REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 323 of 2009

GEOFFREY MWANGI GITHINJI..……..……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The Appellant was together with his co-accused charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, (Cap. 63, Laws of Kenya). The Appellant's co-accused was also charged with a second count of handling stolen property contrary to Section 322(2) of the Penal Code. The Appellant's co-accused was acquitted on the account of handling stolen property and also on account of robbery with violence. The Appellant was however found guilty and was convicted and sentenced to death as by law provided.

Being dissatisfied with his conviction and sentence the Appellant has appealed to this Court on four grounds as follows:

(1) that the learned trial magistrate erred in law and fact by basing my conviction on evidence of identification, without considering that circumstances at the scene of crime were not morally favourable for a positive identification,

(2) that, he further erred in failing to consider that it was a dock identification and no explanation was given for the failure to conduct an identification parade,

(3) that, the learned trial magistrate erred in law and fact by failing to see that very essential witnesses namely Fadil Mohammed and the mentioned informer were not called to evidence and therefore a fatal missing link in the chain of evidence,

(4) that he further erred in finding corroboration on the evidence of my handling as given by PW3 without considering my explanation in defence as required by law.

In support of the grounds of appeal, the Appellant also made written submissions.

The appeal was opposed by the State. The arguments for and against the appeal will appear in the body of this judgment.

1. Of Identification

It was the Appellant's argument that under the circumstances of the robbery the complainant was in fear of death or injury as a result of seeing a pistol being pointed at him to the extent that he even became *"confused"* as PW1 stated in his evidence, and that identification being an act of the mind, a confused mind is weak in its perception, and an identification in such confused mind cannot be safely relied upon in such a case where the only penalty is death. The Appellant relied upon the case of **JUMA NYONGESA vs. REPUBLIC** (Cr. App. No. 121 of 1981 (CA) where at p.4, Madan JA said -

> ***"It is unsafe to convict on identification if circumstances are not conducive."***

The Appellant also relied on the case of **CLEOPAS OTIENO WAMUNGA vs. REPUBLIC** *(Cr. App. No. 20 of 1989 (CA)* Kisumu where it was held that -

> ***"The witnesses who said that they could identify the Appellant in circumstances of shock and fear could have been mistaken as the duration was too short."***

What the learned judge said in the above - cited cases is of course correct in their context. Each case has however to be decided in light of its peculiar facts and circumstances. In this case, it is indeed correct that no police identification parade was carried out. The fact that no such parade was carried out did not detract from the weave of evidence in this case connecting the Appellant with the offence of robbery with violence.

The offence was committed during broad daylight at about 2.30 p.m. The evidence and description *(by PW1 the complainant*) of the Appellant and circumstances is clear. PW1 described the Appellant as the slim dark robber who went to his car door with a pistol and ordered him out of the car. He testified that he clearly saw the robbers.

> ***"The slim one had a white shirt and a black trouser. He had one missing tooth. He is the one who had a pistol and told me to leave the car."***

The description of the Appellant by PW1, as having a *"missing tooth"* is corroborated by the evidence of PW2, a mechanic in a garage within Nakuru Town identified the Appellant as *"Mapengo"*.

> ***"On 19.06.2009 at about 2.00 p.m. I work at my garage doing my work when Mwangi and "Mapengo" drove in a pick-up - registration No. KAK. I do not recall the other numbers. They had a steel bar on the vehicle and they fastened it on the pick-up within a period of about 15 minutes…. Komen (a Police Officer) later told me that the vehicle was stolen, and that Mapengo had been arrested."***

PW3 the broker also told the trial court that the seller was called "Mwangi" the man in court. He is the person who had told him to sell the car on commission of Kshs 10,000/=. He merely confirmed that he is the one and same person who is in the dock. An identification in court of an accused person who is previously known to the witness cannot be worthless. It could only be so if there was any previous evidence of doubt. In this case there was none.

In addition PW4 testified in detail on how the motor vehicle had been tampered with number plates and chassis numbers changed but remained the same vehicle and was identified by PW1 by reference to peculiar features and marks.

There is therefore no doubt either as to the identification of the Appellant as the robber of PW1's motor vehicle or of

the motor vehicle itself the subject of the robbery. Ground one of the appeal must therefore fail.

Of failure to call the informer or other witness "Mohammed Fadhil"

It was the Appellant's contention that important witnesses were not called by the prosecution witnesses, and it was those witnesses who would have irresistibly connected the Appellant with the robbery of the vehicle, and that the prosecution feared that calling those witnesses would have led to adverse evidence in to its case. The Appellant cited the case of **BUKENYA vs. UGANDA [1972] E.A. 549** where the court held inter alia that -

> ***"While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution case."***

The Appellant also referred the court to the English case of **R. vs. SHADRACK [1976] CR. L. R. 755** referred to in Nakuru H.Cr. Appeal No. 475, dated 5th December, 2003, **STEPHEN MICHIRI vs. R.,** where the Court said -

> ***"If a prosecutor has witnesses who are unfavourable to his case he should notify this to the defence and the court, that the prosecution may not call such witnesses, but will offer them to the defence, and failure to disclose such evidence may result in a conviction being quashed."***

The Appellant submitted that without the evidence of Fadhil Mohammed *(who according to the Appellant's submissions was arrested but was not charged),* leaves a missing link in the chain of evidence relied upon to connect the Appellant and his co-accused with whom the car was found.

We have considered the Appellants arguments stated above. *Firstly*, an informer is a public spirited citizen who helps lawful enforcement agencies in the detection and prevention of crime, and often also, in the provision of vital information leading to the apprehension and eventual prosecution of those who commit heinous crimes such robbery with violence. It is a principle of public policy throughout all civilized countries who observe the rule of law such as the Republic of Kenya that identity of informers is strictly protected. No statements are recorded from them, and are consequently never called to testify in any manner except as ordinary witnesses in a matter they may be formally interested in, but not under the name or fabric of an *"informer"*. The prosecution can therefore neither be faulted nor indicted for failure or omission to take a statement from such a person.

Secondly, as for *"Fadhil Mohammed"* it was the evidence of PW4 Police Constable Komen who was the Investigation Officer, that he received information from an informer that motor vehicle registration number KAL 758J was at Enosura in Narok South. His testimony is detailed as to his travel and recovery of the motor vehicle in Narok South, repair thereof, and return to Nakuru. He also described in detail his investigation of the changes by the Appellant and his co-accused of the number plates of the motor vehicle from KAL 758J to KAK 250P, and given a logbook in that registration, to KAK 149M, under which it was insured in the name of one Mohammed Fadhili. PW4 testified at p. 17 of the record that Mohamed Fadhili who gave a Nakuru address is still at large. There is no evidence that he was ever arrested at all, let alone that he recorded a statement and that the prosecution declined to call him in evidence. From the testimony of PW4, Mohamed Fadhili if he were found and arrested, he would have been charged like Jacob Chege as the Appellant's co-accused as an accomplice in handling

stolen property. His evidence cannot be said by any stretch of the imagination could be adverse to the prosecution's case.

For those reasons, we are unable to agree with the Appellant's contention that vital witnesses were not called to testify. That ground therefore fails.

Of consideration of the Appellant's Evidence.

The Appellant contended that his sworn testimony was not considered by the trial magistrate in his judgment. The Appellant contended that the vehicle he was seen with *(according to the evidence of PW3)* was different from the vehicle his co-accused was found with. This being so, this alone raised sufficient doubt and should secure his acquittal. The Appellant relied upon the case of - **KIPSAINA vs. R [1975]** E.A. 253 where the Court held that -

"the explanation needed only to be possibly true even if the court does not believe it."

and also, the case of **MWAURA MUTHOKA vs. RE [1900] KLR 127** - that -

"the explanation need only be reasonable and possibly be true."

Firstly the learned trial magistrate did consider the Appellant's evidence in its entirety in line with the prosecution evidence and established that the Appellant was not only the violent robber of PW1 of his motor vehicle valued at Shs 450,000/=, a Nokia cell-phone worth Shs 6,000/= and cash Shs 15,000/= but also the prime mover of all the changes to the registration numbers of motor vehicle KAL 758J, to KAK 250P and KAK 149M and persona in the purported sale of the vehicle through PW3, Richard Mwangi Wambugu, a broker, and Daniel Karanja who were obviously not owners of the motor vehicle KAL 758J. *Secondly* PW4 established through his investigation with KRA, Registrar of Motor Vehicles, that motor vehicle registration number KAP, 250P, a Nissan Datsun van was registered in the name of one Peter Kinuthia, whereas motor vehicle registration number KAK 149M (in which PW1's vehicle) was recovered in Enosura Narok South, was a Toyota Matatu minibus, green in colour, owned by Simon Karitu Kiilu. *Thirdly* how the Appellant obtained those registration plates KAK 149M, and KAK 250P, are matters peculiarly within the knowledge of the Appellant, under the provisions of Section 111 of the Evidence Act (Cap, 80 Laws of Kenya). A persistent and robust investigation and interrogation of the Appellant might have revealed and shed light on that question. The lack of such information or evidence is however not an excuse or ground for concluding that the motor vehicle found and recovered with the Appellant's co-accused was not that robbed violently from PW1 by the Appellant and his accomplice who is still at large. The Appellant's evidence although sworn did not rebut or contradict the core evidence given by the prosecution, and in particular by PW1, PW3 and PW4 as already outlined above. This ground too fails.

The Appellant asked us to look in particular at the evidence of PW4, and of the vehicle he recovered, and that of the complainant. Having reviewed the evidence of PW4 and that of PW1, we are satisfied beyond any shadow of doubt that the motor vehicle whose registration numbers were changed no doubt by the Appellant and his accomplice at large, to KAK 149M, and KAK 250P, was indeed KAL 758J, belonging to PW1.

In the upshot therefore we find and hold that the prosecution proved its case beyond reasonable doubt. The Appellant was the violent robber, within the provisions of Section 296 (2) of the Penal Code. There was no evidence to challenge or

contradict the evidence of the prosecution. We find and hold that the trial magistrate came to the right decision and have no cause to interfere either with his findings and judgment, conviction, and sentence on the Appellant.

We affirm the trial court's judgment and sentence and dismiss the Appellant's appeal.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 6th day of May 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE