REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 659 & 693 OF 1977

1. JOSEPH WANGANGU

2. KAMAU MACHARIA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal against convictions by the Resident Magistrate at Kiambu in Criminal Case No 239 of 1977)

JUDGMENT

The two appellants were put up for robbery before the Resident Magistrate, Kiambu, on a charge which reads:

Charge. Robbery contrary to section 296(1) of the Penal Code.

Particulars of Offence. (1) Kamau Macharia (2) Joseph Wangangu: on 24th April 1977 at Kibazi Estate, Kiambu District within Central Province, jointly with others not before the Court robbed Karanja Njau of 20 bags of coffee valued Kenya Shs 42,000 and at or immediately before or immediately after the time of such robbery used personal violence to the said Karanja Njau.

What was alleged against the appellants was that they were two of a gang of four, three of whose members were armed with a club, *rungu* and sword respectively, which, on the night concerned, drove to the estate in a vehicle bearing the name and address of the appellant Kamau Macharia, where they surrounded a watchman who was on guard duty, told him to say nothing if he wanted no trouble, pushed him towards an electric light pole to which they tied him, and began to steal bags of coffee from a store, the venture ending prematurely and disastrously as the police, on information received, were lying in ambush and opened fire. One member of the gang was shot and killed, one, who had been guarding the watchman, got away, and the two appellants were caught. The case for the appellants was that they were innocently involved, Kamau Macharia because two of the gang hired his vehicle, and Joseph Wangangu because Kamau Macharia, his employer, asked him to go along.

The trial magistrate, who tried the case with care, found the case, as he put it, clear and straightforward and convicted both appellants. Having done so, he sentenced each of them to serve four

years in prison, to receive ten strokes by way of corporal punishment and to be the subject of supervision orders. He also ordered the forfeiture of the vehicle which the gang used. From their convictions both appellants now appeal to this Court. Kamau Macharia also appeals against the order of forfeiture, and Joseph Wangangu perhaps appeals against his sentence (it does not matter whether he does or does not). Each appellant puts before us a number of grounds of appeal mainly upon the facts, but woven into them is an important point of general importance concerning the crime of robbery and we shall deal with it first.

We think we can put the argument presented to us in this way: that, even if the facts were as the trial magistrate found them to be, there was no more than a tying-up of the watchman, and such tying-up is incapable in law of amounting to the violence charged because, as it is said in 10 *Halsbury's Laws of England* (3rd edn), paragraph 1537 on page 795: "Unless there was a putting in fear, there must have been some force used". As we read the evidence, the watchman was put in fear because when asked, after being abjured to keep silent, he told the gang where the coffee was stored, and it was not until his guard escaped that he made his presence known to the police, and he was not only tied up but pushed. But then, what was the violence charged against the appellants"

It cannot but be said though the point was not taken before the lower court or before us and it cannot have occasioned or been likely to have occasioned prejudice or a failure of justice, that the charge was badly framed in that the statement of offence is unambiguously laid under section 296(1) of the Penal Code for robbery, whilst the particulars of offence support one of the more serious type of robbery provided by section 296(2) of the Code, ie for robbery with violence. There was, however, no possibility of there being any doubt or confusion because, although it was done for a different reason, the magistrate, before any evidence was recorded, made it clear, as his record shows, "The two now stand charged with robbery contrary to section 296(1) of the Penal Code".

That, then, was the crime charged, and which the appellants knew was the crime charged, against them. It follows, accordingly, that everything which appears in the particulars of offence after the words "valued Kenya Shs 42,000" was otiose and should not have been there. We can, therefore, now answer the question we earlier posed by saying that the violence which the appellants were alleged to have used is that which is catered for in section 295 of the Penal Code, which reads:

> 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 retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery

which is punishable under section 296(1) of the Code. Was there then, upon the facts which the trial magistrate found proved, the use or the threat to use actual violence to the complainant to enable the gang to obtain the coffee which was stolen" Certainly was there a theft"

We will first discuss the word "actual" which, of course, derives from the Latin *actus*. We cannot say that it must be so, but we think that it would have been introduced into the definition for one of two (or perhaps for both of two) reasons, to indicate that constructive robbery, sufficient for the common law offence, is not enough, ie it must be real, or to draw a further distinction between the type of violence needed to establish the offences under the two subsections. At all events, having pondered on the problem, we have arrived at the view that "actual violence" means any unjustifiable force. "The definition of robbery in our Penal Code differs from the definition under the law of England": *Gathuri Njuguna v The Republic* (unreported) but we can, nonetheless, derive assistance from decisions given under that law. Thus in *R v Desmond* [1965] A C 960, the House of Lords held it to be robbery with

violence where the accused persons locked up a night-watchman in a lavatory while they stole, and in *Kenny's Outlines of Criminal Law* (1966) (19th edn), page 320, we find, "The force need not be great", to which there is a footnote which reads:

> Catching hold of an arm suffices. The gentle application of a chloroformed rag, producing a mere momentary unconsciousness, was held sufficient by the Court of Criminal Appeal, since 'it was all the violence that was necessary for the purpose', *R v Carney* (1922) 18th December (unreported). In fact any violence suffices, *R v Harrison* (1930) 22 Cr Ap Rep 82.

We have not consulted the *Carney* case, but we have looked at the report of the *Harrison* case, and that also was concerned with the charge of robbery with violence. Applying what we have said to the facts as found in the court below, there was the threat to use actual violence (we have said something about this already when dealing with the question of putting in fear) and there was the use of such violence when the complainant was pushed towards and tied to the electric light pole. We think the magistrate was justified in commenting:

> Considering what happened to the watchman one cannot say that there was no force used. These four people surrounded the watchman and told him to be quiet if he did not want to be harmed. They led him to an electricity post (there is evidence he was pushed) and tied him up. Surely that watchman was not a free man from the time he was surrounded to the time he was untied. He was threatened that by making any noise he would be harmed. These people had a *rungu* and *pangas*. At least one *rungu* and one *simi* were recovered on the scene. The man who was guarding the watchman had a *simi*. These were offensive weapons to show that these four were serious with their threat to harm should the watchman shout. Hence the circumstances clearly show that this was robbery and nothing else.

So much for the law. We now turn to the grounds of appeal put forward by the appellant Kamau Macharia and after that we shall deal with those of the appellant Joseph Wangangu which can be dealt with rather more shortly.

Ground 1 is that the trial magistrate erred in failing to consider that the appellant would not, were he bent on stealing, have used a vehicle which bore his name and address on its door. The short answer to this is that if you intend to commit a crime such as that with which we are here concerned, you must take a chance. To the gang, the choice lay between hiring a vehicle and using one apparently belonging to one its members. Either one had its danger. It must have been resolved to use the appellant's vehicle. There was only likely to be a watchman or watchmen at the scene, and the arrival of armed men and the use of threats alone was likely to induce fear, as it did, and blunt clarity of thought and recollection. As a matter of fact we think we are right to say that the watchman was asked not a single question about the legend on the door. For what, if anything, it is worth, we would also mention that the appellant told the court that his vehicle was used to carry manure. We do no more than to ask whether anyone would wish, assuming, that is, he knew of this general use, to hire such a vehicle to carry coffee"

Ground 2 is that the trial magistrate erred in failing to consider that the appellant was hired to carry goods. He did not so err.

Ground 3 is that the magistrate erred in comparing the prosecution evidence with the defence evidence and convicting the appellant not on the prosecution case but on the weakness of the defence case. But he did not do that. This ground mainly derives from the magistrate saying:

> I have considered the evidence of Njau [the watchman] and Chief Inspector Kiviatu vis-a-vis the unsworn statements by the two accused persons and I am satisfied that the version given by [the watchman] and

[the chief inspector] is the true version of what happened that evening..

It is said that the magistrate's language is unfortunate, and perhaps it is; but what he was saying was that, bearing in mind that he was faced with two different accounts, he believed that which was given by the prosecution and did not believe what which was given by the defence. He was entitled to do that. He was required to have all the evidence in the case in mind before coming to a conclusion: *Okethi Okale v The Republic* [1965] EA 555, and he had. It would have been wrong of him to convict on the weakness of the defence case: *R v Israili Epuku s/o Achietu* (1934) EACA 166, but he did not do that. The Chief Inspector told the Court:

The vehicle stopped just in front of the office. This was a very short distance from where I was hiding. Four people came out of the vehicle and surrounded the watchman who came to meet them. They talked to the watchman and I heard one of them say to the watchman, 'If you don't want to be harmed you better not shout'. They asked the watchman: 'Where do you keep the coffee"' and the watchman said: 'In these three stores'. I heard one of them say 'we better tie him. I saw them pushing the watchman at the back of the office. One of them came to the vehicle and drove it in front of the chemical store. After a short while I saw them loading the vehicle with bags. I waited for a period and when they had filled the vehicle with the bags I came from my hide-out and I went to them. I shouted 'Police, police' and fired one bullet in the air to warn them. I told them to stand where they were and put hands up. I confronted three people at the back of the vehicle. One of them pushed himself into the vehicle when he heard the shot while the other person ran to the driver's side. He headed to the entrance where Inspector Kitete and one other officer were guarding. I remained guarding the one who had entered the vehicle. The other person went round the passenger's side. At that time there were shouts of policemen '*Simama, simama*' and there was firing. I ordered the person in the vehicle to come out and I made him sit at the back of the vehicle. The man is [Joseph Wangangu]. The other man who ran was brought by Inspector Kitete. The man who was brought by Kitete is [Kamau Macharia]. I learned that [Kamau Macharia] was the driver of the vehicle because he handed the ignition key to me.

If that is true, and it is, the magistrate's decision must be right. When the vehicle stopped, its four occupants came out; three were armed. 'They surrounded the watchman, they threatened him with violence if he said anything, or rather one of them did and the other did not dissent, and one said he should be tied up, and he was. Told where the coffee was, one of the gang drove the vehicle to the store. The driver must have been the appellant Kamau Macharia because he it was who had the vehicle's ignition key. Three loaded the vehicle, two at whom were the appellants. Even if they were at first but innocently involved in the crime, which they were not, they joined in it: *Solomon Mungai v The Republic* [1965] EA 782. But the chief inspector's evidence does not stand alone. The watchman confirms it, and Inspector Kitete told the Court:

... I heard a shot ... I went to where the vehicle was. I flashed my torch and I saw [Kamau Macharia] running towards me, but when he saw me he stopped and knelt down. Firing was still going on. When I reached [Kamau Macharia] I took him back to the vehicle and made him to kneel down next to that man [Joseph Wangangu].

It was urged upon us that the chief inspector's evidence in some way supported the defence case; but it does not.

Ground 4 is that the magistrate erred in failing to consider that the watchman talked to the gang before the vehicle was driven further ahead and parked, and what was put to us was this: the watchman spoke to the gang and told them where to park their vehicle, which the trial magistrate did not consider. Accordingly, the watchman was an accomplice. This attracts us not at all. The magistrate believed what

the watchman and the chief inspector told him, which was that the watchman was threatened with violence before saying where the coffee was. That did not make the watchman an accomplice.

Ground 5 is that the trial magistrate erred in failing to consider that the watchman "possibly conspired" with the thieves "and in finding that the defence alleged that Chief Inspector Kiviatu was a conspirator without any evidence". Quite what the latter part of this means, or can mean, we cannot say. Indeed counsel for the appellant told us, "Only the first part matters and I have dealt with it". The magistrate did not believe that the watchman was an accomplice. He said, "I find that the behaviour of the watchman Njau that evening was far from that of an accomplice". We agree.

Ground 6 is that the magistrate erred in failing to consider whether the explanation which the appellant gave was reasonable. But the real question was not whether it was reasonable, but reasonably possible of being true; which on the facts accepted, it could not have been. The magistrate was entitled to reject it, as he did.

Ground 7 is that the magistrate erred in ordering the forfeiture of the vehicle "which belonged to the bank on hire purchase". State counsel does not support the order, accepting that the vehicle is the property of a bank and because the provisions of section 389A of the Criminal Procedure Code, referred to in section 311 of the Penal Code under which the magistrate purported to make his order, were not followed.

Ground 8 is that the magistrate erred in not considering that the store in which the coffee was kept and from which it was taken must have been opened by a person who knew the type of lock or had a duplicate key, and that the only person who could do so was the watchman. It by no means follows nor does the evidence lead to such conclusion. If it be assumed that the watchman had the key to the store or its duplicate, and was an accomplice of the gang, he would, on the evidence, have given it to them before the men arrived at the scene else the chief inspector would have seen it handed over, but the watchman was threatened and tied up. He might have been tied up to simulate his innocence, but he would not have been threatened. It is true that he said that the stores were locked and there was no broken lock, but he was not involved in the crime save as a victim.

Ground 9 is that the magistrate erred in failing to consider that the watchman waited till the last moment to say where he was in view of the fact that he was very close to the store. But he was not, at first, aware of the police presence, and he was being guarded by an armed man.

Ground 10 is that the magistrate erred in finding that the watchman was neither an accomplice nor an agent of the police who invited the thieves, and so could not have been robbed. He was neither the one nor the other.

We now turn to the ground of appeal put to us by the appellant Joseph Wangangu. Grounds: I, 2, 3, 4 and 5 may conveniently be taken together. They are to the effect that he did not participate in the loading of the vehicle or, for that matter, in the robbery at all. The evidence which the magistrate accepted is totally against him.

Ground 6 is that he was not permitted to cross-examine the witnesses, but the record shows that it is not so.

Making our own assessment of the recorded word, we do not doubt that the magistrate was right to accept the evidence which he did. Nor do we doubt that both the appellants committed the crime charged and were correctly convicted for having done so. So, too, were they properly sentenced.

Accordingly we dismiss both their appeals save only that we set aside the order for the forfeiture of the vehicle.

Order accordingly.

Dated and Delivered at Nairobi this 20th day of December 1977.

E.TREVELYAN	**J.H.S.TODD**
JUDGE	**JUDGE**

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