



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 309 OF 2012

PETER MAINA JOHN APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the judgment of [P. ACHIENG, AG. PM] dated 4.12.12 in Kakamega Chief Magistrate's Court Criminal Case No. 962 of 2012)

J U D G M E N T

The appellant was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal code**. The particulars of the offence were that the appellant *on the 27.4.2012 at Cherovani forest in Kakamega East district within Western Province, jointly with others not before court while armed with offensive weapons namely crude weapons robbed **HILLARY OCHIENG NYAMUNGA** of Motor vehicle registration number KBR 671 E silver in colour make Toyota Succeed valued at KShs.800,000/=, the property of **FRANCIS NZAIYWA MIHESO** and immediately after the time of such robbery murdered the said **HILLARY OCHIENG NAYMUNGA**.*

The appellant was convicted and sentenced to suffer death. the grounds of appeal are that the identification parade was not water-tight, there was material discrepancies in the trial process, Article 50 of the Constitution was contravened, the conviction is against the weight of the evidence and no exhibits were recovered which could connect him to the alleged offence. The appellant filed written submissions and during the hearing of appeal entirely relied on those submissions. The main issues raised in the submissions are that there were contradictory statements in the prosecution evidence. The date of the identification parade is not clear. The evidence of the doctor was that he conducted postmortem on three bodies and the identification documents recovered in the car that was robbed were not of the persons who died out of the shoot-out. Nothing was recovered from him and that he was only brought into the case on allegations that the injuries he sustained were as a result of the shoot-out. The police officers who were involved in the shoot-out alleged to have seen somebody running away from the scene but they did not give a proper description as to that person was the appellant.

Mr. Oroni, State Counsel, opposed the appeal and entirely relied on the record of appeal. Counsel submitted that the appellant was properly identified and supports the convictions.

The record of the trial court shows that eight witnesses testified for the prosecution. **FRANCIS NZAIYWA MIHESO**, was PW1 and was the complainant. He testified that he was the owner of motor vehicle registration number KBR 671 E TOYOTA SUCCEED. The vehicle was operating as a taxi and the driver was the late **HILLARY OCHIENG**. On the 27.4.2012 at about 8.30 a.m. he gave the vehicle to the driver. At about 10.00 a.m. one **HARUN MUNG'AU (PW3)** who is a tout called to ask him whether he had the vehicle. PW3 informed him that the vehicle was being driven badly and it was at

Kambiri area. PW1 called his driver but somebody picked the phone and informed him that it was being charged. He called the number again and somebody told him that there were in Rondo area and they were coming back to town. He waited for the driver but he never came back.

At about 7.30 p.m. he went to the area where the taxis normally park in town but did not see his driver. PW1 decided to report the matter at the Kakamega police station. Shortly he was told that the vehicle had been spotted at a place known as TAILI MBILI on the way to Eldoret. He was told to check at Eldoret. PW1 went to Eldoret the following day and he was informed that two people had been shot dead in the vehicle and one person had run away. He went and saw the bodies but none of them was the driver Hilary. They decided to look for his driver and found him in the forest having been killed. The vehicle was taken to Baharini police post and later transferred to Kakamega police station. It is his further evidence that PW3 informed him that when he checked the vehicle before calling him he saw three people inside but did not see the driver.

PW2, VICTOR OMONDI OGOMBE, is a taxi driver in Kakamega town. On 27.4.2012 he saw the late Hilary at the normal place near Equity stage with the vehicle registration number KBR 671 E. He saw the deceased with three people in the vehicle. After one hour PW1 called him seeking to know whether he had seen Hilary as he had been informed that the vehicle was being badly driven. PW2 called Hilary four times but there was no response. At about 7.00 p.m. he met PW1 at Equity stage and they got information that the vehicle was being driven towards Eldoret. They went to Hilary's house but he was not there. The vehicle was later recovered. They looked for Hilary and found him on the 1.5.2012 in Kakamega forest. His hands had been tied with a masking tape as well as the mouth had been covered. He had been strangled using a manila rope. PW2 identified him from the clothes he was wearing. PW1 was not able to identify the three people who he had seen with Hilary.

HARUN AMUGAMWA BUNYIWA, was **PW3**. On the 27.4.2012 at about 11.00 a.m. he was at Kambiri area. He saw the motor vehicle registration number KBR 671 E and he knew the owner of the vehicle as PW1. The vehicle stopped at a petrol station. PW3 peeped inside vehicle and saw three people. He asked them whether the owner of the vehicle was there but they did not respond. The driver then told him that the owner had remained behind. The vehicle then left at a high speed and hit the front bumper. He called PW1 and informed him about the incident. The following day PW1 informed him that the vehicle had been found in Eldoret with two occupants who had been killed and one occupant who had sustained gun wounds was hospitalized in Eldoret. PW3 later on the 13.5.2012 attended an identification parade and identified the appellant as the person who was seated on the co-driver's seat on the 27.4.2012. According to PW3 he identified the appellant through his facial appearance.

PW4, was **CPL JUSTINE MANGENI**. He was attached to the Flying Squad Unit in Eldoret. On the 27.4.2012 at about 8.30 p.m. he received information that the motor vehicle registration number KBR 671 E had been stolen in Kakamega and was heading towards Turbo. PW4 notified his colleagues and they decided to go towards Baharini area. At about 9.30 p.m. they reached Baharini area and he received a phone call informing him that the vehicle had reached Baharini area. Shortly they saw the vehicle passing in a high speed. They chased the vehicle but when they reached near it he heard a gunshot. The driver of the vehicle slowed down and jumped outside. He was shot dead. The vehicle continued moving and another person tried to control it. Another person alighted from the back seat and started running and shot dead. They checked the vehicle and saw blood inside and it seemed a third person had disappeared. They recovered several items in the vehicle including identity cards of other people as well as a photocopy of the ID card of Hilary, the deceased driver. They handed over the scene to police officers of Baharini police station.

PW4, further testified that after about one hour he got information indicating that a person had been taken to Moi Teaching and Referral Hospital with gunshot wounds. He went there and saw him. The person had used the name of Ali Hussein in his file. A police guard was sent to guard him. PW4 recognized the person at the hospital as the one he had seen leaving the vehicle from the co-driver's seat and had been shot. PW4 recovered a wallet from the appellant and he saw a waiting card for an Identity card with the names Peter Maina John and not Ali Hussein. It is his evidence that the incident happened at night. PW4 went to the Moi Referral Hospital at about 12.45 a.m.

IP NICHOLAS KASYULA was PW5. He was based at the Kakamega Police station. He conducted an identification parade on the 13.5.2012 at about 2.20 p.m. PW3 managed to identify the appellant. **PW6 DR. DICKSON MUCHANA MWALUDINDI** performed a post mortem on the body of **HILLARY OCHIENG** at Kakamega Provincial General Hospital on 3.5.2012. The deceased's eyes had been removed and part of the body had been eaten by animals. The neck was twisted and limbs were fractured. The Doctor formed the opinion that the deceased had not committed suicide and the cause of death was asphyxia following external strangulation. PW6 also produced two post mortem reports on behalf of Dr. Macharia who had conducted post mortems at Moi Teaching and Referral Hospital. The first report was for **ROBERT OBADIA** who died of gunshot wounds and the second report was that of **DAVIS MUYANZI** who also died of gunshot wounds. The first report was conducted on the 3.5.2012 while the second report was conducted on the 10.5.2012.

PW7, PC MICHAEL KIPRONO was based at the Kakamega police station and investigated the case. On the 27.4.2012 at about 9.00 p.m. he was at the station when he got the report of the stolen vehicle. He later got information that the vehicle had been recovered in Eldoret and two people had been shot dead. He also got information that the appellant had been admitted at Moi Referral hospital with gunshot wounds. The appellant was discharged on the 12.5.2012 and he was taken to Kakamega police station. PW7 took the Identity card of the appellant as well as an M-PESA registration form. When the body of Hilary was recovered, PW7 took scene of crime officers to the scene and photographs were taken. According to PW7 the appellant's real name is **PETER MAINA JOHN**. The appellant later confessed and the confession was recorded before **PW8 JOY WESONGA**, Resident Magistrate at Kakamega on 14.5.2012. The appellant was later charged with the offence.

PW8, JOY WESONGA, a Resident Magistrate at the Kakamega Law Courts, testified that the appellant recorded a statement before her on the 14.5.2012 at 8.00 a.m. The statement was voluntarily given.

The appellant was put on his defence and gave sworn testimony. He stated that his name is **MARTIN MWENDA KAMAU** and he works for BAYUSUF CLEARING and FORWARDING COMPANY in Mombasa. On 27.4.2012 he left the Malava border and got a lift from a fellow driver who was heading to Mombasa. His colleague was to sleep at Huruma Estate at Eldoret. They reached there at about 8.30 p.m. and he alighted from the vehicle. He crossed the road and soon heard a sound which he thought was a tyre burst. Shortly he heard the sound again and he found himself in hospital. He was told that he was taken to the hospital by people who found him on the road. Later he found police officers guarding him while hospitalized. He was discharged on the 11.5.2012 and was taken by the police officers to Kakamega police station. He was tortured in his private parts and made to sign a statement. When the parade was conducted he was in hospital clothes. He denied that his name is **PETER MAINA JOHN** or **ALI HUSSEIN**.

The prosecution evidence does establish that PW1 was the owner of motor vehicle registration number KBR 671 E. The motor vehicle was being used as a taxi and the late Hillary Ochieng was the driver. The vehicle was stolen from the driver who was killed and his body dumped at Kakamega forest. The main issue for determination is whether the appellant was one of the robbers. It is the prosecution evidence that the appellant was one of the robbers. According to **PW3, HARUM AMUGAMWA** he saw the vehicle at Kambiri area but when he checked inside he could not see the owner of the vehicle. The witness testified that he saw the appellant seated on the co-driver's seat. According to the evidence of PW4 he saw somebody coming out of the co-driver's door and he was shot. When they went to check on the vehicle they saw blood and noted that one of the robbers had escaped. It is his further evidence that the same night he was notified about somebody who had been taken to Moi Referral Hospital with gunshot wounds. He went there and identified the person as the appellant.

On his part the appellant testified that he was crossing the road at Huruma Estate in Eldoret and got injured only to find himself at Moi Referral hospital. The appellant denied that he is called **PETER MAINA JOHN** or **ALI HUSSEIN**. He denied committing the offence. From the prosecution evidence we do find that the appellant was admitted at Moi Referral hospital. The police went to the hospital and found that the name that had been used for the X-Ray and the hospital records were in the name of **ALI**

HUSSEIN or **HUSSEIN ALI** but the records were for the appellant. The appellant informed the court that his name is **MARTIN MWENDE KAMAU** but there is nothing that was produced to show that that is his name. We do find that the appellant is **PETER MAINA JOHN**. The evidence of PW4 is that he recovered a waiting card for an identity card from the appellant's wallet which had the names of **PETER MAINA JOHN**. We agree with that evidence and do find that the appellant went to Moi Referral hospital and used the name of Ali Hussein instead of his official name.

It is the evidence of PW3 that he saw the appellant in the motor vehicle that was robbed from the driver. The witness attended an identification parade conducted by PW5, IP Nicholas Kasyula and identified the appellant. The appellant contends that when the parade was conducted he was in hospital uniform. The appellant was discharged from hospital on 12.5.2012 and the parade was conducted the following day. It is not indicated anywhere that the appellant complained before the parade was done. During cross-examination PW5 denied that the appellant was in hospital clothes. Apart from the evidence of PW3 and PW5, there is the evidence of PW4 that he saw somebody coming out of the co-driver's door during the shoot-out. The incident occurred at night. PW4 noted that the person who had escaped had sustained gunshot wounds and the appellant was taken to hospital within a short time after the shout-out incident. From the prosecution evidence we are satisfied that the appellant was one of the robbers and he was injured during the shoot-out. In order to hide his identity the appellant used the name of Ali Hussein when he went to Moi Referral Hospital. Even without the evidence of PW8 relating to the confession, we do find that the appellant participated in the robbery. The prosecution case was proved beyond reasonable doubt. The identity documents of the two people who were shot dead were found in the motor vehicle.

In the end we do find that the prosecution proved its case beyond reasonable doubt. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 17th day of February 2014

SAID J. CHITEMBWE

GEORGE DULU

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