REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 471 of 2003

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1080 of 2002 – S. MUKETI [S.R.M.]

JOSEPH NJUGUNA MBUGUA…….....……APPELLANT

VERSUS

REPUBLIC…….....……...RESPONDENT

JUDGMENT

The appellant, Joseph Njuguna Mbugua was charged with two others, (*one of whom was acquitted and the other convicted for the lesser charge of handling stolen property contrary to* ***Section 322(2) of the Penal Code***), with the offence of robbery with violence contrary to **Section 296 (1) of the Penal Code**. The particulars of the offence were that on the 4th of April 2002 along Kericho Nakuru road, the appellant jointly with others not before court while armed with dangerous weapons namely knives, pangas and rungus robbed Samson Kipkemoi Kering of a motor vehicle registration number KAG 277G Mitsubishi Fuso which was carrying 307 bags of Unifeed, one jacket, one long trouser, one wrist watch and cash Kshs 900/= all valued at Kshs 2,668,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Samson Kipkemoi Kering. The appellant pleaded not guilty to the charge and after a full trial he was found guilty as charged and sentenced to serve seven years imprisonment. The appellant was aggrieved by his sentence and appealed to this court.

In his petition of appeal, the appellant put forward three grounds of appeal mitigating his sentence. He pleaded that the sentence of seven years imprisonment which was imposed on him should be reduced because of his poor health and further because he was suffering from stomach ulcers and tuberculosis. He stated that he was the sole breadwinner for his family and his imprisonment had resulted in his children dropping out of school. He pleaded with the court to sentence him to a non-custodial sentence.

During the hearing of the appeal, the appellant however changed his tune and instead made submissions urging this court to allow the appeal both on conviction and sentence. He submitted that the prosecution witnesses had not established that he had committed the robbery in question. He submitted that the complainants, from whom the motor vehicle was hijacked, testified that they did not identify the persons who robbed them of the motor vehicle. The appellant argued that no police identification parade was held to establish if he had indeed participated in the said robbery. He submitted that there was no evidence which was adduced by the prosecution which linked him with the recovery of the stolen motor vehicle at Nyahururu. He argued that the evidence of PW4 who was the investigating officer in the case, should be disbelieved because it was contradictory and in any event pointed to someone else as the person who led the police to the recovery of the stolen motor vehicle.

He further argued that the animal feeds which were recovered in a house within Nakuru Township and which were established to have been removed from the stolen motor vehicle, were recovered in possession of other persons other than himself. He submitted that the owner of the house where the animal feeds were recovered should have been called to testify and establish who had delivered the said

animal feeds at the said premises. He argued that no evidence was adduced by the prosecution to connect him with the delivery of the said animal feeds to the said house where the recovery was made. He further submitted that the trial magistrate had not considered his alibi defence before reaching the decision convicting him. He stated that on the material day that it is alleged he was involved in the robbery, he was at his place of work at Langalanga Estate in Nakuru where he worked as a mechanic. He urged this court to allow his appeal.

Mr Koech, learned counsel for the State made no submission either supporting or opposing the appeal. He asked the court to re-evaluate the evidence and reach an appropriate finding.

The duty of the first appellate court in criminal cases is to reconsider and to re-evaluate the evidence adduced during the trial and reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is mandated to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See* **Njoroge –vs- Republic [1987]KLR 19**). The issue for determination by this court, is whether the prosecution adduced sufficient evidence to sustain the conviction of the appellant on the charge of robbery. I have re-evaluated the evidence and considered the submissions which were made before me by the appellant.

The prosecution's case against the appellant is that he was involved in the robbery whereby PW1 Samson Kipkemoi was robbed of the motor vehicle registration number KAG 277G Mitsubishi Fuso on the 4th of April 2002. PW1 and PW2 Musa Kipkemoi Mutai, the turnboy of the said motor vehicle, did not identify the persons who robbed them. However on the same day, PW4 Police Constable William Kangogo, acting on information went to a house at KITI estate in Nakuru which was still under construction and was able to recover some of the animal feeds which had been unloaded from the motor vehicle which was stolen from PW1. PW3 Inspector Jothan Bikey, a police officer attached to the scenes of crime Nakuru went to the house at KITI and took photographs of the recovered animal feeds. The photographs were produced in evidence as exhibits.

PW4 testified that he interviewed a watchman who was guarding the house called John Ndunda and inquired who had made the deliveries of the said animal feeds. The said watchman told him that it was the appellant and another person (*who was charged with the appellant but was acquitted when he filed an appeal to the High Court after being convicted of* ***handling stolen property***) who had delivered the goods to the house. The said watchman led PW4 to a place in Nakuru town where he pointed out the appellant and his friends. The appellant was then arrested and interrogated by the police. PW4 testified that the appellant then volunteered to take the police to Nyahururu where the motor vehicle which was robbed from PW1 was recovered. The watchman who led the police to the arrest of the appellant was not called to testify. Neither was the owner of the house where the animal feeds were recovered from called to testify.

Musinga J. who heard the appeal filed by the appellant's co-accused in the lower court who had been convicted for handing stolen property had this to say on the failure by the prosecution to call these two crucial witnesses:

"***Another reason why Hassan should have been called as a witness or charged is that the house where the stolen goods were found was associated with him in that it was said to belong to his girlfriend who was staying in Nairobi. The prosecution should have the led the evidence to establish the ownership of the house. The watchman who was guarding the house was a material witness who should have been called but was not. He was the only person who told the police that the goods belonged to the appellant. He knew the owner of the house or at least the person who was in charge of it as he must have been getting his salary from that person. At one point the prosecution applied for witness summons against that watchman but as it turned out, they never called him. Another person by the name Salim is said to be the one who hired the appellant to offload the goods. Salim was arrested together with the appellants and the other accused but was later released. He was not called as a witness. The appellants advocate submitted that it must be inferred that these people who were not called as witnesses would have given evidence which was adverse to the prosecution case. He relied on the case of Bukenya & Another –vs- Uganda C.A.*** *No. 68 of 1972 …" (Simon Muchiri–vs- Republic*

Nakuru Criminal Appeal No. 472 of 2003 (unreported)).”

I agree with my brother Musinga J. that the failure by the prosecution to call these crucial witnesses raises reasonable doubt as to the guilt of the appellant in this case that he was actually involved in the robbery of the motor vehicle from the complainant. It is apparent that there were other persons who were intimately connected with the said lorry after it was robbed from the complainant before it was recovered by the police at Nyahururu. I agree with the appellant that the evidence of PW4 as to the circumstances under which the said motor vehicle was recovered should be considered with caution in view of the fact that crucial witnesses who could have shed light as to the circumstances under which the said goods were unloaded at the house where the watchman who later pointed out the appellant was guarding.

Having re-evaluated the totality of the evidence adduced, the evidence by the appellant in his defence that he was at Langalanga Estate at the material time when it is alleged that the motor vehicle was robbed from the complainant could well be true. Although the appellant did not raise any grounds in his petition of appeal challenging his conviction but instead opted to make oral submissions challenging his conviction, this court is not prevented in law from reconsidering the evidence adduced before the trial magistrate’s court and re-evaluating it to determine if the appellant was properly convicted.

The submissions made by the appellant, and the re-evaluation of the evidence adduced before the trial magistrate by this court, raises reasonable doubt that leads this court to reach the conclusion that the conviction of the appellant on the charge of robbery is unsafe. Mr Koech Learned Counsel for the State rightly did not make any submission supporting the conviction. It would have been embarrassing to the State in view of the judgment of my brother Musinga J. on the same facts.

The conviction of the appellant cannot therefore stand. It is quashed. The sentence that was imposed on the appellant is hereby set aside. The appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED at NAKURU this 11th day of May 2006.

L. KIMARU

JUDGE