REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 151 of 2002

(From original conviction and sentence in Criminal Case No.2574 of 2000 of the Chief Magistrate's Court at NAKURU – G. A. NDEDA, MRS)

JAMES WACHANGA KAMAU…….....……APPELLANT

VERSUS

REPUBLIC…….....…….……..RESPONDENT

JUDGMENT OF THE COURT

The appellant has appealed against the original conviction and sentence in the Chief Magistrate's Criminal Case No. 2574 of 2000 at Nakuru. In that case, the appellant had been charged for the offence of robbery with violence, contrary to Section 296(2) of the Penal Code.

The particulars of the charge as stated in the charge sheet are as follows:-

"***On the 10th November 2000 at Free Hotel Estate in Nakuru District of the Rift Valley Province jointly with others not before court while armed with a sword robbed John Muigai of his wrist watch, identity card and cash Kshs.8,000/- all valued at Kshs.13,000/- and at or immediately before or immediately after the time of such robbery wounded the said John Muigai Gitahi."***

After a full trial, the appellant was found "guilty" and convicted accordingly. Thereafter, the learned trial magistrate viz. Mrs Gladys Ndeda then Chief Magistrate, Nakuru sentenced the appellant to death as provided by the law.

During the hearing of the appeal, the appellant opted to present written submissions to the court. A perusal of the same indicates the following major grounds:-

1. That the learned trial magistrate erred in law and fact by basing the conviction and sentence on reliance of identification by recognition which was in doubts and also without putting into consideration that the identifying witness did not make his first report to the police.

2. That the learned trial magistrate erred in law and fact when he based the conviction and sentence on the evidence of the recovered motor-vehicle and the evidence of PW1, PW2 and PW4 without considering that the charge was defective.

3. That the learned trial magistrate erred in law and fact in convicting the appellant on medical evidence without considering that the evidence was contradictory to that of the police surgery doctor (probably he meant police surgeon) and the complainant.

4. That the learned trial magistrate erred in law and fact when he became impressed by the appellant's mode of arrest and failed to consider that he was a victim of confusing circumstances and thus mistaken identity.

5. That the learned trial magistrate erred in law and fact by convicting the appellant without taking into consideration that the instant case was poorly investigated and thus unsafe to sustain a conviction.

6. That the learned magistrate erred in law and fact when he heard the prosecution witnesses in isolation and therefore rejected his sworn defence without giving his points of determination.

On the other hand, the state through Mr. Koech, Senior State Counsel, supported the conviction and sentence. He further submitted that on 10th November, 2000 the complainant approached the appellant who was driving a motor vehicle registration number KTU 982 which belonged to PW4. That was around 4.00 a.m. when PW1 entered the vehicle – two other people also entered. The appellant later stated that they were police officers. On the way, the vehicle was stopped and the complainant was strangled by someone at the back. The appellant held the complainant on the hands. According to Mr. Koech, PW1 identified the appellant and noted down the registration number of the vehicle. Later, PW1 met the appellant in town and he fled. On seeing him the second time, he identified him and the appellant was arrested. Thereafter, PW4 also identified the appellant and confirmed that he was his employee and had given him the vehicle on that night. Apart from the above, he further submitted that there was no doubt that the appellant was one of the robbers. He interpreted his conduct of running away to confirm his guilt conscience. He concluded by urging the court to dismiss the appeal.

In his reply, the appellant stated that PW4 had testified that by the time of the commission of the offence he was not his employee. He also took issue with the fact that the investigating officer and the watchman at the bar never gave evidence.

This court has carefully perused the above together with the entire record of appeal. Being the first appellant court, we have the obligation and duty to examine and analyse the evidence afresh before reaching our own independent conclusion (see ***OKENO VS REPUBLIC [1972] E.A. 32***.

From the evidence on record, it is apparent that the complainant viz. John Mungai Gitahi clearly saw and remembered that he had boarded a taxi registration number KTU 982 Biege in colour on 10th November 2000.

In his evidence, **PW4, Joseph Mwangi Muchemi** stated that he was the owner of the above vehicle. Besides the above, PW4 confirmed that on the material night he had given out the said vehicle to the appellant to use as a taxi. The above independent evidence clearly shows that it was the appellant who had control and possession of the said vehicle on the material night. There is no contrary evidence to show that the said vehicle had been given to anybody else to use on that night.

Tied up with the above, it is significant that the appellant was identified by the complainant on the material night and that when he was seen in Nakuru Town he disappeared. Over and above, what has been stated, assuming that the appellant was not part of the gang that robbed the complainant, the least that was expected of him was to have reported the matter to the police. In this case, he never reported the incident because he was part of the gang that robbed the complainant.

This court has carefully perused the grounds of appeal that have been put forward by the appellant. Having done so we do not see any merit in any of the said grounds. The evidence against the appellant was definitely overwhelming and explicitly showed how the appellant had participated in the commission of the offence. In addition, the court has carefully perused the judgment of the learned magistrate and find that she evaluated the evidence properly and reached the proper conclusion.

In view of the above, we find that the conviction is safe and well merited. We hereby uphold the said conviction and confirm the sentence since the same is lawful and valid. The upshot is that we hereby dismiss the appeal since the same has no merits at all. Those are the orders of the court.

MUGA APONDI

JUDGE

19/5/2006

DANIEL MUSINGA

JUDGE

19/5/2006

Judgment read signed and delivered in open court in the presence of Mr. Koech for the state and the appellant.

MUGA APONDI

JUDGE

19/5/2006

DANIEL MUSINGA

JUDGE

19/5/2006