IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, LAKHA & BOSIRE JJ.A)

CRIMINAL APPEAL NO.48 OF 1997

JULIUS MAINA NDIRANGU .....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (V.V. Patel & S.O. Oguk JJ.) dated 30th April 1996

in

H.C.CR.A. No.345 of 1993)
****

JUDGMENT OF THE COURT

Following his trial, jointly with another person whose appeal is not before us, of two counts of robbery contrary to **section 296(2)** of the penal code, and an alternative count of handling stolen property contrary to **section 322(2)** of the penal code, Julius Maina Ndirangu, the appellant, was convicted of the less cognate offence of stealing a motor vehicle contrary to **section 278 A** of the penal code, in the first count, and of robbery with violence in the second count. No finding was made in the alternative count. The appellant was thereafter sentenced to suffer death in the second count, but sentencing in the first count was left in abeyance. The appellant's first appeal to the superior court was dismissed. This is his second appeal.

The appellant's conviction was wholly based on circumstantial evidence. In the present appeal the appellant raises two main points of law against his conviction. First that his conviction was on a defective charge. Second, that the circumstantial evidence upon which his conviction was based did not exclude co-existing circumstances which exonerate him from the offences.

The first point relates to count two. The particulars thereof are as follows:-

> "***On the 31st day of March, 1992, at Gakonya village in Muranga District within Central Province, jointly with others not before the court, being armed with guns, robbed Constantine Wambugu Wangondu of a motor vehicle registration number KAA 055A and cash Kshs.559,245.85 and at or immediately before or immediately after the time of such robbery shot Constantine Wambugu Wangondu dead."***

Mr Nyachoti for the appellant submitted before us that the aforesaid particulars disclose two distinct offences, and thus make the charge duplex. It was his view that the addition of the word "dead" at the end of the particulars introduced the offence of murder.

Section 137 of the Criminal Procedure Code (CPC) enacts rules for the framing of charges and informations. Paragraph (a)(ii) thereof provides that a count of a charge or information shall commence with a statement of the offence charged. Paragraph (a)(iii) of the said section provides that after the statement of the offence, the count should include or set out particulars which in effect state the facts, in summary, constituting the offence stated in the statement of the offence.

A casual look at the second count shows that the prosecution, prima facie, complied with the provisions of section 137 CPC. The question which falls for consideration is whether the addition of the word "dead" at the end of the particulars introduced another charge and thereby rendered the charge duplex.

The section creating the offence of robbery is section 295 of the penal code. The section provides that:

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or to prevent or overcome resistence to its being stolen or retained, is guilty of the felony termed robbery.***"

Section 296(1) of the penal code prescribes the penalty for the offence of simple robbery. Section 296(2) of the same code makes provision for the sentence for robbery with violence. All robberies involve some form of violence. However, section 296(2) deals with robbery with aggravated circumstances. It provides for a special penalty for such an offence. The aggravating circumstances include, being armed with any dangerous or offensive weapon, or being in the company with one or more person or persons, or wounding, beating, striking or using any personal violence.

In the matter before us the particulars which counsel for the appellant contends make the charge duplex relate to the killing of the complainant. As we shall show later in this judgment, the deceased in that count was killed in the course of stealing a motor vehicle and money. The Legislature by enacting section 296(2) of the penal code was in effect validating what otherwise would have been an omnibus charge. The standard form for a robbery charge provided in the Second Schedule of the CPC has a framework for drawing such a charge. Section 137(a)(iv) CPC, is clear that the standard form may be modified as deemed appropriate depending on the circumstances of each case.

To our minds therefore, the addition of the word "dead" or words to the effect that the violence which was meted out to the victim of the robbery charged caused his death is merely descriptive of the nature of the violence which was meted out in the course of the robbery charged. It is that aggravating factor which brings the offence within the ambit of section 296(2) aforesaid.

In the result we are of the view and so hold, that the robbery charge in count two is not duplex. Besides, the appellant understood the charges he faced, initially put up a defence to them and was not in any way prejudiced.

As regards the second complainant, a resume of the background facts is essential before dealing with it.

On 22nd March, 1992, Eunice Rose Wangui Njoya (Eunice), then an employee of Old East Graphics Ltd, parked motor vehicle Reg. No.KAA 657K, which her employer had assigned to her for her use, along Swara Crescent, in Nairobi West. It was a Nissan Saloon car. For convenience we shall refer to it as the Nissan car. With her were her two daughters. After parking the Nissan car, she went to talk to a friend who had also parked her car nearby. She sent one of the daughters to a nearby house to deliver a certain document. The other daughter remained inside the said car. Shortly later some thieves came, forced the said daughter out of the car and drove it away. It was not found until 31st March, 1992. It had false registration particulars, to wit KAA 355G; which were particulars for a Peugeot 504 Saloon SR, then registered in the name of Ms C.M Wambugu & Company (K) Ltd. Neither Eunice nor her daughter

identified any of the car thieves.

In the meantime on 31st March 1992, at about 8.15.a.m, David Njenga Wang'ondu, then the Assistant Depot Manager with Kenya Breweries Ltd, Sagana branch, left his station in a Toyota Hilux motor vehicle Reg. No.KAA 055, then owned by Securicor(K) Ltd. He was proceeding to Muranga town to bank some money. The money included Kshs.559,245.85 in cash and kshs.5000 in cheques. With him in the said motor vehicle were Securicor staff who included Mark Njeru who with another man sat inside the rear cabin of the vehicle to guard the money which was kept there in boxes. The driver of the vehicle was Hezekiah Kamau Mwangi. Constantine and another man sat with the driver inside the driver's cabin.

As the vehicle was being driven towards Muranga, it was overtaken by the Nissan car. It had many occupants. Shortly later it stopped in the middle of the road and blocked the path of the Securicor motor vehicle. The occupants of the Nissan car were robbers. They descended on the survivors of the Securicor vehicle, and after roughing them up, they commandeered that vehicle with all occupants on board and drove it towards Sagana with the Nissan car following closely. At Gakonya, they left the main road, and joined an earth road, and after driving for a short distance along that road they stopped. The robbers took all the money in boxes, transferred it to the Nissan car, and drove off leaving behind the Securicor vehicle with all its occupants.

In the meantime the police at Muranga were alerted about the robbery. They circulated the information to all police installions in the area, and policemen were mobilized and positioned themselves along all major roads. P.C Kiptoo testified that he spotted the Nissan car heading towards Muranga town via Kiriaini Market, with two occupants. The one who was driving was wearing a pullover with black and white spots, while the passenger had a black coat on. He was not able to identify them as the car was driven past him at high speed. The vehicle was later found abandoned near Wahundura High School. The occupants had escaped. A search for them was mounted and the appellant was found lying on his back inside a banana plantation near somebody's house. He had socks on but no shoes. There were no shoes found nearby. He did not explain where he had left his shoes. He had a brown pullover on which had white spots. On being searched, he was found with Kshs.91,600/= tucked under his shirt just above the groin area. The appellant was then arrested and the police took possession of the money.

The appellant admitted he was arrested from inside a banana plantation but contended that he had hid himself because he feared being robbed of some Kshs.95,000/= odd he had, by a crowd of people which he saw approaching chanting menacingly. He stated that he runs some business both in Nairobi and Kariaini, and that the money had been earned from the business. He further stated that he was proceeding to his home to attend to a land boundary dispute between him and his brother, when he met the crowd of people. He did not explain why he carried such a large sum of money with him from Nairobi. He denied having committed the offences charged.

The trial magistrate, in a carefully written judgment considered all the evidence before him which was wholly circumstantial and came to the conclusion that the evidence irresistibly pointed to the appellant as having been party to the theft of the Nissan car and also the robbery against Constantine. He rejected the appellant's defence on the ground that it was an afterthought. He then proceeded to sentence him as earlier on stated. The appellant was aggrieved and appealed to the superior court against his conviction and sentence. The superior court (Patel & Oguk, JJ) reevaluated the evidence and relying mainly on the decisions of Rex v. Kipkering Arap Koske [1949]16 EACA 135 and Simoni Musoke v. R. [1958]EA 715, held that the circumstantial evidence against the appellant excluded co-existing circumstances which would weaken or destroy the inference of guilt, and also irresistibly pointed to the appellant as having committed the offences he stood convicted of.The court agreed with the trial magistrate that Eunice was not robbed of her car, but that her case was merely one of theft of a motor vehicle. The court upheld the appellant's conviction and thus provoked the present appeal.

Rex v. Kipkering Arap Koske (supra) and Simoni Musoke v. R (supra) lay down the tests upon which a court will be justified in drawing the inference of guilt from circumstantial evidence. Both courts below applied those principles correctly, and came to the conclusion that the circumstantial evidence against the appellant indeed supported the charge of theft of the Nissan car, and robbery against Constantine, and that

there were no co-existing circumstances to weaken or destroy such inference.

We have no hesitation in coming to the same conclusion. The appellant was arrested from a hideout in socks but no shoes suggesting that the shoes must have either dropped somewhere, in the course of his escape, or that he removed and dropped them somewhere to enable him escape with ease.He did not explain why he did not have his shoes on. That was a fact peculiarly within his own knowledge. Likewise the appellant was duty bound to but did not explain why he had to carry a lot of money in his pocket. If as he said, the money was part of proceeds from his business in Nairobi, it was clearly a matter peculiarly within his knowledge why he did not first bank it or if it was not necessary to bank it, why he had to carry it along with him. Section 111(1) of the Evidence Act, Cap 80 Laws of Kenya places that burden on him.

Besides, the appellant was arrested within the vicinity where the Nissan car had been abandoned shortly before his arrest. He was found wearing a pullover which almost answered the description Kiptoo had given of the pullover the driver of the Nissan had on just before the motor vehicle was abandoned. The place where the appellant was arrested was not within the vicinity of his home. It was not by sheer coincidence that he was found there without shoes and in possession of a large amount of money hiding himself amongst banana plants. The explanation he gave for being found there was quite properly rejected by both the courts below as it was not reasonable in the circumstances of this case.

For the foregoing reasons, the appellant's appeal lacks merit. It is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 29th day of June, 2001.

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR