



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL APPEAL NO. 269 OF 2011 CRIMINAL APPEAL NO. 388 OF 2010

(as consolidated with Criminal Appeal No. 389 of 2010

(as consolidated with Criminal Appeal No. 270 of 2011.)

JOSEPH MACHARIA MBURU.....1ST APPELLANT

JOSEPH MWANGI NGIGE.....2ND APPELLANT

Versus

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence by Hon. C. Oluoch (Mrs) S.R.M.

dated 13th October, 2011 at Kiambu CMCCR Case No. 1606 of 2010.]

JUDGEMENT

This appeal is a consolidation of appeals No. 269/2011 and 270/2011. It proceeds under appeal No. 269 of 2011.

The appellants, **Joseph Macharia Mburu** and **Joseph Mwangi Ngige** were 1st and 2nd accused respectively in criminal case No. 1606 of 2010 at the Chief Magistrate's court in Kiambu. They were charged with robbery with violence contrary to S. 296(2) of the Penal Code. The particulars of the offence are that on the 18th day of October, 2010 at around 7.30 p.m. at King'othua Kajiko Marram Road in Kiambu District within Central Province, jointly with others not before court and being armed with dangerous or offensive weapon namely pistol robbed **Samuel Njoroge Thuku** motor vehicle Reg. No. KZU 729 Nissan Sunny B12 white in colour valued at Kshs.170,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said **Samuel Njoroge Thuku**.

The prosecution called seven witnesses whereas the defence called two. The prosecution case is that on 18th October, 2010 a man came to PW1, the complainant and said that he wanted to be taken to a church. PW1 was a taxi driver at Banana and employed by Joseph Kahiga who drove Motor vehicle Reg. No. KZU 729 B12, white in colour. The charges/fare was agreed at Kshs.300.00 and they proceeded to AIC King'othua. He asked to be dropped at the gate but there were two people there and the complainant therefore declined to stop at that point. He feared because they were coming towards him. The appellant sat on the co-driver's seat. He thereupon removed something and put it on PW1's waist. He could not confirm if it was a pistol but he ordered him to stop the car and he complied. The two people at the gate came into the vehicle. One of them put a pistol on his face and ordered him to jump to the back seat. The

1st appellant moved to the driver's seat as one of them came to the back seat, removed a rope and tied his hands. He had a cap but not a pistol. The place was dark but he had seen them through the car lights as they came to the car.

The 1st appellant drove him to a farm near Kantaria Police Post and the one with a gun kept guard for about 2 hours. The assailant keeping guard and who was not part of the accused persons then received a call and left. PW1 was able to untie himself at about 900 hours. They took the vehicle and Ksh.900.00 from the complainant. This was by the assailant at the back. He had removed his license, ID card and phone but they did not take them. PW1 further testified that he reported the incident to Kantaria Police Post. He later took part in an identification parade and identified the two accused.

PW2, **Joseph Kahiga Njoroge** identified the stolen vehicle in court and produced a log book indicating that the vehicle was still registered in the name of the person who had sold it to him. He had a duly executed sale agreement, transfer forms and a PIN certificate and photocopy of an identity card for the seller. He further testified that he had reported the loss of the motor vehicle to the tracking company and travelled to Nyahururu and identified the vehicle upon recovery.

PW3, Samuel Kamau Karuma testified that he worked with the tracking company which had fitted a tracking device on the car. He had received a report of loss of the motor vehicle on 18th October, 2010 and on 21st October, 2010 he traced the car to Ol'Kalou and notified the police. He was able to identify the car at Ol'Kalou Police Station.

PW4 and PW5 who were police officers from Ol'Kalou Police Station testified how they received information of a suspected stolen car and were able to track it to Ol'Kalou. The two appellants came out from the motor vehicle and were arrested and searched and then escorted to the police station. The car keys were later found on the driver's seat and the car driven to the police station.

PW6, Chief Inspector Peter Ochieng Ogola testified that he conducted an identification parade on the appellants on 26th October, 2010 at Kiambu Police Station. This was by consensus and it comprised of eight (8) persons. The appellants were both identified but complained that the other members of the parade were much younger than themselves. They however conceded that there was no irregularity of the identification parade at cross-examination. The Investigating Officer, PW7 testified that he received information on the arrest of some suspects at Ol'Kalou. The motor vehicle was photographed after its transfer to Kiambu together with the appellants. He charged them with the offence.

At the close of the prosecution case, the appellants were put on their defence. They gave unsworn statements in testimony.

The 1st appellant testified that he stays at Ol Kalou and operates a shop. On 20th October, 2010 he woke up at 700 hours to go to work. It was Jamhuri Day and he does not normally open during public holidays. He went to the stage to board a matatu but there was no one because it was a holiday. At the stage he met the 2nd appellant who is his neighbour and is a businessman. A Nissan matatu came but it was full. Another vehicle /taxi came and people in plain clothes alighted. They enquired as to where we were going and searched us only to recover nothing except my phone and money. These people told them to follow a path on the right. After about 150-200 metres there was a saloon car parked there. They then called the taxi they had come in and took us back to the stage in it. They were thereafter taken to Ol'Kalou Police Station and thereafter Kiambu and booked to Kikuyu Police Station at 1900 hours.

The following day an identification parade was conducted and to the appellant this was unsatisfactory and irregular. He denied ever committing the offence.

The 2nd appellant, **Joseph Mwangi Ngige** testified that he operated a wine and spirit at Kaptan Trading Centre which is about 7 kilometres from Ol-Kalou. On 20th October, 2010 at around 745 hours, he left his home and proceeded to the stage at Jua Kali Shopping Centre which is about 2 – 3kilometers from Ol-Kalou police station where he found the 1st appellant. As they waited to board a matatu they saw people alight from a vehicle who were in plain clothes and had guns. One demanded that they (appellants) show

them where they had left the vehicle to which they replied that they had no car.

One of the policemen said he had been told that the vehicle was along the road. About 100metres down the road they found a white car stuck in the mud. There were muddy fingerprints on the side of the car and the officer CPl. Kimeti who was in charge ordered a bodily search to which nothing was found on them. Kimeti called for a taxi which had dropped them and the appellant heard him order that the vehicle which was stuck in the mud be towed. They then were taken to Ol'Kalou police station and booked for theft of a motor vehicle.

After 2 hours their fingerprints were taken and at 4.00 p.m. they were moved to Nyahururu police station. As they were boarding the vehicle, the appellant could see two vehicles, one of them being the subject matter of this case while the other one was Reg. No. KAT and the complainant and another person were leaning on it. The DCIO, Nyahururu was also there. They stayed in the cells for 2 days. On 23rd October, 2010 at around 1600 hours they were taken to Kiambu Police Station and booked at Kikuyu Police station. On 24th October, 2010 they were moved from cells and the subject motor vehicle was at the parking lot. PC Hussein was also there and said that they meet at Kiambu the following day. On 25th October, 2010 they were taken to DCIO's office in Kiambu and overheard him ask the Investigating Officer if they were the people they were looking for. The Investigating Officer said the people involved were between 20 and 30 years of age whereupon they enquired of their ages. P.C. Cheruiyot was told to proceed with the case and on the same day they were called for a parade. The appellant was to be the first one and the rest were all cell-mates. He raised an objection to the parade because other members were of very young age between 21-28 years. The witness was called from upstairs and picked him at position 4.

At the close of the trial, the court convicted the appellants and sentenced them to death as provided for by the law.

They now come to this court on appeal. The 1st appellant Joseph Mwangi Ngige based his appeal on grounds of having been convicted on the basis of a defective charge, faulty identification parade, insufficient and inadequate evidence to warrant a conviction and a wrong application of the doctrine of recent possession to the circumstances of their cases.

The appeal came for hearing before us on 27th October, 2013.

In his opening statement, the 1st appellant prayed that the evidence and process of arrest be reviewed. He posited that he was a passer-by who was fabricated in the charges. He also submitted that the arresting officer, PW4 tendered evidence contrary to his statement and this is contradictory.

He also submitted that the report in the OB (Occurrence Book) and the charge sheet did not tally thereby rendering the charges a nullity. He further submitted that the conduct of the identification parade was defective in that the identifying party, PW1 had followed them throughout the four police stations and was familiar with them. This rendered the identification parade a flop.

The 2nd appellant besides giving written submissions submitted that the complainant did not give the descriptions of the assailants or even the registration number of the stolen motor vehicle. The 2nd appellant also submitted that PW2 was stopped midstream in his evidence and not sworn in when he as recalled thereby rendering the same defective.

We heard oral submissions from Ms Spira, learned counsel for the respondent. We also received written submission from the appellants. In her oral submissions, Ms Spira opposed the appeal and set out to submit on issues of identification and swearing in of PW1 as pleaded in the grounds of appeal. She submitted that it was not necessary to swear in PW1 as he was already sworn.

As a first appellate court, we are under duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. This duty has been stated and restated in many decisions both by the high court and Court of Appeal See **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32**. See also **Mwangi –vs- Republic [2004] 2 KLR 28** where the court held that “an appellant

on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.”

Having considered the record and the respective submissions of the parties, and bearing in mind our duty as a first appellate court, we consider the following issues to be pertinent in this appeal. The first is whether or not the appellants were in possession of the motor vehicle. The other issue for consideration is the veracity of the identification parade and sufficiency of evidence utilized in the conviction of the appellants.

Again, the ground of a defective identification parade is untenable in that at page 6 of the proceedings, PW1 testified that he did not see the 1st appellant before the identification parade. This perfects the identification of the appellant who had also been identified by the complainant taxi driver at the time of negotiation of the charges for the taxi services. This therefore clears the issue of identification of the assailants.

The application of violence during the robbery is also overwhelmingly demonstrated in the evidence of the complainant, PW1. He testified that he was hired to take the 1st appellant to ACK King'othua Church. As they approached the church the 1st appellant removed something which he could not identify as a pistol and put it on his neck and ordered him to stop and sit at the back. At this moment in time, the 2nd Appellant and another person both of whom he had seen standing at the gate had come into the car and taken control of events. PW1, through this experience was able to identify the appellants.

The doctrine of recent possession is clearly demonstrated by the tracking of the stolen motor vehicle in possession of the appellants at Ol Kalou two days after it was stolen. This was facilitated by the motor vehicle's tracking device.

PW2, Joseph Kahiga Njoroge testified that he does taxi business and on 18th October, 2009 at 2200 hours his driver called and informed him that he had been robbed of his car. He reported this to Kantaria police post. The car KZU 729, Nissan B12 had tracking gadgets and the tracking company tracked it to Ol'Kalou police station on reporting. He travelled to Ol'Kalou and found the car at the police station.

The appellants did not offer a substantive defence but make mere denials of the charge in their unsworn statements and therefore the conviction and the sentence.

The 1st appellant in his written submissions raises the issue of identification and insufficiency of evidence and also misapplication of the doctrine of recent possession. He faults his identification by PW1 and submits that this was not safe and also error ridden. PW1's evidence of the drive between the taxi parking lot and King'othua AIC Church should be faulted for being inaccurate and unreal. There is also no evidence directly linking him to the motor vehicle at the time of its finding and recovery at Ol'Kalou.

He further relies on the authorities of **Paul Entole and another –vs- Rep CR. APP. No. 24 of 2000 at pg 2-3** of the judgment and submits that no span of time under which the complainant stayed under observation of the appellant explained in evidence and also **Turnbull – vs –R (1976) 3 ALL ER 549**, where it was held that:-

“...the judges should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witnesses have the accused under observation? In what light? Was the observation independent in any way. Passing motor vehicle, people?.....”

In **Wamunga Vs. Republic [1989] KLR 424** the court of appeal called for special caution in use of visual identification. It stated thus:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn

itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification...”

The appellants were properly identified as the persons who were in the motor vehicle by PW4 and PW5. Both of them moved from the motor vehicle on a muddy road stretch at Ol’Kalou. They were stopped and interrogated upon which they were arrested and taken to Ol’Kalou Police Station. This was adequate identification and linkage of the appellants to the stolen motor vehicle and a claim on a defective identification parade would not dilute the impact and veracity of this clear identification.

The trial court was always aware of the consequences of an injustice being occasioned by the evidence of identification as in the authority of Wamuga aforesaid. It therefore was so warned but relied on the overwhelming evidence of PW1 and PW4 who linked the appellants and the stolen motor vehicle. PW4, the arresting officer testified that the appellants were arrested after coming from the motor vehicle which they had parked a few metres from the tarmac road.

We find that the three issues for interrogation in this appeal namely, recent possession, identification of the appellants and the authenticity of the identification parade are fully met by the evidence on record. The appellants were arrested in the possession, custody and control of the motor vehicle the subject matter of robbery with violence. PW1 and the other prosecution witnesses adduce ample evidence as has been recited hereinabove linking the appellants to this crime. The evidence of the identification parade was not shaken by contradicting evidence by the appellants. It remains valid and relevant in the circumstances.

In the result we find that the prosecution’s case in the trial court case was proved. We dismiss the appeals and uphold both the conviction and sentence.

Delivered, dated and signed the 27th day of June, 2014.

R. LAGAT-KORIR

D.K.NJAGI MARETE

JUDGE

JUDGE

In the presence of:

.....: Court Clerk

.....: Appellant

.....: For the Appellant

.....: For the State/respondent