



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: KWACH, SHAH & O'KUBASU, J.J.A.

CRIMINAL APPEAL NO. 32 OF 1999

BETWEEN

STEPHEN MAINA MUNGAIAPPELLANT

AND

REPUBLICRESPONDENT

**Appeal from a Judgment of the High Court of Kenya
at Nairobi (Mr. Justice Osiemo & Lady Justice Ondeyo
20th November, 1998**

in

H.C.C.C. NO. 1303 OF 1996)

JUDGMENT OF THE COURT

The appellant, Stephen Maina Mungai , was convicted by the Senior Resident Magistrate, Nairobi, of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. The charge against him stated that on 31st August, 1994 at Dunga Road, Industrial Area, Nairobi, with others not before the court, he robbed Gilbert Kariuki of Shs 600,000/= in cash, and in the course of the robbery he shot and killed one Kennedy Gituno (Kennedy).

On the material day Gilbert Kariuki (P.W.2), a cashier, was sent by his employer, Pashpidu Singh (P.W.1) , to go and withdraw Shs 600,000/= for wages at the Kenya Commercial Bank Limited, Moi Avenue Branch in Nairobi. He asked his assistant, Kennedy, to accompany him and they left in a Mercedes Benz KRN 234 driven by John Mbugua (P.W.3). The cash was issued in notes of various denominations and coins. As a matter of precaution Kariuki split the notes between himself and Kennedy and each of them carried these in the pockets of his jacket. The coins and small notes were carried in a bag provided by the Bank which Kariuki placed under his feet in the front passenger seat.

After withdrawing the money the three drove back to the factory but shortly before reaching the gate, their car was suddenly blocked by another vehicle. Before they knew what was going on they saw robbers pointing guns at them. They took the money in the bag and ordered Kariuki to give them the money he had in his pocket and they took his jacket as well. In the process Kennedy was shot and fatally wounded. Although the attack was sudden and took only a few minutes, George Mbugua, the driver, had the presence of mind to note the registration number of the robber's car as KAA 365Z Lancer, white in colour. The robbery was reported at Industrial Area Police Station and a search for the robbers was

underway.

On 5 August, 1994 a vehicle belonging to a gentleman called Shem Masara Nyambae (P.W.4), an Assistant General Manager with Phoenix Insurance Company Limited registration KAB 482R was stolen when he sent his driver to collect his son's bicycle at an address in the Industrial Area. He reported the theft to the police and on 2 September, 1994 he was summoned to Parklands Police Station to inspect a car which they had recovered. The vehicle he saw carried registration No. KAA 365Z. When the chassis and engine numbers were checked it was discovered that the number plates on the vehicle (KAA 365Z) were false and that it was in fact Nyambae's vehicle registration KAB 482R except that the number plates had been removed.

Following a tip-off a team of officers attached to CID Anti- Robbery Team were dispatched to Wangige in Kiambu District where a vehicle resembling the one involved in the robbery had been sighted. They found the car parked and laid an ambush. At about 7 p.m. two men were seen walking towards the vehicle. As one of them was opening the driver's door, the police challenged them. They tried to escape but the police shot and killed one and managed to arrest the other man. The car keys were found in the pockets of the one who was arrested. This was the appellant. The vehicle in question was KAA 365Z which had earlier on been used in the robbery. A navy blue jacket was found inside the vehicle which Gilbert Kariuki identified as his jacket. The robbers had taken it during the robbery.

In his unsworn statement, the appellant did not deny that he was arrested at Wangige but he denied being involved in the robbery. He said the vehicle belonged to his cousin Thomas Njoroge who had offered to give him a lift home. He said they were just about to get into the car when the police shot and killed Njoroge . Although the appellant said the vehicle belonged to Njoroge there was credible evidence that it belonged to *Shem Nyambae* (P.W.4) who had reported it stolen on 5 August, 1995. The thieves had removed the genuine number plates KAB 482R and fixed fake plates KAA 365Z.

The appellant made a confession in which he explained in great detail how the robbery had been planned and executed and the part he had played. At his trial he retracted the confession but it was admitted in evidence after a trial within a trial. We were not able to see this confession because after the conclusion of the trial it disappeared from the court file. Mr. Ndege, for the appellant, submitted that in the absence of that confession the appellant's conviction cannot be sustained. With respect, we cannot agree. The confession was admitted in evidence at the trial and the substance of it was reproduced in the judgment of the learned trial magistrate. The reasons which the appellant had put forward to persuade the magistrate to disallow the confession were rejected after a trial within a trial. We cannot now reject the confession which was properly admitted in evidence.

But even assuming that *Mr. Ndege* was right, the exclusion of the confession alone cannot render the conviction unsustainable. The appellant was found with the vehicle which had been used to commit the robbery a few hours earlier. His explanation that he was given a lift by his cousin Njoroge was rejected by the trial magistrate and in our view, rightly so.

It was an incredible story concocted simply to get the appellant out of a tight corner. Inside the vehicle the police found a navy blue coat identified by Gilbert Kariuki (*P.W.2*) as belonging to him. It was Kariuki's evidence that his coat was removed by the robbers as he was bundled out of the car. There was, of course, no burden on the appellant to prove anything but having been found with the vehicle which had been used in the robbery, and in possession of a coat belonging to one of the victims, he was bound to explain how these heavily incriminating items came into his possession if he was to avoid the inference that he had taken part in the robbery. He tried to pass the buck to his cousin Njoroge who was shot dead by the police when he tried to escape when confronted by the police at Wangige.

When P.C. *Ruben Kiptoo* and his colleagues searched the appellant after arrest, they recovered the car key and Shs 9,530/= from his pocket. His possession of the car key was clear proof that he, the appellant, was the driver and not his cousin Njoroge. In the circumstances there is compelling evidence that the appellant participated in the robbery.

The circumstantial evidence in this case leaves no doubt that the appellant committed the robbery. This was a very tragic case because an innocent man simply going about his work to earn a living for himself and his family was needlessly killed.

We have come to the conclusion that the appellant's conviction was sound and his appeal must fail. It is accordingly dismissed.

Dated and delivered at Nairobi this 2nd day of July, 2002.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR