



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 1210,1214 & 1215 OF 1991(CONSOLIDATED)

1.NAHASHON NDUNGI KAHEHU.....1ST APPELLANT

2. JOSEPH KARANJA KINUTHIA.....2ND APPELLANT

3. JOHN KIMANI MWANGI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 2072 of 1991 of the Resident Magistrate's Court at Kiambu: R K Mwangi Esq)

JUDGMENT

These appeals have been consolidated.

The 1st appellant, Nahason Ndungi Kahehu (original A3); the 2nd appellant, Joseph Karanja Kinuthia (original A2) and the 3rd appellant, John Kimani Mwangi (original A1) were jointly charged before the learned Resident Magistrate, Kiambu on a charge comprising 3 counts of the offence of robbery contrary to section 296(1) of the Penal Code. Each of the appellants denied the offences but after trial, the Court convicted the 1st appellant (A3) on the 3rd count but acquitted him on counts 1 and 2. The 2nd appellant (A2) was convicted on counts 2 and 3 but acquitted on count 1; while the 3rd appellant (A1) was convicted on count 1 and 2 but acquitted on the 3rd count. The 2nd and 3rd appellants were sentenced on each of the 2 counts they were convicted on to serve a concurrent term of 7 years imprisonment with 10 strokes corporal punishment which means that each of them was to receive a total of 20 strokes. The 1st appellant was also sentenced to 7 years with 10 strokes. They were all ordered to undergo a period of police supervision for 5 years upon completion of their sentences. Their appeals to this Court are against conviction and sentence.

Briefly, the prosecution case was that on the evening of 27th of April, 1991 at about 7.30 pm, the 1st complainant, David Maina Waweru (PW7) who is a *matatu* operator, left Tea Room, Nairobi with 18 passengers in his motor vehicle Reg No KYT 282, Nissan Minibus, heading for Nyeri, when he reached Lower Tana power station along Nairobi / Sagana Road, one of the passengers who was seated next to him told him that he was alighting at that place and when he slowed down to stop, the said man switched off the engine of the vehicle. The next passenger who was with the said man then drew a pistol. He sensed danger and opened the driver's door and slipped off the vehicle into a ditch by the road side where he lied down.

The evidence of the 1st complainant (PW7) was corroborated by that of the 2nd complainant, Douglas Kamondo Ngata (PW1) who was one of the passengers in the said vehicle. He testified that after the

driver (PW7) had slipped off the vehicle when having been ordered not to drive by a man who was next to him, the said man took over the steering and drove off towards the bush as the other gangsters who had been seated in the vehicle posing as passengers were beating the passengers with metal bars. The vehicle was stopped in the bush and all the passengers were ordered to remove all their clothes and leave them in the vehicle together with everything they had. They were all stripped naked by the said gangsters amidst screams from the passengers. Those who were living within the neighbourhood started coming towards the scene and the said gangsters got scared and drove off leaving all the passengers there. PW1 testified that he was robbed of cash Shs 1,800/- a blue jeans suit, 1 pair of black shoes, a blue suit, and one piano key board valued 46,000/- a brief case

and other personal effects all valued at Shs 51,469/-. Other passengers in the vehicle were similarly robbed of various items and money. They then went to a local police station where they reported the incident. The police officers gave them a lorry which took them up to Nyeri. The 1st complainant (PW7) also came out of the ditch where he was hiding after he had heard his vehicle being driven away. He went to Wanguru Police Station and reported the incident.

On the same night at about 12.30 am the 3rd complainant, Livingstone Gachoki Kimicha (PW2) testified that as he was driving his motor vehicle Reg No KQK 109 Datsun 120Y from Maragwa towards Kirinyaga along Muranga/Sagana Road, he found some 2 men on the road who were supporting a 3rd man who appeared to be sick. They stopped him asking for transport for the alleged sick man to take him to hospital. He stopped and one of the said men entered the vehicle and immediately held him by the neck from the rear. Another man put a *panga* on his neck and several other people sprung up from the nearby bushes. They were in all 6 men. They ordered him to keep on driving. The man next to him placed a Somali sword on his stomach. After some 2 kms, he was told to stop and hand over the keys to his vehicle. He did so. He was then pulled out of the vehicle and the thugs took away his wrist watch and cash Shs 960/-. He was then taken further into the bush where he was beaten up and robbed of his cash. He was left there with his hands tied to a tree. They then drove off in his vehicle. He managed to untie himself, went to the road and got transport to Muranga Police Station where he reported the incident. His vehicle was later recovered by police along Sagana/Makuyu Road minus its battery and rear view mirror.

Later on the 27th of May, 1991 as the 2nd complainant (PW1) was reading a "Nation" newspaper for the 22nd of May, 1991, he saw a photograph printed on the paper of some people who had been convicted by the Kiambu Court as they were lead to the prison vehicle. The said men were described in the paper as highway robbers. He noticed that one of the said men wore a pair of jeans suit which resembled the one he had been robbed of. He was convinced that the said clothes belonged to him as he had cut off the sleeves of the jacket which were quite long on him and he even retained the two pieces that he had cut off. He went to Nyeri Police Station with the said newspapers and reported the matter. He carried with him his own photograph which he had previously taken in the same clothes. He was referred to Kiambu Police Station by IP Kigaru (PW6). They proceeded to Kamiti Prison where the said prisoners were held and with the help of the newspaper photograph, the 2nd appellant was produced. He was then wearing a pair of jeans suit make philips with cut sleeves. The 2nd

complainant (PW1) identified to the police the said clothes as the ones he had been robbed of. The same were then taken as exhibits.

In the meantime, the police officers on the 10th of May, 1991, arrested the 1st appellant in the course of their investigations and on the following day arrested the 3rd appellant. While interrogating the 3rd appellant, IP Kiragu (PW6) testified that he volunteered to take him to the bush where they had hidden some properties. He lead them to a bushy area near Muranga town. There PW6 testified that he recovered 3 receipts books belonging to motor vehicle Reg No KYT 282 which had been stolen from the 1st complainant (PW7) on the 27th of April, 1991. At that same spot, he also recovered a piano holder and two tapped cassettes together with a manual guide for the piano. He took possession of all these items which were identified by the 2nd complainant (PW1) while the 1st complainant (PW7) identified the two receipt books.

The appellants were later charged with the offences that were laid against them after various identification

parades had been held. The 3rd complainant (PW2) duly identified the 3rd and 2nd appellants at the parades as the two men who had stopped him while pretending to be assisting a sick man.

In their respective defences, the appellants denied all the offences that were laid against them saying that they had simply been arrested in connection with some other offences which they were then serving. They denied any involvement in all these robberies. In their respective petitions of appeal and written submissions, they attacked the correctness of their identification at the said identification parades. The 2nd appellant repeated his defence that the jeans suit that PW1 was claiming belonged to him. The 3rd appellant also denied that he was the one who had lead the police officers to the bush where 2 receipts books and some items identified by the 2nd complainant (PW1) were recovered.

I have scrutinized the recorded evidence. I am in agreement with the submissions of the learned state counsel that there was insufficient evidence to support the charge laid against the appellants in count 3. The evidence against the 1st and 2nd appellants who were convicted of this offence was based solely on the testimony of the 3rd complainant (PW2), who alleged that he had seen them at the scene by means of the head lights of his vehicle as he approached them and by means of his rear vehicle lights as he was reversing to assist them. Learned trial magistrate found that the prevailing circumstances were then not conducive for proper identification. The complainant had never known them before. They were

strangers to him and immediately he stopped his vehicle, he was attacked by a gang of 6 men who entered the vehicle and later robbed him of the same. In the absence of any corroboration of the testimony of the 3rd complainant (PW2), I am satisfied that the conviction of the 1st and 2nd appellants was not safe.

For reasons stated, I allow the appeals by the 1st and 2nd appellants in respect of count 3. I quash their conviction and set aside the sentence that was imposed on each of them.

As regards count 2, I am satisfied as was the learned trial magistrate that the 2nd complainant (PW1) satisfactorily identified the jeans pair of blue suit that the 2nd appellant was found wearing at the time of his arrest and later in prison remand after he had been arraigned before the Court for some other offence which does not concern us in this appeal. The jacket had its sleeves cut off. The complainant produced the two pieces which he stated he had cut off when the sleeves were long for him. The same had remained in his house when he was robbed of the same. He even produced his own earlier photographs which he had taken while wearing the said jeans suit showing the sleeves having been cut off. The 2nd appellant was also photographed after his appearance in Court by "Nation" newspapers while wearing same clothes. I am satisfied that these clothes belonged to the complainant and I am satisfied that the claim of ownership put by the 2nd appellant over these clothes were rightly disbelieved by the learned trial magistrate.

As I have found out above, the 2nd appellant was found in possession of the 2nd complainant's stolen clothes less than a month after he had been robbed of the same together with other items while travelling in motor vehicle Reg No KYT 282 as a passenger. The 2nd appellant who was found with these clothes was either one of the thieves who had stolen the same or a handler. I think that the available evidence of recent possession is more consistent with the 2nd appellant having been one of the thieves who had attacked and robbed the complainant. I hold that the 2nd count has satisfactorily been proved against the 2nd appellant.

I am equally satisfied after scrutinizing the recorded evidence that the 3rd appellant was the one who lead the police after his arrest to the bush near Muranga town where the two receipt books for motor vehicle Reg No KYT 282 which the 1st complainant had been robbed of were recovered. Also found at that place were other items which the 2nd complainant (PW1) had been robbed of in his brief case during the same incident. His defence that he had not lead the police to such a place in my view, was

not correct. As some of the stolen items were recovered at that place, such evidence was admissible under section 31 of the Kenya Evidence Act (cap 80 Laws of Kenya). This directly connects the 3rd appellant with the robberies that occurred on the 1st and 2nd complainants on the night of 27th / 28th of April, 1991. His conviction in respect of these counts was therefore quite safe.

Turning again to the 2nd appellant, I have found that he was found at the time of this arrest while wearing the jeans suit belonging to the 2nd complainant (PW1) which he had been robbed of on the material night. The offences in count 1 and 2 took place at the same time and place. I am satisfied that the 2nd appellant was also involved in the robbery in respect of count 1. It was an error on the part of the learned trial magistrate to have acquitted him on this count. As there was no cross – appeal by the State, I am afraid no conviction can now be entered by this Court in respect of this count.

All in all, I have found that the conviction of the 1st appellant (A3) in respect of the 2nd and 3rd counts cannot stand. I quash his conviction in these two counts and set aside the sentences that had been imposed. I order that he shall be set free and be released forthwith unless otherwise lawfully held.

As for the 2nd appellant (A2) his conviction in count 3 is quashed and the sentence imposed set aside. However his conviction in count 2 stands. The sentence of 7 years imprisonment which was imposed was not in my view manifestly excessive in view of the nature of the offence that the appellant had committed. The 10 strokes corporal punishment was quite excessive and I reduce the number of strokes to 4. I order that this sentence do run concurrently with another sentence that the 2nd appellant (A2) had been serving in Cr Case No 2073/91 from Kiambu Court. The order of police supervision stands upon completion of the sentence.

As for the 3rd appellant (A1), his conviction in count 3 is quashed and sentence that was imposed is set aside. His conviction in counts 1 and 2 is upheld. I also uphold the sentence of 7 years imprisonment that was imposed in respect of each count, however, I reduce the number of strokes in respect of each count to 2 thereby making a total of 4 strokes. The imprisonment term in count 1 and 2 to run concurrently. I order that the same will also run concurrently with the sentence that he was serving in respect of Cr Case No 2073 / 91 from Kiambu Court.

Dated and Delivered at Nairobi this 24th day of June 1994.

S.O.OGUK

JUDGE