



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appael 1076 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 11963 of 2003 of the Chief Magistrate's Court at Makadara (C.O. Kanyangai – SPM)

PETER KAMAU WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

PETER KAMAU WANJIKU was convicted on one count of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 297(2)** of the **Penal Code** and sentenced to death as by law prescribed. The Appellant, it was alleged attempted to rob **ROBERT WAHOME KIBOI** of his motor vehicle on 10th June 2003 along Landhies Road with others not before court whilst armed with a pistol. The Appellant was aggrieved by the conviction and therefore lodged this appeal.

The Appellant raised several grounds of appeal.

One that the charge was defective,

Two that the evidence adduced by the prosecution was contradictory.

Three that there was no positive identification of the Appellant.

Four that essential witnesses and exhibits were lacking.

Five that the defence was rejected without due consideration.

The facts of the case are that the Complainant was a “Matatu” driver while PW2 was his conductor. They were in Motor vehicle registration No. KAG 282 travelling along Landhies Road towards the City Centre direction. That there were 11 passengers in the motor vehicle most of them women when four men boarded the Matatu at City Stadium Stage. One of them sat in the front seat. As PW1 continued driving, the Complainant felt a gun on his head. It had been placed on his head by the male passenger who had just boarded and who sat in front. The Complainant defied the order to stop and accelerated while PW2 struggled with the gun man until he jumped out of the vehicle. It is not clear what happened

to the gun he had. The three other male passengers were also struggling with other passengers but managed to overpower them and jump out. PW3, Police officer manning Landhies Road round about said he saw 3 men alight from a matatu in a huff and they all started running. He ordered them to stop but they refused. He chased and arrested the Appellant. PW3 took him to Kamukunji Police Station where passengers in the Complainant's matatu identified him as one of those who had tried to over power them.

We have carefully considered this appeal and have subjected the evidence adduced before the trial court to fresh analysis and evaluation as expected of us as a first appellate court.

The State conceded to this appeal stating that the evidence of the prosecution was not consistent. **MRS. KAGIRI** learned State Counsel submitted that the Complainants in the case were PW1 and PW2. Counsel submitted that PW1 did not identify the Appellant while PW2 was not clear in his evidence whether or not he had identified him as one of those who attacked them. Counsel submitted that in the circumstances, the identification was not positive.

The learned trial magistrate did not consider the issue of the identification at all. He first stated that:-

“It is clear that the accused with his colleagues who managed to escaped (sic) attempted to rob the Complainant of the motor vehicle...”

The learned trial magistrate did not consider the evidence adduced in support of the charge particularly that of the identification. There was no evidence of identification given. In fact PW1 was very clear that the assailant he could identify was the one who placed a gun on his head and that one managed to escape first. PW2 struggled with the gunman and from his evidence he did not come out clearly whether the Appellant was the one with the gun or not. PW2 avoided committing himself as far as identifying the Appellant was concerned.

PW3 on the other hand said that the Appellant was identified by the other passengers as one of the 3 men who jumped out of the matatu before it reached the area PW3 was manning. If that is the case then the Appellant was not the one with the gun. A fresh issue would then arise as to whether he was from that matatu and secondly whether he acted in concert with the gun-totting man who escaped earlier. These issues were never considered and remained unresolved.

It is our view that from the evidence before us, we can only find that there was no nexus between the Appellant and the man who attacked PW1 and struggled with PW2. In the circumstances the conviction was unsafe and cannot be allowed to stand. We allow the appeal quash the convictions and set aside the sentence. We order that the Appellant be released forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 23rd day of May 2006.

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LESITT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Kagiri for State

CC: Erick/Ann

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE