



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA**

AT NAIROBI

Criminal Appeal 3 of 2004

1. **ONESMUS MUTUA KIILU 1ST APPELLANT**
2. **PATRICK MUCHUNGU NJINE 2ND APPELLANT**

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ) dated 22nd July, 2003

in

H.C.CR.A. NOS. 324 & 330 OF 2001)

JUDGMENT OF THE COURT

The two appellants and another were jointly charged before the chief Magistrate, Nairobi with three counts of robbery with violence contrary to **Section 296 (2)** of the Penal code. In the first count they were charged with robbing **PETER NYAGA IRERI** of a motor vehicle registration No. KAH 460T Toyota Carina and cash Shs.1,800 on 5th October, 2001.

In the second count, the appellants were charged with robbing **ONESMUS JACKTON NJIRU** of two wrist watches, electric calculator and Shs.120,000/= in cash on 5th October, 1999. In the third count the appellants were alleged to have robbed **FELISTA PRISCAH NJIRU** (Felista) of a wrist watch – RADO, valued at Shs.50,000/=.

The first appellant **ONESMUS MUTUA KIILU** was the first accused at the trial while the second appellant **PATRICK MUCHUGU NJINE** was the third accused. The co-accused **HENRY MUTUKU MUSAU** was the second accused. The first and second appellants were acquitted of the first and third counts but were convicted of the second count and each sentenced to death. The co-accused was acquitted of all the three counts.

On 5th October, 1999 at about 9 p.m. Peter Nyaga Ileri (PW1) (Ileri) the complainant in the first count had parked motor vehicle registration No. KAH 460T Toyota Carina outside the house of Marjory Marigu Saidi (PW2) at Tena Estate, Nairobi. The motor vehicle belongs to Marjory who had asked Ileri to drive Janice Njiru from her house to her parent's home in Buru Buru Estate, Nairobi. The parents of Janice

Njiru are Onesmus Jackton Njiru (PW7) (Onesmus) and Felista Prescah Njiru (PW9), the complainants in counts 2 and 3 respectively. While Ileri was waiting for Janice Njiru to come out of the house, three people who were armed with pistols appeared. They pointed a gun at him and ordered him to surrender the car and move to the back seat after which the three robbers entered into the car. The car was driven by one of the robbers for a short distance towards Outer Ring Road. The driver then stopped the car and Njiru was questioned. He disclosed that he had Shs.1,800/= and that he intended to go to the house of Onesmus Jackton Njiru in Buru Buru. The Shs.1,800/= was taken and he was forced to take the three robbers to the house of Njiru. Ileri directed the robbers to Njiru's house at Buru Buru.

They found Njiru and his wife inside their vehicle registration No. KRQ 100 Volvo 244 DL in the parking about to drive away. Motor vehicle registration No. KAH 460T stopped behind Njiru's car and three people including Ileri came out of the vehicle. Ileri told Njiru and his wife not to worry as the people he was with were his friends. Felista alighted from the car and one of the robbers entered into the car and hit Njiru at the eye with a gun. Njiru was searched and Shs.20,000/=, a wrist watch and a calculator were taken. Njiru and his wife were then forced back into the house where the robbers demanded more money. They were given a total of Shs.120,000/=. The robbers demanded more money and shot once at a wall unit which was in the house. Njiru told the robbers that he had no more money. Ileri suggested to Njiru that Njiru could borrow money from other places like Jam Rescue bar and the Connections bar. The robbers ultimately drove away towards Kayole taking Njiru and his wife with them.

On reaching Kayole the robbers alighted and released the car to Njiru. Meanwhile, Ileri who was left in Njiru's house rang Marjory Marigu Said and reported the robbery to her. She in turn rang the police and reported the robbery.

Njiru drove back along Outer Ring road up to Caltex Petrol Station when his wife Felista took over driving as Njiru could not see properly due to the injury to his eye. On arrival at their house they found Ileri still inside the house.

On 5th November, 1999, at about 1 p.m. PC James Ouna (PW3) and PC Abdi Ali (PW4) went to a house in Mathare area near Juja Road on information and arrested the first appellant and recovered a Taurus pistol with 13 rounds of ammunition hidden at his left hip side.

On 8th November, 1999 the first appellant led PW3 and PW4 to a house in Kayole where they arrested the second appellant and the co-accused who was acquitted. The co-accused was in possession of America Colt Pistol with one round for ammunition.

On 11th November, 1999 Ileri identified the first and second appellant at respective identification parades conducted by IP John Kiema (PW5) and IP John Wainaina at Pangani Police station.

Each appellant denied committing the robberies and described in detail the circumstances under which each was arrested. The first appellant also denied that he was found in possession of a pistol.

The trial magistrate reviewed the evidence. In respect of the first count of robbery where Ileri was the complainant, the trial magistrate said in part:

"I have doubts whether he was carjacked or not. Apart from Peter himself there is no other evidence to corroborate him. From what the court was told I do not find that a robbery was committed in respect of count 1. Even if PW1 had been robbed the evidence to prove that is lacking. It is a situation where Peter Nyaga was himself taken as a suspect. Indeed PW1 wanted him to be arrested and be charged for robbing him but police officers refused for some reasons they were not ready to disclose. An impression was created showing that Peter Nyaga chose to take the thugs to rob PW7 in this case. In the circumstances I would dismiss count I in this case".

The trial magistrate further found that the charge in count III where Felista was the complainant was a duplication of count II where her husband Njiru was the complainant and dismissed the charge.

In convicting the appellants for the offence in count II, the trial magistrate was satisfied that the appellants were identified by Peter Nyaga inside the house of Njiru and that the evidence of Peter Nyaga was corroborated by the evidence of Njiru and his wife Felista.

The superior court agreed with the finding of the trial magistrate that Ileri was in the position of an accomplice and stated:

“At best we find that the story of PW1 is quite doubtful in so far as to whether he was hijacked or not. It may or may not have been true. Under those circumstances, the trial magistrate in our view and finding, was entitled not to convict the appellants on the 1st count without corroboration”.

The superior court however accepted the evidence of Ileri as to the identification of the appellants inside the house of Njiru as true and concluded:

“We have no hesitation in agreeing with the honourable trial magistrate that PW1’s evidence together with that of PW7 and PW9 on identification was strong and reliable and corroborated each other”.

Mr. Ndungu, learned counsel for the appellants, argued the grounds of appeal together but addressed the court mainly on two grounds. Firstly, he submitted that the proceedings of the trial were irregular as on two material occasions, the record does not show the name of the prosecutor who was present and his rank. He referred to the proceedings of 11th July, 2000 when two witnesses gave evidence; the proceedings of 25th May, 2000 when again two witnesses gave evidence and the proceedings of 29th November, 2000 when the appellants gave evidence.

Except on the three mentioned occasions, the record shows that in all other occasions an Inspector of Police or a Chief Inspector of Police attended as a prosecutor. The record does not show that the prosecution was on any occasion conducted by a police officer below the rank of an Assistant Inspector. Furthermore the appellants do not claim that an unauthorized prosecutor conducted the prosecution on any of the three occasions. This ground of appeal undoubtedly has no merit.

Secondly, and more importantly, Mr. Ndungu contended that the superior court misdirected itself in law by using the evidence to support count I, which evidence was rejected by the court, to convict in count II. He further contended that without the evidence to support count I the evidence in support of count II could not stand as it was dock identification. We understand Mr. Ndungu to be saying that the superior court misdirected itself in law in relying on the uncorroborated evidence of an accomplice (Ileri) to convict the appellants for the offence in count II.

In *Rex v Ndara s/o Kariuki and six Others* [1945] 12 EACA 84, the court at page 86 enunciated the correct approach to accomplice evidence thus:

“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness.

If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence; and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief”.
(See also *Kinyua v Republic* [2002] 1 KLR 256).

In this case although the two courts below did not make a specific finding that Peter Nyaga Ileri the complainant in count I was an accomplice, they treated him as an accomplice. There was ample evidence to support a finding that he was an accomplice. For instance, his evidence that he was forced into the back seat of the car and one of the robbers took over driving was refuted by Njiru, his wife Felista and by

Kimani Rongída (PW10) the watchman who said that it is Ileri who drove the vehicle to the house of Njiru in Buru Buru. Ileri admitted that he is the one who led the robbers to the house of Njiru – about 3 km from Tena. Njiru and his wife said that Ileri told them that the people he had brought were his friends and during the robbery inside the house Ileri was just seated on the sofa set. He was not injured. There was evidence that he persuaded Njiru and his wife to go and borrow more money from some bars. He was arrested as suspect but later treated as a witness.

The trial magistrate disbelieved his evidence that he was robbed of the motor vehicle and money. The superior court agreed with that finding. This is a case therefore where the two courts below made a concurrent finding that Ileri as an accomplice was not a credible witness. Yet the two courts below quite, erroneously in our view, believed his evidence of the identification of the appellants during the robbery at the home of Njiru and mainly relied on such evidence to convict the appellants. The evidence of the accomplice should have been rejected in *toto*. It was not capable of corroboration.

We respectfully agree that in this case the superior court grossly misdirected itself in law when it heavily relied on evidence of an accomplice whom it had previously found to be unworthy of belief to convict the appellants. The only other independent evidence of the identification of the appellants was from Njiru and his wife Felista but the conditions for identification were unfavourable. The first appellant stood at the door and did not enter into the house where there was electricity light. Njiru had been hit with a gun on the eye and was not seeing properly. The evidence of Njiru and his wife Felista was evidence of dock identification over 10 months after the robbery. Without the evidence of Ileri, the independent evidence of dock identification was inconclusive and insufficient to justify the conviction of the appellants.

For those reasons, we have come to the conclusion that the appellants were not properly convicted.

We allow the appeal of each appellant, quash the conviction and set aside the sentence.

Each appellant to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 26th day of May, 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