IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GICHERU, BOSIRE & O'KUBASU JJ A)

CRIMINAL APPEAL NO 160 OF 2000

BETWEEN

JOHN NYAGAH NJUKI ……..……....1ST APPELLANT

FRANCIS BONANI SABAYENI…….…….2ND APPELLANT

JEREMIAH KABOGO MUCHIRI……..……..…...3RD APPELLAN

GEOFREY MWANGI NDIRANGU……...……..…4TH APPELLANT

JOHN KARANJA GAKII …….5TH APPELLANT

AND

REPUBLIC…….....……..RESPONDENT

(Appeal from a Judgment and Decision of the High Court of Kenya at Nakuru, Rimita & Ondeyo JJ dated 10th November 2000,

in

HCCrA Nos 199-203 of 1996)

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JUDGMENT OF THE COURT

This is a second appeal from the judgment and decision of the Senior Resident Magistrate's Court, at Nakuru, in its Criminal Case No 1229 of 1996, in which that court convicted, after a trial, John Nyagah Njuki (1st appellant), Francis Bonani Sabayeni (2nd appellant), Jeremiah Kabogo Muchiri (3rd appellant), Geofrey Mwangi Ndirangu (4th appellant) and John Karanja Gakii (5th appellant) of one count of robbery with violence, contrary to section 296(2) of the Penal Code and thereafter sentenced each of them to the mandatory death sentence. The aforesaid trial, followed an earlier trial for the same offence which however aborted because the court record was stolen while the case was pending for judgment.

The trial magistrate in the first trial, Harun Kimutai Bomett, testified in the second trial that the court record was one of the items stolen from his car when it was broken into, on 11th June, 1996, along a street in Nairobi. The record was in the Magistrate's briefcase at the time. It was further his evidence that he had already drafted the judgment in the case which, because of the theft, became still born.

Among the issues which were raised in the present appeal is whether, in the circumstances, the second trial was fair and in accordance with the spirit of the Constitution of Kenya. Mr Mirugi Kariuki, for the 1st appellant, submitted before us that the record of appeal before us is not explicit on how the first trial was terminated. He stated that there is only an oblique reference in the record that the first trial was terminated by the entry of a *nolle prosequi*, by the Attorney General. Mr Kariuki did not think that, in absence of a copy of the *nolle prosequi*, as an exhibit, it can be said that the proceedings in the first trial were properly terminated. Consequently, it was his view that the appellants were being subjected to double jeopardy in breach of the provisions of the Constitution of Kenya. Mr Kariuki, had a second and alternative argument. In his view, as the appellants had faced a full fledged trial, which as at the time the court record went missing had lasted for about eight months, the retrial was highly prejudicial to them as it meant that the appellants' fate remained undetermined for over two years.

Both Mr. Odhiambo for 2nd, 3rd and 5th appellants, and Miss Mwai for the 4th appellant agreed with Mr Kariuki that he second trial was unfair to the appellants. We will deal with that issue in limine.

It is not in dispute that the first trial did not terminate in either a conviction or an acquittal. So the appellants are not raising defences under section 138 of the Criminal Procedure Code, (CPC) or section 77(5) of the Constitution of Kenya. The first part of their argument appears to us to the be that the previous proceedings are still *in situ*, and that the proceedings which gave rise to the present appeal are concurrent. Whether or not the earlier proceedings are still alive is a question of fact. We have perused the court record of the trial court and note that before any evidence was called in the second trial, counsel then on record for all the appellants, Mr Cheche, is recorded as having made an application as follows:- "Mr Cheche:- I apply for proceedings in Cr 2249/94 which was coming for judgment before *nolle prosequi* was entered. The proceedings on that case are important to this matter and are necessary before we begin this case." Inspector Odinga, who was prosecuting immediately responded as follows:

> "Prosecutor:-
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> We cannot produce those proceedings at this moment as we are told that the original court file in that case got lost and most of the evidence today will be secondary evidence. We will be producing evidence as to the manner in which the file got lost and we shall call the custodian of the original file who will explain how it got lost."

Thereafter, Mr. Cheche, said he would leave the issue to the Court. The trial Magistrate (H Owino, SRM) then made the following order

> . "Order:-
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> I think it will be an exercise in futility to order for the proceedings to be produced when there is an indication that original court file is lost. Let us proceed."

Two things may be said about the aforequoted excerpts from the trial court's record. First, the defence counsel was aware that a *nolle prosequi* had been entered in Criminal Case No. 2249 of 1994, and that proceedings in that case were no more. Two, learned counsel did not want proceedings in the earlier case to enable him to raise objection in bar of the second case. Rather he wanted the proceedings, as it would appear, to enable him effectually defend his clients. That, in our view, would explain why he did not press the issue of the production of the earlier record, when he was told that the record got lost.

In view of the fact that the defence counsel categorically stated at the trial that the appellants' earlier case had been terminated by a *nolle prosequi*, was it necessary and essential for the prosecution to produce in evidence a copy of the *nolle prosequi?* There was no dispute before the trial court on whether or not the earlier proceedings were *in situ*. Nor do we think that such an issue, if it ever existed, is alive before us having not been raised before the two courts below.

As regards the issue of unfairness, Mr Kariuki submitted before us that the long delay in concluding the appellants' respective cases, greatly prejudiced the appellants. A delay of about two years before the

conclusion of the appellants' cases was indeed a long time. But whether that delay went to the root of what would otherwise be a fair trial is also, a question of fact. The appellants' is not the first criminal case in which a court record got lost. In *Haiderali Lakhoo Zaver v Rex.* (1952) 21 EACA, 244, the Court of Appeal for Eastern Africa, in dealing with a situation in which, as here, a file of the court was lost stated thus:

> "The Courts must in this matter try to hold the scale of justice evenly between the parties and whilst no wholly satisfactory solution can be expected for such an unsatisfactory state of affairs as this appeal discloses, we think the course followed by the learned Judges of first appeal was on balance the fairest and most just, and is the only solution which offers an opportunity for a judicial determination on the merits of the case."

As in our case, the Court in the case cited above, was asked to order an automatic acquittal because of the loss of the court record. Balancing the scales involves considering what, in the circumstances of each case, will best serve the interests of justice or put another way the good of society. The loss of the court file in our case arose from the criminal act of a third party or third parties. Neither the prosecution nor the defence was to blame for the loss of the court file. The trial Magistrate of the first trial explained the circumstances under which the file was stolen, and it cannot be said that the theft of the file along with other personal items was blameable on the Magistrate. True, the delay in finalising the appellants' first trial was quite unsatisfactory. However the good of society in the circumstances, demanded that the appellants be retried and the trial be before a different magistrate as happened here. If the retrial met the ends of justice the delay complained about cannot be said to have been fundamentally prejudicial to the appellants. And looking at the facts and circumstances of this case we cannot say that an automatic acquittal of the appellants, merely because of the loss of the court file, would have best served the interests of justice. The court in *Zaver's* case (ante), said, that:

> ".....simply to quash the conviction because the record was lost would be to act wholly without logic, reason or justice, and ..... the "nearest approach to justice" in the circumstances would be to order a re-trial ....."

In the circumstances of this case, logic reason and interests of justice clearly demanded that the trial of the appellants start *de novo*. We say no more on the matter.

Before we consider the other grounds of appeal proffered by the appellants, we consider it imperative to give a resume of the facts of the case.

Homegrown Farm (K) Ltd, is a limited liability company which carries on commercial farming near Naivasha. On 17th November, 1994, its assistant farm manager, one Aimable Gakirage, (Gakirage), encashed two of the company's cheques at the Naivasha branch of the Kenya Commercial Bank (KCB), with which they normally banked its money. The proceeds of the cheques were to be used to pay part of the wages for the company employees. But Gakirage, did not carry away the money. Instead, according to John Ongoma (Ongoma), a cashier at the bank, the money was kept inside a cash box of the bank to await collection the next day. Ongoma testified at the trial that the cash box was previously used to transport stationery either from the bank's headquarters in Nairobi to the branch or from the branch to Narok which was then a satellite branch. The box was *ipso facto*, labeled "Narok Satellite."

The money was collected on 18th November, 1994, by guards from a company called Securicor Kenya Ltd, and witnesses confirmed that the money was received at Homegrown farm in Naivasha, the same day, at bout 9.40 am.

The robbery, which is the subject matter of this appeal, was committed at about 10.15 am. on 18th November, 1994. Three men walked into an office at the farm which was shared between Steven Jeremy Outram (Outram), Michael Robert Cannington (Cannington) and Gakirage, and at gun point demanded the money. All the three gentlemen were in the office. Outram testified that he was able to identify clearly one of the three men, and later picked him at an identification parade. He identified him in court as the first appellant. Cannington and Gakirage, too, testified that they were able to identify the first appellant as

one of the three men who demanded money at gun point. They too picked him at an identification parade which the police mounted later.

The three men allegedly escaped with some money in the cash box which we alluded to earlier. As they dashed out, Mohamed Hussein (Mohamed), a security officer at the farm, was entering the said office. It was his evidence that he met with the three men with one of them carrying the cash box. He observed the three men and he was sure he saw two of them armed with a pistol each. He identified first appellant in court as one of the two armed men and that he was the one he saw carrying the cash box. The 4th appellant, who was the 5th accused, is the second man the witness said he identified. He was categorical that he identified the 4th appellant because the latter stopped and talked to him. He therefore was able to observe him. The 4th appellant, he said, was wearing a tee-shirt and jeans trousers. The witness later picked the 1st and 4th appellants in two separate identification parades.

The robbers escaped in motor vehicle KZB 086, a Pajero, then owned by Outram. Initially however, they had wanted to escape in a car, registration No KAB 532D, a Mazda 323, then owned by Gakirage, but they changed their mind. They had extorted its keys from him before they left the office with the cash box.

A cash box resembling that which was stolen with the money was seen by Gideon Musyo Kavoti (PW22) at a roadside near Kenya Co-operative Creameries (KCC), factory at Naivasha. He was driving motor vehicle registration No KAB 853 U, a Mitsubishi Canter, towards Nakuru, when a heavily set man, stopped him at gun point. Next to that man was the said blue cash box. As soon as the witness stopped his motor vehicle two other people appeared and the three men pulled the witness and two Asian passengers out of his motor vehicle and drove away with the cash box, leaving the three people by the roadside.

All the appellants with another whose appeal is not before us, were arrested on 18th November, 1994. There was a dispute, at the appellants' trial regarding where each of the appellants was arrested. The prosecution's case was that the 1st, 3rd, 4th and 5th appellants were arrested either inside or as they were escaping from inside motor vehicle registration number KQH, 277, a Peugeot 504, station wagon. This was in the Naivasha area near KCC. There were two other people in the same motor vehicle, but one was shot and died later, and the other one escaped. The 2nd appellant was arrested separately near KCC. Among those who arrested him was Samson Ochieng Omongo (PW8). According to PW8, the 2nd appellant was one of the men who robbed Homegrown of its money, but who was unable to reach the escape car in time before it was driven off. As he escaped on foot PW8, among other people, pursued him and managed to arrest him along Nairobi-Nakuru highway near KCC.

The appellants were later jointly with others not before the court charged with two counts or robbery with violence contrary to section 296(2) of the Penal Code. The first count related to motor vehicle KZB 086 and cash of Kshs 737,430/= which was allegedly inside the cash box which the robbers escaped with. The second count related to motor vehicle KAB 853 U, which as we stated earlier on was violently taken from PW22. In the latter charge one Hirji Murji was named as complainant, but because he was not called to testify, the trial court formed the view, quite properly so, in our view, that the charge was not proved to the standard required. The appellants were therefore acquitted of it. This appeal concerns only the first count. We have already outlined the basic facts and evidence the prosecution relied upon to prefer charges against the appellants. What were the appellants' respective defences?

John Nyagah Njuki, the 1st appellant, was on the material date a police corporal attached at Naivasha Traffic base. His defence was that at the material time of the alleged robberies he was at Nyahururu where he had gone to attend the funeral of one Peter Ndungu Kamau, who had been his elder sister's husband. While there he learnt that motor vehicle registration number KQH 277, had been involved in a fatal road traffic accident near Marula along Naivasha-Nakuru road. The motor vehicle and another one, registration No KSV 113, a Peugeot 404 pick-up, were due to be used in carrying the body of the deceased and mourners from Nyahururu to the deceased's home. Following the accident the 1st appellant said he proceeded to Gilgil Police Station to check on the fate of the driver of motor vehicle KQH 277, whom he said was his cousin. On arrival there he was arrested. He denied he was arrested at the scene of the accident involving that motor vehicle. In short his defence was an alibi.

Regarding witnesses who identified him at an identification parade the police mounted, it was his case that he was exposed to them before the parade, and that the other parade members were remarkably different from him.

The second appellant Francis Bonaya Sabayeni, stated that on the material date he had gone to a fruit farm near KCC factory, at Naivasha, to buy fruits. After buying the fruits he transported them to a bus stage along Naivasha-Nakuru road, where he intended to catch a bus to Nairobi. It was while there that a group of people came from a nearby farm owned by Homegrown Company Ltd, and arrested him along with PW22 and two Asians who were passengers in PW22's motor vehicle. PW22 and his passengers had been forced out of their vehicle by a group of three or four people who forced PW22 to stop. He denied he participated in any robbery. He further stated that he was picked in an identification parade the police later organized because he was the only member of the parade with a bandage on the head.

The 3rd appellant described himself as a farmer, businessman and politician. On the material date he left Nairobi for Eldoret in the morning by a Nissan *Matatu*. At about 10.30 a.m the vehicle arrived at KCC, Naivasha, where, because of a traffic hold up the vehicle stopped. He came out of the motor vehicle to check what was holding the traffic. He saw a Peugeot 504 car in a ditch and went close to it to check what had caused it to veer off into a ditch. He saw a person being dragged out of the motor vehicle, and because he had pity for him he asked those dragging him why they were manhandling him. A police officer who was standing nearby became infuriated by the question, hit him on the back of his head, and inquired why he was being "the thief's advocate". He arrested the 3rd appellant and together with people who were already under arrest he was taken to Gilgil Police Station and was later charged as herein before stated. He denied he participated in the robberies complained of.

The 4th appellant said he was the owner of motor vehicle KQH 277. He admitted he was arrested from inside the motor vehicle as the prosecution eye witnesses alleged but explained that prior thereto he had been robbed of the motor vehicle by a group of people who came out of a Mitsubishi Canter motor vehicle. That motor vehicle blocked his way to force him to stop. As soon as he did so they commandeered the motor vehicle, ordered him to lie down in the vehicle facing down, and drove it away with him inside. He did not know how and why it landed in a ditch and only realized it was in a ditch when the police asked him to come out of it. It was his case that he had been exposed to the witnesses who picked him at an identification parade. He denied knowing his co-accused. That cannot certainly be true as the 1st appellant testified that he had been driving motor vehicle KQH 227 before, and it cannot possibly be true that the 3rd appellant did not know him. If indeed the 3rd appellant was telling the truth then the 1st appellant is the one who lied when he stated that he was in Naivasha on the material day because he had gone there to check on the driver of the said motor vehicle whom he said was his cousin.

The 5th appellant stated that he was a victim of mistaken identity. He stated that he was walking along Naivasha-Nakuru road near KCC, Naivasha, when he saw a police car chasing motor vehicle KQH 277. He witnessed both vehicles leaving the road and landing in a ditch. The police were firing their weapons at motor vehicle KQH 277, and because of that he jumped into a ditch by the roadside, and there hid himself because he feared he would be shot. He lay down facing the ground. He was pulled out shortly later by a policeman who, despite the 5th appellant's explanation that he was an innocent passerby, arrested him as a suspect in the robbery at the Homegrown company offices.

The trial magistrate after a careful assessment of the evidence before her, found as fact that all the five appellants participated in the robbery at Homegrown premises, and rejected the appellant's respective defences and thereafter, convicted each of them on the first count. In dealing with the alibi defences of the 1st and 2nd appellants she remarked that the two appellants should have but did not call witnesses to support their respective alibi defences. The Superior Court (Rimita and Ondeyo JJ), on first appeal, appear to have endorsed that view. With due respect to both courts below, an accused person does not assume the burden of proving a defence of alibi he may put forward (see *Ssentale v Uganda* [1969] EA 365). In criminal cases the burden lies squarely on the prosecution, except in those cases where the section creating the offences specifically places some burden on the accused to establish a fact, to prove a criminal charge beyond any reasonable doubt. It is also its duty to disprove any alibi defence an accused puts forward, unless of course from the evidence adduced it appears to the court that the alibi cannot be

sustained. We will revert to the appellants' alibi defences later in this judgment.

The appellants' first appeals to the superior court were dismissed and hence the present appeal. We have already dealt with one of the grounds of appeal. The crux of the remaining grounds is identification. Each of the appellants was arrested within an hour of the robbery complained of. Mr Mirugi Kariuki for the 1st appellant, Mr Odhiambo for the 2nd, 3rd and 5th appellants and Miss Mwai for the 4th appellant were all of the view and submitted that the circumstances under which the robbery in question was committed did not favour a correct identification. They also submitted that identification parade evidence on record cannot be properly relied upon because the appellants were exposed to identifying witnesses before their respective parades. With due respect to all the counsel, the robbery took place in broad daylight. The witnesses were not surprised by the robbers as not to have had in full focus, particularly the three men who entered the office from where the money was stolen. Besides, as we stated earlier, the appellants were arrested within an hour or so after the robbery, in circumstances which left no doubt about their involvement in the robbery.

For instance, the 1st, 3rd, 4th and 5th appellants were arrested along Naivasha- Nakuru road near KCC, Naivasha. That was the concurrent finding of fact by the trial and first appellate courts. It was a finding based on clear and cogent evidence which was adduced before the trial court and which that court accepted. Edward Kiprop (PW 13), and Johnson Wesi Watu (PW 14) testified that they chased motor vehicle KQH 277, fired several gun shots at it and in the process punctured its tyres. The car lost control, veered off the road and landed in a ditch. They saw the four appellants either escaping out of the car or inside it, and arrested them on the spot. Inside the motor vehicle a cash box resembling the one which was stolen from Homegrown Company premises was found. When it was later opened, about Kshs.250,00 was recovered. There was a discrepancy regarding the label which was on the cash box in court and the one which had been affixed on the cash box in which money was carried from the bank to Homegrown offices. The discrepancy we think must have come about because after its recovery, the cash box was returned to KCB for safe custody. The foregoing evidence, when considered along with the testimony of Outram, Cannington, and Gakirage places the four appellants at the scene of the robbery.

In coming to that conclusion we bear in mind the fact that the trial Magistrate was the best Judge on the issue of credibility of witnesses. She saw and heard them testify. She accepted and acted on their respective pieces of evidence. We have no proper basis for faulting her on that.

Besides, statements under inquiry given to the police by 3rd and 4th appellants make a clean breast of the robbery and leave no doubt as to the participation of all the appellants in the said robbery. True, the statements were repudiated. However, there was ample corroborative evidence provided by the policemen who effected the appellant's arrest, and also the testimony of Outram and Cunnington among others. The trial magistrate did not specifically make a finding as to the truth of the statements. However, considering the way she handled them, it is obvious that she accepted them as true. We however, think that it is prudent to make a specific finding on record in that regard. It is our view that her failure to specifically make such a finding is curable under section 382 CPC.

We earlier alluded to the manner in which the trial and first appellate courts handled the alibi defences of some of the appellants. We held that both courts misdirected themselves on the burden of proof in criminal cases. That notwithstanding, the evidence on record when considered as a whole dislodges the alibi defences. This being a second appeal we need not delve into greater detail on questions of fact more so when we find no error in principle in the manner both courts have handled the evidence.

As rightly pointed by Mr Kariuki for the 1st appellant, there were flaws in some of the evidence produced by the prosecution. For instance Outram admitted he saw some of the appellants before he participated in identification parades in which they were suspects. There was also the fact that the members of some of the parades were not, as nearly as practicable, of similar appearance, to the suspects. Besides, there is the fact that the money which was recovered was not exactly the same as the amount of money which was alleged to have been stolen. In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not

have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.

As regards the case of the 2nd appellant, Mr Odiambo submitted before us that he might have been mistaken for one of the robbers. The evidence on record in clear that PW8 among others did not lose sight of him as they pursued him from the Homegrown offices towards the Naivasha – Nakuru road. The robbery took place in broad daylight and those who pursued him were able to see him as he ran away. As we stated earlier, PW8 was one of the witnesses who arrested him. They chased the 2nd appellant for about a Kilometre. That is not a long distance which, per se, would have made the witnesses to lose sight of the 2nd appellant. Evidence was led to the effect that from the Naivasha-Nakuru highway one could easily see the offices of Homegrown where the robbery took place. It must then mean that the area was generally open.

There are two or so other legal points which were raised by counsel for the appellants. First there is the issue of the motor vehicle stated in the charge sheet. The evidence on record clearly states that the robbers did not take it from any particular person. It was parked outside with the ignition key inside the key hole of the ignition switch. Counsel for the appellants submitted that the motor vehicle was not robbed from the owner. Rather it was stolen from where it was parked. The theft of the money and the motor vehicle was clearly one transaction. The theft of the motor vehicle was part of the execution of the robbery of the money and cannot be said to be a separate transaction.

Related to that is the fact that Steven Outram is named the complainant. He was the farm manager and although the money which was stolen belonged to his employer, he was in the position of special owner of money. The motor vehicle KZB 086 was his. We see nothing objectionable to his being named as complainant.

We find no merit in the appellants' respective appeals. They are accordingly dismissed.

Order accordingly.

Dated and delivered at Nakuru this 8th day of March, 2002

J.E GICHERU

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JUDGE OF APPEAL

S.E.O BOSIRE

…….

JUDGE OF APPEAL

E.O O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR