



REPUBLIC OF KENYA

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

Criminal Appeal 629 of 2004

ROBERT KIMANI MWANGI..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

Mrs. J. Oseko dated 19th December, 2004 in Criminal Case No. 2697 of 2003 at the Nairobi Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with offences set out in two counts. The charge on the first count was robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). And the particulars were that the appellant, on 23rd October, 2003 at Buru Buru Phase V in Nairobi within the Nairobi Area, jointly with others not before the Court and while armed with an offensive weapon, to wit a toy pistol, robbed **Peter Kimeu Kitulya** of a motor vehicle, Toyota Hiace Registration No. KAQ 109Z valued at Kshs.1,945,560/= and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence to the said **Peter Kimeu Kitulya**.

In the 2nd count, the appellant faced the charge of being in possession of an imitation-firearm, contrary to s.4(2)(a) of the Firearms Act (Cap.114, Laws of Kenya). And the particulars were that, on 24th October, 2003 at Westlands, within the Nairobi Area, he was found being in possession of an imitation – firearm, namely a toy pistol.

PW1, **Peter Kimeu**, an employee of a private security firm known as Wells Fargo had been assigned the task of dropping off employees of the Standard Bank, Moi Avenue Branch in the night, after they completed their work. PW1 set out with the said employees as well as security guards from his employer, and drove them in a Toyota Hiace, Registration No. KAQ 109Z, towards Buru Buru Estate. As he was dropping off staff at Buru Buru Phase V, at 11.00 p.m. on 23rd October, 2003 he saw a Peugeot 504 motor vehicle, with part of its registration number being KXE. This Peugeot vehicle was parked in front of PW1's motor vehicle and it had its headlamps on. PW1 took a slight turn, and passed the said Peugeot vehicle, and then dropped off one of his passengers, by name **Naomi Kagucha**; and at this time he noticed that the said Peugeot KXE vehicle was some 10 metres behind. When he now made a u-turn, to drive in the same direction he had come from, he saw two people walking towards his vehicle; they appeared to have come from the gates opposite to **Naomi Kagucha's** house. One of these two people was carrying an object, which he pointed upwards, and ordered PW1 and those in his motor vehicle to get out. This object, PW1 testified, had a sharp end, and looked like an axe. PW1 identified the said object in Court – a sharp metal object attached to a wooden stick. The second attacker, at the time, went to PW1's passenger

door, and passed confusing messages: “*Shukeni, ingieni!*” (meaning; “Alight, board!”) As the passengers took no action, the intruder went to the said Peugeot vehicle which was parked ahead, even as the first intruder kept standing just next to PW1. From the said Peugeot car, the second intruder fished out a pistol, and came to PW1’s side of the Wells Fargo Toyota Hiace aforesaid. The second intruder held the pistol to PW1’s face, and ordered him to alight, failing which PW1 would be killed. The first intruder, at this stage, entered the Wells Fargo vehicle, and started demanding money from the passengers. PW1 identified the second intruder (the appellant herein) as the one who held a threatening object at him. When PW1 tried to move over to the co-driver’s seat, the intruder opened the driver’s door, and held him by the leg. The intruder removed both of PW1’s shoes, and grabbed PW1’s name tag and ripped it off. PW1 testified that he had seen the appellant clearly, as there were security lights lighting up the *locus in quo* directly. The appellant was demanding money while he stood only one foot ahead of PW1. PW1’s vehicle had a remote panic button, and he pressed it to activate alarm to the control room; he did so while his shoes were being removed by the intruder. PW1 was ordered out, and told to lie down on the lawn, like his passengers were already doing. The appellant took command of PW1’s vehicle and drove it off, being followed by the said Peugeot KXE car. PW1 lost the car, his shoes, and his identity card. When the robbers were gone, PW1 and his passengers sought help from a different security firm, which facilitated a call to the Buru Buru Police Station. PW1 later heard that the Wells Fargo motor vehicle had been recovered, and someone arrested in the process.

PW1 had been with the robbers for some 20 minutes. He was called two days later to attend an identification parade at the Pangani Flying Squad offices. He had to look at a line-up of eight persons, to see if he would identify the robbers of the material night. In his testimony about the parade, PW1 said:

“I saw the accused person [the appellant herein]; I remembered his face. He was one of the people who robbed us. He was short, and brownish. His mouth I also remembered. He was wearing the shirt he had that night. It was a yellowish-green, flowered shirt.”

The witness also identified the said Wells Fargo Toyota Hiace, which was parked outside the Court.

On cross-examination, PW1 testified that he had had enough time to see his attackers, and as for the appellant herein, PW1 said he had on the material night taken note that the appellant had a large mouth, and his eyes appeared sleepy.

PW2, **Barnabas Orwa**, is a Wells Fargo security guard, who had been in PW1’s company on the material night. He testified that on 23rd October, 2003 at about 11.00 p.m. at Buru Buru Estate, as he was on the team escorting Standard Bank Staff, and when in their company vehicle Reg. No. KAQ 109Z they reached Buru Buru Phase V, some two people came from the front, and one of them ordered the driver of the company vehicle to get out of the driver’s seat. One of the attackers, a tall and slim man, went into a parked saloon car and returned with a pistol. He came to the driver and ordered him out. The other attacker kept the passengers in the company motor vehicle on contradictory orders, which elicited no response from the victims. The attackers then ordered everybody out, and to lie on the ground. They frisked the pockets of their victims, entered the company motor vehicle, and drove off. Later in the night, the company motor vehicle was recovered at Westlands. PW2 and his fellow guards were taken to Westlands where the vehicle was recovered, and he saw the appellant herein at Westlands. On 27th October, 2003 PW2 was invited to an identification parade, during which he identified the appellant herein as having been one of the robbers several days earlier. He testified that the appellant herein, on the material occasion, had been wearing a spotted short-sleeved shirt, bluish-yellow in colour. This man was short and brownish, and his teeth were spaced. PW2 testified that at the *locus in quo*, there had been security lights from a nearby house, and he had seen the appellant clearly.

PW3, No. 60584 **Sgt. Malu Mwangangi**, who is attached to the Pangani Police Flying Squad base, testified that he had been on duty at 12.30 a.m. on 23rd October, 2003, in the company of **Police Constable Kimathi** (PW6), when he received a signal from the Police control base, that a motor vehicle had been carjacked by two people, one brandishing a pistol. At the Westlands roundabout, at about 12.45 a.m., PW3 and his colleagues spotted the motor vehicle in question, Reg. No. KAQ 109Z Toyota Hiace, green in colour. The said vehicle had just entered a ditch, and there were street-boys pushing it in the

middle of the roundabout. PW3 and his colleagues stopped the vehicle and as they approached, two people disembarked and took to their heels. The one of these two who was in the driver's seat got delayed in exiting from the vehicle, and PW3 and his fellow officers were able to arrest him. When they searched his apparel, they found a toy pistol in his trouser-pocket. (PW3 identified the toy pistol in Court). The appellant is the one who was arrested, and taken back to the stolen vehicle. PW3 and his colleagues found behind the driver's seat a metal object, which the witness said is normally used by thugs to create an explosive sound when it hit hard surfaces.

PW4, No. 60580 **Inspector of Police Richard Mose** from the Pangani Police Flying Squad testified that he was at his office on 25th October, 2003 at 10.00 – 11.00 a.m. when his colleague, **Patrick Mbinu** told him of this matter, and requested the mounting of an identification parade. PW4 explained the purpose of the parade to the appellant herein, and asked him to pick eight people he was comfortable to have on the parade. The appellant did the selection; and PW4 then arranged a parade with the selected eight as the members. The appellant stood between the parade members Nos. 6 and 7, and he indicated to PW4 when he was now ready for the identification process. PW4 then called the witness (PW2) who had been out at the front office. PW4 asked PW2 to look at the people lined up in the parade. PW2 looked at them, reached the appellant herein, and touched him saying, the appellant was the one. PW4 then asked the appellant for his comments; "he said he had none, [and] that we should meet in Court." PW4 signed the parade forms; the appellant too signed these forms. PW4 testified that the suspect he was talking about was the appellant herein; and he produced the Identification Parade Form duly filled in and signed. The appellant had no question to ask in cross-examination of PW4.

PW5, **Charles Okwanyo** works with Wells Fargo private security firm, in the capacity of Special Operations Manager. On 24th October, 2003 at 8.00 a.m., one of the company's drivers, **Peter Kimeu** (PW1), who the previous night (at 11.00 p.m.) had been driving the company motor vehicle Reg. No. KAQ 109 Z, reported to him that he (PW1) had been robbed of the motor vehicle by armed gangsters. PW1 had reported to PW5 that when the robbers ordered him to leave the motor vehicle, he had activated an alarm device aligned to the car-track unit. The incident had been recorded at the Police 999 control, when a report reached Pangani Flying Squad base. PW5 testified that the carjacked motor vehicle was fitted with a computerised car-track equipment and once this was activated, it produced a print on the movement of the motor vehicle. PW5 produced the print-out, and testified that the Police were able to catch up with the subject motor vehicle at Westlands; and it is the car-track control room that had indicated to the Police where the vehicle was to be located, at that time of night.

PW6, No. 50675 **Police Constable Onesmus Kimathi**, who is attached to the Pangani Flying Squad Base, testified that on 23rd October, 2003 he was on patrol duties along Waiyaki Way in Westlands, when the control base announced the theft of the Wells Fargo motor vehicle Reg. No. KAQ 109Z. PW6 and his colleagues went up to University Way roundabout, and clearly saw the stolen motor vehicle being driven towards Westlands, and they began the chase. At the Westlands roundabout, the stolen vehicle got into a ditch; PW6 and his colleagues arrested the man who was driving the said vehicle. Upon searching the driver of the stolen vehicle he was found to have a pistol. PW6 and his colleagues also found in the stolen motor vehicle an object which robbers have been known to use as an explosive; it produces the sound of an explosive when tapped on hard surface. The driver of the stolen vehicle was found with a toy pistol in his trousers. PW6 and his colleagues arrested the man they found driving the stolen vehicle, and he is the appellant herein.

PW7, No. 58967 **Cpl. Fredrick Mbingo**, who is attached to the Pangani Police Flying Squad base, was the investigating officer in this case. He was on duty on 23rd October, 2003 when, at midnight, an officer on patrol brought in the Wells Fargo motor vehicle, Reg. No. KAQ 109Z – Nissan. The report recorded was that the appellant herein, had been arrested while driving the said Wells Fargo motor vehicle. The officer on patrol also brought a toy pistol, and a gadget used to make explosive sounds, and usually used by robbers.

The appellant elected to make an unsworn statement, which was very brief. He said he lived at Mlango Kubwa; he understood the charge; he understood the evidence; on the material date he had gone to work near Unga House in Westlands, then he got his pay, and he went to a pub for a drink, and was arrested

while enjoying his drink.

On the evidence, the learned Principal Magistrate stated the critical issue for determination as: “Whether the accused person is one of the people who robbed the complainant of the motor vehicle.” She went on to hold that the main incriminating evidence is that of PW1 and PW2; these two had seen the appellant, in favourable conditions of visibility created by the security lights. The two, in addition, identified the appellant at an identification parade, two days after the robbery. PW2 had given fairly accurate physical description of the appellant. The learned Principal Magistrate noted, and we are in agreement, that the evidence of PW1 and PW2 is mutually corroborative to a substantial degree. On whether the evidence adduced rightly fixed the appellant with responsibility for the crime that was charged, the learned Magistrate thus held:

“The question to ask is whether this evidence is sufficient for [purposes of] identification. My considered view is that it is sufficient. The evidence of PW1 and PW2 is further corroborated by the evidence of PW3 and PW6 who arrested the accused person when he was leaving the motor vehicle they said they did not lose track of... The items that they had used were still found in the vehicle... The [appellant] was also found in possession of a toy pistol. Evidence had been tendered to the effect that the attackers of PW1 and PW2 were armed with a pistol. I am therefore satisfied that the accused person was correctly and positively identified and was...arrested while in possession of the stolen item, which item only he, had stolen.”

The learned Magistrate also found that the appellant had been in possession of an imitation firearm.

The trial Court considered the applicable law, before convicting the appellant as charged. For a conviction for robbery under s. 296(2) of the Penal Code, there must be one or more persons perpetrating the act of robbery; or, the offenders must be armed with dangerous or offensive weapons or instruments; or, at, or immediately before, or immediately after the time of the robbery the offenders strike or use violence on any person. In this particular case, evidence shows that there were two offenders, who also had dangerous and/or offensive weapons or instruments, and who did apply threats of violence at, or immediately before, or immediately after the robbery. The learned Magistrate found the appellant guilty as charged, under both counts.

The appellant in his petition of appeal contested the accuracy of the identification of him as the culprit; he contended that the mode of recovery of the several exhibits did not properly link him to the robbery which is the subject of the charge; he contended that the evidence relied on by the trial Court was not sufficiently corroborated; he contended that the learned Magistrate had not considered his evidence.

On the basis of these grounds of appeal taken together with the appellant’s oral and written submissions, learned State Counsel **Mr. Makura** submitted that the prosecution had brought before the Court overwhelming evidence making a case for the conviction of the appellant on both counts. He urged that there had been sufficient lighting, favourable to identification of the appellant by both PW1 and PW2; and these witnesses had spent a sufficient amount of time with the appellant at the time the robbery was staged. Besides, both PW1 and PW2 had positively identified the appellant at a properly-convened identification parade.

We have carefully considered all the evidence tendered in this case; and we find that it all points unambiguously to the hands of the appellant in the staging of the robbery which took place at Buru Buru on 23rd October, 2003. Both PW1 and PW2 were eye-witnesses who saw the appellant, accompanied by another and the two supporting themselves with offensive or dangerous weapons, extorting upon the complainant and others, and thereafter depriving PW1 of the motor vehicle he was driving, and converting it to the appellant’s own purposes. PW1 and PW2 were in a position to see and to note the larcenous activities of the appellant, in conditions of clear lighting. Those are the circumstances in which the appellant robbed the subject motor vehicle from PW1, and drove it off. There was still more identification. The appellant was arrested as he endeavoured to leave the driver’s seat; so he remained the thief both at the beginning and at the end; and in these circumstances, the ordinary course of nature dictates it be deemed that the appellant was the thief *continuously*, from the time of theft to the time he

was arrested. There was still more identification of the appellant as the robber. Both PW1 and PW2 attended a well-conducted identification parade, and, with accuracy, pin-pointed the robber, namely, the *appellant* herein.

We record our full agreement with the learned Principal Magistrate, that the appellant was the robber on the material night, and he must be held accountable under the law, for such a criminal act. It is also proved, that the appellant had been in possession of a firearm, contrary to the provisions of s.4(2)(a) of the Firearms Act (Cap.114).

We have considered all the points raised by the appellant, in his unsworn evidence, in his petition of appeal, in his written submissions, and in his verbal submissions. All those points, in our view, do not shake the firm evidence placed before the trial Court by the prosecution. It follows that proof by the prosecution had been achieved on a beyond-reasonable-doubt basis.

Consequently, we hereby dismiss the appellant's appeal on both counts, uphold convictions on the same, and confirm the two separate sentences awarded by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of July, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Courts Clerks: Tabitha Wanjiku, Erick

For the Respondent: Mr. Makura

The Appellant in person