REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 261 & 262 of 1995

(From original Judgment in SPM Nyeri CR.C. 3520 of 1994 heard by Mr. Apondi,SPM)

JAMES MURIUKI MITHAMO)

JOSEPH MAINA GACHERU)..... APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

11/5/98

Coram: Hon. Mwera J.

Mwangi State Counsel for Republic c.c. Murimi - Kik/Eng. Appellants present

JUDGEMENT

The two appeals were consolidated, heard and disposed of together. James Muriuki Mithamo, appellant in CR. A. 261/95 was the first accused in the lower court. His mate Joseph Maina Gacheru was the 2nd accused. His appeal here is CR A. No. 262/95. On 4.10.94 the two were charged with 3 counts for robbery c/s296 (2) P.C. The robberies allegedly took place on the night of 25/2/96 September, 1994 at various villages. Count 1 stated that the two appellants with others who had not been arrested and charged as at 4.10.94 at Tanyai village, Nyeri, used violence or threatened to use it against George Nderitu when they robbed him of a Peugeot 504, electrical motor among other items like clothing. All items totalled about shs. 1.8 m. In count 2 it was at Karemeno village where the robbers armed and in a similar style robbed David Macharia of cash, shop goods and personal items valued at shs. 34,479/-. And finally the appellants with their mates also robbed David Gathua of his property at Ruiri Village in Nyeri district (See Count 3).

The appellants denied the offences and their trial opened on 6.2.95 before the S.P.M. Appellant 1 James Mithamo was represented by Ms. Gitonga, While seemingly the 2nd Appellant Joseph Gacheru conducted his own defence

In all some 9 prosecution witnesses testified. The appellants were heard in their defences. Judgement followed on 27.10.96. Both appellants were convicted and sentenced under S.296 (l) P.C. when it appeared to the learned trial magistrate that evidence proved a lesser offence than originally set. On Count 1 each appellant got 5 years and 5 strokes of the cane. On count 2 only appellant 1 James

was concerned and he similarly got 5 years with 5 strokes. Count 3 was for appellant

2, Joseph, alone and he got a similar sentence. The learned trial magistrate it can be said in error overlooked to impose the mandatory 5 year police supervision on release of the 2 appellants (see S.344 A CPC). The prison terms were to run concurrently while the strokes were cumulative.

This means that each appellant would serve 5 years imprisonment and suffer 10 strokes of the cane. On 5.12.95 each appellant filed a petition of appeal against conviction and sentence. Appellant 1 James in the main focused attention on, it can be said three areas: identification since the robbery took place at night the status of an electrical motor he was allegedly arrested with and a faulty police identification parade. Appellant 2 Joseph also alluded to identification and had a quarrel with the police identification parade. Then he added the matching of his blood group with that that was found on a piece of clothe that had been left in the stolen m/v (see count 1) that had been abandoned by the robbers and it was discovered on the morning after the robberies.

At the hearing of the appeals on 11.5.98 the appellants who were unrepresented argued by reading their respective petitions. They urged this court to allow the appeals. The learned state counsel did proceed as it shall appear presently. In the lower court, it was not in doubt that the robberies did take place as alleged in the charge sheet. The learned trial magistrate did not lose sight of the fact that the

robberies took place at night and so identification of the perpetrators was of central concern if he had to convict.

In a carefully crafted judgment the learned trial magistrate was satisfied that by thetorch David Macharia (P.W.2) had, he flashed it at appellant 1 (James) and in itslight identified him from a distance of 10 metres as he advanced, armed, with hismates after breaking through the off-cuts fence into P.W.2's compound. He addedthat when an identification parade was conducted at a police station he picked himout. Appellant I told this court that the convictions at the time of robbery were notconducive to positive identification and what he called dock identification was notworth much. Indeed P.W.2 had testified that he knew Appellant 1 before as his customer at a shop he ran.

As for appellant 2, Joseph, the learned trial magistrate found that David Gathura (P.W.3) had also identified him in torch light at his premises and he had done so again at an identification parade. The 2 witnesses, P.W.2 & 3 were assaulted during the robberies and their property was stolen.

It was argued by the appellant 2 that the learned trial magistrate was in error when he received a government analyst's report that matched his blood group "O "

sample with that that was left on a piece of cloth left in a stolen motor vehicle. But besides this as, it shall appear later, Appellant 2 was found lying drunk near

that motor vehicle with a fresh wound on the head. It was not readily available to the court that police identification parades were carried out and by who, and that is why the learned state counsel was not quite content with the night identification and he observed that there could be a weak link in that aspect

of the case. That may as well be so. But he had something more in regard to the convictions of the appellants by way of additional evidence that the learned trial magistrate heard and which connected the appellants to the robberies, and more, may be said about P.W.2's evidence on identifying appellant.

For appellant I, James, on the morning of the robberies he boarded a matatu witha colleague. He carried some piece of luggage which contained an electrical motor.When the matatu got near a certain bus stage, P.W.7 APC Silas Murungi

who was in that motor vehicle had gotten suspicious of the 2 travellers with their luggage. When they alighted, he too alighted and asked them about it. Appellant 1 's friend fled while, the appellant 1 who carried the item answered that it was his property. Members of the public helped P.W.7 arrest Appellant 1. It turned out that this motor belonged to the 1 st complaint. In such circumstances, it was safe to convict appellant I as the learned trial magistrate did. So soon after the robbery one could not come to a different conclusion with circumstances as these.

I.P. Kaberia Kanake (P.W.8) completed the link when he immediately went to the

house of the complainant and found a carton that bore the same serial number as

that of the electric motor appellant 1 was caught with.

The same P.W.8, when he learnt of the stolen and abandoned motor vehicle lying

by the road side, he proceeded there and found appellant 2 lying nearby drunk and

with a fresh bleeding head injury. There was this wiping cloth in the motor vehicle,

stained with blood. A government analyst's report revealed that a blood sample

taken from appellant 2 matched, in group "O ", that that was on the cloth. The

learned trial magistrate lingered a little on this; and concluded, this court thinks

correctly, that appellant 2 was linked to the robbery in count 1 where a car was

stolen.

As for appellant 1 James, and count 2 this court concurrently finds that the identification by P.W.2 on the night of the robbery, (of appellant 1) was not faulty. P.W.2 knew appellant 1 before as his customer. When the group of thugs passed through the off-cuts fence to descend on him, P.W.2 using his torch flashed at appellant 2 from a distance of 10 metres. He saw and identified, and, recognised this appellant. The gang then robbed and beat him up. Conceded,

evidence of identification parade(s) was not put before the lower court but that identification by recognition in this court's view was positive. It is the identification of appellant 2 by P.W.3 that left this court not quite comfortable. His conviction on count 3 is thus quashed and sentence set aside. The end

result is that appellant lst conviction and sentences on count 1 and 2 remain. Appellant 2 remains convicted on count 1 also but his appeal succeed as regards count 3.

The learned trial magistrate heard that the appellants were first offenders. But the offences were serious. The victims were assaulted and or threatened with violence at the time of the robberies. The appellants may count themselves lucky that the

medical evidence of assault on complainants was not given. This court is not of the view that the sentences be disturbed. Accordingly appellant 1 James Mithamo shall serve 5 years plus 5 strokes for counts 1 and 2. The sentences are concurrent and so they translate into 5 years imprisonment plus strokes of the cane. Thereafter he shall remain under police supervision for 5 years (as per S.344 A CP.C.) The appellant 2 Joseph Gacheru, whose appeal in respect of Count 3 has been allowed will nonetheless serve 5 years imprisonment plus 5

strokes of the cane for Count 1. He too shall be under police supervision for 5 years on release.

Save for the variation in regard to appellant *2,* the appeals are dismissed. Judgment accordingly.

Delivered on 19.5.98.

W. MWERA

JUDGE