REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 17 of 2008

CORNELIUS KIPTARUS NGETICH…...…...…APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Nakuru C.M.CR.C.NO.2921/2005 by Hon. W.M. Kagendo, Senior Resident Magistrate)

Coram:

Hon. M. Koome, Judge

Hon. M. G. Mugo, Judge

Mr. Njogu for State

Court clerks –Kosgei/Lydiah

Appellant present

JUDGMENT

The appellant herein Cornelius Kiptanui Ngetich was charged with the offence or robbery with violence contrary to section 296(2) of the Penal Code. After a full trial before the Hon. Ag. Senior Resident Magistrate, Kagendo of Nakuru, the appellant was convicted of the offence and sentenced to suffer death. He has now appealed against both the conviction and sentence on the grounds that:

1. The learned trial magistrate erred in finding that the appellant was among the robbers who committed the crime for which he was charged.

2. That he was wrongly convicted on the evidence of a single identification witness with no description of the robbers being given.

3. That a vital witness from whom the keys to the stolen motor vehicle were recovered was not called to testify.

4. That the evidence adduced by the prosecution witnesses P.W.1, 3 and 4 bore material contradictions thus creating doubt.

5. THAT his conviction was based only on unsupported circumstantial evidence a few days after the robbery incident.

6. That his defence was ignored with no reasons being given by the court for so doing.

The appellant represented himself at the hearing of the appeal and relied solely on written submissions. The State, represented by the learned State Counsel Mr. Njogu, has conceded the appeal on the ground that the evidence of identification was wanting, the appellant having been arrested merely for having been found passing urine next to the vehicle, the subject matter of the robbery. Mr. Njogu submitted further that the arrest was at night which meant that the identification of the appellant by the single witness (P.W.1) was under difficult circumstances rendering the conviction unsafe.

The particulars of the charge facing the appellant were that on the 1st day of September 2005 in Nakuru Township, Nakuru District within the Rift Valley Province, he, jointly with others not before court and while armed with offensive or dangerous weapons namely pistols, robbed Philip Gitonga Kamau of his motor vehicle, Registration No.KAP 336 valued at Kshs.450,000/-, a Nokia mobile phone valued at Kshs.7,800/= and shs.7000/= in cash. The appellant and his alleged accomplices are said to have threatened to use actual violence to the said Phillip Gitonga Kamau while robbing him.

In his written submissions, the appellant asked us to review the entire proceedings and judgment of the trial court and to find that no evidence was adduced by the prosecution in regard to visual identification of the robbers at the scene of the robbery. Neither was an identification parade conducted for the purpose of identifying the culprits. The appellant submitted also that no description of the robbers was given in the witness statements or at the trial and that the victim (P.W.1) himself did not identify the person who robbed him. According to the appellant his was a case of suspicion upon suspicion without any proof that he was in any way connected with the robbery.

The appellant has submitted further that his unsworn defence was not controverted at all. He gave an account of how he happened to have been at the scene where the subject motor vehicle was recovered in Eldoret and denied having been at the scene of the robbery in Nakuru.

We have reviewed the entire proceedings of the trail court and considered the judgment therein in light of the evidence adduced at the trial. After a careful evaluation and analysis of the said evidence we have made our own independent conclusions.

The complainant herein Philip Gitonga Kamau (P.W.1, whom we have noted was not the owner of the motor vehicle in issue), testified that he was carjacked after he hired out the subject motor vehicle to one man (the hirer) who directed him to pick another one from a certain bar in Nakuru. The latter came out of the bar with a certain lady and joined the hirer and P.W.1 in the taxi and the group drove towards the Nakuru police lines. The hirer sat at the back with the lady and the new man sat at the front. At one time the hirer and his two friends stopped the vehicle as if to complete their trip, only for the two men to change their minds and ask P.W.1 to drive towards Shabab area in Nakuru. The hirer and the new man now sat at the back seat with the lady sandwiched between them. All of a sudden, the hirer, who sat behind P.W.1 grabbed him by the neck and pointed a gun at him. He ordered him to the back of the car and took over the driving. The second man pushed the lady to the floor of the vehicle and stepped on P.W.1's chest. After driving for some time in the dark P.W.1 and the lady were forced into the boot of the vehicle and after driving for sometime towards a direction the complainant did not know, they were asked to leave and the two men drove off with the vehicle. In the process P.W.1 was robbed of the items stated in the charge sheet. He managed to report the theft to the police the following day and the motor vehicle's registration number was circulated. After about a week, P.W.1 received a report that the vehicle had been spotted in Eldoret. He traveled to Eldoret and with the help of two friends managed to trial the vehicle as it drove and parked outside a bar known as "*Wheels Bar.*" From where P.W.1 and his friends had parked their vehicle which was about 100 metres away, they saw a man alight from the stolen car and enter the bar. P.W.1 called the police who came and lay an ambush. After about 15 minutes P.W.1 and his group saw a man come out of the bar looking drunk. He went to the car and started urinating on the car's wheel. He was arrested as he did so.

Under cross-examination by the appellant, P.W.1 testified that he did not see the driver of the vehicle as it was moving. He only saw the appellant as he was arrested while urinating at the vehicles wheel.

The owner of the stolen motor vehicle testified only that he had given P.W.1 the vehicle for taxi operations at the material time and that he assisted P.W.1 with money and another vehicle to travel to Eldoret. He did not witness the arrest.

P.W.3, Cpl. Ismail Ombati testified that he way among the police officers who laid ambush and arrested the appellant as stated by P.W.1. He supported P.W.1's evidence. The appellant was arrested 15 minutes after they laid ambush while he was urinating on the wheel of the subject vehicle. P.W.3 stated that the appellant was in the company of a lady with whom, he was arrested and that P.W.3 came to learn later that the appellant's name was "*Cherotich"* and that the lady had been released from police custody having been found to have been a "*joy rider"*. During cross-examination by the appellant, P.W.3 testified that the appellant did not resist arrest and was very drunk. Also that the appellant was not arrested inside the vehicle but outside and that it was only (his presence at) the car which connected him to the case.

P.W.4 P.C. Allan Ndolo testified that he was in the company of P.W.3 and another police officer when the appellant's arrest was executed outside Wheels Pub. He testified that he and his colleagues had positioned themselves to

"***wait and see who would come to drive away the vehicle."***

He supported P.W.3's evidence that the appellant came out of the pub in the company of a lady and that he was drunk. Also that he was arrested as he passed urine on the wheel of the car. In cross-examination by the appellant P.W.4 testified that the appellant did not have the keys to the motor vehicle but the complainant had them.

P.W.5, P.C. Mohammed Abdullahi testified only that he had been told of the robbery and recovery of the motor vehicle and that upon his interrogation of the driver (P.W.1) the latter said

"***he could not identity the passenger."***

The appellant's defence was that on the day he was arrested he had been at his house in Iten. He received a call from one Lilian Kitolo, a girl friend who invited him to Eldoret. He left Iten at around 4.00P.M. and on arrival in Eldoret he went to Wheels Pub where he relaxed drinking and playing pool. His girlfriend joined him between 10.30p.m. and 11.00p.m. They left together at about midnight. Along the way he felt pressed by a call of nature and decided to relief himself by urinating behind a parked car. It was as he was doing so that two police officers pounced on him and arrested him and the friend on the pretext that they

"***were in possession of a stolen car."***

The two were locked up at Eldoret police station and after 3 days the appellant was taken to Nakuru police station and charged with the robbery herein.

In her judgment, the learned trial magistrate took note material discrepancies in the evidence of P.W.1 and that of P.W.3 and P.W.4. She also took note of P.W.1's evidence that he did not see the appellant either while driving the vehicle or alighting from it. The learned trial magistrate also noted that the arrest was executed at night and that the conduct of the investigations and the prosecution of the case herein did not meet the required legal standards. It surprises us therefore that she would have gone ahead to convict the appellant in those circumstances.

We find that the learned trial magistrate did not properly evaluate the evidence adduced before her. She recorded, for instance, that:

"***It was the evidence of P.W.1 that he could not recognize the accused person when he (accused) alighted from the motor vehicle at Wagon Wheel Hotel in Eldoret on 8/1/2005"***

We have noted that P.W.1 never gave such testimony. His evidence was that he could not identify the

driver of the motor vehicle as it passed before being parked at Wagon Wheel. Whereas P.W.1 testified that he could not see his attackers properly during the attack as it was dark he said he saw the appellant as he was being arrested. He had not described any of his attackers to anyone prior to the arrest and gave no evidence as would connect the appellant as one of the people who had previously accosted him and robbed him of the motor vehicle about a week earlier in Nakuru.

The learned trial magistrate found as a fact that neither the appellant, nor P.W.1 called independent witnesses to support their version of events, presumably, of the night of the robbery, yet she proceeded to believe the evidence of P.W.1 and to dismiss the appellant's defence and to convict him, despite the gaps in the prosecution's case.

We are of the considered view that the charge against the appellant was not proved beyond reasonable doubt and that the evidence adduced by the prosecution did not connect him to the robbery of 1st September, 2005. The same was purely circumstantial; and uncorroborated, thus rendering the conviction quite unsafe. The conviction cannot be sustained and is hereby quashed and the sentence set aside.

Accordingly, we allow the appeal and order that the appellant be set free and be released from jail forthwith unless he be otherwise lawfully held.

DATED, SIGNED and DELIVERED at NAKURU this 21st day of May 2009.

M. KOOME **M. G. MUGO**

JUDGE **JUDGE**