



## IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Potter JJA & Kneller Ag JA )

### CRIMINAL APPEAL NO 136 OF 1981

**RAPHAEL NGOYA & 5 OTHERS .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the High Court at Nairobi, Chesoni & O’Kubasu JJ)*

### JUDGMENT

The six appellants in this second appeal were jointly charged in the court of the Senior Resident Magistrate at Kisumu with three counts of robbery with violence, contrary to section 296(2) of the Penal Code, one of burglary contrary to section 304(1)(a) of the Penal Code, and one of shop-breaking contrary to section 306(a) of the Penal Code. All these offences are alleged to have been committed at Kadero Village and the neighbouring village of Bukuyi Market in North Wanga Location of Kakamega District on the night of May 30/31, 1979, by a gang of robbers armed with firearms. In the course of the commission of these offences, a woman, a young girl and a man were wounded by bullets fired from the firearms carried by the robbers. The wounded man subsequently died.

In the same charge sheet the 4th, 5th and 6th appellants were further jointly charged, together with another man with whom we are no longer concerned, with two further counts of robbery with violence, contrary to section 296(2) of the Penal Code. The offences are alleged to have been committed on the night of June 23/24, 1979, at Buhunyi Village in Marachi Location of Busia District. Firearms were again used on this occasion, but no-one was wounded.

The complainants in the first two counts of robbery were Marcelina (PW 1) and Adijah (PW2), two wives of Okumu (PW3), each living in her own house. A third wife, Josephine (PW9) lived in a third house. That house was the first to be attacked, and Josephine was forced by the robbers to accompany them to the houses of the other two wives. A considerable amount of property and money was stolen from the houses of Marcelina and Adijah by the armed robbers, who drove off with their loot in a Mazda pick-up belonging to Okumu which they stole. The gang then went to Bukuyi Market about 1 kilometre away and there committed a further robbery with violence and a shop-breaking in the course of which much property including shop goods and money were stolen.

On June 9, 1979, Chief Inspector Watunda (PW7) saw and stopped the stolen Mazda. Its colour had changed from blue to red and it bore false number plates. It was being driven by the 3rd appellant, Ogola, next to whom was sitting the 2nd appellant, Ohonjo.

The robberies charged in counts 6 and 7 were committed on the night of June 23/24, 1979, in the houses

of Judith (PW15) and Birgita (PW16), the wives of Mukhwana (PW17). Again, much property and some cash were stolen.

On June 24, 1979, Chief Inspector Rabura (PW19) and Inspector Gitau (PW20), accompanied by the 2nd and 3rd appellants who had been arrested on June 9, went to the houses of these appellants in which large quantities of shop goods similar to those stolen at Bukuyi Market on the night of May 30/31 were found. The 2nd and 3rd appellants then led the police party to the house of 1st appellant Raphael where more similar goods were found; then the 1st appellant led the police party to the house of the 5th appellant Okech in which were also the 4th appellant Paul Mbugua and the 6th appellant Vincent, and a considerable quantity of property similar to that stolen from the various complainants. The 5th appellant led the police party to the house of his step-father who produced an automatic rifle and a quantity of ammunition; they then returned to the 1st appellant's house where his wife at his request produced a pistol. Expert evidence established that the rifle was the one which had fired two spent cartridges recovered from the scene of robberies on May 30/31.

Chief Inspector Tambo (PW23), from Kakamega CID, took charge and caution statements from the 1st, 3rd, 4th and 6th appellants on June 29, and from 2nd and 5th appellants on July 3. All these statements amount to full confessions to all the offences with which the makers were charged. All these statements were objected to at the trial, and repudiated or retracted, on the ground that they were induced by repeated ill-treatment and torture administered by unnamed policemen before the makers were taken before Chief Inspector Tambo, against whom personally no allegations were made. The learned trial magistrate held a separate trial within a trial in respect of the 1st appellant's statement, and admitted it in evidence as having been made voluntarily. Then a joint trial within a trial was held in respect of the statements of the other 5 appellants, and each one was admitted in evidence as having been made voluntarily.

In a full and careful judgment the learned magistrate considered in detail the evidence for the prosecution and for the defence. He directed himself carefully and correctly as to the caution to be exercised before accepting the evidence of a single witness as to identification when the circumstances are unfavourable to accurate identification, and as to necessity for corroboration in the case of retracted and repudiated confessions, which should not be acted upon unless shown to be true. He was left with no doubt as to the guilt of all 6 appellants, and convicted them all on the first 5 counts (May 30/31) and the 4th, 5th and 6th appellants on the 6th and 7th counts (June 24/25), and sentenced them to the mandatory death sentence on count 1, leaving sentences on the other counts in abeyance.

The 6 appellants appealed to the High Court, and for the first time some of them, the 1st, 2nd and 4th appellants were legally represented, the other 3 being unrepresented.

The learned first appellate judges, in a long and detailed judgment, criticized the holding of a joint trial within a trial in respect of the statements allegedly made by appellants 2,3,4,5 and 6, but held that this irregularity was not fatal to the convictions as no prejudice or failure of justice had been occasioned. They however decided that the statements made by the 2nd and 3rd appellants should be excluded from evidence, as the makers had been in custody for 23 and 20 days respectively before their statements were taken or any charges preferred, a period which the learned judges rightly considered unduly long. They were satisfied that the confession statements of the 1st, 4th, 5th and 6th appellants were rightly admitted as voluntary, and we see no reason to differ. They also held that there had been no misjoinder of persons in the charge, in view of section 136 (c) of the Criminal Procedure Code, as the 3 appellants who were charged with participating in the second series of robberies were also charged with participating in the first series with the other 3 appellants.

The learned first appellate judges had a doubt as to whether the 4th appellant Paul Mbugua was an active participant in the offences committed on May 30/31 and they allowed his appeal against conviction on the first five counts, but they dismissed his appeal against conviction on counts 6 and 7, the offences committed on June 23/24, and sentenced him to the mandatory death sentence on count 6. Otherwise the appeals of all the appellants were dismissed.

On the second appeal to this court Mr Kirundi appeared for the 1st, 4th and 6th appellants, Mr Odero for

the 2nd appellant, and Mr Mugo for the Republic. The 3rd and 5th appellants informed us that they preferred to defend themselves.

We are indebted to Mr Kirundi and Mr Odera for their able and clear presentation of the points of law and of mixed law and fact on which they relied.

These related to –  
1. Identification  
2. The joint trial within a trial  
3. The taking of charge and caution statements from all 6 appellants by the same officer.  
4. Misjoinder of persons and charges.

As regards identification, the circumstances on both occasions did not favour accurate observation, as it was night-time and the witnesses were naturally terrified by the firing of guns and were generally confused. Both courts below had these considerations very much in mind. Josephine (PW9) purported to identify the 3rd appellant (Ogola) as being the robber with a gun who shot and wounded the girl Akumu. Judith (PW15) purported to identify the 4th, 5th and 6th appellants on the night of June 23/ 24. The trial magistrate, strangely enough, does not mention Josephine's identification evidence, but the first appellate judges accepted it as reliable, pointing out that she was taken by the robbers to the house of Marcelina (PW1) and that she was with the robbers for some considerable time while they were flashing torches, and the reliability of Josephine's evidence as to the identity of the 3rd appellant was confirmed by the fact that the 3rd appellant was found in possession of the Mazda pick-up, which was stolen on the night in question, only 9 days later. As regards Judith, the trial magistrate accepted her evidence that she saw the 4th, 5th and 6th appellants on the second occasion. She was with them for a long time, while they were using their torches to search for things to steal, and the first appellate judges also considered her evidence to be reliable. We see no reason to think that the evidence of Josephine and Judith was wrongly accepted, in the circumstances of this case.

As regards the joint trial within a trial, we do not think it was objectionable in the circumstances of this case, where the same witness recorded and produced statements made by 5 appellants. Different considerations might arise in the case of a trial with assessors, but we do not see any prejudice having arisen in this particular case by the procedure adopted by the trial magistrate. Having said that, we think it preferable in all cases where there are several accused persons to hold separate trials within a trial but the failure to do so is not fatal unless prejudice can be shown to have been occasioned, which was not the case here.

As regards the alleged misjoinder of more than one accused in the same charge, the learned first appellate judges were of the opinion that section 136(c) of the Criminal Procedure Code covered this case. That section provides that persons accused of more offences than one of the same kind can be joined in one charge and tried together if the offences were committed by them jointly within a period of twelve months. With respect to the learned judges, we do not think that the offences with which we are concerned were committed by all the accused jointly. For instance, the 2nd and 3rd appellants were in custody when the offences of the June 23/24 were committed, so that those offences cannot have been committed by the 2nd and 3rd appellants jointly with the 4th, 5th and 6th appellants on that date. However, it seems clear that the offences committed on both occasions were committed by the same gang, although not consisting of exactly the same persons on both occasions, that the same weapons were used, and that the offences formed part of a series of offences of the same or similar character and were properly charged together, under section 135(1) of the Criminal Procedure Code.

As regards the taking of charge and caution statements from more than one accused person by the same police officer, we know of no authority for the proposition that this is irregular. It is no doubt preferable that each statement should be taken by different officers, but some regard must be had to practical considerations. If there are, for instance, 10 co-accused, it would hardly be a practical proposition to assemble 10 officers of the requisite rank to record the 10 statements, without undue wastage of time, effort and expense.

Mr Odero made the point, in favour of the 2nd appellant Ohonjo, that once his confession statement was excluded (as it was on first appeal) his appeal should have been allowed, as all that then remained against him was his presence in the stolen Mazda on June 9, for which presence he gave the explanation that he was an innocent passenger, and the fact that he was implicated by being referred to in the confession statements made by some of his co-accused. Such implication is evidence of the weakest sort, which can be taken into consideration, under section 32(1) of the Evidence Act, but only to lend assurance to other evidence. The only other evidence against the 2nd appellant is his presence in the stolen car, 9 days after it was stolen, for which he gave an explanation that could possibly be true. Mr Mugo conceded that the case against the 2nd appellant, once his extrajudicial statement was excluded, was very weak. We agree, and allow his appeal against conviction on counts 1,2,3,4 and 5, and set aside the sentence of death passed on him on count 1.

We now turn to a consideration of the case against the other appellants.

The 1st appellant Raphael made a full confession of his participation in the offences committed on the night of May 30/31, and that statement is corroborated and its truth confirmed by the fact that he led the police to the house of the 5th appellant, in which some of the stolen property was found. Later his wife, at his request, produced a pistol from his house. Also, this appellant is implicated in the confessions of the 4th and 6th appellants. We have no doubt that he was properly convicted. The 3rd appellant Ogola was proved to have been in possession of the Mazda car on June 6, 7 days after it was stolen, when he employed Otieno (PW5) to change the colour of the car, which was blue, by painting it red with paint provided by Ogola, who told him the car was his. Otieno's evidence was corroborated by Constable Ndungu (PW8) who went to Ogola's house on June 12, and who found buried in the adjoining maize shamba 4 tins of red paint and the original number plates of the Mazda. In addition this appellant was identified by Josephine (PW9) and he is implicated in the confession statements made by the 1st – 4th and 6th appellants. There can be no doubt whatever that the appellant no 3 Ogola was properly convicted.

The 4th appellant Paul Mbugua made a full confession of participation in the offences committed on both occasions, which is corroborated by the fact that he was identified by Judith, who had seen him over a long period of time on June 23/24, and he is also implicated in the confession statements of the 1st and 5th appellants.

The 5th appellant Peter Okech also made a full confession, which is corroborated by the finding of recently stolen property in his house, by his identification by Judith, and by the fact that he led the police party to the house of his step-father (the original 7th accused) who revealed the whereabouts of the rifle used in the various robberies. This appellant maintains that his statement should not have been admitted as it was induced by ill-treatment which necessitated his being sent to the New Nyanza General Hospital on July 5, 1979, five days after his statement was recorded. The appeals both in the High Court and in this court were adjourned, and both courts made efforts to obtain a copy of the relevant medical record and report on the appellant's condition from the Hospital, but without success. We accept that this appellant was treated in hospital as an out-patient on July 5, as is confirmed by the Kisumu Occurrence Book, but we do not know whether it was for him to be treated for sickness or for physical injuries. Chief Inspector Tambo, who recorded the statement of this appellant, deposed that it was made voluntarily, without any threat, promise or inducement. He did not notice any injuries on this appellant, nor was he cross-examined by this appellant as to this. All this appellant asked the Chief Inspector was whether anyone else was present when the statement was recorded, the answer being that no-one else was present. We see no reason to differ from the concurrent holdings of both courts below that this appellant's statement was voluntary, but even if his statement were to be excluded, there remains against him the fact that he was identified by Judith, evidence which is corroborated by the discovery in his house of several articles of stolen property, and assurance is lent to the reliability of Judith's evidence by the fact that this appellant is implicated in the confession statements made by the 1st, 4th and 6th appellants. We see no merit in the appeal of the 5th appellant.

The 6th appellant was also identified by Judith. He was arrested in the 5th appellant's house. He made a full confession, which although retracted was admitted as voluntary and true, and which is supported by the fact that he is implicated in the confession statements made by the 1st, 4th and 5th appellants. We

think he was rightly convicted.

We accordingly dismiss the appeals of the 1st, 3rd, 4th, 5th and 6th appellants. The sentence of death passed on them is mandatory. The appeal of the 2nd appellant against conviction on all the counts of which he was convicted (counts 1,2,3,4, and 5) is allowed, and his convictions on those counts quashed, and the sentence of death passed on him set aside. He is to be set at liberty unless otherwise lawfully detained.

And we order accordingly.

**Dated and delivered at Nairobi this 28th day of October , 1982 .**

***E.J E LAW***

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***JUDGE OF APPEAL***

***K.D POTTER***

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***JUDGE OF APPEAL***

***A.A KNELLER***

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***Ag. JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**