. That man got into the Datsun and pulled a pistol on Mwai. He was ordered into the back seat. He complied. Other people jumped into the Datsun from the NISSAN. Mwai was ordered to keep quiet. They drove on. At the junction to Karatina Mwai with his captors overtook a Citroen driven by a European. Down the road the Datsun was stopped in the middle of the road. The Citroen came along. It was blocked by the Datsun so it stopped. Mwai's captors left his car with ignition keys in place and went to that Citroen. He had a chance. He drove off. Later on the same road the Citroen passed him at a high speed with the European sandwiched in the rear seat. P.W.4 did not identify his captors. They were armed but they did not demand or in anyway threaten to steal anything from him. Indeed they let him go off with his motor vehicle as they apparently now saw something better in the white man's Citroen. They just drove on, although in an extremely awkward position but that was that. And it goes this way. In view of all this robbery against P. W.4 was not proved.

The last count of robbing and killing Morris, the owner of the Citroen, then came up for scrutiny. Miss Mwai submitted that the appellants were convicted on this count 3 because Peter Mwangi allegedly confessed and that in his statement he implicated James Maina. But that that confession was repudiated as having been extracted with torture violence etc. and such other misdeeds as to make it involuntary. That indeed to involve James Maina, his co-appellant here was evidence of the weakest point. The case of GORGE KARANJA MWANGI & OTHERS vs R NRI CR. APP. No. 132/83 (CA) was cited to us on this account. That the learned trial magistrate could only convict on the repudiated statement of Peter Mwangi if he was convinced and satisfied that it was true. And in this regard our attention was drawn to the case of JOSEPH NJARAMBA KARURAVS R (1982-88) 1 KAR 1165. The learned appellant's counsel strenuously made attempts to persuade us to accept a notion that if the appellants led police officers to the spot where Morris's body was lying in the forest, that amounted to a confession and that there ought to have been a caution administered before the appellants did so. We took this to mean that leading the police to the dead body was as good as one stating that they had killed Morris in the robbery whereupon the appellants ought to have been cautioned. That that act of leading the police to the scene of the body would be put in evidence in a court of law. This was quite an ingenuous approach to the law governing confessions. But we were not persuaded that indeed in such situations cautions ought to be administered. We heard that cigarette butts that were recovered from the Citroen and analysed with the saliva from Peter Mwangi, whereupon there was agreement, did not preclude a probability that Morris, the owner of the Citroen was also a smoker whose saliva group was the same as Peter Mwangi's.

Miss Mwai moved to another aspect of the evidence which the learned trial magistrate relied on: whether Peter Mwangi was found wearing the clothes of Morris, deceased, or that he was in his own clothes and only that Morris' clothes were planted on him. She drew our attention to the evidence of C.I Kamunde (P.W.16) and that of Birgen (P.W. 15). We will revert to this evidence presently.

Then the court heard that James Maina 1st appellant had put forth an alibi that the prosecution did not displace namely that he had been to Kamakwa and when he was asked by friends to go and do some electrical work at Kinamba, they rode in the Citroen and that is how he was arrested. On this issue of alibi, we were told of the case of KARATON OLE LESARAUVS REPUBLIC CR. APP. 78/88 (MBA)

We heard that the learned trial magistrate relied on circumstantial evidence to convict yet that evidence was not water-tight. That the appellant Peter, too had put forward an alibi. He was lost in the forest and that is how Birgen (P.W. 15) arrested him.

The learned state counsel countered that Robert Mwangi was found wearing Morris's clothes. The cigarette butts found in the Citroen were analysed for saliva group and the same tallied with the specimen taken from Peter. The two appellants led police to where the body of Morris was hidden in the forest. That while Peter was arrested as he was chased by police in the farms, James Maina even slept at a cattle dip. He then got on a NRI matatu the following day and that is where he was arrested.

We then rose to consider a decision on this Count 3. We observe as the lower court did that there was no direct evidence but that it was by circumstantial evidence that the 2 appellants were convicted. The learned trial magistrate visited the scene where the body of Morris was found in the forest and accepted the police evidence and indeed the prosecution case that Robert Mwangi and James Maina led the police to the scene. He discarded the defences of the appellants including alibis as being fabrications. An alibi must be displaced by evidence from the prosecution if it stands to be displaced. But if it is raised and all circumstances taken in regard show that the alibi has no basis then it cannot be displaced. Here there are the confessions that the learned trial magistrate found worthy to rely on after due tests and the chain of events do not permit a place of an alibi.

We however agree that perhaps the saliva test i.e. the cigarette butts and the specimen from Peter Mwangi did not by itself exclude the possibility that Morris was also a smoker and his saliva group was the same as Peter's. But still it was a strong point to take besides other evidence.

We may next remark on the clothes that Peter allegedly wore at the time of arrest. The prosecution evidence was that they belonged to Morris. Peter Mwangi insisted that he had been forced to wear them after the arrest.

To resolve this point we look at the evidence of Birgen (P.W.15) who first arrested Peter and the police evidence. Said Birgen:

"While arresting the accused 1 he was wearing a blue jacket and black trousers. However he was wearing different shoes. The accused 1 was wearing a white shirt with yellow and brown stripes. He is now wearing the same in court."

C.I. Kamunde (P.W.16) told the lower court on the arrest of Peter Mwangi, appellant 1.

"On the following morning I received information that some Turkana had arrested a suspect. I immediately proceeded there and I found the suspect -the accused 1 whom I rearrested. After interrogation, the Accused 1 gave the list of the other suspects whom they were together with in the Citroen. The accused 1 was wearing a shirt - MFI 7, a trouser MFI15. He also informed me that the other suspects were still in the forest. While carrying the Accused 1 in my motor vehicle we went back to the forest again. On the way a Turkana boy informed me that there was a man walking very fast while his clothes were stained (sic) with mud. At a distance I saw the man about 1/2 km away going towards the bus station. Immediately a matatu came and stopped next to the suspect that we were pursuing. The said matatu was heading towards Nyahururu. Consequently, we chased the matatu to Nyahururu where I found the passengers had alighted. On checking another Nissan going to Nairobi, I found that the Accused 2 was lying on the front seat. I observed that the trouser, coat and shoes were covered with mud."

The witness then stated that he arrested the Accused 2 also and took both to Nyahururu Police Station.

"After interrogating both the accused 1 and 2 they volunteered to go and show us where they had dumped the European. Both of them led us to Aberdare Forest..... both the Accused 1 & 2 led through a foot path for 300 yards (meters?). Thereafter they led us to a bush where we saw the deceased European lying facing down. It was the Accused 1 who pointed out the body saying "..... this is the body..... " On observing the body, I saw a bullet wound which was bleeding."

The evidence then went on to other aspects of the case. The foregoing evidence was in Rumuruti area where this witness had got word that the motor vehicle of the European had been spotted. He went there and found an aeroplane with police officers searching. They came to the abandoned Citroen. The police got information that the occupants of that motor vehicle had entered the forest. So they laid an ambush that led to the arrest of Peter Mwangi and James Maina. This was the evidence of P.W. 16. We recount his evidence to the length we do to show the chain of events and also to clarify this point of the deceased's clothes which Peter is said to have worn

To finish with the clothes first, we encountered some confusion because only Birgen P.W.15 described them. P.W.16 C.I. Kamunde or Dr. Robert Morris (P.W.3) the deceased's Morris brother did not. So in the light of the evidence of P.W. 15 that the clothes Peter Mwangi was first arrested in were the ones he wore in court at the time of trial, we were unable to conclude that the exhibits in court were also the clothes. Peter wore at the time of arrest and that he was photographed in them.

We however move to the more important part of the case. The learned trial magistrate was satisfied that the two appellants led the police officers to the scene where the body of Morris was. But even if the statement of Peter Mwangi was discredited by the defence on all evidence we believe it was a true account by Peter Mwangi - about himself, (Exh. P54). It spoke of Peter and others killing Morris in the forest by shooting after robbing him. This was before 25.5.96 when the group picked up James Maina at Kamakwa, Nyeri. They then drove to Nyahuru in the Citroen of Morris, with James. It got punctures and developed other problems. They attended to these and continued driving in Rumuruti area until police gave them a chase in a plane. They stopped the motor vehicle and fled into the bush. This statement of appellant 1 does not speak of James Maina being with the Peter's group before Morris was robbed of cash, clothes and motor vehicle (Citroen) and subsequently killed. He was picked up later on 25.5.96 at Kamakwa Nyeri, after all those acts. His statement (Exh.55) said so and so he did repeat in his defence. This consistency cannot be ignored. The two appellants went together with the police to show where Morris lay dead in the forest. But then it was Peter Mwangi who offered to go and point it out. When he got there he told the police with P.W.16 that "..... this is the body." We can say that James

Maina was a victim of circumstances. But this should serve as a deadly warning to those who associate with wrong-doers.

Thus we allow James Maina's appeal on count 3 by quashing the conviction and setting aside the sentence. As for Peter Mwangi, appellant 2, we uphold the conviction and sentence on count.3

James Maina may be set at liberty unless otherwise lawfully held.

In the result the 2 appellants' appeals on both counts 1 and 2 are allowed. As for count 3 only the appeal of James Maina is allowed. That of Peter Mwangi is dismissed.

Judgment accordingly. Delivered on 26th October, 1998.

J.W. MWERA J

J.V.O. JUMA J