



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
HIGH COURT CRIMINAL APPEAL NO. 437 OF 2013

JAMES KIMANI NJUGUNAAPPELLANT

VERSUS

REPUBLIC DEFENDANT

(From original conviction and sentencing in Criminal Case No. 32 of 2013 at the Chief Magistrate's Court at Thikao by D.A. Orimba - Principal Magistrate on 11th January, 2013)

JUDGMENT

The appellant James Kimani Njuguna was the 3rd accused in the lower court. He had been charged jointly with two others with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. It was alleged in the particulars of the charge that on 24th March, 2011 at Ruiru Township Kiambu County, jointly with others not before the court while armed with dangerous weapons namely, a pistol and pangas they robbed Henry Karuru Kareithi of cash Kshs. 1000/=, mobile phone make Nokia 1200 and Motor Vehicle Registration No. KAS 965 G Mitsubishi FH all valued at Kshs. 2,004,600/=, and that at the time of such robbery threatened to use actual violence to the said Henry Karuru Kareithi.

They all denied the offence but after a full trial they were convicted and sentenced to death. This appeal arises from the said conviction and sentence. From the record before us, the appellant had been asked by Ngaah J. on 30th September, 2013 whether or not the other co-accused had filed any appeals. He replied that he was not aware whether there are other appeals. The court noted that from the records it is only the appellant who had appealed and therefore his appeal was fixed for hearing.

The evidence adduced before the learned trial magistrate was that P.W. 1 who was the driver of the said Motor Vehicle Registration No. KAS 965 G was hired by the 1st accused in the lower court at the instance of the appellant who acted as a broker to go to Meru to transport bananas to Gikomba Market Nairobi. The agreed charge was Kshs. 25, 000/=

After the appellant introduced P.W. 1 as the sister of the customer in Meru, he went out of the scene but kept in touch with both the 1st accused in the lower court and P.W. 1. P.W. 1 set off to go to Meru but on the way he was asked by the 1st accused in the lower court to return to Githurai as the 1st accused had forgotten some money at home. He did so and while at the parking, he was attacked by some three people who posed as Mungiki members. He was forced to take some liquid after which he dosed off and found himself in hospital the following day.

In the meantime, the owner of the said Motor Vehicle one Benard Ngugi and who gave evidence as P.W. 2, was concerned about the movement of his Motor Vehicle which had been fitted with a tracking system. At some stage he traced the Motor vehicle moving towards Kiambu road but his drivers cell phone had been switched off. He instructed his agents to switch off the engine of the Motor vehicle while at the same time reporting to the Police. The police led by P.W. 5 moved and intercepted the Motor Vehicle along Kirigiti road, Kiambu. The Motor vehicle had stalled and the appellant herein was attending to it unaware of what had happened. He and his co-accused were arrested at the scene. They were subsequently charged with this offence.

The appellant gave a sworn statement in defence saying how he was arrested for an offence he was not concerned about. He now challenges his conviction on the basis that the learned trial magistrate relied on issues of identification which was not water tight and that his defence was never taken into consideration. The prosecution evidence left a reasonable doubt and therefore he should be acquitted.

The appeal is opposed by the state. The appellant was well known to P.W. 1 as a broker. That was not the first time they had engaged with one another. He is the one who introduced the 1st accused in the lower court to P.W. 1. In the course of the day, he communicated with P.W. 1 to wait for him. Later in the night he was found attending to the motor vehicle that had stalled as a result of the tracking system having been activated on the instructions of P.W. 2, the owner of the Motor Vehicle.

It is true from the evidence that he was not one of the people who introduced themselves as members of Mungiki and took possession of the Motor Vehicle. However, the fact that he the one who first approached P.W. 1 for the hire of the Motor Vehicle and subsequently found at the scene where the motor vehicle had stalled, directly connects him with what transpired in the movement of the Motor Vehicle.

What is disturbing to us is that whereas the particulars of the charge alleged that the robbers were armed with a pistol and pangas and that the complainant was robbed of Kshs. 1000/= and a cell phone, no evidence was adduced in that regard. There is some inference however that can be drawn to connect the people who posed as Mungiki members with appellant herein. This is because after the motor vehicle was snatched from P.W. 1 it was found in the possession of the appellant and his co-accused only a few hours thereafter.

We have asked ourselves whether or not the offence of robbery with violence contrary to Section 296 (2) of the Penal Code was proved. With respect we are unable to find any evidence in that regard. However, we are persuaded that sufficient evidence was adduced to prove the offence of theft of a motor vehicle contrary to section 278 A of the Penal Code. Although the appellant was not one of the people who attacked P.W. 1, his engagement with P.W. 1 earlier in the day and his being found at the scene in possession of the said Motor Vehicle conclusively proves that he was one of the people who devised the scheme to steal the motor vehicle and did so. The doctrine of recent possession applies in this case.

In our judgment therefore, we allow the appeal and quash the conviction on the charge of Robbery with violence contrary to Section 296 (2) of the Penal Code and set aside the sentence imposed. In place thereof, we substitute a conviction for the offence of stealing a motor vehicle contrary to section 278A of the Penal Code.

The appellant was charged on 28th March, 2011 and was in custody up to the time he was sentenced on 11th January, 2013 a period of about two years. To date he has been in prison for about 11 months making a total of just about three years considering the period he spent in custody in the course of the trial.

The offence of stealing a motor vehicle attracts a sentence of seven years imprisonment. In our judgment, we have considered that the Motor Vehicle was recovered and that the appellant spent a substantial period of time in custody while the trial was going on. Under Section 333 (2) of the Criminal Procedure Code, we have taken that period into consideration. We have come to a conclusion that the period served in prison is sufficient punishment and therefore sentence the appellant to the period already served such that he shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 29th day of November, 2013.

A. MBOGHOLI MSAGHA

RADIDO STEPHEN

JUDGE

JUDGE