



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)**

**CRIMINAL APPEAL NO. 58 OF 2015**

**BETWEEN**

**STEPHEN MUOKI MUSYOKA.....1ST APPELLANT**

**SAMUEL KURIA IRUNGU..... 2ND APPELLANT**

**DAVID KIBUE MUCHEKE..... 3RD APPELLANT**

**LAZARUS KANGETHE NJOROGI..... 4TH APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi*

*(Kimaru & Nyamweya, JJ.) dated 11th November, 2013*

in

**H.C. Cr. A. NO. 373-375 OF 2014)**

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**JUDGMENT OF THE COURT**

1. The four appellants were convicted by the Chief Magistrate, Nairobi of three offences namely; robbery with violence contrary to section 296(2) of the Penal Code in count 1, impersonating a public officer contrary to section 105(b) of the Penal Code in count 2; unlawful possession of Government stores contrary to section 324(3) of the Penal Code in count 3. Each was sentenced to death for robbery with violence. The trial magistrate did not pass sentence in respect of the 2nd and 3rd counts for the reason that he had already sentenced the appellants to death in the first count. The appellants appealed to the High Court against the respective conviction and sentence. Upon consideration of the appeal, the High Court dismissed the appeal against conviction for robbery with violence and impersonating a public officer and ordered that the sentence for the latter offence be held in abeyance. However, the appeal against conviction in respect of the offence of possession of Government stores was allowed and the conviction quashed. By this second appeal, the appellants assail the judgment of the High Court on various grounds.

2.1. The prosecution case in summary was as follows.

On 14th May 2009, **Lazarus Kangethe Njoroge**, the 4th appellant hired a green Rav 4 Registration No. KAU 147X from **Joseph Maina Kamanthi (Joseph)** of Evolution Car Hire and Tours Limited at Shs. 4,500/- per day for two days. The 4th appellant paid Shs. 9,000/-. The 4th appellant boarded the vehicle and it was driven away by a person who was in the company of the 4th appellant. On 15th May, 2009 at about 10.00 a.m. **Josphat Mweu Mutua (Josphat)**, the complainant in the first count of robbery with violence withdrew Shs. 15,000/- from an ATM at Equity Bank along Koinange Street, Nairobi City. He put the money in the rear pocket and crossed the road to where there was a Bata shop. As he was walking, he was called by people who were in a motor vehicle who accused him of being a member of 'Mungiki' and told him to board the vehicle. When he entered, he found two people seated at the front seat and two at the rear seat. One of them was in police uniform and had a 'walkie talkie'. He was handcuffed and his face covered with clothes. He was put on the back between two men and the vehicle was driven away. On the way, one of the men in the car took his money. The clothes covering his face were removed near State House.

2.2. Meanwhile **Cpl. Daniel Wambua (Cpl. Wambua)** and **Chief Inspector Jackson Owino (CI Owino)** who were in an unmarked patrol car at the junction of Uhuru Highway and University Way received communication from the Central Room that a person had been forced into a green Rav 4. which was driven towards Koinange street. The two police officers took a turn and headed towards University Way. At the junction of University Way/Monrovia street, they saw a green Rav 4 registration “No KAX 147X” that was being driven roughly. They took interest in the vehicle as it was similar in description to the one whose details had been circulated. The green Rav 4 was driven towards Nyerere Road and joined Processional Way. There was a traffic jam and the vehicle made a U-turn and the two police officers blocked it using the patrol car and fired in the air and ordered the vehicle’s occupants people to surrender. Five people alighted from the vehicle and were ordered to lie down. The five people were the four appellants and the complainant. The complainant reported at the scene that he had been hijacked and robbed of Shs. 15,000/-.

2.3. The vehicle and the suspects were searched and Shs. 15,000/- recovered from the shirt pocket of the 1st appellant. Police also recovered a black suitcase from the boot of the car which contained a jungle jacket, jungle trouser, ballet, handcuffs, walkie talkie and other items. According to **Cpl. Daniel Wambua**, the vehicle was being driven by **Samuel Kuria Irungu**, the 2nd appellant herein. Police officers from Kamukunji police station arrived and took over the investigations. On 21st May, 2009 **Joseph** was summoned at Kamukunji police station where he identified the recovered motor vehicle as his.

3. The 1st appellant stated at the trial that on 15th May, 2009, he was walking on processional way towards the offices of Citizen Radio to place a funeral announcement when he heard gunshot and lay down by the road side. The CID Officers came and arrested all people who had emerged from vehicles and lay down. He was then arrested with five other people. The 2nd appellant stated that on 15th May, 2009 he alighted from a matatu near Serena Hotel and started walking along Processional Way when he heard gunshots and was ordered to lie down.

On his part, the 3rd appellant stated that on 15th May, 2009 he was walking along State House Road towards House of Leather when he heard gun shots and lay down. Then the police searched him and many other people who were all over the road.

Lastly, the 4th appellant stated that he had hired a motor vehicle to travel to Murang’a and on the material day he was driving towards State House when he found a traffic jam. He then heard gun shots and decided to turn back but his vehicle was blocked and when he alighted from the motor vehicle, he was ordered to lie down.

4. The trial magistrate considered the evidence and identified the issues for his determination thus:

**“The issue which falls for determination is whether or not the accused persons are the people who hijacked and robbed the complainant and whether or not they were the same people who were arrested after alighting from the motor vehicle which the complainant was. Whereas the key prosecution witness said that the accused persons are the people who alighted from the motor vehicle in which the complainant was, the accused persons on the other hand said that they were innocent travelers along Processional Way who were caught up in a police operation. This would imply that the police let loose the real culprit people.”**

After evaluating the evidence, the trial magistrate believed the prosecution witnesses and disbelieved the evidence of each appellant.

5. The High Court considered the grounds of appeal raised and made findings, amongst other things, that the ingredients of the charge of robbery with violence were proved; that the contradiction in the evidence in the description of the vehicle and the money stolen was not material or fatal to the conviction; that the complainant identified the 1st and 4th appellants and **Cpl. Wambua** and **CI Owino** positively identified all the four appellants as persons who were in the car after the robbery and whom they arrested; and that the 4th appellant was in recent possession of the suitcase in the car he had hired and did not give any explanation as to how the suitcase which contained suspected Government stores used to commit the robbery came to be in the motor vehicle.

6. The 1st and 4th appellants are represented by **Mr. Oyalo** who relied on the grounds in the supplementary memorandum of appeal filed on 20th January, 2016.

The 2nd appellant is represented by **Mr. Amutallah** who relied on the grounds of appeal in the supplementary memorandum of appeal filed on 8th February, 2016. The 3rd appellant is represented by **Mr. Paul Mugwe** who relied on the supplementary memorandum of appeal filed on 10th February, 2016. The grounds of appeal essentially raise the same issues although expressed in different words. They fault the High Court in failing to find that the ingredients of the offence of robbery with violence were not proved; in failing to re-evaluate the evidence and find that the evidence was inconsistent and contradictory; in failing to find that the evidence did not prove the charge, and, in failing to find that each of the appellants was not identified. **Mr. Omirera**, prosecuting counsel opposed the appeals.

7. The issue whether or not robbery with violence was proved was raised in the High Court. The High Court considered the evidence and the law and made a finding that Shs. 15,000/- was stolen from the complainant by four persons; that Shs. 15,000/- was recovered from the 1st appellant when he was in the company of other appellants. **Section 295** of the Penal Code defines the offence of robbery thus:

**“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”**

Thus the ingredients of the offence of robbery are theft and use of threat or use actual violence immediately before or immediately after the stealing.

**Section 296 (2)** of the Penal Code provides:

**“(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”**

8. In Johanna Ndungu v Republic [1996] eKLR cited by counsel for 1st and 4th appellants, this Court said in part:

**“In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2)...”**

9. The facts in this appeal show that the complainant was called by people who were inside a vehicle and accused *Josphat* to be a member of ‘*Mungiki*’. He was told to get into the vehicle and he found four persons. Upon entering, he was sandwiched on the rear seat between two persons. He was then handcuffed, blind folded, driven away and Shs. 15,000 removed from his rear pocket in the course of the journey. One person was in police uniform and a walkie talkie. In those set of circumstances, robbery as defined in section 295 of the Penal Code was committed as there was theft and tacit use of personal violence immediately before the theft. One additional element in section 296(2) was proved that the 1st appellant in whose possession the Shs. 15,000/- stolen was recovered was in the company of three other persons. Those three elements completed the offence of robbery with violence and section 296(2) of the Penal Code.

10. The other grounds of appeal essentially refer to the sufficiency of the evidence. The contention of the appellants is that the prosecution did not prove the charges beyond reasonable doubt for reasons, amongst others, that the complainant did not prove that he had withdrawn the money, the evidence relating to description of the vehicle and the money was inconsistent; that the appellants were positively identified and the defence of each appellant was not considered. We are satisfied from the excerpt of the judgment of the trial magistrate quoted in paragraph [4] above that the trial magistrate correctly appreciated the essence of the prosecution and defence case. Thus, whether or not the charges were proved beyond reasonable doubt depended on the credibility of the key prosecution witness and the evidence of each appellant explaining the circumstances in which each was arrested.

The prosecution case was dependent on the evidence of the complainant *Josphat*, *Cpl. Wambua* and *CI Owino*. The trial magistrate considered their evidence and made a finding that the inconsistencies in the evidence of the witnesses as to the denominations of the recovered money and the correct registration number of the vehicle that the appellants were using did not affect the veracity of the testimonies of the witnesses. Similarly, the High Court evaluated the evidence in great detail and believed that the prosecution evidence saying that any contradictory evidence in the registration number of the motor vehicle and in the currency was neither material nor fatal to conviction.

11. The complainant identified the 1st and 4th appellants as among the four persons who were in the vehicle, and *Cpl. Daniel Wambua* and *CI Jackson Owino* identified each of the four appellants and the complainant as the five people who alighted from the vehicle after they blocked the vehicle. The appellants were arrested in broad daylight. All the appellants admitted the version of the evidence of the two police officers that there were gun shots and that they were arrested at the scene while lying down. *Cpl. Wambua* identified the 2nd appellant as the person who was driving the vehicle. The evidence of the complainant that one person was in police uniform and that he was handcuffed was supported by the evidence of recovery of a suitcase in the back of the car containing police uniform and handcuffs. Further, the evidence of the complainant and the two police officers that the 4th appellant was among the people inside the car was supported by the evidence of *Joseph* who identified the 4th appellant as the person who had hired his car which was recovered by the police. Lastly, since Joseph identified the vehicle recovered as the one hired by the 4th appellant, the mis-description of the vehicle by *Cpl. Wambua* and *CI Owino*, who in any case handed over the investigations to Kamukunji police station was not material.

12. We are satisfied that the concurrent findings of fact that the four appellants robbed the complainant and were inside the vehicle together with the complainant when the police blocked it, was supported by credible and cogent evidence and that the appellants were properly convicted for the offence of robbery with violence and impersonating police officers.

13. As regards sentence, the appellants were sentenced to death on 30th June, 2010 for the offence of robbery with violence. The record of the trial court shows that no mitigation was received from the appellants. In Francis Karioko Muruatetu & Anor v Republic [2017] eKLR, the Supreme Court held that **section 204** of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for mandatory death sentence for murder and that death sentence is a discretionary maximum sentence. That decision has been applied by this Court to the mandatory death sentence provided in **section 296(2)** of the Penal Code for the offence of robbery with violence (See William Okungu Kittiny v Republic, Court of Appeal at Kisumu Criminal Appeal No. 56 of 2013; Daniel Gichimu Githinji & Anor v Republic [2018] eKLR. The record of the trial shows that one magistrate disqualified herself from hearing the case because she was already hearing Criminal Case No. 990 of 2009 with similar facts as this case. Thus full information regarding the appellants is not before the Court. Further, sentence was not passed for the offence of impersonating police officers. In the circumstances this is a proper case where the case should be remitted to the trial court which was the Chief Magistrate for sentence rehearing in accordance with **section 361(2)** of the **Criminal Procedure Code**.

For the foregoing reasons,

**(i) The appeal of each appellant against conviction for robbery with violence in count 1 and impersonating a public officer in count 2 is dismissed.**

**(ii) However, the appeal of each appellant against sentence for the offence of robbery with violence is allowed and the sentence of death is set aside.**

(iii) The case is remitted to the Chief Magistrate Court for sentence hearing and re-sentencing for the offence of robbery with violence and impersonating a public officer.

(iv) The appellants to be produced before the Chief Magistrates Court within 21 days from the day hereof for directions regarding the sentence rehearing and sentencing.

Dated and delivered at Nairobi this 26th day of August, 2019.

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**