



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: TUNOI, O’KUBASU, & DEVERELL, JJ.A.
Criminal Appeal 7, 8 and 9 of 1999
BETWEEN**

**DAVID NJERU KIBUTHU 1ST APPELLANT
JOSEPH MBOGO KINYUA 2ND APPELLANT
DAVID NJERU MWENDWA 3RD APPELLANT
AND
REPUBLIC RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nyeri
(Mwera & Juma, JJ) dated 26th November,
1998*

in

H.C.CR. APPEAL NOS. 297, 298 & 299 OF 1996)

JUDGMENT OF THE COURT

This is an appeal by **DAVID NJERU MWENDWA** who is the 3rd appellant and was the 2nd accused in Criminal Case No.49 of 1994 in the Principal Magistrate’s Court at Embu, **DAVID NJERU KIBUTHU** who is the 1st appellant and was the 1st accused and Joseph Mbogo Kinyua who is the 2nd appellant and was the 3rd accused. The appeal is from the judgment of the superior court (Mwera & Juma JJ) sitting in Nyeri dated **26th November 1998 in Criminal Appeal No. 299 of 1998.**

There were also two other accused persons but they were acquitted by the trial magistrate and they were not parties to either the first appeal before the superior court or the second appeal to this Court.

The particulars of the offence as set out in the charge sheet, after the names of the five accused persons, were as follows:-

“On the 1st day of January 1994 at 1.30 a.m. at Kangaru village in Embu District within the Eastern Province, jointly with others not before the court robbed Dr. Mohammed Mushtaq of cash KShs. 32,000/= , one rado wrist watch, one roma wrist watch, one Gold Jewellery and one blood pressure machine all valued at Kshs. 210,000/= and immediately before the time of such robbery used actual violence to the said Dr. Mohammed Mushtaq.”

The facts relating to the robbery itself were well summarized by the Principal Magistrate Mr. Kaburu Bauni in his judgment as follows:-

“On the fateful night the complainant (PW1), his wife (PW2) and children were asleep in their house in Kangaru village while in or the outskirts of Embu town. At about 1.00 a.m. they were woken by a

commotion outside and screams of his watchman. When PW1 looked out through the window he saw some people beating the watchman. He also realised that electricity lights had been disconnected. The robbers broke the metal grill of one window in the sitting room and got into the house. They were armed with pangas, rungas and iron bars. The complainant pleaded with them not to beat them and to take whatever they wanted. They were beating them. Before getting into the house the robbers had cut the watchman Gichovi Karani (PW3) with a panga and he fainted. They also had cut and whipped Richard Njue Njoka (PW4) who was the complainant's shamba boy. He too fell unconscious. Once in the house they attacked and injured the complainant and his wife. Some of the robbers ransacked the house as others were demanding money from the complainant. He gave them over Sh.30,000/= he had but they went on beating him. They also threatened to kill one of his children. Some of the robbers took 3 wrist watches, pressure blood (sic) machine, jewellery and other items from various rooms. Meanwhile the complainant's neighbours had rang (sic) the police. As neighbours gathered the thieves who were outside shouted to those inside warning them. They ran out and disappeared. The complainant, his wife, watchmen and shamba boy were badly injured. They were taken to hospital for treatments."

Richard Njeru Njoka, (PW 4) the complainant's shamba boy testified that he was the one who alerted the neighbours and was told by them that they had already informed the police and Securicor. As he was returning to the complainant's house he met more than five people one of whom cut him on the head and then as he ran away he was cut again on the head and the hands.

Neither the complainant nor his wife nor *Njoka (PW 4)* were able to identify any of the appellants at any stage.

None of these facts were disputed by the appellants who denied that they had anything to do with the robbery.

The prosecution case for linking the appellants to the offence committed that night was based on two categories of evidence: the first being the evidence relating to the activities of the police tracker dog called "*Omas*" which was relevant to all the three appellants and the second being *finger print* evidence which was relevant only to the 2nd and third appellants and did not affect the 1st appellant *David Njeru Kibuthu*. (hereinafter "*Kibuthu*").

The evidence relating to the dog *Omas* was that given by *P.C. Eliphias Bitok (PW 5)* who was the dog handler and that of *PC Amos Marimba (PW 7)* who accompanied him. As their evidence is critical to the case against all three appellants we will set it out in full.

"PW 5 sworn and states:-

I am No. 51388 P.C. Eliphias Bitok attached to Muranga police division. I am a dog handler. Last year I was attached to Embu police station still as a dog handler. On 1/1/1994 I was on duty at Embu police station. We got a report of Robbery within Kangaru area. I got a dog called Omas. We went with other officers up to scene. It was a house of Dr. Mustaq. We found he had been beaten and his watchman and shamba boy had already been rushed to hospital. We were shown the window which was broken to gain access. I also saw where they left the compound through. The dog picked the scent and we started tracking.

Before reaching Kangaru trading center the dog took me past a church. It became agitated showing that it had noticed someone. I put on my torch. I saw a man with a hat. When he saw us he started running. I told him to stop or I will release the dog. He did not stop. I released the dog. It chased and caught him. I took him back to Dr. Mustaq house. He is that one (identifies accused 1). I handed him to O.C.S. I went back to the scene where I arrested him. The dog started tracking again. The dog took us to one house. We knocked the house but it was not opened. We broke the door. Inside we found two men. They are those (identifies accused 2 and 3). Accused 3 was in one room locked from outside. Accused 2 said there was nobody but the dog stuck there. When we broke the door we found accused 3 inside. We arrested the two of them.

XXD by accused 1

You were hiding in a keapple fence. The dog tracked you. It was around 3.00 a.m. You said you are from a disco. The dog would not have just picked anybody else. Once it got your scent it would not confuse another person.

You said you were with others. You did not say where your house was. You said you are from Meru. You had no identification card.

XXD by accused 2

The dog led me to your house. There was a panga under your bed.

XXD by accused 3

We did not get anything stolen in the house. You refused to open the house. We broke (sic).

PW 7 PC sworn and states:-

I am No.65530 PC Amos Marimba attached to Embu C.I.D. Office.

On the night of 31/12/93 and 1/1/1994 I was on crime standby at Embu police station. At about 1.30 a.m. I received a telephone report from Dr. Mohammed Mustaq of Kangaru village that he had been attacked at his house. He had been injured together with his watchman and shamba boy. I and O.C.S., Dog handler PC Bitok and Duty Officer sergent Musau proceeded to the scene. We found that the robbers had broken into the house by breaking glass windows after breaking window bars. We left O.C.S. at scene. I and the dog handler started tracking the robbers. The dog led us around the Kangaru road. We went near a church. There we spotted one man trying to hide in a maize plantation beside the road. The dog handler informed him we were police officers and ordered him to stop. Instead he started to ran. The dog handler released the dog which ran after him. He was arrested and took him back to the scene. He is that one (identifies accused 1). We went to track the other robbers with the dog. It led us towards Kangaru market. Beside the market there was a village. The dog led us to one house. We knocked the door and informed the occupants we were police officers and that we wanted to search the house. That man (identifies accused 2) opened the door. We arrested him. We searched the house but did not recover anything. There was another house which was adjacent. We knocked. Accused 2 said there was nobody inside. We suspected there was someone inside. He was not responding. The door was locked with a padlock. We broke the door. Inside we found that man (identifies

accused 3).

Accused 4 in dock was arrested on 25/1/1994 and accused 5 arrested on 14/2/1994.

XXD by accused 1

You were found near a fence. There was a maize farm. We searched you but did not find any of the stolen items. You said you were from Meru. You first had said you were from a disco.

You did not have any money.

The dog led us to you. You wanted to injure the dog. You were violent.

XXD by accused 2

We did not get any of the stolen items in your house. The dog led us to your house. You could have hidden the things elsewhere.

XXD by accused 3

You had locked yourself in the house. We found you hiding under a bed. We did not get any of the stolen items.

We will consider the position of **Kibuthu** first. We do not consider that there were, as suggested by learned counsel for the appellants **Mr. Patrick Kiage**, sufficient inconsistencies between the evidence of PW 5 and PW 7 as to the “arrest” of **Kibuthu** by **Omas** to raise doubts as to the truth of their evidence. However, we are concerned at the lack of evidence as to both the experience of Omas as a tracker dog and as to the ability of tracker dogs to distinguish between the scents of a number of persons at a scene of a robbery such as this. It is probably the case that a competent experienced dog can do so but there should be evidence adduced from a tracker dog expert as to these sort of issues. The learned Principal Magistrate did describe Omas in his judgment as being “well trained in tracking” and yet there was no evidence tendered by any witness to this effect. His handler, PW5 did not claim this.

Kibuthu was not recognised by any of the complainants. None of the stolen property was traced back to him. His finger prints were not found at the house at which the robbery took place.

For all these reasons we do not consider that **Kibuthu’s** guilt of the offence charged has been proved beyond reasonable doubt. We are fortified in making this decision by the fact that **Mr.Orinda** Senior State Counsel representing the State did not support the conviction of **Kibuthu**.

Turning now to the 3rd appellant (hereinafter “**Mwendwa**”) and the 2nd appellant (“hereinafter **Kinyua**”), we consider that it would be unsafe to rely solely on the fact that the dog **Omas** led the police to the places where they were found that night. The fact that the dog was able to pick up and follow the scent of two different people starting at the same place where the dog selected the scent of **Kibuthu** seems unlikely in the absence of any evidence as to what a tracker dog can or cannot do.

However, in the case of **Mwendwa** and **Kinyua** there is the additional evidence of the finger prints provided by Chief Inspector **Wilson Karani (PW 9)** and **Samson Mwangi Maraka (PW 6)** who described himself as a finger print expert attached to CID headquarters Nairobi. **PW 9** examined the house of the complainant for finger prints at about 10.30am on the day of the robbery and was able to lift prints from the following places in the house:-

Lift No. 1 Palm print found on a table in the sitting room.

Lift No. 2 Palm print found on a table in the sitting room.

- Lift No. 3** Palm print found on a door to the sitting room.
- Lift No. 4** Finger print found on the telephone hand. (sic)
- Lift No. 5** Finger print found on the toilet cover
- Lift No. 6** Finger print found on the toilet cistern
- Lift No. 7** Finger print found on wardrobe door
- Lift No. 8** Palm print found on a table in the same bedroom
- Lift No. 9** Palm print found on a shelf in the children's bedroom
- Lift No. 10** Palm print found on a table in the children's room.

PW 9 went on to say that he submitted these prints to the Criminal Records Office, (C.R.O) together with elimination finger prints from some suspects arrested namely **Kibuthu**, **Mwenda**, and **Kinyua** which prints had been brought to him by the OCS C.I.P **Kamiti** who was with him at the scene.

Later, on the 25th April 1994, **PW 9** received a report from the C.R.O which showed that lift No 2 was identical with the finger prints of **Kinyua**. Lift Nos. 4 and 8 were identical to those of **Mwendwa**. Lift No 7 was that of Dr Mustaq the complainant.

This evidence was accepted by both the trial court and the superior court as showing without any doubt that **Mwendwa** and **Kinyua** had been in the house of the complainant and there was no evidence that either of them had ever been in or near the house on any previous occasion. We are satisfied by the finger print evidence that they were both in the house on the night of the robbery and were indeed part of the gang which robbed the complainant.

For the reasons set out above we accordingly hereby allow the appeal of the 1st appellant David Njeru Kibuthu and hereby quash his conviction and set aside the sentence of death imposed upon him. We order that he be released forthwith unless he is otherwise lawfully held.

The appeals of the 3rd appellant **David Njeru Mwenda** and the 2nd appellant **Joseph Mbogo Kinyua** are hereby dismissed.

ORDER: Appeal of **DAVID NJERU KIBUTHU** – allowed.
 Appeal of **JOSEPH MBOGO KINYUA** – dismissed.
 Appeal of **DAVID NJERU MWENDWA** – dismissed.

DATED and DELIVERED at NYERI this 20th day of May, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR