



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 29 OF 2018

REPUBLIC.....APPELLANT

-VERSUS-

CHARLES MWANGI WANJOHI.....1ST RESPONDENT

MICHAEL NDUNGU KIRITO.....2ND RESPONDENT

(Appeal from original acquittal in Nyeri Chief Magistrates Court Criminal Case No. 263 of 2015

Hon. Wendy Kagendo, Chief Magistrate)

JUDGMENT

The respondents were charged and acquitted of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code, cap. 63, Laws of Kenya particulars being that on the 14th day of January 2015 at Mweiga Township in Nyeri County within the Republic of Kenya, jointly with others not before court being armed with dangerous weapons namely pistols robbed the late Nathaniel Mutitu Gicheche of cash Kshs. 100,000/= and assorted brands of cigarettes valued at Kshs. 150,000/= all being of total value of Kshs. 250,000/= and immediately before or immediately after the time of such robbery shot dead Nathaniel Mutitu Gicheche.

They pleaded not guilty to the charge and at the conclusion of the trial, they were acquitted under section 215 of the Criminal Procedure Code, cap. 75, Laws of Kenya.

The state was not satisfied with the acquittal and therefore preferred the present appeal. In its petition of appeal dated and filed on 15 August 2018, it raised the following grounds of appeal:

1. The honourable learned trial magistrate erred in law and fact in acquitting the respondents yet the appellant adduced evidence against them to the required standard.
2. The honourable learned trial magistrate erred in fact in finding that the respondents had poked holes in the appellant's case which finding was against the evidence on record.
3. The honourable learned trial magistrate erred in law in placing weight on the defence evidence and failed to place appropriate weight to the prosecution's overwhelming evidence.
4. The honourable learned trial magistrate erred in law and in fact in discounting the strength of the prosecution exhibits and in overly relying on the defence exhibits.
5. The honourable learned trial magistrate erred in law in considering extraneous issues and hypothesis in arriving at her decision.
6. The honourable learned trial magistrate erred in law and fact by failing to consider the elements required to prove the charges before court.

As always in these sort of appeals, this honourable court, being the first appellate court, has the duty to consider the evidence on record afresh and come to its own conclusions but being conscious of the fact that it was the trial court that had the benefit of seeing and hearing the witnesses. See **Okeno versus Republic (1972) EA32** where the Court of Appeal stated as follows: -

An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See page 36).

The first prosecution witness was the deceased's daughter, **Mercy Waithegeni Mutitu (PW1)**. It was her evidence that on 14 January 2015, at about 5:45 A.M, she received a call from her brother **Haron Gichure Mutitu (PW4)** suggesting that all was not well; he asked if he could meet her husband at their father's shop at Mweiga. Her husband, Peter Wachiuri, left and came back after about 20 minutes. He did not tell her anything and it is only after her grandmother came and told her that her father had been killed that she realised what the problem was.

She rushed to the scene but she couldn't see her father's body; apparently a large crowd had gathered around it. The body was picked by police who were also at the scene and taken to the mortuary. She later attended the post-mortem exercise together with her uncle Michael Mwangi.

Douglas Macharia Ndegwa (PW2) testified that on 13 January 2015, at about 10:00 A.M. he received a call from one Waibochi to the effect that some robbery incident had happened at Kimathi University and that a motor vehicle registration number KBX 728 H (sienta) was involved in the robbery. He knew the vehicle and that its owner was his longtime customer. He identified her as **Margaret (PW3)** and testified further she had wanted him to operate the vehicle when she purchased it. Instead, he referred another driver to her. He identified this driver as Charles Mwangi, the 1st respondent.

He called the 1st respondent after Waibochi informed him of the robbery incident but he was not picking his calls. He proceeded to Mweiga and asked his friend Ben Githae to call the 1st respondent on his phone. The 1st respondent picked this particular call.

He called the police at Nyeri police station to confirm whether the vehicle had been involved in any robbery incident. He was later called by the officer in charge of the police division who told him that indeed the registration number of that vehicle had been circulated as having been used in a robbery incident. He informed the owner accordingly. She called the 1st respondent and had him arrested by the police.

During cross-examination, the witness testified that he was only aware of the theft at Kimathi university and not the one at Mweiga shopping center. He also testified that he was an employee of one David Kimondo although he was also managing Margaret's car. However, he denied that he was the driver of the vehicle.

Margaret Wangui Gitonga (PW3) testified and confirmed that she was the owner of motor vehicle Registration No. KBX 728H (Toyota sienta). On 14 December 2014, she engaged Douglas Macharia (PW2) as its driver. The vehicle was to be used as a taxi operating between Nyeri, Kimathi Mweiga. It could also be hired as a self-drive car and also be engaged as a public service vehicle. According to the arrangement between them, Macharia would send her the proceeds from the vehicle business through Mpesa on daily basis. On 13 January, 2015 he delayed sending the money and so she called him. On the same date at about 10:00 P.M. she received the sum of Kshs. 1240/= from an mpesa agent.

On the morning of 14 January 2015 Macharia called and asked her where her vehicle had been the previous day. She was surprised that he was asking yet he was the one who was in charge of the vehicle. He told her that the vehicle had been involved in a robbery at Kimathi University. She confirmed from a Criminal Investigation Officer that indeed the vehicle had been involved in a robbery incident. When she went to the police station she met Macharia who told her that he had given the vehicle to another driver. He gave her the number of the driver. He called the number and agreed with whoever picked the phone that they meet at the National Library. They met as agreed and the person turned out to be the 1st respondent; however, he did not have the vehicle. He said that he had left it at Kiganjo. He had given it to one Michael from Kamakwa. He was then arrested by the police. She accompanied the police to where the vehicle was.

Haron Gichure Mutitu (PW4) testified that the deceased was his father. He lived at the same shopping center where his late father operated a shop. On 14 January 2015 someone told him that his father had been killed. He proceeded to the shop and found his father's body being removed from the shop. He had sustained a gunshot wound on the head. He entered the shop and found cash missing. A carton of cigarettes had also been stolen. It was his evidence that his father stayed in the shop alone.

The deceased's wife **Mary Wangui Mutitu (PW5)** testified that on 14 January 2015, she received a call from her son **Haron Gichure (PW4)** to the effect that his father had been killed. She went to the center where her husband used to run a shop and found that he had been shot dead. Several cartons of cigarettes and cash money had been stolen from the shop.

Peter Ngina Wangari (PW6) operated a hand cart at Mweiga. He bumped into the robbers at the deceased's shop as he went to buy cigarettes at 5:30 A.M. on 14 January 2015. Just before he entered the shop he had seen a vehicle nearby and in it was a man behind the driver's seat. He found a man armed with gun at the entrance to the shop. He was immediately pushed to the ground by a different person whom he could not see. Some other person came to the shop and he too was ordered to lie down. Another person removed two cartons of cigarettes from the shop on two different trips; it is after the second trip that he heard the car drive off. According to him, they were two robbers. He could not identify them. After they left, he realised that there were other people who had also been ordered to lie down. He identified them as Muchai and Njuki. They realised that the deceased had been shot.

Sergeant Florence Karimi (PW7) testified that she was a firearms examiner; in the course of her work she was presented with some fragments of ammunition which she was to confirm whether indeed they were parts of ammunition and if so, the firearm from which they were discharged. While she established that the fragments were part of ammunition she could not establish the type of weapon used to fire it; the ammunition had disintegrated and the caliber could not be determined. She was able to tell that it must have hit a hard object before it fragmented.

Grace Wawira Njagi (PW8) worked in wines and spirits shop in the neighbourhood of the deceased's shop. On 14 January 2015 at about 11: 00 A.M., she was in the backroom of her shop when one Maina called her out. Maina, according to her used to operate a taxi registration number KBX 728H. She also identified him as Mwangi, the first accused. He wanted her to keep for him the car keys as he rushed to Nyeri town. When she sought to know where the vehicle was, Mwangi told her that it was parked at the end of the building where she had her shop. She enquired why he could not drive the car to Nyeri but he said that the car had developed some mechanical problems and that he was going for a mechanic. He even asked her to handover the keys to the mechanic if he was to arrive earlier than him. Neither Mwangi nor the mechanic showed up until 2.00 P.M. when police officers came with Mwangi and enquired from her whether he had left her with the keys for that car. Together they left for the police station. She had known Mwangi since July 2014 because he would supply her with her stock for her trade.

Inspector of police James Kiprotich Chepchir (PW9) testified that as a scenes of crime officer, he took the photographs of motor vehicle registration number KBX 728 H; according to him, it had been abandoned at Kiando market. He produced the four photographs he took of the vehicle in support of his evidence.

The investigations officer was **corporal Francis Kibindu (PW10)**. On 14 January 2015 he got information of a murder at Mweiga shopping center. He went to the scene together with two of his colleagues. At the time they arrived at the scene, the deceased's body had been taken to a nearby hospital. It was his evidence that they gathered evidence at the scene to the effect that the getaway vehicle used in the crime was registered as KBX 728 H. He later learnt that the same vehicle had been used in a separate robbery the previous day. When he established who the owner of the vehicle was, she told him that the driver of the vehicle was the 1st respondent. She called him to come and meet her at the National library but he came without the vehicle. When he was questioned of the whereabouts of the vehicle, he told them that the vehicle was at Kiando area. He led them there and to the person he had left the keys with. They got the keys opened the vehicle and established that the vehicle was in good condition. The rear number plate had been pasted with mud. They also recovered a toy pistol from the vehicle. It was dusted and driven to the police yard. Mwangi told them that he had hired out the vehicle to Michael Ndungu, the second respondent. He led them to Ndungu's home but they did not find him. They searched his house and recovered some chalk and stationery.

The officer testified further that he attended the deceased's post-mortem which was conducted by Dr. Obiero. He produced the post-mortem report. According to him, bullet fragments were retrieved from the deceased's brain. On 8 February 2015, the 2nd accused was arrested within Naromoru town.

In his defence the 1st accused gave an unsworn statement to the effect that in December 2014 he hired Douglas Macharia to transport beer from Kamakwa to Kiandu but since he was not paid he was also not able to pay Macahria. He was arrested two days later for not renewing his licence. He was fined or in default of payment of the fine, he was to serve three months in prison. His family paid the fine and he was released. On 15 January 2015 he went to deliver beer together with Macharia. Again he could not pay him and so he left in a huff. He then took the car keys to Njagi. He took a matatu and went to Nyeri town. While in town Macharia asked him if they could meet. He agreed that that they could meet only for Macharia to turn up with police officers. The police enquired from him where he had left the vehicle and he told them where Macharia left it. They both went to Kiando and took the car and later he was taken to the police station where he was informed of the offence against him.

The second accused gave a sworn testimony and testified that on 31 August 2014 he was arrested and asked to sign a bond to keep peace. On 1 September, 2014 he was remanded. He was taken to court but he was released on a free bond on 16 October 2014. He then went to Naromoru to look for a job. On 10 January 2015 he received a call from a police officer telling him that he could collect a motor cycle he had left with the police at Naromoru police station. He went to the station on 8 February 2015 and it is then that he was arrested and later charged. He denied that he knew the first accused.

Section 295 of the Penal Code defines the offence of robbery

295. Definition of robbery

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 mm stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Section 296, on the other hand, prescribes the punishment the severity of which depends on the circumstances in which the offence was committed; it states as follows:

296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

As noted earlier, the accused was charged under section 295 as read with section 296(2) of the Penal Code. In their submissions, both the learned counsel for the state and the respondents were in agreement that the charge revealed two offences and to that extent it was defective.

I doubt they are right because while the offence of robbery is defined in section 295 the punishment is prescribed in section 296(1) and (2). The punishment for what is popularly regarded as simple robbery is prescribed in section 296(1) while section 296 (2) prescribes the punishment for what is usually regarded as robbery with violence or aggravated robbery.

Turning back to the facts of this case, there is clear evidence at least from one eyewitness that the offence of robbery with violence was committed as was particularised in the charge sheet. According to Peter Ngina Wangari (PW6), he innocently walked to the deceased's shop not knowing that it was under siege of armed robbers. Moments before, he had heard a blast-like sound. He was confronted by a man who was armed with what he described as a 'a long gun'; it probably was a machine gun. He was forced to lie down but even in that state he noticed one of the robbers carry two cartons of cigarettes from the deceased's shop to the getaway car. It is after the robbers left that he and other two people who had also been held captive at the deceased's shop realised that the deceased's had been fatally wounded. The evidence by the investigation officer that fragments of ammunition were found in the deceased's brains coupled with Wangari's evidence that he heard something blast-like or a tyre burst sound would point to the conclusion that the deceased was shot before or in the process of the robbery at his business premises.

It follows that it was proved beyond all reasonable doubt that the offence of robbery with violence as known in law was committed as suggested by the state.

What the state did not prove to the required standard, and here I agree with the learned magistrate, is that the two respondents were the people who perpetrated the offence.

Wangari (PW6) who is the only eyewitness who testified was categorical in his evidence that he could not identify any of the robbers for various reasons the sum total of which is that the conditions for a positive identification were not favourable. He mentioned one Muchai and one Njuki as the two other people who were caught up in the robbery and who, like himself, were forced to lie on the ground as the robbers went about robbing the deceased. None of the two people testified and it is difficult to tell whether their evidence would have provided any clue on the identity of the robbers had they testified.

The only piece of evidence that state appear to have heavily relied upon as linking the robbery with the respondents is the motor vehicle registration number KBX 728 H. It was the prosecution case that the 1st respondent was somehow in charge of this vehicle and had been hired out to the 2nd respondent. I understand their case to have been that the vehicle was used in the robbery as a getaway vehicle and it was in possession of the respondents at the time of robbery and therefore although they were not identified at the scene there is circumstantial evidence that they were not only at the scene of robbery but that they were also the robbers.

But the evidence in support of any of these theories is either contradictory, insufficient or lacking altogether.

Take the vehicle, which is by and large the connecting factor, for instance. No witness testified as having seen this particular vehicle at the scene of crime at the material time. Wangari who testified that he saw a vehicle in which one of the robbers loaded the stolen cartons of cigarettes and in which also the robbers probably escaped, did not specifically say that it was motor vehicle registration number KBX 728 H. His evidence regarding this vehicle was like this:

“There was a vehicle ahead of me. It was stationery and with the lights on. It was a small car like a sienta. I went and passed the vehicle.”

As to whether the robbers drove off in the vehicle, the witness had this to say:

“We only heard a vehicle drive off. We did not see them get into the vehicle. When we came out we saw that the vehicle that had stopped there had gone.”

Apart from the make of the vehicle there is nothing else in this part of Wangari's testimony that associates motor vehicle registration number KBX 728 H with the crime scene.

Of course, if there was other corroborating evidence placing not only the vehicle but the respondents at the scene, it would have been easier for the learned magistrate to consider, at the very least, Mwangi's evidence as sufficient enough to support a conviction. But what would have been the corroborating evidence was lacking in several respects.

Apart from Wangari, only the investigation officer testified that it was this particular vehicle that was employed in the criminal activity. He did not, however, have any concrete basis for this evidence apart from stating that he got the information through intelligence. This is what he said:

“We were able to gather some information which was to the effect that the attackers were three and that a motor vehicle sienta had been used. The intelligence told us that the motor vehicle used was registration number KBX 728 grey sienta.”

In a case such as the one with which the respondents were faced, where they faced a potential death penalty if they were convicted, the investigation officer and by extension, the state, could not get away with this kind of evidence. No clue was given of who “the intelligence” was and in what circumstances he gave the information; and again, who were these “us” that the investigation officer referred to as having received the information? If “the intelligence”, for whatever reason, could not testify why couldn't they testify? With all these loopholes and unanswered questions, the trial court was entitled to disregard what was presented as the corroborating evidence.

The evidence on who may have been in possession of the vehicle did not make it any better for the prosecution case. Contradictory versions were given by crucial witnesses whose evidence ought to have settled this question without much ado.

According to **Margaret Wangui (PW3)**, the owner of the vehicle, she had employed **Macharia (PW2)** to be the one driving or managing her car. It was her evidence that Macharia would remit the proceeds of the day to her, apparently on daily basis. Her car could be used as a

taxi, a public service vehicle or was also available for anybody who would want to hire it and drive it himself.

But Macharia's evidence was contrary to Wangui's testimony. His evidence with regard to this vehicle was as follows:

“At 10:00 A.M. I received a call by a colleague driver. He told me that there was some theft that took place at Kimathi University. It was alleged that there (sic) using KBX 728 H sienta by make. I knew the motor vehicle. I knew the owner of the motor vehicle as my longtime customer. When he (sic) bought it, he (sic) had approached me to operate it. I gave him (sic) a driver who I could supervise. The owner of the vehicle is called Margaret. I was acting as its manager. It was driven by Charles Mwangi. The driver I gave Margaret is Charles Mwangi. He is in the dock (accused 1 pointed).”

The contradiction between the evidence of these two witnesses is rather obvious; while Margaret said that she handed the vehicle to Macharia, he denied it and said the vehicle was given to the 1st respondent. Besides this contradiction, it is possible, if the evidence of these two witnesses is anything to go by, that at any one time, the vehicle would be in the possession of Macharia, Mwangi or any self-driven customer. It is possible that it could also be in the hands of the owner.

With all these possibilities, it was always incumbent upon the state to prove, without any shadow of doubt, that one of these people was in possession of the vehicle at the material time. This it did not do.

One other disturbing thing I have noticed in the prosecution case is that the vehicle was installed with a car track device whose purposes was to monitor its movement and location. There was evidence that the owner of the car could even remotely disable its movement at one time. With this device, it should have been possible to trace the movement of the car and its location on the date and time of the robbery. Such evidence should have removed any doubt as to whether this was the vehicle that was employed as the getaway vehicle and whether indeed it was the same car that Wangari saw moments before the robbers took off. Yet this crucial evidence was not produced.

There was also evidence that the vehicle was dusted for finger prints; I would suppose if the vehicle was established to have been at the scene of crime at the material time, the evidence of the fingerprints would have removed any doubt as to whether the respondents or any of them was at the scene of crime at that particular time. But once again, this evidence was not produced.

What all this boils down to is this; while it is trite that an accused may be safely convicted on circumstantial evidence such evidence must be narrowly examined because as much as it may be the best evidence (see **Tumuheire versus Uganda (1967) E.A at pages 328 and 331; R versus Taylor, Weaver and Donovan (1928), 21 Cr. App. Reports at page 20**), there is always the danger of the evidence being fabricated. In **Teper versus Republic (1952) A.C. at page 489 Lord Normand said of this evidence in the following terms:**

‘Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’

Going by the respondent's defence, there is a reasonable doubt that the charges and the evidence against them could possibly have been fabricated. Fabrication aside, the prosecution case was not only contradictory but was replete with co-existing circumstances that either weakened or altogether destroyed the inference of guilt on the part of the respondents. I agree with the learned magistrate that it would have been unsafe to convict the accused on such evidence. They were properly acquitted.

And for these reasons the state's appeal is dismissed.

Signed, dated and delivered on 5 August 2020

Ngaah Jairus

JUDGE