REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 5 OF 2019

SIMON CHUCHU KIBURI……....……...APPELLANT

VERSUS

REPUBLIC……..……....RESPONDENT

(Being an appeal against the conviction and sentence dated 18th January, 2019, of Hon. K. Bidali, Chief Magistrate, in Naivasha CMCCR No. 2463 of 2015)

JUDGMENT

1. The appellant was charged in the lower court with the offence of robbery with violence contrary to section 295 as read with section 296 of the Penal Code. The particulars were that on 19th December 2015, at Eburru trading centre Gilgil, within Nakuru County, jointly with others not before the court, and being armed with a danger weapon, namely a pistol, he robbed Daniel Maina Mwangi of Kshs 60,000/= and three mobile phones all valued at a total of Kshs 20,500/=, assorted airtime cards worth Kshs 4,800/=; cigarettes worth Kshs 3,200/= and a Maasai Shuka valued at Kshs 650/=; all totalling Kshs 90,150/=. After the time of such robbery, the charge states that the appellant threatened to use actual violence.

2. After hearing four prosecution witnesses and the accused, who gave sworn evidence, the trial magistrate convicted the accused and sentenced him to death. The trial court noted clearly that:

> ***"The case against the accused is therefore circumstantial in nature i.e. that his vehicle was used in the robbery and therefore he must have been among the robbers in the absence of any explanation." (Underlining a***

3. Dissatisfied with the judgment, the appellant has appealed against both conviction and sentence. The appellants amended petition of appeal contains the following grounds:-

> *1. THAT the Learned Trial Magistrate erred in Law and fact in convicting and sentencing the Appellant on inconclusive evidence which had not proved as required in law by the evidence on record and without any corroboration.*
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> *2. THAT the Learned Trial Magistrate erred in Law and facts in finding that the circumstantial evidence on record is sufficient to proof the case against the accused person in the absence of any other corroborative evidence.*
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> *3. THAT the Learned Trial Magistrate erred in Law and facts in shifting the Burden of proof to the accused in this case against the established principles of criminal procedure.*
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> *4. THAT the Learned Trial Magistrate erred in Law and facts in finding that the licence of the Appellant's Driving Licence was recovered in Motor Vehicle Registration Number KAN 906F when the said vehicle was not produced as an EXHIBIT in court either physically, its photographs or its official records.*
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> *5. THAT the Learned Trial Magistrate erred in Law and facts in finding that the robbers abandoned Motor Vehicle Registration Number KAN 906F a short distance away from the scene of Robbery when the Motor Vehicle Registration No. KAN 906F Toyota was never produced in court physically, or its photographs or its official records.*
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> *6. THAT the Learned Trial Magistrate erred in Law and facts in not finding that there was no evidence at all adduced by the*

prosecution to prove that there was a vehicle involved in the Robbery and all the evidence relating to the motor vehicle was hearsay hence the failure to produce the vehicle physically, or its photographs or its official records was fatal to the entire prosecution case.

7. THAT the Learned Trial Magistrate erred in Law and facts in failing to find that the Appellant had given an explanation as to how he came to learn about the whereabouts of his vehicle.

8. THAT the Learned Trial Magistrate erred in Law and facts to consider the fact that it was incumbent on the part of the prosecution to disapprove the Appellant Alibi.

9. THAT the Learned Trial Magistrate erred in Law and facts in failing to find that the Appellant had given an explanation of the presence of his license in the vehicle.

10. THAT the Learned Trial Magistrate erred in Law and in facts in failing to consider the Defence given by the Appellant in this case and the Appellant's case was prejudiced.

11. THAT the Learned Trial Magistrate erred in Law and facts in that he misdirected himself in evaluating the evidence on record and the onus of proof required on circumstantial evidence.

12. THAT the Learned Trial Magistrate erred in Law and facts in failing to appreciate that the only conclusive evidence that would have corroborated the circumstantial evidence herein was evidence of identification of the Appellant and nobody was identified in this case.

4. A brief summary of the facts will suffice to place this case in context. The complainant Daniel Maina Mwangi gave evidence as PW1. Essentially he stated that on 19TH December 2015 at about 7 - 7.30pm he was in his retail shop at Eburru, when two me appeared, and asked for sugar. As he bent under the counter to enter, he saw a man facing him and another pointing a gun at him. They ordered him to lied down threatening they would kill him. He obeyed. The robbers then robbed him from the cash box to items he had in his clothing to shop items.

5. When the assailants left he was still on the floor. Someone walked in and, not seeing anyone, asked *"kwani uko wapi"*. PW1 realised it was his brother and he told him he had just been robbed. They raised an alarm and people came around. Then they went to report the robbery to the police. On the way they met two policemen on foot who had received information about the robbery. The policemen entered the vehicle and informed PW1 and his brother that there was a vehicle that had been detained.

6. The police visited the scene where the vehicle had been blocked. It was a saloon car registration number KAN 906F with no occupant. The driver was said to have run away after he was blocked. PW1 was thereafter told to go and record his statement. Both in his evidence-in-chief and in cross-examination PW1 asserted that he could not identify the robbers as he did not observe their faces.

7. PW2 Moses Gachoka Mwai was at Eburru centre on the material day driving his matatu. He stopped and parked at PW1's shop around 6.30pm. He returned at 7.30pm. After a while he went to PW1's shop and saw the door closed leaving a small space. He returned to his car and saw three men leave PW1's shop. He assumed they were customers. He then went to the shop and called PW1, who eventually answered, and informed PW2 that he had been robbed.

8. PW2 then went to his car to follow the three people he had seen leave the shop, but stopped when he was warned that they had a gun. He saw three men walk off. People gathered around, and PW2 drove PW1 to the police station. He testified that he did not observe the faces of the three men. In cross-examination he said he was seeing the accused for the first time in court, and did not recognize the three men.

9. PW3 PC Bernard Gitau testified that the OCS Gilgil called him and told him a robbery had been committed at PW1's shop. As he knew the place, he rushed there with one PC Mwakio, but met PW1 on the way coming to report. So they went back. He was told the robbers left the shop on foot, and that vehicle registration number KAN 906F had been seen there. In cross-examination, he said he did not know the connection of the accused to the case.

10. PW4, CIP Simon Kiiru testified that he received a report of the robbery. He went to PW1's shop and noted that the scene had been disturbed. He was told of the items that had been stolen. Shortly thereafter, he was informed that a vehicle had been abandoned at a place called Camp Brethren, and that it had allegedly been used in the robbery. He went there and secured the vehicle. Inside it, he found the accused's driving licence and a parking ticket from Kiambu.

11. On 25th December 2015, the accused appeared at the station claiming the vehicle to be his alleging that his friend, Mungai, had disappeared with it. Since PW4 had not circulated the vehicle to other stations, he suspected the accused knew where it was. He interrogated the accused who said he had reported to Karuri Police Station. However, PW4's suspicion was heightened when he realized that the accused did not have his friend, Mungai's number.

12. In cross-examination he confirmed that when he asked PW1 about his ordeal, PW1 confirmed that he could not identify the robbers. The accused said he had to come to the station because his driving licence was in his vehicle.

13. Thus the prosecution's evidence closed.

14. In their submissions, the state counsel conceded as follows:-

"I concede to the appeal. I agree with sentiments of Appellant's counsel. I concede Appellant was never identified. PW1 in his

evidence stated: "I did not see the accused robbing me."

PW2 stated: ***"I spotted the robbers walking away. Three in number." There was no mention of a motor vehicle at the scene. The motor vehicle was recovered nearly after being abandoned. The trial magistrate relied on circumstantial evidence that since his motor vehicle was found near the scene he must have been involved. In celebrated Abanga (Onyango) v Republic Criminal Appeal 32 of 1990 sets out the three tests before admitting circumstantial evidence.***

The first is the circumstances from which guilty inference is sought to be drawn must be carefully and firmly established. Here there was no recovery from the vehicle of any stolen items/money. No proof that robbers used the vehicle and no proof that Appellant had driven the vehicle.

Second facts should point towards guilty of adduced. Here the facts pointed to the motor vehicle and not to the Appellant.

Final test: The chain of evidence should be so complete that there is no escape from the conclusion that the crime was committed by Accused and no one else. Here there was no connection between the vehicle and the scene. Nothing in fact connected them.

Trial magistrate made an assumption at Page 28 line 11 Record of Appeal. No prosecution evidence was tendered to show the vehicle was abandoned by the Appellant and that he had come from the vehicle. We concede the conviction is unsafe. The said members of public were not called to give evidence."

Disposition

15. I find that there was no evidence upon which to charge the accused. He was not identified by anyone at the trial and there are too many gaps in the evidence to found the basis of a safe conviction. The evidence is barely sufficient to prove any connection on balance of probabilities between the accused and the robber. The evidence was insufficient to place the accused on his defence.

16. Further, the state having conceded the absence of identification, the absence of circumstances from which a guilty inference could be drawn and the absence of a chain of evidence linking the accused to the crime, the conviction is wholly unsafe

17. Accordingly the conviction and sentence are hereby set aside. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

18. Orders accordingly.

Dated and Delivered at Naivasha this 10th Day of March, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. D. K. Gichuki for the Appellant

2. Ms Maingi for the State

3. Appellant - Simon Chuchu Kiburi - present

4. Court Clerk - Quinter Ogutu