



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 130 OF 2015

PETER MAHIANYU KABATI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. H. M. Nyagah – Chief Magistrate delivered on the 15th May, 2015 in CMCR Case No. 981 of 2012)

JUDGEMENT

The appellant **PETER MAHIANYU KABATI** has filled this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court on 15/5/2012 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

“On the 10th day of May 2012 at Salгаа area along Nakuru-Eldoret road in Molo District within Rift Valley Province, jointly with another not before court while armed with a dangerous weapon namely a pistol robbed HUSSEIN RUBEА KANYI of his unregistered motor vehicle engine No. IKZ-0443153, Chasis No. JT111-GJ09500044646 Toyota Prado valued at Ksh 3,000,000 cash Ksh 2,800, one mobile phone make Nokia 1600 valued at Ksh 2,000, one bag containing personal items and a driving license all valued as Ksh 3,004,800/= and at or immediately before if immediately after the time of such robbery used actual violence to the said HUSSEIN RUBEА KANYI”.

The appellant pleaded ‘Not Guilty’ to the charge and his trial commenced on 11/5/2012. The prosecution led by **CHIEF INSPECTOR MUTETI** called eight (8) witnesses in support of their case.

PW2 HUSSEIN RUBEА KANYI was the complainant in the case. He told the court that on 9/5/2012 he was driving a motor vehicle Toyota Prado which was unregistered on transit from Mombasa to Kampala. From Mombasa the complainant had a cousin and nephew with him in the vehicle. He dropped them in Nairobi and proceeded on his own up to Naivasha.

At Gilgil the complainant stopped and picked 7 passengers who were going to Eldoret. He drove with them up to Nakuru and each paid the agreed fare. They then proceeded to Salгаа where the complainant stopped because one child wanted to urinate. At Salгаа all the passengers he had alighted except for two. Then the man seated in the front seat brandished a gun and told the complainant not to try anything funny. He ordered the complainant into the back seat and took over the steering wheel.

The appellant then also re-entered the vehicle in the back and began beating the complainant ordering him to lie low. Since the back passenger door was still open the complainant jumped out of the vehicle as it drove off and fell onto the tarmac leaving a young girl in the car with the two robbers. The vehicle drove off with the vehicle containing the custom and import documents as well as cash belonging to **PW2**. Then the complainant together with his other passengers who had alighted in order to relieve themselves ran to a nearby road block to report the incident.

Police circulated the report. The young girl was eventually abandoned in Sachangwan and she pointed out to the police the direction the vehicle had taken. Later the complainant was called to Molo police station where he identified the vehicle which had been stolen from him. The complainant later identified the appellant at an identification parade conducted at the police station. The appellant was then charged with the offence of Robbery with Violence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an

unsworn defence in which he denied having robbed the complainant of the vehicle in question.

On 15/10/2015 the learned trial magistrate delivered his judgment in which he convicted the accused with the offence of Robbery with Violence and thereafter sentenced him to death. Being aggrieved the complainant filed this appeal.

Being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004]KLR 81**).

In this case the complainant told the court that he was transporting an unregistered vehicle from Mombasa to Kampala. **PW1 INSPECTOR JOSEPH KIOKO** who was the investigating officer produced the motor vehicle a Prado black in colour **Chassis No. JT111GJ950004646 bearing Reg. No. P2ATW** as an exhibit **P. exb1**. The vehicle was released back to the owner. The complainant identified photographs of the vehicle as the one he was driving **P. exb 1**.

In his evidence the complainant narrated how he had given 7 people including 3 women and 2 children a lift from Naivasha. The passengers were supposedly going to Eldoret. However in the course of the journey, one of these passengers turned on the complainant and wielding a gun forced him to move into the back seat. Another passenger who sat in the back with the complainant continued to beat him. Therefore from the evidence of **PW2** it is clear that there was

- Use of force in the commission of the theft
- The theft was perpetrated by more than one person

Although the complainant did not sustain major injuries during the incident the existence of at least two ingredients suffice to prove the offence of Robbery with Violence. I find that the incident as described by **PW2** did amount to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code.

The next crucial question is whether the appellant has been properly identified as one of the men who robbed the complainant. In his submissions the appellant argued that part of the record could not be deciphered as some pages parts of the original record were torn. It is indeed correct that certain words were not captured due to the torn pages. However this was not a widespread problem affecting the entire record. The problem only affected some parts of the testimony the complainant. Nevertheless it was still possible to decipher the record and the torn pages did not substantially affect the integrity of the record.

Having said that the complainant told the court that he saw and was able to positively identify the appellant as one of the men to whom he gave a lift. The complainant drove with the appellant from Naivasha to Gilgil. He told the court that he left Naivasha in the morning. Therefore they were together in all enclosed space being the car in broad day light. The complainant stated that the appellant was the passenger who had been seated on the left side while they travelled. After the gun-wielding thug took over the steering wheel and forced the complainant into the back seat, he identified the appellant as the man who sat with him in the back seat and was beating him.

In his evidence at page 14 line 15 the complainant states

“I identified the accused. He was the man who was beating me on the back seat telling me to lie low”

Later after the stolen vehicle was recovered the complainant was summoned to Molo Police station where he identified the appellant on the identification parade.

PW9 CHIEF INSPECTOR SAMUEL OMENTA told the court that on 10/5/2012 he conducted an identification parade at Molo Police Station. **PW9** told the court that he explained to the appellant the purpose for the parade and the appellant consented to participate in the parade. **PW9** explained how he conducted the parade and confirms that the complainant did not have an opportunity to see the appellant prior to the parade. During the parade the complainant identified the appellant by touching him.

The only comment the appellant is said to have made is that the complainant had carried him in his vehicle. **PW9** produced as an exhibit the parade forms duly signed by the appellant confirming that he was satisfied with the manner in which the parade was conducted.

The identification of the appellant by **PW2** was corroborated by **PW7 KELVIN KIPTOO**. This witness told the court that on the material day he and his family went to the Nakuru/Naivasha Highway to seek for transport home. He came across the Prado being driven by the complainant who offered him a ride to Eldoret. They negotiated a fare and **PW7** his wife and 2 children got into the vehicle. **PW7** stated that aside from his family two other men were also given a lift in the same car. **PW7** identified the appellant as one of the men who was in that same vehicle. **PW7** also confirms the evidence of the complainant that the appellant sat in the rear seat.

At Nakuru the driver stopped to allow his passengers go for a short call. **PW7** alighted but his daughter called ‘**Charity**’ remained inside the vehicle. **PW7** told the court that the driver (complainant) got out of the vehicle and relieved himself. He then returned to the driver’s seat. **PW7** confirms that the two male passengers also followed the complainant into the car. Suddenly the vehicle drove off with the child of **PW7** inside it. A few metres away the complainant jumped out of the moving car and ran to the others shouting ‘**mwizi mwizi**’. The complainant told them that he had been robbed of the vehicle and they reported to a nearby police road block. The daughter of **PW7** was later abandoned at Sachangwan.

PW7 told the court that he saw the appellant clearly. Again I note that these events occurred during the day time. Just like the complainant **PW7** sat in close proximity with the appellant for an extended period of time. He therefore had ample time and opportunity to see him well.

The witness **PW7** was also invited to attend an identification parade at which he positively identified the appellant. **PW9** testified to the manner in which the parade was conducted and confirms that **PW7** did positively identify the appellant by touching him.

Further confirmation of the appellant's involvement in this incident is provided by the circumstances under which the stolen vehicle was recovered. **PW8 SERVEANT GEOFFREY SITUMA** told the court that on 10/5/2012 at 3.30pm he was alerted of the report concerning a stolen Prado vehicle. He and other officers left in pursuit of the vehicle. They traced the vehicle to Mauche area and pursued it. The driver upon noticing that the police were in hot pursuit diverted off the main road towards Okilgei. Fortunately or unfortunately a lorry blocked the path of the vehicle. **PW8** states that the appellant who was in the front passenger seat jumped out of the vehicle and ran into a maize plantation. **PW8** pursued the appellant and fired thrice into the air. This caused the appellant to stop and **PW8** arrested him.

The fact that the appellant was found in the stolen vehicle barely hours after the owner had been robbed of the same leads to the logical conclusion that the appellant was involved in the theft of that vehicle. The doctrine of '**recent possession**' squarely applies here.

In his defence the appellant readily admits that he was found in the stolen vehicle. However the appellant pleads his innocence saying that he too was a mere victim of the carjacker. The appellant says that he had merely sought a lift like the other passengers and that when the car-jacker struck he was unfortunately still in the vehicle.

I am not persuaded by this defence for several reasons. Firstly the complainant told the court that the appellant was the one who sat with him in the back seat and was beating the complainant telling him to lie low. This shows an active participation by the appellant in this robbery. Secondly the child who was inside the vehicle when the robbers struck was abandoned at Sachangwan. If the appellant was not one of the robbers why he was not abandoned together with the child. What need would the car jacker have for the appellant once his mission was complete. Thirdly the evidence from **PW8** and the other officers who pursued the stolen vehicle was that the appellant was seated in the front passenger seat of the vehicle. If as he claims the appellant was also a victim of the carjackers he is unlikely to have been sitting in the front seat next to the armed man. The evidence clearly points to the active involvement and participation of the appellant in the robbery. I therefore dismiss his defence.

From the evidence it is clear that the appellant together with an armed accomplice robbed the complainant of this Prado vehicle. I am satisfied that there has been a clear positive and reliable identification of the appellant as one of the robbers. His conviction was sound and I confirm that conviction. The death sentence imposed by the trial court was lawful and I do confirm that conviction.

Finally this appeal fails in its entirety and is hereby dismissed.

Dated in Nakuru this 22nd day of August, 2017

Maureen A. Odero

Judge