



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 367 of 2007

SIMON WANYEKI MAHIUHAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 278 of 2006 in the Chief Magistrate's Court at Nairobi – Mrs. T. W. C. Wamae (PM) on 06/06/2007)

JUDGEMENT

1. The appeal of **Simon Wanyeki Mahiuha**, the appellant herein arises out of conviction by Mrs. T. W. C. Wamae, Principal Magistrate, in two counts for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Nairobi CM Cr. Case no. 278 of 2006**.
2. The particulars in count I were that on the 28th day of January 2006, at Kilome/Kirinyaga road junction in Nairobi within Nairobi area, jointly with others not before the court, while armed with dangerous weapons namely pistols, they robbed Henry Mburu Munge of cash Kshs.180,000/= and one mobile phone make Sendo valued at Kshs.5,000.00/=, and one Peter Migwi Munge of cash Kshs.650/= and one mobile phone make Siemens A35 valued at Kshs.4,250/=. It was stated that at or immediately before or immediately after the time of such robbery they used actual violence against the two victims.
3. Upon conviction the appellant was sentenced to suffer death as per the law prescribed in **count I**, while the sentence in **count II** was suspended. He subsequently filed a petition of appeal grounded on arguments that the identification evidence was inconclusive because he was not identified at the parade, the prosecution case was not proved against him and, the defence statement was not considered adequately.
4. The appeal was opposed by the state through the learned state counsel Ms. Gateria, who submitted that **PW1** and **PW3** gave a detailed account of what transpired on the material date, that the attackers were more than one in number during the commission of the offence, and were armed with 8 pistols. Although **PW1** and **PW3** were not able to identify the motor vehicle used at the time of robbery, the appellant was the one who hired the said motor vehicle and returned it and when the offence occurred it was the appellant who had the motor vehicle.
5. The appeal was heard before a bench of Hon. Khaminwa and Warsame, JJ on 24th May 2010 and judgment reserved for 5th October 2010 unfortunately the judgment was not read and has remained pending to date. The two judges are no longer in the High court and when this matter came up for mention on 27th March 2013, the appellant elected to have the judgment written by any other judges instead of prosecuting his appeal afresh. This therefore is the judgment in this appeal.

6. The proceedings show that the two complainants testified that they were not able to identify the three robbers who bundled them into the motor vehicle that abducted them before they were robbed, nor the driver thereof.
7. The sole nexus between the appellant and the offences therefore, is the evidence of the two complainants to the effect that, the motor vehicle into which they were bundled when they were abducted at the junction of Kirinyaga and Kilome roads on 28th June 2006 at 9.00 a.m., was a white Toyota corolla 110 bearing the registration no. KAT 375 K.
8. The police subsequently traced that motor vehicle to Brit Travel and Car Hire Company. **PW4** who was a manager in the said car hire company testified that the appellant herein hired the motor vehicle registration no. KAT 375 K Toyota Corolla from his company on 25th January 2006 and returned it on 30th January 2006.
9. The state contended that **PW5**, the document examiner, had confirmed that it was the appellant who leased the subject motor vehicle from the owner, and that there was therefore strong circumstantial evidence linking the appellant with the commission of the offence.
10. The appellant did admit that he hired the motor vehicle in question and had in his possession at the material time but that on 28th January 2006 which is the date of the robbery he was in Machakos where he had transported his client. He denied any involvement in the robbery.
11. The record shows that both complainants testified that they saw the motor vehicle registration number when the motor vehicle in which they were abducted dumped them at a place in Dagoretti and drove off. Secondly, that **PW1** also saw the registration number on one window while **PW2** saw it on one rear view mirror of the motor vehicle as they moved about.
12. Upon scrutinizing and reassessing the evidence afresh we find that none of the two witnesses indicated in their statements to the police that they read the registration number of the motor vehicle through or on the motor vehicle windows. **PW1** admitted on cross examination that his mind was clearer on the date when he recorded the statement with the police, but that his statement did not mention the fact of the motor vehicle registration number being on the car windows.
13. Secondly, both witnesses testified that they had to keep their heads down since every time they tried to lift them the robbers would box them in the faces. That was the reason they gave for not being able to identify the robbers who were in the rear of the car with them.
14. In those circumstances it is difficult to fathom at what point they looked out of the windows to see what was written on the rear view mirror or the windows themselves.
15. After a careful re-evaluation of the evidence on record, we find that the connection between the appellant and the offence is too tenuous to sustain a conviction when it is considered that, sometimes robbers use fake number plates to throw the police off their trail.

For the foregoing reasons the appeal succeeds. We therefore quash the conviction, set aside the sentence, and order the appellant be to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

SIGNED DATED and **DELIVERED** in open court this 16th day of **April 2013**.

A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE