



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 77 OF 2012

JOHN MUTEMBEI MUTHAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(APPEAL FROM CONVICTION AND SENTENCE IN NANYUKI SENIOR PRINCIPAL
MAGISTRATE'S COURT (HON. J.N NYAGA (SPM) DELIVERED ON 17TH APRIL, 2012).*

JUDGMENT OF THE COURT

1. The appellant was charged with Robbery with Violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 25th February 2010 at Ichuga area in Laikipia East District with others not before Court while being armed with offensive weapons namely axes and swords they robbed Zachary Mathai of a motor vehicle Reg. No. KBJ 544K, ATM Card, 2 mobile phones, one radio, a binoculars, a wrist watch, clock beddings and other household goods valued at Kshs.900,000 and at or immediately before or after the time of such robbery used actual violence to the said Zachary Mathai.
2. The prosecution case was that the complainant, a resident of Kwa Huku village near Nanyuki town, on the material day at 10.30 pm was returning home from Nairobi. He was driving his motor vehicle registration number KBJ 544K. On reaching his gate he hooted and his house worker Titus Kimathi (PW2) opened the gate for him and drove into the compound. As PW2 closed the gate he was attacked by a group of people who were armed with bows and arrows and ordered him to lie down which he did. Some of the assailants went to the complainant and found him inside his vehicle. One of them directed an arrow at him through the window of the vehicle and ordered him out of the vehicle which he did. The person searched him and removed cash Kshs.8,000 and an ATM Card from him. He was then frog matched into the house and tied on the hands and legs. His worker (PW2) was also brought into the house and tied up. The people ransacked the house and removed various goods from the house and put them in the complainant's vehicle. They demanded for the complainant's ATM PIN Code which he gave them after which they escaped in the complainant's vehicle. The complainant untied himself and pressed the alarm and neighbours came to his compound. He borrowed a phone from one of them and called his family members in Karatina who in turn called Nanyuki Police station and reported the incident. He thereafter checked his house and found the following goods missing – an artificial dog, a Sony system, a gas cylinder, a meko gas, 2 mobile phones, 10 pairs of bed sheets, 3 briefcases, a watch and a pair of binoculars.
3. Meanwhile, PC Lukwa (PW3) and PC Njuguna (PW6) then of Nanyuki Police Station who were at the time on patrol duties in Nanyuki town around 11 pm, received a report through police control room that there had been a robbery at Kwa Huku Village and that the robbers had stolen a

motor vehicle Reg. No. KBJ 544K and a Barclays ATM Card. They then kept watch over Barclays Bank.

4. After about 30 minutes a motorcycle carrying three people went and parked outside Barclays Bank. The rider of the motorcycle went towards the ATM machine and two of his passengers were left standing near the motorcycle. The policemen rushed towards the motorcycle and the two passengers ran away. The rider of the motorcycle heard the policemen shouting and returned towards the motorcycle and the policemen ordered him to surrender which he did.
5. On being searched, the police found him holding an ATM Card on his hand and when the police took it they found it was in the name of Z. M. King'ori. The appellant on interrogation mention his accomplices to them. They then handed over the appellant, motorcycle and the ATM Card to Cpl. Kangogo and went in search of those who had been mentioned at Katheri area but did not get them.
6. The complainant was informed of the arrest and the recovery of the ATM Card and on the following morning he went to the police station and identified the ATM Card. His vehicle was found abandoned at Nturukuma area. The 1st appellant was therefore charged with the offences set out herein earlier which he denied.
7. In his defence the appellant stated in unsworn statement that he was a motorcycle taxi operator in Nanyuki town and that on the 25/2/2010 he got a customer which he took to Nturukuma village and on the way back to town he found two people on the way. They requested him to bring them to town which he did. On reaching Nanyuki town they asked him to drop them at Nanyuki Barclays Bank for them to withdraw money so as to pay him his charges which he did. When they reached the bank, the two passengers alighted and left him atop the motorcycle. After a few seconds he heard gun shots and the two people escaped. The policemen approached him and he surrendered to them. They asked him whether he knew the people he had carried and he said he did not as they had just been his customers. According to him, the policemen knew him as a motorcycle taxi operator. He was taken to Nanyuki police station where he found the complainant.
8. At the conclusion of the prosecution's case, the trial court came to the conclusion that the accused was guilty as charged, convicted him and sentenced him to death as prescribed by law.
9. The appellant being dissatisfied with the verdict of the trial court, brought the instant appeal arguing on the main that the learned trial magistrate erred both in law and in fact by failing to evaluate the defendant's defence alongside prosecution's evidence thus contravened provisions off section 169(1) of the CPC. He further complained that the trial magistrate erred in law and in fact by failing to find that the charges were not proved in the absence of complete and proper investigations.
10. Ms Mwai who appeared before us for the appellant submitted that the case against the appellant was not proved and his defence was not considered. Counsel further submitted that the giving of the evidence of PW3 was conducted by a person not qualified as a prosecutor. According to her, all prosecutors must not be below the rank of an Inspector of Police. PC Ihaji who conducted the prosecution on 24th March, 2011 when PW3 gave evidence was not qualified to prosecute hence the evidence of PW3 ought to be expunged from record. In support of this submission she relied on the case of **Roy Richard Elirema & Another v. Republic Criminal Appeal No. 67 of 2002 (MSA)** in which the Court of Appeal nullified conviction and sentence of an appellant who was prosecuted by an unqualified public prosecutor. Ms Mwai submitted that if the evidence of PW1 is expunged from record, there would be no other evidence in respect of which to sustain the appellant's conviction.
11. Ms Mwai further submitted that there was no evidence of who really had the ATM card on the material night. It was her contention that the court seemed to have relied on the doctrine of recent possession however the prosecution did not prove positive possession. According to her the

- property must be positively and identified and must be recently stolen to this she relied on the case of **David Olegume Kimayian v. R Criminal Appeal Number 185 of 2008 (Kisii)**. According to counsel, it was necessary to call bank witnesses to authenticate the ATM card. She further submitted that the trial court did not consider the appellant's defence that he ferried customers to the Bank that night to withdraw money to pay him. Counsel submitted that the Duty Officer knew the appellant as a "boda boda" operator in town therefore investigations ought to have been conducted in that regard to establish the authenticity or otherwise of this allegation.
12. Mr Cheboi for the state submitted that the grounds urged by the appellant were not covered in the petition for appeal and regarding the argument that PC Ihaji was not qualified to conduct the prosecution, he submitted that article 159 of the constitution discourages technicality of procedure while dispensing justice. In that respect, he submitted that the evidence of PW3 should not be rejected on the basis only that the prosecution at that time was conducted by PC Ihaji. In the alternative, Mr. Cheboi submitted that even if PW3's evidence was expunged, there would still be the evidence of PW6 which would be sufficient.
 13. Concerning submission by Ms Mwai that bank officials ought to have been called regarding the ATM card, he submitted that this was not necessary since the prosecution had established that PW1 was robbed from his home and several items taken and the ATM card was one of them. PW1 later received a call that someone was trying to withdraw money using the same card. The card had PW1's details which he submitted were sufficient.
 14. It was Mr. Cheboi's closing submission that the trial court analysed the prosecution's evidence and the defence raised by the appellant and was satisfied that the appellant was among the robbers since he failed to sufficiently explain why he had the ATM card in his possession.
 15. Concerning, the competence of PC Ihaji to conduct prosecution, we will rely on the views of the Court of Appeal in Elirema's case and state as that court did that prosecution can only be conducted by a competent public prosecutor appointed in accordance with section 85 of the CPC. Whereas we so hold, we are of the view that a significant part of the prosecution was conducted by a qualified prosecutor and only the evidence of PW3 was taken under the conduct of PC Ihaji. Further, just like the court of appeal stated, the major consideration in such cases should be if any prejudice has been occasioned to the accused by an act or omission complained of. It is our view that, in as much as it is a requirement under section 85 of the CPC that prosecution be conducted by a police officer not below the rank of Assistant Inspector, where no prejudice is occasioned to an accused person by the conduct of prosecution by a police officer below the rank of Assistant Inspector, the court can in a proper case invoke the provisions of article 159 and ensure substantial justice is not sacrificed at the altar of technicality. It does not make much sense to permit any member of the public to commence private prosecution without any restriction yet, restrict who should conduct public prosecution. Prosecution is about leading evidence and lining witnesses to prove a charge before a court and any police officer experienced enough in such matters can competently prosecute regardless of his or her rank in the force. To this extent we will ignore albeit reluctantly, the evidence of PW3 as urged by Ms Mwai. But does this have the consequence of rendering the appellant's conviction unsafe to uphold?
 16. PW3 was in the company of PW6 when they arrested the appellant. They were the team that laid ambush at the ATM in Nanyuki after receiving the robbery report. The evidence of PW1 was that he was robbed and among the items taken from him was the ATM card after the thugs demanded that he reveals to them his PIN code which he did. The robbery took place at about 10.00pm about one and half hours later (11.30pm), the appellant in the company of others arrived at the ATM machine in Nanyuki, and according to PW6, the appellant alighted and proceeded to the item while his accomplices kept watch. When they were approached by PW3 and PW6, they ran away leaving behind the appellant who was apprehended and the ATM card recovered from him. According to the appellant however, he was known by the policemen as a "boda boda" operator in town and that upon his arrest nothing was found on him. According to him, he found the complainant at the police station and was locked for 13 days prior to being arraigned in court. The appellant did not allege if there was any existing grudge or difference between him and the police

or the complainant. Further, PW1 did not allege that he previously knew or could identify the appellant during the robbery. In the circumstances we concur with the trial magistrate that neither the police nor PW1 had any reason to plant the ATM card on the appellant.

17. The appellant was found with the ATM card soon after the robbery, hence the trial court rightly concluded that the appellant must have either been one of the robbers or received the card knowing it was stolen. In the circumstances the trial court was justified in convicting the appellant on the principle of recent possession.

18. In the Court of Appeal decision of Simon Musoke versus Republic (1958) EA 715 at page the court said;

“... in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

19. This decision has been followed in the case of Okeno versus Republic (1972) EA 32 at page 35 where the Court of Appeal said;

“In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

20. It is our view that the appellant's possession of the PW1's ATM card shortly after the robbery and at the ATM of the issuing bank soon after the owner of the card had forcefully revealed the PIN code to his assailants is without reasonable doubt incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

21. We therefore hold that the appellant's conviction was safe with the consequence that we disallow the appeal.

22. It is so ordered.

Dated and delivered at Nyeri this 19th day of December 2013.

OUGO R.E

.....

JUDGE

ABUODHA N.J

.....

JUDGE

***Delivered in open Court in the presence of..... for the Appellant and.....
for the Republic.***