



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 56 OF 2015

ISAACK MEEME KOBIA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 57 OF 2015

LUKAS MURIUKI MBUBUA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 210 of 2011

by Hon. T. B. Nyangena Principal Magistrate on 27th May 2014).

JUDGMENT

1. **Isaac Kariuki Ngare (deceased)** was employed to drive a taxi which was owned by Isaiah Macharia Nderitu. He was driving motor vehicle KAR 033 K. He used to park that taxi at a place called Nyakio in Nanyuki town. On 2nd February 2011 at about 7a.m. he was hired by a person who was rolling a car wheel. Isaiah the owner of the motor vehicle got concerned when on that day at 5 p.m. he was unable to reach the deceased. Having been unable to reach him he contacted the chairman of the taxi drivers the following day. Following the search that was mounted by about 100 taxi drivers from Nanyuki the motor vehicle was found in Meru at a place called Gakoromone Market. The two appellants Isaac Meeme Kobia and Luka Muriuki Mbubua were found to be in possession of the motor vehicle together with two others that escaped.

2. The appellants were charged before Nanyuki Magistrate's Court with the ***offence of robbery with violence contrary to section 296(2) of the Penal Code*** and with an alternative charge of ***handling stolen goods contrary to section 322 (2) of the Penal Code***. After trial they were both convicted on the main charge and were sentenced to suffer death as provided under the law. They were aggrieved by the

conviction and sentenced and have preferred this appeal. This is the first appellate court and the duty of such a court has often been stated. The duty of the first appellate court is to analyse and re-evaluate the evidence tendered before the trial court. The first appellate court on doing so can reach its own conclusion on the evidence bearing in mind that it did not see or hear the witnesses testify. See the case of **OKENO VS REPUBLIC (1972) EA 32**.

3. The prosecution's evidence was supported by five civilian witnesses most of whom were taxi drivers at Nyakio in Nanyuki. The evidence of **Silvanus Waweru** is what begins to draw light on what happened to the deceased. They used to refer to the deceased by the alias name of **Kahembe**. Silvanus on 2nd of February 2011 arrived at the place where they used to park their taxis at Nyakio in Nanyuki at 6.20a.m. Soon after another taxi driver Julius Mutaba Kamotho arrived. As they were conversing Kahembe parked the vehicle KAR O33K. About 10 minutes later Silvanus saw someone rolling a car wheel. He was able to notice that it was a Subaru ream. The person came towards Silvanus car. As he did so Kahembe who was parked opposite side called him over. Silvanus noticed that a conversation was going on between this person and Kahembe. It seemed to him that Kahembe and that person were bargaining on the taxi fare. Silvanus crossed over the road it seems intending to join in the bargain and this prompted Kahembe to open his car door for that person after he put the wheel in the car boot. Silvanus was able to see that the person sat next to Kahembe. He was able to note the manner of dressing of that person who entered Kahembe's car. He stated:

“That person was wearing a brown Jacket, blue jeans, Safari boots and a cap like the one Oginga Odinga wears.”

It was the next day that Silvanus learnt that Kahembe had not been seen.

4. Kamotho who was in the company of Silvanus also confirmed that Kahembe came and parked his vehicle at Nyakio in Nanyuki. He himself had parked his pick up at the same place. He later saw kahembe put a car wheel in his boot. He was later to learn that kahembe was said to be missing.

5. When the information was relayed to the chairman of the taxis that Kahembe was missing a search was mounted by the taxi drivers. Information was received by those who were carrying out the search that Kahembe's vehicle had been seen on the material date being driven very fast in the Timau area. It was headed towards Meru. There was also information that the vehicle had been seen going past Makutano in Meru. Information was also received that the vehicle registration number had been changed to No. **KAP 125T**.

6. On 4th of February 2011 at 3 p.m. the vehicle was spotted as it passed through the Total petrol station in Meru Town where some of the taxi driver who were searching for Kahembe were. The vehicle did not stop. The taxi drivers who were searching for the missing car decided to wait at that petrol station. Later the vehicle was seen by the five civilian witnesses being driven to that petrol station as though it was to be refilled. The owner of the vehicle Nderitu was able to identify that vehicle as his, because he noted that the mud slump on the left side was cut and it had a bent on the front part. The vehicle registration number had been changed to KAP 125 P. Once he confirmed that that was his vehicle those that were searching began to go towards the vehicle. One of them by the name of Mugusu rammed into the vehicle. The police officers that were present namely Sgt Sebastian Kalawa Marena and Cpl Gideon Mbuthu were present at the petrol station following the report made at the police station of the missing taxi and the driver. They assisted in the pursuit of the vehicle. They were able to arrest the first and second appellant as they attempted to ran away. On arresting them they found in their possession a rifle and its magazines. In their evidence they stated that the rifle was rapped with some clothing and was in the possession of the 2nd appellant. The magazine was found in the possession of the first appellant. They noted as did the other taxi drivers that there was attempt to scratch the original registration number of the vehicle embossed on the windows.

7. The evidence relating to the arrest of the appellants was very clear. Nahason Kimani one of the taxi drivers had this to say in that regard. In respect of the first appellant he stated:-

“I saw you clearly when officers asked you to get out.

.....you were wearing spectacles.”

8. In regard to the 2nd appellant this witness was able to note that he was seated at the front of the vehicle on the left side. Similarly another witness George Maina Nyangweso stated as follows:-

“I never lost sight of the vehicle”. This was in respect to the time the chase began in order to stop those that were driving the stolen vehicle. This witness also said that he saw both the appellant.

9. Silvanus who had seen the first appellant was not at the scene where the appellant were arrested. Chief Inspector Ranson Gambo mounted an identification parade where Silvanus was able to identify the first appellant as the person who hired Kahembe on 2nd February 2011 and who was wheeling the car wheel.

10. On 8th February 2011 it was reported to the police that a body had been sighted within Imenti North District. Cpl Peter Ndei Kanyi went to the scene. He found that the body was decomposing and had been tied to a tree. The hands were tied to the back of the body. He took photographs of the scene and also the body. The post-mortem report was presented to court by Doctor Makanga on behalf of Doctor Kalaba. It revealed that there was rigor mortise. There was also marks on the legs neck and the wrists. The cause of death was found to be strangulation. That body was identified as that of Kahembe.

11. On the trial court finding that the accused persons had a case to answer they both chose to give sworn testimony. The first appellant in his defence stated that on the day he was arrested he had left his shoe shining business. On reaching the bus stage he wanted to buy some fruits. As he waited to buy he heard a loud sound. He joined the people who began to run. He said that he thought it was an attack by the Al shabab. He said he fell down, lost consciousness and found himself in a police cell facing the charges in this case. He said that he was taken to court on 5th February 2011 but the police were given more time to carry out investigations. He said that whilst he was at the court the person who picked him up at the identification parade saw him. He also stated that he was charged with the present offences together with second appellant who up to that time he did not know him. The 2nd appellant in his defence said that he was a business man. On 4th of February 2011 he was on his way to visit his parents. He was in a matatu but when there was a loud bang and people began to ran he too began to ran. It was then that people began to point at him to the police men saying that he was one of the people from the car. He was charged with the present offence but he was not identified at the identification parade.

12. The appellants during the trial cited other cases that they were facing in other courts in which they said they had been acquitted and which case they said were related to the offences in this case. At their request two court files were produced by Gladys Muthoni Muthiora an assistant executive officer. This witness stated that criminal case no. 120 of 2011 at Meru court related to the offence of possession of firearm by the two appellants. In that case the two appellants had been acquitted of that offence. The other file was at Nanyuki Magistrate’s Court being Criminal Case No. 221 of 2011. The assistant executive officer stated that the case had been concluded with the discharge of the accused persons. That case related to an offence of robbery with violence where the complainant was Felix Ndirangu.

13. The appellants were given an opportunity to submit before court. The first appellant relied on his written submissions filed in court. He also submitted orally to supplement those submissions. Before court he submitted that Silvanus who picked him out in the identification parade had seen him when he appeared before court. Although he stated that he was taken to the court on 7th of February 2011 and yet during in his defence before the trial court he stated he was taken to court on 5th February 2011 the record shows that he was taken to court on 11th of February 2011. His identification parade was carried out on 8th of February 2011. Over and above that it is important to note that when he cross examined Silvanus and the inspector of police who organised the identification parade he did not raise that issue at all. It can therefore be said that issue was an afterthought.

14. In his written submission the first appellant stated that there inconsistencies between the evidence of

the arresting officer in regard to who between him and the 2nd appellant had the rifle or the magazine. In my view there are no such contradictions in that evidence. Moreover the offence that the appellant faced related to robbery with violence and in the alternative to handling stolen goods. For that reason I shall not dwell much more on the issue on who was found possessing the rifle or the magazine. The first appellant continue with his written submissions to fault the prosecution for failing to produce the photographs of the scene of arrest and for failing to dust the motor vehicle for finger prints. In the courts view the absence of those photographs or the dusting of the vehicle did not in any way reduce the weight of the prosecution's case.

15. The second appellant relied on his written submissions. In his submissions he stated that the prosecution failed to prove his guilt of the offences. For reasons I shall give later in this judgment I do find that the prosecution well met the burden of proof. This appellant continued to submit that the circumstances under which he was arrested did not allow for positive identification. As stated before while summarising the evidence submitted at trial the appellant were found as they wanted to escape from the subject motor vehicle. Most of the witnesses who testified and were at the scene of arrest were able to confirm that they were arrested as they attempted to escape from the stolen car. It was 5 p.m. in the afternoon and there was therefore no difficult in their identification at the scene.

16. It is important to respond to the appellants submission that because they were acquitted on the charge of possession of firearm they should not have been convicted in respect of this offences. The lower court file in which the appellant were acquitted from the offence of possessing fire arm was not before me. That as it may be the offences before this court and the offences the appellants were acquitted from are entirely different when one considers the ingredients of the offence. It is for that reason that I reject the submission of the appellant in respect of that acquittal.

17. The offence on which the appellants were convicted was robbery with violence contrary to section 296(2) of the penal code. In considering that section the Court of Appeal had this to say in the case of **DANIEL NJOROGE MBUGUA VS REPUBLIC (2014) eKLR:-**

“The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of Oluoch vs Republic (1985)KLR where it was held that robbery with violence is committed in any of the following circumstances:-

(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more person or persons; or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other person violence to any person”. emphasis supplied.

The use of the word “or” implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

This is the position taken by the High Court in Mohamed Ali vs Republic (2013)eKLR where it was held “the use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.”

18. It will be seen from that case that the ingredient of section 296(2) would be satisfied if the offender was armed with dangerous and offensive weapon or instrument or was in the company of one or more persons or at or immediately before or immediately after the robbery the offender wounds, beats, strikes, or uses person violence to any person. Bearing in mind the evidence of the prosecution the ingredients of robbery with violence were well met. The first appellant was seen hiring Kahembe's vehicle on 2nd February 2011. He was arrested whilst in that same vehicle together with the 2nd appellant on the 4th

February 2011. Kahembe's decomposing body was recovered from the forest on 8th February 2011. The appellants either at or immediately or before the robbery used personal violence against Kahembe. That personal violence resulted in his death.

19. I say that the appellant used personal violence while applying the doctrine of recent possession. The doctrine of recent possession was discussed in two cases firstly, in the case of **DOUGLAS SILA MUTUKU AND 2 OTHERS VS REPUBLIC (2014)eKLR** the court of appeal held that:-

“Although none of the witnesses identified the 3rd appellant, the fact that shortly after the robbery, he was found in possession of some of the items stolen from the victims there is a rebuttable presumption of fact under section 119 of the Evidence Act, that he was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of those items”

20. It was also discussed in the case of **STEPHEN MWENDE VS REPUBLIC (2015) eKLR** where the court stated:-

Malingi vs Republic (1989) KLR 225 at page 227 WHERE Bosire J. (as he then was) held thus:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was guilty receiver.”

21. The doctrine of recent possession was well proved in the present case because the appellant were found in possession of a recently stolen motor vehicle and in their defence the appellants did not give a reasonable explanation to account for their possession of that motor vehicle. The presumption therefore from the evidence of the prosecution was that they were either the thieves or they were receivers. The motor vehicle was recovered in their possession two days after it went missing. The nature of a motor vehicle is such that it cannot change hands within a short time. It follows that the appellant will be presumed to be the thieves or the robbers of the motor vehicles. The prosecution well met the standards of proof in respect of the charge of robbery with violence.

22. It is because of the above finding that I find there is no merit in the appellant's appeal. The two appellant's appeals are hereby dismissed and their conviction is confirmed and their sentence is upheld.

DATED AND DELIVERED THIS 31ST DAY OF MAY 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellants: 1. Isaack Meeme Kobia

2. Lukas Muriuki Mbubua

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE