REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 258 of 2002

CHARLES BUNDI IRINGO ……………………………...……………1ST APPELLANT

JOSEPH MUCHOKI MUTHONI ………………………....………….. 2ND APPELLANT

AND

REPUBLIC ………………………………….……….……………….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Patel & Tuiyot, JJ.)

dated 22nd February, 2002

in

H.C.CR.A. NO. 889, 891 & 886 OF 1999)

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JUDGMENT OF THE COURT

CHARLES BUNDI IRINGO, the 1st appellant, and ***JOSEPH MUCHOKI MUTHONI,*** the 2nd appellant, were together with another person charged in the magistrate's court at Murang'a with robbery with violence contrary to **section 296(2)** of the Penal Code. They were convicted and sentenced to death. Their first appeals to the High Court of Kenya at Nairobi *(Patel and Tuiyot JJ)* were however dismissed on 22nd February, 2003. They now appeal to this Court by way of a second appeal.

The brief summary of the pertinent evidence is as follows. At about 2 a.m. during the night of 31st November, 1998, ***Elizabeth Kamau (PW1),*** her husband ***Moses Kamau***, and their children ***Jennifer Kamau (PW2)*** and ***Jonathan Kamau (PW3)*** were asleep in their house at Iteru Village in Maragua District when they were attacked by an armed gang of about five robbers who broke into the house. The gang was armed with arrows, pangas and axes. They proceeded to beat the members of the family while demanding money. Moses Kamau was cut several times on the head and shoulders when he did not produce Shs.1,000,000/= as demanded by the robbers. The robbers then ransacked the house and loaded into Moses Kamau's motor vehicle Mercedes Benz KXH 667, PW1's TV set, a gas cylinder, a radio, shoes, a wall clock and a water pump. They also took with them PW2's wrist watch and some household goods. As they could not start the car, the robbers ordered PW2 to do it for them. When they left a siren was switched on but the neighbours found the robbers having disappeared.

Corporal Kisuru (PW4) received the robbery report an hour or so thereafter and he led a team of police officers to the home of PW1 to conduct investigations. He learnt that the stolen motor vehicle KXH 667 had been found in a ditch at Kaharati. He rushed there and inspected it. In it he found 15 arrows and a bow, knives and explosives. There was a lot of human blood both inside and outside. The motor vehicle was also extensively damaged.

PW4 and his team then just before 6 a.m. moved to Nairobi – Nyeri highway for investigations. At Kenol they stopped a Nissan matatu plying the route. It was on its way to Nairobi. PW4 picked two suspicious looking people among the early passengers. One of them had a fresh cut wound above the left eye, an injury above the ear and on the head. This person was the 1st appellant. They also stopped a lorry carrying coffee to Nairobi and on it they arrested the 2nd appellant who had visible injuries on his leg. The 1st appellant was searched and the ignition keys of the motor vehicle KXH 667 were found in his pocket. The 2nd appellant was wearing a ladies wrist watch. Further, the two appellants had a lot of mud in their clothes.

The blood stains in the vehicle were taken for analysis. They were found to be of human blood of groups A, B and O. The 1st appellant's blood group is A and that of 2nd appellant is of group B. The co-accused of the appellants Simon Macharia who died soon after conviction by the magistrate's court had blood group O.

On 17th November, 1998, Simon Macharia, had given a charge and caution statement in which he confessed his planning and participation in the robbery. He also implicated the two appellants. However, at the trial he retracted the confession but it was held admissible after a trial within a trial.

In his testimony in defence before the trial court, the 1st appellant stated that he was a businessman at Athi River. On the material night he was at Maragua with a Canter vehicle to buy bananas. On the way to Nairobi the vehicle landed in a ditch and the shaft snapped. He stayed there overnight and boarded a Nissan Matatu early for Nairobi. He explained to the Police that the mud he got all over his clothes was due to the fact that he had been pushing the Canter for a long distance. He stated that the injuries he had on his body were caused by the police due to beatings he sustained from them. He asserted that the charge against him was a frame up.

The 2nd appellant testified that he was a casual labourer. He was arrested early in the morning on his way to work. The injuries he had on his body had been inflicted by the Police who assaulted him for nothing on 11th November, 1998. He denied being a member of the gang of the robbers which raided the house of Moses Kamau.

It is significant and indeed worthy of note in their trial that the two appellants said nothing whatsoever about the Mercedes Benz car keys and the ladies wrist watch recovered from them.

The trial court after considering the above evidence held:-

"*It is true it is not the accused alone who have those blood groups but the fact that they had fresh wounds and their blood group was as above the vehicle was stained with those blood groups and the fact that each of them was found with items from the complainant 1st accused table cloth 2nd accused ignition key and 3rd accused wrist watch and it was soon after robbery shows that indeed it is the accused who robbed and seriously injured the complainant, now deceased.*"

The High Court as the first appellate court concurred with the findings and conclusions of the trial court and upheld the convictions of the appellant.

Before us, *Mr. Wamwayi* for the appellant argued that the trial court and the first appellate court erred in law and misdirected themselves in relying on the fact that the car keys and the wrist watch were recovered from the appellants and in applying the doctrine of recent possession. *Mr. Wamwayi* further

submitted that the appellants had reasonably and sufficiently explained the injuries they had in their bodies. He doubted the evidential value of the blood analysis contending that the blood groups were not unique to the appellants but were common among many persons in the country. *Mr. Wamwayi* contended that the confession of the co-accused of the appellants which was relied upon by the two courts below was a retracted one which required to be corroborated and there was no corroboration of it. Moreover, he pointed out it would be difficult to conceive of a case in which it would be proper to convict on the unsupported evidence afforded by the confession of a co-accused.

Mrs. Murungi, counsel for the Republic, supported the conviction. She averred that there was strong circumstantial evidence that the appellants were among the members of the gang which attacked and robbed the family of Moses Kamau of property and inflicted grave injuries on him to which he eventually succumbed a few hours afterwards. Those circumstances were the appellants' bloodstains in the deceased's car and the recovery of the car's ignition keys from the 1st appellant's pocket; the possession of PW2's ladies wrist watch by the 2nd appellant and fresh injuries in the appellant's bodies of which they gave no reasonable explanation. On the co-accused's confession, *Mrs. Murungi* argued that it was taken together with other evidence on record and could sustain a conviction. She urged us to dismiss the appeal.

This being a second appeal only matters of law by dint of ***section 361(1)*** of the Criminal Procedure Code Cap 75 Laws of Kenya fall for consideration.

Further, this Court will not depart from concurrent findings of fact by the trial and first appellate courts unless it can be persuaded that there are compelling reasons for doing so. And the compelling reasons would be that no reasonable tribunal could on that evidence have arrived at such findings or, in other words, the findings were perverse and therefore bad in law. In that regard, we would reiterate what this Court said in ***STEPHEN MURIUNGI & OTHERS V. REPUBLIC (1982-88) 1 KAR 360.*** Chesoni, Ag. J.A. (as he was then) in delivering the majority judgment said at page 366:-

"***We would agree with the views expressed in the English case of MARTIN V GLYWED DISTRIBUTORS LTD. (T/A MBS FASTENNGS) [1983] 1CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

And in ***NYAMBANE V. REPUBLIC [1986] K.L.R. 248***, this Court held that:-

"***An appellate court should be reluctant to disturb concurrent findings of facts on a second appeal unless there were compelling reasons."***

The 1st appellant admitted being at Maragua at the material time and within a short distance from the home of the deceased, Moses Kamau. He also stated that his vehicle had landed in the ditch near where the deceased's Mercedes Benz KXH 667 was found. But it is curious that the police never saw the 1st appellant's Canter vehicle if there was one. Also, he never gave its registration number. Further, the two appellant's admitted possessing injuries of which they gave no explanation as to how they received them.

In our view, there is no compelling reason to depart from the concurrent findings of fact that the appellants were involved in the robbery. All the findings established by the trial court constituted circumstances which irresistibly led to the conclusion that the two appellants were involved in the robbery as they were incompatible with their innocence and incapable of explanation on any other reasonable hypothesis than that of their guilt, and, accordingly, they satisfied the test of sufficient circumstantial evidence as propounded in the case of ***KIPKERING ARAP KOSKE V. R. (1949) 16 EACA 135*** and reiterated in several other decisions of the predecessor of this Court and this very Court. We would, on that basis alone, reject this appeal.

Now, turning to the confession of the co-accused, ***Simon Ndegwa Macharia,*** which he retracted but was admitted during a trial within a trial, we would agree with *Mr. Wamwayi* that it was evidence of the weakest kind and could not be used to found conviction against the appellant in the absence of other cogent evidence. It is a rule of practice and also a rule of prudence that it would not be proper to convict solely on the unsupported evidence afforded by the confession of a co-accused. See ***R. V. NDARIA S/O KARIUKI 12 EACA 84.***

But, it is evident from the synopsis of the evidence we outlined earlier that the convictions of the appellants were not founded exclusively on the confession of the co-accused. The convictions were founded also on circumstantial evidence and the doctrine of recent possession. It was thus safe, we so think, to take into account the detailed confession of the co-accused which by itself – was sufficient to justify the conviction of the co-accused, the person making the offence for which he was being jointly tried with the appellants.

The other limb of the evidence linking the appellants with the commission of the crime charged is the recovery of the deceased's ignition keys and PW2's ladies wrist watch from the appellants. The evidence shows beyond any shadow of doubt that these properties belonged to the deceased and his daughter. The recovery from the appellants was about three hours after the robbery.

The question for decision here is whether this possession was sufficient to sustain a conclusion that the appellants did participate in the robbery at the house of Moses Kamau. How proximate in time in relation to the date of the robbery were the goods found in their possession? We think that the time lapse between the time of the robbery and the recovery of the articles from the appellants was not such that it would be unreasonable to hold that the appellants' possession thereof at that time was sufficient enough to found a conclusion that the appellants did indeed participate in the robbery in that they were found in the possession the property subject of the robbery shortly afterwards. As they were silent in their evidence about the articles and as to how they came by them the two courts below properly invoked the doctrine of recent possession and did come to the correct conclusion that the appellants were members of the gang that robbed Moses Kamau of property and caused him the injuries which resulted in his unfortunate death.

In the result we uphold the convictions and the sentence. We accordingly dismiss this appeal.

DATED and DELIVERED at NAIROBI this 28th day of April, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original**.**

DEPUTY REGISTRAR