



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL 82 & 83 OF 2007

**(APPEAL AGAINST CONVICTION AND SENTENCE OF [MR. R. NYANKUNDI, C.M.] IN
THE CHIEF MAGISTRATE'S COURT AT BUNGOMA, IN CRIMINAL CASE NO.2996 OF
2006)**

JUSTIN KIMANI NGUBIA.....1ST APPELLANT

GEORGE KAMAU NDOGO.....2ND APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

J U D G E M E N T

The appellants submitted that the learned trial magistrate did not consider relevant pieces of evidence from both the prosecution and the defence. It is their contention that that failure prejudiced the appellants.

It is the appellants' submission that the crucial issue for determination was whether the vehicle registration No. **KAR 220 X** was in the hands of the appellants on 9th November 2006, when the offence was committed.

As far as the appellants were concerned, crucial evidence adduced before the trial court showed that on 9th November 2006, the vehicle was neither in the hands of the appellants, nor was it at the scene of crime, within Bungoma Municipality.

In order to appreciate the significance of that vehicle, it is important for us to set out the basic facts giving rise to the offence with which the appellants were charged and tried.

PW1 was the complainant. His names are **JOHN NJENGA WAMBUI**. He is a mechanic, who also deals with transport. He carries on the transport business all over East Africa.

On 9th November 2006 PW1 withdrew KShs.200,000/= cash, from Barclays Bank, Bungoma branch. He did so when he was in the company of a Ugandan friend. He then boarded a matatu, to travel to Malaba.

According to PW1, the vehicle he boarded was full of passengers, by the time it set off for Malaba.

However, before the matatu had traveled far, it was intercepted by another vehicle. Three people emerged from that other vehicle and asked the driver of the matatu why he was carrying excess passengers. They also asked the driver of the matatu to identify the robbers who were armed with firearms, and who were allegedly in the said matatu.

One of the 3 people from the other vehicle then pointed at PW1 and his friend, as being the armed robbers.

PW1 and his friend were handcuffed and forced to enter the vehicle which had intercepted the matatu. The said vehicle then made a U-turn, and drove towards Bungoma.

The occupants of that vehicle, turned out to be robbers, for they robbed PW1 of the money which he had withdrawn from the bank earlier that day. They also then abandoned PW1 and his friend in a shamba.

PW1 was assisted by the villagers in the area where they had been abandoned. The villagers helped to raise KShs.40/= which PW1 and his friend used as bus-fare, to get back to Bungoma.

It was the testimony of PW1 that the vehicle which intercepted the matatu was a Toyota Corolla, registration No. KAR 220 X. The vehicle was white in colour.

During the robbery, the complainant and his friend stayed with the robbers for about one hour. Secondly, the incident occurred in broad daylight. PW1 therefore said that he was able to clearly see the assailants.

However, PW1 did not manage to see the registration of the robbers' vehicle. He said that the circumstances prevailing at the time of the robbery, were not conducive for making note of the registration particulars of the vehicle. He only requested help from members of the public in taking note of the registration. And after he was given the said registration, he noted it at the back of a pay slip.

PW2, ZACHARIA KIMUTHEE MUCHAI, owns and drives a matatu, registration No.KAK 256 T.

On 9th November 2006, PW2 was driving his said matatu from Bungoma to Malaba. However, when he got to Nang'eni, PW2's matatu was obstructed by another vehicle.

According to PW2, the vehicle which obstructed him was registration No. KAR 2002 X. After PW2 was forced to stop his matatu, 2 people emerged from the other vehicle, and went to PW2's matatu. Those 2 people identified themselves as police officers. They then ordered 2 passengers out of the matatu and handcuffed them.

PW3, SIMON MBUGUA, was the conductor in the matatu registration **KAK 256 T**, on 9th November 2006. The time was 11.30 a.m., when the matatu was traveling from Bungoma to Malaba.

Just before Nang'eni, a passenger was alighting from the matatu. Therefore, according to PW3, the matatu driver stopped the vehicle, so that the passenger could alight.

It was at that stage when PW3 saw a saloon car, registration **KAR 220 X**, which blocked the matatu. The saloon car was white in colour.

The people from the said saloon car arrested 2 passengers from the matatu. The said passengers were handcuffed, then placed in the saloon car. The people introduced themselves as police officers.

After putting the 2 passengers into the saloon car, the "police officers" drove back towards Bungoma.

As both PW1 and PW3 did give the registration of the saloon car as **KAR 220 X**, whilst PW2 indicated that registration was **KAR 202 X**, we deemed it prudent to peruse the original hand-written

record of the proceedings before the trial court. That decision was made when we were putting together this judgment. Therefore, it is not a matter about which we asked the parties to address us, when the appeal was being canvassed.

Upon our perusal of the hand-written record, we ascertained that PW2 had given the registration of the saloon car as **KAR 220 X**, and **NOT KAR 202 X**.

In effect, the typed record of the proceedings contains a typographical error.

Therefore, when the learned trial magistrate made a finding that PW2 had given the registration of the saloon car as KAR 220X, he was not at all wrong, as was suggested by the appellant.

As far as the colour of the vehicle is concerned, PW1 and PW2 both said that it was white. However, in the statement to the police, he had said that the vehicle was greyish.

When analyzing the evidence tendered, the learned trial magistrate said;

“The issue about the colour as described by the conductor, PW3, does not go to the core of the evidence to create in the mind of the court that the witness was describing a different vehicle other than the one involved in the robbery.”

To our minds, given the fact that the robbery was committed at 11.30 a.m., PW3 should have given to the police, in the first instance, the correct colour of the vehicle. Yet, PW3 told the police that the vehicle was “greyish,”

But when he was giving evidence, PW3 emphasized that the vehicle was white. If that be the correct factual position, the question that PW3 should have answered is why he told the police that the vehicle was greyish.

We will revert to the issue of the colour of the vehicle later.

PW4, FRANCIS NGUGI KANYANJUI, operates a “Car Hire Services” company, called “Alternative Drive.”

He recalled having hired out a vehicle registration number KAR 220 X. He produced the Rental Agreement, which showed that the said vehicle was hired by one **JUSTINE KIMANI**. The agreement showed that the vehicle was hired for 2 days, from 18th October 2006.

PW4 also produced in evidence, a photocopy of a National Identification (I.D.) for one **JUSTINE KIMANI NGUBIA**.

It is common ground that the 1st appellant, Justine Kimani Ngubia, hired the vehicle registration KAR 220 X, on 18th October 2006. He so admitted.

PW4 testified that although the Rental Agreement indicated that the 1st appellant was to hire the vehicle for only 2 days, the 1st appellant sought and was granted an extension of the period when he was hiring the vehicle. Indeed, it was the testimony of PW4 that the vehicle was not returned to the company until 13th November 2006.

However, PW4 did admit that the extension of the hiring was not documented. His explanation was that the 1st appellant was a regular client, and that on that occasion, the period of hire was extended through a telephone discussion between PW4 and the 1st appellant.

PW5, IP SAMUEL KIPYEGO KOGO, was the Officer-In-Charge, Crime, at Muthaiga Police Station.

On 28th November 2006 he conducted an Identification Parade for **GEORGE KAMAU NDOGO**, the 2nd appellant.

In the parade form, the 2nd appellant registered a complaint, that the complainant may have seen him before the parade was conducted.

PW6, CPL ANDREW RANA, was attached to the Pangani Flying Squad, as at 21st November 2006. He received a report that a vehicle registration **KAR 220 X**, which had been used in a robbery at Bungoma, had been sighted at Eastleigh Nairobi. PW6 proceeded to Eastleigh, where he laid an ambush.

When the “owner” of the vehicle arrived, PW6 arrested him.

After the owner explained that the vehicle had been hired out to the 1st appellant, at the time of the robbery, PW6 got the said owner (PW4) to call the 1st appellant.

By that time, on 24th November 2006, PW4 had told PW6 that the 1st appellant had returned KAR 220X, and had instead hired KAR 066T, a grey Toyota.

PW6 arrested the 1st appellant when he went to meet PW4. At the time, the 1st appellant had the vehicle KAR 066T. The vehicle was searched, and a pair of handcuffs and a “Motorolla” walkie talkie were recovered.

PW7, PC EVANS MOSE was attached to the Crime Office, Nairobi. He produced photographs of the vehicle KAR 220X. He is the person who had taken photos of the said vehicle.

PW7 said that no fingerprints were dusted for. His explanation was, that the vehicle had been removed from the scene.

PW8, AKHARILUS OCHOLA, was a Clinical Officer at the Bungoma District Hospital. He examined PW1 and then filled a P3 form, which showed that the complainant had suffered injuries classified as harm. However, PW2 had not been treated at Bungoma District Hospital.

PW8 filled the P3 form, on the basis of information which PW1 provided.

PW9, PC ERICK DAVID NDIEMA, was attached to the CID office, Bungoma.

On 9th November 2006 he was in his office, when PW1 and MUKHUNSU MUBUSI reported that they had been robbed by people who were in a vehicle registration KAR 220X. After getting the report, PW9 and his colleagues rushed to the scene. They tried to pursue the vehicle KAR 220X, but they did not get it.

They also circulated the particulars of the vehicle to other police stations.

On 21st November 2006, PW9 received information that the vehicle had been spotted in Nairobi.

During cross-examination PW9 said that when PW1 made his statement to the police;

“He never knew the thieves or appearances of the accused.”

PW10, IP CHARLES MWANGI, was the OCS Crime, Pangani Police Station, Nairobi. He conducted the Identification Parade for the 1st appellant.

According to PW10, the 1ST appellant was identified by the complainant, PW1.

Considering that PW1 did not give to the police any description of the assailants, it follows that the appellants were not arrested because of their physical features. Therefore, we find that the arrest of the appellants was because the 1st appellant was identified as a good customer of Alternative Drive Car Hire Company Limited.

PW4 knew the 1st appellant well, because he used to regularly hire their vehicles. And, according to PW4, the 1st appellant had hired the vehicle registration KAR 220X during the period when the complainant was robbed by persons who are said to have used the said vehicle.

The person who gave to the police the registration number of the vehicle, was PW1. However, PW1 did not personally see and take note of that registration. He was given the particulars by some members of the public. But the said person or persons did not testify at the trial. Consequently, what PW1 told the police about the particulars of the vehicle was reported speech. This court has no way of testing whether or not the information relayed to the complainant, about the registration number of the vehicle was accurate.

Had the person who gave the particulars to PW1 testified at the trial, the court would have had an opportunity of ascertaining the circumstances under which he or she saw the registration of the vehicle allegedly used in the robbery. As the said person did not testify, we hold the considered view that the information relied upon by PW1, as the foundation of his report to the police would, if it stood by itself, be of doubtful integrity.

Of course, one could say that because both PW2 and PW3 also said that the robbers used the vehicle KAR 220X, that would have corroborated the evidence of PW1. But because the evidence of PW1, regarding the registration particulars of the vehicle is not based on solid ground, we hold that the same was not capable of being corroborated.

Then again, PW3 said that the vehicle was greyish. He did so in his first statement to the police. Later, when he was giving evidence, PW3 insisted that the vehicle was white.

Given the size of a vehicle vis-à-vis the size of its registration plate, we find that if PW3 could change his mind about the colour of the whole vehicle, he cannot have been sure about the registration number.

We also find that had the learned trial magistrate given due consideration to the appellants' respective defences, he would have concluded that the prosecution had failed to prove the case against the appellants beyond any reasonable doubt.

We say so because both appellants indicated that at the time of the robbery, they were either in Nairobi or Maragua, respectively. In other words, they were not in Bungoma.

As the 1st appellant had hired the car for 2 days, between 18th and 19th October 2006, and as the prosecution produced the Rental Agreement to confirm that position, the prosecution should have done more to prove that as at 9th November 2006, the 1st appellant still had possession of KAR 220X. For instance, PW4 could easily have produced copies of receipts for the payment which the 1st appellant made, for the period up-to 13th November 2006.

In his judgement, the learned trial magistrate did express himself thus, regarding the appellants' defence;

“In my analysis, the accused persons have not put up a credible alibi capable of negating the prosecution evidence, which is watertight and not shaken.”

To our minds, whilst the learned trial magistrate was right to have weighed the alibi defence as against the evidence tendered by the prosecution, he then raised the appellants' responsibility too high. We say so because the legal position is, as was stated by the Court of Appeal **in KIARIE V. REPUBLIC**

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in any 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.”

As the complainant did not identify the 1st appellant at the scene of crime; and as the complainant did not personally see the registration number of the vehicle used by the robbers, and also because there was no Rental Agreement for the period in issue, we find that the prosecution did not prove that the appellants were involved or that KAR 220X was used in the robbery. Of course, there is a lot of suspicion that the appellants were involved in the robbery, and that they used the vehicle KAR 220X in the process of the robbery; but however great the suspicion is as against them, that cannot substitute the legal requirement that the prosecution should tender such evidence as would provide the trial court with proof beyond any reasonable doubt. To our minds, the alibi defences did give rise to reasonable doubt as to the involvement of the appellants in the robbery.

For those reasons, the learned Senior Principal State Counsel, Mr. Evans Onderi, was right to have conceded the appeal herein. In the result, the appeal is allowed. The convictions against both appellants are quashed, and the sentences are set aside.

We order that the appellants be set at liberty forthwith unless they or either of them are otherwise lawfully held.

Dated at Bungoma, this 18th day of February 2009

A. MBOGHOLI-MSAGHA

FRED A. OCHIENG

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