CRIMINAL
Doctrine of possession of recently stolen goods
Ingredients of robbery of violence charge
Identification of single witness under
Difficult circumstances

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Kasango & Tuiyot, JJ.)

CRIMINAL APPEAL NO. 58 OF 2011

-BETWEEN-

ABDULKARIM MUSA ALI… …….....……..APPELLANT

AND

REPUBLIC …….……..…. …….RESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate Mr. T. Ole Tanchu in Criminal Case No. 3086 of 2009 at Mombasa Law Courts)

JUDGMENT

The appellant was charged before the Chief Magistrate's Court Mombasa with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. After trial he was convicted of the offence of robbery contrary to Section 296(1) of the Penal Code. He was sentenced to imprisonment of 12 years. He presents this appeal against conviction and sentence. This is the first appellant court and as such we are guided by the principles in the case; **OKENO VS REPUBLIC 1972 EA 32** where it was stated:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs R., (1957) E.A. 336 and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post (1958) E.A. 424."

PW1 **Francis Ndegwa Njoroge** the complainant herein stated that on **3rd August, 2009** he was operating a taxi on behalf of **KENATCO** Company. He had worked for **KENATCO** for over 1 year. At 6.30pm on

that day he was approached by a customer whilst he had parked car registration No. KBF 078R. This was at Ambalal House in Mombasa. He negotiated with the customer a price for taking him to the Moi International Airport Mombasa. They agreed a price of Ksh. 900. The customer informed the complainant that he was in the company of other people who were in the car that was being driven behind them. He therefore requested the complainant to drive slowly which he did. The customer directed him to drive to Kizingo area. The purpose of going to Kizingo was to collect his bag. All the while the customer was talking on his mobile phone in Somali language. The customer requested the complainant to stop at a murram road near a secondary school. By then the customer was still engaged on telephone. The customer alighted from the vehicle. He continued to converse on his telephone whilst he was outside the vehicle. After sometime he informed the complainant that he would pay the waiting charges. The customer inquired from the complainant where he could exchange dollar currency. The complainant informed him that it could be done at the airport. At one time the customer informed the complainant that his credit had ran out in his mobile phone. The complainant offered him his mobile phone to use but the customer declined. The customer then went to the driver's side of the vehicle and as he did so he put his mobile phone in his pocket and produced a pistol. The complainant in evidence said that the customer told him "***Francis these are your last moments***." At that time the customer spoke to him in English.

The customer then ordered the complainant to alight from the vehicle because he did not want blood to spill in the car. When he alighted the customer told him to remove his belongings with one hand as he covered his eyes with the other hand. The complainant removed his National Identity card, driver's licence, PSV licence, Ksh. 7,400, siemens phone 570 model, handkerchief and house keys. The customer then got into the driver's side as he continued to point the gun at the complainant. He then told him "***Francis I will not kill you but I want you to lie down here***."

The complainant did so as the customer sped away with the car. The complainant reported the matter to the police. On **22nd September, 2009** the complainant on confirming that he could identify the person who robbed him was taken to Makupa Police Station. At that station, he was asked to identify that customer from a group of eight persons. He identified the appellant from that group of people. He also confirmed that the person that was before the Chief Magistrate's Court was the robber. He identified a phone which was before the court as the one that was taken away from him by the robber. He identified it by noting the scratch on the phone and the cracked battery. He stated that the appellant had hired the vehicle at 6.50 pm and at the point of hire and as they negotiated the price they took 5 minutes.

Before the robbery the complainant said that he was in the company of the appellant for a total of 40 minutes. Further, that where they stopped before the robbery took place, there were lights which enabled him to see what was happening. PW2 ***Hamza Abdalla Barak*** confirmed that on **3rd August, 2009** at 3.00pm he was called by the appellant whom he knew and who requested him to give a vehicle to use to go to the shamba(farm) at Takaungu.

PW2 called his father and requested him to release to the appellant vehicle registration No. KAW 514N. The appellant collected the car and returned it the following day the **4th August, 2009**. Subsequently, on PW2's brother being arrested with that same car on suspicion of ferrying stolen goods PW2 led the police to the appellant's home. PW2 confirmed that the appellant was his neighbour. PW2 confirmed also that the appellant gave his father Ksh. 2,500 when he collected the vehicle from him and which was the money the appellant owed him.

PW3 was **Angela Syombua Muthini**. She was the owner of vehicle registration No. KBF 078R. She had given that vehicle to **KENATCO** Company for them to use it in their fleet of vehicles. She confirmed that she was informed that the vehicle had been stolen but it was later recovered at Takaungu in Kilifi.

PW4 was Police Inspector who conducted the Identification Parade which involved the appellant. He said that on **22nd September, 2009** he arranged for eight people to join the appellant in the parade. He first arranged the people, then called the appellant who chose to stand between the 4th and 5th persons. PW1 was thereafter called and requested to identify the appellant by touching him.

PW1 identified the appellant by touching him. The inspector of police said that the appellant although was requested, chose not to say anything after the parade but did sign parade forms. On cross examination PW4 the Inspector of Police said that the appellant had a scar on the forehead but that there were other people in the parade with a mark on their head.

PW5 was the investigating officer. He stated that at 7.00pm on **3rd August 2009** it was circulated amongst the police officers that motor vehicle registration No. KBF 078 R had been stolen. On **4th August, 2009** that vehicle was tracked by tracking mechanisms at Takaungu. It was recovered the following day at a house with all its tyres, the communication radio and the car radio removed. This officer received information that a car registration No. KAW 514 N had carried tyres within than area. PW2 led the police to the appellant's home. The police at the appellant's home recovered a toy pistol and a siemen phone.

On being cross examined the investigating officer said that he found that phone in the hands of the appellant. The toy pistol was beneath the roof top. On cross examination further, this officer stated that PW1 had given him the appellant's description. The appellant was found by the trial court to have a case to answer at the close of the prosecution case.

In his defence, the appellant stated that he works for a company called **AL-MARAI** Co. Ltd based in Saudi Arabia in Mecca where he worked in sales and marketing. He said that he had worked for that company from the year 2005. He returned to Mombasa in June 2009 on an emergency leave. On **3rd August, 2009** he attended his child's birthday at the home of his former wife in Kilifi Town Bondeni. On the day of the arrest at 1.00 pm he saw PW2 come to his house and later some other six people entered the house and ordered everybody to lie down. These were police men who searched his house. He said that he inquired from PW2 whether he had brought Police to him because of a debt owed by the appellant's wife to PW2's wife of Kshs. 2,500. After the search by the police, the appellant said that his passport went missing. On **22nd September, 2009** appellant confirmed that he was taken to Central Police Station and was told to sit in the middle of six people on a bench. After the parade, he said that he was told ***"….shut up and asked to append my signature on a form."***

On being cross examined, he confirmed that he was in Mombasa in August 2009. He denied that he revealed where the toy pistol was. He further stated in cross examination that when he was arrested he was holding his own phone.

DW2 ***Shamza Hussein Yusuf*** described herself as a wife of the appellant for two years. She said that on 3rd August, 2009 she and the appellant went to the appellant's first born's birthday in Kilifi. She said that the appellant worked for a Saudi Arabian Company known as **AL-MARAI** as a driver. She also stated that she had obtained Ksh. 2,500 as a loan from PW2's wife at one time when she was sick.

The learned counsel for the appellant ***Mr. Alando*** in submissions in support of the appellant's appeal stated that the charge before the Chief Magistrate's Court was defective and that consequently the appellant should have been acquitted of the offence charged. He submitted that section 296 (2) of the Penal Code Cap 63, the words '*threatened to use actual violence*' are not provided for. At this point it is important to remind ourselves what that section provides:

"(2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

The reading of that section shows that there was no deviation of the charge from that section. We are in agreement with learned counsel for the stated ***Mr. Tanui*** when he submitted that the charge does comply with the provisions of section 137 of the Criminal Procedure Code Cap 75. That is the section that provides the rules of framing of charges and information. To support our finding, we shall rely on the case **OKWARO GEORGE WILLIAM VS REPUBLIC NRB CRA 178 OF 2007** where the court of

appeal had these to say:

"This evidence confirms one of the ingredients required for the establishment of the charge under section 296(2) of the Penal Code. Thus lack of weapons used does not invalidate the charge as framed against the appellant unless it was the only ingredient of the offence relied on by the prosecution."

In this case, when the matter appeared before the chief Magistrate's Court Mombasa, the appellant faced the following particulars:

"ABDUL KARRIM MUSA ALI

On the 3rd day of August, 2009 at around 9.45pm at Kizingo area near Government Training Institute in Mombasa district within Coast Province <u>while armed with dangerous weapon namely pistol</u> robbed off *FRANCIS NDEGWA NJOROGE* ***motor vehicle registration number KBF 078 R Toyota Platz Gold in colour, mobile phone siemens M570, driving licence, PSV and cash Kshs. 7,400/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said*** *FRANCIS NDEGWA NJOROGE****." (Underline ours)***

As can be seen, the words complained of by the appellant were not the only words relied upon by the prosecution. We therefore reject that ground of appeal. In so rejecting we also would rely on the case **<u>PETER MBAO MUTHONI VS REPUBLIC NYERI CRA 33 OF 2005</u>**; where the High court relied on a court of appeal decision as follows:

"The Court of Appeal in the case of JUMA VS REPULIC (2002) 2 EA considered what particulars should inform the charge under that section and stated as follows:

Under section 296(2) of the penal code the charge must state the accused was armed with dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds, beats or strikes or uses any other personal violence to any person."

There is no basis in our view of faulting the conviction of the appellant on the charge he faced in the lower court on the ground that the appellant was convicted on the evidence of one single identifying witness, PW1. The learned trial Magistrate addressed himself to that fact and also to circumstances surrounding the identification. In his considered judgment, the learned trial magistrate had these to say:

"The complainant gave consistent and unshaken evidence as to how the accused person got into his car for purposes of hire to the airport but instead, he directed complainant to Kizingo where he went to rob him. Complainant spoke to the accused outside Ambalal House when they negotiated for the price and he stated that there was still some light as darkness was creeping in. it therefore means that complainant saw the accused person at that time and therefore agreed to carry him in his car. Further, the complainant and accused went to Kizingo area and complainant averred that they stopped in two spots and that where they had stopped there were lights and one could see what was happening. Complainant spent quite sometime with the accused while the accused was speaking on the phone inside the car, outside the car and when he was alighting on the three or so occasions he did and he spoke to the accused when complainant complained about delay whereby the accused stated he would pay waiting charges.

In any view all these circumstances make a person familiarize with the other and thus was sufficient time and lighting sufficient for the complainant to observe and recognize the accused person."

The learned trial magistrate in warning himself as seen above was aware of the case **<u>ABDALLA BIN WENDO & ANOTHER V. REPUBLIC [1953] 20 EACA 166</u>**where the court of appeal had this to say:

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a

single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult."

The argument by the appellant that the trial court erred to have convicted him on reliance of a single identifying witness has no basis. We reiterate what the learned trial magistrate stated that the appellant spent a considerable amount of time with PW1 in close proximity to lead this court to find that his identification cannot be faulted. The appellant's identification at the parade was after PW1 had described him to the investigating officer. Even the appellant in his defence confirmed that evidence. The fact that the parade may have taken place when the parties in the parade were seated is of no consequence.

The Regulations on Parade do not specifically prohibit it. The parade met the requirements that the person in the parade including the suspect be a minimum of nine persons. The identification of the appellant was not reduced in its cogency by the fact that the investigation officer did not record the description of the appellant by PW1. The investigating officer did confirm that PW1 described the appellant to him.

It should be recalled that the appellant was not convicted on the evidence of identification alone. He was found in possession of the mobile phone of PW1 which PW1 identified before court. The appellant was therefore in possession of recently stolen telephone of PW1. We would therefore, invoke the doctrine of possession of recently stolen goods. The court of appeal in the case **ANTHONY KARIUKI KARERI VS REPUBLIC NKR CRA 110 OF 2002,** discussed that doctrine as follows:

"The doctrine of recent possession is comprehensively dealt with in the case of Andrea Obonyo Vs Republic (1962) EA 542 relied on by the appellant's counsel. The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. That is a presumption of fact and not an implication of law which presumption is merely an application of the ordinary rule relating to circumstantial evidence.

In that case the court said at page 349 para H, I:

"when a person is charged with theft and, in the alternative, with receiving and the sole evidence connecting him with the offence is the recent possession of stolen property, then, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more possible or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be doubt as to which of the two offences he has committed."

It is also worthy to refer to the case of **KENNEDY KAVAI ABDALLAH vs REPUBLIC MSA CRA 42 OF 1999** on the same issue. The court of appeal in that case had these to say:

"It bears repetition to say that air tickets, passport and identification papers belonging to PW1 are personal items which when found on the appellant 5 days after the robbery in the absence of any explanation by the appellant as to how he came into possession thereof the only inference to be drawn is that he was either the thief or handler. His possession of Italian currency in the absence of any explanation also points to his being one of the robbers."

The appellant did not cross examine PW1 or the investigating officer in regard to what he stated in his defence that when he was arrested he was holding his own phone. He raised that issue for the first time when he gave his defence. We can only term such a defence as an after thought and we reject it just as the trial court did.

The appellant faulted his conviction on the alleged contradictions about the time that was stated by PW1 as the time when the offence occurred that is 7.50 pm and the time stated in the charge sheet that is 9.00pm.

We are in this regard in agreement with the submissions of the learned state counsel when he stated that

such difference would not warrant the quashing of a conviction. We are of the view that such differences in time are curable under section 382 of the Criminal Procedure Code which provides as follows:

"**382. **subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

We have examined the other alleged contradiction highlighted by the appellant but we find that they are not material to lead to the quashing of conviction of the appellant. The fact that no independent witness gave evidence of the recovery of the stolen vehicle is of not consequence. It is enough that the investigating officer testified how and where it was recovered. There is no allegation by the appellant that such witnesses who were not called in respect of that recovery could have given evidence adverse to the prosecution's evidence. There is no rule of any number of witnesses that ought to be called to prove a fact. One witness can suffice.

The appellant raised a defence of alibi; it was rejected by the trial court. We would state that it is now accepted by the court that an accused person when he raises the defence of alibi he assumes no burden to prove the same. This was so stated in the case **KIARIE VS REPUBLIC [1984]KLR** when the court stated:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."

Whereas the prosecution testimony in the lower court was consistent and believable the defence offered by the appellant was not. The appellant stated that he was employed in Saudi Arabia where he worked in sales and Marketing. His wife of two years DW2, who one would expect would know what work her husband does, stated that he worked as a driver. It is because of that glaring contradiction and with a view to the consistent evidence of the prosecution that we reject the appellant's alibi evidence.

The appellant in his defence and for the first time stated that when the police went to his house to arrest him his passport was lost. If that was so, it would be expected that he would have put a question to the investigating officer on this matter. We can only once again conclude that that line of defence was an afterthought. We also find that the appellant's defence cannot be relied upon because of the appellant's failure to cross examine PW2 over the alleged loan given by his wife to the appellant's wife.

On the whole, the prosecution in our view proved the case beyond reasonable doubt that the appellant was the robber who robbed PW1 of the car, telephone , PSV/driver's licence, and money.

We find that we are in agreement with the trial court's reduction of the charge against the appellant to simple robbery because the appellant used a toy pistol in the robbery. A toy pistol cannot be termed as a dangerous weapon. In this regard we refer to section 2 of the Firearm Act which provides as follows:

"Firearm means a lethal barreled weapon of any description from which any shot bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile."

In regard to the sentence, in respect of section 296(1) of the penal code, the maximum is 14 years imprisonment. The appellant was sentenced for 12 years imprisonment. The appellant was a first time offender. With that in mind, we are of the view that 12 years imprisonment was excessive and having made that finding we shall then proceed to interfere with the trial court's sentence. Having regard to the fact that the appellant was a first time offender we shall substitute his sentence to one of 9 years imprisonment.

Our judgment is that the appellant's appeal against conviction is rejected. The appeal against sentence is allowed and this court does hereby set aside the lower court's sentence and does substitute it with a sentence of 9 years of imprisonment of the appellant with effect from the date of his conviction.

DATED and **DELIVERED** at **MOMBASA** this **22nd** day of **November, 2011.**

…… **……..……..……**

MARY KASANGO **FRANCIS TUIYOT**

JUDGE **JUDGE**