



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 206 of 2003

(An Appeal from the judgment of Nakuru C.M.CR.C. NO.984/02 by Mrs. S.M. MUKETI, Senior Resident Magistrate)

ELIJAH WAINAINA KIHUYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that on 21st May, 2002 at the junction of Nairobi Nakuru Highway and old Nairobi road in Nakuru District, the appellant jointly with others not before court while armed with dangerous weapons namely rifles, robbed Nelson Makoba Indegu of a motor vehicle registration number KAL 936 A, Nissan matatu and Kshs.200/= all valued at Kshs.450,200/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Nelson Indegu. The appellant also faced a second count of robbery with violence where he was alleged to have robbed Mathew Ndegwa Wairi of mobile phone make Nokia and cash Kshs.2,400/= on the same date and place as in the first count. The appellant further faced a charge of being in possession of a firearm and ammunition without the appropriate certificate contrary to **section 4(1)(a)** of the **Firearm Act** as read with **section 3(2)(a)** of the **Firearm Amendment Act No.8 of 1998**. After a full trial, the appellant was convicted of all the counts. In respect of the first two counts, the appellant was sentenced to death as mandatorily provided by the law while in the other two counts, he was discharged.

He was aggrieved by the said conviction and sentence and he preferred this appeal. The appellant's grounds of appeal can be summarised as hereunder:

- (1) That the trial magistrate erred in law and in fact by basing her conviction of the appellant on the evidence of P.W.4 and P.W.6 without considering that they were incredible witnesses.
- (2) That the people who effected his arrest were not called to testify.
- (3) That the trial magistrate erred in law by rejecting his defence without giving any cogent reason for doing so.
- (4) That the trial magistrate erred in law by admitting a repudiated confessionary statement.

The prosecution evidence briefly stated was as follows:

P.W.1 Nelson Makoba was matatu driver. In the morning of 21/5/2002 he was driving a matatu registration number KAL 736A. He was with the owner of the matatu, **Mr. Mathew Ndegwa P.W.2** and the conductor of the matatu, **Wilson Otieno, P.W.3**. Along the pipeline route near a railway crossing, P.W.1 saw four people standing on the road and one of them pointed a gun at him, opened his door and ordered P.W.1 to move and sit in the middle. The armed man took control of the vehicle. The other three people jumped on the back seat. After a short while, the one who was driving, stopped the vehicle and ordered P.W.1 to move to the back seat. He was ordered to lie down.

After about thirty minutes, the vehicle stopped and P.W.1 was ordered to alight. The robbers took Kshs.200/= from P.W.1 and drove on. Later, the vehicle was found abandoned about half a kilometer from the scene of the robbery. The owner of the matatu went to the scene after about half an hour with police officers. They later went towards Elementaita. After about forty to forty five minutes, they came back with a person who was said to have been the one who pointed a gun at P.W.1 and had driven the said vehicle. The witness further stated that the police also had the gun that he had been threatened with and two jackets. P.W.1 purported to identify in court the person who had robbed him but he pointed at another accused person who was not involved in the said trial.

In cross-examination, P.W.1 said that the appellant was the one who had the gun and he conceded that he had mistakenly identified the wrong person. P.W.1 said that the appellant was arrested in a forest. He had not seen him before. P.W.2 corroborated the evidence of P.W.1 and said that he was robbed of kshs.2400/= and a Nokia mobile phone by one of the robbers who sat next to him and pointed a gun at him. He explained that after the matatu was hijacked by the robbers, the people who were inside were ordered to alight from it after it had covered some distance. Then they walked on foot and found the vehicle having stalled after about a kilometer as it was not in a good working condition. P.W.2 went to report to the police. When P.W.2 and the police officers who accompanied him reached where the vehicle was, they found a person who had been arrested by Anti-Stock Theft Unit officers and members of the public. P.W.2 said that the appellant was the one who sat next to him holding a gun and not the one who drove the matatu after it was hijacked. P.W.3 corroborated the evidence of P.W.1 and identified the appellant as the person who was fished out of the forest by the police after the vehicle stalled. He also identified the gun that the appellant had in his possession .

P.W.4, corporal Timothy Mulwalwe said that he was attached to the police Dog section at Nakuru and on the material day at about 8.00a.m. he received a report that a matatu had been hijacked by some robbers and he went to the scene of the robbery together with police officers from the flying squad unit and a trace dog. He said that they were shown the direction that the robbers had taken. They followed their foot prints. The dog led them to a bush where they found a person lying on the ground. The man was asked to surrender and he complied. The police asked him to show them where the gun was. P.W.4 said that the man led them to a place about ten metres away and showed them a gun which had 14 rounds of ammunition. No other suspect was arrested.

In cross-examination by the appellant, P.W.4 said that the police dog bit the appellant as he hid in the bushes.

P.W.6, Inspector Dominic Mukoma said that on the material day, after he received the robbery report, he involved the dog section of the police and went to the scene accompanied by P.W.4 and a police dog which led them to a place where the appellant was hiding. He said that the appellant wanted to run away. They released the dog on him and he was subdued. Then the police arrested him. They recovered a gun from him. There were also two jackets that had been thrown nearby and the police recovered the same.

P.W.8, Johnson Musyoki confirmed that the firearm and ammunition that the appellant was alleged to have had in his possession was a firearm and ammunition within the meaning of the **Firearms Act**.

P.W.9 Chief Inspector Richard Katola said that on 21/5/2002 at about 4.35P.M. he recorded a statement under inquiry from the appellant. He said that they communicated both in English and Swahili languages. The appellant said that he was forced to sign the statement and a trial within a trial was

conducted and eventually the statement was admitted as having been voluntarily recorded.

The motor vehicle in question was photographed by P.W.10, **P.C. Livingstone Lihanda** and thereafter was released to its owner.

The appellant elected to give a sworn statement of his defence. He said that he was a house broker and on 20/5/2002 he woke up in the morning and went to pipeline area at a place where houses were being constructed. On the following day, he boarded a matatu and alighted at Stem hotel stage. When he got to a place known as Rugeshwa he met three people who stopped him and asked him where he lived and he told them. The three people said that they knew him and about 80 metres away he found a vehicle, Nissan by make and he was told that it had been stolen. Police officers then arrived with P.W.2 who said that the appellant looked like one of the people who had robbed them. The police then spoke to the anti-stock theft police. They went and searched his house but found nothing. On 28th May, 2002 he was charged in court and was thereafter taken to hospital. He said that he knew nothing about the various exhibits that had been recovered.

In cross-examination, the appellant said that after his arrest, he was taken to the police station and the police released one of their dogs to bite him. He denied that a police dog led to his arrest and bit him at the time of his arrest.

In her judgment, the learned magistrate held and we believe rightly so, that the evidence of P.W.1, P.W.2 and P.W.3 in so far as identification of the appellant was concerned was inconsistent. P.W.1 alleged that the appellant was the one who jumped onto the driver's seat while armed with a gun and pushed him to the middle chair. When P.W.1 was asked to identify the appellant in court, he pointed at the wrong person.

On the other hand, P.W.2 said that the appellant was the one who sat next to him armed with a gun, as another robber who was also armed with a gun drove the motor vehicle. P.W.1 and P.W.2 were sitting on different places and obviously both of them could not have been right in their identification of the appellant. P.W.3 said that he could not identify any of the robbers although he identified the appellant as the person who had been arrested by the police on the material day. The trial magistrate was therefore right in rejecting the identification evidence of the complainants as against the appellant.

The trial magistrate relied on the evidence of P.W.4 and P.W.6 regarding the manner in which the appellant was arrested and she held that it clearly pointed to only one inference, that of guilt. However, there was material contradiction in the evidence of key witnesses regarding the manner in which the appellant was arrested. P.W.1 said that after the robbers abandoned the vehicle, P.W.2 went and reported the matter to the police. He came back after about half an hour accompanied by police officers and entered Elementaita forest and after about forty to forty five minutes they came out with the appellant and a gun which had been recovered. He said that he did not know how the police managed to trace the appellant. P.W.1 did not mention that the police officers had any sniffer dog.

P.W.2 said that after they found the abandoned vehicle, he went and reported to the police and went back to the scene with some police officers. He did not say that the officers had a sniffer dog. P.W.2 said that they found the appellant having been arrested by officers who were said to be anti-stock theft police and members of the public. P.W.2 further stated that he did not know how the appellant was arrested.

The appellant had in his sworn defence stated that on the material day, he alighted from a matatu and as he walked he met some members of the public who stopped him and asked him who he was. He said that there were also anti-stock theft police and after about half an hour P.W.2 arrived with police officers from Nakuru. P.W.2 then said that the appellant looked like one of the robbers and he was re-arrested by the police. During a trial within a trial that took place after P.W.9 had testified and alleged that the appellant had voluntarily made a confessionary statement, the appellant alleged that on 21st May, 2002 after his arrest, two police officers took him to P.W.9 for interrogation and when he said that he knew nothing about the robbery, he was taken to the dog section and one police dog was let loose on him and it bit him. He was then returned to P.W.9's office and forced to sign the confessionary statement.

P.W.1, P.W.2 and P.W.3 were at the scene where the vehicle had been abandoned. They were there when P.W.4 and P.W.6 went to the scene accompanied by P.W.2. None of the three complainants talked of any sniffer dog that accompanied P.W.4 and P.W.6 yet the two police officers said that it was the police dog that identified where the appellant was hiding after it picked his scent right from the footmarks that led into the forest. The two witnesses also said that the appellant then showed them where the loaded gun was hidden. The evidence of P.W.4 and P.W.6 in that regard contrasts sharply with that of the complainants.

When P.W.6, Dominic Mukoma, was cross-examined by the appellant during a trial within a trial, he admitted that on the material day, he found anti-stock-theft officers at the place where the stolen vehicle had been abandoned and that gives credence to the defence that was tendered by the appellant. The evidence of P.W.4 and P.W.6 does not appear to be credible. The trial court should have directed that the anti-stock-theft officers be summoned to testify and failure to do so prejudiced the appellant's case as was held in **BUKENYA VS UGANDA** [1972] E.A. 549.

Going back to the evidence of P.W.1, P.W.2 and P.W.3 the robbers must have escaped after the vehicle stalled in the middle of the road. If then the appellant was spotted at the scene shortly thereafter and was arrested following the screams that were raised by the complainants, it is illogical that the appellant, if indeed he was one of the robbers, could have been hovering around the scene since there had been sufficient time to enable him escape therefrom.

Regarding the gun that was allegedly shown to the police by the appellant, the same was not dusted for fingerprints to determine whether the same had been handled by the appellant. The exhibit memo form that was submitted together with the gun to Ballistic experts showed that the gun had been found by P.W.6 on 21/5/2002 at **5.00 a.m.** That was not true because according to the evidence on record, the alleged recovery took place after 8.00a.m.

In view of our findings as hereinabove we hold that the appellant's conviction was unsafe and consequently, we allow the appeal, quash the conviction and set aside the sentence that had been imposed upon him and order that he be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru on 12th day of May, 2006.

D. MUSINGA

JUDGE

12/5/2006

L. KIMARU

JUDGE

12/5/2006

Judgment delivered in open court in the presence of the appellant in person and N/A for the state.

D. MUSINGA

JUDGE

12/5/2006

L. KIMARU

JUDGE

12/5/2006