



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, SHAH & O'KUBASU, JJ.A

CRIMINAL APPEAL NO. 41 OF 1994

BETWEEN

JACKSON GATHIRU KARIUKI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nairobi (Mbogholi & Oguk, JJ) dated 22nd April, 1994

in

H.C.Cr.A. NO. 364 OF 1990)

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JUDGMENT OF THE COURT

***Jackson Gathiru Kariuki***, the appellant, who was the second accused in the Senior Resident Magistrate's court at Kiambu, was, on the 13th day of March, 1990, convicted along with one ***Ibrahim Wafula*** of seven counts. Both originally faced nine counts which we summarize as follows:

***"1. Robbery with violence contrary to Section 296(2) of the Penal Code in that on 10th day of November, 1988 the appellant and Ibrahim Wafula jointly with others not before the court robbed Trufena Wangui Kimani at Mwimuto Trading Centre, Kiambu District, of cash and other items and in so doing used personal violence on her.***

***2. Robbery with violence contrary to Section 296(2) of the Penal Code in that on the 19th day of September, 1988 the appellant and Ibrahim Wafula, at Ruaka village in Kiambu District, jointly with others not before court and being armed with a rifle robbed John Kihui Njoroge of cash and other items and in so doing used personal violence on him.***

***3. Robbery with violence contrary to Section 296(2) of the Penal Code in that on the 19th day of September, 1998 at Ruaka village in Kiambu District, Ibrahim Wafula Wanjala jointly with others not before court and being armed with a rifle robbed Stephen Njoroge Kamau of cash and other items and in so doing used personal violence upon the said Stephen Njoroge Kamau.***

**4. Robbery with violence contrary to Section 296(2) of the Penal Code in that on the 19th day of September, 1988 at Ruaka village in Kiambu District, Ibrahim Wafula Wanjala jointly with others not before court, whilst being armed with a rifle robbed Edward Ndung'u Njuguna of a leather jacket and a wrist watch and in so doing used personal violence on the said Edward Ndung'u Njuguna.**

**5. Attempted murder contrary to Section 220 of the Penal Code in that on the 19th day of September, 1988 at Ruaka village in Kiambu District, both Ibrahim Wafula Wanjala and Jackson Gathiru Kariuki jointly with others not before court attempted to kill police constable Abercon Agallo by firing at him.**

**6. Killing an animal contrary to section 338 of the Penal Code in that on the 19th day of September, 1988 at Ruaka village in Kiambu District both Ibrahim Wafula Wanjala and Jackson Gathiru Kariuki jointly with others not before court willfully and unlawfully killed a police dog named Carl.**

**7. Robbery with violence contrary to Section 296(2) of the Penal Code in that on the 2nd day of October, 1988 at Rungiri village in Kiambu District both the accused persons jointly with others not before court and whilst being armed with a rifle robbed Christopher Robert Davidson of a motor vehicle registration number KVH 253 and other items all valued at Shs.90,050/= and in so doing used personal violence upon the said Christopher Robert Davidson.**

**8. Robbery with violence contrary to Section 296(2) of the Penal Code in that on the 19th day of September, 1988 at Ruaka Trading Centre in Kiambu District both Ibrahim Wafula Wanjala Jackson Gathiru Kariuki jointly with others not before court and whilst being armed with a rifle robbed James Ngetha Munyi of cash and other items and in so doing used personal violence upon the said James Ngetha Munyi.**

**9. Robbery with violence contrary to Section 296 (2) of the Penal Code in that on the 19th day of September, 1988 at Ruaka Trading Centre in Kiambu District both Ibrahim Wafula Wanjala and Jackson Gathiru Kariuki jointly with others not before court, and being armed with a rifle robbed Kamau Kinuthia of cash and a Soni Radio and in so doing used personal violence upon the said Kamau.**

The first accused person Wanjala was convicted on counts 3 and 4 and sentenced to suffer death. On count 5 both of them were sentenced to a term of 15 year imprisonment. On count 6 both the accused persons were sentenced to a term of two year imprisonment. On counts 7,8 and 9 both were sentenced to suffer death.

They appealed against both the convictions and sentences to the superior court. Their appeals in respect of conviction on counts 3,4,8 and 9 were allowed by the superior court, convictions quashed and sentences set aside. Convictions on counts 5,6 and 7 were upheld by the superior court but the sentence in regard to count 5 was reduced from 15 to a 7 year prison term.

The first appellant before the superior court, **Ibrahim Wafula Wanjala**, died whilst in prison and we are no more concerned with him in this appeal. The appellant is before us by way of a second appeal challenging his conviction on counts 5, 6 and 7.

Mr. Kiage who appeared for the appellant argued the appeal primarily on the issue of identification which is a matter of mixed law and fact and hence we have the jurisdiction, as a second appellate court, to re-inquire into that issue. Mr. Kiage's main argument turned on the fact that the appellant was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code on the strength of only one identifying witness, namely **Christopher Robert Davidson** (PW1), hereinafter referred to as Davidson. The relevant count is numbered 7 above. On the 2nd day of October, 1988 Davidson was at home, at about 10.00 p.m. He was watching television. His family was also at home.

The children were asleep. The wife was still up and around. At that time the bell rang and he went to inquire into the cause of such ringing. He saw his landlord's son Kimani Chege with two persons. The security lights outside were on and hence, he testified, he was able to see the three persons. He came out

but warned his wife to keep the door to the house locked as he was suspicious. When he got out of the house he saw two other persons with **Kimani Chege**. They held themselves out as policemen wanting to search Davidson's compound. There was also a fifth person around there, who according to Davidson, was "slightly hidden in the dark from the verandah." Two more persons joined the others. Kimani and Davidson were then ordered to sit down and kneel. At that instance the appellant removed a rifle from his jacket. Davidson moved his position so that Chege could see the armed person. Chege still kept on asking for identification documents from the intruders. Immediately Chege was shot at a close range by the appellant and he appears to have died instantly. The appellant then pointed the rifle at Davidson and gained entry along with others into the house. Davidson who appeared to know something about guns thought that the rifle the appellant was totting was an AK 47 rifle. The intruders asked for money. One of them brought the children from the bedroom where they were asleep.

Davidson and the children were slapped and warned to kneel near a fire place. The appellant guarded them with the rifle. Under threats Davidson gave Shs.1,200/= to the intruders. He was deprived of 5 wrist watches, beaten up and taken round the house. Eventually, the intruders obtained from Davidson the keys to his vehicle. He was ordered to switch on the vehicle lights. The intruders pushed Davidson back into the house and took away a radio cassette, a colour television and some cassettes. The intruders still kept on asking for money. The cupboards were forced open and the telephone was disconnected.

It becomes necessary for us to consider the circumstances under which the robbery took place. Chege was killed at a point blank range. That may have unnerved Davidson but he appeared to have sufficient self control to see what was happening and to observe the intruders, who had taken no trouble to disguise themselves and who spent nearly sixteen minutes inside a lit house. It is in these circumstances and others which we will come to, that the superior court as well as the trial court were satisfied that Davidson's evidence was credible. Mr. Kiage attacked these findings on the grounds that; (1) there was no evidence of the strength or the intensity of the lights; (2) Davidson could only have had fleeting glimpses of intruders; (3) that he gave a totally wrong age of the appellant, 49 years as opposed to the appellant being a young man; (4) that he must have been terrified; and, (5) that his wife was unable to identify the appellant at the identification parade which parade was not properly held in that its members were of diverse complexions the appellant being the odd man out. These factors all combined, Mr. Kiage argued, make the conviction unsafe. That could be a good argument but there are other factors, rather important. It cannot be denied that the fatal bullet (one that killed Chege) came from the rifle in question. Nor can it be denied that the policemen were led to the place where the rifle was hidden by the appellant and his colleague. Equally the bullets which were fired from the rifle used to terrorize the policemen were fired from the same rifle.

The learned Magistrate dealt with the evidence of Davidson as follows:

***"We also have the evidence of Christopher Davidson PW1. PW1 has in my view given a very lucid account of how the robbery took place at his house and how he was able to see the thugs who he identified as accused 1 and 2 very clearly first before they shot Chege in his presence and as they ransacked his house for about twenty minutes. All this time electric lights were on. The thugs struck when PW1 and his family were watching TV. PW1 was able to pick accused 1 and 2 on the ID Parade very easily. I have no doubt in my mind that PW1 has positively identified accused 1 and 2."***

As regards the appellant and his colleague leading police officers to the place where the rifle was hidden the learned Magistrate said:

***"The accused persons were allegedly arrested on 4/11/88 at 6.15 a.m. by Sgt Nzioka PW11 and Sgt Njoroge PW 12 both of CID Nairobi Area Anti -robbery Section. The accused persons were allegedly walking along Muranga Road from the direction of Pangani side. I have believed the testimony of the arresting officers as to where the accused persons were arrested and I do reject accused No. 2's (the appellant here) suggestion that he was arrested from a kiosk at Pangani. I also believe the testimony of Sgt. Nzioka and Sgt. Njoroge that accused 1 and 2 led them to Church Road at a place where they had hidden a gun AK 47 rifle exhibit 1 in a foliage from where it was recovered."***

The learned Judges of the first appellate court (Mbogholi-Msagha and Oguk JJ) re-evaluated the evidence in the court below and had this to say:

***"We have scrutinized his (Davidson's) evidence and we find it safe to rule out any possibility of mistake or error on his part. We find corroboration of his evidence on the very fact that the bullet 9(Ex.24) that was recovered from his verandah where David Kimani Chege was shot dead, was established to have been fired from the AK 47 Assault Rifle (Ex.1)***

***As we have already stated, this rifle was found in the possession of the 1st and 2nd appellants on the 4th of November, 1988. According to the evidence of PW14, PW16, PW17, they actually saw the 1st appellant while firing at them on the material night. The vehicle lights were on and it was at close range some 8 meters away. This enabled them to see the two appellants. It was a case of identification by more than one witness under favourable circumstances. We rule out any possibility of mistake on their part."***

Despite Mr. Kiage's valiant efforts to discredit the identification evidence we see nothing that could lead us to say that the same was unreliable. We keep in mind the fact that this is a second appeal. The two courts below have accepted the identification evidence as buttressed by the recovery of the rifle and the matching of the bullets (including the fatal one). We see no reasons to interfere with these findings and we also uphold the convictions and sentences.

As we are upholding the conviction on count 7 and as the punishment thereof is mandatory death sentence we need not really go further into the counts relating to the attempted murder and killing of the dog Carl. However, the bullets that harmed and killed have been traced to the AK47 Assault Rifle which was found in the joint possession of the appellant and Ibrahim Wafula and there can be no doubt that the appellant is guilty of both the said offences. We see no merit in this appeal and it is dismissed.

***Dated and delivered at Nairobi this 4th day of October, 2002.***

***P.K. TUNOI***

.....

***JUDGE OF APPEAL***

***A.B. SHAH***

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***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.**