IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI & O'KUBASU, JJ.A.)

CRIMINAL APPEAL NO. 192 OF 2002

BETWEEN

GITAU GOKU ……..…….....…… 1ST APPELLANT

SAMMY MUSEMBI MBUGUA ……..…… 2ND APPELLANT

NICKSON MUTINDA KITHEKA ……..…….. 3RD APPELLANT

SAMUEL KINUTHIA NYORO …… 4TH APPELLANT

AND

REPUBLIC …… RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi & Mbito, JJ.) dated 2nd day of October, 2002 in

H.C.CR.A. NOS. 916 – 919 OF 1999)

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JUDGMENT OF THE COURT

The four appellants, **Sammy Musembi Mbugua, Nickson Mutinda Kitheka, Issac Gitau Goku** and **Samuel Kinuthia** Nyoro were jointly charged on two counts of robbery with violence contrary to *section 296(2)* of the Penal Code. The particulars of the offence as regards the first count were as follows:-

> *"On the 31 st day of July 1999 along* ***Katani/Syokimau road in*** *Katani Location of Machakos District within the Eastern Province being armed with dangerous weapons namely –* ***iron bars, simis, a toy pistol*** *jointly robbed Jimmy Muthiani Nyumu of his motor vehicle registration No. KAE 366H Toyota Corolla, a jacket, citizen wrist watch, a pair of black shoes, a ring (wedding), a car remo te control device and cash 3,050/= and at or immediately before or immediately after the time of such robbery used actual violence to the said* ***JIMMY MUTHIANI NYUMU.*** *The said items were valued at* ***K.Shs.403,050/=."***

The particulars of the offence in respect of the second count read as follows:-

> *"On 31st day of July, 1999 along Katani/Syokimau road in Katani Location of Machakos District within the Eastern Province, being armed with dangerous weapons namely iron bars, simis, a toy pistol jointly robbed Maing i Ndutu of an Oris watch valued at K.Shs.800/= and*

cash K.shs.2,240/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MAINGI NDUTU."

The four appellants were tried by the learned Senior Principal Magistrate (Mr. J.S. Kaburu) who convicted them on both counts and sentenced them to death as mandatorily provided by the law. Their appeals to the superior court were dismissed and hence the appellants are now before this Court by way of second and final appeal.

Briefly, the facts were that on *31st July, 1999*, at about 11:00 a.m., the two complainants, *Jimmy Muthiani Nyumu (P.W.1)* and *Maingi Ndutu (P.W.2)* were in a vehicle registration **KAE 366H** being driven by Jimmy along Katani/Syokimau road when they were suddenly confronted by four men. One of the strangers pointed what appeared as a pistol at Jimmy and ordered Jimmy to stop. Jimmy complied and the strangers ordered the complainants to open the doors of the car. The complainants complied and one of the attackers took the steering wheel. The two complainants were robbed of the property set out in the particulars of the offence in the two counts set out at the commencement of this judgment.

The complainants were driven for some distance after which they were abandoned by the roadside as the attackers drove away at high speed. Along that same road and about the same time, there were police officers on patrol who noticed a vehicle being driven at high speed. To the police officers, the occupants of that vehicle looked suspicious and so the police gave chase. The car stopped and the occupants started running away. The police fired several shots and managed to arrest two of the occupants of the car near the scene. One of the suspects threw away what turned out to be a toy pistol. The two other occupants ran into a near-by National Park but with the assistance of KWS personnel they were arrested. The two complainants identified all the four suspects as the people who had earlier robbed them of the car and other personal effects.

In their respective defences, the appellants denied having been in any way involved in robbing the complainants.

The learned trial magistrate considered the evidence as adduced by the prosecution and the respective defences by the appellants and in the end came to the conclusion that the four appellants were indeed properly identified as the four strangers who attacked and robbed the two complainants. In convicting the appellants the learned trial magistrate said:-

"Both J immy and Ndutu gave graphic details of the whole incident.

They were robbed of their car by four men. Each of the four had a weapon. One of them threatened them with a toy pistol.…… In my view, although Jimmy and Ndutu were not injured, these people instilled fear in them. I hold that all the ingredients of robbery have been proved.…… The incident took place at about 11:00 a.m. It was during the day. So Jimmy and Ndutu saw these people well. In fact, they described very confidently what each of the a ccused person had worn (sic) and did on that day. I note that after their arrest, the police did not conduct an identification parade. But I find the circumstances of the arrest of the accused very obvious. The police officers saw suspicious people and gave chase. The four accused were in the car and it was moments after they had taken it from their victims. The three officers saw the four accused very well. They did not lose sight of the car nor did they lose sight of the four accused persons even af ter they (accused) left the car. Indeed, accused 1 threw down the toy pistol. Jimmy had clearly seen accused 1 with the toy pistol. I can only say that this is a case of being caught "red handed"…….. I do find the evidence quite clear and overwhelming. "

Being dissatisfied with the judgment of the learned trial magistrate in which they were convicted on both counts and sentenced to death, the appellants filed separate appeals in the High Court. Their appeals in the High Court were consolidated and in the end the High Court dismissed them.

In dismissing the appeals the learned Judges of the Superior Court (Msagha and Mbito JJ) expressed

themselves thus-

> *"On our part, we have made an independent evaluation of the evidence on record. As correctly observ ed by the learned trial Magistrate, the incident took place during broad daylight. The victims and their attackers sat in the same car for some time before they (complainants) were abandoned. The faces of the assailants were not covered or disguised in an y way.*
>
> *The police officers on the other hand did not loose sight of the suspects from the time they spotted them in the car to the time of their arrest. This was not a case of mistaken identity.*
>
> *It is true that none of the two complainants was injured but the ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code had been proved. The appellants respectively could not withstand the overwhelming evidence presented by the prosecution."*

When the appeal came up for hearing before us, Mr. Mogikoyo, who appeared for all the appellants, raised only one issue viz identification of the appellants. It was Mr. Mogikoyo's submission that since the complainants were subjected to sudden attack, the circumstances were not favourable for a correct identification. He pointed out that positive identification was not possible as there were many activities in the vehicle. Mr. Mogikoyo's second limb of submissions was that the defence of the appellants taken together with other evidence made it necessary for an identification parade to be held. To answer these submissions, Mr. Ondari, for the State, was of the view that since the appellants were arrested in possession of stolen vehicle soon after the robbery, an identification parade was not necessary.

We have considered the submissions made on behalf of the appellants and it would appear the only complaint relates to identification. The incident took place in broad daylight at about 11.00 a.m. The two complainants testified on what took place.

They explained in great details what each appellant did during the robbery. It so happened that events moved so fast that the appellants were arrested soon after the robbery. The prosecution adduced evidence to the effect that all the four appellants were seen inside the vehicle registration number **KAE 366H** which vehicle belonged to the first complainant, Jimmy. The three police officers who saw that vehicle being driven at high speed suspected it and gave chase. They opened fire as the occupants stopped and tried to escape. Two of them were arrested immediately while the other two ran into the National Park where they were arrested that same afternoon. The two courts below were satisfied that the four appellants were the occupants of the stolen vehicle hence their conviction was inevitable.

We have considered the judgment of the superior court and in our view that court adopted a correct approach in dealing with the evidence adduced in the trial Court. In OKENO V. R [1972] E.A. 32 at p. 36 the predecessor of this Court stated inter alia:-

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination* ***(PANDYA V. R [1957] E.A 336)*** *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion* ***(SHANTILAL M. RUWALA V. R (1957) E.A. 570).*** *It is not the function of a first appellate court merely to scrutinize the evidence to se e if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make all owance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see* ***PETERS V. SUNDAY Post [1958] E.A 426."***

The learned Judges of the superior court clearly made an independent evaluation of the evidence on record and came to the conclusion that the appellants were convicted on clear, nay, overwhelming evidence. On our part, we would observe that the case against the appellants was based on both

identification evidence and possession of stolen property. The appellants were identified in broad daylight. The two complainants gave graphic details of the whole incident in which they were robbed of their personal property and the vehicle registration number **KAC 366H** Toyota Corolla. There was then the evidence of the police officers on patrol along that same road on which the complainants were attacked. Immediately after the attack on the two complainants, the four appellants were found in that same vehicle which had been stolen from Jimmy. We would observe that apart from identification evidence by two witnesses (the complainants), the appellants were found in the stolen vehicle. Looked at differently, it can be safely said that the evidence of the three police officers to the effect that the four appellants were in that stolen vehicle from which they made a bid to escape, would have been sufficient to convict the appellants. The learned trial magistrate was of the view that this was a clear case in which the appellants were caught "red handed". Perhaps we might only add that in our view, this was a case in which the appellants ran into the hands of the law enforcement officers and their spirited efforts to escape came to naught.

For the foregoing reasons, we are satisfied that the appellants were convicted on overwhelming evidence and consequently we find no merit in this appeal. The same is dismissed.

Dated and delivered at Nairobi this 30th day of April 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

……...…..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR