



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 309 of 2008

JEFFA MOHAMED CHAROAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

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The Appellant herein **JEFFA MOHAMED CHARO** has filed this appeal contesting his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant together with his co-accused **SHAFFI SALIM SHAFFI** had both been arraigned before the lower court on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

“On the 26th day of July 2007 at Njuki Enterprises Mikindani in Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons namely pistols robbed DAVID KINGORI MUTHONI, cash Kshs.40,000/-, video camera valued at Kshs.40,000/- and a mobile phone Nokia make 1600 valued at Kshs.4,500/- the total value Kshs.84,500/- and at or immediately before or immediately after the time of such robbery shot dead JAMES OBIERO MIYOGE”

The Appellant entered a plea of not guilty and the trial commenced on 18th February 2008. The prosecution led by **INSPECTOR KITUKU**, called a total of thirteen (13) witnesses in support of their case. The brief facts were that on 26th July 2007 **PW3 DAVID KINGORI MUTHONI** who operates an electronics shop in Changamwe arrived at his said shop at about 1.00 p.m. A white vehicle came up and parked next to his vehicle and three men alighted and went into his shop. The driver remained in the car. About five (5) minutes later he saw armed men run out of his shop. **PW3** ran towards the shop but a shot was fired at him. He was dragged into the shop where he found every one lying down. Inside the shop was yet another man armed with a pistol. The thugs stole a mobile phone, video camera, ATM card and cash before getting back into their white vehicle and driving off. **PW3** also rushed to his vehicle and gave chase. He managed to note the Registration Number as KAM 851F. They lost track of the vehicle and called police. The vehicle was later found abandoned. Inside was recovered the stolen video camera. Police also found that the registration number was fake as it had been altered with strips of black tape. The black tape was removed and the genuine registration number was found to be KAW 952N. The vehicle was taken to Changamwe Police Station.

PW2 MWARUA CHINDANGA told the court that he was the driver hired to drive the motor vehicle Registration No. KAW 952N which was used as a taxi. Earlier on that material day he had been approached by the Appellant who was his in-law and told that there was a customer at the port who wished to hire the vehicle. They proceeded to the port gate. The Appellant persuaded **PW2** to allow him to drive into the port to collect the ‘customer’. **PW2** waited at the gate but the Appellant never returned the vehicle. The two kept communicating through their mobile phones with the Appellant constantly misleading **PW2** about his whereabouts. Finally **PW2** reported the matter to the police. He was informed by police that the vehicle was at Changamwe Police Station. He went to the police station where he was told the vehicle had been used in a robbery. **PW2** later led police to arrest the Appellant who was charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer. He gave an unworn defence in which he denied the charge. On 27th October 2008 the learned trial magistrate delivered her judgement in which she convicted the Appellant on the charge of Robbery. His co-accused was however acquitted. After listening to his mitigation the trial magistrate sentenced the Appellant to death. Being aggrieved by both this conviction and sentence the Appellant filed this appeal.

MR. MAGOLO advocate appeared and argued the appeal on behalf of the Appellant whilst **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State conceded the appeal.

Being a court of first appeal we are mindful of our obligation to re-examine and re-evaluate the evidence adduced in the lower court. In the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81** it was held by the Court of Appeal

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”

The robbery incident in question occurred on 26th July 2007. Both **PW1** and his wife **JULIET WANJIRU NJENGA PW5**, told the court that they were attacked by three men armed with guns. During the course of the robbery an innocent bystander **JAMES OBIERO MIYOGGE** was shot dead. **PW13 DR. LAWRENCE NGONE**, who conducted the post mortem on the body of the deceased concluded that the cause of death was massive hemorrhage due to a gun-shot wound to the head. We are satisfied that the ingredients of Robbery with Violence contrary to section 296(2) are well shown to have been present [see **OLUOCH –VS- REPUBLIC [1985] KLR 549**]. None of the two eye witnesses to the robbery were able to identify the Appellant as one of the men who robbed them and neither is able to place him at the scene. The only evidence linking the Appellant to this crime is his possession of the motor-vehicle allegedly used in the commission of the robbery.

PW1 JOSEPH MANENO told the court that he is the owner of the motor-vehicle Registration No. KAW 952N. He produces his log-book as evidence of ownership **Pexb2**. **PW1** confirms to the court that he had hired **PW2** as his driver and that his vehicle was being used as a taxi. **PW2** on his part told the court that on 26th July 2007 he was parked at his usual spot at Shelly Beach waiting for business when his brother-in-law came and told him there was a customer needing the vehicle. **PW2** positively identifies the Appellant whom he names as ‘*Jeffa*’ as his brother-in-law. He says Appellant is his wife’s brother. Clearly the Appellant and **PW2** were well known to each other before this incident. Indeed no doubt this is why the Appellant picked on **PW2** who was his relative to give the business to. The two met at 9.30 A.M. It was broad daylight. They held a discussion and we find there was no possibility of any error in identification. In addition it has been held that evidence of recognition is far more reliable than mere visual identification [**ANJONONI –VS-REPUBLIC**]. **PW2** went on to testify that the Appellant took him to the Port gate where they were to pick up the customer. **PW2** could not go past this gate as he had no pass. The Appellant offered to drive the vehicle into the port and collect the customer. **PW2** obliged and handed over the vehicle to him. The Appellant drove into the port and that was the last **PW2** saw of him. **PW2** waited at the gate for about an hour and when the Appellant failed to drive out he called him on his mobile phone. The Appellant said he had left through another route. The two kept in communication with the Appellant leading **PW2** on a wild goose chase to Kibarani, Mwembe Tayari and finally to Makupa. Eventually Appellant switched off his phone to block any further communication. Finally police recovered the abandoned vehicle after the robbery and found **PW2’s** notebook inside it. They called and informed **PW2** that the vehicle was in the hands of the police. From this evidence we are quite satisfied that the Appellant was in actual possession of the motor vehicle Registration No. KAW 952N on the day the robbery was committed. In her judgement at page J4 line 28 the learned trial magistrate states

“From the foregoing it is evident that PW2 and the first accused [the Appellant herein] were not strangers. I have no reason to doubt that they truly were in-laws. I also have no reason to doubt that first accused was given the motor vehicle in issue by PW2. There was absolutely no denial or inference of accused’s part that the evidence of PW2 was the truth. They were in constant communication after being given the motor vehicle until the point when he [accused] switched off his phone”

We are in agreement with these findings of the trial magistrate.

The next crucial question is whether this vehicle was the very same vehicle used in the commission of this crime. **PW3** an eye-witness to the robbery told court that the vehicle used by the thugs was Registration No. KAM 851F. He says he saw his attackers get into that vehicle and drive off. He chased them in his own car and only abandoned the chase after he had noted the registration number at which point he called the police. Police came and recovered the car abandoned on a path. Inside the vehicle they recovered the video camera recently stolen from the shop of **PW3**. **PW3** was able to positively identify his stolen

video camera by the stock number on it **Pexb3**. There can be no doubt that this was the very vehicle used by the thugs who robbed the shop of **PW3**. The question is whether this is the vehicle which the Appellant was in possession of having hired it out of the hands of **PW2**. At first glance it would appear not. The vehicle **PW2** spoke of was Registration No. KAW 952N but the vehicle which **PW3** identified was Registration No. KAM 851F. **PW10 CHIEF INSPECTOR RAPHAEL MUTUKU**, was one of the police officers who responded to the call by **PW3** and found the abandoned motor-vehicle. He told the court that it bore Registration No. KAM 851F but upon closer scrutiny he noticed that pieces of black tape had been placed at strategic points on the number plate whose effect was to alter the registration number. He removed the pieces of black tape and revealed the genuine and correct Registration Number to be KAW 952N which was the vehicle **PW3** told the court he handed over to the Appellant that day. This evidence of **PW10** is corroborated by **PW3** who was with police at the place where the abandoned vehicle was recovered. He confirms that he saw police remove black tape placed on the number plate to reveal the correct registration number which he also states to be KAW 952N. **PW12 PC ALLAN ONDERA OCHIENG** was also at the scene and corroborates the evidence of both **PW3** and **PW10** – the pieces of black tape – eight in number removed from the number plate were kept by police and were produced as exhibits in court **Pexb5**. From this evidence we find that the abandoned vehicle was in actual fact Registration No. KAW 152N, but had been cleverly disguised by using black tape to read a different number altogether. We therefore find as a fact that this vehicle which was used to perpetrate the robbery and which was later found abandoned was actually the very same vehicle which **PW3** had given into the Appellant's possession earlier that day.

The crucial question is whether proof that the Appellant had in his possession the vehicle used in the commission of the robbery amounts to proof of his active involvement and/or participation in the crime. As we have stated earlier, there is no evidence placing the Appellant at the scene of the robbery. Similarly none of the recovered items was found in the possession of the Appellant. The vehicle was not recovered in the possession of the Appellant – it was found abandoned by the roadside. The evidence linking the Appellant to this offence is largely circumstantial. Circumstantial evidence has been described as indirect evidence linking the suspect to the offence. In the case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 327**, the Court of Appeal in defining circumstantial evidence held as follows:-

“In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt”

It could be argued and indeed Mr. Magolo for the Appellant did argue that in the absence of direct evidence linking the Appellant to the said robbery, the trial magistrate erred in convicting him. We have ourselves carefully and anxiously analysed the available evidence. The fact that the Appellant went missing after the robbery is very telling. If the Appellant had encountered a problem after the vehicle came into his possession, then he would not have hesitated to inform **PW2** of this. The behaviour of the Appellant in misleading **PW2** about his whereabouts after he drove into the port ostensibly to pick up the customer is also very telling. Did he pick up the said customer or not? If not, why did he not then immediately return the vehicle to **PW3**? The Appellant offers no explanation as to how the vehicle left his hands. The Appellants loud silence on what he happened after he took possession of the vehicle from **PW2** is very suspicious. The Appellant could not be traced from 26th July 2007 to 4th September 2007 the date when he was eventually arrested. This is a period of almost two (2) months. The Appellant offers no explanation for his whereabouts all this time. All these factors combine to prove a guilty mind on the part of the Appellant. He was clearly hiding something. The Appellant in his defence totally denied having taken the vehicle from **PW3** but instead states that **PW3** had framed him due to a family dispute. The learned trial magistrate did consider this defence but dismissed the same thus at page J6 line 24

“His defence was that a grudge existed from the 4/4/2007 between him and his brother in law **PW2**. He said he had been sent by his father to tell **PW2** that he had to marry [Appellant's] sister under the Muslim law a fact which angered **PW2**. In my view even if such an issue would have arisen the grudge would have been between **PW2** and his father in law and not his brother in law who was only a messenger. I fail to find any truth in the defence of grudge raised herein”

On our part we find that this defence amounts to a blanket denial and an attempt by the Appellant to put as much distance between himself and the vehicle as possible. As we stated earlier we are satisfied from the evidence on record that the Appellant did have in his possession the said vehicle on the very day it was used to commit the robbery. The facts show further that during this robbery a man was shot and killed. Immediately thereafter the Appellant goes underground and is not traced until two months later. He did not return the vehicle to **PW3** neither does he make any report to any authority regarding the said vehicle. Instead he spends the day leading **PW2** on a wild goose chase, giving misleading statements about his whereabouts. These facts taken jointly can lead to one and only one conclusion. The Appellant took this vehicle as part of an elaborate plan to use it in the commission of the robbery. That is why he could neither return the vehicle to **PW2** nor explain what he had been doing with it all that time. The circumstantial evidence points in only one direction – the guilt of the

Appellant. The prosecution did succeed in proving its case as required by law. As such we do uphold the conviction of the Appellant by the lower court. The ensuing sentence is also upheld. This appeal fails entirely.

Dated and Delivered in Mombasa this 10th day of September 2010.

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F. AZANGALALA
JUDGE

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M. ODERO
JUDGE

Read in open court in the presence of:-

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M. ODERO
JUDGE
..10.../09/2010