IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: TUNOI, GITHINJI & ONYANGO OTIENO, JJ.A)

CRIMINAL APPEAL NO. 275 OF 2002

BETWEEN

1. JUMA MOHAMED GANZI)

2. RAMADHAN MOHAMED GOVI) …………………….APPELLANTS

3. HASSAN HUSSEIN MWAMBIEGA)

VERSUS

REPUBLIC …………………………………………………… RESPONDENT

JUDGMENT OF THE COURT

The first appellant, **Juma Mohamed Nganzi (Juma);** the second appellant, Ramadhani Mohamed Govi (Mohamed); the third appellant, **Hassan Hussein Mwambiega (Hassan)** and one **Kassim Ali Mwafamau (Kassim)**, were jointly charged with six counts of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code in counts I, II, III, IV, V and VI respectively; two counts of arson contrary to **section 332 (a)** and (b) of the Penal Code in counts VII and VIII; and one count of assault causing actual bodily harm contrary to section 251 of the Penal Code in count IX. Kassim who was the fourth accused at the trial was charged with an alternative charge of consorting with armed bandits contrary to **section 89 (1) and (2)** of the Penal Code. The three appellants were each convicted of the six offences of robbery and sentenced to death on each of the six counts.

They were also convicted on the two offences of arson and each sentenced to one year imprisonment; the sentences for the offences of arson to run concurrently. The three appellants were however acquitted of the offence of assault. The 4th accused (Kassim) was acquitted on all the charges.

Each appealed to the superior court. Their respective appeals to the superior court against conviction and sentence (which appeals were consolidated and heard together) were dismissed save that the conviction for the offence of robbery in count V was quashed.

They now appeal to this Court on ten grounds. However, the second ground of appeal was abandoned at the hearing of the appeal.

The evidence of the prosecution witnesses at the trial is, in a summary, that on 23/10/1997 at 9.00 a.m.,

Samuel Njuguna Muiruri (Muiruri) who was PW 7 at the trial and complainant in court IV, went to the shop of the 4th accused at the trial (Kassim) riding on a bicycle to buy cigarettes. He found Kassim speaking with eight people – three of whom had guns while the other five were standing in a line with their thumbs in the mouth. Muiruri gave Sh.20/= for cigarettes but was attacked by the people he found at the shop saying that he was a Kikuyu. He was beaten and knocked down. His two artificial teeth were knocked out. The jacket that he was wearing was removed. The people then took him away leaving his jacket, bicycle and hat with the shopkeeper. The people thereafter blindfolded him with a transparent blindfold, tied his hands and led him into the bush saying that they were going to kill him. He was thereafter taken into a hut in the bush where they slaughtered something. He was then removed from the hut and the blindfold removed. The people informed him that they would kill him because of the oath they had taken, and eight people led him away. After walking for ½ a kilometre, they reached a place where there was stagnant water and one person (the 3rd appellant) cut Muiruri's ear with a knife and licked the blood on the knife. He was then stabbed with a knife and attacked with pangas. After several attempts to kill him, Muiruri jumped into Ramisi River, which was swollen as it was during the Elnino floods, and swam to safety on the other side. He reported the matter at Msabweni police station and was taken to hospital.

On the same day at 5.30 p.m., a group of people raided Kanana Trading Centre. Some of the raiders had their faces painted and others had masks. Some of them entered into the shop of Jane Wanjiru Njuguna (complainant in count II) (Jane) and demanded money. Jane gave them Sh.27,000/=. They searched the bedroom and took a further Sh.3,000/=. They removed assorted shop goods from the shop and the store, including a radio, a thermos flask and a suitcase. They then set the shop on fire. They also raided a bar and lodging where Joel Gikeria Kamau (complainant in count III) (Kamau) and Francis Njuguna Njoroge were staying. Kamau saw about 15 people, one of whom was armed with a gun and the others with pangas, sledge hammers and sticks. Those people beat Kamau and took his Sh.8,800/=. They also took his box from the room. Francis Njuguna Njoroge was killed. The premises of John Ngutungi (John) (complainant in count VI) were also raided and various goods stolen from his kiosk. He however hid in his room and the raiders did not see him.

The raid was reported at Msabweni Police Station on the same day but police could not go to Kanana Trading Centre as the bridge on Ramisi River had been swept away. A temporary bridge was made on the following day and police went to the trading centre for investigations. On 27/10/1997, about ten police officers including Reuben Lwambi (PW 10) and Cpl. Peter Karoi went to Buda forest on information in search of the raiders. They walked for 3 kilometres in the forest. They then saw a person patched on top of a tree and was told to come down. He was identified as Juma – the first appellant. The police advanced further into the forest and saw about 10 people about 50 metres away from where the first appellant was arrested. Some of these people ran away leaving three of them behind. One of the three people had a spear. He was ordered to put it down but declined. He was shot dead. The other two identified as Ramadhan and Hassan (the 2nd and 3rd appellants respectively) were arrested and taken to police station. There were five temporary houses in the forest in which many goods were recovered. The respective complainants, Jane, Wanjiru Njoroge, Joel Gikera Kamau, Samuel Njuguna Muiruri and John Mutungi Kathaya identified some of those goods as the ones stolen from each of them at Kanana Trading Centre on 23/10/1997. On 3/11/97, Juma, the first appellant, was identified by Muiruri **(PW 7)** in an identification parade conducted by I.P Dick Muteti (**PW 9**). On 27/10/1999, Hassan, the third appellant, made a statement under inquiry before I.P Flora Tson Zaki. The other two appellants were also identified at the identification parade, but the trial court rejected evidence of their identification on proper grounds.

The first appellant, Juma, gave sworn evidence at the trial denying that he was involved in the raid at Kanana Trading Centre. He said that he was arrested in his father's shamba when he was cutting trees. He denied that he was found on top of the tree and said that he was down after having already cut timber.

The second appellant, Ramadhan, also gave sworn evidence at the trial. He also denied that he was involved in the raid at Kanana Trading Centre. He stated that he was arrested at his father's home about 20 kilometres from Kanana. Lastly, the third appellant, Hassan, gave sworn evidence at the trial. He denied taking part in the raid at Kanana and said that he was arrested at his father's home in Msabweni

and that some of the goods brought to court belonged to him.

This being a second appeal, the Court can only deal with issues of law. Further, this Court cannot interfere with concurrent findings of fact by the two courts below unless they are based on no evidence or unless arrived at as a result of misdirection or non direction of such a nature that, without them, it is reasonably possible that the appellants could not have been convicted (see KARINGO V. R [1982] KLR 213).

The first and third grounds of appeal can be considered together. The appellants complain in ground I that the trial court erred in law in convicting the appellants and the superior court erred in law in upholding the convictions in counts (i), (ii), (iii), (iv) and (vi) when the charges were defective by failing to clearly specify the essential ingredients of the offence of robbery under section **296(2)** of the Penal Code. In support of that ground, Mr. Sangoro, the learned counsel for the appellants, submitted that the particulars of the charges should have specifically stated that the weapons or instruments that the appellants were allegedly armed with were dangerous or offensive weapons or instruments. He relied on the case of Juma v. Republic [2003] 2 EA 471.

This Court has said in several decisions (see particularly the case of Oluoch v Republic [1985] KLR 549 that the offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:

> **"(i) The offender is armed with any dangerous or offensive weapon or instrument; or**
>
> **(ii) The offender is in the company with one or more other person or persons; or**
>
> **(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."**

The offence of robbery with violence under **section 296(2**) of the Penal Code is proved if the prosecution proves any of those three elements. Firstly, the mere omission of the words "dangerous or offensive weapon or instrument" in the particulars of the six charges of robbery that were under consideration does not make the charges defective because as the charges show, the prosecution was also relying on the other two elements of a charge of robbery.

Secondly, the particulars of the six charges say that the appellants were armed with "G3 rifles, bow and arrows".

In the recent case of **John Maina Kimemia and Another v. Republic** **Criminal Appeal Nos. 105 & 110 of 2003 (unreported)** this Court held that the words "dangerous or offensive weapon" **in section 296(2)** of the Penal Code bear the same meaning as defined in **section 89(4)** of the Penal Code thus:

> **"any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use."**

A firearm is made for causing injury. Similarly, a bow and arrows are made for causing injury to a person. It is not necessary to state in the charge sheet that such weapons are dangerous or offensive weapons as they are inherently so. Thirdly, that ground of appeal was raised for the first time in this Court. The appellants were all represented at the trial and in the first appeal by a counsel who did not raise the issue. In any case, such a defect as complained of by the appellants has not been shown to have caused a failure of justice and is indeed curable under section 382 of the Penal Code.

The same can be said about ground 3 of the appeal where the appellants are contending that **section 211** of the Criminal Procedure Code was not complied with as the charge was not read again to the appellants after the trial court found that the appellants had a case to answer. The appellants were represented by a counsel who led the appellants in their evidence and thereafter the appellants called witnesses. That was a minor procedural error which did not occasion any failure of justice and which is also curable under

section 382 of the Criminal Procedure Code. In any case, the action of the appellants in choosing to give sworn statements and calling witnesses at their trial indicated that they knew the requirements of section 211 of the Criminal Procedure Code.

The appellants also complain in ground 4 of the appeal that the trial court erred in failing to take into account the fact that Muiruri was in court during proceedings prior tothe hearing of the testimony. This ground of appeal is not supported by the record of the proceedings. It was only raised by the counsel then on record for the appellants for the first time when he was making his final submissions after the close of the trial. The counsel now on record for the appellants has no personal knowledge of what transpired at the trial. This ground was not raised in the superior court. We have no facts or full facts on which we can make a finding on this ground.

Mrs. Mwangi, the learned State counsel does not support the conviction in the first count for the reason that the evidence proved the offence of murder and not the offence of robbery. The particulars of the offence of robbery in count I states:

> **"….. on 23rd day of October, 1997, at about 5,30 p.m. at Kanana Trading Centre Kikoni Location in Kwale district within the Coast Province jointly with others not before the court armed with G3 rifle, bows and arrows, pangas and knives robbed FRANCIS NJUGUNA NJOROGE of assorted types of drugs value not know and some money amount not known and at or immediately before or immediately after killed the said FRANCIS NJUGUNA NJOROGE by cutting him with a panga."**

The prosecution did not call any evidence to prove that Francis Njuguna Njoroge was robbed of money or drugs or to show the circumstances under which he was killed. The only evidence given was that after the raid at Kanana Trading Centre his body was found lying outside a building. We would agree that the first count of robbery was not proved. Similarly, the offence of arson in count VIII was not proved. The particulars of the charge in count VIII allege that the appellants set fire to motor vehicle registration **No. KAA 639L –** Isuzu Canter- the property of Bernard Ongera valued at Sh.1,000,000/=. The complainant in that count, Bernard Ongera, did not give evidence and no other witness was called to give evidence in support of that charge. The main issues of law raised by this appeal are the identification of the appellants; the circumstantial evidence relating to possession of goods and the identification of the goods by the various complainants and the respective defences of alibi.

The trial Magistrate considered the case of each appellant separately. She weighed the defence of alibi of each appellant against the weight of the prosecution evidence. This is the correct approach where the defence of alibi is first raised in the appellant's defence and not when he pleaded to the charge – see Wang'ombe v. The Republic [1980] KLR 149.

On the evidence of identification by Muiruri, the trial Magistrate considered that he gave very detailed evidence and found that the witness had no reason to lie. She was satisfied that the witness was with the appellants for a long time and that he was able to identify the appellants. She was also satisfied that the first appellant was properly identified in an identification parade by Muiruri. The learned trial Magistrate, however, found that the identification parades in which Ramadhan and Hassan were identified were flawed as the same members of public were used in the three parades. The learned trial Magistrate considered as one aspect of circumstantial evidence that the appellants lived in the general area where the offence was committed and therefore had an opportunity to commit the offence.

The learned Magistrate further considered the circumstances under which the appellants were arrested and found that they were arrested in the forest and that the first appellant was on top of a tree. The learned Magistrate also made a finding that the goods identified by the complainants were recovered in the forest where the appellants were arrested. She was satisfied with the identification of the goods by the respective complainants.

The superior court, as required, re-appraised the evidence, exhaustively in our view, and made its own findings similar to the findings of the trial court. The superior court re-considered the evidence of Muiruri

and was satisfied that he identified the appellants. The superior court, quite correctly in our view, concurred with the finding of the trial Magistrate that the identification parades in respect of Ramadhan and Hassan were flawed but was nevertheless satisfied that the evidence of visual identification of the appellants by Muiruri was reliable. The superior court considered the legal definition of the words "be in possession of" in the Penal Code and concluded that the appellants were in law, in possession of the goods recovered in the forest. The superior court was also satisfied with the identification of the goods by the various complainants saying, among other things, that some of the goods like radio, jeans, metallic suit, the box with medicine were not so ordinary. After that thorough review of the evidence, the superior court concluded:-

"We have looked at the evidence and although they are not direct (sic) we think the circumstances show that the three were involved in the robbery and were jointly in the company of the others. The arrest, location of the appellants at the time of the arrest; at seeming possession of the stolen goods within the lapse of 3 days, the unconverted (sic) identification (dock) of all the appellants by Muiruri. These circumstances connect them with the robbery"

It has not been shown that the two courts below misdirected themselves in the manner they dealt with the evidence and the law. Indeed, we are satisfied that the appellants were convicted on strong evidence of identification, circumstantial evidence showing that they were hiding in the forest and on unexplained recent possession of stolen goods showing that they were the robbers.

We see no merits in the appeals against conviction for the offences of robbery in counts II, III, IV and the offence of arson in count VII. The learned State counsel does not support conviction for the offence of robbery in count VI for the reason that the evidence supports the offence of stealing and not robbery. We agree that a conviction for the offence of stealing contrary to section 275 of the Penal Code, which is a minor and cognate offence to the offence of robbery should be substituted.

Before we conclude this appeal, we would like to observe that the appellants were convicted and sentenced to death in each of the six counts of robbery. In addition, each appellant was sentenced to one year imprisonment for the two offences of arson – the sentence of one year imprisonment to run concurrently. We would like to repeat the observation of this Court in Muiruri v. Republic [1980] KLR 70 that where a person is charged with a number of capital charges, it is preferable to proceed with one capital charge only and leave the other capital charges in abeyance even if the other charges appear inter-linked. In our view, and as a collorary, where that advise has not been heeded by the prosecution and a person has been convicted of several capital charges with or without other charges, it is a good practice to pass a sentence of death on one count and leave the sentences in the other charges in abeyance. This is the procedure which commends itself to us in this appeal.

For those reasons, we allow the appeal in respect of the offence of robbery in count I and the offence of arson in count VIII, quash the respective convictions and set aside the sentences passed upon the appellants.

We do also allow the appeal in respect of count VI, quash the conviction for the offence of robbery and substitute a conviction for the offence of theft contrary to section 275 of the Penal Code and sentence each to two years imprisonment with effect from 9th October, 1998. We dismiss the appeal against convictions in counts II, III, IV, VII. We leave the sentences in counts III, IV and VII in abeyance. The result is that the appellants shall suffer the sentence of death passed in respect of count II only.

Those shall be the orders of the Court.

Dated and delivered at Mombasa this 21st day of January, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR