



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: TUNOI, GITHINJI & VISRAM, J.J.A.**

**CRIMINAL APPEAL NO. 305 OF 2007**

**BETWEEN**

**PETER KANGETHE MWANGI  
CYRUS MURIITHI MBURU**

**PIUS NGIDIA MARANO.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ) dated  
12<sup>th</sup> April, 2005**

**in**

**H.C.CR.A. NOs. 652, 653 & 654 OF 2002)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

***PETER KANGETHE MWANGI, CYRUS MURIITHI MBURU and PIUS NGIDIA MARANO***, the appellants herein, were convicted by the Senior Principal Magistrate, Kibera, on various counts of robbery with violence contrary to ***Section 296 (2) of the Penal Code*** and each sentenced to death. The particulars of the charges are laid out in the charge sheet incorporated in the record of appeal.

During the first week of June 2001 and for about three or so consecutive days, a heavily armed gang of robbers possessing pistols, guns and assorted crude weapons terrorized, harassed, injured, maimed and robbed with abandon the residents of Ongata Rongai township. The first robbery was staged on 2<sup>nd</sup> June, 2001, when the gang waylaid a shopkeeper Fredrick Mwangi (PW 3) and his wife Grace Wanjiku (PW 4) who were on their way home after closing their shop at the end of the day. The couple was in the company of James Gachuhi (PW 7), one of their workers, in the vehicle KAL 612 D at around 9.00pm., when upon reaching California estate, they saw some people dash onto the road from the junction. PW 3 slowed down but as he was passing them, he heard a gun shot and was shot in his right arm and sustained serious injuries. Realizing that those people were robbers, he accelerated the vehicle to the nearby shops. PW 3, PW 4 and PW 7 rushed to Green Castle Hotel to seek help. PW 3 who was injured sat down on the floor as he was bleeding profusely. Unfortunately, the people who had shot at him caught up with him, entered the said hotel and ordered everybody therein to lie down. One of the people went to PW 3, removed his watch and also ransacked his pockets and took KShs.10,000/= . Others took PW 4's money and her handbag. After this, the robbers entered the counter in the bar and took money, a radio and cigarettes.

It is the testimony of PW 7 that when PW 1 was being shot while on the road, he was able to see one person who was wearing a long coat, though his face was not clearly visible. However, at the Green Castle Hotel, PW 3 saw the same man this time very clearly as electricity lights were on. The person was the appellant **Cyrus Muriithi Mburu**.

The second robbery was staged during the same night of 2<sup>nd</sup> June, 2001, when Michael Gitau (PW 8) and his wife Naomi Wanjiru (PW 6) were travelling home from an outing in their vehicle KAN 622A, when they were blocked by another vehicle from which some people alighted and robbed them of their mobile phones, a video camera and money before commandeering the couple to their home where they continued with the robbery. From the house, the gang took a radio, television, beddings, clothing, shoes, gas cooker and cylinder and other properties. The gang even took a trophy belonging to PW 8. It is apparent from the evidence tendered in the trial court that PW 6 and PW 8 did not identify their assailants; but, it suffices to say that their vehicle was recovered abandoned somewhere in the area. In the series of robberies which were staged on 2<sup>nd</sup> June, 2001, PW 3 was badly injured on the arm after being shot and the injury was certified by the doctor as grievous bodily harm. All the other victims had sustained less serious injuries and had been threatened with pistols and *pangas*.

On 3<sup>rd</sup> June, 2001, at about 5.00 am Mbugua Dismas (PW 1) and Peter Gikonyo (PW 2) drove their *matatu* vehicle to Ongata Rongai bus stage to collect passengers to Nairobi. They found four people who stopped the vehicle and boarded. PW 2 closed the door and sat at the back but before PW 1 could start the vehicle, he felt one of the passengers hold him by the back of his collar. When he turned back to see what was happening, he saw somebody pointing a pistol at him. He was ordered to stop, which he did. Both PW 1 and PW 2 were ordered to lie down on the floor of the *matatu* as the robbers took charge. The robbers drove the vehicle to Maasai Lodge Road. They stopped the vehicle somewhere and alighted, then loaded some things into the *matatu*, including cushion covers, clothes, a TV and a gas cylinder which was actually placed on PW 2's back.

PW 2 testified that as he lay on the *matatu* floor, he was able to see the faces of some of the robbers. After the goods were loaded into the vehicle, the robbers commandeered it again to the main road, where one of the robbers alighted leaving the rest who drove the vehicle to Dandora area where they abandoned it after offloading their luggage.

On 5<sup>th</sup> June, 2001, the police acting on information went to the house of the 1<sup>st</sup> appellant **Peter Kangethe Mwangi**, where upon a search conducted by PC James Wambua (PW 9), resulted in the recovery of a trophy, a leather jacket and some TVs. The police then went to the house of the 2<sup>nd</sup> appellant **Cyrus Muriithi Mburu** where they also found the appellant **Pius Ngidia Marano**. A search in that house yielded a gas cylinder and the pistol which according to PW 9 was covered with some beddings. The police also took some other items and arrested the three appellants whom they took to Ongata Rongai Police Station.

At Ongata Rongai Police Station, PW 9 summoned the complainants to the Police Station, where PW 6 identified her husband's trophy, the gas cylinder, leather jacket and the bed sheets. She also identified a black bag and a table cloth as hers. She testified that there was a mark on the cylinder which she used to identify the same to PW 9. This was confirmed by PW 9, too.

PW 1 and PW 7, also attended identification parades at the Police Station conducted by IP Majimbo (PW 11). From the parade, PW 1 picked the 1<sup>st</sup> appellant **Peter Kangethe Mwangi**, and according to PW 1 it was this appellant who was wearing the long coat at the junction and is the person who had shot PW 3; and is also the same person he had seen clearly inside the Green Castle Hotel. The three appellants were then formally arrested and charged with the offences stated hereinbefore.

The appellants denied committing the offences charged. They each gave a narrative of what they were doing during the material dates and times and how they were arrested.

In convicting the appellant, the trial magistrate stated:

***“PW 2’s evidence on the identity of the robbers corroborated that of PW 1. The court notes that his identification of the other accused persons, is what one would call ‘dock’ identification which is not very weighty evidentially. As pointed out earlier however, when it comes to Accused 1, the issue is that of recognition and not identification. The court will also note that this evidence corroborated PW 1’s in all material details.***

***... From the evidence of PW 6 and PW 8 those are items which were robbed from them. In all these robberies, the robbers were armed with a pistol and did threatened to use force.***

***When PW 9 and other officers went to Banana area, they recovered the items which were photographed and photographs exhibited in court.***

***According to PW 9 from Accused 1’s house, they recovered the trophy, some TVs and the leather jacket. The court notes that PW 8 identified the trophy positively as his. A trophy is not just an item you buy from a shop and keep in your house. One is given after accomplishing some feat or important event.***

***This particular trophy had been given to PW 8. It was recovered from Accused 1’s house among the other items barely 3 days after the robberies.***

***I am satisfied that although the actual exhibits were not brought to court, the complainant’s identified them clearly to PW 9 and also in the photographs.***

***The doctrine of recent possession also applies. Accused 1 cannot therefore escape count 6 and count 4.”***

Being dissatisfied with these findings which led to their conviction, the appellants preferred an appeal before the High Court of Kenya at Nairobi (Mutungi and Ochieng, JJ). In their respective appeals, the appellants raised three main grounds of appeal. They were:

- (i) Identification;***
- (ii) Recovery of items which were doubtfully identified;***
- and***
- (iii) Standard of proof as required by law.***

The first appellate court upheld the convictions and the sentences and acquitted itself thus:

***“On the basis of the foregoing record from the lower court, we are wholly satisfied that the challenge on the identification has no merit and that the appellants were properly identified in properly constituted identification parades.***

***Besides, on the doctrine of recent possession, there is, on record, evidence that each of the appellants was found in possession of one or other of the goods recently robbed from the complainants. For instance, at page J10 through J11, appellant 3 was found with the blue gas cylinder and bedsheets all of which were recovered from his house and which PW 6 identified as hers.***

***The Learned Magistrate was satisfied with the identification of the stolen items by the respective complainants and these were the items recovered from the appellants. Accordingly, the challenge that the recovered items were not properly identified holds on (sic) water, and the same is hereby rejected.***

***The last ground of appeal by the three appellants is on the basis of the standard of proof as by law required in criminal cases of this nature.***

***We have carefully gone through the record of the lower court and we are satisfied that the learned Magistrate properly considered the sufficiency of the evidence in each count and against each of the appellants, before reaching her conclusions.***

***All in all therefore, the appeals have no merit and are accordingly dismissed.”***

The 1<sup>st</sup> and the 3<sup>rd</sup> appellants in their respective memoranda of appeal and the subsequent supplementary memoranda of appeal filed by their learned counsel Mr Wamwayi and Mr Ondieki, learned counsel for the 2<sup>nd</sup> appellant, the appellants mainly faulted the two courts below for convicting the appellants on identification which allegedly was neither positive nor favourable and was not free from possibility of error. They also complained on the inapplicability of the doctrine of recent possession.

This being a second appeal, only points of law fall for the consideration of this Court – ***see Section 361 (1) of the Criminal Procedure Code.***

On our part, we have reviewed and re-evaluated the evidence on record tendered before the trial court and the decision reached by the first appellate court against each of the grounds of appeal preferred by each appellant. We are satisfied that the conviction against the 3<sup>rd</sup> appellant, ***Pius Ngidia Marano***, cannot be sustained on the evidence adduced before the trial court. He was not identified by any of the witnesses as a member of the vicious gang that endlessly terrorized the residents of Ongata Rongai during the material times. He was neither found with any stolen property. Consequently, the case against him was not proved beyond any reasonable doubt and we allow his appeal. We quash the conviction and set aside the sentence of death. He is entitled to his liberty forthwith unless he is otherwise lawfully held.

The learned Senior State Counsel, Mr Monda, concedes the appeal and very properly so, in our view.

As for the 1<sup>st</sup> and the 2<sup>nd</sup> appellants, both Mr Wamwayi and Mr Ondieki have vigorously submitted that their convictions cannot stand based on the evidence tendered before the trial court. They led us through those portions of the evidence they submitted were contradictory, inconsistent and not credible. They also referred us to various decisions of this Court which they averred bolstered their case.

Mr Monda, on the other hand, submitted that all the ingredients required for a charge under ***Section 296 (2) of the Penal Code*** were present; that the identification evidence was water tight and that the appellants were, moreover, found in possession of the stolen property moments after their arrest.

As regards identification, there is evidence on record that the 1<sup>st</sup> appellant was recognized by PW 2 who was his former schoolmate at Kieru Primary School. Thus, his challenge on the identification has no merit.

Further, both the appellants were properly identified in properly constituted identification parades. In our view, the evidence relating to identification was, indeed, safe and cannot be faulted.

Finally, we concur with the submission of the learned Senior State Counsel that the doctrine of recent possession was properly invoked. The stolen property from the complainants, was recovered in possession of the two appellants moments after the incident. The appellants gave absolutely no explanation about how they came to be in possession of the same. In the absence of any explanation, the inevitable inference is that they were the robbers.

Accordingly, and for the reasons outlined, we find no merit in the appeals of the 1<sup>st</sup> appellant ***Peter Kangethe Mwangi*** and the 2<sup>nd</sup> appellant ***Cyrus Muriithi Mburu*** and dismiss the same. We so order.

***Peter Kangethe Mwangi*** – Appeal dismissed.

***Cyrus Muriithi Mburu*** – Appeal dismissed.

***Pius Ngidia Marano*** – Appeal allowed.

Dated and delivered at Nairobi this 11<sup>th</sup> day of March, 2011.

**P. K. TUNOI**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**