IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 71 OF 2013

ELIJAH OTIENO OGALLO……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

This is an appeal from the judgment of Hon. Sitati, Ag. Senior Resident Magistrate, Narok, which was delivered on 3/5/2013 in Senior Resident Magistrate Criminal Case No.538 of 2012. Elijah Otieno Ogallo, the appellant herein, was charged with the offence of attempted robbery with violence contrary to **Section 296(2)** of the **Penal Code**. After the trial the appellant was convicted under **Section 297(2)** of the **Penal Code** and sentenced to suffer death. Aggrieved by both the conviction and sentence, the appellant preferred this appeal based on the following grounds:-

1. **That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant for the offence of attempted robbery with violence (contrary to Section 297(2) of the Penal Code) notwithstanding that the charge against him was in relation to the offence of robbery with violence (contrary to Section 296(2) of the Penal Code) without the charge sheet being amended;**

2. **That the learned trial magistrate erred in law and in fact in failing to appreciate that the evidence led by the respondent did not support the particulars of the charge against the appellant particularly, that the appellant was armed with an AK 47 Rifle and a pistol;**

3. **That the learned trial magistrate erred in law and in fact in finding that there was firm and cogent evidence against the appellant whereas the entire case against the appellant rested entirely on circumstantial evidence which at any rate did not establish that:-**
    a. **The inculpatory facts were incompatible with the innocence of the appellant.**
    b. **The motor vehicle purportedly hired to the appellant was at the material time in his possession/or that another hypothesis could be inferred as to actual possession of the aforementioned motor vehicle;**

4. **That the learned trial magistrate erred in law and in fact in finding that the respondent had discharged its burden of proof as required by law whilst the respondent's case was solely predicated on hearsay evidence of a purported hirer of a motor vehicle used in the commission of the offence whilst the hirer was inexplicably not called as a witness to confirm having hired his motor vehicle;**

5. **That the learned trial magistrate fell into error in relying on an expert's report to inculpate the appellant notwithstanding that it was neither produced by its author nor a qualified expert nor were there reasons advanced by its author/or expert upon which the opinion was based thus denying the appellant an opportunity to challenge the report;**

6. **That the learned trial magistrate misdirected himself by shifting the burden of proof on the appellant to demonstrate his innocence/or prove his whereabouts on the material date/or produce exculpatory evidence despite the burden being on the respondent to prove its case beyond reasonable doubt;**

7. **That the learned trial magistrate meted out a sentence that was exceedingly harsh and unconscionable in view of the offence and of the fact that there were no aggravating circumstances to justify meting out of capital punishment.**

He prays that the appeal be allowed, conviction quashed or in the alternative, the conviction be set aside, altered or revised by this court and the court to exercise its discretion under **Section 354(3)** of the **Criminal Procedure Code**. The appeal was opposed.

The brief facts of the case before the trial court were as follows:-

PW1, John Ndahi Kamau, was driving motor vehicle KBN 686B Mercedes Benz 3340 Trailer ferrying sugar from Mumias towards Nairobi. He was with the turnboy, Alfred Letete Onyango (PW2). They used Narok route. On reaching Ntulele Hill at about 8.30 p.m. two vehicles passed them. The occupants in the second vehicle ordered him to park besides the road and aimed a gun at them through the window. He steered his vehicle towards the said vehicle, and forced the vehicle off the road and then drove to Ntulele Police Station where they made a report of the incident. Accompanied by the police they went to meet and escort another of their vehicles which was still behind. PW1 said that two days later, they went to the scene with police and recovered a wind breaker but did not find any vehicle at the scene. PW1 and PW2 denied seeing any of the people in the saloon car.

It is PW3, Chief Inspector, Paul Ndungu Karanja who received the report from PW1 and PW2 about the attempted robbery. He visited the scene the next day and found a wind breaker with Registration No. KBA 668V and a cover of the left light. He commenced investigations on the ownership of the said motor vehicle and he got a certificate from KRA to the effect that the owner was Joel Agawo and with help of DCIO Kilimani Police Station they managed to get the owner.

PC Diba Chacho (PW4) was with PW3 when they visited the scene and confirmed the recovery made. He is the one who contacted Joel Agawo, he accepted owning motor vehicle KBA 668V and was arrested. Agawo claimed to have hired out his vehicle to Vincent Ouma and Ogallo Otieno and both people had signed an agreement – PEx.5. He helped arrest the appellant. He later handed over the matter to PEx.5.

PW6, PC Collins Otieno Okoth who was also an Investigation Officer found the owner of the vehicle arrested and claimed that the drivers of his vehicle Elijah Ogallo and Vincent were introducewd to him by one Yahya Odede. He was one of those who arrested the appellant after he was spotted in Kibera by Joel. Efforts to trace Vincent were futile. The appellant's specimen signature was taken for comparison by a document examiner. PW6 produced the documents in evidence. He produced the examiner's report under **Section 77(1)** of the **Evidence Act.**

When called upon to enter his defence, the appellant denied having committed any offence. He recalled having been arrested on 8/5/2012 for allegedly violently robbing one Osaman Adan of motor vehicle KBH 444Q, which was loaded with sugar. The case was withdrawn for lack of evidence and he has no knowledge of the present case. He told the court that the purported hire agreement is a forgery.

This being the first appellate court, it behoves this court to analyse and consider the evidence and the law afresh and arrive at its own determinations.

PW1 and PW2 did not see the occupants of the vehicle that tried to block their vehicle on the night of 1/4/2010. They did not see the Registration number of the vehicle. This case therefore wholly turns on circumstantial evidence.

The appellant relied on the case of **Rep v Lamaiyan Koileken, CRC 11/2007**, where J Maraga considered several decisions where the courts considered the threshold to be met by the prosecution in cases wholly dependent upon circumstantial evidence. The most recent case considered is that of **Omar Chimera v Republic** CRA 56/1998, where the Court of Appeal stated thus:-

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> **The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,**
>
> i. **These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,**
> ii. **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."**

We shall consider the evidence adduced in this case in light of the above cited authorities to establish whether it meets the said threshold.

After carrying out their investigations, the police found a wind breaker at the scene of the attempted robbery. It bore the Registration number of motor vehicle KBA 668V. Whereas the incident occurred at about 8.30 p.m. on 1/4/2012, the recovery of the wind breaker was not recovered till about 4.00 p.m. of the next day. This being a busy road there is no doubt in our minds that the scene had been disturbed because many vehicles use that road. The question that lingers in our minds is whether it can be said with certainty that this wind breaker belonged to the vehicle in which the alleged robbers were travelling on the said night.

The police established that the owner of the subject vehicle was Agawo Joel as evidenced by the certificate from KRA. The certificate is dated 3/5/2012. The log book of the vehicle was also produced in evidence as PEx.8. It bore the name of Mary Mwangi Gitau and was dated 27/4/09. Even if the ownership of the vehicle had changed as of 3/5/2012 when the records (Ex.4) were extracted, yet Mr. Murimi noted that the records indicate that the log book is No. S4096370 while the log book, Ex.8 shows that it is No. R 03994790. All the other particulars are, however, similar. The discrepancy in the numbers of the log book was not explained and we ask the question that counsel asked, might there be two vehicles with same registration number and if that is the case, which of the two was involved in the alleged attempted robbery if at all?

It is the alleged Ogawo Joel who told the police that he had hired out his vehicle to the appellant together with one Vincent Ouma who signed an agreement which was produced as PEx.3a & b. Ex.3b was taken to the Document Examiner for verification while one remained in the court. Whereas they are supposed to be the same document because one is a copy of the other, there are glaring variations in the two documents. In the document marked as Ex.3a, the vehicle is described as grey. It is signed by 4 people and phones numbers of 3 people are provided. However, in Ex.3b, the vehicle was described as grey but that word is cancelled to replace it with Silver. It is then signed by 4 people but only two telephone numbers are indicated. Another material difference is that in Ex.3a, there are dates written after the signatures. In Ex.3b, the dates only appear after the signatures against the 3rd and 4th signatures. The documents are materially different. The question is whether one is really a copy of the other? There was no attempt by the prosecution to reconcile the two documents and this court is left to wonder if at all any of them is genuine.

The alleged owner of the vehicle who indentified the appellant to the police never testified. He was

arrested as a suspect and released. The police did not explain why they could not have him testify. His evidence was crucial to this case to explain under what circumstances he hired out his vehicle to the appellant and in what state it was in when it was returned to the owner. Although the said Joel had made a report to the Kilimani Police Station about damage to his vehicle there was no such evidence tendered to the court. It was therefore never established whether the wind breaker belonged to Joel's vehicle or that his vehicle was ever damaged.

The burden of proof always remains with the prosecution to prove its case beyond any doubt. In this case, failure to call Agawo Joel and Ibrahim Yahya as witnesses left gaps in the prosecution case as to the circumstances under which vehicle was hired out, if at all. And why did they not testify? Did they go underground? If so, why? The said Joel was a suspect when he pointed out the appellant to the police and could only be cleared of the involvement in crime if he appeared before this court to clear his name and subjected to cross examination. He remains a suspect.

In the purported hire agreement, the appellant's identification card number is recorded as 25145170. Unlike the other people to the agreement, the appellant's identification number was not exhibited nor was it established that that is his identification number. In the same document, a mobile phone number was written against his name. The police never established whether the phone number is the appellant's or not.

We do agree with the appellant's submissions that the court misdirected itself when it allowed the police to produce the document examiner's report by PW5. Before the production of the report the prosecutor made an application as follows:-

> **"We only have 2 document examiners serving the entire Country. They are very scarce and difficult to secure and pray that the document examiner's report only be tendered as prayed by PC Okoth under Section 77(1) of the Evidence Act."**

The application was granted by the court.

Section 77(1) of the **Evidence Act** provides thus:-

> **"77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence;**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it;**
>
> **(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."**

The onus is on the prosecution to establish that they have tried to secure the attendance of the expert to no avail. No effort was made by the prosecution to secure the attendance of the document examiner. In our view, invoking **Section 77** of the **Evidence Act** was premature and irregular.

We also find that the court misdirected itself in allowing the prosecution to cross examine the appellant on his statement under inquiry because it was not a confession envisaged under **Section 25A** of the **Evidence Act**. The section generally provides that confessions are inadmissible but there are exceptional circumstances under which they can be taken. The **Section** reads:-

> **25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is**

made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

The statement under inquiry was not a confession and cross examination on it was irregular.

Whether the charge sheet was defective:

The charge indicated that the appellant was charged with attempted robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge and evidence in support thereof clearly show that the offence committed was one of attempted robbery with violence and the charge should have been preferred under **Section 297(2)** of the **Penal Code**. In my view, that was just a typographical error that could not render the charge defective. The case of **Raymond Kiplangat Kiptoo v Rep CRA 10/2001** is distinguishable from this case because in that case, the facts did not disclose an offence. Apart from stating that there was a breakage in a shop it never stated that there was a theft. In **John Maric Kulet v Rep CRA 404/00**, the charge stated that the appellant failed to stop after an accident, while the particulars stated that he failed to report an accident. These two authorities are not relevant. The trial court considered the defect in the charge.

Having considered all the evidence adduced before the trial court and the grounds of appeal, We are satisfied beyond any doubt that the circumstantial evidence did not meet the threshold required to prove the charge there are serious doubts in the prosecution case that should have been resolved in favour of the appellant. In the end, we allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 18th day of February 2014.

R.P.V. WENDOH

JUDGE

L. WAITHAKA

JUDGE

PRESENT:

Mr. Murimi for the appellant

Mr. Chirchir for the State

Kennedy – Court Assistant

Appellant