



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAKURU

Criminal Appeal No. 76, 78 & 83 of 2003

PETER SAMSON WANJERU ..... 1<sup>ST</sup> APPELLANT

LAWRENCE ASUNDA KULALI ..... 2<sup>ND</sup> APPELLANT

KENNEDY AMIRA AMBASA ..... 3<sup>RD</sup> APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT OF THE COURT

The three appellants, **Peter Samson Wanjeru**, **Lawrence Asunda Kulali** and **Kennedy Amira Ambasa** were charged before the Chief Magistrate's court in Criminal case No.2570 of 2001 with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. After a full trial, the learned Senior Resident Magistrate convicted them of the offence and sentenced them to death. Being dissatisfied with both the conviction and sentence, the three appellants have appealed. The three appeals being HCRA Nos. 76, 78 & 83 of 2003 were consolidated and the holding file is HCRA No. 76 of 2003. The particulars of the counts can be stated as follows: -

The three appellants were charged with several counts of robbery with violence that on 20<sup>th</sup> day of November, 2001 at Saba Saba Enterprises, Maasai Avenue, Nakuru Township, jointly with others not before court while armed with dangerous weapons namely, pistols and pangas, robbed Nileth Kantilal Amin of one Panasonic Television set, one Panasonic video deck, one Sony 3 C.D changer serial No. 3301241 make H.C.D GR 48, one speaker, one Motorola mobile phone, one golden chain, 25 C.D cassettes, 50 audio cassettes and cash money Kshs.45,000 all the total value of Kshs.160,000/- and at or immediately before or after the time of such robbery threatened to use actual violence on the said **Nilesh Kantilal Amin**.

The three appellants also faced the alternative charge of handling stolen property contrary to **Section 322(2) of the Penal Code** in that on 2<sup>nd</sup> day of December 2001 at Bondeni Estate within Nakuru Municipality in Nakuru District, otherwise than in the cause of stealing jointly dishonestly handled one Sony 3 C.D changer serial number H.C.D GR X 8 and one speaker the property of Nilesh Kantilah Amin knowing or having reasons to believe them to be stolen property or unlawfully obtained.

In the second count they were charged with robbery with violence contrary to **Section 296(2) of the Penal Code** in that on 29.1.01 at Mwariki Estate jointly with others not before court while armed with

dangerous weapons namely, pistol and pangas robbed one Juma Kimani Matenja of his motor vehicle registration number KAM 890V Mazda Mini bus valued at Kshs.1,500,000 and at or immediately after the time of such robbery threatened to use actual violence on the said **Juma Kimani Matenja**.

The appellants also faced the third count of robbery with violence contrary to **Section 292(2) of the Penal Code** in that on 29.11.01 at Mwariki Estate jointly with others not before court while armed with dangerous weapons namely; pistols and pangas robbed **Elvis Eliakim Butiko** of his Sony car radio cassette serial number 66786, a Seiko watch, 5 wallets, watch, Kshs.2,500/- all valued at Kshs.9,500 and at or immediately before or after the time of such robbery threatened to use actual violence on the said Elvis Eliakim Butiko.

The third appellant also faces an alternative count in that on the 3<sup>rd</sup> day of December 2001 at Kayole Estate within Nairobi city in Nairobi area otherwise than in the cause of stealing dishonestly handled one Sony car radio serial No.66786 property of Elvis Eliakim Butiko knowing or having reasons to believe it to be stolen property or unlawfully obtained.

The third appellant was similarly charged with the fourth count of being in possession of a firearm without Firearm Certificate contrary to **Section 4(1)** as read with **Section 3(2) of the Firearm Act Cap 114 of the Law of Kenya** and the particulars are that on the 2<sup>nd</sup> day of December 2001 at Bondeni Mosque area within Nakuru Municipality, the Appellant was found in possession of one Ceska pistol magazine without firearm certificate.

The three appellants were also charged with the sixth count of being in possession of public store contrary to **Section 324 (2) of the Penal Code** in that on the 2.12.01 at Bondeni Estate, jointly had in their possession public stores namely one handcuff serial number KPS 3359/91 of the Kenya Prisons Department such property being reasonably suspected of having been stolen or unlawfully obtained.

The 1<sup>st</sup> appellant raised several grounds of appeal, in addition to the original petition, on the day of the hearing of this appeal he sought to introduce a supplementary list of grounds of appeal which can be summarized as follows;

Ø *The prosecution relied on uncorroborated evidence.*

Ø *The prosecution relied on circumstantial evidence.*

Ø *The identification parade was conducted contrary to the rules and regulations under the Police Act and the sworn statement of defence by the 1<sup>st</sup> appellant was not given any consideration by the trial Magistrate.*

The 2<sup>nd</sup> appellant too, submitted a supplementary record with grounds of appeal in addition to what was filed in the original petition of appeal, the grounds of appeal raises the following issues: -

Ø *That the learned Magistrate wrongly convicted the 2<sup>nd</sup> appellant while relying on uncorroborated evidence and failure to call essential witnesses and to produce essential exhibits.*

Ø *The learned Magistrate wrongly relied on the evidence of identification.*

Ø *That the Learned Magistrate wrongly ignored the 2<sup>nd</sup> Appellant's statement of defence.*

The 3<sup>rd</sup> appellant similarly submitted additional grounds of appeal and written submissions. The 3<sup>rd</sup> appellant's grounds of appeal are essentially similar to the ones raised by the 1<sup>st</sup> and 2<sup>nd</sup> appellant although we must emphasize that the 3<sup>rd</sup> appellant complained also of having been convicted on the basis of insufficient evidence.

We have carefully reconsidered and re-evaluated the evidence that led to the conviction and sentence as

we should be the first appellate court.

The summary of the evidence that led to the conviction and sentence can be stated briefly. There were three reports made on 20.11.01 and on 29.11.01 at Bondeni Police station of a spate of robberies with violence. On 2<sup>nd</sup> December 2001, PW 9 together with other police officers while acting on a tip off raided a certain dwelling house at Bondeni Estate where they found the three appellants. They forced the door open and after conducting a search the 2<sup>nd</sup> appellant was found with a pistol magazine in his jacket. They searched the house and found the handcuffs, music system, C.D player, a Seiko watch, and other unmarked watches from that house where the appellants were at Bondeni estate.

After investigations the 1<sup>st</sup> and 2<sup>nd</sup> appellants took PW 9 to another house where they recovered a weapon being a pistol which fitted the magazine that was found in possession of the 2<sup>nd</sup> appellant.

On 29<sup>th</sup> November 2001, the prosecution evidence was that the appellants commandeered a passenger vehicle KAM 890V and threatened to shoot PW 1 and PW 2 unless they drove the vehicle as per their instructions. In the process and while under the threats of being shot they were robbed of a car radio cassette a watch and money. PW 2 was able to identify the 2<sup>nd</sup> appellant whom he described as the one who was holding a pistol and who fired a shot. There was a struggle when the 2<sup>nd</sup> appellant aimed the pistol at PW 2 but it shot under his legs. Further PW2 testified that he was able to identify the 2<sup>nd</sup> appellant because they had a few minutes earlier engaged in an argument about the 2<sup>nd</sup> Appellant giving a seat in the passenger vehicle to another lady passenger. PW 2 also identified the 2<sup>nd</sup> appellant during an identification parade which was conducted by PW 4.

PW 8 who was also a passenger in the motor vehicle positively identified the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants during the identification parade. His evidence is clear that the 1st appellant entered the passenger's vehicle and the 1<sup>st</sup> appellant sat next to the driver. The 2<sup>nd</sup> appellant sat next to the conductor near the door and he described what he was wearing and the 3<sup>rd</sup> appellant sat at the back of the vehicle during the said ordeal.

The evidence that therefore connects the appellants with the offences they were charged with is the fact that PW 2 was able to identify the 2<sup>nd</sup> appellant. PW 8 who was also a passenger identified all the three appellants.

PW 9 the arresting officer found the three appellants in possession of some of the recognizable items that were robbed on 20.11.01 and 29.11.01 and the 2<sup>nd</sup> appellant was found in possession of a firearm magazine and subsequently led the police to a place where the pistol which fitted the magazine was recovered.

Arising from the above summary, the question we have to ask ourselves is whether there was adequate evidence to convict the appellants of the offences. Was there sufficient identification or was the identification parade conducted according to the laid down guidelines.

Secondly, the fact that the appellants were found in possession of stolen goods some of which belonged to PW 1, PW 2 and PW 4 the victims of the spate of the robberies of 20.11.01 and 29.11.01, does the possession of these items link the appellants to the acts of robberies? All of the appellants raised a similar defence and complained that the learned Magistrate failed to take it into consideration. We are of the view that the learned Magistrate properly disregarded the defence as a mere sham for reasons that the Appellants were arrested together and it is not possible that it was by a mere coincidence that the Appellants who were identified as the perpetrators in a spate of robberies could have converged in a dwelling house merely to have a good time. We are satisfied that the learned trial Magistrate properly accepted the evidence of PW 9. The only inference that can be drawn from the possession by the appellants of the complainants' property that had been reported stolen was that the appellants were involved in the robbery that took place on 29.11.01 where the 2<sup>nd</sup> appellant was identified by PW 2 and

PW 7 and where the 1<sup>st</sup> and 3<sup>rd</sup> appellants were identified by PW 7 and accordingly we find that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were properly convicted on the 3<sup>rd</sup> count.

The appellants were not found guilty of count one (1) and although we find evidence that would have led to a conviction of the appellants with the alternative lesser count of handling stolen properties, nothing turns on this.

As regards count two (2) it is clear from the evidence that the motor vehicle registration number KAM 890V was not produced as an exhibit. Moreover the evidence adduced in court was to the effect that the appellants commandeered the motor vehicle through the use of force and threats to use force to the place where they directed. They did not take possession of the vehicle, they only stole the radio cassette and in this regard we quash the conviction in respect of the 2<sup>nd</sup> count.

As regards the 4<sup>th</sup> count, we find that there was adequate evidence to support the conviction and the learned Magistrate properly accepted the evidence of PW 9, PW 10 and PW 12 and we accordingly uphold the conviction in respect of count 4.

Similarly, we uphold the conviction in respect of count 5 and 6.

In conclusion, we allow the appeal in respect of the 2<sup>nd</sup> count but the conviction in respect of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> counts still stands and the appeal in respect to the said counts is therefore dismissed. The appellants to serve the sentence in respect of counts 3, 4, 5 and 6.

**Judgment read and signed on 3<sup>rd</sup> March 2006.**

**MARTHA KOOME**

JUDGE

**D. K. MUSINGA**

JUDGE