



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(SITTING AT NAKURU)
(CORAM: VISRAM, KOOME & OTIENO-ODEK, J.J.A.)

CRIMINAL APPEAL NO. 178 OF 2011

BETWEEN

TITUS MWANGI MUCHIRA 1ST APPELLANT
PETER KINUTHIA 2ND APPELLANT
PETER GIBSON KIMANI 3RD APPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Nakuru

(Wendoh & Emukule, JJ.) delivered on 15th July, 2011

in

H.C.CR. Appeal No. 53 of 2008)

JUDGMENT OF THE COURT

1. Titus Mwangi Muchira, Peter Kinuthia and Peter Gibson Kimani were jointly charged with nine counts for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal code**. The events relating to all the nine counts occurred in a single robbery episode. The information in Count I was that on 28th May, 2005, at Kiamunyi farm in Nakuru District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistols and iron bars robbed Mosses Kamau Ngige of motor vehicle registration no. KAE 831 C make Nissan, one cell phone make Siemens A35 and cash Ksh. 1,050/=all valued at Ksh. 540,850/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Mosses Kamau Ngige. The other counts in the charge sheet relate to robbery with violence meted on passengers who were in the motor vehicle belonging to Mosses Kamau Ngige.

2. The complainant PW1, Mosses Kamau Ngige, testified that he is the owner of a matatu motor vehicle registration no. KAE 831C plying Nakuru-Ngata road. He testified as follows:

“That on 28th May, 2005, at around 7.30 pm, I was at Carnation Stage where I pick up passengers going to Ngata; passengers came in and filled the car and I drove off. On reaching Mustard Seed, I heard passengers in the vehicle being told to lie down; that next to the door, there was a young man who immediately jumped upon me and ordered me to leave the steering wheel; as I hesitated, I was hit on the head with a piece of metal; the other boy at the front was able to push me to the passenger’s seat and took control of the car. We were now two in the cabin since the person who was at the passenger’s seat when he saw the commotion opened the door and jumped out. This person then drove the motor vehicle off the main road and into the murrum road towards Mustard Seed. Passengers were still in the motor vehicle and the thugs behind were now demanding money, phones and other valuables from the passengers. Their driver demanded from me my phone and I gave him Siemens A35 phone and Ksh. 1,050/= which I had... He drove through Mustard Seed Road and got out on the main Nakuru-Kabarnet Road where he drove for about a kilometre and again took a side road into some farm; they drove deep into the shamba; he stopped the car and ordered the passengers to get out as they searched them. They were three at the back and the driver at the front. After they searched all of them they ordered them to sit on the ground and then asked for the driver, I stepped forward. They returned me into the car. I was put in the front with the driver and the rest were behind. The driver drove back to the tarmac into the Nakuru Kabarnet Road. He started driving towards Kabarnet. He saw a police road block; so he returned the car back toward Nakuru and drove along the road to Provincial General Hospital. It was still the same person who was driving. At Olive Inn, we met with police officers in a motor vehicle driving towards Kabarnet at that time. I did not know they were policemen. We continued on our way to Nakuru; after a while, I heard one of them asking what vehicle it is that was following us and not passing. The driver was ordered to drive slowly so that he passes. This motor vehicle from behind made to overtake us but did not instead they stopped down our car. The driver did not stop. One of them said “Morio, they are policemen, let us go”. They continued and police shot; the police gave chase and at the corner of the Provincial General Hospital the driver lost control of the car and it hit a tree and stalled. That is when they were arrested. The others and I were not injured. The police came and we all surrendered to them. They were now four of us. We were all arrested and taken to Central Police Station. I could see these people well at the outside when they searched passengers since the motor vehicle’s light was on; these people came out and stood outside the door as they searched passengers. Remember I was sitting at the passenger’s seat. The three persons are the three accused now in the dock. The driver was the 1st accused. The rest were behind. I do not know who hit me or who said “Morio, they are policemen”.

Immediately the police swammed the car after it hit the tree. I immediately identified myself and informed the police that the driver had my phone and Ksh. 1,050/=. He was searched and the phone and money recovered from his pocket”.

3. PW8 Police Constable 57058 Joshua Omino Nola testified as follows:

“On the night of 28/29 May, 2005, I was on patrol at Kiamunyi - London area. I was with other officers in one motor vehicle registration no. KAP 203 R. At around 8.00 pm, the controller circulated a robbery of motor vehicle registration KAE 831C within Kiamunyi Nissan matatu. It was ferrying passengers to Kiamunyi when it was hijacked by robbers who were on board as passengers. On reaching the bump, I saw the motor vehicle coming towards town. I called the controller and asked him to repeat the registration number. He did and I confirmed it was the on-coming matatu and I confirmed this to the controller. I made a U-turn and gave chase while pointing a gun

at the driver. I ordered him to stop, he declined and instead increased speed; we circulated the information to other police on patrol to block the State House and KFA roads. I also started shooting in the air. Near State House, the driver lost control and hit a tree with the motor vehicle they had hijacked. The tree fell on the road. All our officers came out and we immediately surrounded the vehicle to foil any escape. Nobody escaped since all doors were locked. We opened the passenger door at the rear. We found four people inside the vehicle. We removed them one by one from the car and made them to lie down on the ground under guard. The one in the white shirt (1st accused) was the one who was driving. The first person we removed was the 2nd accused who was in the rear seat. I immediately searched him and found him with a wooden toy pistol (MFI 6) tucked in his waist on his right side. His wallet had Ksh. 1150/=; there was also an ID in his pocket in the name of Benina Bothom Onchoro. This is it. The 2nd person to be removed was the 3rd accused who was in the front seat with the driver of the vehicle (1st accused). The 1st accused was stuck in the driver's seat and we could not remove him immediately so we called a breakdown to pull the motor vehicle from the tree to enable us unstuck the 1st accused. When this was done, we removed him and searched him and found a Siemens mobile phone belonging to the matatu driver. This is the phone (MFI2). We took the 1st accused to hospital because with thought his legs could have been broken; he was treated and discharged. So we took the accused persons and also towed the motor vehicle to the police station. One of the complainants was hit on the head with the wood. The complainants unanimously pointed at the 2nd accused as the one who was threatening them with a pistol”.

4. The trial court having considered the evidence convicted all the three appellants and sentenced them to death; the first appeal to the High Court (*Wendoh & Emukule, JJ.*) was dismissed.
5. Learned counsel Ms Kilach Linda Cherotich appeared for the 1st appellant while learned Mr. Maragia Ogaro appeared for the 2nd and 3rd appellants. The State was represented by Mr. J. M. Maroro. Each of the appellants proffered several grounds of appeal which can be condensed as follows:
 - a. *The learned High Court Judges erred in law in failing to note that the circumstances pertaining at the scene were not conducive for a positive identification.*
 - b. *The learned Judges erred in law in failing to note that the identification of the appellants was not preceded by any description and as such it was a dock identification which is worthless.*
 - c. *That the concurrent findings of the two courts below were based on evidence that was weak, shaky, inconsistent and contradictory.*
 - d. *That there was a mistrial at the High Court as it appears that only one Judge heard the appeal whereas the judgment is signed by two Judges.*
 - e. *That the burden of proof was not discharged by the prosecution.*
 - f. *That the appellants rights as enshrined in Section 77 (1) of the Constitution and Section 198 (1) of the Criminal Procedure Act (Cap 75) were violated.*
6. Counsel for the 1st appellant submitted that the charge sheet indicting the 1st appellant was defective to the extent that it pre-dates the offence; that the charge sheet is dated 8th May, 2005, yet the offence was committed on 28th May, 2005; that a charge sheet cannot be prepared before an offence is committed. Another ground urged before us is that the 1st appellant never understood the proceedings as the record does not specify the language used to conduct the proceedings; that the constitutional right of the 1st appellant was violated contrary to **Article 50** of the **Constitution**; that there was no identification parade conducted and the incident happened at night when

- conditions for identification were difficult; that the 1st appellate court did not consider the defence testimony.
7. Counsel for the 2nd and 3rd appellants submitted that the evidence on identification of the appellants was weak; that the appellants were told to look down and close their eyes and as such, it was not possible for the prosecution witnesses to positively identify the appellants. It was submitted that the evidence of PW1 was contradictory in relation to the 3rd appellant. That the police recovered Ksh. 850/= from the 3rd appellant yet the complainant stated he lost Ksh. 1,050/=; that the witness did not identify the money recovered as his; that currency notes are a legal tender and one cannot easily say that the money recovered from the 3rd appellant belonged to the complainant, more so when the sum stated as lost is different from the sum recovered. That the report to the police does not mention car jacking by the 3rd appellant; that the appellant's evidence was not taken into consideration and neither the 2nd nor the 3rd appellants were in control of the recovered motor vehicle. Counsel further submitted that the case against the appellants is a case for re-trial as the record of appeal does not have the notes of the second Judge; that the appeal before the High Court was conducted by one Judge instead of two Judges as required by law; that the judgment on record is signed by two Judges yet the appeal was heard by a single Judge.
 8. The State opposed the appeal and supported conviction and sentence meted on the appellants. The State submitted that all the elements required for the offence of robbery with violence were proved. It was submitted that the grounds of appeal urged by counsel for the 1st appellant were not in the memorandum of appeal; that counsel for the 1st appellant argued new grounds and issues without seeking leave to file supplementary grounds of appeal; the State urged this Court to ignore in entirety the 1st appellant's submissions. The State observed that the only issue relevant from the submissions by counsel for the 1st appellant relates to the evidence on identification. It was submitted that the appellants were positively identified as the robbers; that the 1st appellant was the driver of the robbed motor vehicle and he got stuck in the ill-fated vehicle when the accident occurred; the police found him seated on the driver's seat and removed him there from; that the 1st appellant drove away with PW1 who was seated on the co-driver's seat; that PW1 was able to see the 1st appellant very well; that there was light inside the car and the other prosecution witnesses who were passengers in the ill-fated motor vehicle were able to see and identify the appellants when they were being searched. The State submitted that it is not true that conditions for positive identification were unfavourable because all the appellants were found inside the robbed vehicle and arrested at the *locus in quo* while they were fleeing from the scene of crime; that the two courts below properly analysed and evaluated the evidence on record taking into account the defence testimony and arrived at concurrent findings on involvement of the appellants in the crime.
 9. On the issue that the appeal was heard by a single Judge instead of two Judges, the State submitted that the record clearly shows the coram of the High Court on 26th October, 2010, when the hearing was conducted; the coram shows that two Judges Justice R.V.P. Wendoh and Justice A. Emukule heard the appeal; that the judgment on record is properly signed by the two Judges who heard the appeal.
 10. We have considered the submissions by the counsels for the appellants and the State. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. (See ***David Njoroge Macharia – v- R, [2011]e KLR; and Chemagong vs. Republic (1984) KLR 213***).
 11. In the present case, the appellants are faced with nine counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. A charge under this section has three essential ingredients that must be proved by the prosecution. In ***Johana Ndungu –v – R, Criminal Appeal No. 116 of 1995***, the ingredients for the charge of robbery with violence were stated to be:

**(i) if the offender is armed with any dangerous or offensive
or instrument or**

weapon

(ii) if he is in company with one or more other person(s) or

(iii) if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.

12. We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction on under **Section 296 (2)** of the **Penal Code**. It is our duty to examine if the two courts below erred in law in finding that the prosecution had proved the essential ingredients of the charge of robbery with violence. The 2nd and 3rd appellant contends that the trial court and the first appellant court failed to reconcile the inconsistencies in the prosecution evidence. The charge sheet indicates that the persons who robbed the complainants were armed with dangerous weapons namely “*pistols and iron bar*”. PW1 testified that he was hit on the head with an object. PW2 to PW6 all testified that they were threatened with a pistol. We are satisfied that the prosecution led evidence to prove the existence of the alleged dangerous weapons in the form of “*pistol and metal bar*”; the pistol was produced as an exhibit though it turned out to be a toy wooden pistol.

13. An alternative ingredient for the offence of robbery with violence is that the prosecution must prove that the appellant was in the company of another person(s) at the time of the robbery. PW1 and all the prosecution witnesses testified that the robbers were more than one person. The police officer PW8 who arrested the appellants testified that the three appellants were found inside the vehicle and were removed therefrom after the accident. It is our considered view that the ingredient for the offence of robbery with violence that the appellant was in the company of one other person(s) was proved beyond reasonable doubt.

14. The appellants submitted that no identification parade was conducted and thus the prosecution was not able to establish beyond reasonable doubt that it was the appellants who were robbers; the appellants case is that when report was made to the police, no description of the appellants was given by the complainant and all we have is evidence of dock identification. We have examined the evidence on record particularly by PW1 Moses Kamau Ngige and PW8 Joshua Omino Nola. The appellants were removed one by one by police from the motor vehicle after the accident. PW1 testified that the appellants were the robbers. Even if the offence was committed at night, from the time of robbery to the time of the accident and subsequent arrest by the police, PW1 was physically with the appellants and they were never separated. PW1 never lost sight of the robbers; it was these robbers who were arrested by the police as testified by PW8. PW6 Rebecca Adhiambo Otieno testified that the 2nd appellant was sitting behind her and that she had seen him at the stage when he had stepped on her seat belt; that the 2nd appellant was the robber who was inspecting the matatu. PW2 Godfrey Eric Okongo testified that he was slapped on the head by the person who was sitting behind him; the person who was behind him was carrying a revolver like and asked him “*do you see what I am carrying*”? The person who was searching at the door was armed with a metal bar. PW4 Jane Adhiambo Onyango testified she saw the 3rd appellant when she switched her cell phone and she had a lot of time to see him when he was ordering her to remove her jacket and abusing passengers. In our view, the evidence on record place the appellants at the scene of crime and it goes to prove beyond reasonable doubt that all the three appellants were involved in the robbery and were positively identified as the robbers. We find that the absence of an identification parade does not prejudice the appellants and did not dent the prosecution evidence on the positive identification of the appellants as the perpetrators of the crime.

15. The identification of the 1st appellant is corroborated by the doctrine of recent possession. The 1st appellant did not offer an explanation as to how he came to be found in possession of PW1’s mobile phone. PW1 testified that his Siemens A35 mobile phone was robbed by the 1st appellant. PW8 testified that upon search, the 1st appellant was found with PW1’s Siemens’ phone in his pocket. We find that the doctrine of recent possession corroborates and provides evidence of probative value that links the 1st appellant to the crime. (See ***PETER KARIUKI KIBUE VS REPUBLIC, Criminal Appeal No. 21 of 2001***).

16. The appellants contend that the learned Judges erred in law in relying on dock identification which was worthless. On this issue, we concur with the finding and statement by the learned Judges who expressed themselves as follows:

“PW 8 the investigating officer ...described in detail how they trailed and were able to reach the matatu and arrested the robbers. The 1st appellant was the driver who was stuck at the wheel of the matatu; the 2nd appellant was in the rear seat and on a search found to be carrying a toy pistol; the complainants were unanimous that he was the person threatening them with a pistol. The 3rd accused was with the driver at the front side...The evidence of identification is therefore not dock identification. The testimony of these witnesses was simply that the persons in the dock were the persons who had robbed them and they were merely confirming so. There was no question of dock identification”.

17. A contention by the appellants is that the two courts below did not consider and evaluate the defence evidence. In their defence, the appellants raised an alibi. The two courts below arrived at the conclusion that the alibi testimony did not displace the evidence of police officer PW8 who arrested the appellants when the ill-fated motor vehicle hit the tree. In our view, we are in agreement with the two courts below that the testimony of PW 1 to PW6 as well as the testimony of PW8 squarely places the appellants at the scene of crime. We are satisfied that the defence testimony was considered and evaluated and weighted against the prosecution case; the defence testimonies neither raised any doubt as to the identity of the appellants as the robbers nor dented the prosecution case. We concur with the two courts below that the alibi raised did not dislodge the prosecution case.

18. On the appellant’s submission that this case is fit for re-hearing of the appeal before the High Court on the ground that the initial appeal was allegedly heard by a single Judge, we have perused the record of appeal and observed that the coram on 26th October, 2010, shows that the appeal was heard by two Judges namely Justices R.V. P. Wendoh and A. Emukule who both signed the judgment. We find that this ground of appeal has no merit.

19. Another ground urged by the 1st appellant is that his constitutional right was violated as he neither followed the proceedings nor understood the language in which the proceedings were conducted. This ground of appeal was not urged before the High Court. However, the record shows that on 8th June, 2005, when the appellants were arraigned before the trial court, the proceedings were conducted in English/Kiswahili and all the appellants entered a plea of not guilty. The record further shows that on 31st August, 2005, the appellants demanded witness statements before they could conduct cross-examination of PW1; on 9th January, 2006, the appellants cross-examined PW1 and cross-examined PW2. All the appellants gave sworn testimony in their defence on 26th October, 2007. The record reveals that the appellants participated in the trial and conducted cross-examination and for this reason, we are satisfied that the trial and proceedings were conducted in a language understood by all the appellants.

20. As regards the other grounds of appeal urged by the appellants, we are of the considered view that the grounds have no merit and do not displace the prosecution case which was proved beyond reasonable doubt.

21. Finally, the trial court imposed a death sentence on the appellants; however, the learned Judges of the High Court substituted the death sentence with a term of life imprisonment on the basis that the death sentence is no longer mandatory for the offence of robbery with violence under **Section 296 (2)** of the **Penal Code**. In the case of ***Joseph Njuguna Mwaura & 2 Others – v- Republic, Nairobi Criminal Appeal No, 5 of 2008***, a five Judge bench of this Court stated as follows:

“We hold that the decision in Godfrey Mutiso – v- R [2010] eKLR Criminal Appeal No. 17 of 2008 to be per incuriam is so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to Section 203 as read with 204 of the Penal Code, treason contrary to Section 40

of the Penal Code, administering oaths to commit capital offence contrary to Section 60 of the Penal Code, robbery with violence contrary to Section 296 (2) of the Penal Code and attempted robbery with violence contrary to Section 297 (2) of the Penal Code carry the mandatory sentence of death”.

22. Guided by the decision of the five Judge bench of this Court in ***Joseph Njuguna Mwaura & 2 others – v- Republic, Nairobi Criminal Appeal No, 5 of 2008***, death sentence is the mandatory penalty for the offence of robbery with violence under ***Section 296 (2)*** of the ***Penal Code***. We appreciate that the learned Judges of the High Court delivered judgment before the five Judge bench of this Court rendered their decision on 18th October, 2013. For that reason, we will not interfere with the life sentence imposed upon the appellants which in the circumstances of the aforesaid decision was otherwise an illegal sentence. The upshot of the above is the appeal lacks merit and it is hereby dismissed.

Dated and delivered at Nakuru this 23rd day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR