



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU
(Coram: Madan & Kneller JJ A & Chesoni Ag JA)
CRIMINAL APPEAL NO 89 OF 1983

BETWEEN

EDWARD KABUI JACKSON KARIUKI

JOSEPH NGANGA KAHINDA APPELLANTS

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court
of Kenya at Nakuru (Bennett, J) dated
9th September, 1971
in
Criminal Appeals No 15 & 18 of 1971**

JUDGMENT OF THE COURT

Edward Kabui Jackson Kariuki (Kariuki) and Joseph Nganga Kahinda (Nganga) were convicted on January 6, 1971 by the Senior Resident Magistrate of Nakuru of robbery with violence contrary to Section 296(2) Penal code (Cap 63) and sentenced to twenty years' imprisonment with hard labour and 18 strokes corporal punishment.

They appealed to the High Court in Nakuru (Bennett J) and after hearing them and the State Counsel the learned judge dismissed their appeals on September 8, 1971. On April 18, 1983 (eleven years and seven months later) they gave notice of their intention to appeal to this court. We admitted their appeals even this late, consolidated and heard them this morning.

They were two of five accused charged jointly, with others not before the magistrate with robbing Francis Ngenge Ngugi of Kshs 164,499.10 and at or immediately before or immediately after the time of such robbery used personal violence to him.

The trial and first appeal of two others, James Mwangi and John Gabriel Gitau Kamau, followed the same course, and in this Court through their memorandum of appeal were filed as late as these they were heard because it was impossible to any where the blame lay (see judgment in Criminal Appeal 33 of 1982, at Nakuru of March 21, 1983) and the same is true of this one.

We cannot entertain the appeals of Kariuki and Nganga against sentence for it was (in early January, 1971) a legal one and we have no jurisdiction to deal with them in this second appeal. Another appellant in the High Court, Anthony Mwangi Nduma (Nduma) has since died. The appeals of James Mwangi and John Gabriel Gitau Kamau were allowed on March 21 this year because this court was satisfied there

was no evidence on which the conviction and sentence of either appellant could be sustained. It was circumstantial and for James Mwangi did not raise a hypothesis of guilt and for John Gabriel Gitau Kamau it was unreliable.

Bennett J's summary of the Republic's evidence was this:

“Between 9.30 and 10.00 am on November 4, 1970, a gang of armed men entered the Naivasha Agency Branch of Barclays Bank DCO, terrorized the bank staff and customers and stole currency notes and coins to the value of Kshs 164,493.10 from the Bank, together with certain other articles which will be mentioned hereafter. The gang left the bank in a white Cortina after the robbery. PW 4 saw the car leave the bank with a number of people inside it. When PW 6, the Chief Inspector, went to the bank as a result of telephone call, he met PW 4 outside the bank. As a result of information given to him by PW 4, he entered PW's car from which PW 4 and PW 6 noticed a white Cortina car in front of them in which there were a number of passengers. They followed the car to the bottom of the escarpment where the Cortina turned into a side road, leading to Kijabe.

They followed the Cortina for about three miles along this road. On catching up with it, they found it some 250 yards off the road abandoned. Subsequent investigation “established that it bore false number-plates and that it had been stolen in Nairobi on the 3rd November, 1970. The car featured in the trial Ex 15. PW6 followed fresh foot-prints in the wet earth which led through the bush from the abandoned car to a village in the Uplands area. The appellants were arrested in or near Kirenga village in the Uplands area within a few hours of the robbery.”

The Republic's evidence was that the appellant Nganga on the same day at about 1 pm ran up to and entered the house of Mrs Tera and she did not know him or invite him into it. The police boats arrived a few minutes later and did the same. Nganga came to the doorway, stood there, began to run off and was halted by the police. A search revealed a large number of currency notes under the blanket on one of Mrs Tera's beds and she denied all knowledge of them. There were, in all, Kshs 11,000 in notes on him and under the blanket similar to those the robbers took from the bank 21/2 hours before. Nduma was with Nganga until the police entered Mrs Tera's cottage and then he ran out and leapt the perimeter fence but was soon caught by a police dog. He had in his possession Kshs 18,117.95 in notes and coins similar to those carried off from the bank by the robbers 21/2 hours before.

Both Nganga and Nduma were arrested within talking distance of the stolen Cortina in which the gang arrived at and escaped from the bank.

Nganga was charged with this offence and cautioned and in his reply said he and eight other men took part in the event. His share of the booty was Kshs 11,000 which was found in his possession at the time of his arrest.

He admitted that his palm prints were found on the false number plates on the stolen Cortina which the gang used for the raid.

Nganga repudiated the confession alleging his reply had been that he knew nothing about the matter and he signed this statement not realizing what it contained. The learned magistrate had a trial within a trial and held it was a correct record of what Nganga said of his own free will. The judge refused, after due consideration, to upset that ruling and, in effect, made the same finding. Those are concurrent findings.

Nganga elected to make an unworn statement in which he said he worked in Nairobi as a panel beater, paint sprayer and repairer of number plates which he fixed to cars. On November 4, 1970 he was arrested by an armed policeman behind a house at Kirenga. He had Kshs 330.75 in his pocket.

The magistrate and judge considered all the evidence against and for Nganga together and declared the witnesses for the prosecution told the truth and Nganga did not do so. So far as Nganga is concerned, then, there are concurrent findings by the trial court and the first appeal court that Nganga voluntarily confessed to his part in the robbery. He repudiated it. Corroboration of it is in his palm print on the

number plate, false number plate on the Cortina, the stolen Cortina, used in the operation abandoned in the area. Add to that the sum of Kshs 11,000 in notes and coins similar to those stolen from the bank 21/2 hours before which were found in his possession. No one swore, it is true, they were some of the very same notes stolen from the bank but they amount to the sum he said was his share of the loot. The total is more than a Nairobi panel beater would have on a visit to his brother a mason in Kirenga. Finally, there is an alibi he put forward as his defence which the Republic proved beyond any reasonable doubt was false.

Turning to Kariuki, the case against and for him was this. At about 12.30 pm on the day of the attack on the bank he was walking along a road near this same Uplands area village, Kirenga, and a policeman stopped and challenged him and he bolted. He cast off his black coat and in it or in his trouser pockets he had Kshs 5,838.25 in currency notes similar to some of those grabbed by the gang from the bank. He was chased and caught by some public spirited students whom the police rallied to their help.

He was implicated in the reply of Anthony Mwangi Nduma who was caught by the police dog after he had cleared her garden fence. Nduma inculpated himself in his statement.

He also said:

“I did not rob but I was with the robbers. I was guarding the vehicle outside waiting for the money and I was given Kshs 81 by Edward Kabui Kariuki. Then I went to Uplands”

Kariuki's unsworn statement set out his defence; an alibi. He had traveled up from Mombasa, where he lives and on November 4 between 9 am and 10.30 am he was in Kirenga trying to find a school contemporary. He was very suddenly overwhelmed by about 100 people who burst out of a maize plantation. They flung him to the ground, beat him and removed his shoes, watch, 50 envelopes and Kshs 140 cash. They took him towards the police station beating him again. His nose bled and he passed out, so they abandoned him. He came to three days later in Tigoni Hospital. Then he was arrested and charged. Again two courts having set out all this and looked at it as a whole found they believed the prosecution witnesses and not Kariuki.

So his alibi was proved beyond a reasonable doubt to be false. The appellant had this judge sum of money on him in his coat or trousers which he did not account for in his defence but was not shown to be part of the money stolen from the bank. He cast of his coat when he took to his heels when the policeman checked him. Nduma's statement was found after a trial within a trial to have been made voluntarily by him. He inculpated himself and it could be taken into consideration against Kariuki, a co-accused, if it implicated him but it did not do so because all Nduma said was Kariuki gave him Kshs 81: Section 32(1) Evidence Act. Anyway, it is accomplice evidence and evidence of the weakest kind (especially if the confession is repudiated) Anyima Omolo v R [1953], 20 EACA 218; and can only be used as lending assurance to other sound evidence against Kariuki: Gopa Gidamebanya [1953], 20 EACA 318 and Anyangu v R [1968] EA 239 (CA-T) which is what the trial judge did but, with great respect, there was no other sound evidence against Kariuki.

Nganga has not shown that the trial magistrate or judge made an error in law by a wrong assessment of the evidence before him or failure to apply a correct principle. His conviction was rightly entered. Kariuki succeeded in showing that there was an error of law and his conviction is not safe.

Nganga's appeal is dismissed and Kariuki's is allowed.

Kariuki's conviction is quashed and his sentence set aside, so he must be released forthwith unless he is otherwise lawfully detained.

Delivered at Nakuru this 7th day of October, 1983.

C B MADAN

JUDGE OF APPEAL

A A KNELLER
JUDGE OF APPEAL

Z R CHESONI
AG JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR