



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 54 OF 2015

DANIEL MUTUKU MBITHE APPELLANT

versus

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 839 of 2014 by Hon. Thripsisa Wanjiku Cherere Chief Magistrate on 24th April 2015).

JUDGMENT

1. **DANIEL MUTUKU MBITHE (Daniel)** was charged with **three counts** of the **offence of robbery with violence contrary to section 296(2) of the Penal Code** and was convicted on **two counts**. He was sentenced to suffer death as provided under the law. He was aggrieved by his conviction and sentence and has accordingly filed this appeal. This is the first appellant court and as such the duty of this court has been the subject of discussion in many cases. The Court of Appeal in the case **KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED (2009) 2EA 212** stated that duty to be:-

“On a first appeal from the High court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

2. The prosecution's case is that Daniel on 6th June 2014 hired a motor vehicle Toyota Fielder silver grey in colour registration number **KBY 425 F**. He hired that vehicle from Khan tours and Cabs(Khan Tours). The hire was facilitated by Kenneth James Mwangi (Kenneth) who was an employee of Khan tours. Kenneth was employed by that firm as a Marketing Manager. Daniel and Kenneth were acquainted prior to that hire. They used to meet at Ngara area in Nairobi at what Kenneth described as Miraa den. On 27th May 2014 while at that miraa den Daniel informed Kenneth that he was working for a tour firm. Kenneth took that opportunity to request Daniel to give business to his employer Khan tours. Kenneth gave Daniel his business card. Daniel telephoned Kenneth on 6th June 2014 and informed him that he wanted to hire a Premio saloon car. Daniel was informed that khan tours only had a Toyota fielder car. Daniel agreed to hire the Toyota fielder for 14 days at the cost of Kshs.3,000 per day. Daniel on arrival at the premises of khan tours was taken by Kenneth to Mr. Khan the Proprietor and Mr. Rueben Wanjala the Operations Manager. Daniel signed a contract with Khan Tours for the hire of a motor vehicle at

the cost of Kshs.45,000. He initially paid kshs.9,000 and the vehicle was released to him. On 12th June 2014 Daniel sent to Kenneth by mobile phone transfer kshs.13,000. A receipt was issued by Khan tours for that amount but Daniel did not collect it.

3. On 11th June 2014 Charles Thurania (Charles) met with members of Kianda Horticultural Self Help Group. Charles was its treasurer. At that meeting the group authorised the withdrawal of Kshs.180,342 from their bank account at Equity Bank Nanyuki Branch. On 13th of June 2014 Charles in the company of Charleston Macharia Kimondo (Macharia) and David Kaberia M'Mutea (kaberia) went to withdraw money as authorised by the group. After withdrawing the said money and while they were on their way to the bus stop their path was blocked by a grey salon car. There were four people in that car. The people told them that they were police officers and accused them of being members of the *mungiki* group (an outlawed group). They could not identify these four men because they were wearing caps low on their faces. The alleged police officers assaulted them handcuffed them and placed them in the car and drove away with them. The car stopped at a place they did not know. The amount that they had withdrawn from the bank was taken away from Charles together with his money amounting to kshs.10,000. They also took Charles mobile phone by the make *Gtide*. Both Charles and Macharia were able to identify the vehicle which blocked them and which the alleged policemen used to rob them. They identified the vehicle from the photographs that were shown to them by the prosecution. They were able to state that the vehicle was registration number KBY 425 F. Kaberia did not testify and accordingly the count which related to him was not proved.

4. Charles and Macharia reported the matter at the Nanyuki Police Station. Police constable Kelvin Yakhama was assigned the case to investigate. He said that he was able to establish that the subject vehicle was registered in the name of Khan tours. On contacting Khan tours he was informed that the subject vehicle was on hire to Daniel for 14 days. The proprietor of Khan tours was able to confirm that the vehicle was at Kariene area in Meru. This is because the vehicle had a tracking mechanism. PC Kevin on going to Kariene police station found the vehicle there.

5. The prosecution called police officer Cpl Teresio Wahome who was based at Kariene Police Station. Cpl Teresio informed the court that on 13th June 2014 at about 8.30 p.m. while he was at Kariene Police Station he heard gun shots from about 1 km away. He in the company of other police officers went to the scene of the shooting. They found motor vehicle KBY 425 F silver grey in colour a Toyota Fielder which had numerous bullet holes. The driver of the vehicle and his female passenger had been shot dead. In the car they recovered a Samsung mobile phone which was later confirmed to belong to Henry Muthuri the dead driver and also recovered a *Gtide* phone.

6. PC Kevin in evidence stated that when he arrived at Kariene Police Station he recovered from the subject vehicle three caps, a rungu (club), penknife, and a *G tide* mobile phone. The *G tide* mobile phone was identified by Charles as the one that had been stolen from him by the alleged police men.

7. PC Kelvin said that he tried to call Daniel on his mobile phone but it was switched off. He was however able to trace him with the assistant of mobile phone service provider at the Dandora area in Nairobi on 11th September 2014. At Daniel's home the police officer recovered a police sweater blue in colour, a penknife, and other things that were unrelated to this case. PC Kevin on being asked during cross examination why he had arrested Daniel and charged him with the offence of robbery with violence responded by saying:-

“Accused (Daniel) is charged because he hired motor vehicle KBY 425 F to Henry Muthuri without authority and he had no evidence of the hiring in support thereof.”

8. Daniel was put to his defence. In his sworn evidence, he stated that he operates a freelance tour and safari. That is, that he hired motor vehicles to customers. He said that he had been in that business for 2½ years. On the day in question he said that he was at Jomo Kenyatta

International Airport (JKIA). He had gone to the airport to pick up his clients who were arriving and whom he was to take to Egerton. He said that his clients did not arrive. He was informed of their non-arrival by telephone. He stated that on being requested he gave the subject motor vehicle to Henry Muthuri who requested for the car which he said he would use to transport his father from the Kenyatta National Hospital to Meru. Daniel denied having committed the robberies and further denied being in Nanyuki on 13th June 2014. Daniel said that he spoke to Henry Muthuri on 12th June 2014 because Muthuri had failed to return the subject vehicle as agreed. Muthuri promised to return the motor vehicle in 3 days. Daniel said that he failed to return the subject vehicle as promised and when he tried to call him he could not reach him.

Although Daniel said that he telephoned Khan Tours and informed them that Muthuri had not returned the vehicle this was not put to the Khan Tours employees when they testified before court.

9. The trial court magistrate in her considered judgment acknowledged that the perpetrators of the robbery were not identified by Charles and Macharia. The learned trial magistrate correctly in my view concluded that the prosecution's case relied on circumstantial evidence. After considering the holding in the case **ABANGA alias ONYANGO V. REP CR.A NO. 32 OF 1990(UR)** the learned magistrate stated in her judgement as quoted:-

“After considering the evidence on record and the unexplained inaction on the part of the accused (Daniel) I hereby make an inference that the accused knew that the subject motor vehicle had been involved in crime and that Henry had been killed. The circumstances outlined herein above taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability accused and others committed the robberies complained of.”

The learned trial magistrate proceeded to convict and sentence Daniel on two counts of robbery with violence.

10. Daniel through his learned counsel Mr. Abwuor filed 8 grounds of appeal. I have looked at those grounds and in my considered view those grounds seek to have this court re-examine the prosecution's case and determine whether it had met the criminal standard of proof and also seeks that this court do find that Daniel had raised a plausible defence.

11. The learned Principal Prosecution Counsel Mr. Tanui opposed the appeal and submitted that the prosecution at the trial had proved its case beyond reasonable doubt. He too confirmed that the prosecution case relied on circumstantial evidence which in his view proved that Daniel was a partner to the robberies on 13th June 2014. In his submissions he confirmed that the prosecution's case did not rely on identification evidence.

12. I am indebted to both the learned counsels for their industry in research and that effort has enriched this judgment.

COURT ANALYSIS AND DETERMINATION

13. As it is discernable from the evidence reproduced above the victims of the robbery did not identify the perpetrators of the crime. This is because the robbers were wearing caps that were covering their faces. That being so the arrest of Daniel on the basis that he had hired the subject vehicle which was used in the robbery shows that the prosecution relied on circumstantial evidence. In the case of **ABANGA alias ONYANGO V. REPUBLIC CR.A NO. 32 OF 1990 (UR)** The court of appeal set out the principles which are to be applied when faced with circumstantial evidence. The court stated:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

In my humble view the prosecution’s evidence fails the tests set out in the above case. It will be recalled that PC Kevin the investigating officer of the case stated that Daniel was arrested merely because he had hire the vehicle that was used in the robbery.

14. It would be recalled that Kenneth the employee of Khan tours was well acquainted with Daniel. When he asked Daniel to give khan tours business Daniel obliged. When Daniel went to Khan Tours to hire the subject vehicle he went in person. At the premises of Khan Tours Daniel did not conceal his identity. In any case Kenneth who was present during the hire well knew Daniel. In my view Daniel could not have gone for such a hire without concealing his identity when he knew that the vehicle would be used to commit a crime. Daniel allowed the proprietor of Khan Tours to photocopy his national identity card and his drivers licence and in view of that it cannot be said that his intention was to use the vehicle for the robbery. In my view the pertinent question one needs to ask is whether a person like Daniel who intends to use a vehicle for a crime would go and hire a vehicle at a place where at least one person was acquainted to him and in addition would leave copies of his identification. In my view the answer to such a question must be an emphatic no.

15. The prosecution’s evidence was far from clear how Henry Muthuri and his female passenger were shot. Were they shot by police or their accomplices in the robbery? That evidence ought to have been laid before the trial court.

16. The principal prosecution counsel was of the view that Daniel’s failure to report the subject vehicle as stolen showed his complicity in the robbery.

17. I seek to differ with that point of view. Daniel in his evidence stated that he called Henry Muthuri when he got concerned of his failure to return the car as they had agreed. That was on 12th June 2014. Muthuri promised to return the vehicle after 3 days. He did not. Bearing those circumstances in mind that Daniel either rented or hired the subject vehicle without the permission of Khan Tours, that may explain why Daniel kept low so to speak and did not report the vehicle as stolen.

18. The Court of Appeal in the case **BARISA WAYU MATAGUNDA V REPUBLIC (2014)eKLR** considered how circumstantial evidence should be treated. It is stated:-

“The parameters within which a court of law can both receive and rely on circumstantial evidence to found a conviction have now been crystallized by case law. To quote a few, see the case of Rex versus Kipkering Arap Koske & Kimire Arap Matatu 26EACA 135, Simon IMusoke versus Republic (1958) EA 715 and more recently Sawe versus Republic (2003) KLR 364.

The central thread running through all the above cited decisions among numerous others is that the exculpatory facts established by the prosecution against an accused on the basis of which that accused is sought to be convicted, must be such that lead irresistibly to the conclusion of the accused’s guilt incapable of explanation on any other reasonable hypothesis other than the accused’s guilt and are incompatible with the innocence of that accused.”

19. Bearing in mind that holding and paying regard to the prosecution's evidence I find that the said evidence is not reliable to secure a conviction of the charges that Daniel faced.

20. Daniel raised alibi defence. As held in the case **UGANDA VS SBI ALA & OTHERS (1969) EA 204** the accused does not have to establish that his alibi is reasonably true. What he had to do by raising an alibi defence was to create doubt as to the strength of the prosecution's case. In this case Daniel's defence was that at the time of the robbery 13th June 2014 he was at JKIA waiting for the arrival of his clients. JKIA is in Nairobi. The robbery took place on that day at 1 pm in Nanyuki town. His defence was that he had either lent or hired the subject vehicle to Henry Muthuri. On the same day at about 8.30 p.m. Henry Muthuri and his female passenger were found dead from gunshot wounds in the subject car. In my view the prosecution failed to produce a cogent and reliable evidence connecting Daniel in the robbery. The police could have obtained information from the mobile phone providers to confirm when Daniel spoke to Henry Muthuri. They did not. The police also could have investigated who in the Equity Bank Nanyuki Branch had served Charles and Macharia before they were robbed. If such information was obtained again the phone call records of such a person to either Henry Muthuri or Daniel could have been confirmed. There was no evidence relating to that teller who served Charles and Macharia. Further Charles and Macharia were accosted on their way to the bus stop in the middle of the day. In all probability business people or passers-by at the place where Charles and Macharia were accosted could have been interviewed. If they had been interviewed perhaps someone could have identified the robbers. On the whole the prosecution's case was too weak to be relied on for convictions. It failed to form a complete chain of events. It is for that reason that the appellant's appeal succeeds.

21. In the end the **appellant's appeal succeeds and the conviction of Daniel Mutuku Mbithe is hereby quashed on both counts of robbery with violence and the sentence is hereby set aside. An order is hereby made that DANIEL MUTUKU MBITHE be set free unless he is otherwise lawfully held.**

DATED AND DELIVERED THIS 28TH DAY OF JULY 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Daniel Mutuku Mbithe

For appellant:

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE