



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 363 & 476 OF 2010

BETWEEN

JAMES MWANGI WANJAMA

PETER MURIUKI alias MORIO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

*(Appeal from a conviction, Judgement of the High Court of Kenya at Malindi (Omondi , Odero JJ.)
dated 21st September, 2010*

in

H.C.C.R.A. No. 14 & 15 of 2010)

JUDGMENT OF THE COURT

The two appeals have been consolidated.

The two appellants were jointly charged with four others with four counts of robbery with violence contrary to **section 296 (2)** of the penal code. However the charges against the 4th, 5th and 6th co-accused were withdrawn under **section 87(a)** Criminal Procedure Code (code) after one witness had given evidence. After the close of the prosecution case the 3rd co-accused was acquitted under **s. 210** of the Code. Thereafter the appellants were convicted by the Principal Magistrate of counts II, III & IV. They were sentenced to death in count II and the sentences in count III and IV were left in abeyance.

The charges arise from a robbery which was committed at Flamingo

House Malindi on 12th February 2007.

The complainant in count II was **Christopher Katana Mangi (Pw2)**

(**Christopher**) who was a cook at Flamingo House. The charge sheet alleged that he was robbed of Kshs.3000/=.

The complainant in count III was **Michael Mbogo Konde (Pw3)**

(**Michael**). He was a kitchen head at Flamingo House. He alleged that he was robbed of one mobile phone and cash Kshs.4000/= on the material day.

The complainant in count IV was **Lawrence Shida Chengo (Pw1)**

(**Lawrence**) who was a room steward at Flamingo House. He alleged that he was robbed of Kshs.1000/= on the material day.

On 12th February 2007 at about 2pm a gang of robbers armed with pistol's raided Flamingo House which is apparently a guest house patronised by foreign tourists.

The robbers rounded up the employees including the three complainants and one **William Thoya Mapanga (Pw5) (William)**, a pool attendant, and took them to the dining area where the guests were taking lunch. The employees and the guests were ordered to lie down. Thereafter the robbers searched them all and stole their valuables including money, mobile phones, jewellery and personal documents. The three complainants claimed that they were robbed at this stage. The guests were then lead to their respective rooms where their rooms and bags were searched and their valuables stolen after which they were all locked up in one room and robbers left.

According to the evidence of **Cpl. Frank Oyaró (PW6)** after police arrested **Mary Mukulu Kituku**, the 3rd co-accused she gave police information which led to the arrest of the two appellants. Cpl. Frank Oyaró testified at the trial that following information that some suspect had gone to a lawyers office to instruct a lawyer to get Mary released they went to a lawyer's office in Malindi Town on 14th February 2007, and arrested **Peter Muriuki**, the 2nd appellant inside the lawyer's office. On the same day, Cpl. Frank Oyaró arrested **James Mwangi**, the first appellant in restaurant in Malindi Town.

On 23rd February 2007 from 1.00 pm. **CI. Martin Otieno** of C.I.D. Malindi conducted an identification parade behind Watamu police station where the 1st appellant was identified by Christopher, Michael, William and Lawrence as one of the robbers. On the same day at the same police station, I.P. Wilson Mati conducted an identification parade from 10.00 where the 2nd appellant was identified as one of the robbers by Christopher, Michael and William.

The 1st appellant gave a defence of alibi that on the material day he was at Mpeketoni where he was buying fruits for sale at Kongowea market in Mombasa and that on 15th February he had gone to Malindi to meet middleman when he was arrested.

Similarly, the 2nd appellant raised a defence of *alibi* that on the material day 12th February 2007, he travelled from Nairobi to Mombasa and produced a bus ticket to support the alibi, He further stated that on the day of arrest he had gone to a lawyer's office to meet a man who was to sell land to him.

The two courts below believed the evidence of prosecution witnesses that the two appellants were positively identified at the time of the robbery and rejected the respective defence of alibi.

The point of law raised in the consolidated appeals relates to evidence of identification and failure to consider the respective defences of *alibi*. *Mr. Wachira*, learned counsel for the appellants submitted, among other things, that the identification parades did not comply with Forces Standing Orders.

Regarding identification of the 1st appellant the trial Magistrate made a finding that he was identified by four witnesses, namely, Lawrence(Pw1), Christopher (Pw2) Michael (Pw3) and William (Pw5) at the

time of the robbery and also at the identification parade. The trial Magistrate rejected the defence of *alibi* as false.

Regarding the identification of 2nd appellant the trial Magistrate made a finding that he was identified at the time of robbery and at the identification parade by Christopher, Michael and William.

The trial Magistrate further found that the description of the appellants given by eye witnesses was credible and concluded that the identifications of appellants was perfect and free from any possibility of error or mistake.

The High Court after evaluation of evidence reached the same conclusion and stated:

“ The incident occurred at 2.00 pm. It was in broad day light and visibility was good. The incident took several minutes since the robbers took time to locate and herd the victims into one room not to mention the time it took to search the luggage for each of the Italian guests. None of the robbers had masked their faces or made any attempt to disguise their appearances. The prosecution witnesses all gave very clear and concise evidence. They were each able to state with clarity the role each appellant played in the robbery.....”

The High Court also believed the evidence of Lawrence and Christopher that the 1st had a scar on the forehead above the left eye.

In this case there were concurrent findings of fact by the two counts below that each appellant was positively identified at the time of the robbery and also at the respective identification parades and that the defences of *alibi* were false. There was also concurrent findings of fact that identification parades were properly conducted.

This Court cannot interfere with those concurrent findings of fact unless there was no evidence to support them or unless there was material misdirection or non direction.

The sequence of events in the Flamingo House were described by Lawrence, Christopher, Michael and William.

At about 2.00 pm Christopher and Michael were in the kitchen while Lawrence and William were at the laundry with other workers having lunch. The guests were in the dining room having lunch.

According to evidence of Christopher and Michel the 1st appellant appeared in the kitchen armed with a pistol.

He told the two that if they wanted to be safe they should move to the dining area. They walked to the dining area in company 1st appellant where they walked to the dining area where they found the 2nd appellant who ordered them to lie down. They were asked where the other employees were and the robbers were informed that the other employees were at the laundry. The 1st appellant held Michael by the neck and Michael led him to the laundry. Lawrence and William testified, that when Michael appeared in the laundry he accompanied by the 1st appellant and they were all taken to the dining area.

After the guests and employees were searched in the dining area and their properties stolen each guest was taken to his room and their properties stolen after which the employees and guests were taken to a room and locked inside.

The four witness Lawrence, Christopher, Michael and William testified that they identified the 1st appellant in the course of those movements. Regarding the identification of the 2nd appellant, Christopher testified that he is the one they found at the dining area and also the one who ordered them to

lie down. Lawrence identified the 2nd appellant as the one they found at the dining area. On his part, William identified the 2nd appellants as the person who was watching over the guests at the dining area.

From that examination of the evidence it is clear that the 1st appellant made several movements to the kitchen then to the dining area, then to the laundry and back to the dining area. It also clear that both the robbers also went to the rooms occupied by guests before moving the employees and guests to another room where they were all locked up. In the circumstances we are satisfied the finding of fact by the two courts below was supported by credible evidence that the two witness positively identified the appellants.

There was no complaint that two police officers who conducted the identification parades, I.P. Wilson Mate and CI. Martin Otieno misconducted themselves. They appear to be honest witnesses. Where a witness failed to identify any of the appellants they indicated so. Further they accurately recorded the comments of each appellant. Both appellants commented that they were satisfied with the manner the parade was conducted. The witness identified the appellants within two weeks of the robbery when their memory of the robbery was fresh in their minds.

In the final analysis, we find no misdirection or non direction by the two courts below to warrant our intervention.

We are satisfied that the appellants were convicted on substantial and credible evidence of identification.

In the result, the consolidated appeals are dismissed in their entirety.

Dated and delivered at Malindi this 26th day of June 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

