



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

LESIT, KIMARU, JJ

CRIMINAL APPEAL NO. 245 OF 2012

AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 246 OF 2012

(Appeal from the original conviction and sentence in Milimani CM's Criminal Case No. 24 of 2011 by Mr. E. Obaga SPM)

GILBERT ESUAVA CHADAMBA ALIAS

STEPHEN SAMUEL MULI.....1ST APPELLANT

JAMES NYANGAU NYABEGA.....2ND APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellants **GILBERT ESUAVA CHADAMBA** alias **STEPHEN SAMUEL MULI**, hereinafter referred to as the 1st Appellant, and **JAMES NYANGAU NYABEGA**, the 2nd Appellant were the 1st and 2nd accused respectively in the trial before the lower court. Their appeals have been consolidated as they arise from the same trial.
2. The Appellants were facing three counts of offences in the lower court. In Count I both Appellants were charged with Robbery with violence Contrary to **Section 296(2)** of the **Penal Code**. The particulars of this offence were as follows:

That between the night of 3rd January and the morning of 4th January 2011 outside Sagret hotel along River road in Nairobi within Nairobi county, jointly with others not before court while armed with a dangerous weapon namely a knife robbed John Njane Njuguna off one motor vehicle Reg. No. KBK 518P Toyota Probox valued at KShs.505,000/=, one LG mobile phone model KP105 valued at KShs.1,3000/= and a voter's registration card valued at KShs.50/- all valued at KShs.506,350/= and at the time of such robbery wounded the said John Njane Njuguna.

3. The second count was an alternative count of Handling Stolen property contrary to **Section 322** of the **Penal Code**. It was against both Appellants and its particulars were as follows:

That on the 4th day of January 2011 in Mai Mahiu town within Naivasha county otherwise than in the course of stealing jointly and dishonestly retained a motor vehicle

registration number vehicle Reg. No. KBK 518 Toyota Probox valued at KShs.505,000/=, one LG mobile phone model KP105 valued at KShs.1,300/= and a voters registration card valued at KShs.50/= all valued at KShs.506,350/= the property of JOHN NJANE NJUGUNA knowing or having reason to believe it to be stolen.

4. The third count was against the 1st Appellant and was of Making a Document without Authority contrary to **Section 357(a)** of the **Penal Code**. The particulars of this offence was as follows:

That on unknown date at unknown place within the Republic of Kenya jointly with others not before court with intent to defraud without lawful authority or excuse made a certain document namely a National Identity Card Number 24788273 in the names of Stephen Muli Samuel purporting it to be genuine and issued by the Registrar of persons.

5. After the trial, the learned trial Magistrate found both Appellants guilty in the main count of Robbery with Violence and sentenced each to death. The 1st Appellant's was convicted of the third count of Making a Document without authority but the sentence suspended.
6. The 1st Appellant was represented in this appeal and Mr. Saenye argued the appeal on his behalf. On the other hand the 2nd Appellant was unrepresented. Ms. Aluda learned Prosecution Counsel represented the State.
7. Each Appellant filed their respective Petitions of Appeal. In their petitions both Appellants have raised three grounds of appeal as follows:

- I. **That the learned trial magistrate erred in both law and facts by failing to consider that I was not identified by anybody at the commission of the robbery.**
- II. **That the learned trial magistrate erred in both law and facts by failing to consider that my actual arrester was not available to clear this doubt of my arrest as alleged with the stolen motor vehicle.**
- III. **That the learned trial magistrate erred in both law and facts by failing to give due consideration to my alibi defence which ought to displace the prosecution case.**

8. After engaging counsel, the 1st Appellant's grounds of appeal were amended on 8th November 2013 and the following new grounds raised:

- I. **The learned trial Magistrate erred in fact and in law when he failed to appreciate that the evidence of identification of the Appellant was not sufficient to enter a guilty verdict.**
- II. **The learned Magistrate erred in law and fact when he failed to analyze the evidence on lighting at the scene as required of law in that there was no indication as to how bright or strong was the security light from the adjacent premises to secure proper identification or recognition.**
- III. **The learned trial magistrate erred in law and fact when he failed to appreciate that the evidence of the prosecution witnesses were contradictory and uncorroborated in the circumstances hence was not sufficient to sustain a conviction.**
- IV. **The learned trial Magistrate erred in law and fact in failing to warn itself that it was dealing with the testimony of a single identifying witness, which is normally essential and imperative in situations when conditions favouring a correct identification.**
- V. **The learned Magistrate failed to give due consideration to the matters relating to circumstantial evidence and the Appellant defence of alibi.**
- VI. **The learned trial Magistrate erred in law when he handed down harsh and excessive death sentence against the Appellant and against the weight of the evidence.**
- VII. **The Appellant consequently craves for the re-evaluation of the evidence, analyze same and draw its own conclusion in view of the conflicting evidence.**

9. The prosecution called a total of nine witnesses.

10. The Prosecution case was that PW4 Peter Mwaura employed PW1 John Njane Njuguna as a driver of his taxi registration number KBK 518P a Toyota Probox. On the 3rd January, 2011 at

around 11:30 pm while outside Sagret Hotel, PW1 was approached by two men who wanted to be dropped at City Cabanas along Mombasa road. They agreed on the fare and proceeded towards Jogoo Road. One passenger sat in the front seat while the other sat at the back seat. As they entered City Cabanas, the man in the front removed a shiny knife and threatened to kill him if he resisted his instructions. He then stabbed him on the left side of his stomach. He then ordered him to drive on and when they reached the turnoff to Jomo Kenyatta Airport, they ordered PW1 to turn and park the vehicle towards Nairobi before they removed a rope and tied his hands and legs. They then placed him at the back seat. They robbed him off his LG Mobile phone, (exhibit 5a) PSV License (exhibit 5(b), driving licence (exhibit 5(c), electors card (exhibit 5(d) and driver's budge (exhibit 5(e) and abandoned him in a thicket off Mombasa. The two thugs also went with the vehicle.

11. PW1 struggled and managed to untie himself and walked back to Mombasa road where he got a lift from a security van that took him to Viranga Police Post where he reported the matter and also spent the night.
12. PW4 was contacted by Police from Viranga Police Post the same night of the incident, who wanted him to confirm whether PW1 was his employee. PW4 proceeded to Central Police Station and reported the matter. PW4 also contacted M-Track which had installed a tracking device on the vehicle. PW4 and M-Track personnel met same night and were able to track the vehicle on the computer. They saw it was driven towards Westlands, Nairobi and later to Mai Mahiu. That is when M-Track Team disabled the vehicle and PW4 accompanied them to Mai Mahiu. They found the Appellants standing behind the vehicle and PW3 working on the steering wheel area.
13. PW2 identified the Appellants as people who approached him at about 4am at Mai Mahiu where he worked as a watchman. The two men wanted a mechanic to repair their Probox vehicle which they had driven up to where PW2 worked. PW2 said he knew one who lived nearby and he telephoned PW3 who came carrying his toolbox. PW3 identified the Appellants as the ones who hired his services to repair their vehicle which they identified to him. Their complaint about their vehicle was that the vehicle had had a cut out. PW3 testified that he just opened the steering wheel cover and before he could do anything he was arrested by the police.
14. The Appellants put forward an alibi as their defense. The 1st Appellant stated that at the alleged time of the offence, he had gone to buy sweet potatoes at 4.00 a.m. The 2nd Appellant on his part stated that he was on his way to a construction site to receive lorries which had delivered sand and stones.
15. We are a first appellate court and as expected of us, we have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses, and have given due allowance for the same. We are guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (See Pandya Vs. Republic (1957) EA. 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (See Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters Vrs Sunday Post [1958] E.A 424).”

16. Mr. Saenye for the 1st Appellant relied on the submissions filed by Mr. Mboya. He argued that the Identification parade was not conducted in accordance to Law and that it was not fair and

practical as the complainant had already identified the accused person in the police cell at Mai Mahiu upon his arrest. He contended that the learned trial Magistrate failed to take into account contradictions in the testimony of PW1. Finally, he argued that there was no direct evidence linking the 1st Appellant to the offence.

17. The 2nd Appellant appeared in person. He challenged the Identification evidence of PW1 and urged that the same was insufficient and wanting since the prevailing circumstances at the time of the offence did not favor positive Identification. Secondly, he argued that the Prosecution failed to prove beyond reasonable doubt that the 2nd Appellant was found in possession of the alleged stolen motor vehicle registration KBK 518P. Crucial witnesses he urged were not called, in particular the OCS of Mai Mahiu who arrested the Appellants. The 2nd Appellant challenged the investigations as being shoddy. The 2nd Appellant argued that he was denied his constitutional right to recall witnesses.
18. Ms Aluda for the State opposed the appeal and urged that the prosecution relied on circumstantial evidence and in particular the doctrine of recent possession. Ms Aluda submitted that PW1 was robbed of his motor vehicle at midnight by the Appellants who also stabbed him. Counsel urged that a P3 form was produced to prove the same. The learned Prosecution Counsel submitted that PW2 identified the Appellants as the two people who approached him at 4am where he worked as a guard asking for help to get a mechanic to fix a problem with their vehicle. PW2 called PW3 to assist them. Ms Aluda urged that PW3 confirmed the testimony of PW2 and said that as he assisted the Appellants, the police arrived and arrested him together with the Appellants.
19. Ms Aluda submitted that the prosecution was able to prove that a blood stained knife which was recovered from the vehicle at the time of arrest, had blood which matched that of PW1. The stolen motor vehicle was also recovered at 4 am after the theft had taken place at midnight. The learned Prosecution Counsel submitted that the time PW1 took to negotiate for the fare with the customers was sufficient to identify the 1st Appellant at the ID parade. Ms. Aluda urged that a sale agreement was also recovered in the vehicle and that the same was proof that the Appellants intended to sell the vehicle to a third party as the 2nd Appellant had appended his signature on the sale agreement as the seller. Counsel urged that the fact that both Appellants were found in possession of the motor vehicle as well as the sale agreement was not a mere coincidence.
20. Regarding the identification of the Appellants, the prosecution had only one identifying witness of the robbery incident. This was PW1 who was robbed of the vehicle. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

21. The Court of Appeal has held over and over again that it is possible to base a conviction on the evidence of a single witness so long as it is safe to do so. In **RORIA –V- REP [1967] EA 582** the Court of Appeal for Eastern Africa held:

“While it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so.”

22. The Court of Appeal has set out the principles applicable when dealing with evidence of visual identification in many cases. In the case of Charles Maitanyi –vs- Republic [1985] 2 KAR 25 that Court held :

“It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.

There is a second line of inquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify the accused, the recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.”

23. We have analyzed afresh the evidence of the sole identifying witness, PW1 in regards to identification. PW1 testified that the place where he parked his taxi was well lit by security lights from Sagret Hotel and the street lights along River road. PW1 testified that before the two men hired him he saw them go to another taxi nearby belonging to his colleague. He then saw them return to Sagret Hotel before coming out and heading straight to his vehicle. PW1 stated that he took time to negotiate the fare with the Appellants and that he could see their faces well. PW1 described the two as one being short and stout and older while the other was younger and sat at the back seat before taking over the driving.

24. Two ID parades were conducted by PW 8 Chief inspector Boniface Lomuk on 5th January 2011. PW1 was able to identify the 1st Appellant by picking him out and said that he was the older stout and black man of the two. He was unable to identify the 2nd Appellant at the parade claiming that there were two of them who looked alike. PW1 identified him in court at the trial.

25. In the case of Gabriel Njoroge vs. Republic

(1982-88) 1 KAR it was held: -

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade.

A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

26. The incident took place at midnight and therefore at night. We noted that PW1 was able to describe only the 1st Appellant to the police before the parade was conducted and also in court. He failed to describe and subsequently identify the 2nd Appellant. We find the circumstances of identification were not conducive for positive identification especially of strangers. The subsequent identification of one of the Appellants in the ID parades did not provide the corroboration required in law. The identification of the 2nd Appellant in court was equally worthless. What was required was other independent evidence implicating the Appellants with the

offence.

27. The counsel for the 1st Appellant challenged the conduct of the ID parades urging that they were not conducted as provided in the law. The issue was not one of the grounds of appeal raised in the petition. That notwithstanding we did examine the manner in which the parades were conducted by PW8. We are satisfied that the proper procedure was followed as stipulated under the Forces Standing Orders Cap 46 and that each of the Appellants were satisfied with the same. Nothing turns on this point.
28. We have examined the evidence adduced by the prosecution in order to determine whether there was other evidence implicating the Appellants with this offence. PW2 and 3 identified the Appellants. PW2 identified them as the ones who approached him at 4am at his place of work asking whether he knew a mechanic to assist them as their vehicle had developed problems. PW3 identified the two Appellants as the ones who hired his mechanic services to fix their vehicle for developing a cut out.
29. The vehicle, registration number KBK 518P, which the two Appellants had possession of was identified by PW1 as the one stolen from him. PW4 identified the vehicle as his which he bought before hiring PW1 to run a taxi business with it. PW4 also confirmed that it is the same car which M-Track disabled four hours after it was stolen, having tracked it at Mai Mahiu Area. That was the very same place that both Appellants had stopped the vehicle complaining it had developed cut out in its system.
30. We find that there was overwhelming independent evidence which establishes beyond any reasonable doubt that the Appellants were in possession of the complainant's stolen vehicle four hours after it was stolen from PW1. To buttress the case against them further was the Sale Agreement found with them which the 2nd Appellant had signed as a seller of the same stolen vehicle. There was sufficient proof not only that the two were in possession of the vehicle at the time of the arrest but also the fact they had a plan to sell it to third parties. Given these circumstantial evidence against the Appellants, what the Appellants required to do was to explain how they came by or into possession of the stolen vehicle. This evidential burden is placed upon them under section 111 (1) of the Evidence Act which provides that:

“ 111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

31. We have considered each of the Appellants defences. They each denied being in possession of the motor vehicle in question
32. The Court of Appeal case of ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990, the court of appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to

explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.

33.The court has a duty to make presumptions based on the evidence before it under section 119 of the Evidence Act which provides as follows:

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

34.The Appellants defence denying possession of the vehicle was rejected by the learned trial Magistrate. On our part, having re-analyzed and re-evaluated the entire evidence find that the Appellants were proved to have been found in possession of the vehicle and that the circumstances of their possession, only four hours after the robbery from PW1 is proof they were the ones who stole it from the complainant. Possession of the vehicle within a period of four hours after it was stolen was recent possession of vehicle. We are guided by the case cited herein below:

35.In the case of **ERICK OTIENO ARUM VS REPUBLIC, CA NO. 85 OF 2005** (unreported) the Court of Appeal dealing with the doctrine of recent possession stated:-

“In our view, before a Court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that, that property is positively the property of the Complainant, thirdly that the property was stolen from the Complainant, and lastly, that the property was recently stolen from Complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.....”

36.A vehicle cannot easily move from one person to another and four hours does fall within the period that can be regarded as recent possession of a stolen vehicle. We are entitled to presume, which we hereby do that the Appellants were in possession of the vehicle because they are the ones who robbed the complainant of the same. The Appellants explanation was rightly rejected by the learned trial magistrate.

37.The Appellants also argued that the learned trial magistrate erred in law and fact when he failed to appreciate that the evidence of the prosecution witnesses was contradictory. Singled out was PW1’s evidence regarding the injury he received during the incident and in particular the part of the body where he was injured or stabbed. We have examined the record and find that there is no contradiction. PW1 said that he was stabbed on his stomach and he then exhibited the healed stab wound in court and the scar was noted by the court. The P3 form was also produced as an exhibit number 7 by PW6, the doctor who examined the complainant. According to the doctor the complainant had a stab wound near the sternum and two stab wounds on his fingers on one hand. The sternum is described in the Encarta Dictionary as the breastbone located at the top of the abdomen. In our view the fact the complainant said he was injured in the abdomen and fact the doctor described the same area as sternum is not a contradiction in any way, but a variation of terminology. That does not create any doubt in our minds regarding whether the complainant was injured during the incident. Nothing turns on this point.

38.The 1st Appellant was convicted of Making a Document without authority. The document was an identity card, P. Exh. 10b. which bore the portrait of the 1st Appellant but names of Stephen Muli

Samuel. From the record, PW5 is the one who conducted a search on the 1st and 2nd Appellants at Mai Mahiu police station after their arrest and recovered the following items respectively in their possession; National ID card No. 20959423 in the names of Valentine Ingosi Shianzira (exhibit 14), National ID card No. 14441049 in the name of Gilbert Esuava Chadamba (exhibit 10(a)), National ID card No. 24788273 in the name of Stephen Muli Samuel (exhibit 10(b)), Photograph of 1st Appellant, (exhibit 12), Driving licence in the name of Geoffrey Douglas Ndegwa Thuo (exhibit 13), agreement of motor vehicle sale dated 3rd August 2010 (exhibit 11).

39. We have noted that among the documents recovered from the 1st Appellant were two identity cards bearing the photographs of the 1st Appellant but different names; Gilbert Esuava Chadamba and Stephen Muli Samuel. PW9, from the Registrar of Persons produced a Report which established that the identity card bearing the names Stephen Muli Samuel did not belong to the 1st Appellant, but the one bearing the names Gilbert Esuava Chadamba was his.

40. The 1st Appellant was charged under section 357 (a) of the Penal Code which stipulates as follows:

“357. Any person who, with intent to defraud or to deceive -

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or

(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person,

is guilty of a felony and is liable to imprisonment for seven years.”

41. It was the 1st Appellant who was found in possession of the ID card bearing his portrait but in different names found not to belong to him by the Registrar of Persons. It is clear that the intention of the document was to deceive. The offence was clearly proved as against the 1st Appellant and the learned trial Magistrate was right in his decision.

42. We have come to the conclusion that the Appellants' appeals have no merit and accordingly we dismiss them in their entirety. We confirm the convictions and uphold the sentences imposed against them.

DATED AT NAIROBI, THIS 15TH DAY OF MAY, 2015.

LESIT, J.

JUDGE

L. KIMARU,

JUDGE