REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 158 of 2004

RWARU MWANGI ……..…….. APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(From the conviction and sentence of A.N. Kimani P.M. in Chuka Cr. Case No. 1922 of 2003)

J U D G M E N T

The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. He was convicted and sentenced to suffer death. He appealed against the conviction and the sentence.

The prosecution facts are that on 15.9.2003 at 1.30 p.m. the complainant PWI, Isaac Wambugu, in the company of Anthony Mwangi at Chogoria were selling newspapers using motor vehicle registration number KAB 650Z, a Toyota corolla. They stopped at a junction to check whether it was clear and safe to join the main road. They had a few minutes before, seen two people who appeared drunk near the junction but had ignored them. Suddenly, one of the two drunken people became alive. He pushed his hand through the drivers open window and switched off the complainant's car engine.

The other person who displayed a gun tried to enter the car. PW2 Antony Mwangi, held the gun and with some struggle, wrested it out of the attacker's hand. However as struggle went on inside the moving motor vehicle, the vehicle ended falling into a ditch nearby. By then the appellant had already taken control of the m/v. The attackers, had now no alternative but to begin escaping with the complainant pursuing after one of them, who later turned out to be the appellant. Soon thereafter the appellant was arrested by the members of the public but his colleague escaped. The pistol which was left behind in the motor vehicle was picked by PWI who soon there after, handed it over to the police. The appellant was then taken to Chogoria police station where he was later charged with this offence. The value of the m/v was given as Kshs.350,000/=. PWI stated that he had not seen the appellant before that day. Nobody was injured, although the motor vehicle was badly damaged.

PW2 Anthony Mwangi corroborated PWI's testimony in detailed particulars. He confirmed that when the appellant had switched off the engine, he had pushed PWI to the back seat and taken over control of the m/v. He confirmed that as the appellant's colleague had pointed a pistol at them, he PW1 had tried to enter the back of the vehicle.That is when the witness got hold of the pistol and was able to

wrest it away. And as the m/v started to move forward under the control of the appellant who was now sitting on the driver's seat, PW2 held the steering wheel and diverted the m/v to a ditch. The attackers seeing their progress thwarted, jumped out of the m/v and took off. But members of the public who had already seen the attempted hijack, went after the attackers, finally managing to arrest the appellant, as the other one escaped. When the police arrived, the witnesses had handed over the pistol to them. Members of the public had tried to lynch the appellant, added the witness,but police saved him as they took him to Chogoria police station.

The third witness who testified was PW3, Corporal Obed Kiio. He was at Chogoria police station on 15.9.2003 at about 1.30pm although at the time he was serving as the in- charge of Magutuni police post. As he stood outside the police post, he witnessed the hijack. A car was joining the main road at a high speed without giving way. It was being driven in a zig zag manner. The man in the front seat on the driver's side was struggling with another in the back seat. The manner the m/v was being driven attracted members of the public, who now keenly watched. PW3 started to follow and saw as the m/v fell into a ditch after 300 metres drive. Two of the occupants went out of the car and started to run away. He saw one get arrested by members of public before going far, as the other escaped. PW3 immediately moved to the scene and took possession of a gun from the owner of the vehicle. He also took control of the appellant with the help of the members of the public. He led the appellant to Chogoria police base and handed him over to the officer on duty. He also handed over the pistol which turned out to be defective and without a serial number. Later, with arrangement of his superiors and the police station, he escorted the gun to the ballistic expert for tests. A report was later received back from the expert and was admitted in evidence. The report was to the effect that the pistol was a firearm as per the definition in the Firearms Act. The firearm and the ballistic expert's report were introduced as exhibits 1 and 2. This witness confirmed that the man he re-arrested and handed over to Chogoria Patrol base was the appellant. He confirmed also that the members of the public wanted to lynch the appellant before he was handed over to him.

Upon the above evidence the appellant was put on his defence. He said that on 15.9.2003 he left his home to go and buy tobacco. He crossed the road and went near a car. That is when people questioned his conduct as the owner of the motor vehicle said that the attacker looked like a person he knew before. That although he disagreed with him a police officer who came to the scene told him to enter a m/v which was nearby. As he could not refuse to obey he was taken to the police station where he was charged with stealing a motor vehicle. What he was carrying on his arrest, was thrown away at the police station. The appellant's defence statement was unsworn.

In his judgment the honourable trial magistrate accepted the evidence of PWI and PW2 as credible and true. He said that the incident took place during daylight and that one of the attackers who tried to escape after the m/v had been hijacked fell into the ditch but was arrested there and then and taken to the police station. He found that the identification of the arrested attacker by the witness under the circumstances did not raise any doubts in his mind. He saw no grounds upon which the witnesses could frame the appellant. He considered the defence of the accused and saw little truth in it. He was left with no reasonable doubt in his mind that the appellant was one of the two people who violently took control of the complainant's m/v and drove it away, which facts amounted to robbery with violence. He accordingly convicted the appellant.

We have on our part carefully perused the record and considered the circumstances of this case. The incident took place in broad daylight. The complainant was driving his m/v registration **No. KAB 650Z**, a Toyota Corolla in company of PW2 who sat beside him, on his passenger front seat. The two had opportunity before the incident occurred, to notice the two men who pretended to be drunkards before they attacked the complainants. The most likely thing was that the attackers pretence to be drunk was intended to mislead the complainant before the appellant got opportunity to extend his hand and switch off the ignition key. We accept PWI and PW2's evidence that the attackers, one of whom was the appellant, had forcefully entered the vehicle, with the latter taking control of the wheel, and his colleague with a pistol, threatening PW2 with it. We accept that PW2 managed to wrest the pistol away from the other attacker although the latter nevertheless managed to enter the back seat. We further accept that before the appellant drove away, struggles continued inside the vehicle among the four occupants. As the

incident took place during broad daylight members of the public who included PW3, a police officer who stood outside Chogoria police patrol base, saw and witnessed the incident. We as well accept the evidence from PWI, PW2 and PW3 to the effect that due to the commotion inside the m/v and PW2's act of holding and turning the steering wheel, the m/v fell into a ditch about 300 metres away. We finally also accept the evidence that as the two attackers escaped, the appellant was arrested by members of the public almost at the spot of the accident. He was soon handed over to PW3, a police officer who had moved to the accident spot after witnessing the incident from the beginning. The appellant's defence, as the honourable magistrate found it, made little sense and was incredible considering the other clear evidence on the record. We have been left with no doubt in our minds that the incident took place in the manner narrated by the three witnesses who testified. We therefore fully support the honourable trial magistrate in his conclusions on the facts.

The next issue is whether these facts proved the charge of robbery with violence contrary to section 296(2) of Penal Code. The complainant testified that he was driving the above mentioned m/vehicle which he valued at Kshs. 350,000/=. There is no dispute over the fact that, as he drove it, whether it belonged to him or otherwise, he owned and controlled it at the time of the incident. The appellant and another, using physical violence and a gun, threatened to shoot the complainant as they forcefully entered the motor vehicle, took control of it, and drove it away. In our understanding, the moment the complainant lost control of the motor vehicle, he lost the same to the appellant and his colleague. In our further understanding, the act of stealing the m/vehicle was complete when the complainant lost control of it at that point in time and space, however shortly he took control of it. We accordingly find that all the elements of robbery under S. 296(2) of the Penal Code were present. The robbers threatened and/or used violence before and during the violent stealing. They were more than one. They threateningly used a gun, which is a dangerous weapon. They successfully managed to completely take control of the motor vehicle during which period the complainant lost the property in the m/vehicle to them. We harbour no doubt accordingly that the charge of robbery with violence contrary to section 296(2) of the penal code was proved beyond a reasonable doubt. We therefore find this appeal to be without merit. We hereby accordingly dismiss it and confirm the conviction and the sentence of death.

We are however very perturbed by the careless and shoddy manner in which this serious case was handled. We do not see why the case was not fully investigated by an independent investigating officer. No clear record of arrest and detention of the accused at Chogoria police patrol base or any other where accused was detained and later charged, were put in evidence during the prosecution of the case. No evidence of the handling of the gun from the time it was received in some police station, through the process of sending it for ballistic tests and return of it with the report, were put in evidence. This conduct is below the standard of our police force which otherwise is competent. We castigate it. We have recently noticed a number of cases where due to poor investigations, the cases which should not otherwise be lost, were lost. We hope this issue will be taken up seriously by the Attorney General's office in this part of the Republic. May the office properly express the court's concern over the matter to the various police stations under his jurisdiction.

Dated and delivered at Meru this 29th day of September, 2005.

D.A. ONYANCHA

JUDGE

29.9.2005

RUTH N. SITATI

JUDGE

29.9.2005