



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: TUNOI, GITHINJI, JJ.A. & RINGERA, AG. J.A.)**

**CRIMINAL APPEAL NOS. 105 & 110 OF 2003**

**BETWEEN**

**1. JOHN MAINA KIMEMIA**

**2. PETER KAMAU NDUNGU..... APPELLANTS**

**AND**

**REPUBLIC..... RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nyeri (Mr. Justice Juma & Mr. Justice Mitey) dated 1st March, 2002**

**in**

**H.C.CR.A. NOS. 435 & 436 OF 2000)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

*John Maina Kimemia*, the first appellant in this appeal was the second accused at the trial before the Principal Magistrate, Kerugoya while *Peter Kamau Ndungu*, the second appellant in this appeal was the first accused. The two appellants were jointly charged with seven offences of Robbery with Violence contrary to Section 296(2) of the Penal Code. They were convicted of five counts and acquitted on two counts.

Their respective appeals to the superior court which were consolidated were dismissed. They now appeal to this Court mainly on the grounds that, both the subordinate court and the superior court erred in law in concluding that the particulars of the charges were proved as required by law (contained in section 296 (2) of the Penal Code); the superior court erred in law and fact in upholding the convictions while relying on dock identification which is worthless and that the superior court failed to evaluate the evidence of the subordinate court in relationship to identification of the appellants, burden of proof, identification of stolen goods, alleged confessions which were retracted and common intention.

On 19th September, 1999 Joseph Weru Kirungu (PW1), referred to herein as Joseph Weru was driving motor vehicle registration No. KAJ 292, a Nissan matatu from Nairobi to Karatina, Nyeri. He left Nairobi at about 11 a.m. He had eighteen fare paying passengers including Joseph Irungu (PW6), who was the conductor and the two appellants. After crossing Tana bridge and before reaching Makutano Trading Centre a passenger who was seated next to the driver and who was identified by appellants in their statements to police as Jotham Maina asked the driver to drop him at a certain signpost. As the driver stopped, Jotham Maina pointed a pistol at his chest and held the driver by the collar of the shirt and

searched the drivers pockets for money. There was another man seated second from the driver in the front cabin who produced a knife, came out of the vehicle, opened the drivers door and pushed the driver under the dash board and took over the vehicle. He then drove the vehicle into the bush and stopped about 1 km from the tarmac. That man was identified as the first accused in the trial (Peter Kamau Ndungu). There was a third person seated in the first seat behind the driver and next to the conductor, Joseph Irungu and Mercy Njeri (PW2). When the vehicle stopped at the sign post the third person produced a knife and ordered the passengers to lie down. He then searched the passengers for money. The third man was identified as the second accused in the trial (John Maina Kimemia). After the vehicle stopped in the bush all the passengers were removed from the vehicle one by one and ordered to lie down in the bush. They were searched again and money removed from their pockets.

The three people then abandoned the passengers in the bush and drove away telling the driver that he could find his vehicle at the tarmac road. The driver, complainant in Count I, was robbed of the motor vehicle and Shs.3,000/=. The conductor, Joseph Irungu, complainant in Count II was robbed of Shs.4,800/=. Mercy Njeri (PW2), complainant in Count III was robbed of Shs.3,000/= a bag and a radio, Beatrice Muraguri (PW5), complainant in Count IV was robbed of Shs.500/= and Amos Muriuki (PW3) complainant in Count V was robbed of Shs.2,000/= and a wrist watch.

Meanwhile a report of the robbery was made on radio call to Sagana Police Station and PC Leonard Okello (PW7) and other police officers went to Kambiti on Makutano/Nairobi highway, a short distance from Makatuno. They found the stolen vehicle parked beside the road. There were three suspects being beaten by the members of the public, that is, the two appellants and Jotham Maina. There were scattered goods near the vehicle. A toy pistol and a knife were lying near the three suspects. There were about 200 members of the public who wanted to kill the three people but police rescued them. The passengers who had been robbed also went to Kambiti and identified the three people as the ones who had robbed them.

The three suspects were taken to Muranga District Hospital but Jotham Maina died on the way to hospital. On 30th December, 1999, John Maina Kimemia (first appellant) made a statement under Inquiry to I.P. Jacinta Wangechi (PW9). On the same day, Peter Kamau Ndungu (second appellant) made a statement under Inquiry to I.P. Meshak Musyoka (PW8).

The first appellant, John Maina Kimemia gave sworn evidence at the trial. He testified that he was a hawker and was traveling in the same motor vehicle as the complainants from Nairobi to Sagana to sell some goods; that he was also a victim of the robbery and was robbed of Shs.6,000/= and some goods; that before he alighted in the bush as other passengers, the vehicle drove off but stopped after traveling for a short distance and the robbers fled and that as he was looking for the way back to the tarmac road he met a group of people who suspected that he was a robber and beat him unconscious.

Similarly, Peter Kamau Ndungu (2nd appellant) gave sworn evidence at the trial. According to his evidence, he was also a passenger in the same vehicle and was seated at the rear with three other people; he was also robbed of Shs.2,800/= and a wrist watch; the vehicle drove off before he and three other passengers alighted; the vehicle was driven back to the tarmac road and then towards Nairobi for about one kilometre. The vehicle then turned to a rough road and stopped and the robbers fled. He further testified that a vehicle came from Makutano with the passengers who had been robbed and the passengers alleged that he was one of the robbers, that he was beaten; that he saw some other suspects who had been seriously beaten lying on the ground but did not identify any and that on 30th August, 1999 he was tortured to sign a statement.

The appellants complain and Mr. Mahan, learned Counsel for the appellants contended, that the ingredients of the charge of a capital robbery under Section 296 (2) of the Penal Code was not proved. He particularly relied on the case of *Oluoch v Republic* [1985] KLR 549 at page 556 where this Court said at paragraphs 10 – 15:

“Under section 296 (2) of the Penal Code robbery with violence is committed in any of the following circumstances.

- 1. The offender is armed with any dangerous or offensive weapon or instrument; or**
- 2. The offender is in company with one or more other person or persons; or**
- 3. 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”.**

Those three elements of the offence of capital robbery are lifted from the provisions of Section 296 (2) of the Penal Code. It is clear from the wording of Section 296 (2) of the Penal Code that the offence is proved if prosecution proves any of the three elements which constitute the charge of capital robbery.

The particulars of each of the five counts of capital robbery stated that the appellants:

**“jointly with others not before the court, while armed with knives and toy pistol robbed ..... and or immediately before or immediately after the time of such robbery used actual violence to .....”.**

Mr. Mahan submitted that a toy pistol is not a firearm and is therefore not a dangerous or offensive weapon. The particulars of each of the five counts of capital robbery do not state that the knives and toy pistol are dangerous or offensive weapons.

The phrase “dangerous or offensive weapon” is not defined in Section 296 of the Penal Code or in Section 4 – the interpretation section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other “offensive weapon” etc and section 89(4) of the Penal Code defines “offensive weapon” for purposes of section 89 as meaning:

**“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”.**

In **Mwaura and Others v. Republic** [1973] EA 373 the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were “dangerous or offensive weapon” for the purposes of the offence of preparation to commit a felony under section 308 (1) of the Penal Code held at page 375 letter F:

**“In our view “dangerous or offensive weapons” means any articles made or adapted for use for causing injury to the person such as a cosh knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person”.**

The High Court followed that interpretation in **Muthiori v. Republic** [1981] KLR 46 at page 473 paragraphs 1 – 5.

In our view the words “dangerous or offensive weapon” in Section 296 (2) of the Penal Code bear the same meaning as Section 89 (4) of the Penal Code and as construed in the case of **Mwaura & Others v. Republic** (supra) for the purposes of Section 308 (1) of the Penal Code.

There cannot be any doubt that although a knife is not made or adapted for use for causing injury to a person, it would nevertheless be a dangerous or offensive weapon for purposes of Section 296 (2) of the Penal Code if the robbers in wielding it in the cause of robbery intend to use it for causing injury to any person. We are satisfied that the knives which the robbers had in this case were intended to cause injury to the passengers and are therefore dangerous and offensive weapons.

We cannot say so with the same certainty in respect of the toy gun. The definition of the word “firearm” in section 2 of the Firearms Act does not seem to include a toy pistol as the essence of a firearm is that the weapon is capable of discharging any shot, bullet or other missile and is also capable of causing death, injury, maiming or any other bodily harm. However, under paragraph (d) of the definition, a firearm includes any weapon or other device or apparatus which the Minister by order published in the Gazette

specifies to be a firearm for the purposes of the Firearms Act.

We are not certain whether a toy gun has been gazetted as a firearm. We did not get any assistance from the learned State Counsel on this subject. If a toy gun is gazetted as a firearm, under the Firearms Act, then in our opinion, it would be considered as a dangerous or offensive weapon for purposes of section 296 (2) of the Penal Code.

The superior court was satisfied that the particulars of the charge were proved mainly because:

“The hijack was carried out by 3 people.”

That element is sufficient to constitute the offence of capital robbery.

Although the particulars of the charges were not correctly framed and were in fact overloaded, the charges did disclose offences of capital robbery as they stated that the offences were committed by more than one person and, alternatively, the offenders were armed with knives which are dangerous and offensive weapons. The appellants were represented by a counsel in the superior court who did not raise any objection to the charges throughout the trial. We are not satisfied that the defect in the charges has occasioned a failure of justice and, in our view, any defects in the charges is curable under section 382 of the Criminal Procedure Code.

On the question of the identification of the appellants by the witnesses and the evidential value of the statements under inquiry, the trial Magistrate after evaluating the evidence concluded thus:

***“I have perused the defence and any relevant material particulars. The accused would want the court to believe that they were passengers in the motor vehicle and that they were also robbed and thus hijacked to Kambiti by the gangsters. I disbelieve this evidence. The evidence is clearly an afterthought. The two accused were sufficiently identified as the robbers who perpetrated the robbery on the material time. They adopted the defence as an afterthought more so considering that they both gave statements under inquiry in which they admitted their participation in the commission of the offence.”***

On its part, the superior court found in part:

***“Second ground was that there was no witness who was able to identify the appellants during the commission of the offence. The prosecution witnesses identified the appellants. We however, note that none of the villagers testified as to how the appellants were caught and beaten. This gap was however filled up by the appellants’ own detailed statements to the police which was (sic) produced in evidence without any objection. The statements clearly show how the plan to hijack the matatu was hatched. The role of each participant and how they were set upon by the villagers. We have evaluated the evidence on record and are satisfied that the appellants’ own confessions which were not retracted were further corroborated by the evidence of the prosecution witnesses...”***

Thus there were concurrent findings of fact by the two courts below that the appellants were not passengers in the motor vehicle, that they were sufficiently identified by the witnesses as the robbers, that they were not trapped in the vehicle and hijacked to Kambiti and that each gave a detailed statement under inquiry admitting the commission of the offence which statements were produced as evidence without any objection.

A second appeal is confined to points of law and this Court cannot upset those findings of fact unless satisfied that the findings were based on misdirections of such a nature that it is reasonably probable that without them, the appellants could not have been convicted. (See ***Kiringo v. Republic*** [1982] KLR 213). The appellants were particularly identified by three witnesses - Joseph Weru (PW 1), Mercy Njeri (PW 2) and Joseph Irungu (PW 6). Peter Kamau Ndung’u (2nd appellant) was in the front seat in the drivers cabin. He was seated close to PW 1 all the way from Nairobi. It was during broad daylight. John Maina

Kimemia (first appellant) was seated next to Mercy Njeri and Joseph Irungu. He was seated next to the two witnesses all the way from Nairobi. All the three witnesses were alert. The two appellants agreed in their evidence that the passengers were in fact robbed of their properties. Their account of how the robbery was committed is not different from the accounts given by the witnesses. In the circumstances, the findings of the two courts below that the appellants were sufficiently identified cannot be faulted.

The respective statements under inquiry were admitted in evidence at the trial without any objection by the appellants. In fact, the appellants' counsel specifically told the trial Magistrate that he had no objection to the production of each of the two statements. Both IP Meshak Musyoka (PW 8) and IP Jacinta Wangechi (PW 9) said that the respective statements were voluntary. John Maina Kimemia (first appellant) did not in his evidence say that the statement was not voluntary and all what Peter Kamau Ndung'u (2nd appellant) said in his evidence is:

*“On 30.8.99 I was tortured to sign a statement.”*

That bare statement is not a sufficient repudiation or retraction of the statement. The second appellant should have objected to the admission of the statement as evidence at the trial so that the trial Magistrate could have had an opportunity to inquire into the circumstances in which the statement was recorded before it was admitted as evidence.

Lastly, the complaint that the superior court as the first appellate court failed to perform its duty to reconsider the evidence, evaluate it and make its own conclusion is not supported by the judgment of the superior court. The passage of the judgment of the superior court that we have set out above shows that the superior court reconsidered the evidence of identification, considered the deficiency in the evidence and came to its own conclusions. Similarly, the superior court dealt with the statements under inquiry, analysed them and found them truthful.

For these reasons, we are satisfied that the appellants were properly convicted and accordingly, we dismiss this appeal.

**Dated and delivered at Nyeri this 14th day of May, 2004.**

**P.K. TUNOI**

**JUDGE OF APPEAL**

**E.M. GITHINJI**

**JUDGE OF APPEAL**

**A.G. RINGERA**

**AG. JUDGE OF APPEAL**

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

DEPUTY REGISTRAR