



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CRIMINAL APPEAL 169 OF 2007

ZACHARIA GATHUMBI GITAUAPPELLANT

- AND -

REPUBLICRESPONDENT

(An Appeal from the Judgment of Principal Magistrate Mrs. Wasilwa, dated 19th March, 2007 in Criminal Case No. 4223 of 2004 at Kibera Law Courts)

JUDGMENT

The appellant was charged with offences in two counts; the first being robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya); and the second being possession of a firearm without a firearm certificate contrary to section 4 (2) as read with s. 4 (3) of the Firearm Act (Cap. 114, Laws of Kenya).

The particulars on the first count were that the appellant jointly with others not before the Court and while armed with dangerous weapons, namely pistols, on 1st June, 2004 at Kenyatta National Hospital Parking Yard in Nairobi, robbed one **Gideon Kipruto Kibowen** of a motor vehicle, Reg. No. KAD 636Q a Nissan Bluebird, a Motorola cellphone, and cash in the sum of Kshs.2,300/= ? all valued at Kshs.308,300/= ? and at, or immediately before or immediately after the time of such robbery, used actual violence upon the said **Gideon Kipruto Kibowen**.

The particulars on the 2nd count was that the appellant, on the material date, along Ngong Road in Nairobi, was found with a firearm, Barretta Pistol Serial No. D76600, without a firearm certificate.

PW1, was at Kenyatta National Hospital on the material date, at 8.30 p.m., with his motor vehicle No. KAD 636Q which was doing taxi business at the Hospital. He was then called by a person known to him, one **Kamau**, who asked him to take certain customers to Medical Research Institute (KEMRI) in the neighbourhood. Three men came along, one wearing trousers folded on one leg, and a bandage on his leg. PW1 agreed to take these men to KEMRI at a cost of Kshs.250/=; and one of them sat in front, the other two sitting behind. PW1 did not know the customers; but he took them up to KEMRI. When he began to turn and get back to his base at the hospital, somebody pressed a cold metal gadget on his neck, hurled abusive epithets at him, and ordered him to leave the driver's seat and relocate to the backseat. He did so; but two men then sat on him. He identified the *appellant* herein as the man who had taken the front seat, and who had negotiated the taxi fare. It is the appellant who took the driver's seat after PW1 had been confined in the backseat. The appellant drove on, and picked up a boy after stopping briefly;

and this boy was also kept in confinement in the backseat. The appellant drove on, and very soon, PW1 notice that the vehicle had reached a Police road-block on Ngong Road; at this point the motor vehicle was driven into a side road, Kabarnet Lane. The car-jackers now stopped the car briefly, and tied up PW1; and in the meantime, they had grabbed his Motorola cellphone and his money. Later they abandoned PW1 after *trying him up and sealing his mouth with cellotape*. In the course of time PW1 freed himself, and went up to the Police road-block on Ngong Road, at about 10.00pm. The complainant was in a Police car as Police officers followed in the car-jackers' tracks; and then he saw his motor vehicle being driven into a petrol station. PW1 tipped-off the Police Officers, who stopped PW1's motor vehicle and conducted a search. More Police officers were called and, in a search conducted on the appellant, certain items were found: a driving licence, and radio-cassette equipment.

PW2, **Police Constable Charles Mubea**, testified that he was on duty at a Police check-point, with other officers under the command of **Cpl. Koech**, on the material night at 8.00 pm, along Ngong Road. PW2 and his colleagues, sometime before 9.00 p.m., saw a saloon car whose driver hesitated as he approached the road-block; and that driver then reversed the car and entered an earth road going off the main road. Police officers were then deployed at the entry into the said earth road, and they later saw the same saloon car being driven out, and it had inside *four occupants*. When asked why the said saloon car had avoided the Police road block, those in charge of the car said they had been in a hurry, as they were carrying a patient. A Police check on the back-seat passengers of the car showed nothing; but as they conducted the search three men from the car escaped, though not the driver. The Police officers took the driver up to the road-block, for a more careful search. At that very moment a man came to the vehicle saying it was his, and this man (PW1), had his *hands tied with a sisal rope*. PW1 informed the Police officers that he had been robbed of his motor vehicle; and it is then that the officers came to know that this was a *stolen motor vehicle*. The driver was put under arrest, and the car was searched; and in it, a *pistol* was found. This pistol, Serial No. D7 6600, had no magazine. It was PW2's evidence that the *appellant* herein is the person the Police officers arrested as he drove the subject motor vehicle. On cross-examination, PW2 testified that he had witnessed the recovery of a *Barretta Pistol* from the subject motor vehicle, and he had at first mistaken this pistol for a Ceska Pistol, which is not very different.

Police **Constable Shafi Abdulahi** (PW3) testified that he was with other officers manning a road-block on Ngong Road, on the material night at about 7.00 p.m.; and they saw an on-coming motor vehicle diverting, as it came close to the "Stop" sign. PW3 and his colleagues got interested in this diverting motor vehicle, and they made informal arrangements to take positions from which they could conduct a follow-up on the said motor vehicle. There was an alert from members of the public when the subject motor vehicle took the diversion; and a number of the Police officers soon caught up with the said motor vehicle, which the complainant identified as his. When a search was conducted on the suspect motor vehicle, a *Barretta pistol*, Serial No. D76600 was found *behind the passenger seat*. PW3 and his colleagues apprehended the appellant herein, and had him held at Kilimani Police Station.

Police Constable Evans Maogi (PW4) gave testimony similar to that of PW2: he said one of those who escaped from the subject car had *tied his legs with a white bandage*; and that the *Barretta pistol* was found *hidden behind the seat*; and the appellant herein was found with the *driving licence of the complainant*.

Chief Inspector Lawrence Ndhiwa (PW6) is the firearms examiner who examined the pistol in question; and he testified that it was a *Barretta pistol*, calibre 9mm, Serial No. 76600, in fair general and mechanical condition, complete in the component parts, and capable of being fired; he successfully test-fired it using two rounds of ammunition.

The appellant herein, when put to his defence, said that he was not in the neighbourhood of the *locus in quo* on the material occasion; he left his Kibera Laini Saba residence, found a pick-up track at Nyama Kima close to the city centre, and went away to Makuyu where he bought charcoal and vegetables; he got into conflict with the Police over his charcoal, in respect of which Police asked for a bribe; and he ended up being apprehended, as part of a grudge.

The learned Magistrate considered all this evidence, and assessed it as follows:

“I have examined all the evidence on record [and the] submissions of [the] accused. PW1 explained clearly how he was hired at Kenyatta National Hospital to take some patients to KEMRI. They turned out to be robbers. The *mens rea* was already made up at the hiring stage and in my view, the robbery was committed from Kenyatta National Hospital and KEMRI. The charge [states] it was at Kenyatta National Hospital, which is in order. The complainant says he talked to the robbers, especially the accused who bargained for the hire price at Kenyatta National Hospital, and so he saw [the accused] well. They were in the vehicle together, and [the] accused was in [the] co-driver’s seat from Kenyatta National Hospital to KEMRI. There was thus ample time to see and recognize the accused person. The accused was arrested within 10 minutes of the time of the robbery, with the stolen motor vehicle, and the evidence of PW2, PW3 and PW4 is corroborative as to the circumstances which led to [the] accused [being] arrested. The accused was with others not before the Court, and armed. We are told the others escaped, and the circumstances of escape are elaborated. The pistol found in the vehicle where the accused was arrested was of [the] Barretta [make]

“I find [that] the prosecution have established their case against the accused person beyond reasonable doubt. I find the accused guilty as charged on count 1, and I convict him under s. 215 of the CPC”.

The appellant filed the following grounds of appeal: that he had not been identified at the *locus in quo*; that he should not have been convicted on the basis of the *doctrine of recent possession*; that the prosecution evidence had contradictions and inconsistencies; that the prosecution had failed to call certain essential witnesses; that there were doubts in the prosecution case; that the trial Court had paid insufficient regard to the defence case.

Learned counsel **Mr. Ondieki** later introduced supplementary grounds of appeal, which he canvassed at the appeal hearing.

Mr. Ondieki submitted that the appellant’s convictions had been based purely on circumstantial evidence ? and that such evidence did not irresistibly point towards culpability. Counsel contended that nothing material had been recovered from the appellant; and that, therefore, only *suspicion* had been the basis of conviction as entered by the trial Court. **Mr. Ondieki** urged: “The entire evidence, and the circumstances, [do] not point to guilt [on the part of the] appellant”. **Mr. Ondieki** disputed the testimony that a pistol was recovered from the subject motor vehicle; for “[the] alleged pistol [is associated with] different testimonies, on the type of gun it was”. Counsel submitted that the gathering of prosecution evidence had been “done carelessly, leaving gaps”.

Although **Mr. Ondieki** did not give a full picture on the scenario of *suspicion*, which he urged was the basis of the conviction, he still cited case law which he said carried the principle that conviction is not to be based on mere suspicion. He in particular invoked **John Kimani Kimaru & Another v. Republic**, Criminal Appeal No. 32 of 2000, and **Mary Wanjiku Gichira v. Republic**, Criminal Appeal No. 17 of 1998.

Learned counsel also urged that the appellant could not have been identified at the *locus in quo*, because it was after 8.30 p.m. and the circumstances were not conducive to positive identification.

Mr. Ondieki urged that the prosecution case carried doubts; and the same must be resolved in favour of the appellant herein; and again, he placed before the Court case law which he maintained, favoured that course: **Wanjohi & 2 Others v. Republic** [1989] KLR 415; **Wamunga v. Republic** [1989] KLR 424; **Karanja & Another v. Republic** [2004] KLR 140; **Simon Paulo Maliel & Another v. Republic**, Nairobi High Ct. Crim. App. No. 80 and 83 of 2006 (Consolidated); **George Ochieng Ndeda v. Republic**, Nairobi High Ct. Crim. Appeal No. 38 of 2006.

Mr. Ondieki next submitted that the manner in which the language used in Court was recorded, carried a defect; and on that account he asked that the appellant be acquitted. He contended too, that critical witnesses were not called, and so proof had not been properly discharged.

Learned counsel **Mr. Makura** conceded to this appeal. He urged that the charge of capital robbery had not been proved? owing to inconsistencies in the evidence. The inconsistencies cited by counsel had to do with the *make of the gun* which had been associated with the offence in question: whether it was a Ceska Pistol, or a Barretta Pistol; and **Mr. Makura** urged that such inconsistencies be resolved in favour of the appellant.

Mr. Makura also urged that it was not clear if the appellant had been positively identified, at the material time.

We have given careful attention to the turns in the evidence, and what, in our opinion, emerges, is not on the same plane as the position taken by counsel on both sides.

There is no basis, in our opinion, for doubting the evidence adduced by the complainant: he had been together with the *appellant* and the appellant's accomplices when he had set out from Kenyatta National Hospital, to drive them to KEMRI; and at that time it was the appellant who negotiated the taxi fare; and then the appellant positioned himself in the co-driver's seat, wherefrom, subsequently, he seized the steering wheel, and had the complainant held and tormented in the backseat by other robbers. We do not doubt that the complainant, in these circumstances, did clearly perceive the appellant herein.

After the complainant's motor vehicle was commandeered by the car-jackers, they disposed of him, by binding him with *ropes* and immobilizing him; this is his evidence, which we believe to be true, a fact corroborated by the circumstantial evidence that, when he arrived at the Police check-point on Ngong Road, he still had the remains of *the rope* on him, by the evidence of PW2.

There is no doubt, the complainant's car had been *stolen*; and when it was recovered, the man driving it was the *appellant* herein, the same man who had *negotiated the taxi-fare* with the complainant, and who had staged the *theft* of the car. All the evidence shows that the complainant's car was recovered *from the hands of the thief* who stole it, namely, the appellant herein. There is evidence too, from PW4, that one of those who escaped from the car just before the appellant was arrested in it, was a man who *had tied his legs with a white bandage*; and this, in our finding, is the same man who had been in the company of the appellant at the time the appellant had negotiated the taxi-fare at Kenyatta National Hospital.

The complainant gave evidence that a metallic gadget had been used to cow him at the time his car was commandeered, by the appellant herein and the appellant's friends; and PW2 testified that he had witnessed the *recovery* of a *Barretta Pistol* from the motor vehicle, when it was recovered from *the appellant* herein. That was also the evidence of PW3.

Even though there was a mix-up in some of the evidence on whether the said pistol was *Ceska* or a *Barretta*, we hold that such discrepancy is immaterial, so far as the *lines of criminal liability* are concerned. Indeed, PW2 did correct himself, and clarified that the pistol was *Barretta*, and not *Ceska*; and PW6 test-fired this *Barretta Pistol*, and found it to be a firearm capable of being fired.

Our findings are that on the material date, the appellant, in the company of fellow robbers and while armed with a dangerous weapon which they used threateningly, *stole* the complainant's motor vehicle. These events fall squarely within the offence - category known as *robbery with violence*, contrary to s. 296 (2) of the Penal Code.

We did not find the several points of appeal raised by learned counsel, **Mr. Ondieki**, to be persuasive or to carry conviction; such points were raised, in our view, largely as a formality; such points were not *detailed out*; and such points did not give any impression at all that the appellant's *fundamental trial-rights* had in any manner been compromised.

The appellant had elected *Kiswahili* as his language of choice during the trial, and he had been duly granted the *interpretation facility* right from the time of plea-taking, on *8th June, 2004*, and he had not raised any complaint in that regard. After the complainant gave his testimony, he was subjected to focused *cross-examination* by the appellant's counsel; and this witness (the complainant) gave his

evidence in Kiswahili. PW2, similarly, gave his testimony in Kiswahili, and was *cross-examined* by counsel for the appellant herein. PW3 gave his testimony in Kiswahili, and was *cross-examined* by counsel for the appellant herein. PW4 too, gave his testimony in Kiswahili, and *cross-examined* by **Mr. Kanyi**, learned counsel for the appellant herein. PW5 gave his testimony in Kiswahili, in the presence of counsel for the appellant herein. PW6 gave his testimony in English, and was *cross-examined* by **Mr. Kanyi**. PW7 gave his testimony in Kiswahili, and was *cross-examined* by **Mr. Kanyi**.

With the record showing so clearly that the appellant had not been prejudiced with regard to the *language* used in Court, we refuse learned counsel **Mr. Ondieki's** claims that there was some fatal defect in the record.

We *dismiss* the appellant's appeal. Like the learned trial Magistrate, we find that the prosecution did establish their case against the appellant herein beyond reasonable doubts, and that the appellants had raised no defence sufficient to make a dent in the prosecution case. We *uphold* the conviction, and *affirm* the sentence as imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 17th day of February, 2009.

J. B. OJWANG M. WARSAME

JUDGE JUDGE

Coram: Ojwang & Warsame, JJ.

Court clerks: Huka & Erick

For the Appellant: Mr. Ondieki

For the Respondent: Mr. Makura