



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 158 OF 2011

HUMPHREY WANYAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction in Criminal Case No. 326 of 2010 in the Chief Magistrates Court at Eldoret by A. Onginjo, Ag. Senior Principal Magistrate dated 4th August 2011]

JUDGMENT

1. The appellant **HUMPHREY WANYAMA** was convicted on a charge of robbery with violence Contrary to **Section 296 (2) of the Penal Code** and sentenced to serve 30 years imprisonment. The particulars of the charge was that on **16th November 2009** at Marura Centre in **UASIN GISHU DISTRICT** within the **RIFT VALLEY** province jointly with others not before the court, while armed with dangerous weapons, namely knives, robbed **VICTOR ODHIAMBO** of a Motor Vehicle Reg. KAC 389 X Toyota Corolla Salon white in colour, one mobile Nokia 1100, radio and cash Ksh.700/- all valued at Ksh.192,200/- and immediately before the time of such robbery used actual violence against the said **VICTOR ODHIAMBO**. The appellant denied the offence.

2. **VICTOR ODHIAMBO** (PW2) was employed by **JOSEPHAT WESONGA JUMA** (PW1) as a taxi driver using Motor Vehicle Reg. KAC 389 **TOYOTA COROLLA** which operated at **PARADISE**. On 16.11.2009 at about 11:00pm while parked at **PARADISE**, the appellant approached him and requested to be taken to **MARURA**. PW2 told him it would cost ksh.500/-.

3. The appellant bought a credit card, then sat at the rear seat and they left for **MARURA**. They stopped at **CALTEX** along **ITEN** road for fuel then proceeded. As they got to **MARURA**, the appellant who had a black bag, told PW1 that they should drive back as it appeared they were lost. PW1 turned and entered a murrum road and after about 5km, suddenly the passenger used a rope to strangle him; then stabbed him on the right side of the neck. A struggle ensued.

4. PW1 went to the back seat of the Motor Vehicle and the struggle continued, and PW1 managed to get out of the Motor Vehicle and ran onto the road. He found an old man on a bicycle who assisted him to get to the junction – from where he was able to make a call to his colleague taxi driver named **JOSE JOSE** in turn called PW2's employer and they were able to pick him and take him to Moi Teaching and Referral Hospital for treatment.

5. The Motor Vehicle was recovered the same night at about 3.00am and PW2 was called to identify the arrested individual at an identification parade. He explained that there were security lights at **Paradise** the time the appellant approached him to hire his services.

6. On cross examination PW2 explained that when the appellant approached him at **PARADISE** on the night in question, he was standing outside the car. After they had agreed on the terms, the appellant went to buy credit before returning.

7. **JOSEPH JUMA WESONGA** (PW1) who owned Motor Vehicle **KAC 389 X Toyota Corolla E91** presented a sale agreement and logbook to confirm that he was the owner of the said Motor Vehicle which operated as a taxi. He testified that while inside his house on 17.11.2009 at about 11:55pm, he received a call from one **JOSE** who informed him that his driver **VICTOR** had been stabbed and robbed of the vehicle. He linked up with the said **JOSE** who was in the company of the said driver and they made a report to police before taking him to hospital then took him to his house.

8. After about 20 minutes **JOSE** called to say the Motor Vehicle had been recovered at **BETA** farm. **JOSE** then picked him and they went to the place where the motor vehicle had been found.

PW1 noted that the Motor Vehicle radio and speaker were missing but he identified the motor vehicle as his.

9. **PC WILLY KORIR** (PW6) who was then attached to **FLYING SQUAD ELDORET** confirmed that having received report about the

robbery, he got an informer who led him to **NAMBUKU** and into the appellant's home. Incidentally the area chief also had information about the stolen Motor Vehicle. So together they proceeded to the appellant's home, found him and he was arrested.

10. The appellant led him to **SEGA** area where he had sold the stolen Motor Vehicle and the Motor Vehicle was recovered, but it had a different registration, being **KZN 032**. However this was a different Motor Vehicle.

On cross examination PW6 stated that:

“...chief led us to accused person's home and identified him... accused was within compound and when he saw us and was called by the chief, he started running but we pursued and arrested him.”

11. However Motor Vehicle **KAC 389 X** was recovered by **CPL SILAVANO NJERU (PW3)** **KAPSOYA** Police Station who received a call from **ELDORET** Police Station on 17.11.2009 at around 4.00am to the effect that a white motor vehicle Reg. **KAC 389 X** white in colour had been abandoned at **BETA** farm in **MARURA**. He proceeded to the scene and recovered the said Motor Vehicle which had been abandoned on a dirt road off the **ITEN-ELDORET** road.

While at the scene, the owner came and identified the Motor Vehicle.

Later on **CPL ISAIAH NGETICH** of Eldoret Scenes of Crime took photographs of the recovered Motor Vehicle.

12. PW2 was examined by **JOEL SUTER (PW4)** at **UASIN GISHU** district hospital who noted that he had a cut wound on the posterior side of his neck probably caused by a sharp object like a knife. The wound was wide enough to require stitching.

13. **Ag IP MOHAMMED GUYO ABAI (PW7)** who conducted the identification parade confirmed that the appellant was positively identified by PW2.

14. In his unsworn defence, the appellant who described himself as a driver told the trial court that on 12.1.2010 while waiting for his wife at home, he saw her arrive in a saloon car accompanied by her three brothers. Two men alighted and told his wife to collect her belongings. The other man asked appellant whether his wife was someone else's wife before declaring that the appellant was under arrest.

He was placed in cells and later two young men were called and asked whether they knew him – their answer was in the negative. According to the appellant even when an identification parade was conducted no one identified him.

The trial magistrate in her judgment pointed out that PW2 had an opportunity to satisfactorily identify the appellant because there were security lights out where he parked the motor vehicle. These lights enabled him to see the appellant clearly as they negotiated the price for his services.

Secondly that PW2 later positively identified the appellant at an identification parade.

15. The trial magistrate held that the case was adequately proved, and his alibi defence very hollow.

16. The appellant contested these findings on amended grounds that:

a) The trial court failed to observe Sec.198 (1) and 207 of the Criminal Procedure Code,

b) The prosecution failed to prove its case, and evidence on identification as insufficient and ought not have relied on the evidence of a single witness to convict him,

c) A crucial witness failed to testify,

d) The trial magistrate failed to consider this defence nor was any reason given for its rejection.

17. The appellant argued the appeal by way of written submissions saying the charge was not read out and explained to him in a language he understood. It was his contention that after the charge was read over to him, he was not given time to prefer his defence. Suggesting that he infact did not enter plea. The record shows entry which was also confirmed at appeal stage.

18. It was also his contention that the version of events as narrated by PW2 defeated logic saying it was not clear who led police to recover the vehicle, and if as the victim claimed, he saw the appellant deriving the vehicle away, then how did it end up back at the scene of the robbery especially because PW2 did not visit the scene to clarify as to where the vehicle was initially and where it was found.

19. He also submitted that the log book produced did not prove that PW1 was the owner of the motor vehicle. He further doubted the credibility of the medical examination report indicating that the appellant had sustained injury, saying the Doctor who initially treated appellant ought to have testified. He faulted the entries made in the P3 form indicate the patient's referral no number.

20. The appellant's contention is that opportunity for identification was not proper both at the scene of crime and at the identification parade which he claimed was compromised.

21. He also argued that the evidence of PW1 and PW2 was not confirmed by the named **JOSE** who failed to testify and he urged the court to allow his appeal.

22. In opposing the appeal, Miss **ODUOR** on behalf of the State submitted that the prosecution witness's evidence was credible, consistent and well corroborated. She argued out that the appellant was positively linked to the offence and placed at the scene and the ingredients of robbery with violence were proved as evidence showed he was armed with a knife and he used violence against the victim who had to undergo medical attention having suffered injury during the attack which injuries were inflicted by the appellant.

Indeed the medical evidence confirmed the injuries the complainant alluded to and although the appellant casts aspersions on the credibility of the P3 form, he never raised these issues at the time the medical evidence was tendered so as to test the record. The P3 form made reference to earlier treatment notes from Moi Teaching and Referral Hospital and even had the patient reference number from the said facility.

23. As regards identification, **Miss Oduor** submitted that the appellant had posed as a client and as they negotiated on the price outside **PARADISE** hotel, PW2 was able to see him clearly because there were security lights outside the hotel, and the pair spent a considerable time together before leaving for the appellant's purported destination.

Indeed PW2 described to the court in detail the time spent with the appellant and the opportunity for identification – they stood together outside the motor Vehicle negotiating the fare before the appellant boarded.

24. The interaction was not a cursory glance. I concur with counsel that PW2 had ample opportunity to see and observe the appellant and the state contemplated in **O. MAITANYI V K 1986 KLR** was well met – there was opportunity for adequate opportunity, given the source of light (electricity) and the time spent together. The identification parade was conducted in line with the rules and the parade was not the only evidence on identification.

25. As pointed out by Miss **ODUOR**, the appellant raised an alibi defence which was an afterthought and he never raised it during cross examination of PW2 to enable him rebut or confirm what he claimed.

26. I hold and find that the ingredients of robbery were proved, and the trial magistrate adequately considered the evidence regarding identification in my view the conviction was safe and is upheld.

27. The appellant was sentenced to serve 30 years imprisonment – taking into account the injury suffered, and that the stolen motor vehicle was recovered. I would interfere with the sentence and reduce it to 15 years, I therefore substitute the sentence to 15 years to take effect from date of conviction.

DATED, SIGNED and DELIVERED at ELDORET this 24th day of September 2018.

H. A. OMONDI

JUDGE