REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 53 of 2008

PETER KARIUKI MATHI ....APPELLANT

VERSUS

REPUBLIC ……………………………………………………….. RESPONDENT

(From the original conviction and sentence in Criminal Case No.3618 of 2004 of the Chief Magistrate's Court at Kibera by Mr. Maundu - Resident Magistrate)

J U D G M E N T

PETER KARIUKI MATHI is the appellant. He has filed an appeal challenging his conviction for the offence of Robbery with Violence **contrary to section 296 (2) of the Penal Code.** In his said appeal, he is also challenging the sentence.

He has raised a total of eight issues, which can be summarized as follows;

1. ***The charge sheet was defective in its material particulars.***

2. ***His rights under*** *section 72 (3) (b) of the Constitution* ***were violated.***

3. ***There was no compliance with*** *section 200 of the Criminal Procedure Code.*

4. ***The trial court deprived him of his right to mitigation.***

5. ***Identification was not positive as there was no supportive description in the initial report.***

6. ***The alleged identification by the complainant was not supported in any material way, such as by identification documents.***

7. ***The alleged arrest of the appellant and recovery of the stolen vehicle were not proved beyond any reasonable doubt.***

8. ***The defence was not given due consideration.***

The starting point in determining the appeal herein is the charge sheet, which the appellant says was defective.

The particulars of the offence were that on 9th April 2004 at Ngong in Kajiado District, jointly with

another who was not before the court, and whilst armed with a pistol, the appellant robbed DOMINIC KIHURI MURIUKI of one motor vehicle Registration Number KAP 903K, a Toyota Corolla; a Sagem mobile phone; a diary and cash KShs.700/-. The two robbers are said to have threatened to use actual violence on the complainant.

The defect in the charge sheet is said to be the failure to describe the pistol as an offensive or dangerous weapon.

The appellant relied on two authorities to back his argument, namely;

(a) DAVID ODHIAMBO & ANOTHER Vs REPUBLIC CR.A.NO. 5 OF 2005;

(b) SULEIMAN JUMA Alias TOM Vs REP. CR. A. 181 OF 2002.

In the first of those authorities the court held that the prosecution must choose and state the specific element of the offence under **Section 296 (2) of the Penal Code,** that they were charging the accused person with.

And in the second authority, the Court of Appeal held that the charge sheet must state that the accused was armed with dangerous or offensive weapon or instrument.

In answer to that issue, Mr. Mulati, learned state counsel, submitted that this case can be distinguished from the authorities cited by the appellant. He pointed out that whereas there was only one assailant in Criminal Appeal No. 181 of 2002, there were two persons who robbed the complainant in the present case.

In those circumstances, he urged, even though the pistol was not described as a dangerous or an offensive weapon or instrument, the ingredients of the offence of Robbery with Violence was still proved because the appellant was in the company of one other person.

We accept the contention of the respondent in that regard.

Had the appellant been alone during the incident, and if the pistol was not described as a dangerous or an offensive weapon or instrument, we may have accepted the appellant’s contention.

The second issue arises from the delay in taking the appellant to court. He says that he was arrested on 14th April 2004, but was not taken to court until 19th May 2004.

Clearly, therefore, there was a delay in taking the appellant to court. That means that for the period of about 21 days, the appellant was detained unlawfully in police custody, before he was taken to court.

The prosecution did not offer any justification for the delay in taking the appellant to court.

But, as the respondent submitted, that violation of the appellant’s rights cannot, in law, invalidate the trial or conviction of the appellant.

In **JULIUS KAMAU MBUGUA V REPUBLIC, CRIMINAL APPEAL NO. 50 OF 2008,** the Court of Appeal conducted an extensive analysis of the remedies available to an accused person who had been held in custody for longer than is permissible under the law, before he is first taken to court. They then rejected the appellant’s quest for a discharge. Their Lordships expressed themselves thus;

“Lastly, had we found that the extra judicial detention was unlawful and that it related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy, seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate

remedy under *Section 84 (1)* ***would be an order for compensation for such breach. The rationale for prescribing monetary compensation in*** *Section 72 (6)* ***was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages.”***

That is our answer to that issue. The delay in taking the appellant to court cannot undo the conviction or the trial. It cannot undo the unlawful detention. But it cannot also exonerate the appellant from the serious crime he is said to have committed.

The next issue appertains to **Section 200 (3) of the Criminal Procedure Code**. The said section was not applicable to this case because after Hon. Maundu SRM took over the conduct of the case, the trial started afresh. **Section 200(3)** only comes into play where a succeeding magistrate commences the hearing of proceedings when part of the evidence had already been recorded by his predecessor.

Meanwhile, as regards the contention that the appellant was deprived of an opportunity to mitigate, the same is not borne out from the record.

It is clear from the record of the proceedings that after convicting the appellant, the learned trial magistrate gave to the appellant an opportunity for mitigation. Furthermore, the appellant did put to use the said opportunity. He asked the court to consider the fact that he was a first offender.

In the circumstances, there is no basis for the contention that he was denied an opportunity to mitigate.

On the question of identification, the appellant asserted that it would only have been deemed as positive if the complainant had given his description in his first report.

In this case, the complainant did not give the description of any of the two robbers. He only told the police that if he saw them, he could identify them.

It is significant that it was not the complainant who led to the arrest of the appellant. He confirmed that fact when the appellant was cross-examining him.

Had the appellant been arrested because the complainant had said that he could identify him, then the failure to give a description of the appellant in the first report would have been significant.

In this case, the complainant was operating a taxi vehicle. The vehicle was a Toyota Corolla, Registration No. KAP 903K.

Two men approached him at the base where he was operating from, which was at the UpperHill Springs Restaurant. They asked **PW 1** to take them to Ngong.

PW 1 negotiated with them, and they agreed to pay Kshs.1,000/-. They paid the agreed sum and **PW 1** drove them towards Ngong.

Just before Ngong town, **PW 1** entered into a Petrol Station where he fueled using Kshs.300/-. He was then given Kshs.700/- as change from the note of KShs.1,000/-.

PW 1 then drove into Ngong town, and asked the two men where they wished to be dropped. They told him to go into Wakipigo Forest.

As it was against the policy of the company whose vehicle he was driving to go beyond towns, **PW 1** notified the two customers that he could not take them into the forest.

He stopped the vehicle at the junction to Wakipigo Forest and Ngong Police Station.

The two customers immediately turned on **PW 1**; one grabbed him by the neck, whilst the other grabbed his trousers. They insisted that he had to drive them into the forest.

PW 1 pleaded with them, and they loosened their grip on him. He drove for about 2.5kilometres until he reached the forest. The robbers pointed out the path which they wanted him to use. He complied.

However, as it had rained, the car skidded, and he was then ordered to stop the car. He switched off the engine as he had been told to do.

PW 1 was pulled out from the car. Then the two men tried to open the boot of the car, using keys. The boot did not open.

PW 1 pretended that he would help them to open the boot, but he then ran off into the forest. He hid in the bush.

Soon, he saw the vehicle being driven back along the road they had used earlier.

After the vehicle passed, **PW 1** went to a shop nearby and borrowed a phone. He dialed the Emergency number 112, which was received at Ngong Police Station. **PW 1** reported the incident, and the police circulated the registration particulars of the vehicle.

Next, **PW 1** phoned his boss **(PW 3),** and informed him. **PW 1** then went to Ngong Police Station and made a formal report. He was then told to wait at the police station.

Meanwhile, at the time the robbers were robbing him of the vehicle, they also took **PW 1's** mobile phone, a diary, the fueling receipt, plus KShs. 700/- which was the change he had been given at the Petrol Station.

On 18th April 2004, **PW 3** told **PW 1** that the vehicle had been recovered. The said vehicle had been taken to Gigiri Police Station.

On 20th April 2004 **PW 1** went to Gigiri Police Station, but he was promptly arrested. His arrest was attributed to the contention that it is he who had sold the vehicle to the person from whom it was recovered.

Whilst **PW 1** was in the cells, he noticed one of the two men who had robbed him. That person was also being held in the cells.

PW 1 informed the police about that fact, and said that he could not stay in the same cells as the person who had robbed him earlier.

Later, **PW 1** was released.

PW 2, MARGARET CHEPKURUI, was the registered owner of the vehicle in issue, as at the time of the incident.

She had leased out the car to **PW 3, JOSEPH KIMACHIA**, for use as part of his fleet in the car-hire business named Elite Car Services.

PW 3 confirmed that he had leased the vehicle from **PW 2**, for a sum of Kshs.30,000/- monthly.

On the day the vehicle was snatched by robbers, **PW 3** got a call from **PW 1**, who told him that he could identify the robbers if he saw them.

PW 4, C.I. SAMUEL WAMBUGU, was in the Scenes-of-Crime Support Service. Their duties include forensic investigations and photography that would assist in the investigations of criminal

offences.

In this case, he took photographs of the motor vehicle in issue.

The said photographs were identified by **PW 1, PW 2** and **PW 3** as being of the vehicle which was taken by robbers from **PW 1**.

PW 5, SGT REUBEN KIPTOO, was the Investigating Officer in the case. He took over that role from PC James Ngugi, on 2nd November 2005.

He confirmed that from **PW 1's** initial report, the complainant had said that he could identify those who had robbed him.

He also confirmed that the appellant was arrested at the compound of Kisii District Hospital.

PW 6, PC GEORGE BOMET, was the arresting officer. He was together with the DCIO, Inspector Wangila; and Inspector Betty.

An informer had told them that a vehicle had arrived at the hospital compound on the night preceding 14th April 2004. The vehicle was parked overnight at the hospital compound, but the informer believed that it would be relocated to a residential area on 14th April, 2004.

The police officers went to the hospital compound early that morning. They identified the vehicle from the registration particulars provided by the informer.

None of the three officers knew the person who would come for the vehicle. Therefore, they simply laid an ambush nearby.

At about 9.00a.m. the appellant arrived, removed a key from his pocket and started opening the car door. It is at that stage that the officers arrested him.

Upon interrogation, the appellant said that he had come from Nairobi. But the officers were not satisfied with his explanation for parking the vehicle at the hospital compound. They therefore locked him up for being in possession of suspected stolen property.

The officers then circulated the particulars of the vehicle to all police stations in the country.

Police officers from Nairobi Crime Prevention unit went to Kisii and informed **PW 6** that the vehicle had been stolen from Nairobi. The officers from Nairobi then escorted the vehicle and the appellant to Nairobi.

When the appellant was put to his defence, he said that he was a hawker in Kisii town. He said that on 14th April 2004, he went to the Kisii General Hospital because he was unwell. Shortly after he entered the compound, he was arrested, although they had recovered nothing from him when the officers who arrested him had searched him.

Having re-evaluated all the evidence on record, as a first appellate court is obliged to do, we have drawn our own conclusions. We have, however, given an allowance for the fact that, unlike the learned trial magistrate, we did not have the benefit of observing the witnesses whilst they were giving their evidence.

First, we note that the appellant was arrested on the strength of information provided by an informer. It is obvious that the said informer did not connect the appellant to the complainant or even to the incident which took place in Ngong on 9th April 2004.

The appellant was arrested because **PW 6** and his colleagues were not satisfied with his explanation for parking the vehicle in issue at the hospital compound overnight, after he had allegedly arrived from Nairobi.

At that stage they only had reason to believe that the vehicle had been stolen.

When they circulated the particulars of the said vehicle, the Crime Prevention Unit in Nairobi noted that that was the vehicle which had been reported stolen from Ngong.

And when **PW 1** saw the appellant within the same cells as where he was being held, he told the police that the appellant was one of the two persons who had robbed him.

As the complainant is the one who pointed out to the police that the appellant was one of the robbers, it would not have made any sense to thereafter conduct an Identification Parade.

We are satisfied that the learned trial magistrate was right to convict the appellant on the strength of the doctrine of recent possession.

The appellant was in possession of the motor vehicle. He did not offer any reasonable explanation as to how he came to be in possession of a vehicle which had only recently been stolen from the complainant.

His defence confirmed his presence at the exact place where he was arrested. He said nothing about the vehicle.

Indeed, he did not raise any questions when cross-examining the arresting officer, about having been within the hospital compound only because he was unwell.

He also said nothing about where he was on 9th April 2004, when **PW 1** was being robbed.

In effect, the defence put forward by the appellant did not cast any doubts at all on the corroborative and consistent evidence adduced by the prosecution.

The conviction was sound. We therefore uphold it. We also uphold the sentence.

Dated, Signed and Delivered at Nairobi this 24th day of September, 2012.

....	**.........................**
FRED A. OCHIENG	**L.A. ACHODE**
JUDGE	**JUDGE**