



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O’KUBASU & ONYANGO OTIENO, J.J.)

CRIMINAL APPEAL NO. 74 OF 2007

BETWEEN

MICHAEL MBUGUA MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Machakos (Ojwang & Sitati, JJ.)
dated 18th May, 2007**

in

H.C.CR.A. NO. 125 OF 2003)

JUDGMENT OF THE COURT

The appellant **Michael Mbugua Mwaura** was charged before Senior Principal Magistrate’s Court at Machakos with seven counts, each of robbery with violence contrary to **Section 296 (2)** of the Penal Code. All the robberies took place on 27th November, 2002 at about 7.30 p.m. and all of them took place in a public service motor vehicle registration Number KAN 898D Toyota Hiace which was, at the relevant time, operating along Nairobi/ Machakos/Wote road. After the full hearing of the case, the then learned Senior Resident Magistrate (S. M. Kibunja) found him guilty of five counts which were counts 1, 2, 3, 5 and 6, convicted him of those counts and sentenced him to death but did not specify whether the sentence was in respect of each count or in respect of all counts together. He was found not guilty of two counts, namely, counts 4 and 7 and was acquitted under **Section 210** of the Penal Code as the learned magistrate held that he had no case to answer in respect of those two counts. He was not satisfied with that decision and he lodged appeal against it in the superior court. The superior court (Ojwang & Sitati, JJ.), in a lengthy judgment dated and delivered on 18th June, 2007, dismissed the appeal but made a correction of the sentence awarded by the learned Magistrate by reversing it to read that the sentences on counts 2, 3, 5 and 6 were to be held abeyance. It is the superior court’s decision that has prompted this appeal before us.

The particulars of each of the charges upon which the appellant was convicted were, on the first count,

that he together with others not before the court, while armed with knives, pistols and a hammer violently robbed **Eliud Maina Rugiri** Kshs.1,290/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **Maina Rugiri**. On second count, the particulars were the same except that the victim was **Albert Ndwiga** and the item of which he was robbed was Kshs.8,000/=. On the third count, the victim was **Charles Maweu Wambua** and he lost a mobile phone make Sagem valued at Kshs.5,495 to the robbers. **Moses Muindi** was the victim in the fifth count and he was robbed of his wrist watch valued at Kshs.900/=. On the sixth count, **Anjela Nzisa Mutisya** was robbed of Kshs.440/=. For clarity, Eliud Maina Rugiri gave evidence in the subordinate court as PW1. Albert was PW2, Charles Maweu Wambua was PW5, Moses Muindi was PW3 and Angela Nzisa Mutisya appeared in court as PW6.

The appellant had filed his memorandum of appeal in person and that was filed on 30th May, 2007. However, on being assigned a counsel by the Court, supplementary memorandum of appeal dated 15th December, 2009 was filed by his advocate. Mr. Maina Njuguna, who appeared for him before us relied on ground 1, 3, 4 and 7 of the original grounds and on the only two grounds in the supplementary memorandum of appeal. The four grounds relied on in the original grounds read as follows:

- “1. That the learned judges erred in law by failing to provide an interpreter as required by the law. This violated Section 198 (1) of the CPC.**
2.
- 3. That the learned judges erred in law in upholding the conviction in reliance with (sic) the evidences of recovery of that (sic) possession was not positively proved as required by the law.**
- 4. That the learned judges erred in law by failing to analyse the circumstances prevailing and find that they were no (sic) favourable for positive identification as they were doubtful.**
5.
6.
- 7. That the learned judges erred in law by failing to find that prosecution case casted doubts”.**

The two grounds in the supplementary memorandum of appeal were:

- “1. The learned superior court judges failed to re-evaluate the evidence adduced as required by the law.**
- 2. The learned superior court judges erred both in law and in fact in upholding to (sic) conviction as the evidence adduced by the prosecution was inadequate and contradictory”.**

In his address to us, Mr. Njuguna, who argued all the above grounds as one ground, submitted that the learned Senior Resident Magistrate did not properly analyze and evaluate the evidence and thus came to a wrong conclusion and the superior court failed in its duty to re-evaluate the evidence independently and arrive at its own independent decision as is required by law. It was submitted that the superior court did not in law live upto the standards expected of it as a first appellate court and thus justice was not done to the appellant. He referred us to the record and contended that it would appear there were two robberies that took place one after the other involving different robbers and that did cast doubt as to the identity of the person who broke the light as the person might have escaped with the first robbers. He further submitted, on identity and prevailing conditions at the scene of the incident, that the light in the vehicle was blue and that could have made it difficult for the witnesses to positively identify the person who

broke the light in the vehicle at the time of the robbery. He maintained that as the appellant was not found with any of the items allegedly stolen from the victims, the appellant might have been a mere innocent observer and particularly as there was no connection between the appellant and the hammer found in the vehicle, and lastly, he stated that as no P3 was produced to prove injury upon victims and none positively identified the appellant and as the appellant never made any attempt to escape, the conviction was not proper. Mr. Kaigai, the learned Principal State Counsel, on the other hand submitted that the evidence that was adduced by the prosecution witnesses, particularly **Moses Muindi** and **Charles Maweu Wambua**, proved beyond reasonable doubt the guilt of the appellant. He submitted that those two witnesses, who were truthful witnesses, saw the appellant break the light in the vehicle using a hammer during the robbery and there was no doubt that the superior court re-evaluated the evidence as is required of it, as a first appellate court and came to a correct decision. On facts, he urged us not to interfere with the concurrent findings of the two courts.

The brief facts giving rise to the entire case were, that Eliud Maina Rugiri and Albert Ndwiga were the conductor and driver respectively of a public service vehicle KAN 898D, Toyota Hiace which was operating the route Wote/ Machakos/Nairobi. On 27th November, 2002, at about 7.30 p.m., their vehicle was at Athi River heading towards Nairobi. It was full of passengers. At the Steel Plant area, a passenger who was seated behind Albert told Eliud to stop at K.M.C. stage. Eliud told Albert and the vehicle stopped as requested. That passenger, on alighting, pointed a pistol at Eliud and ordered him to return to the vehicle, lie down and give him money. As Eliud was returning to the vehicle, other passengers also alighted and Albert says those passengers approached him from the front, but one who came from the back, held him, and told him not to drive. One passenger who had alighted and was outside opened his door, pushed him to the other side and took over the vehicle. Eliud gave the first thug Kshs.1,290/=. After the vehicle was taken over by one of the attackers, Albert heard those who had alighted being told to return into the vehicle. After three meters the vehicle swerved and went into the bushes and stopped. Albert was relieved of Kshs.8,000/=. The person who had taken over the vehicle from Albert ran away and Albert took over the vehicle and attempted to drive the vehicle to a police station, but again, before he could go far, one of the two passengers in the front seat pulled the handbrake and the vehicle stopped. He was pushed and made to leave the driver's seat and the vehicle was taken over by another thug who drove it towards Athi River. In the meantime, during the confusion that had ensued, the lights inside the vehicle were smashed. In the vehicle PC. Moses Muindi, who was a passenger, travelling from Machakos to Nairobi and was seated on the second rear seat, heard the passengers being ordered to bend down and to give whatever money they had. He gave out a wrist watch and Kshs.400/= to the attackers. He was also slapped hard on the face and witnessed other passengers being beaten as well. He saw one person who was seated next to the window hit the light inside the vehicle with a hammer and then drop the hammer down. He identified that person as the appellant. The robbers escaped on seeing that the police were approaching the hijacked vehicle but the appellant did not escape. Moses pointed him out to the police as one of the robbers. Charles Maweu Wambua was also a passenger in the same vehicle that fateful evening. He confirmed the evidence of Eliud and added that before the passengers in the vehicle could lie down as ordered by the other passengers/cum thieves, he saw a person who was seated on the second last seat hit the lamp inside the vehicle with a hammer. That person was the appellant according to this witness. He was robbed of his Sagem mobile and Kshs.900/=. He however confirmed that the one who robbed him was not arrested. Angela was travelling in the same vehicle. She was from Machakos also. She sat on second seat from behind the driver next to the left window. She heard vehicle's inner lamp being hit and saw the person who hit the lamp. That person was seated on the other side of her seat. That person had a hammer which he placed below the seat after use. She identified that person as the appellant. She was robbed of Kshs.440/= by one of the thieves. At long last, PC. Robert Ndambuki (PW4) of CID, Athi River who was together with others, on patrol duties at Mlolongo, received a call from Athi River Police Station about the incident. They proceeded towards the scene and spotted the matatu being driven from Athi River direction and crossing Nairobi/Mombasa road towards Kinanie. They followed it. As they closed in on it, it stopped suddenly. The police also stopped their vehicle and one Sgt. Ouma fired three shots and ordered all to lie down. Three people dashed into the bushes nearby from the matatu. The police then went to the vehicle. On interrogation of the passengers left in the vehicle, they pointed out the appellant as one of the robbers. He was arrested. On searching the vehicle, this witness found a hammer below the seat pointed out by those in the vehicle to be the seat where the appellant was sitting. P.C. Ndambuki produced that hammer in court as exhibit 1.

On being charged in court as stated above, the appellant on being put on his defence, gave unsworn statement and stated:

“I’m Michael Mbugua Mwaura from Makueni District. I used to work in a hotel in Nakuru. I heard the evidence adduced and I want to say those witnesses are not known to me. I was not with the robbers otherwise I could have ran away. I was only a passenger in the that (sic) vehicle. That is all I wish to state”.

In convicting appellant, the learned Senior Resident Magistrate stated, *inter alia*:

“On the recorded evidence, it is obvious from the testimony of PW1, PW2, PW3, PW5 and PW6 some of the passengers in the vehicle they were travelling in on reaching K.M.C. Athi river took over the vehicle and robbed those in the vehicle including PW1, PW2, PW3, PW5 and PW6. As those people took over the vehicle evidence of PW3, PW5 and PW6 shows accused who was one of the passengers in the vehicle hit the light on the roof of the rear cabin with a hammer. Accused has not clearly disputed breaking the light but only says he was not a robber but a passenger. Why would he break the light in the vehicle if he was not with the robbers evidence of PW3, PW5 and PW6 remains unchallenged that it was indeed accused who, using a hammer broke the light in the vehicle and all that aided the robbers in carrying out their honours (sic) act of robbing the passengers”.

He then made a finding that for certain the appellant did break the lighting in the vehicle and found that

“a conduct that leads to only one conclusion that accused was acting in cohorts (sic) with those passengers who had commandeered the vehicle and robbed PW1, PW2, PW3, PW5 and PW6 of the listed items”.

He also found that they did so using dangerous weapons and that they were more than one person and thus the offences were proved beyond reasonable doubt.

The superior court, after analyzing and re-evaluating the evidence afresh concluded as follows:

“On the merits, therefore, it is our considered view that the learned Senior resident Magistrate made his findings correctly. Those who observed the actions of the appellant, at the time the robbery was being executed, did so (and particularly PW6) from close range, and from the time when lights were still working, before the appellant is said to have crashed them; and so we reject the contention by the appellant that he had not been positively identified as a suspect”.

This is a second appeal. By dint of the provisions of Section 361 of the Criminal Procedure Code, only matters of law stand to be considered unless we are convinced that either of the two courts below failed to consider matters that they ought to have considered or considered matters extraneous or on the facts before them, they came to a conclusion that was not tenable. In those cases, such failure would be considered as a matter of law. The concurrent findings of the Magistrate’s court and the superior court were that the appellant was in the matatu which was attacked by thieves and not only that, but that he took part in the robbery by breaking the lights inside the vehicle obviously to make it difficult for would be witnesses to identify the robbers. They both found that he did that by use of a hammer which was eventually found under the seat he had occupied just before the robbery commenced. The appellant admits being in the vehicle but does not come out clearly as to whether he occupied the seat under which the hammer was found, nor does he specifically deny breaking the lights. It was not his duty to demonstrate that he was not the one who sat where the hammer was, or that he did not break the lights. Those were aspects to be proved by the prosecution. However, the appellant in denying the entire charge and in saying in his defence that he was not with the robbers but was just one of the passengers did put in question his identity as one of the robbers. Thus, it was not only to identify him as a passenger, but to connect him with the robbers and demonstrate that he was indeed one of them even though he did not run away when the robbers did.

We have anxiously considered that aspect. In our view, as the appellant was not found with any stolen property and as he was not caught running away from the scene, the evidence that was required to prove that he was one of the robbers was clearly the evidence of any action he carried out that aided the other robbers in their mission. In other words, did the appellant by action indicate his being part of the robbers? Did he, for example, take such action as standing at the door of a house when the robbers continue to steal from the house so as to either stop those seeking to stop robbery or to warn robbers of the approach of police to that scene? This Court takes judicial notice of the fact that in most robbery with violence cases involving more than one suspect, not all suspects attack and steal from their victims. Some are assigned other duties that aid the robbery but are not directly involved in the actual robbery. Nonetheless, those also still remain robbers for without their carrying out such assignments actual robbery may not succeed. Thus, the identification required in this case is as to whether there was evidence to demonstrate that the appellant was not only in the matatu, but that he is one of the people who was seen taking part in facilitation of the robbery that took place in the matatu registration No. KAN 898D on 27th November, 2002 at about 7.30 p.m. at Athi River area. In the case of Anjononi & Others vs. R. [1980] KLR and particularly at page 60, this Court stated:

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused”.

And in the well known case of R vs. Turnbull [1976] All ER 549, which is an English decision, guidelines were given to help the Courts in deciding cases which depend wholly or substantially on the correctness of a disputed evidence of identification of a suspect. Those guidelines were as follows:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have this accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused. How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the prescription of the accused given to the police and the witness when first seen by them and his actual appearance”.

In this case, Moses Muindi described vividly the appellant as the passenger who sat next to the window in the matatu. He further stated that the appellant used a hammer to smash the light in the vehicle. Charles Maweu described the appellant as the person who was seated on the second last seat and the lamp was above his head. He also said the appellant used a hammer to break the lights. Angela was even more emphatic. She said that the appellant was seated on the other side of her seat and he had a hammer which he placed below the seat after use. PC. Robert Ndambuki said that they arrested the appellant who was identified to them by the other witnesses and recovered a hammer below the seat when the appellant was alleged to have sat. All this evidence was accepted in the concurrent findings of the two courts below. We see no reason to fault those concurrent findings. It is true that it was stated, that the light inside the vehicle was blue, but we have considered the time all these people were together in that vehicle and the fact that the appellant was seated in a seat inside the vehicle under which a hammer was found. He did not run away together with the other thieves but that is neither here nor there as he might have seen no chances of escaping if he did that or that decision might have been his planned escape route.

Before we dismiss the appeal as we must do, we need to comment on the first ground of appeal filed by

the appellant in person. Although Mr. Njuguna stated at the beginning of his submissions that he was relying on that ground, in his submissions, he did not address us on it. That was on sound advice because the record shows clearly the language in which each witness gave evidence and that the appellant gave his defence in Kiswahili. There was an interpreter provided throughout the entire hearing. This ground was ill-advised and ought not to have featured in the grounds of appeal.

In conclusion, having carefully considered the grounds of appeal, the submissions, the record and the law, we have no reason to disturb the decision arrived at by the two courts below. The conviction was based on sound law and the appeal has no merit. It is dismissed.

Dated and delivered at Nairobi this 12th day of February, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR