



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 411 of 2009

OLIVER MBURU NJERI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 835 of 2008 in the Chief Magistrate's court at Nairobi – E. C. Cheronno (SRM) on 18/9/2009)

JUDGMENT

1. This is an appeal against conviction and sentence in **Cr. Case no. 835 of 2008** before Hon. E. C. Cheronno, Senior Resident Magistrate as he then was. The appellant was charged with one count of robbery with violence contrary to **Section 296** of the **Penal Code**, and in the alternative with handling stolen goods contrary to **Section 322(2)** of the same Act.
2. In count I, it had been alleged that on 15th May 2008 at Kihara village within Nairobi area, jointly with others not before the court, while armed with dangerous weapons namely AK 47 rifle they robbed Samuel Kihumba Mwangi of cash Kshs.5,000/-, a motor vehicle registration No. KAZ 077T Toyota Corolla 110 pearl in colour, mobile phone Sony Erickson K801, K8001 S/n 35975 , one Toshiba DVD S/No. 10995, one national ID all valued at Kshs. 824,000/- and at or immediately before or immediately after the time of the robbery used personal violence to the said Samuel Kihumba Mwangi.
3. In count II, it was alleged that on 23rd May 2008 at Kiambu township, jointly otherwise than in the course of stealing, dishonestly detained motor vehicle registration no. KAZ 077T Toyota Corolla 110 pearl in colour valued at Kshs.800,000/- knowing to it to be stolen or unlawfully obtained.
4. The appellant was convicted on the alternative count and sentenced to serve 14 years imprisonment without option of fine. He filed an appeal contending that the prosecution had not proved its case beyond reasonable doubt. That the court had misdirected itself in finding the appellant guilty while there was no documentary evidence to confirm the recovery of the alleged stolen goods. He also contended that it was an error for the learned trial magistrate to disprove his defence and to hand him the maximum sentence of 14 years without due consideration that he was a first offender.
5. Mr. Kanyi, the learned counsel for the appellant submitted that the appellant was arrested as a result of being mentioned by two other suspects who were arrested on 23rd May 2008, and that he was not found in possession of the stolen motor vehicle as stated by the learned trial magistrate in his judgement.

6. I have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion but to make my own findings and draw my own conclusions. See **Kiilu and Anor v Republic [2005] 1 KLR pg 174.**

7. I have perused the lower court record and note that according to the evidence of **PW4** CPL Daniel Wambua, the appellant was arrested elsewhere in Ngara and charged with the offence of robbery with violence as a result of being mentioned by two other suspects who were arrested on 23rd May 2008. These two had been found in possession of a suspected stolen motor vehicle which turned out to be motor vehicle registration no. KAZ 077T Toyota Corolla 110 pearl in colour, the subject matter of this case.

8. The learned State Counsel Miss Maina conceded the appeal on grounds that there was no evidence to implicate the appellant as he was only mentioned by **PW4** and that he was not found in possession of the stolen motor vehicle.

9. The learned trial magistrate in his judgment, observed that the appellant and his co-accused were found inside the stolen motor vehicle, and that although they were not identified by the complainants, their own defence did not hold water. The evidence of **PW4** CPL Wambua however, was that when he and his colleague stopped the motor vehicle on 23rd May 2008 at noon, while on patrol duties, it had two occupants namely, Geoffrey Ng'ang'a and James Chege Kinyanjui.

10. It was those two suspects mentioned above who told the police that the motor vehicle belonged to Oliver Mburu, the appellant herein and took the police to Fig Tree where he was arrested. The victims of the robbery never identified him as having been in the robbery.

11. Having perused the lower court record, the grounds of appeal and the submissions of the learned counsel, I am satisfied that the learned state counsel, Miss Maina was wise to concede the appeal, for the nexus between the appellant and the offence is too tenuous to sustain a safe conviction.

12. For the foregoing reasons I find that the appeal is meritorious. I 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.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **18th day of April 2013.**

L. A. ACHODE

JUDGE

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