



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 115, 121, 122 & 127 of 2008

BENJAMIN MUTETHIA KIUNGA 1ST APPELLANT

JAMES KIMATHI 2ND APPELLANT

ALEX MWONGERA KIUNGA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Ouko, JJ) dated 8th February, 2008

In

H.C. CR. A. Nos. 145, 150, 151 & 152 OF 2006)

JUDGMENT OF THE COURT

A Senior Resident Magistrate at Isiolo (W.K. Korir, Esq) tried and convicted the four appellants before us, Benjamin Mutethia Kiunga (Benjamin), James Kimathi (James), Alex Mwongera Kiunga (Alex), and Stephen Kinoti M’Ikiao (Stephen) on various charges under the Penal Code, the first one of those charges and the one we are immediately concerned with in the appeal, being one of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of that charge were that on the 19th December, 2005 at 8.30 p.m. at Kiwanja Ndege Area in Isiolo District, Eastern Province, the four appellants, while armed with a rifle and pangas, jointly robbed Moses Kaunyange of a TV set make Tel Star, a VCD machine make Orion and a KV Battery, all being of the value of K.shs.12,800/- and that during the robbery they wounded the said Moses Kaunyange. In the trial before the Magistrate, Stephen was Accused 1, Benjamin was Accused 2, Alex was Accused 3 while James was Accused 4.

The evidence before the Magistrate was that in the evening of 19th December, 2005, at about 8.30 p.m. Moses Kaunyange (Moses – PW1) was in his sitting-room together with Peter Kinyua Kithinji (Peter – PW2). Peter apparently used to spend the nights in Moses’ house. Agnes Kagweria (Agnes-PW3), the wife of Moses was also in the house but she was in the kitchen preparing the evening meal; the kitchen was next to the room where Moses and Peter were sitting. There was a lantern lamp on in both rooms; that is understandable because it would not be reasonable for Moses and Peter to sit in darkness in the room where they were; it would equally be unreasonable to expect that Agnes would be preparing the family meal in darkness. It was the evidence of Moses and Peter that two men then burst into the house; those men were identified as Stephen and James. Stephen carried what looked like a rifle while James had a rungu. Stephen ordered the two to lie down but Moses who knew both of them defied the order, pushed aside Stephen and was on his way out; James hit Moses with the rungu on his cheek-bone but Moses still managed to get out of the room and went outside. At the door outside he (Moses) came upon Benjamin who was with another man. Moses knew Benjamin but he did not see who the other man was. Benjamin stabbed Moses on

the ribs with a knife but Moses managed to escape and ran to an A.P. camp nearby. He did not get any help there and he next went to the home of Charles Limiri (PW5). Charles put the time at about 7.30 p.m. Moses explained to him what had happened in his home and the two of them left to go to the home of Moses.

Meanwhile Peter had remained in the room where he had been with Moses. He took refuge under the bed but according to him Stephen ferreted him out from under the bed and as he (Peter) tried to run away to escape, Alex stabbed him on the eye, asserting that Peter would also be one-eyed like him (Alex). Apparently Alex has only one eye. According to Peter, earlier in the day, he had been taking some traditional liquor with Stephen and another man called Mwenda. The two men had advised him not to spend the coming night in the house of Moses but he did not understand why they were saying so. It was only after the attack that he (Peter) understood what they had meant. Peter managed to run away and he also ran to the home of Charles. By the time Moses arrived at the home of Charles, Peter was already there; it is to be remembered Moses had first gone to the AP camp and only went to the home of Charles after failing to get help from the camp.

Agnes was left cooking in her kitchen. She heard the commotion in the room where her husband and Peter were but before she could go there, three men burst into her kitchen. She was ordered to lie down but because she was carrying a baby, she refused to do so. She was beaten and generally molested. Those who actually entered her kitchen and molested her were Benjamin and James; she knew them well. Stephen remained standing at the door.

The names of all the four appellants were mentioned to Charles (PW5) that same night. When Peter and Charles went to Isiolo police station that night, they found Police Constable Nickson Talaam (PW6). Nickson said he visited the home of Moses that night and the names of all the four appellants were given to him that night. The following day, Constable Nickson, in the company of Moses and Charles arrested all the four appellants. Stephen was met on the road and said he was on his way to see Moses whom he (Stephen) had heard had been robbed. Moses identified him as one of the robbers and he was arrested; he was taken to his house which was searched. Nothing was found inside the house but some twenty or so metres from the house, a TV set was found covered with grass. Moses identified the set as his; Stephen's sworn defence was that the TV set was found inside his house not outside as alleged by the prosecution witnesses. Stephen claimed the TV set as his. He also said that he never left his house after going there at around 6.00 p.m. on 19th December, 2005.

Moses, Charles and P.C. Nickson said that after the TV set was found, Stephen led them to a quarry where they found Benjamin and Alex. Benjamin went with them to his house which was searched; nothing was found there but in the house of the father of Benjamin a battery was recovered. Moses identified the battery as his but Benjamin later told the Magistrate the battery had been found in the home of some other man, not in his father's house. Benjamin also swore he never left his house on the night of the robbery.

Next the police party visited the house of Alex. Nothing was found in the house but just outside the house, a VCD machine, still wrapped in its cover, was dug from the ground. Moses identified the VCD as his; he had bought the TV set, the battery and the VCD on 17th December, 2005 and he still had their receipts. In his sworn evidence Alex claimed the VCD to be his and he produced some photocopy receipt for it; he said the original receipt had been taken away from him by P.C. Nickson. Like the other appellants, Alex said he had never left his house after he went there and he did not participate in the robbery.

Upon arrest, the police took James to his house; a search there revealed nothing but outside, at some spot about ten metres away a rifle was removed from where it had been dug down and covered with soil. James denied any connection with the gun and he also stated he had never left his house during the night of the robbery. James said he was married to the sister of Moses, that he had not paid dowry due in respect of the marriage and he appeared to be implying that Moses gave his name to the police because of the failure to pay dowry.

Both courts below considered these conflicting versions and both were unanimous in their findings that Moses was robbed in the manner stated by the prosecution witnesses, that each appellant was recognized during the robbery, that the TV set found in the compound of Stephen belonged to Moses and not to Stephen as Stephen had claimed; that Benjamin was in fact found in possession of the battery belonging to Moses and that Alex was found in possession of the VCD which in fact belonged to Moses; if it had belonged to Alex, there would be no reason for burying it in the ground outside the house. The two courts were also satisfied that the gun found buried in the compound of James was part of the arsenal which had been used during the robbery in the house of Moses.

These concurrent findings of facts were based on sound evidence recorded by the trial court. Mr. S.K. Njuguna represented all the four appellants before us. We did not hear Mr. Njuguna complain that either there was no evidence at all on the record upon which the conclusions could have been made or that the evidence that was there was of such a nature that no reasonable tribunal could be expected to base its decision on it. The conclusions arrived at by the trial court and confirmed on the first appeal by the High Court (Lenaola & Ouko, JJ) were fully justified by the recorded evidence and there is no legal basis upon which this Court can interfere with them on a second appeal.

But Mr. Njuguna told us that the constitutional rights of the appellants were violated and he appeared to have been contending that after their arrest, the appellants were not informed of the charge or charges for which they were arrested. There is no merit in this contention. No evidence was given by anyone that the police did not tell the appellants why they had been arrested. The police drew up a charge-sheet and they were brought before the Magistrate on the charges contained in the

charge-sheet. They pleaded not guilty to the charges.

Nor is there any evidence that they were detained for more than the fourteen days which was permitted under the repealed Constitution. They were arrested on the 20th December, 2005 and appeared in court on 5th January, 2006. There were public holidays in between those dates and even if they were detained for two or so days above the permitted period that would have been reasonable under the circumstances. As to the language used, the appellants themselves had chosen to speak in Kiswahili and where interpretation in another language was necessary, there was always an interpreter present throughout the trial. At some stage Peter (PW2), for example, wanted to give his evidence in Kimeru; a court clerk called Faith Marete was called in to do the necessary interpretation. Each of the four appellants gave their sworn evidence in Kiswahili. On the very first day they appeared in court, they chose to communicate to the Magistrate in Kiswahili. There is equally no merit in the complaint regarding the language used in the proceedings.

In our view these appellants were properly convicted on the charge of robbery with violence and as at the time of their conviction, the death sentence imposed on them was inevitable. They informed us that their death sentences were commuted by the President to life imprisonment. They must continue to serve that sentence. The appeals fail against conviction and sentence and we order that they be and are hereby dismissed.

Dated and delivered at Nyeri this 19th day of November, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

MOIJO OLE KEIWUA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.