



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 53 of 2007

MARCARIOUS ITUGU KANYONI ALIAS PETER NJOGU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

*(Appeal from the original conviction and sentence in the Chief Magistrate's Court
at Nyeri in Criminal Case No.3904 of 2005 dated 4th April 2007
by E. J. Osoro, Senior Resident Magistrate)*

JUDGMENT

MARCARIOUS ITUGU KANYONI alias **PETER NJOGU**, the Appellant herein, was tried on a charge of two counts. In the first count he faced a charge of robbery with violence contrary to *Section 296 (2)* of the Penal Code whose particulars are that on the 16th day of February, 2005 at Mweiga area in Nyeri District within Central Province, jointly with others not before court while armed with dangerous weapon namely iron bar robbed **NAHASON KAIRU NDUGO** of one motor vehicle registration number KAP 027D Toyota corolla valued at Kshs.500,000/=, a driving licence, a photocopied identity card and cash Ksh.800/= all valued at kshs.501,430/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nahason Kairu Ndugo. In the second count, the Appellant faced a charge of obtaining money by false pretences contrary to *Section 313* of the Penal Code. The particulars are that on the diverse dates between 19th February, 2005 and 26th February, 2005 at Nanyuki Township in Laikipia District within Rift Valley Province, jointly with others not before court, with intent to defraud, obtained from ROSE KANANU MAKOTA the sum of Kshs.115,000/= by falsely pretending that they were going to sell to her a motor vehicle registration number KAN 818T Toyota Corolla saloon. At the end of the trial the appellant was convicted in both counts. He was sentenced to suffer death and to serve three (3) years imprisonment in count I and II respectively. Being dissatisfied he preferred this appeal. On appeal the Appellant put forward the following six (6) grounds in his Petition:

1. *The Learned Senior Resident Magistrate erred in law and in fact in relying on identification parades and made a conclusion that the Appellant was picked out from them without considering and resolving whether or not they were flawed. A miscarriage of justice was occasioned.*
2. *The Learned Senior Resident Magistrate erred in law and in fact in totally failing to consider the submissions made by the defence counsel. Prejudice was occasioned to the Appellant and a miscarriage of justice occasioned.*

3. *The Learned Senior Resident Magistrate erred in law and fact in failing to consider that though P.W. 10, stated he was assaulted, no P3 form was produced as exhibit to buttress this finding more particularly so when considering that the said iron bar as mentioned in the charge sheet was not produced in the proceedings. A miscarriage of justice was occasioned.*
4. *The Learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that it is one Alfred Karimi who received the said money's and even wrote down two acknowledgements for them. A miscarriage of justice was occasioned.*
5. *The Learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that "falsity of an existing fact" is a preliquisite (sic) in a charge under Section 313 of the Penal Code thus convicting the Appellant on a defective charge. A miscarriage of justice was occasioned.*
6. *The Learned senior Resident Magistrate erred in law and in fact in failing to consider that very vital witnesses were never called by the Prosecution and no explanation was offered yet the Learned Magistrate never made any finding on this issue whether favourable or otherwise. A miscarriage of justice was occasioned to the Appellant.*

When the appeal came up for hearing before us, Mr.

Kimani, learned advocate for the Appellant, argued grounds 1 to 3 together with grounds 4 to 5 together and ground 6 separately. Mr. Kimani was of the view that the Appellant was not properly identified because Nahashon (P. W. 10) did not give the description of the robbers when he first reported to the Police neither did he do so to his employer (P. W. 5). Mr. Kimani further pointed out that there were material contradictions in the testimonies of P. W. 5 and P. W. 10. It is said by P. W. 10 that he was hired by two people yet P. W. 5 stated that four people hired his motor vehicle. Another contradiction pointed out is that according to P. W. 1, the motor vehicle was hired on 10th and 12th February 2005 yet the charge sheet talks of the offence having taken place on 16th February 2005. The learned advocate further pointed out that the Appellant was wrongly convicted in count II because the charge was fatally defective in that the act of pretence was not established. Mr. Kimani further urged this Court to find that the prosecution failed to summon certain witnesses whom they knew had vital evidence which could destroy its case.

On his part Mr. Makura, learned State Counsel, urged this Court to dismiss the appeal because there was overwhelming evidence which was consistent and corroborative to sustain a conviction. The learned State Counsel saw no fault in the manner the identification parade was conducted. Mr. Makura, however, conceded that the Complainant did not give to the Police the initial description of the Appellant or anybody else but nevertheless the conditions for identification were positive and free from error. It is the submission of Mr. Makura that the Appellant obtained a sum of Ksh.115,000 from P. W. 1 as

consideration for the purchase of a motor vehicle which the Appellant knew was a stolen motor vehicle.

We have carefully considered the arguments of both learned counsels. We wish to re-evaluate first the evidence that was presented before the trial court. A total of 12 witnesses were summoned to testify in support of the prosecution's case. The Complainant, Rose Kananu Makotha (P. W. 1) told the trial Court that the Appellant offered to sell to her a good used motor vehicle. On 19th February 2005, the Appellant is said to have delivered to P. W. 1 motor vehicle registration number KAN 818 T to purchase at Ksh.235,000/=. P. W. 1 is said to have paid to the Appellant a deposit of Ksh.20,000/=. On 21st February 2005 P. W. 1 said the Appellant, his brother, with one Alfred Karimi visited her home of whereupon an agreement for sale of the aforesaid motor vehicle was executed. On that day the Appellant introduced Alfred Karimi as his agent to sign the agreement and to collect the purchase sum on his behalf. She went on to say that she paid the Appellant's agent Ksh.35,000/=. Edward Atonge (P. W. 3) said that he saw P. W. 1 pay two people whom he did not identify a sum of Ksh.60,000/= being part of the purchase money. It turned out that motor vehicle registration number KAN 818 T had been robbed from Nahashon Kairu Ndugo (P. W. 10). There was evidence that the actual registration number of the motor vehicle was KAP 027 D and owned by Edward Kamunde Mburu (P. W. 5) but robbed from his driver P. W. 10. We have re-evaluated the evidence and come to conclusion that P. W. 1 knew the Appellant very well. In fact the Appellant in his testimony stated that P. W. 1 was his customer. The Appellant denied selling the aforesaid motor vehicle to P. W. 1. We find his denial displaced by the evidence of P. W. 1 and that of Daniel Kimathi (P. W. 2) who saw the Appellant deliver the car to P. W. 1's home. P. W. 2 saw P. W. 1 withdraw ksh.20,000/= and give to the Appellant. According to the evidence of P. W. 10, two people amongst them the Appellant hired motor vehicle registration number KAP 027 D to transport them from Dandora Nairobi to Nyeri and then to Mweiga where a third person was given a lift. It is said the motor vehicle traveled for a short distance after Mweiga whereupon the person who had boarded at Mweiga pounced on P. W. 10 and robbed him of the motor vehicle and cash 800/=. It is the evidence of P. W. 10 that he was with the trio for three hours, that is, from 1.30 p.m. to 4.30 p.m. P. W. 10 said he managed to identify the appellant since he saw him alight in Nyeri town to make a phone call and to change one of the tyres. P. W. 10 said he was beaten senseless when he failed to ingest a substance he was given by the man whom he had picked in Mweiga. In the identification parade conducted by I.P. David Cheruiyot (P. W. 6), P. W. 10 was able to identify the appellant. He was also able to identify the motor vehicle as the one he was robbed of by the Appellant in company of accomplices. We are satisfied that the Appellant was seen by P. W. 10 since the robbery took place in broad day light.

When placed on his defence the accused person denied having committed the offence. He admitted that P. W. 1 was his customer having ferried him from Meru town. He denied having received any money from her. He raised the defence of alibi.

Having reconsidered the evidence tendered by both sides, we now wish to consider the grounds raised on appeal. It is argued that Nahashon Ndugo (P. W. 10) did not give the description of the Appellant when he booked the report at the Police station. He also never gave the Appellant description to his employer. Mr. Makura conceded that P. W. 10 did not give the physical and or attire of the Appellant. We have carefully reconsidered that submission. We think the omission to do so is not fatal. There is no evidence that P. W. 10 was asked by the Police to describe the physical appearance of the Appellant nor the clothes he wore that day. We are satisfied that the Appellant and his accomplices were with P. W. 10 for about three hours and during broad day light. We are also satisfied that P. W. 10 saw the Appellant when he alighted at Nyeri to make a phone call and to change a deflated tyre. We think the conditions were favourable for a positive identification free from error. We have also

carefully perused the identification parade forms and we are convinced that the identification parade was conducted according to the Force Standing Orders.

The Appellant has also complained that there were conflicting evidence as to the dates when the incident occurred. We are unable to allow the appeal on this ground because it is clear that the motor vehicle was delivered on 16th February 2005 but payments were made on 19th February 2005. Mr. Kimani urged this Court to find that the offence of obtaining money by false pretences was not proved. There is no doubt the appellant visited the home of P. W. 1 where he received the initial sum of Ksh.20,000/=. He later on introduced one Alfred Kirimi as his agent who later is said to have collected a sum of Ksh.35,000/=. There is doubt whether Alfred Kirimi acted on behalf of P. W. 1. We are, however, certain that the Appellant received ksh.20,000/=. He knew the motor vehicle was the one he had robbed. We are satisfied that he was properly convicted on the second count.

In the end we find no merit in this appeal. It is accordingly dismissed. However regarding sentence, we note that the appellant was sentenced to death in respect of count I as well as 3 years imprisonment in respect of count II. That was, in our view erroneous as the appellant cannot logically serve the sentence of death as well as prison sentence. We accordingly correct the error by ordering the suspension of sentence in count II. The result is that the appellant shall suffer the sentence of death in count I only.

Dated and delivered this 13th day of January 2010.

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE

In the presence of Mr. Njuguna for the Appellant and Mr. Makura for State.

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE