



IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 57 of 2007

DAVID KIRAGU THUO 1ST APPELLANT

JOHN MWANGI KINOGA2ND APPELLANT

NAFTALI MUMO MWANGI 3RD APPELLANT

STEPHEN WACHIRA GITUNDU 4TH APPELLANT

MAINA GACHAU alias PILOT..... 5TH APPELLANT

JAMES MUTURI KURIA 6TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ) dated 27th September, 2006

In

H.C. Cr. A. No. 127 of 2001)

JUDGMENT OF THE COURT

The appellants, David Kiragu Thuo alias Rasta, Maina Gachau alias pilot, Naftali Mumo Mwangi, James Muturi Kuria Muthoni, John Mwangi Kinoga and Stephen Wachira Gitundu, who we shall hereafter refer to as 1st, 2nd, 3rd, 4th, 5th and 6th appellants respectively, were convicted upon trial by the Principal Magistrate, Muranga, of four counts of robbery contrary to section 296 (1) (a) of the Penal Code, having been charged with thirteen counts of robbery with violence contrary to section 296 (2) of the Penal Code and were thereafter sentenced to imprisonment terms of 10 years in each count to run concurrently, but the 1st appellant was sentenced to 14 years in each count to run concurrently. Stephen Wachira Gitundu and David Kiragu Thuo alias Rasta, were in addition charged, tried, convicted and sentenced to one alternative count each of handling stolen goods contrary to section 322 (2) of the Penal Code. However, the conviction and sentence in the alternative counts were set aside on first appeal, quite properly so, because having been convicted of the main counts it was not open to the trial Magistrate to make any finding on the alternative counts. All the appellants were acquitted of the 5th to 13th counts, both inclusive, because the prosecution did not call any evidence on all those counts.

The appellants' respective first appeals against both conviction and sentences in the 1st to 4th counts, both inclusive, were dismissed and these appeals are their second.

Each appellant filed his own memorandum of appeal raising several issues. However, Mr. Mahan, who appeared for all the appellants, attacked the judgment of the superior court on three main grounds. Firstly, whether the superior court

was right in holding that the doctrine of possession of recently stolen property applied in the appellants' case. Secondly, whether the appellants were properly identified as having been in the gang that attacked the complainants and violently robbed them of various items. Thirdly, whether confession statements which both the trial court and the first appellate court accepted and relied upon in support of the case against the appellants were properly admitted.

Before we consider those grounds a resume at the background facts is necessary. On 10th April, 1999, motor vehicle registration No. KAE 077Y, a Toyota Hiace, which was then being operated as a "Matatu" left Nairobi at about 2.00 p.m. heading for Mugoiri, in Muranga. Apart from one passenger who alighted at Makuyu all the other passengers were bound for Mugoiri. At Kayahwe river, another passenger indicated to the driver, one James Kariuki Mwangi (PW1) that he wanted to alight, but it later turned out that he was one of the six people who had boarded the vehicle intending ultimately to attack and rob the driver and the other travellers. When the driver stopped the vehicle, that passenger with five others who too were in the motor vehicle set on the driver and other passengers and robbed them of various items including money. One of the six men shoved away the driver from the driver's seat and took control of the motor vehicle. The gang commandeered the vehicle at gun point and drove it towards Muchungucha. However, shortly thereafter it landed in a ditch and got stuck. The attackers then took away a "radio cassette" from the vehicle after which they escaped. The time was between 6.00 p.m. and 6.30 p.m.

Among the passengers in the said motor vehicle was Paul Wainaina Mwangi (PW2), then a University student at Kenyatta University. He was sitting immediately behind the driver. He had two bags, one of which contained his clothes. There were also University Library cards inside the bag with his names on them. The robbers took possession of the two bags. PW2 testified that he was able to identify one of the robbers who was seated next to the driver and another one who sat next to the witness. It was his evidence that the gang member who took over driving from the driver had a cut wound behind one of his ears. He later identified him on an identification parade.

Stephen Muchiri (PW4) was also a passenger in the same vehicle. He was then working as a loader in a lorry which was ordinarily based in Nairobi. On the material day he was travelling to his home which was at Wanjengi, in Muranga. It was his evidence that he was able to identify one of their attackers, whom he later picked on an identification parade.

The third passenger who testified was Paul Murimi Wanjiru (PW5), he was then working as a conductor in motor vehicle KAJ 025D, which operated as a Matatu between Nairobi and Muranga. It was his evidence that he identified two members of the gang, namely, the 5th appellant who was the 2nd accused, and the 1st appellant who was the 1st accused.

Inspector Francis Kamande (PW7) and Corporal Joseph Koech (PW9) were among the police officers who later pursued the robbers. The robbers had abandoned PW1's motor vehicle when it got stuck in a ditch, and ran away on foot. The two testified that a group of six people had been seen walking towards a certain home in Gatundu. The two officers pursued them there. They surrounded the home, and from a distance they were able to see two or three people smoking outside the house. By this time it had become dark. The police officers surrounded the home after which they made their way into a house there. They found six people inside. The six were the appellants before us. A quick search was conducted. From 4th appellant, who was the 6th accused, a toy pistol was recovered. The third appellant had a panga. Under a mattress which was on a bed inside the house, a bag was found. The bag was later identified by PW2 as one of the bags which was taken from him by the robbers. Inside that bag PW2's Library cards with his names thereon were recovered. A toy pistol was recovered from 1st appellant as also from 6th appellant who was the 4th accused at their trial. The 1st appellant was also wearing a pair of shoes which was later identified by PW2 as his. Other items which were recovered included a wrist watch (Exht. 16), radio cassette, a cardigan, a black and green jacket, diary, among others. All the appellants were arrested and the police took possession of all the items they found there which they suspected had been stolen. The appellants were taken to Kahuro police station.

On 15th April, 1999, Inspector Zabron Shitanda (PW6) recorded a charge and caution statement from the 5th appellant which was later admitted in evidence after a trial within a trial. In the statement the 5th appellant made a clean breast of the robberies.

Likewise, Naftali Mumo (3rd appellant) gave an inquiry statement under caution to Inspector Daniel Musau (PW11), on 15th April 1999, and like the 5th appellant he made a clean breast of the robberies complained of. The statement was repudiated, but was admitted in evidence after a trial within a trial.

On 4th April, 1999, Inspector Mutuku conducted identification parades with appellants as suspects. It however transpired that the suspects had been exposed to James Kariuki Mwangi, Paul Muriithi Wanjiru and Peter Irungu Mwangi who were the identifying witnesses.

The appellants were charged as herein before mentioned. As expected they all denied the charges. The 1st appellant gave his defence on oath. In his evidence in chief he said nothing about the robberies. His account was confined to how

he was arrested. He testified that he had brewed some liquor, and that at the time of his arrest he was sharing the liquor with his co-appellants, who in their respective defences gave evidence on oath in support. None of the appellants said anything about events leading to the robberies other than denying committing the robberies.

In her judgment the trial Magistrate, F.F. Wanjiku, Senior Principal Magistrate, found as a fact that all the appellants were positively identified at the time of the robbery for they were identified in identification parades the police organized, and items stolen in the course of the robberies were recovered in the possession of the appellants. In her judgment, she was satisfied the case against all the appellants had been proved to the standard required. She then convicted and sentenced them as earlier on stated.

The superior court on first appeal affirmed the appellants' respective convictions and sentences except that that court set aside convictions on alternative counts, quite properly so, as in law a person cannot be convicted on both the principal and alternative counts at the same time. That court also observed that the trial court improperly relied upon identification parade evidence. We agree. Some witnesses conceded that the appellants were exposed to them before the parades. Such exposure greatly weakened the probative value of such evidence. We agree with the superior court that that evidence was worthless.

The foregoing notwithstanding, the superior court was satisfied that evidence of identification of each of the appellants by eye witnesses was proper. In the court's view since the offences were committed in broad daylight the witnesses had no difficulty observing the robbers. The court was also satisfied that the circumstances of the offence, the fact that as the appellants escaped information concerning them spread quickly, helped the police to trace their whereabouts for purposes of arrest. The court also relied on alleged recoveries from the appellants of toy pistols, a panga, and several items which the court was satisfied had been positively identified by some complainants as theirs. On that aspect the superior court said:-

“We think the recovery of the radio cassette, two handbags, the pair of shoes and the University library cards provided a strong connecting link between the appellants and the robbers. That link is more strengthened by the fact that recovery was made within a matter of only a few hours from the time of the robbery.”

The court used the recovery evidence as corroboration for the confession statements. The court did not accept the appellant's respective defences and accordingly it rejected them.

The superior court was however not satisfied that the appellants' respective convictions were properly entered for the lesser offences of robbery contrary to **section 296(1)** of the Penal Code. The court therefore quite properly substituted a conviction under **section 296 (2)** of the Penal Code, and sentenced the appellants to the mandatory death penalty. Thus these appeals were provoked.

We earlier set out the issues for determination in these consolidated appeals. Mr. Mahan, for the appellants, submitted that evidence regarding identification of the appellants was wanting. We have considered the issue of visual identification of the appellants. PW1, PW2, and PW3, all testified that the robberies occurred in broad daylight. The appellants were close to the witnesses and those witnesses were able to observe them. The evidence on visual identification cannot be considered in isolation considering the facts and circumstances of this case. After the robberies, the appellants were said to have commandeered PW1's motor vehicle. When it got stuck in a ditch they abandoned it and escaped with properties they had stolen from passengers in that motor vehicle. Police who were notified of the incident acted quickly and pursued the robbers. Eventually the appellants were arrested together. Police witnesses testified that they made recoveries of several items, a fact the appellants challenge.

Whether or not there were recoveries, is a question of fact. The trial and first appellate courts found as fact that several items were recovered from the appellants. Mr. Mahan wondered how those items could be regarded as having been in joint possession. We have no difficulty in dealing with that issue. The robbers were identified as having been six in number at the time of the robbery. Evidence was led that six people escaped from PW1's motor vehicle. Six people were arrested together in a certain house which the 1st appellant claimed to belong to him, but which a defence witness, one Joyce Muthoni (DW1) said belonged to one Thuo Ngechu. A rebuttable presumption was thus raised that all the appellants were in joint possession of the items recovered. The appellants denied possession but were disbelieved by both courts below. We cannot but accept those findings as they are based on cogent evidence. Except in certain well known exceptions this Court has no jurisdiction to interfere with concurrent findings of fact, and much less on findings based on credibility of witnesses as was the case here. Unlike the trial and first appellate courts, it did not have the advantage of seeing and hearing witnesses testify.

Having come to that conclusion, we cannot but agree with the superior court that the confession statements tendered in evidence were amply corroborated by the evidence of recovery of recently stolen items, more particularly against the makers of those statements.

An issue was raised by Mr. Mahan, concerning the attitude of the trial Magistrate towards the appellants. Mr. Mahan was particularly unhappy with a remark by the trial Magistrate on the day the trial opened, when she is recorded as having remarked as follows:-

“Order: Accused do not appear to be serious with this case. Hearing 16.2.2000. Mention 10.11.99.”

That remark appears to have been prompted by something the appellants did or failed to do. We find nothing objectionable to that remark, and we say no more on it.

We find no basis for interfering with the appellants’ convictions and sentences. Accordingly their respective appeals are hereby ordered dismissed.

Dated and delivered at Nyeri this 7th day of November, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR