



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 14 OF 2019

HUMPHREY NGURE MUNENE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. C. A. Mayamba

dated 22/01/2019 in Kilungu SRM Criminal Case No. 602 of 2017.)

JUDGMENT

1. **Humphrey Ngure Munene** the Appellant was charged with robbery with violence, contrary to section 296 (2) of the Penal Code. The particulars being that the Appellant on the 18th day of November 2017 at Athi River Delta Petrol Station along Nairobi-Mombasa highway within Machakos county jointly with others not before court robbed **Peter Macharia Waithera** of a motor vehicle registration No. KCH 321B Isuzu FRR valued at Kshs.5 million loaded with parcels of unknown value and immediately before the time of such robbery threatened the said **Peter Macharia Waithera**.

He faced an alternative count of handling stolen goods contrary to section 322(1)(2) of the Penal Code. The particulars being that the Appellant on the 18th day of November 2017 along Emali – Loikotok road in Emukatan area within Kajiado county, otherwise than in the course of stealing, dishonestly undertook the disposal of one motor vehicle registration No. KCH 321B make Isuzu FRR valued Kshs.5 million loaded with parcels of unknown amount for the benefit of others not before the court knowing or having reasons to believe them to be stolen goods.

2. He pleaded not guilty to the charges and the matter proceeded to hearing with the prosecution calling six (6) witnesses. The Appellant gave a sworn statement of defence. He was found guilty, convicted and sentenced to fifteen (15) years imprisonment. Being aggrieved, he appealed against the judgment raising the following amended grounds-

a) **That**, the learned trial Magistrate erred in both law and facts by arriving at a finding that the prosecution has succeeded in establishing their case as against him the Appellant whereas such a finding is not supported by the evidence on record.

b) **That**, the learned trial Magistrate erred in law by shifting the burden of prove upon him the Appellant hence contravened section 169(1) of the CPC in relation to his sworn defence statement.

c) **That**, the learned trial Magistrate erred in both law and facts by failing to observe that the circumstantial evidence presented by the prosecution was too weak to support the commission of the offence charged.

d) **That**, the entire evidence brought forward by the prosecution fell short of the requisite standard needed in case of this nature.

3. A summary of the case is that Pw1 **Teresia Wanjiku** owns the lorry KCH 321B together with **Peter Mbutha Ngugi**. Their driver was **Peter Macharia** (Pw5). She testified that on 19th November 2017 3:00 am, she was called by Pw5 who informed her that their lorry had been stolen. Reports were made all over and trucking done. She was later informed that the lorry had been recovered and was at Emukatan police station.

4. She later met both their drivers (Pw5 and Mumira). Pw5 was admitted after the incident which happened at Loitoktok junction at Emali.

5. Pw2 **Geoffrey Njogu Kiriko** is a clerk at Take It Africa Ltd which had hired the subject lorry. He stated that on 18th November 2017 at

4:00 pm he went to Kamukunji and loaded items on the motor vehicle KCH 321B blue in colour. The lorry had two (2) drivers i.e. Pw5 and Mumira. Its Mumira who left with the motor vehicle and was to pick Pw5 at Cabanas. At 5:00 am he received a call from Ngugi informing him that the lorry had been stolen at Emali. As he made a follow up he was notified that the motor vehicle had been found at Emukatan police post (A.P).

6. He met with Pw1 and others and went to the post and found the motor vehicle which was intact. He found Francis Mwangi Mumira his driver at Delta petrol station and he appeared drunk while Pw5 appeared sedated. He saw the Appellant at the police post.

7. Pw3 **No. 226335 APC Nicodemus Mutia** and Pw4 **No. 20113165606 Inspector Mwenda Mbabu** both of Emukatan police post in Kajiado south sub county were on patrol on 19th November 2017 at 3:00 am when they received a call from P.C Kivuva who told them of a stolen motor vehicle KCH 321B headed to Loitoktok. They created a temporary roadblock, after 10-15 minutes the motor vehicle came and stopped. The Appellant was the one driving it and he was the only passenger inside. He was arrested and taken to the police post. A.S.P Mr. Korir then arrived with the reportee.

8. Pw5 **Peter Macharia Waithera** testified that on 18th November, 2017 8:00 pm he was going to Mombasa taking some consignment. They were using motor vehicle KCH 321B. At Kamukunji he asked the other driver to meet him at Cabanas, as he picked something from the house. They went to Delta petrol station with Mumira and a lady who had brought some parcels for Mombasa. While at Delta, two men came by while Mumira had gone drinking.

9. He was brought some energy drink which was opened for him by the lady. He drunk it and started feeling drowsy and he could not drive. Three men came and got into the cabin as the lady took off. The men threatened to kill him if he made noise and was even shown a knife. He was beaten and placed on the bed behind the seat with a knife placed on his neck. After leaving Delta he was abandoned at Emali after being tied on an electric post using the vehicle's curtain. His phone was taken. They took Mombasa route then turned towards Loitoktok.

10. He managed to free himself and run to the police officers manning a road block and reported. He called the motor vehicle owner and reported to her. He was able to identify the lorry through the photos and also the loading sheet confirming the consignment. He identified the Appellant as the one who drove the motor vehicle from Delta petrol station and the one who beat him.

11. Pw6 **No. 84145 P.C Bernard Cheruyoit** was on patrol with colleagues along Mombasa – Nairobi road on 19th November 2017 when they were informed of a robbery of a motor vehicle registration No. KCH 321B loaded with parcels to Mombasa. They trailed it upto Emukatan along Emali – Loitoktok road. They found the recovered vehicle together with the Appellant at Emukatan police post. The parcels were recovered.

12. During investigations, he found that the motor vehicle as per the log book belonged to Pw1. The said motor vehicle had been hired by Take It Africa Limited which offers parcels and courier services. The driver was waylaid near Delta petrol station at Athi river. The Appellant was arrested while driving the vehicle. Pw6 produced photos of the motor vehicle (EXB1); loading sheet (EXB2) and logbook (EXB3). In cross examination he said it was the Appellant who violently took the motor vehicle from Pw5 at Delta petrol station.

13. In his sworn defence, the Appellant said he was a driver. On 18th November 2017 he was in Emali where he gets manual driving jobs. He was at Paris club chewing khat and taking alcohol when Francis Mumira a driver he had known from earlier in the day entered the club with a woman. They continued to drink beer upto 2:00 am.

14. Later Mumira told him he was very tired and requested him to drive the canter KCH for him and drop some parcel at Kamana. He gave him the keys and opened the door for him. He drove off and stopped at Simba cement to buy cigarettes. Before he could leave after buying the cigarettes a white motor vehicle stopped ahead of him. He was ordered out of the motor vehicle as the people brandished guns and was searched. He informed them Mumira had given him the vehicle to take to Serian store.

15. He further stated that Mumira was called and he confirmed he had given him the motor vehicle. He was bundled into the white saloon car and taken to Emukatan A.P post and locked up. The next day Mumira and another came there and gave their story. They were then taken to court but never entered the court room. Mumira and others were set free as the police demanded for Kshs.20,000/= from him to save his neck.

16. He produced the following as exhibits:

OB 12/20/11/2017 (DEXB2), OB 11/19/11/2017 (DEXB3) statement of Geoffrey Njogu of Take It Africa Limited (DEXB4) to support his defence.

17. The appeal was canvassed by way of written submissions. The Appellant in his submissions states that the prosecution did not adequately discharge its burden of proof. That he was not identified, as the evidence of Pw5 is very weak. He says he does not deny being found with the vehicle but he was not identified as one of the robbers.

18. He submits that he gave a plausible explanation as to how he came to possess the vehicle. He finally submits that the trial court shifted to him the burden of proof, which is not the law.

19. The Respondent through learned counsel Mrs. Monica Owenga filed written submissions opposing the appeal. It's her submission that the evidence tendered by the State ably addressed all the issues in a case of robbery with violence as found by the trial court. She urged the court not to interfere with the sentence as the same was lawful.

Analysis and determination

20. This being a first appeal this court has a duty to re-evaluate and reconsider the evidence on record and come to its own conclusion. It should bear in mind that unlike the trial court it did not see nor hear the witnesses. **See Simiyu & Anor –vs- Republic (2005) I KLR 192** where the Court of Appeal stated

“It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions.”

21. Having considered the evidence on record, the grounds of appeal and submissions by both parties, I find the main issue for determination to be *whether the prosecution proved a case of robbery with violence against the Appellant*. Section 296(2) Penal Code outlines the ingredients of the offence of robbery with violence. These are; *theft from the person while being armed with dangerous offensive weapon or being in the company of one or more person, or injuring or threatening to injure the person.*

22. Pw1 **Teresia Wanjiku** is one of the registered owners of the lorry KCH 321B. A log book (EXB3) was identified by Pw1 and produced by the investigating officer (Pw6). Photographs (EXB1) of the said lorry were also produced by Pw1. The cabin is white in colour while the body is blue.

23. It was confirmed by Pw1 that this lorry had two drivers namely: (i) Peter Macharia (Pw5) and Mumira. She stated that the former was their driver while the latter was the company driver. Pw2 Geoffrey Njogu Kiriiko works for Take It Africa Limited, a company which had hired the lorry KCH 321B for offering parcels and courier services. He too stated that the motor vehicle had been assigned to Pw5 and Francis Mumira as its drivers.

24. Pw2 testified that the lorry was to travel to Mombasa from Nairobi on 18th November 2017 and had been loaded with parcels as per the loading sheet No. 322 from Take It Africa Limited (EXB2). Pw5 in his evidence claims to have identified the Appellant at the scene. He did not explain what enabled him to identify him besides saying that it was at Delta petrol station. Was there any light at the scene or even in the lorry. He mentions none of it.

25. A perusal of his evidence in chief confirms that he says nothing about the identification of the Appellant at the scene or anywhere else. Its only in cross examination that he mentions that he drove the vehicle upon the Appellant’s arrest.

26. Besides Pw5 there is no other witnesses who testified on the issue of identification at the scene. In the case of **Kiilu & Anor –vs- Republic (2005) I KLR 174** the Court of Appeal stated this of such identification:

(1) Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

Since there is no evidence of identification at the scene the court had to look for any other evidence to support identification.

27. Upon his release, Pw5 immediately called his employer (Pw1) using a borrowed phone since his phone had been stolen from him. Pw2 also got to know about the incident that same night. Pw5 further quickly alerted police at a road block along Nairobi – Mombasa road.

28. Pw3 **No. 226335 APC Nicodemus Mutia** and Pw4 **No.2011316506 Inspector Mwenda Mbaabu** who were on patrol duty at Emukatan AP post confirmed having been called on 19th November 2017 at 3:00 am by PC Kivuva from Emali road block in respect to the stolen vehicle. Pw6 **No. 84145 PC Bernard Cheruyoit** was on patrol along Mombasa-Nairobi road. That is how the Appellant was arrested, while driving the subject vehicle, a fact he has not disputed.

29. At this point I find that the fact of theft of the lorry, the thieves being more than one, and injury to Pw1 have been established. I further find that all these facts point to the fact indeed an offence of robbery with violence was committed.

30. The remaining issue is whether the Appellant was identified as one of the people who robbed Pw5 of the motor vehicle registration No. KCH 321B. Pw3 and Pw4 have explained that upon receipt of the theft report they erected a temporary road block. The Appellant was arrested at the said roadblock. The Appellant does not deny having been arrested while in possession of the stolen vehicle. Pw2 confirmed that upon recovery of the vehicle he found it to be intact meaning the parcels had not been tampered with.

31. In his defence, the Appellant explained that he had been given permission by Francis Mumira (*Pw5’s co-driver*) to drive the vehicle and drop for him a parcel in Kimana at Serian’s store where he would meet a person he would give the vehicle’s keys. He was the only person in the vehicle. The evidence of Pw3 and Pw4 who arrested him is to the effect that when they stopped the Appellant he complied. He even told them he had been given the vehicle by Mumira.

32. It is not only in the Appellant’s defence that the name of Francis Mumira (*Pw5’s co-driver*) is being mentioned. Pw1, Pw2, Pw5 and Pw6 talked about him. He was Pw5’s co-driver. Pw5 had been with him at Delta petrol station before he (Francis Mumira) disappeared to go and take alcohol.

33. Pw2 **Geoffrey Njogu Kiiriko** told the court that he found a drunk Francis Mwangi Mumira at Delta petrol station after the lorry had been recovered. After the recovery Pw5, Appellant and Francis Mwangi Mumira were arrested and taken to the cells (DEXb3) on 19th November

2017. The next day they were all escorted to the court at Kilungu. They were however all returned and booked at the station (DEXb2). Thereafter it is only the Appellant who was charged and arraigned in court on 21st November 2017.

34. After all these happenings and the defence raised by the Appellant why did the prosecution not find Francis Mwangi Mumira to be a crucial witness? It must be remembered that when Pw5 says the motor vehicle was taken from him he was drowsy and could not tell much of what was happening. He could not therefore purport to have identified the Appellant. The lady who supposedly opened the drink disappeared and was also not called as a witness.

35. The Appellant who was found with the vehicle gave a sworn defence explaining how he got to be in possession. **Section 309 Criminal Procedure Code provides:**

309. "If the accused person adduces evidence in his defence introducing a new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

36. The prosecution still had an opportunity to rebut this evidence. The crucial witness who could have done it was Francis M. Mumira who was not called.

37. This court is alive to the fact that there is no legal requirement on the number of witnesses to be called to prove a fact. Section 143 of the Evidence Act (Cap 80) – provides:

"No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact."

38. In the case of **Bukenya & Others –vs- Uganda (1972) E.A 549** the Court of Appeal addressed itself as follows:

- i. There is a duty on the director to call or make available all witnesses, necessary to establish the truth, even though their evidence may be inconsistent.
- ii. The court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case,
- iii. While the director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.

39. In my view the failure to call Francis Mumira as a prosecution witness and/or as a rebuttal witness under section 309 of the Criminal Procedure Code weakened the prosecution case to an extent that it failed to prove the case against the Appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure by the prosecution to call Francis Mumira left the Appellant's defence unchallenged and creates a doubt in the court's mind which the Appellant must benefit from.

40. I have come to the conclusion that the conviction is unsafe. The appeal has merits and is allowed. The conviction is quashed and sentence set aside.

41. Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge