



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NOS. 100 & 101 OF 2007

PATRICK MBURU GATHITE	1ST
APPELLANT	
JOSEPH OTIENO LWANDE	2ND
APPELLANT	

VERSUS

REPUBLIC	RESPONDENT
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(From the original conviction and sentence in Criminal Case No. 3135 of 2004 of the Chief Magistrate’s Court at Nairobi

by L. Nyambura (Ms) - Senior Resident Magistrate

JUDGEMENT

The two appellants were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars are that on 17th December 2004 at about 11.30 a.m. along Moi Drive Umoja II while armed with dangerous weapons to wit pistols, jointly with others not before court robbed Birian Nungo Akwir one motor vehicle reg. No.KAS 335F Toyota Carina silver in colour valued at Kshs.810,000/=, cash 5,000/=, casio watch valued 1,800/=, Burudian frank 6,000, Zambian kwacha 4,000, Zimbabwe dollars 1,000, Ugandan shillings 2100, mobile phone Nokia valued Kshs.15,000/= all valued Kshs.833,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Birian Nungo Akwir. They were also charged with an alternative count of handling stolen property contrary to section 323 of the Penal Code. Particulars are that they were found otherwise in the course of stealing, knowing or having reason to believe that motor vehicle reg. KAS 335F was stolen and dishonestly handled. After full trial they were convicted in the main count and sentenced to death as provided by law hence this appeal.

The basis of the appellants’ conviction is that they were found in possession of a motor vehicle stolen or robbed from the complainant a few days after the subject robbery. It is also the case of the prosecution that the 2nd appellant was positively identified by the complainant in a properly conducted identification

parade.

From the testimony of PW1 there is no doubt that on the night of 17th December 2004 he was robbed of motor vehicle reg. No.KAS 335F. The robbery was committed by three men who were armed with dangerous weapons. It is clear from the evidence that the complainant was assaulted and sustained injuries as was attested to by the medical evidence adduced by PW4 Dr. Kamau and the P3 form produced before court as exhibit 4. There is also no doubt that apart from the vehicle, PW1 lost the items indicated in the charge sheet. The evidence on record is also that part of the personal items stolen from PW1 was found in the vehicle at the time the two appellants were arrested. The items included the business cards of PW1 which actually enabled police to contact him and summon him to Pangani Police Station. There is also evidence which is undisputed that the motor vehicle recovered, though bearing reg. No.KAQ 300D, was indeed the actual motor vehicle stolen from PW1 on the material night.

According to PW2, PC Cpl Tom Otieno from the Flying Squad of the CID section, on 18th December 2004 while on normal patrol duties with three other police officers, they noticed a motor vehicle reg. No.KAQ 300D coming from the opposite direction was being driven in abnormal manner. The police officers doubted the registration numbers as they were not written the way other numbers are written. According to PW2, the registration numbers appeared to have been placed on the vehicle. The officers then reversed in order to find out the status of the occupants and whether the said vehicle had genuine registration numbers. Immediately the occupants of the said car drove off at a very high speed. PW2 contended that the vehicle was driven very badly from one side of the road in a zigzag manner and overtaking other vehicles in a dangerous manner. The officers gave a chase and a few minutes the car was forced to the side due to oncoming traffic and the driver lost control and the vehicle overturned. The officers got to the scene and managed to apprehend two of the occupants whom they had earlier seen in the vehicle. PW2 confirmed that the two persons they removed from the vehicle were the appellants herein. On closer observation, the officers discovered that the registration number was KAQ 300D while the windows had registration numbers KAS 335F. On searching the vehicle the officers recovered a set of number plates from under the seats. He contended the number plates recovered inside the vehicle was tallying with what was on the windows. The officers then communicated with the control room to find out if motor vehicle KAS 335F had been reported missing. It was confirmed to them that the said vehicle had been stolen the previous night. PW2 also confirmed that it was the 1st appellant who was driving the motor vehicle while the 2nd appellant was on the passenger's seat.

PW5 and PW7 both from the office of the Registrar of Motor vehicles confirmed to court that the exact and actual number of the motor vehicle found with the two appellants is KAS 335F. PW5 produced the print out of the motor vehicle as exhibit 9 while PW7 produced the file for motor vehicle registration No.KAQ 300D showing that it was a completely different vehicle from the model, type, owner, chassis Number and engine number. PW7 also confirmed the plates KAQ 300D were not genuine and did not originate from the office. He also testified that the number plates KAS 335F originated from their office and was a genuine number plate.

The evidence of PW5 and PW7 was reinforced by the evidence of PW9 who confirmed the chassis and the engine number from the photos produced, as those indicated in the log book and print out produced as exhibit 3 and 9 respectively.

PW3 IP Kivuga stated that on 21st December 2004, he conducted an identification parade where PW1 identified the 2nd appellant as one of the persons who robbed him on the material night. He then produced the identification parade forms as exhibit 8. The identification parade was carried out at Pangani Police Station and was conducted in a proper manner as per PW3.

PW8 is the investigating officer who after evaluating the statements, charged the two appellants with the charge subject of this appeal.

The 1st appellant gave sworn testimony and stated that on 18th December 2004 at about 9.00 p.m. he left with a customer's vehicle to take to Jam Reserve since he is a mechanic who was left with the said motor vehicle to repair. He started that he finished the repairs at about 6.30 p.m. and on talking to the customer,

he was directed to take the vehicle to Jam Reserve. Before he left, he met the 2nd appellant who was known to him and who asked for a lift. As they were driving towards Mutindwa, they met five people in a vehicle who produced guns and told them to stop. They tried to escape but the vehicle rolled a few metres from the place they were ordered to stop. He stated that he assumed the persons who stopped them were thugs, but they later identified themselves as police officers.

The 2nd appellant also gave sworn testimony and stated that he was given a lift by the 1st appellant since there were no *matatus* to take him to his home. He confirmed that they were stopped on the way but since they were not sure about the identity of the said persons, they proceeded with their journey. He confirmed the vehicle overturned and he was injured and could not tell what happened thereafter until he later found himself in a police station.

The question for our determination is whether there is sufficient evidence to sustain the conviction entered by the trial court. It is clear that the complainant was robbed of his motor vehicle and other valuables at gun point by three armed men on 17th December 2004. It is undisputed that the vehicle was found the following day driven by the two appellants. The two appellants themselves confirmed that they were found in possession of a motor vehicle earlier robbed from the complainant. At the time the two appellants were found in possession of the said motor vehicle, its registration numbers had been changed. No doubt the original and actual registration numbers of the motor vehicle stolen from PW1 was found under the seats. It is also important to note that some of the items earlier stolen from PW1 were found inside the motor vehicle leading police to contact the complainant. The motor vehicle was positively identified by the complainant. His testimony was reinforced by the evidence of PW5 and PW7. There is also no doubt that PW2 and PW6 were police officers who arrested the two appellants inside a motor vehicle earlier robbed from the complainant. The said officers described in details how and why they became suspicious of the vehicle when they first noticed it. The testimony of PW2 and PW6 is that the number plates KAQ 300D appeared irregular. That was confirmed by the evidence of PW7. The two officers stated that they identified themselves as police officers and ordered the occupants to stop but the vehicle sped off leading to the chase and eventual arrest of the two appellants.

The 1st appellant in his defence stated that he was in lawful possession of the said motor vehicle having been entrusted to him by one of his clients to repair it. He admitted that during the time he was repairing the motor vehicle he was getting into the vehicle yet he never noticed the number plates KAS 335F on the floor. It is also curious and strange that he never noticed the number plates on the windows, windscreen and the lights were different from those on the number plates. It is also difficult to understand that he admitted that he does not know the name of the client on whose vehicle he was working, yet this was a regular client who used to take several vehicles to him for repairs.

As was rightly pointed out by the trial court, the defence of the appellants is quite unbelievable and extremely farfetched. No doubt that the two appellants were found in possession of motor vehicle earlier robbed from PW1. It was 24 hours after the incident and they did not give a reasonable explanation as to how they came into possession of a vehicle stolen from PW1. We agree that the only presumption or inference is that the two accused persons either participated in the robbery or received and handled the vehicle knowing it to be stolen since they did not give any account or explanation for their possession. We therefore think that the two appellants were convicted on sound and credible evidence. In our view, the trial court correctly and rightly so convicted the two appellants. We think there is no basis to interfere with the conviction against the appellants. Consequently, the appeals by the appellants are not merited. We uphold conviction and affirm sentence against each of the appellants.

Dated, signed and delivered at Nairobi this 16th day of May, 2011.

J. KHAMINWA

M. WARSAME

JUDGE

JUDGE