



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

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

CRIMINAL APPEAL NO. 226 OF 2002

BETWEEN

CHARLES ANJARE MWAMUSI

VORGA IBRAHIM KASENGE APPELLANTS

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mr. Justice Onyancha & Comm. Khaminwa) dated 14th May, 2002

in

H.C.CR.A. NO. 326 & 327 OF 2000)

JUDGMENT OF THE COURT

The two appellants were convicted of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and each sentenced to death. Their respective appeals to the High Court against conviction and sentence were dismissed. They now appeal to this court on several grounds.

The two appellants were jointly charged with one, Richard Omweru Ondimo who was the first accused in the trial. Charles Anjare Mwamusi, the first appellant in this appeal, was the third accused in the trial while Voroga Ibrahim Kasenge, the second appellant in this appeal, was the second accused.

The particulars of the offence alleged in part, that the three accused jointly with others while armed with dangerous weapons namely pistol and knives robbed Joseph Kariuki Mwiruri of motor vehicle registration No. KAM 108, a Nissan Matatu .

Briefly the prosecution case was as follows:- On 19th November, 1999 Joseph Muiruri (PW1) was the driver of motor vehicle registration No. KAM 108A, a Nissan matatu while Wilson Dingwa (PW2) was the turn boy. They were operating the motor vehicle as a matatu along Tudor-Port route. The motor vehicle belonged to Peter Roko Kiarie (PW4). On the material day, the vehicle arrived at Tudor from port direction at about 11:20 a.m. and all the passenger's disembarked. Four passengers then boarded the vehicle and the vehicle set off with the four passengers. Two of the passengers sat in the cabin with the driver. The two others sat on the seat behind the driver where the conductor was seated. When the motor vehicle reached a stage opposite Pumzika bar, one passenger at the www.kenyalawreports.or.ke

rear seat stopped the vehicle ostensibly to alight. The driver, (PW1), stopped the vehicle. The passenger then alighted but went round to the drivers window which was open; pushed his hand through the window; switched off the ignition and removed the ignition keys. The man seated behind the driver and two men seated at the front seat produced knives and ordered both the driver and the conductor to come out of the vehicle. The driver was dragged out through the “co-drivers door”. PW2 also alighted. The man who went to the drivers door boarded the vehicle after pushing the driver out, got into the drivers seat and drove off. The driver and conductor reported at Makupa Police Station at almost 11:30 p.m. Meanwhile, PC. Mburune Marwa, (PW3), and P.C. Benjamin Some, (PW5), were on duty in Majengo Area when they received a report through police radio that motor vehicle registration No.KAM 108A, a white Nissan matatu , had been stolen in Tudor area. At that time, PW3 and PW5 had information that another previously stolen motor vehicle would be delivered at Majengo and had laid an ambush. At about 12:30 am, they saw a parked motor vehicle. They approached the motor vehicle and found two people inside the vehicle who attempted to flee. The two people were the appellants. The vehicle had a registration number KAL 926E and the number plates had been stuck with a cello tape. The insurance sticker however had registration No. KAM 108A.

Both PW1 and PW2 who were still waiting at Makupa Police Station were taken to Majengo where the motor vehicle had been recovered. Both the driver and the conductor pointed out the two people who had been arrested as the two passengers who had sat at the cabin. The vehicle was towed to Makupa Police Station. The second appellant was taken to Makupa Police Station while the 1st appellant was taken to Central Police Station. Both PW3 and PW5 remained at the scene and shortly after, a white Toyota Corolla drove to the scene and stopped. One person alighted from the vehicle and when PW3 and PW5 approached the vehicle the person who had just alighted ran away. The motor vehicle reversed and sped off. That person was chased and arrested. That person was Richard Omwebu Odimo who was the first accused in the trial and as we have said he was acquitted. Peter Goke Kiarie (PW4) went to Makupa Police Station on the following day and identified the vehicle which was then released to him on the same day.

After the close of the prosecution case, the trial magistrate found that the first accused had no case to answer and said in his ruling in part;

“The circumstances of his arrest together with the fact that those who robbed PW1 and PW2 were strangers to them and the robbery lasted a very brief moment and occurred at night makes it fatal for the police not to have held an identification parade for him.”

The 2nd appellant denied committing the offence. He stated that he was walking home from a bar on 19th January, 1999 at 12:40 am when a police vehicle stopped. A police officer told him that those who walk at night are thieves. He was arrested. He was then put in the boot of the police vehicle and driven to a place where there was a person seated beside a parked Nissan matatu . Two police officers from Makupa Police Station accompanied by two young men went to the scene. The two young men were asked if they knew the 2nd appellant but they said that they did not. The 2nd appellant was then taken to Makupa Police Station where he was questioned. On 29th November 1999 he was forced to sign some papers after which he was taken to court.

The 1st appellant stated in an unsworn statement that he was employed as a cook at Kingorani bar and restaurant and was on his way home on 19th November 1999 at midnight, from a night shift. He was stopped by police officers near Salama bar and interrogated. He was then taken to a parked matatu . He was asked if he had seen it before. He replied in the negative. He was handcuffed. A motor vehicle then came carrying five people, one in the boot. The one in the boot was put beside the appellant. Another motor vehicle full of people came to the scene. The police officers asked them to look at the two appellants and see if they were the ones who had robbed them. The people said that appellants were not the ones who had robbed them.

The learned Senior Resident Magistrate convicted appellants mainly on the evidence of identification by PW1 and PW2 and on the evidence by PW3 and PW5 that they were arrested inside the stolen motor vehicle. On the issue of identification, the learned Magistrate said in part:

“The court notes that though it was required by the police to show the two accused the witnesses soon after their arrest instead of an identification parade the time between the robbery and their arrest was so brief that the images were still fresh in their minds of those identifying them.”

Firstly, it will be recalled that the same Magistrate had found while acquitting the first accused on the ground that he had no case to answer, that it was fatal for the police not to have held an identification parade considering the circumstances of the case. What the learned Magistrate found in respect of the identification of the first accused must logically apply to these appellants as the circumstances were the same. The finding by the learned Magistrate that the appellants were positively identified by PW1 and PW2 was consequently a serious misdirection in view of the previous finding.

Secondly, the evidence of visual identification was not reliable because the police took PW1 and PW2 to the two appellants upon arrest.

Thirdly, the conditions for positive identification were not favourable, as the incident took about two minutes according to the evidence of PW1 and PW2.

As regards the finding that the appellants were arrested inside the stolen motor vehicle each gave a detailed circumstances of his arrest. Each denies that he was arrested inside the motor vehicle and claimed that he was arrested elsewhere. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable *Kiarie v. Republic* [1984] KLR 739 at page 745 paragraph 25. The High Court as the first appellate court had a duty to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether or not the judgment of the trial court should be upheld – *Okeno v. Republic* [1972] E.A. 32, *Ngui v. Republic* [1984] KLR 729. Mr. Buti, the learned Counsel for the appellant submitted that failure to consider each appellant’s defence of alibi was fatal to the conviction. He relied on the case of *Peter Njuguna Murui v. Republic* – Court of Appeal Civil Appeal No. 54 of 1983 (unreported).

We have studied both the judgment of the trial Magistrate and of the first appellate court. The appellants’ complaint that their respective defences were not considered is justified as both courts merely gave the defences a passing mention. The High Court in particular failed to perform its duty as spelt out above. There were several questions to be answered on the issue of arrest of appellants inside the motor vehicle. While both PW3 and PW5 say that the two appellants were arrested inside the vehicle PW2 said in his evidence in cross-examination by 1st appellant that the 1st appellant had been tied and was lying down next to the motor vehicle. Such contradictions tended to support the appellants version.

In our view the omission by the High Court to reconsider the evidence, re-evaluate it and draw its own conclusion and the failure to give due consideration to each of the appellants defence are fundamental errors. It is reasonably probable that the learned appellate judges would not have dismissed the appeals had they directed themselves appropriately.

For the foregoing reasons, we are satisfied that the appellants were not properly convicted. We allow the appeal of each appellant, quash the conviction and set aside the sentence. They are to be released from prison forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 8th day of August, 2003.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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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