



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 65 OF 2011

(Being an appeal arising from conviction and sentence in Kitale chief Magistrate's

court 4341 of 2009 delivered by M.N. Gicheru Chief Magistrate on 30/5/2011)

MICHAEL WANYOYO KAMURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. The appellant was charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge were that **on the 7th day of December, 2009 at Sinyerere area along Kitale- Cherengani road in Trans Nzoia West District within Rift Valley Province, jointly with others not before court and while armed with dangerous weapons namely pangas robbed Stephen Kariuki Kangere of a motor vehicle registration number KAK 575 B Toyota Saloon valued at Kshs 300,000/-, one mobile phone make Nokia 2603 valued kshs 5000/-, a wallet containing cash kshs 3,000/- and one pair of shoes valued at kshs 800/= all valued at kshs 308,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Stephen Kariuki Kangere.**

2. The appellant was convicted and sentence to life imprisonment hence this appeal.

3. Before looking at the appellant's grounds of appeal it is appropriate to summarise the proceedings in the trial court.

4. **PW1 Stephen Kariuki** the complainant told court that he was a taxi driver having been employed by one Simon Kamure. He drives motor vehicle Registration No. KAK 575 B Toyota and that the appellant is his cousin.

5. He testified that on 7/12/2009 a short man came and told him that he had been sent by the appellant who is normally his customer to take him elsewhere as the appellant's vehicle was late in coming. He obliged and they went to Rock Hotel where they found the appellant and they all went to Bidii farm. On the way he picked other 2 young men who allegedly were to assist the appellant to load maize at Bidii farm.

6. As they reached to where was to be the entrance of the old man's home they stopped and the rest got out. The appellant according to the complainant snatched the key and put off the car engine. They pulled him out and placed him on the passenger's seat. The appellant then took charge of the vehicle. After driving for a while, they stopped and forced the complainant out where the appellant pulled a panga and viciously attacked the complainant who sustained several panga cuts. He was then dumped near a river and left. He managed painfully to walk for some distance whose luckily some good Samaritans took him to hospital. By then he had bled profusely and lost consciousness.

7. The complainant identified to the court the mobile phone which was recovered from the appellant as well as the motor vehicle. He also identified the panga and his blood stained clothes.

8. **PW2 David Macharia Mwangi** who was also a taxi driver testified that he was called at around 10.00 pm and told that the complainant had been hijacked. He reported the incident at the police station. He later found the good Samaritans at the hospital with the complainant. When he went to the hospital he found the appellant having been arrested.

9. **PW6 Peter Kasiba Eمويت** a village elder at Sinyerere scheme testified that he was going to the chief's office on 8/12/2009 when he met a group of neighbours and told him what had taken place. He went to the scene and secured the blood stained panga till the police arrived and he handed the same to him.

10. **PW4 Gerald Wahome** a taxi driver knew the complainant as his colleague. He also knew the appellant as the complainant cousin. He said that he was called by Macharia and informed that the complainant had been carjacked and seriously injured. He went to the hospital and saw the complainant. While they were searching the complainant's vehicle, they saw some vehicle with blaring horns and it was the complainant's vehicle that was leading. The appellant was leading. The accused then escaped to the police. His counterpart was lynched by the mob.

11. **PW5 Henry Kiptoo Sang** the government analyst produced the results of the exhibits submitted to the Government Chemist department. The blood sample from the soil, jacket, panga and trouser matched that of the complainant.

12. **PW6 P.C. William Kemoi** from the scenes of crime office produced the photographs of the vehicle as well as the panga.

13. **PW7 P.C. Paul Kamau Mwangi** from Kitale Police station testified that he received a report from David Macharia concerning the robbery incident. He went to the hospital and met the complainant who had sustained serious injuries on the head and neck. He narrated to them the whole incident. Together with CID Officers who had joined them they went searching for the robbers. He said that they knew the vehicle as it used to operate as a taxi.

14. They saw the same at the Webuye – Eldoret junction and they gave chase and were assisted with other taxi drivers. The appellant who was driving the said vehicle went towards the police station and he successfully dashed inside the report office at the police station. One of the accomplice was connered and beaten by the mob while the rest of the 2 escaped. The appellant was searched and recovered the phone Nokia 2600 was recovered from him. He recovered a Safaricom line from his colleague.

The complainant was able to identify and activate his phone on 8/12/2009. Maina the appellant's counterpart was escorted to the hospital but succumbed to the injuries.

15. **PW8 Francis Barchebo** a clinical officer from Kitale District Hospital produced the P3 form in respect to PW1 and who had injuries on the head and neck. He classified the injuries as harm.

16. **PW9 Corporal David Mekan** from CID Office Kitale carried out the Investigations recorded statements from the witness and preferred charges against the appellant.

He also produced exhibits which had not been produced by the rest of the witnesses.

17. When put on his defence the appellant gave sworn evidence denying the charge. He said that he was a businessman at Moi's Bridge dealing with buying and selling chicken. He said that on 9/12/2009 he had come from hospital having been admitted on 5/12/2009. Some Kenya Police Reservist officer came and arrested him and took him to the police station. They searched his house and recovered his phone and some other medical documents. He said that he had been admitted at the hospital between 5-9th December 2009. He produced a discharge summary and he prayed that a doctor be called to authenticate the same.

18. when cross-examined he denied knowing the complainant neither did he knew the vehicle.

19. **DW2 Dr. Blustus Kakundi** a medical officer from Kitale District Hospital was called by the appellant to produce the discharge summary. He said that the same belonged to someone called Joseph Andrew Tabani and it was for the year 2011 and not 2009. He said that there were alterations made so as to have the name of the appellant on the summary.

Analysis and Determination

20. The appellant has raised several issues in his grounds of appeal. key among them is that the trial court based its findings on circumstantial evidence of PW5 in convicting the appellant and that the owner of the vehicle was not called to testify. He also faulted the prosecution in the sense that they failed to conduct a parade identification. Finally he said that his defence of alibi was not taken into consideration.

21. The court has perused the proceedings as well as the submissions by the appellant as well as the learned State counsel.

22. There are 5 issues which ought to be established as laid down in the now famous case of Johanna Ndungu Vs Republic CR APP. No. 116/1995 as well as other related authorities, and which are in tandem with Section 295 of the penal Code. These are;

- 1) The offender must be armed with a dangerous or offensive weapon**
- 2) If he is in a company of more than one person**
- 3) If at or immediately after the time of the robbery, he/she wounds, strikes, beats or uses violence to any person**
- 4) The act of stealing and**
- 5) Identification.**

23. In respect to the matter at hand, I find that the prosecution was able to prove that the assailants were armed with dangerous weapon

namely by the production of the panga. The blood sample on the panga did match those of the complainant.

24. The assailant were more than one. Infact one of the assailants was assaulted by a mob as the appellant escaped inside the police station. The other 2 managed to escape.

25. The injuries sustained by the complainant were proved by the complainant's testimony and the rest of the witnesses including those who saw him at the hospital. The clinical officer summarised the injuries he sustained.

26. The complainant's vehicle, phone and other assorted items were stolen . Infact the vehicle was recovered when the appellant drove it to the police station while he was being hotly pursued. Some other items were not recovered.

27. On identification I do not find any reason to suggest that there was a case of mistaken identity. The complainant in my view had sufficient time to identify his assailant especially the appellant who was his cousin.

28. The appellant's defence in a form of alibi was miserable. His witness Dr Blustus tore it to pieces. What he relied on as his exhibit was not only not his but he must have stolen it elsewhere and tried to forge so as to inserted his names.

29. In the premises I do not find any merit in the appeal and the same is dismissed.

30. Pursuant to the supreme court decision in *Francis Mumatetu & Another Versus Republic Supreme Court Case No. 15 &16/2015*. I think it shall be appropriate to reconsider the sentence meted out against the appellant. The supreme court did not outlaw the death penalty but opined that the same was unconstitutional as other forms of punishment could be considered.

Delivered, signed and dated at Kitale this 27th day of September, 2018.

H.K. CHEMITEI

JUDGE

27/09/18

In the presence of:

Mr Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court