REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 614 of 2004

(From Original Conviction and Sentence in Criminal Case NO. 778 of 2001 of the

Chief Magistrate's Court at Nairobi – Mrs. M.W. Mui gai, PM)

PETER GATHANGWA MIGWI…… APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

JUDGMENT

The appellant **PETER GATHANGWA MIGWI** was charged before the subordinate court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 30th March 2001 at Githurai 45 in Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely pistols robbed GEOFFREY MBURU MBUGUA a motor vehicle registration number KAG 709 G a Peugeot 505 Saloon, cash Kshs.6,500/= (later amended to Kshs.5500), a wallet, Barclays cash card and at or immediately before or immediately after the time of such robbery used actual violence to **GEOFFREY MBURU MBUGUA** by shooting him dead.

After a full trial he was convicted of the offence. He was sentenced to serve life imprisonment. Being dissatisfied by the decision of the learned trial magistrate, he has appealed to this court challenging his conviction on the following grounds –

1. The learned trial magistrate erred in law and fact in convicting him with a case which had no eye witness.

2. The learned trial magistrate erred in law and fact in accepting the evidence of PW4 and PW5 and PW6 that they chased the thugs and arrested him whereas the evidence does not indicate that it was a chase and arrest case.

3. The learned trial magistrate erred in both law and facts in disbelieving the evidence tendered of the newspaper to court that the offence in question was committed by police officers.

4. The learned trial magistrate erred in holding that the complainant was robbed and yet there existed no evidence of the complainant having been robbed.

5. The learned trial magistrate erred in law and fact in permitting the investigation officer to tender the postmortem form in absence of the pathologist who had authored it thus denying him a chance for cross-examining him.

6. The learned trial magistrate erred in finalizing the case in absence of the evidence of the doctor, scene of crime officer and those who gave police information that there had been a robbery upon the complainant, as such section 150 of the Criminal Procedure Code was not complied with.

7. The learned trial magistrate erred in basing his conviction on the evidence of the prosecution witnesses that was contradictory to each other.

8. The learned trial magistrate erred in law in accepting the holding that the prosecution side had discharged the onus of proof in the face of the above irregularities, among others.

9. The learned trial magistrate erred in law and fact in rejecting the defence without giving reasons as to why and as such shifted the burden of proof to the defence side which is against law.

Before the appeal was heard, the appellant was informed that the sentence for the offence was death, and that the learned trial magistrate imprisoned him for life, which, on the face of it, was an error. The appellant was therefore warned that there was the possibility of his sentence being enhanced to death sentence, if his appeal was not successful. The appellant, after the warning elected to proceed with the appeal.

Other than his petition of appeal, the appellant filed written submissions which he relied upon. He also sought to rely on the case of HARRISON NJUGUNA – vs – REPUBLIC (CA) Criminal Appeal No. 90 of 2004 with regard to ground 4 of appeal.

Learned State Counsel, Mr. Makura, opposed the appeal and supported the conviction and asked the court to enhance the sentence imposed by the learned trial magistrate. Counsel submitted that on the 30.3.2001 the deceased was car-jacked by a group of people who included the appellant. Police were alerted and they tracked the robbers. It was during daylight and PW4 and PW5 who were police officers were involved in the operation. When they came across the vehicle they ordered the car-jackers to stop, but they defied the orders and shot at the police. Some of the car-jackers ran away but the appellant was found in the vehicle hiding under the steering wheel. The owner of the vehicle was at the front passenger seat and was shot and dead. When the appellant was arrested he was searched and found to have Kshs.5,500/=, the deceased's wallet, the deceased's bank documents and the deceased's watch. In counsel's view the recovery of the items belonging to the deceased from the appellant and the fact that the appellant was in the deceased's vehicle on the driver's seat was strong evidence to justify the conviction of the appellant for the offence.

Counsel also submitted that the postmortem report was properly produced under Section 77 of the Evidence Act (Cap. 80) in the absence of the doctor who was not readily available.

Counsel also contended that there was no law which provided against producing the photographs of the motor vehicle instead of the motor vehicle. The amendment of the charge was also proper and did not prejudice the appellant as it was an amendment to substitute the amount of Kshs.6,500/= with Kshs.5,500/= which was the amount of money that was recovered from the appellant. Counsel further contended that the learned trial magistrate considered the defence but dismissed it as it did not shake the prosecution case.

Lastly, counsel submitted that the mandatory sentence for the offence was death. Therefore, the learned trial magistrate erred in imposing a life imprisonment sentence for a conviction on a charge of capital robbery. He urged the court to rectify the sentence and impose the sentence provided for in law.

The brief facts are as follows. GEOFFREY MBURU MBUGUA, who resided at Thika, went to the bank in the morning of 30.3.2001 and withdrew Kshs.10,000/=. He gave Kshs.5,000/= to his wife . Then

he left in his car Peugeot 505 KAG 709 G and was on his way to St. Paul's Theological College Limuru. At Githurai, he was car-jacked. Members of the public alerted the police on the carjacking. Police on patrol then tracked the vehicle. The police officers included PW4 PC REUBEN KIETI, PW5 PC LEONARD SINDANI SIMIYU and PW6 PC CHARLES MWANGI. They went to Thika road and, near Clayworks Ltd, they saw a light blue motor vehicle. They followed it and it stopped. Shortly thereafter, they heard some gunshots and, when they came out of their own vehicle, they saw 4 men come out of that vehicle. They challenged the 4 men to stop but they shot at the police and ran and disappeared in grass. The police then approached the vehicle from which the four men came. In that vehicle they found a man sitting on the front passenger seat who was dead. They found another man on the driver's seat, but who was hiding under the steering wheel. They searched the man who was alive. They found in his trouser pocket a red maroon wallet. In the wallet was the identify card of the deceased, Barclays Bank card of the deceased, Citizen Trust Bank Credit Card of the deceased. He also had cash Kshs.5,500/= in his inner wear, as well as a wrist watch make Phillip persio. They arrested the man, who is the appellant. The motor vehicle in which the appellant was found was later photographed. A postmortem examination was also conducted on the deceased. The appellant was later charged with the offence.

In his defence, the appellant gave sworn testimony. It was his defence that he lived at Githurai Zimmerman and was a tailor at Kasarani. On the day of his arrest, at about 9.00 a.m. he was on his way to meet a customer near Kenya Tent Company Ltd, when he heard gun shots and saw people running in all directions. He suddenly felt a lot of pain on his left hand and when he checked he found that he was bleeding profusely. He screamed and called for help and a man came towards him, only to discover that that man was a police officer. The police officer took him to Kasarani police station. He had Kshs.6,600/=. He was then taken to Ruiru Presidential Escort Unit where he was treated. The police took him to his house but recovered nothing. He stated that he was charged with an offence that he did not know anything about.

We have evaluated the evidence on record, as we are required to do in a first appeal, see **OKENO – vs – REPUBLIC [1972] EA 32.**

The first complaint of the appellant is that the learned trial magistrate erred in convicting him for commission of an offence in which there was no eyewitness. Indeed, from the evidence on record, there was no witness who testified that he or she saw the appellant rob or steal from the complainant. However, the fact that there is no eyewitness to an offence does not mean that a person cannot be convicted of an offence. An accused person may be convicted of a criminal offence so long as the circumstantial evidence points irresistibly to the guilt of the accused and is incompatible with his innocence, and incapable of explanation upon any other hypothesis than that of his guilt see **REX – vs – KIPKERING ARAP KOSKE, 16 EACA 135**. Therefore the fact that there was no eyewitness herein does not vitiate the conviction. That ground of appeal is dismissed.

The second complaint of the appellant is that the learned trial magistrate erred in relying on the evidence of PW4 and PW5 and pW6 that there was a chase, while in fact there is no evidence of chase and arrest case. We have perused the record. The said witnesses stated that they got information from members of the public and they proceeded in their vehicle to Thika road near Clayworks. There they saw a light blue vehicle and pursued it. That vehicle turned and stopped, and they came out of their vehicle and followed it and found the appellant in that vehicle with the deceased, after other four people had came out of the same vehicle had run away. From the evidence on record, we find that indeed, the police tracked down the vehicle which was described by the members of the public. It might not have been a dramatic chase. It was a chase all the same. We find no basis for this ground of appeal, and we dismiss the same.

The third complaint of the appellant is that the learned trial magistrate erred in disbelieving evidence tendered in a newspaper report that the offence was actually committed by the police. We observe that there is nobody who came to court and testified on the authenticity of the newspaper report. If the appellant wanted the author of the newspaper report to come to court and testify, he would have called him. Otherwise the court cannot be influenced by writings or information disseminated from the press. That ground of appeal is dismissed.

The fourth complaint of the appellant is that the learned trial magistrate erred in holding that the complainant was robbed and yet there existed no evidence of such robbery. The allegation of robbery of the complainant is contained in the charge sheet. The allegation is that he was robbed of his motor vehicle registration number KAG 709 G Peugeot Saloon, cash Kshs.5,500/=, a wallet and Barclays cash card, and that he was killed in the cause of that robbery. The evidence of prosecution witnesses PW1, PW4, PW5 and PW6 confirm that the complainant was robbed. There is no dispute that the subject motor vehicle belonged to him. The evidence of PW4, PW5 and PW6 was also that the appellant was found in the motor vehicle with the deceased when the vehicle was tracked down by the police. The wallet and cards of the deceased were found with the appellant. Also the appellant was found with the alleged stolen money, and he did not offer any explanation on where he got that money, other than stating in his defence that he was found with Kshs.6,600/=. In our view, the offence of robbery was committed, based on the evidence on record. We dismiss that ground of appeal.

The next complaint of the appellant is that the learned trial magistrate erred in allowing the investigating officer to tender in evidence the postmortem form in the absence of the pathologist, thus denying the appellant a chance to cross examine him. Indeed, the postmortem form was produced as an exhibit by Cpl JOHN ROTICH PW7. It was stated that the postmortem doctor had left for Australia. It was produced under Section 77 of the Evidence Act, which provides

77(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications, which he professed to hold at the time he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistic expert, document examiner, medical practitioner or geologist, as the case may be, and examine him as to the subject matter thereof".

In our view, it is preferable for such experts to be called in court to testify, so as to allow the defence a chance to cross-examine them. However, the court has a discretion to require the expert to attend court. In our present case, the court did not ask the appellant, who was a layman, whether he would require the attendance of the postmortem doctor. The appellant has raised that issue in his written submissions.

In our view, the issue for consideration is whether there was any prejudice caused to the appellant. We find no prejudice. Firstly, the reason for the failure to call the post mortem doctor was clearly stated by PW7 – that the doctor had gone to Australia. The reason was given in the presence of the appellant. If the doctor had left for Australia, even assuming that he had not gone there permanently, bringing him to Kenya as a witness would be very expensive. Secondly, the postmortem form did not state that the appellant is the one who killed the complainant. The appellant was not found with any weapon that could have killed the deceased. We therefore find no justification for this ground of appeal. We dismiss the same.

The sixth complaint of the appellant is that crucial witnesses were not called. These were the doctor, scenes of crime officer who took photographs and the members of the public who gave information to the police.

In **BUKENYA – vs – UGANDA [1972] EA 549**, it was held, *inter alia,* that

(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.

In the recent case of **NGANGA – vs – REPUBLIC [1981] KLR 483**, the court stated –

"The prosecution may elect not to call a material witness but they do so at the risk of their own case……"

The informers of the police were not said to have been at the scene. They were certainly not the ones who identified the robbers. They did not go to the motor vehicle. Their evidence, if called would not, in our view, add any substance to the prosecution case. Secondly, the evidence of the postmortem doctor and the scenes of Crime photographer was not so crucial as to connect the appellant to the crime. The doctor merely made findings on the cause of death. The scenes of crime officers took photographs of the motor vehicle. We do not consider their evidence to be of such a nature that can lead us to make an adverse inference against the prosecution case. We dismiss that ground of appeal.

The next complaint of the appellant is that the learned trial magistrate erred in convicting the appellant in the face of conflicting and contradictory evidence of prosecution witnesses. The contradictions he has raised are with regard to the registration number of the motor vehicle, and that PW7 the investigating officer, stated that the appellant was injured in the hand, while PW4, PW5 and PW6 stated that the appellant suffered no injuries. We have perused the evidence on record. We are of the view that the apparent minor contradictions do not go to the root of the prosecution case. We therefore find no merits in that ground of appeal and we dismiss the same.

The next complaint of the appellant is that the learned trial magistrate erred in accepting and holding that the prosecution side had discharged the onus of proof in the face of irregularities. We find no glaring irregularities that would vitiate the conviction as such. As we have stated above, the conviction herein is based on circumstantial evidence. In our view, the circumstances of arrest of the appellant proved that he must have been one of the robbers and was therefore a principal offender. He was arrested in the vehicle of the deceased shortly after other robbers fled; he was, in that vehicle with the complainant lying dead in the front passenger seat; the appellant was seated in the driver's seat but hiding himself under the steering wheel; the appellant was found with documents belonging to the deceased; he was also found with the wallet of the deceased, as well as the money which was found in his inner wear. All this in our view, leads to no other hypothesis than that he was one of the robbers though he was not armed. He must have been the one, among the robbers, who was driving the car-jacked vehicle. In the panic to escape, he must have delayed a bit and ended up being left behind. His involvement made him a principal offender. We dismiss this ground of appeal also.

The last ground of appeal is that the learned trial magistrate erred in rejecting the defence without giving reasons for so doing. In the judgment, the learned trial magistrate stated –

"The accused's defence does not cast doubt on the prosecution case, he claims in a nutshell that he was found by the police. There is no evidence in any prove (sic) knowledge of the accused person by the police officers. There was no evidence of bad faith; malice or revenge between them. If the accused alleged that members of the public rule led (sic) this killer during the gunshot spree why would the police officer pick only on him and frame up these charges against him? Why did they not at random pick more who also ran all over the place? The court finds this claim farfetched and not backed by evidence on record".

In our view, the learned trial magistrate considered the defence of the appellant and rejected the same and gave reasons for so rejecting the same. Therefore the learned trial magistrate did comply with the requirements of Section 169 of the Criminal Procedure Code (Cap. 175). That ground of appeal is also rejected.

The charge against the appellant was also amended midway through the trial on 7/10/2004 to charge the initial figure of robbed money which was Kshs.6,500/= to Kshs.5,500/=. Though the appellant was not asked to plead afresh to the charge or recall witnesses, we find no prejudice occasioned to the appellant. The amendment was merely to change the amount to agree with evidence already tendered.

Having reviewed all the evidence on record, we are satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt for the offence of robbery contrary to section 296(2) of the Penal Code. We will uphold the conviction of the trial magistrate.

Learned State Counsel has asked us to enhance the sentence. As the appellant was convicted of capital robbery under Section 296(2) of the Penal Code, the only lawful sentence is death sentence. As we are upholding the conviction of the learned trial magistrate, we will have impose a death penalty on the appellant.

The upshot of this is that we dismiss the appeal of the appellant. We uphold the conviction of the learned trial magistrate. We substitute the life sentence with a sentence of death. The appellant will therefore suffer death as provided for by law.

Dated and delivered at Nairobi this 12th day of July 2007.

…….

J.B. OJWANG

JUDGE

……..

G.A. DULU

JUDGE

In the presence of –

Appellant in person

Mr. Makura for State

Tabitha Wanjiku/Eric – Court Clerks