IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJ A)

CRIMINAL APPEAL NO 47 OF 1979

BETWEEN

STEPHEN MAGWA MUIRURI.....1ST APPELLANT

MICHAEL KAMAU WILLY.....2ND APPELLANT

DANIEL NGURE KAHURO.....3RD APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the dismissal by Trevelyan and Todd JJ on 16th March 1979 in High Court Criminal Appeal Nos 904, 905 and 906 of 1979)

JUDGMENT OF THE COURT

The three appellants were co-accused on eight counts of robbery with violence, contrary to section 296(2) of the Penal Code, before the Senior Resident Magistrate, Thika, who convicted them on seven counts, sentencing them according to law. The complainant named in the fifth count having left the country, no evidence was led and the appellants were acquitted in respect of it. Their appeals to the High Court have been dismissed, except that the second appellant's conviction was quashed and the sentence set aside in respect of the eighth count.

On the night of 8th March 1977, St Francis Convent at Mangu was raided by a gang of five or more robbers who were armed with *simis*, *rungus* and *pangas*. The three appellants as members of the gang were alleged to have jointly robbed six sisters of cash and various articles, including a Toyota vehicle (registration KPQ 75), which were set out in the relevant counts in the charge sheet. In the seventh count, the appellants were alleged to have jointly robbed a watchman of the convent, named Benson Mundia, of his *simi* and torch. In the eighth count the appellants were alleged to have similarly robbed one Onsare Onunda of his Ford vehicle (registration KMU 151), this robbery being physically committed near the Thika flyover bridge only by the first and third appellants.

Onsare and his companion John Maina Kamiti, who was with him in the car at the time, struggled and resisted the first and third appellants before these two robbed Onsare of his car. When the police made a search of the area soon afterwards they found the first appellant's driving licence lying about 3 yards away from the car and also a *simi* and some documents including a letter, which gave the first appellant's address care of a woman at Nyandarua. The Toyota vehicle (registration KPQ 75) was also lying there abandoned about 50 feet away from Onsare's car. Other articles like a television set, mosquito nets, a

toaster, a suitcase, typewriters and clothes (which had been stolen from the convent earlier that night) were also found at the scene.

On 14th March, 1977 Sister Cecilia Sweeney, who had called at Thika police station in connection with an identification parade, drew the attention of the police to a suitcase there as the one she had packed on the orders of the first appellant on the night of the robbery. She named the articles which she said she had put in the suitcase. On its being opened, practically all the items mentioned by her were found in the suitcase.

The police did not find the first appellant when they called at his Nyandarua address on the night of 9th/10th March. The police then proceeded to his father's house at Jericho, Nairobi, next morning where they found the first appellant packing goods in two cartons, one wooden box and a suitcase. Two *simis* in sheaths and two applications for a driving licence in the name of the first appellant and dated 10th March 1977 were also found in the house. One of the applications for a driving licence stated that the first appellant lost his driving licence while on *safari* at Nakuru.The suitcase was the one which Sister Sweeney had packed on the orders of the first appellant.

A charge and caution statement was recorded from the first appellant on 15th March 1977. It was first recorded in Kikuyu the first appellant's own language but his signature was not obtained on it. Instead, Ins Meshak who recorded the statement obtained the first appellant's signature on an English translation of the statement in Kikuyu. The first appellant understood English well and he signed the English translation after reading it and agreeing that it was correct.

We would dispose of the question of the proper admissibility of the first appellant's statement at this stage. The fourth ground of appeal before us is that the judges of the High Court erred in finding that the first appellant's cautionary statement was properly and correctly admitted. In his sworn evidence in Court the first appellant said that he made no statement and did not sign any statement so that the statement produced in Court was a forgery.

The magistrate, after a trial within a trial, found that the statement was voluntarily made by the first appellant. Whether or not a statement tendered in evidence was or was not made by an accused person is a question of fact for the trial judge; see *Mwangi s/o Njoroge v R* (1954) 21 EACA 377.

A look at the statement tells us that neither Ins Meshak nor the first appellant himself signed the document at the close of the Kikuyu version, although they both signed at the end of the English version and thereafter Ins Meshak also signed the certification. We can see no merit in the argument that the statement was inadmissible because the first appellant did not sign the Kikuyu version of his statement. We also do not accept that the statement was not voluntarily made by the first appellant or that the judges erred, as has been submitted to us.

The identification of the accused persons in a case of capital robbery is always an all-important issue at the trial. It has been argued before us with force that the judges erred in finding that the identification of the appellants was satisfactory, having regard to all the circumstances of the case. So much that Mr Barasa argued only that ground of appeal on behalf of the second and third appellants before us. He said that if the judges of the High Court had adequately applied their wisdom they would have given the benefit of doubt to these two appellants. The judges went into this aspect of the case with care and in detail which we have examined also with care and in detail after having previously perused the whole record of the trial, again, with care and in detail. We are satisfied that the three appellants were identified properly and beyond reasonable doubt as three members of the gang who committed the various robberies with which they were charged, save the acquittal of the second appellant in respect of count eight (as already stated). The evidence against them amply supported the charges under section 296(2). The defence of each of them was not rejected without giving it due weight as it has been argued before us by Mr Karanja who appeared for the first appellant.

We have noted with concern that the appellants were charged and tried on eight counts of capital robbery at the same time. We consider, and State counsel agreed, that it is preferable to proceed on one count of

capital charge only leaving the other counts, if more than one, in abeyance even if the other charges appear inter-linked; but we do not think that the procedure followed in this clear case caused any prejudice to the appellants.

The appeals are dismissed.

Appeals dismissed.

Dated and delivered at Nairobi this 3rd day of March 1980.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR