



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 352 OF 2010

SIMON MWAURA NJOROGEAPPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. S. Soita –Principal Magistrate delivered on the 18th November, 2010 in CMCR Case No. 2483 of 2009)

JUDGEMENT

The appellant **SIMON MWAURA NJOROGE** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court with two other co-accused persons on 19/10/2009 facing four (4) Counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The appellant faced an alternative charge of **HANDLING SUSPECTED STOLEN PROPERTY CONTRAY TO SECTION 322(2) PENAL CODE**.

The appellant pleaded 'Not Guilty' to the charge and his trial commenced on 8/3/2014. The prosecution led by **CHIEF INSPECTOR MUTETI** called a total of eight (8) witnesses in support of their case.

The evidence relating to counts 1, 2 and 3 of Robbery was given by **PW1 FRED KAMAU, PW2 GEORGE KINYANJUI GIKARA** and **PW4 DAVID NGANGA NJUGUNA**. The three witnesses state that on the 4th October, 2009 at about they were all together in a Motor Vehicle Registration No. KAL 479H Toyota Starlet when was being driven by **PW4**. The three friends decided to drop off one **JAMES NDATHE** first. After being dropped and as he closed his gate three (3) armed men suddenly appeared next to the vehicle. They ordered the occupants to get out of the car. The three complied and were then ordered to lie down. The robbers relieved the three of all their valuables like mobile phones, cash etc.

After being robbed **PW1, PW2** and **PW3** were ordered to get back into their vehicle. One of the robbers took control of the steering wheel and drove towards Salgaa. The three witnesses were placed in the back seat being guarded by another armed man.

At a place called Matwiku the vehicles was stopped and all three were ordered out. The robbers then drove away with the vehicle. **PW1, PW2** and **PW3** walked to the nearest village where they reported the incident to the police.

The next day **PW1** was called to the police station and informed that his vehicle had been recovered and was at Elburgon Police Station. He was told that the vehicle had been found abandoned at Togat Farm.

Evidence relating to Count No. 4 was given by **PW3 JAMES MUTURI KARIUKI**. He informed the court that he is a boda boda rider and has a motor bike Reg. No. KMCA 538V. On 4/10/2009 he was on his usual business when he went to Wetima Village. Here he came across a small car parked by the road. The three occupants of the car who were all armed stopped **PW3** and robbed him of his cash 700/= and Nokia Mobile Phone. They also took his motor bike which they put in the boot of the vehicle and drove off. **PW3** raised the alarm. He tried to intercept the vehicle by placing a log in the middle of the road but he only managed to get his boot cover. **PW3** reported the matter to the police.

The following day **PW3** was called by police and informed that his motor bike had been recovered.

PW5 PETER WACHIRA WANGONDU and **PW6 PETER WANYOIKE NDONO** who were both colleagues of **PW3** told the court that after receiving news of the theft of the motor cycle they began to search for it. They were informed by one **JOHN KINYANJUI KIHORO (PW7)** that he had been asked to dismantle a motor bike using his power saw. **PW5** and **PW6** together with a group of boda boda riders went to the home in question and knocked on the gate. The appellant came out to open but upon seeing them he took off running into the adjacent shambas. **PW5** and **PW6** gave chase and apprehended the appellant. Upon returning to her house the appellant directed his wife to open small room where the partly dismantled motor cycle was recovered. Police later collected the motor bike which **PW3** positively identified as his. The accused was later taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied any involvement in the two robberies.

On 24/11/2010 the learned trial magistrate delivered his judgment. He acquitted the appellant on Counts 1, 2 and 3 but convicted him on the 4th Count of Robbery with Violence and thereafter sentenced him to death. The appellant's two co-accuseds were acquitted of all charges. Being aggrieved by both his conviction and sentence the appellant filed this present appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the evidence and to draw its own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2004]2 KLR** it was held

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”

The appellant who was not represented during the hearing of this appeal opted to rely entirely upon his written submissions which had been duly filed in court. **MR CHIGITI** learned State Counsel made oral submissions opposing the appeal.

With regard to the first robbery incident regarding the theft of the motor vehicle Reg No. KAL 479H, **PW1**, **PW2** and **PW3** were the eyewitnesses as they were all inside the vehicle when the three armed men accosted them. None of these three witnesses was able to identify the appellant as one of men who robbed them. They all state that they did not look at the robbers out of fear for their lives.

The appellant is being connected to this robbery on the basis of the testimony of **PW3** who stated that on that same night, he was robbed of his motor bike by three armed men who were in a small vehicle.

The court cannot assume that the vehicle used to rob **PW3** was the very same vehicle which was stolen from **PW1**. **PW3** did not mention the registration number of the vehicle he saw anywhere in his testimony. **PW3** also did not mention the color or make of this vehicle. **PW3** only referred to the car as a

'small vehicle'. There are many models, colours and varieties of small vehicles. The description given by **PW3** is too vague to provide a tangible link to the vehicle in question.

More importantly **PW3** did not identify the appellant as one of the men who robbed him. He told the court that he was not able to identify any of the men who stole his motor bike. The evidence is that the vehicle stolen from **PW1** was found abandoned by the side of the road. The appellant was not found inside or near that vehicle.

I find that there was no direct evidence linking the appellant to the stolen motor vehicle or to its theft. I therefore concur with the decision of the learned trial magistrate to acquit the appellant on Counts 1, 2 and 3 of the charge.

Regarding Count No. 4 of Robbery with Violence, **PW3** who was the complainant narrated how three armed men robbed him of his motor-bike. **PW3** produced evidence that he did possess a motor bike Reg. No. KMCA 538V by producing in court the receipt for purchase of the same **P.exh 2** and a copy of the log-book **P.exb 3**. Both documents bore the name **'Mary Wanjiru Mbugua'** whom **PW3** stated was his wife.

PW3 told the court that he was not able to identify the men who robbed him. The appellant is linked to the robbery by the testimony of **PW5** ad **PW6**.

Both **PW5** and **PW6** were also boda boda riders and colleagues of **PW3**. They received news of the theft of the motor cycle from **PW3** and undertook to search for it.

PW7 JOHN KINYANJUI KIHORO told the court that he operates a power saw and states that he spotted the motor bike at the stage at Turi Farm. He alerted other boda boda riders.

PW5 and **PW6** went to Turi Farm where the motor bike had been spotted. The surprising thing is that both **PW5** and **PW6** testify that **PW7** led them to the residence of appellant. They further state that **PW7** informed them that he had been hired to dismantle the motor bike using his power saw.

However in his testimony **PW7** did not say that he had been asked to dismantle the motor bike. Nor did **PW7** state that it was he who led the other boda boda riders to the home where the motor bike was recovered. **PW7** only talked of having spotted a motor-bike at the stage. **PW7** did not say that he identified it or suspected it to be the motor-bike stolen from **PW3**. Indeed **PW7** insists that he does not know the appellant at all.

There is certainly a major disconnect or contradiction in the evidence of these witnesses regarding the recovery of the motor bike. **PW7** who is alleged to be a key player in this recovery appears to deny all knowledge about it.

The witnesses claim that upon getting to a certain home the appellant bolted when he saw them. They chased him and brought him back to the home. The appellant ordered his wife to open the store where the dismantled motor bike was found. On the basis of this recovery the appellant was arrested and charged.

On close examination of the evidence of **PW5** and **PW6** taken against the testimony of **PW7** shows a disconnect. The chain of evidence is broken. Either **PW5** or **PW7** was not being truthful with the court. Where there exists such doubt regarding the veracity of prosecution witnesses the court ought to be reluctant to convict. This inconsistency cannot just be glossed over. I therefore find that a doubt remains regarding the guilt of the appellant in this matter. I award the benefit of doubt to the appellant and I quash his conviction on Count No. 4. The death sentence imposed by the trial court is also set aside. This appeal therefore succeeds. The appellant is to be set at liberty unless he is otherwise lawfully held.

Dated in Nakuru this 27th day of January, 2017.

Read in open court

Maureen A. Otero

Judge