



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

(From the original conviction and sentence of Chief Magistrate’s Court at Kibera in Criminal Case No.1784 of 2008 – G. Nzioka)

Criminal Appeal 183 of 2010

CONSOLIDATED WITH

Criminal Appeal 184 of 2010

NAHASON KEMBERO YIECHA 1ST APPELLANT

ARMOGAST CHAI NGETI 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT OF THE COURT

Omirera – State Counsel

Betty Rashid for 1st Appellant

G. Kamau for 2nd Appellant

The charge -

1. The appellants, Nahason Kombero Ayiecha (1st appellant) and Armogast Chai Ngeti alias Jairo (2nd appellant) together with others were charged with 3 counts that of robbery with violence contrary to section 296(2) of the Penal Code and handling stolen property contrary to section 322(2) of the Penal Code. Particulars of the offence were that:

First count-

NAHASON KEMBERO AYIECHA

ARMOGAST CHAI NGETI alias JAIRO

RICHARD ATAMBO OTISO

BERNARD MWAKERA NGETI

ANASTUS LUSWETI FUKUO

ROBERT SIMIYU WAFULA

on the 28th day of June 2008, at Ebony Park villas Apartment – Riara in Kilimani within Nairobi areas, jointly with others not before court, while armed with dangerous weapons namely guns robbed EMMANUEL ANASSIS of a motor vehicle registration number KBB 230G make Hammer 3, two lap tops computers, two lap top computer bags, four mobile phones namely three black berry and on Samsung, three wrist watches, one diamond necklace, black torch, one DVD player, one colour TV set, debit royal card, six bank royal cards, Panasonic camera, cash Kshs.15,000/=, 15,000 US Dollars, 105 Canadian Dollars all valued at Kshs.10.2 million and at or immediately before or immediately after the time of such robbery used actual violence to the said EMMANUEL ANASSIS.

The second Count –

NAHASON KEMBERO AYIECHA

ARMOGAST CHAI NGETI alias JAIRO

On 28th day of June 2008 at Konza area in makueni District within eastern province, otherwise than in the course of stealing, jointly and dishonestly retained one motor vehicle registration number KBB 230G make hammer 3 knowing or having reason to believe it to be stolen property.

The third count –

RICHARD ATAMBO OTISO

On the 5th day of July 2008 at Zambezi Estate in kikuyu, kiambu district within central Province3, otherwise the course of stealing dishonestly retained two lap top computer bags and one black torch knowing or having reason to believe them to be stolen property.

Facts

2. On the night of 28th June 2008, Emmanuel Annasis (PW1) had arrived from Canada and was driving to his residence around 12.30 a.m. To 1.00 am aboard his car going to Avenue Villa Apartments. He was accompanied by his girlfriend (PW9). He entered the apartment through the front door and was immediately attacked by a group of 6 men who were waiting for them, one with a military rifle wearing military attire and boots and others wore war hat and had pangas, screw drivers, small knives and other weapons. There was light from the drive way. He was tied up together with his girlfriend, was beaten and together with his girlfriend had their hands tied from behind as a gun was put behind his back. They stole his watch and his girlfriends watch and jewels, stole from the suitcase which had two computers, a camera, LG TV and used the TV cable to tie him and his girlfriend. They stole PW1 ATM card and forced him to give his PIN number and then called somebody from an ATM and started using the cards. They were dragged to the bathroom, were gagged and locked in as they were being threatened with death. The gang proceeded to ransack the house and on their way out stole his car KBB 230G Hammer 3 silver in colour. PW1 was able to free himself, broke a window and called for help and security guards and neighbours came in through the front door that was left open by the gang. The robbers left with his car. He called the police who came to his house and then left to spend the night at the Serena hotel. The next day the police told him that his car had been recovered and some items and two people arrested. PW1 went to the police station Kilimani and identified the 6th, 5th, 4th and 3rd accused persons and his brother William identified some of the stolen items. He did not identify the 1st and 2nd appellants.

3. On this same night of 28th June 2008, P.C. Peter Nyambane Otieno (PW3) a Highway patrol officer was at Sultan Hamud base and at 3.30 a.m. he was along Mombasa road with a colleague at Kima Estate and were conducting normal searches to vehicles where they stopped vehicle KBB 230G Hammer 3,

silver colour. It had two occupants, he demanded to see the driving Licence (DL) and found it mutilated and decided to interrogate the driver who said he was heading to Voi to pick the owner of the car called Mohammed Salim. They asked him to call the own so that they could talk to him and while the driver was scrolling through the phone, he asked the passenger to alight and conducted a search but found nothing offensive. He also decided to search the driver as well and continued to interrogate him further but he changed and said the vehicle belonged to Richard causing PW3 to get suspicious. He asked the two to go to the patrol car parked by the road side. The driver pretended to pick something from the car which had the engine still on, PW3 prevented him and pushed him to the patrol car and called Inspector Michael Mwaura. They continued with the interrogation of the two and at this point PW3 decided to take the driver's phone and in the process he attempted to grab the DL back and in the process the driver took off running towards the vehicle (KBB 234G) that was still running and the other passenger took off to the opposite direction. PW3 fired a warning shot from his AK47 and when the driver tried to open the door, PW3 shot twice at him and he run off to a nearby bush. He took the vehicle and drove it to sultan Hamud. By then they did not have information that the Hammer vehicle had been stolen and it was booked at the station. The DL belonged to Armogast Ngeti the 2nd appellant who was the driver of motor vehicle KBB 230G and the passenger was the 2nd appellant.

4. PW3 and his colleague went back to the road at a place near Salama town, 2 kilometres from Salama and saw a Toyota Harrier with no registration numbers heading to Nairobi. They stopped it. It refused to stop and they followed it with Cop Mutonga using GKA 97K a Nissan Xtrain. They called the patrol car at Konza and told them to stop the vehicle as it was driving fast but still kept following. This vehicle was stopped and found to have 5 occupants, they were told to alight and PW3 said that he identified the driver as the 1st appellant who was a passenger in the Hammer car. He was taken and booked at Sultan Hamud. PW3 still had the phone from the 2nd appellant a Nokia 1100.

5. On 1/7/08 P.C. Paul Kipkorir Ngeno (PW4) was called by Inspector Njeru who was with Samson an employee of 'Track it' company that had covered the motor vehicle KBB 230G and the two informed him that the DL which was found in the motor vehicle KBB 230G Hammer belonged to Armogast Chai Nyeti an employee of 'Track it' Company and that one other suspect had been arrested and was at Sultan Hamud. This was the 1st appellant who was moved to Kilimani Police Station. The Director of 'Track it' helped trace the 2nd appellant through his brother in Kangemi who took them to Kitui and found him at 10.00 pm while asleep and he was arrested. The 2nd appellant led them to Richard Atembo, he was arrested and a search at his house resulted in the recovery of a torch and two black lap top bags that were identified as having been part of the good stolen from PW1 house.

6. Upon the arrest, the appellants were charged with robbery with violence and being in possession of stolen property. After a full trial, their co accused were acquitted and the appellants convicted and sentenced. They have appealed against this conviction and sentence in their appeals.

Grounds of appeal

7. The 1st appellant and the 2nd appellant filed substantively similar grounds in their Petition of Appeal, there were 4 ground but upon our scrutiny, these are 3 grounds that;

1. *The learned trial magistrate erred in law and facts when she convicted the appellant in this case without considering that the conditions prevailing to identification were not favourable since there was insufficient light at the scene*
2. *The learned trial magistrate erred in law and facts when she convicted the appellant with the exhibit of the said car by failing to consider that it was not recovered in his possession*
3. *The learned trial magistrate breached the natural justice rule when she convicted the appellant while rejecting the defence without explaining the proper reasons thus violating the law, section 169(1) of the CPC.*

Submissions

8. At the hearing of the appeals, each appellant as represented by their advocate gave oral presentations, Betty Rashid for the 1st appellant submitted that the 1st appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code and handling stolen property and was convicted on the basis that he was found in possession of recently stolen motor vehicle. That the mandate of the court as held in the cases of **Gabriel Kamau versus Republic [1982-88] 1 KLR, 1134** and **Joel Saiyanga Ole Mwaniki and Another versus Republic, Cr. Appeal No.229 of 2003**, is that, the High Court is to analyse all evidence afresh, and come to a conclusion. In this case, PW4 gave evidence that the events alleged events herein took place at 3.30am, it was dark and he may have been mistaken and confused the identity of the 1st appellant with the persons he had earlier seen as he stated the 1st appellant had no distinctive mark. PW1 and his girlfriend (PW9) both did not identify and pick out the 1st appellant as the person who robbed them. On the same night PW4 stopped a Harrier motor vehicle from Mombasa to Nairobi, 1st appellant was driving the Harrier, and PW3 who was with PW4 arrested him from the Harrier, that this was a case of a mistake as one who had escaped from the Hammer. The Harrier was allowed to drive to Nairobi, it had 5 occupants, and 4 of the remaining passengers were allowed to go on to Nairobi without questions. None of the 4 recorded a statement despite the 1st appellant stating that he was driving from Mombasa to Busia and thus explained as to why he was in the Harrier. PW3 indicated that he took a phone from a passenger in the Hammer; this phone was not produced and if its records had been obtained this would have confirmed if it belonged to the 1st appellant. There was nothing to connect the 1st appellant to the crime as he denied he was not a passenger in the Hammer, the stolen vehicle. In **Joel Saiyanga case**, the court dealt with the issue of identification of defendants in difficult circumstances and the court in that case adopted the decision in **Gabriel kamau case**, that even the most honest witness can be mistaken when it comes to identification and the evidence of visual identification can result in miscarriage of justice and should be examined carefully. In this case it was dark without electricity, police officers had torches to assist with visibility but the conversations took place when the occupants in both vehicles were inside. That the appeal should be allowed as the prosecution case was weak with regard to the 1st appellant.

8. Mr. G. Kamau for the 2nd appellant submitted that the 2nd appellant was charged with robbery with violence and handling stolen property. That there were 6 accused but only two were convicted and in this case the trial magistrate did not comply with section 169(1) CPC while writing judgment which should contain the issues, points of determination and the reasons and the rationale is not given and this is a fatal error. In the judgement of the lower court it was stated that the 2nd appellant was found with recently stolen motor vehicle and that he failed to explain how he came to have the stolen car but also, evidence of actual possession was missing, in this case the 2nd appellant was not found in possession of the Hammer. The court relied on PW3 and PW5 who are said to have recovered the vehicle whereas the 2nd appellant was not arrested on the material day but later on 4th of July 2008 in Kitui almost 100 kilometres from where the motor vehicle was impounded. It was at night, PW3 said that he removed two passengers and took them to the patrol car and the lights were on whereas PW5 said that they used a torch. That the two persons escaped yet when the appellants were arrested they were never charged with the offence of escaping from lawful custody and when the 2nd appellant was arrested PW3 and PW5 were never called to identify him as the person who was a passenger in the Hammer vehicle. This vehicle was booked at Sultan Hamud but was never dusted for finger prints to link them to the 2nd appellant. The recovered DL was not booked at the station and when the 2nd appellant was arrested his house was searched and several documents taken his DL being part of the document as no record and schedule of what was taken from his house was produced. At the identification parade, only PW2, the taxi driver identified the 2nd appellant as a person he had driven from Dagoretti to Riara road.

9. For the State, Mr. Omirera opposed the appeals and submitted that PW1 and PW9 were robbed and were able to identify their assailants. The court invoked the recent possession rule as the legal basis of finding the appellants guilty. The proximity of time was that the robbery took place around 1.00am. And the vehicle was intercepted near Sultan Hamud around 3.30am, this was the stolen vehicle and without knowing this was the stolen vehicle PW3 and PW5 stopped it and demanded to have the DL, it was mutilated and cause suspicion and interrogated the driver. This DL was produced in evidence and confirmed to belong to the 2nd appellant. PW3 said it was dark but there was light in the car and was able

to identify the passengers in the Hammer clearly, the two run away in different directions and the 1st appellant was arrested while driving a harrier and the 2nd appellant was arrested due to his DL left with the arresting officer and established the owner of the DL before they went to re-arrest him in Kitui. That PW3 and PW5 are from the disciplined forces and confirmed there was sufficient light to help identify the appellants and when the Harrier was intercepted at 5.30am. The officers were dealing with a normal traffic offence. That the appeals should be dismissed and the decision of the trial magistrate upheld.

Determination of the issues

10. In this appeal, the issues for determination by this court is whether the prosecution proved its case beyond reasonable doubt, whether there was proper identification and the issue of recent possession. As the first appellate court in criminal cases, this court is mandated to reconsider and re-evaluate afresh the evidence adduced by the witnesses before the trial court and reach its own independent determination whether or not to uphold the conviction of the appellants. In reaching this determination, this court is required to put into consideration the fact that it neither saw nor heard the witnesses as they testified. This court is further mandated to consider the grounds of appeal put forward by the appellants in this appeal as held in *Njoroge versus Republic [1987] KLR 19*.

10. The appellants in this case are charged under section 296(2) of the Penal Code and section 322(2) of the Penal Code, robbery with violence and handling stolen property. Under section 296(2) of the Penal Code, a charge brought under this section must satisfy any of the following ingredients;

- i. The offender is armed with a dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more person or persons, or
- iii. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

11. The complainant in this case was PW1; he gave evidence that he was robbed on the night of 28th June 2008 in the presence of his girlfriend PW9. He was only able to identify persons other than the appellants and only PW2, the taxi driver identified the appellants as persons he had carried in his taxi from Dagoretti to Riara on 27th June 2008 but did not know anything about the crime. To this evidence the link is found with PW3 who, without knowing that vehicle KBB 230G had been stolen stopped it while on patrol along Mombasa road at Konza. There were two passengers and he interrogated them and found a mutilated DL and he decided to make further interrogations and directed the two passengers to the patrol car, the driver tried to snatch back the DL but he put it in his pocket and in the process the two passengers escaped in different directions. The 1st appellant was arrested a few hours later abode a Harrier vehicle heading to Nairobi from Mombasa while the 2nd appellant was arrested on 4th July 2008.

Was there proper identification of the appellants?

12. We find the evidence of PW3 most useful in this regard. In his evidence-in-chief stated;

A vehicle approached us from Nairobi direction. It was number KBB 230G Hummer H3 – silver in colour. We stopped it. It had two male occupants. The driver pulled aside. I demanded his driving licence. When he gave me the licence it was mutilated. I decided to charge him for that. In the course of interrogation I asked him his destination. He said he was going to Voi to pick the owner of the motor vehicle. I asked him to come out. I demanded to know who the owner was. The driver told me that the owner was called Mohammed Salim. I told him to call the owner so that I could talk to him. While I was interrogating the driver the other passenger was still in the vehicle. ... In instructed the passenger to come out also. I conducted a quick search on the driver. He was not armed. I also searched the passenger and asked him who the owner of the vehicle was. The passenger told me that the owner was called Richard. ... I became suspicious and instructed them to go to our patrol car.

13. This witness came out to us as a very thorough and detailed officer, he was on night patrol and was able to pick very minute details about what the two passengers said and what he did with them when he stopped the vehicle KBB 230G. His suspicion about them was aroused after their conflicting statements as to who the owner of the motor vehicle was. This is an officer from the disciplined forces and being on night patrol is bound to be cautious and careful with motorists driving along this road at night, he therefore did a search on the two passengers and was satisfied that they were not armed. We believe this witness, that indeed he took time to interrogate and speak with the occupants of the Hammer KBB 230G before they disappeared. He was able to read the DL and being at night, there must have been light for him to do so and he also stated that there was light in the car and there was a torch, this being sufficient for him to read the DL was also sufficient to identify the two males in the KBB 230G Hammer H3. Were these the persons later arrested and are they the appellants?

14. PW3 took the vehicle KBB 230G H3 to Sultan Hamud Police Station booked it and returned back to Patrol and with regard to the arrest of the 1st appellant he stated;

... A Toyota harrier came heading to Nairobi. It had no registration number. We stopped it. It refused to stop. We followed it... we called our other patrol car which was at kona. We told them to stop the motor vehicle which was going towards that direction. We followed it. We found the vehicle having been stopped and the people inside told to alight. We found two ladies and three men. One of them was the driver. I was able to identify accused 1. He was the passenger in the Hammer car. We released the other occupants. We took the accused 1 to Sultan Hamud Police station.

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15. PW3 was the same officer who earlier on had given a detailed account of what he did what he saw and what he talked about with the two passengers in the Hammer vehicle. The two who had escaped. But upon arrest of the 1st appellant, he was very selfish with his details. What made him pick out on the driver of the Harrier vehicle? How did he distinguish him so clearly from the other passengers and the two other men in the same vehicle? These are questions that go to the core of this case and were not adequately addressed. We agree with the Counsel for the 1st appellant, the link to the crime might have been a statement from the other passengers in the Harrier vehicle or from the phone that was retained by PW3 and the purpose of retaining this phone is lost as this was not a phone alleged to be part of the stolen goods from PW1 and PW9 nor was it established to have been part of the stolen property with regard to the charges facing the 1st appellant. PW5 does not help either as in supporting the evidence of PW3 he stated;

... I remember stopping one Toyota harrier which was in transit. It had foreign numbers. When it failed to stop, I called Sergeant Tacho who was at Chumvi highway patrol... they chased that motor vehicle. They came back with one suspect and the driver of the Toyota Harrier. I was able to identify the suspect as one of those two people who had fled from the scene.

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16. There is nothing unique that caused these two officers to pick on the 1st appellant. Nothing stopped them in the course of their investigations to have any of the other passengers in the Harrier to give evidence and state how the 1st appellant was found to be in their company. A court should be given the benefit of all evidence in each case to enable a just decision. This was held in **Republic versus Kipkeri arap Koskei [1949] 16 EACA 135** where the East Africa Court of Appeal held;

That in order to justify, on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts on the accused.

17. The duty was on the prosecution to prove its case and remove all doubts with regard to the 1st appellant.

18. The 2nd appellant was arrested from his home in Kitui. He was tracked through the DL the PW3 had retained when two persons were stopped along Mombasa Road aboard KBB 230G, this two persons escaped but left the DL behind. The driver of KBB 230G had tried to snatch back the DL but PW3 put it in his jacket. These are details supported by PW5 who was present when these events took place. When the two occupants of the Hammer vehicle escaped, the DL was left in the possession of PW3, this DL belonged to Armogst Chai Ngeti, the 2nd appellant.

19. As these events were taking place along Mombasa Road Highway, a report of the robbery had been reported by PW1 and PW9 at Kilimani Police station and the PW5 got information that the vehicle KBB 230G had been recovered and was at Sultan Hamud and that a DL had been recovered, they investigated and established that it belong to the 2nd appellant and an employee of 'track it' company. With the assistance of the director of 'Track it' company, they were able to trace the brother to the 2nd appellant who was arrested and was a co-accused in the lower court and the 2nd appellant was traced to his house in Kitui. The 2nd appellant also led to the arrest of another suspect, a co-accused in the lower court. This evidence is supported by PW6, PC Elijah Gitahi who followed up on the DL that was detained by PW3 from the two persons in the KBB 230G before they escaped. This DL was therefore in the possession of the police well in advance before the 2nd appellant was arrested. His employer from 'Track it' company confirmed that indeed this was 2nd appellant and their employee well before he was arrested on 4th July 2008. In his defence, the 2nd appellant stated that several documents were recovered from his house and this is when his DL was taken and since there was no record or schedule of items recovered from his house, then his DL was among these documents. We have reviewed this evidence carefully, gone through the evidence of PW3 and PW5 and further that of PW6 and come to the conclusion that the DL of the 2nd appellant was retained by PW3 on the night of 28th June 2008 and this was used by PW6 and PW4 to track it and trace the 2nd appellant.

20. The DL of the 2nd appellant was found in a recently stolen vehicle. Even though PW3 and PW5 did not know then that this vehicle had been stolen when they retained the DL, they were suspicious on the conduct of the occupants and their suspicions were proved correct when they escaped from lawful custody. This creates an inference that indeed the person whose DL was found in a recently stolen vehicle was the owner of it, the 2nd appellant. Upon arrest, the 2nd appellant led them to the arrest of another suspect. The 2nd appellant in his unsworn defence stated that when he was arrested in Kitui he was brought to Nairobi and to his house in Kangemi where the house was searched and the officers took his DL together with other document. We have disapproved this as his DL was already in the possession of police officers who used it to trace him. This clearly places the 2nd appellant in the stolen vehicle KBB 230G and this was invoked by the lower court to convict the appellant for the offence of robbery with violence and being in possession of recently stolen property.

21. For the court to invoke the doctrine of recent possession to convict, there must be proof, as held in ***Criminal Appeal 85 of 2005 Arum versus Republic*** that;

- i. *The property was found with the suspect*
- ii. *The property is positively the property of the complainant*
- iii. *The property was stolen from the complainant*
- iv. *The property was recently stolen from the complainant*

22. We have carefully examined the evidence and are satisfied without doubt that the motor vehicle KBB 230G was found in the 2nd appellant, there is evidence from PW3 that he was able to identify the persons aboard KBB 230G on the night of 28th June 2008 and retained the DL of the 2nd appellant who was traced by PW6 to his home in Kitui. This vehicle was recently stolen from PW1 and a report to this effect had been made at Kilimani Police station. The evidence of PW3 is thereof corroborated by the evidence

of PW1 the complainant and PW6 the arresting officer. Even though there was no documentary proof of ownership of the vehicle KBB 230G by PW1, we have considered that the motor vehicle was stolen on the night of 28th June 2008, it was recovered the same night and a report was made to the nearest police station near the place where the vehicle was stolen from. We have also considered that a motor vehicle is not a common item that can easily be acquired and or disposed or suddenly change hands and to be found in possession of one without a plausible explanation as to how one came into its possession and the same having been established to have been stolen from its owner, then this creates the inferences that the 2nd appellant was the one who stole it and was going to remove it to a place far away from the scene of crime, the place where it was stolen. This is as held in ***Peter Macharia Njuguna versus Republic in Criminal Appeal No.182 of 2003***;

It is a fact that a motor cycle can be stolen and sold but we consider that just like a motor vehicle, it is an item that cannot be easily disposed of because ownership of such an item requires identification documents like a logbook and any buyer would insist on these documents. ...

23. The 2nd appellant does not offer an explanation. His defence is not believable.

24. The sum total of all the above is that the appeal of the 1st appellant must succeed. The appeal of the 2nd appellant is hereby dismissed. The conviction of the 1st appellant is quashed and the sentence set aside and is set free unless otherwise lawfully held.

Dated and Delivered at Nairobi this 19th Day of November 2013.

M. Mbaru

J. Rika

Judge

Judge