



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: OMOLO, O’KUBASU & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 465 OF 2007

BETWEEN

PETER KIMANI GICHUHI 1ST APPELLANT

ESTHER WANJIKU NDERITU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ.) dated 20th December, 2006

in

H.C.CR.A. NO. 243 OF 2003)

JUDGMENT OF THE COURT

The two appellants, **Peter Kimani Gichuhi** (1st Appellant) and **Esther Wanjiku Nderitu** (2nd appellant), together with another man Josiah Maina Wanjiku, were tried and convicted by a Senior Principal Magistrate at Nakuru on a charge of robbery with violence contrary to *section 296(2)* of the Penal Code. The three, upon the conviction were duly sentenced to death. The particulars of the charge of robbery with violence stated that on the 3rd of April, 2001, at Kiborojo area in Nakuru District of the then Rift Valley Province, the three of them jointly and while armed with dangerous weapons namely knives, robbed **Samuel Macharia Mukanga** of motor vehicle Reg. No. KAE 953N Toyota Corolla, white in Colour, an Identity Card, Driving Licence, a pen knife, a jacket and a bunch of keys, all valued at K.Shs.400,000/= and at, or immediately before or immediately after the time of such robbery, they used actual violence to the said Samuel Macharia Mukanga. Upon their being convicted and sentenced as already stated, the three of them appealed to the High Court and by its judgment dated and delivered on 20th December, 2006, the High Court, (Musinga and Kimaru, JJ.) dismissed their appeals and confirmed the sentences of death. The third man, **Josiah Maina Wanjiku** escaped from prison and we are not concerned with him in this judgment. The 1st and 2nd Appellants have appealed to the Court against the conviction and sentences as they are entitled to do under *section 361(1)* of the *Criminal Procedure Code* but since theirs are second appeals, the Court is only entitled to deal with issues of law.

Miss. Onchangu Martina Kemunto, learned counsel for both appellants, raised or argued before us two issues which she said were issues of law. The first issue of law was covered by grounds 2, 5 and 6 in the “*supplementary grounds of appeal*” filed by Mrs. Onchangu on behalf of the appellants. The learned counsel contended that the judgment of the trial magistrate violated the provisions of *section 169* of the Criminal Procedure Code, and since those provisions were violated, the Magistrate’s judgment, *ipso facto*, became null and void. The High Court in turn relied on a void judgment and its decision dismissing the appeals to that court must also be null and void. *Section 169* of the Code is in these terms:-

“169(1). Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

Miss Onchangu must have been complaining that the magistrate’s judgment did not specifically set out the point or points for determination, the decision on each point for determination and the reason or reasons for the determination. We agree with Miss Onchangu that the magistrate’s judgment could have been better crafted and this point was appreciated even by the superior court when it stated in its judgment:-

“Regarding the defences of the appellants, we agree that the learned trial magistrate did not give much consideration to them. However, we have re-evaluated the said evidence adduced by the appellants in their defence and agree with the learned trial magistrate that the defences contained very little truth, if any, and could not stand in view of the overwhelming evidence that was adduced against the appellants. We are of the view that each of the appellants was properly convicted and sentenced to death.”

The overwhelming evidence adduced against the appellants was that **Samuel Macharia Mukanga** (PW1) was employed by **Peter Nderi Wangombe** (PW2) as a taxi driver for Peter’s motor vehicle KAE 953N, a Toyota Corolla. On **2nd April, 2001**, Samuel was in that vehicle at the vehicle park at Nyahururu. He was on that day approached by a man and a woman whom he identified as the **1st** and **2nd** Appellants. They wanted to hire him to take them to Subukia Kiborojo. They agreed the hiring charges at Shs.3,000/=. The appellants and Samuel agreed that the trip would be made the following day and they parted on those terms. This meeting took place around 5:30 p.m. The following morning, the two appellants returned with two other people, Josiah and another man and Samuel drove them to Subukia. They passed that centre, proceeding to Kiboronjo, and entered a forest. In the forest, they attacked Samuel, robbed him of his vehicle and the other items stated in the charge. The vehicle was then driven to Londiani forest where Samuel was left tied to a tree. He raised alarm and was rescued. He reported the matter at Londiani Police Station.

Thereafter, nothing happened until the **5th August, 2001**, when Police Constable **Benard Irumbi** (PW7) arrested the **2nd** Appellant along KANU street in Nakuru. It was the evidence of Constable Benard that the **2nd** Appellant led him to some place in Tanzania where they met a man called Amos Gisute who was said to have bought various vehicles which had been stolen from Nakuru. Amos refused to release the vehicle unless the **1st** Appellant was taken to him to refund his money paid for the vehicle. Constable Benard returned with the **2nd** Appellant to Isebania in Kenya and that the **2nd** Appellant led him to the houses in which he arrested the **1st** Appellant and Josiah. The **1st** Appellant then accompanied Constable Benard to Amos in Tanzania and there a total of five vehicles, among them, Peter’s, were recovered. The two appellants together with Josiah were then brought back to Nakuru. Identification parades were held and Samuel was the only identifying witness in those parades. He identified the **2nd** appellant and Josiah during the parades. But he failed to identify the **1st** Appellant.

Chief Inspector Absalom Monari (PW3) took a statement under inquiry from the **2nd** Appellant. He swore that the statement was voluntarily made to him by the **2nd** Appellant. The **2nd** Appellant, however, stated that the statement was not voluntary. After a trial within the trial, the magistrate admitted the statement in evidence. In the statement, the **2nd** Appellant admitted that she participated in the robbery under investigation. **Inspector Patrick Musyoki** (PW6) also recorded a statement under inquiry from the **1st** Appellant. Inspector Musyoki swore the statement was made voluntarily; the **1st** Appellant contended

the statement was not voluntary. The magistrate held a trial within the main trial and at the end of it found the statement to have been made voluntarily and admitted it in evidence. The 1st Appellant admitted having participated in the robbery.

Put on their defence, the 1st Appellant swore that he could not have participated in the robbery on Samuel on the 3rd April, 2001 because on that day, he was in Kakamega attending the burial of some person and he had taken mourners to that funeral in a vehicle he was employed to drive. The 1st Appellant called one, **Peter Samson Nanjero** (DW4) and together they swore as to their attendance at the burial and Samson did attend the same because he was the conductor in the vehicle which the 1st appellant was driving. So the 1st appellant pleaded an *alibi*, i.e. he could not have been at *Nyahururu* and *Subukia* on the 3rd April, 2001 when *Samuel* was robbed as he (the 1st Appellant) was in Kakamega.

In her defence, the 2nd appellant swore that in April, 2001, she was at *Njoro*. She came to *Nakuru* on 15th April, 2005 where she was arrested with another lady. Upon arrest she was interrogated about carjackings which she denied. She was beaten while in police custody and later she learnt that the lady who had been arrested with her had been released. On the 5th day of her arrest, she was taken to an office where she saw other men. She was asked if she knew those men and she said she did not know them. *Samuel* identified her at the parade because he had previously seen her at the police station. She did not know anything about the car-jackings and she did not know the two men charged with her.

This was the entire evidence before the trial magistrate. The magistrate accepted the version given by the prosecution witnesses and rejected that given by the two appellants. In doing so, did the magistrate wholly fail to comply with the provisions of **Section 169** of the Code as to render his judgment a nullity as *Miss Onchangu* contended on behalf of the two appellants?

We have already stated that the magistrate's judgment could have been better crafted but we are not satisfied that he failed to apply the provisions of **Section 169** of the Code. In his judgment, the magistrate set out the charge facing the appellants and the section of the Penal Code under which the appellants were charged. He then summarized the evidence led on behalf of the prosecution and set out the defence of each accused person charged before him. Having done so, the magistrate found as a fact that *Samuel* was attacked and robbed as that witness stated and that the robbery fitted within the provisions of **Section 296(2)** of the Penal Code. The magistrate then stated:-

“What I have to decide is whether or not any of the accused was involved.....”

He then briefly set out the circumstances of the robbery and continued:-

“-----The police told the court that they arrested Esther Wanjiku Nderitu (A3) after some information. On being interrogated about a spate of car-jackings against taxi drivers in Nakuru Town, she explained how she and the other two robbed and took cars to Tarime in Tanzania. Indeed she is the one who led to the recovery of this car in question and the arrest of Accused 1 and Accused 2.

Although the person who had bought the car in Tanzania was not brought to court due to diplomatic complications (he being a Tanzanian) I hold that Esther Wanjiku led to its recovery. This, coupled with the fact that the complainant identified her satisfied me that she is the lady who approached the complainant on 2nd April, 2001. And that being so, then he led to the arrest of accused 1 and accused 2 whom the complainant later identified.

The defences of the accused persons are all lies. They wrote statements voluntarily. And even if I were to disregard the statements, I still would hold that the complainant had ample time to identify them.....”

Of course, the 1st appellant was not identified by *Samuel* during the parade but the truth of the matter is that while the robbery had occurred on the 3rd April, 2001, the police were only able to make a

breakthrough in their investigations after the 2nd appellant was arrested either on the 5th August, 2001 as **Constable Benard** said or on the 15th August, 2001 as the 2nd appellant herself stated. There was no evidence that the police knew the whereabouts of the 1st appellant and Josiah. It was only after the arrest of the 2nd appellant that the police went to Tanzania and found Amos. Amos was hostile to the police on their first visit and it was not until the 1st appellant was arrested and taken to Amos that the stolen vehicle was recovered. These are the issues which the learned trial magistrate was dealing with in the passage which we have quoted from his judgment. So the magistrate basically summarized the entire evidence before him and then set out the issue he saw as crucial to the case: “*Did any of the persons who were charged before him participate in the robbery on Samuel?*” The magistrate answered that question in favour of the prosecution and against the appellants. In those circumstances, we fail to see how anyone can assert, as *Miss Onchangu* did before us, that the magistrate’s judgment was a nullity, it was clearly not a nullity. The judgment met the basic requirements set out in **Section 169** of the Code. That section, naturally, does not and cannot set out the formula on how to comply with its terms. We accordingly reject the contention by the two appellants that the magistrate’s judgment was a nullity and that the High Court ought not to have complied with it.

The second ground raised by *Miss Onchangu* on behalf of the appellants was that the appellants were held in police custody for a period longer than that which was provided for in the repealed Constitution which in fact authorized a maximum of fourteen days in respect of capital offences. That matter was of course not raised in any of the two courts below but we note from the evidence which we have already summarized that upon being arrested, the 2nd appellant went with the police to Tanzania and then back to Kenya (*Isebania*) to arrest the 1st appellant and *Josiah*. They then went back to Tanzania and investigations commenced there. A total of five cars were recovered.

It is not stated or shown in the record before us when the two appellants together with *Josiah* were eventually brought back to Kenya. The Kenya Police could not have produced them in a court in Tanzania because there were no offences committed in that country. In the face of the recorded evidence, it is unreasonable to hold that the appellants were held in police custody beyond the then constitutionally prescribed period and we must reject that contention as well.

These were the only issues of law raised by the appellants before us. We have rejected both of them. *Mr. Omutelema*, the Senior Principal State Counsel, supported the conviction of each appellant. In our view, the prosecution evidence proved beyond any reasonable doubt that the two appellants committed the offence with which they were charged. We dismiss the appeal of each one of them against the conviction. The sentence was lawful and must have been commuted by the President to life imprisonment. We also dismiss the appeals against sentence. Those shall be the orders of the court on the two appeals.

DATED and DELIVERED at NAKURU this 23rd day of FEBRUARY, 2012.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

E.O. O’KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR