



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
[Coram: F.A. Ochieng & G.W. Ngenye-Macharia JJ.]

CRIMINAL APPEAL NO. 60 OF 2011

JAMES WAHOME NDEGWA ::: APPELLANTS

=VERSUS=

REPUBLIC ::::::::::::::;::: RESPONDENT

**{Being an appeal from the Judgment of Hon. G. A. M'masi, Senior Resident Magistrate dated
31st March, 2011 at Eldoret Chief Magistrate's Court in Criminal Case No. 4660 of 2010}**

JUDGMENTS

JAMES WAHOME NDEGWA, the Appellant herein, was convicted for the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code. For that offence, he was sentenced to suffer death as by law prescribed.

The Appellant was also convicted for the offence of Being in possession of a firearm without a Firearm Certificate Contrary to Section 4 (2) (a) as read with Section 4 (3) (a) of the Firearms Act. For that offence, he was discharged under Section 35 (1) of the Penal Code.

In his appeal, the appellant has submitted that there was no positive identification. The alleged identification was by way of the mode of dressing only. And even then, the Complainant just talked of a person who was wearing a jeans jacket, without specifying the colour of the said jacket.

Whilst admitting that he was wearing a jeans jacket at the time of arrest, the Appellant submitted that that manner of clothing was not distinctive.

Therefore, as the arrest was made in the absence of the Complainant, the Appellant's view was that the police should have conducted an Identification Parade.

Instead, the police brought the Complainant to the place where the Appellant was being held, and it is then that the Complainant identified him. That mode of identification was described by the Appellant as faulty.

In answer to the appeal, **Ms Ruto**, learned State Counsel, submitted that the conviction was sound.

The Respondent pointed out that apart from the jeans jacket by which the Appellant was identified, he was found in possession of the Complainant's mobile phone .

It is to be noted that the Appellant was arrested in a bus, which was traveling from Western Kenya to Nairobi. The arrest was made by P.W.3 (**P.C.VINCENT LANGAT**) and P.W.4 (**P.C. JACOB KORIR**). Those two officers were both attached to the General Service Unit (GSU), Burnt Forest Camp.

They both testified that a report was received regarding a vehicle which had been abandoned at Kitigia Centre. The report was that:

“ Some suspects of carjacking had abandoned a vehicle at Kitigia Centre. We were told one suspect had boarded a bus registration No. coming from Western.”

That was the testimony of P.W.4. However, P.W.3 provided the registration particulars of the “**Sun Bird**” bus, as being KAR 379 B.

When the bus arrived at the road block which P.W.3 and P.W.4 had mounted, the officers ordered all the passengers to disembark. The passengers complied, save for the Appellant, who remained asleep inside the bus.

And the Appellant was wearing a jeans jacket. As the officers had been told that one of the people involved in the hijacking incident was wearing a jeans jacket, they found the Appellant to be a suspect.

The victim of the car-jacking is **SAMADU NSUBUGA** (P.W.2). He testified that he had bought a Toyota Mack 2 in Mombasa. He then drove it from Mombasa, heading to Uganda. He got to Nakuru at about midnight, and spent a night there. Early the next morning, he set-off for Uganda. At Timboroa, P.W.2 stopped to buy some carrots along the roadside. Whilst doing the purchasing, he was approached by two (2) men, who asked him for a lift to go to Eldoret. P.W.2 agreed to give them a lift upon payment of Kshs 100/= for each of the two.

P.W.2 testified that the Appellant sat on the back seat, whilst his accomplice sat in the co-driver's seat. After P.W.2 had driven for a short distance, the two men demanded the vehicle he was driving. In the process, the Appellant hit P.W.2 on the head, using a pistol.

Shortly thereafter, the two men threw out P.W.2 from the vehicle. P.W.2 ran to the nearest police station, where he reported the incident.

This is what P.W.2 said:

“ I ran to the nearest police station. I reported. I heard police officers talking on radio-call, saying the suspect had escaped and one had been arrested.”

Later, officers from the Flying Squad, Eldoret arrived and picked up P.W.2. They drove with him upto the Burnt Forest G.S.U camp, where P.W.2 identified the Appellant.

In an ideal situation, the suspect ought to have been placed in an Identification parade. It is only then that the police officers could have been able to verify whether or not the person they had arrested was the same person who the Complainant had seen during the robbery.

In this case, the Appellant sat behind the Complainant during the short distance when they were in the vehicle. P.W.2 did not indicate that he took any particular note of the facial features or other physical features of the Appellant. Indeed, it appears that the Complainant only noted that the Appellant was wearing a jeans jacket.

The Complainant had made it clear that;

“ When I alighted to buy carrots, 2 people approached me. One had a shirt and a cap. He is the one who came in front.

The 2nd person had a cap and a jeans jacket. They asked for a lift to Eldoret. I was inside the vehicle. The one with a T-shirt and cap asked for a lift. I did not talk to the accused.”

Two things emerge from that evidence. First, the Appellant also had a cap. And, secondly, the Appellant did not talk to the Complainant.

Therefore, the more complete description which the Complainant would have been expected to give should have included the cap. And the Complainant could not even describe the Appellant's voice, as he did not hear him talk.

So, did the Complainant give the description of the Appellant to the police? P.C. Vincent Langat (P.W.3) ***“ Members of the public told us one suspect who entered the bus was wearing a blue jeans jacket”.***

Meanwhile, P.C. Jacob Korir (P.W.4) said:

“ On 20/8/2010 at 8.50 a.m., a report came that some suspects of carjacking had abandoned a vehicle at Kitigia Centre. We were told one suspect had boarded a bus ...”

Who told P.W.4 about the incident? He said that it was their in-charge.

As the officer-in-charge of the Burnt Forest G.S.U Camp did not testify, we do not know the particulars of the report he received. We also do not know the identity of the person who made the report to him. But we know that it was not the Complainant because **CPL SYMON OBUYA (P.W.7)**, who was the Investigating Officer said that the Complainant reported the incident at the Tarakwa Police Station.

In the event, it is not known who described the Appellant to the G.S.U officers who later arrested him, or how that person knew what the Appellant was wearing.

In any event, if the Appellant was wearing a cap as the Complainant had observed, the police should have been looking for a person with a jeans jacket and a cap. But the Appellant did not have a cap when he was arrested.

That therefore increased the probability that he was a victim of mistaken identity, if such identification was only pegged on the fact that he was wearing a jeans jacket.

On the other hand, he is said to have been arrested in possession of a mobile phone which had just been stolen from the Complainant. To our minds, even though the identification may have been far from being definitive and positive, if the Appellant was found in possession of the phone which had just been stolen from the Complainant, the doctrine of recent possession could come into play.

The Charge sheet identified the Complainant's phone as being a NOKIA 6620i. However, P.W.2 told the trial Court that his phone was a NOKIA 2060.

The police officers who arrested the Appellant recovered two (2) mobile phones, which were :

(a) NOKIA 1200; and

(b) NOKIA 6612 (1)

Those are the two phones which P.W. 3 and P.W.4 recovered from the Appellant. Thereafter, the Complainant identified the NOKIA 6620 (I) as his: that is what P.W.4 said when he was being examined -in-chief. Later, during cross-examination, P.W.4 said that the Complainant identified the NOKIA 6612(1) as-his.

Given the fact that the Complainant's phone was identified by him as a NOKIA 2060, that means that

none of the 2 phones which the police recovered from the Appellant could have belonged to the Complainant.

In any event, it is not even clear if the phone which the Complainant identified as his was a NOKIA 6612 (1) or a NOKIA 6620 (1).

The Complainant testified that his "Zain Sim Card" was still inside the phone which the police recovered from the Appellant.

On our part, we are unable to fathom how that could have been possible, whereas the police did not recover the NOKIA 2060, which the Complainant claimed ownership of. How the Complainant's Sim-Card got into either the NOKIA 6612 (1) or the NOKIA 6620(1), which the police officers recovered, was never explained by the prosecution.

In the light of the foregoing uncertainties, we deem it to be unsafe to uphold the Appellant's conviction. We therefore allow the appeal, quash the conviction and set aside the sentence. We order that the Appellant be set at liberty forthwith unless he was otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 27TH DAY OF MAY, 2014.

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FRED A. OCHIENG

JUDGE

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G.W. NGENYE-MACHARIA

JUDGE