



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 508 & 509 OF 2009**

*(An Appeal arising out of the conviction and sentence of S. MUKETI - SPM delivered on 4<sup>th</sup> November 2009 in Nairobi CMC. CR. Case No.1073 of 2007)*

**BERNARD GAKURU MUBURIA.....1<sup>ST</sup> APPELLANT**

**EPHANTUS MWANGI WANDIA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Bernard Gakuru Muburia (1<sup>st</sup> Appellant) and Ephantus Mwangi Wandia (2<sup>nd</sup> Appellant) were charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 24<sup>th</sup> June 2007 at 1.30 a.m. at Upper Hill area Nairobi, the Appellants jointly robbed David Kabala Khangati of motor vehicle Registration No.KAX 278B Toyota Corolla valued at Kshs.600,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said David Kabala Khangati. In the alternative, the Appellants were charged with the offence of **Handling Stolen Goods** contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the offence were that on 24<sup>th</sup> June 2007 at 6.30 a.m. in Nakuru, otherwise than in the course of stealing, dishonestly retained motor vehicle Registration No.KAX 278B Toyota Corolla knowing or having reason to believe it to be a stolen motor vehicle. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were convicted of the main charge. They were sentenced to death as is mandatorily provided by the law. The Appellants were aggrieved by their conviction and sentence. Each filed a separate appeal against the said conviction and sentence.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging the decision of the trial court to convict them. They were aggrieved that they had been convicted on the basis of the evidence of identification which was made in circumstances that did not favour positive identification. They faulted the trial magistrate for relying on the doctrine of recent possession to convict them of the charge yet the evidence adduced by the prosecution had not established their guilt to the required standard of proof. They were aggrieved that the trial magistrate had failed to consider the totality of the evidence adduced which in their view was a litany of contradictory and incredible evidence. They faulted the trial magistrate for failing to consider that the identification parades which allegedly

confirmed their identification by the identifying witnesses were not conducted in accordance with the law. The Appellants were aggrieved that the trial magistrate had failed to take into consideration their respective defences which in their view exonerated them from the crime. In the circumstances therefore, the Appellants urged the court to allow their appeals, quash their convictions, acquit them and set aside the sentences that were imposed on them.

During the hearing of the appeal, the two separate appeals were consolidated and heard together as one. The Appellants presented to the courts written submissions in support of their respective appeals. They further made oral submissions urging the court to allow their appeals. In their submissions, the Appellants urged the court to consider the fact that the prosecution had not adduced sufficient evidence to connect them to the offence that they were charged with. In particular, they submitted that the charge that was brought against them was defective as it was not established that they had been found with dangerous or offence weapons. They discounted the prosecution reliance on the application of the doctrine of recent possession because they were emphatic that they had not been arrested in possession of the motor vehicle that was the subject of the criminal case. Mr. Karuri for the State opposed the appeals. He submitted that the victim of the robbery had properly identified the Appellants in the course of the robbery and further that the Appellants were armed with a gun at the time of the robbery. He explained that after the robbery, the victim of the robbery reported the incident to the police. The motor vehicle was fitted with a tracking device. The police were able to track the motor vehicle at Nakuru. The motor vehicle was recovered less than six (6) hours after the same had been robbed from the complainant. The Appellants were arrested inside the motor vehicle. He submitted that after their arrest, the Appellants were positively identified by the victim of the robbery. In his view, the evidence adduced by the prosecution witnesses was so overwhelming that the trial court had no option but to convict the Appellants. He urged the court to disallow the appeals and confirm the convictions and sentence.

Before giving reasons for our decisions, it is imperative that we give the brief facts of this case. PW1 David Kabala Khangati (the complainant) was employed as a driver by a Taxi Hiring Services Company known as Altex. The company operates a 24 hour taxi services. On the night of 24<sup>th</sup> June 2007, the complainant was driving motor vehicle Registration No. KAX 278B Toyota Corolla Saloon. The motor vehicle was white in colour. The motor vehicle was at the material time owned by PW7 Lilian Wangare. She had hired out the motor vehicle to Altex for the purposes of the said company offering the same for taxi hire services. PW7 had fitted the motor vehicle with a tracking device. According to the complainant, at about 1.30 a.m., he stopped at a restaurant called Kaka which is situated along Racecourse Road. As he was parking the motor vehicle, two men approached him and requested him to ferry them to Upper Hill area of Nairobi. The fare was agreed at Kshs.250/-. The two boarded the motor vehicle. At Upper Hill, on Ragati Road opposite NHIF, the men hijacked the motor vehicle. According to the complainant, one of the men was armed with a gun. They used the gun to subdue him. They then drove him towards Roysambu area where he was abandoned off the road after he had been tied up using a seatbelt which the men had cut from the motor vehicle.

During the entire ordeal, the complainant testified that he was able to identify the men as the Appellants because he interacted with them at close quarters. After being abandoned, the complainant managed to free himself and walk towards the Kamiti Corner roadblock. The roadblock was at the time being manned by PW5 PC Patrick Munyu with one PC Korwa. PW5 testified that at about 2.30 a.m., the complainant reported to them that he had been robbed of his motor vehicle by two men who had hired his motor vehicle. PW5 informed the Duty Officer at Kiamumbi Police Station. The complainant was taken to the said police station. The report of robbery of the motor vehicle was circulated to all police stations. PW6 Arnold Mung'azo, the Manager of Altex was also informed. He told the police that the motor vehicle had been fitted with a tracking device.

PW3 Paul Kipng'eno Bey, a crew commander of Track It, a tracking company was notified of the theft. He activated the tracking device. He was able to track the stolen motor vehicle to Nakuru. He commenced the journey to Nakuru on the same night. At about 5.45 a.m., he saw the motor vehicle along Kaptembwa area in Nakuru. He notified the police. He followed the motor vehicle until a road known as Jua Lako. He then saw the two occupants of the motor vehicle get out of the motor vehicle and run towards a maize plantation. The two men were pursued by members of the public who were shouting "*thief! thief!*".

Among the members of the public who were at the scene was PW2 Joseph Onhao. He testified that at about 6.00 a.m., on the material day, as he was walking along Jua Lako Road towards his place of work, he saw a motor vehicle being driven towards him. The motor vehicle stopped about five (5) metres from where he was. The motor vehicle was Registration No.KAX 278B. He saw two men get out of the motor vehicle. One of the men appeared as if he had a gun. He heard someone shout “Wezi!”. The two men ran towards a maize plantation. They were however apprehended by members of the public about 200 and 500 metres respectively from where the motor vehicle had stopped. PW2 was emphatic that it was the two Appellants who were the men who got out of the motor vehicle and who, after a short while, were apprehended by members of the public and handed over to the police. PW2 recalled that despite the effort by the police to search for the gun in the maize plantation, the same was not recovered. What was recovered was a black jacket which contained the identity card of the 1<sup>st</sup> Appellant.

After their arrest, the Appellants were taken to Nakuru Police Station and later transferred to Nairobi. On 29<sup>th</sup> June 2007 a police identification parade was conducted by CIP Chach Okwach at Kilimani Police Station. The 1<sup>st</sup> Appellant was identified by the complainant. On the same day, another identification parade was conducted by PW11 IP Steven Gichiri where the complainant identified the 2<sup>nd</sup> Appellant. In both instances, the Appellants complained that the complainant had had access to their identification documents which had their photographs and therefore enabled him to identify them in identification parade. It was conceded by the two police officers who conducted the identification parade that the complainant had not given the physical description of the men who robbed him of the motor vehicle before the identification parade was conducted. PW10 PC Edward Muhia, a Scenes of Crime officer, took the photographs of the motor vehicle and the exhibits obtained during the recovery of the motor vehicle. He produced the said photographs in evidence. The case was investigated by among other officers, PW12 PC Samuel Ochieng, who after concluding the investigations reached the conclusion that there was sufficient evidence to charge the Appellants for the offence for which they were convicted.

When they were put on their defence, the Appellants gave alibi defence. They testified that they were arrested when they were going on with their normal business in Nakuru. The 1<sup>st</sup> Appellant testified that he was a photographer by profession who conducted his business at Shabab Estate in Nakuru. On the material day of 24<sup>th</sup> June 2007, while he had taken shelter in a kiosk near the bus stage, he saw a group of people approach him after which they arrested him on the allegation that he had been involved in theft of a motor vehicle. He denied that he was involved in theft of the motor vehicle. In essence, the 1<sup>st</sup> Appellant was saying that he was a victim of mistaken identity. On his part, the 2<sup>nd</sup> Appellant also testified that he was a farm produce trader. He undertook his business at the material time at Kaptembwa Market in Nakuru. He told the court that on the material day, he had a quarrel with one his customers near a place called Jua Lako in Nakuru. The quarrel degenerated into a fight. The customer charged on him with a knife. To save his life, he started running away from the scene. The customer shouted that he was a thief. He was apprehended by members of the public and later handed over to the police. He denied the allegation that he was involved in the theft of the motor vehicle. In essence, both Appellants were stating in their respective defences that they were victims of mistaken identity.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and the defence in order to arrive at its own independent determination whether or not to uphold the conviction of the Appellants. In doing so, this court must keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard (**see Njoroge –Vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence which established the guilt of the Appellants to the required standard of proof beyond any reasonable doubt.

We have re-evaluated the evidence adduced before the trial court. We have also considered the grounds of appeal put forward by the Appellants in support of their respective appeals. We have also taken into consideration the submission made before us. The prosecution relied on essentially two pieces of evidence to secure the conviction of the Appellants. The first piece of evidence was that of identification. The complainant in the case testified that he was approached by two men who hired him to take them to Upper Hill area of Nairobi. The complainant testified that he had close interaction with the two men

during the negotiation of the fare before the two men boarded the motor vehicle. He testified that along the way, the two men hijacked the motor vehicle and later abandoned him in Roysambu area of Nairobi. From his testimony, although the complainant claimed that he had identified the Appellants during the carjacking ordeal, no witness testified as to the said complainant giving the physical description of his assailants. The police officers who conducted the identification parade did not have the benefit of the complainant having, prior to the identification parade, given the physical description of his assailants. The complainant did not give the physical description of the persons who robbed him in his testimony. This court is unable to reach a finding, with confidence, that indeed the complainant positively identified the Appellants as his assailants during the robbery incident.

The evidence of the complainant regarding identification falls in the category of evidence of identification which should be treated with caution as advised in the case of **Maitanyi –Vs- Republic [1986] KLR 198** at page 200. In this case however, the prosecution adduced further evidence. This is the evidence of the application of the doctrine of recent possession. The prosecution was able to establish to the required standard of proof beyond any reasonable doubt that indeed the Appellants were found in possession of the stolen motor vehicle approximately four (4) hours after the same had been robbed from the complainant. The evidence of PW2 Joseph Onhao and PW3 Paul Kipngeno Bey was particularly damning. PW3 was at the material time an employee of a tracking company. The stolen motor vehicle had been fitted with a tracking device. After the report of the robbery, the tracking device in the motor vehicle was activated by PW3. The motor vehicle was robbed from the complainant at about 1.30 a.m. The motor vehicle was tracked to Nakuru at about 5.30 a.m. By that time, PW3 had travelled to Nakuru to trace the motor vehicle.

PW3 saw the Appellants in the motor vehicle. When the Appellants realized they were being followed, they abandoned the motor vehicle and attempted to run away. PW2 Joseph Onhao, was at the material time about five (5) metres from the vehicle when he saw the Appellants park the vehicle on the side of the road before attempting to run away from the vehicle. The Appellants were apprehended by members of the public less than 500 metres from the motor vehicle. This was after alarm had been raised by PW3. From the testimony of PW2, it was clear that he did not lose sight of the Appellants from the time they left the motor vehicle to the time they were apprehended by members of the public and handed over to the police. The motor vehicle was positively identified by the complainant and the owner to be the one that was robbed from the complainant in Nairobi earlier that day. We were not persuaded by the evidence adduced by the Appellants in their defence that they were victims of mistaken identity. The prosecution was able to adduce evidence which connected them to the robbed motor vehicle four hours after the same had been robbed from the complainant. The Appellants did not give an explanation how they came to be found in a motor vehicle which had been robbed from the complainant a few hours after the robbery. The trial court, correctly in our view, applied the doctrine of recent possession to convict the Appellants. We too hold that the circumstances under which the Appellants were found in possession of the motor vehicle clearly proved that they were the ones who had robbed the complainant of the motor vehicle.

As regard whether the prosecution established the ingredients of the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**, we hold that the charge was established to the required standard of proof. It is not necessary as claimed by the Appellants that the prosecution was required to state and prove the charge that the Appellants had dangerous or offensive weapons. It was sufficient for the prosecution to prove that the Appellants, being more than one, used threat of physical violence to subdue and then rob the complainant. In the premises therefore, we hold that the respective appeals filed by the Appellants lack merit and are hereby dismissed.

The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JANUARY 2014.**

**L. KIMARU**

**JUDGE**

**P. NYAMWEYA**

**JUDGE**