



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 101 OF 2011**

JOHN MBUGUA MUHUNGI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 736 of 2009 in the Chief Magistrate's Court at Kibera – (Mr.) Onyango (SRM) on 05/04/2011)*

**JUDGMENT**

1. The appellant was charged with one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The brief particulars were that on 4<sup>th</sup> February 2009 at Ongata Rongai Township in Kajiado, jointly with others not before the court, while armed with dangerous weapons namely pistol, he robbed Joseph Mwangi Karisa of one motor vehicle Registration No. KAY 354 U Toyota Premio saloon pearl in colour, ATM card, driving licence, P.S.V licence, national identity card, mobile phone make Motorola L-6 and cash Kshs.3,500/=, all valued at Kshs.814,200/=. That at or immediately before or immediately after the time of such robbery they used actual violence against the said victim.
2. The gist of the prosecution case was that on 4<sup>th</sup> February 2009 at about 8 p.m, **PW1** gave a lift to a stranger to go to langata police station where he said his relatives had been arrested. When they got to langata area the stranger and two others who had been waiting at langata police station gate, set upon **PW1** and boxed him and robbed him of the car, some Kshs.2000/= and personal effects after drugging him. They abandoned him by the road side and drove off.
3. **PW1** reported the matter to Langa'ta police station. The appellant was arrested on 5<sup>th</sup> February 2009 at 9.00 p.m. along the Voi -Taita Taveta road and the motor vehicle was also found abandoned along the same road and recovered. Both the appellant and the motor vehicle were brought to Nairobi, and he was charged at Langata Police.
4. The appellant gave sworn testimony when he was placed on his defence. He stated that he travelled to Loitoktok and Taita -Taveta to buy farm produce for sale. That he bought tomatoes for sale on 4<sup>th</sup> February 2009 and sent them to his wife by matatu, while he travelled the next day to Taita -Taveta to buy mangoes from a farm. That as he was walking back to Taita -Taveta town from buying the mangoes, he was stopped by **PW4**, the OCS Taita -Taveta Police Station and put in the truck that the officer was riding in. He only learnt that he was under arrest when they got back to the Police Station and was placed in the cells. The next day he was transported to Nairobi by people he came to learn were CID officers and was later charged. He denied the offence.

5. The learned trial magistrate assessed the evidence from both sides and found that the prosecution had proved their case against the appellant to the required standard. The appellant was found guilty and convicted accordingly. He was sentenced to suffer death in accordance with the law.
6. The appellant immediately filed a memorandum of appeal. In the supplementary grounds of the appeal he posited that the judgment of the learned trial magistrate was a nullity for failing to conform to **Section 169(2)** of the **Criminal Procedure Code**. He also stated that he was convicted on circumstantial evidence which did not satisfy the principles thereof and that the learned trial magistrate had made no specific finding on the burden of proof. He further complained that the burden of proof had been shifted on to him, that the evidence was full of inconstancies and that he was convicted on mere suspicion.
7. Learned state counsel, Miss. Maina opposed the appeal. She stated that lack of conformity with **Section 169** of the **Criminal Procedure Code** was not fatal to the prosecution case, because the charge sheet showed that he was charged under **Section 296(2)** of the **Penal Code** and the judgment showed that he was convicted as charged. She submitted that even though the appellant was not positively identified by **PW1**, he was found in possession of **PW1**'s personal documents such as the ATM card three days after the robbery. That the documents were listed in the Occurrence Book as having been found in the appellant's possession and thus the burden of proof shifted from the prosecution to the appellant to explain how he came to be in possession.
8. Miss Maina also urged that the trial magistrate found the evidence of **PW4**, the Arresting Officer who searched the appellant to be truthful. In her view the conviction was not based on suspicion because the appellant was found in possession of goods stolen in the robbery three days before. She therefore urged the court to dismiss the appeal.
9. From the proceedings **PW1** was the sole eye witness to the robbery and from his testimony, he neither identified his assailants at the scene of the robbery, nor was he able to pick any of them from the subsequent identification parades. The upshot is that the appellant was convicted on circumstantial evidence. We therefore set out the circumstantial evidence and examined it to establish whether it passed the litmus paper test.
10. The Court will only rely on circumstantial evidence to support a conviction of an accused person, if the evidence points irresistibly to the accused person's guilt to the exclusion of everybody else and if it is in- explainable on any other hypothesis other than that of the accused person's guilt. Before drawing the inference of the accused person's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of the accused person's guilt. See **R.V Kipkering arap Koske & Another (1949) 16 EACA 135, Simoni Musoke V R (1958) EA 715.**
11. The circumstantial evidence implicating the appellant in the case before us according to **PW4** was that, he was found walking alone on a lonely road that ran through a wild life park. Further that **PW4** recovered the keys to the abandoned motor vehicle on the floor of the double cabin truck in the area where the appellant had sat, as they rode to the scene of the recovery. He also stated that upon searching the appellant he found what he called "sony-face of music system" that fitted well in the abandoned motor vehicle when he tried it.
12. We note first, that neither the said keys nor the music system were produced in evidence as exhibits. Second, that the driver of the double cabin truck was not called as a witness to lend support to the testimony of **PW4** about the recovery of the car keys. His testimony would also exclude him as a suspect for the keys deposited in the truck. The truck was after all in his custody. From the evidence on record we find that it was unsafe for the court to make a conclusive finding that the keys to the subject motor vehicle were recovered in the appellant's possession.
13. We also considered the evidence that he was found walking in the wildlife park alone. We find that, whereas this may be foolhardy or even suicidal, it is not a factor upon which the court may

conclude that the appellant committed the offence of robbery with violence. He was said to have been found several kilometres from the abandoned motor vehicle and he gave an explanation which, in our view was plausible, as to how he came to be where he was found by **PW4**.

14. Having carefully scrutinized the evidence on record afresh as is our duty as the first appellate court, we are constrained to agree with the appellant that the circumstantial evidence herein does not meet the threshold for such evidence to be relied upon. The presence of a third party who was not called to testify did introduce other coexisting circumstances which weakened the inference of the appellant's guilt. We also find that the manner in which the learned trial magistrate assessed the defence evidence gave the impression that the burden of proof had been shifted to the defence.
15. For the foregoing reasons we find that the appeal is meritorious. We quash the conviction and set aside the sentence imposed on the appellant, and order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this **30<sup>th</sup>** day of **July 2014**.

**A. MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**