



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 33 OF 2007

JAMES MURIGU KARUMBAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2070 of 2005 in the Chief Magistrate's Court at Thika – U. P. Kidula (CM) on 19/01/2007)

JUDGMENT

1. **James Murigu Karumba** the appellant herein, has appealed against conviction and sentence in four counts for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, by Mrs. Kidula Chief Magistrate in **Thika CM Cr. Case no. 2070 of 2005**. He was sentenced to death in accordance with the law, in all four counts.
2. The particulars of the offence were that on the 8th day of March 2005 at Kiganjo in Thika District of the Central Province, jointly with others not before court while armed with dangerous weapons, to wit pistols, they robbed Abdi Kanyere Aden of a lorry registration number KAP 860P make Mercedes Benz, cash Kshs.28,000 and a mobile phone make Nokia 3310 all valued at Kshs.3,734,500 in **count I**. They also robbed Peter Mutua Kimeu of Kshs.3,800/= and a mobile phone make Sagem 930 all valued at Kshs.6,800/=, in **count II**, Peter Muasya Kanyumu of Kshs.400/= in **count III** and Martin Maina Mwangi of Kshs.500/= in **count IV** respectively. It was further alleged that at, or immediately before, or immediately after the time of such robbery they used actual violence against the said victims in the four counts respectively.
3. In a nutshell, the prosecution case in the lower court was that the appellant hired a lorry registration number KAP 680P, driven by Abdi Kanyere Aden (**PW1**), to deliver sand to a building site at Kiganjo area in the then Thika District. He joined the driver and 4 loaders Peter Mutua Kimeu (**PW5**), Peter Muasya Kanyumu (**PW4**), Martin Maina Mwangi (**PW2**) and Simon Mwangi (**PW3**). On arrival at the site the appellant was joined by labourers who were dressing building blocks and together they robbed the driver of the lorry, his turn boy and two loaders of property as set out in the charge sheet. The matter was reported to the police and following investigations, the appellant and three others were arrested and charged as stated in the charge sheet.
4. The appellant advanced 12 grounds of appeal which were consolidated for purposes of submission and which we have also addressed in a consolidated manner.

5. We have scrutinized and re-assessed the evidence on record bearing in mind that in law, it is the duty of the first appellate court to weigh all the conflicting evidence and make its own inferences and conclusions, but bearing in mind always that it had neither seen nor heard the witnesses and make allowances for that. See - **AJODE V REPUBLIC [2004] 2 KLR.**
6. Mr. Oundu the learned counsel appearing for the appellant condensed all the grounds of appeal into a single ground in his submission, and contended that the appellant's conviction was against the weight of the evidence. The respondent on the other hand argued that no good reason had been advanced by the appellant to warrant the court's interference with the findings of the lower court and urged us to dismiss the appeal.
7. We did note as stated by Mr. Oundu that the printout obtained by IP Owino from Safaricom, by which the appellant was traced and arrested, was not produced in evidence because the said IP Owino was not called to testify, and neither was IP Toroitich who was the first officer at the scene. We considered what was left of the evidence after distilling what the learned counsel Mr. Oundu was referring to when he stated of the learned trial magistrate that **"she then proceeded to invent an own theory not born in evidence or submissions."** We were also careful to set aside what the learned trial magistrate termed as her **"personal experience at Thika law courts"**, lest this should be brought to bear against the appellant unduly and occasion him prejudice.
8. We made a careful inquiry into the evidence bearing in mind the old age caution which has been repeated in numerous cases before this one, and which judges of appeal in **Kiarie v Republic [1984] KLR pg 739,** revisited as follows:

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.

Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

9. The sequence of events was narrated by **PW1** and corroborated by **PW5**. In part, the evidence of these two was also corroborated by **PW2, PW3** and **PW4**. **PW1, PW4** and **PW5** testified to having seen the appellant the day before when he came to inquire about the sand and to negotiate the price. He was alone, in broad daylight and in circumstances which did not cause any of the witnesses' apprehension or hinder their observation of the appellant.
10. The three witnesses saw the appellant again the next day when he came to collect the sand and when he travelled with them to Kiganjo. This was also done in broad daylight and their observation was not hindered in anyway. **PW4** testified that it was the appellant who boarded the lorry at the back when they arrived at the site and ordered them to alight.
11. There was confusion as to whether **PW5** sat in the driver's cabin with **PW1** and the appellant on the trip to Kiganjo as **PW1** and **PW2** stated, or he sat on top of the sand at the back of the lorry as he himself and **PW3** testified. All the five witnesses who took the ill-fated trip to Kiganjo were however agreed, that **PW5** was in that lorry when they went to Kiganjo. The learned trial magistrate did analyse the facts and the opposing evidence in her judgment to assess the credibility of the witnesses and concluded that the prosecution witnesses were credible. We gave that allowance as we re-evaluated the evidence afresh and found that we were in agreement with the learned trial magistrate that this contradiction was not fatal to the prosecution case.
12. Mr. Oundu was not entirely correct in submitting that the log book of the motor vehicle which is the main subject matter of this case was not produced in evidence, or that the loss of the said motor vehicle was not circulated by the police. **PW7** the motor vehicle owner did produce the motor vehicle log book in evidence, while **PW8** and **PW9** both of the Flying Squad at Pangani became aware of the robbery when they heard the motor vehicle registration number being circulated by Thika Police Control Room, on 8th March 2005. The fact that the police efforts to

trace or recover the stolen truck appear to have been lacklustre does not diminish the evidence that shows that it was stolen in the first place.

13. This being a criminal trial the learned trial magistrate should not have used language, that appeared to shift the burden of proof, on any of the issues to the appellant. We do agree with Mr. Oundu that on the issue as to whether one Peter Muasya did or did not visit the appellant in Kamiti Prison, the court did seem to place the burden on the appellant to prove that he did. Whether or not one Peter Muasya did visit the appellant in prison, and whether or not the said Peter Muasya is the man who testified as **PW4** in this case, was not material to the prosecution case. All the prosecution was required to do was prove that the complainants in the four counts were robbed, and that the appellant was identified as one of the robbers, who were involved.

14. In the context of the evidence of the prosecution, the appellant's defence was that he and **PW1** were very well known to each other. He testified that **PW1** bore him a grudge because of a relationship the appellant had nurtured with a Muslim girl called Amina, to the chagrin of **PW1**. That in fact, **PW1** had tried to run him down with a motor vehicle at one time and when that did not succeed he sent the said Amina, his own cousin and two other people to lure him to the police station. He was surprised to learn of the charges which awaited him at the police station, which he denies to date.

15. We re-examined the evidence to establish whether this was a robbery as stated by the prosecution, or a story of revenge spawned out of a love triangle gone sour. It was not clear from the evidence whom the appellant intended to show as the adversary in the said love triangle. In cross-examination **PW1** denied any knowledge of a girl called Amina who resided in Makongeni Thika or that he had sworn to separate the appellant and this girl. **PW1** also denied any knowledge of one Yusuf Aden nor that he too had a dispute with the appellant over the same girl.

16. Besides the appellant there were eight other people who were dressing stones when the lorry arrived at the site. It is not clear from the evidence whether some only, or all of the eight masons participated in the robbery. What is clear is that the appellant did not act alone and was aided by people who had been at the site when the lorry arrived. An excerpt from the testimony of **PW1** is as follows:

“We arrived and found about 8 people on the site. Some were dressing the stones. My customer and turn boy alighted to direct where I was to offload the sand. I went into reverse gear and reversed to where I was directed. I stopped. Before I got out of the vehicle someone entered the vehicle on the left passenger seat, it was a thin black person with a clean shaven head. He entered and pointed a gun at me. He told me he would shoot me unless I got out of the vehicle immediately. I wanted to alight through my door. He ordered me to get out through the left where he was seated. I alighted and he led me to the back of a house under construction. I found my turn boy lying on the ground behind the said house. The three turn boys were then brought and they joined us.”

17. **PW5** in his testimony lent credence to evidence of **PW1** when he stated as follows:

“I started directing Abdi to reverse to where I had been shown. As he did so the customer grabbed me on the shoulder. He put a hand in his jacket. He removed a pistol. He showed it at me and pushed me to a building under construction. He threw me down. He took my phone and money which was in my pocket it was 3800/= . Abdi was then brought also with a pistol pointed at him. The rest of the turn boys were likewise brought to this building. We were all tied up. We were left with some people who were beating us.”

18. It is evident from these two accounts that people numbering more than one, set upon **PW1** and his group and that they wielded offensive weapons, that is guns, as they robbed them. Violence was visited upon them as the gang beat them, bound them and forced them to ingest drugs which

rendered them unconscious for a while. The four complainants were at the scene of the robbery and were forcefully fed with the said drugs. They all did record their statements with the police although it was not done on the same day.

19. All four complainants lost property in that robbery. All the three ingredients of robbery with violence under **Section 296(2)** of the **Penal Code** were thus satisfied, even though proof of only one of them would have sufficed as a basis of a conviction.
20. We found it difficult to believe that **PW7** the truck owner, went to so much trouble and expense to travel to Democratic Republic of Congo to look for a truck that did not exist, or which had not been stolen. It was also difficult to believe that **PW1** hatched this elaborate plan that included several people and the disappearance of the lorry, just to frame the appellant because he was opposed to his relationship with a Muslim girl.
21. What **PW7** the lorry owner did or failed to do when he traced his lorry in Zaire and subsequently lost it again did not detract from the evidence of what occurred at the scene of the robbery. Being an alien civilian in a strange land he cannot be faulted for not knowing exactly what to do when he found the lorry before it vanished again. He was just trying to do what our police had failed to do for him, and that is to trace his lorry which had been stolen and taken across the border.
22. The upshot is that nothing in the proceedings aids us in reaching the conclusion, to which we have been steered by Mr. Oundu, that the court was impartial, and the trial unfair and a violation of the appellant's fundamental rights under **Article 50** of the **Constitution**. In any case, if he was held in custody for 15 days before he was arraigned in court, his remedy lies elsewhere, and not in the quashing of a conviction properly founded on evidence.
23. In light of the above, we find that the trial court directing itself to the evidence before it and the law applicable reached the correct conclusion. On the sentence, the learned trial magistrate sentenced the appellant to death as by law prescribed and ordered that the sentences in counts **II**, **IV** and **V** remain in abeyance. We therefore find that both the conviction and the sentence were proper. As a result the appeal lacks merit and is **dismissed**.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **25th** day of **July 2013**.

A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE