REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION
CRIMINAL APPEAL 237 OF 2002

(From original conviction (s) and Sentence(s) in Criminal Case No. 4008 of 2001 of the Chief Magistrate's Court at Makadara by H.A. Omondi, SPM

PAUL NGANGA ALIAS RASTA…….……...……..…….…..APPELLANT

VERSUS

REPUBLIC…… ……..…....RESPONDENT

CONSOLIDATED W ITH

Criminal Appeal 239 of 2002

DANIEL MUTEI GEORGE…….……..……....…….…….…..APPELLANT

VERSUS

REPUBLIC…….....……..…….....…….…....RESPONDENT

J U D G M E N T

The Appellant **PAUL NGANGA Alias RASTA** and **DANIEL MUTETI GEORGE** hereinafter referred to as the 1st and 2nd Appellants respectively were jointly charged with one court of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. They were convicted for the offence and each sentenced to death. Being dissatisfied by the conviction, each lodged their appeal which have been consolidated having arisen out of the same trial.

The brief facts of the prosecution case was that on the evening of the material day, the Complainant in this case, **JOSHUA**, PW1 was driving his vehicle registration No. KAA 384G with one passenger. On reaching Makongeni near BAT stage on his way to Mwingi, he by passed a lorry. Immediately on passing it, he knocked a pedestrian who emerged from the right side behind the lorry. The Complainant said that as he stopped, he saw a mob of about 10 people running towards his vehicle and he decided to drive off. As he drove towards a petrol station, the Complainant said he noticed a matatu vehicle following him. The driver of the matatu flashed him and then blocked his path. He drove even faster but eventually the matatu blocked his way completely and he stopped. The passengers alighted and attacked him. The Complainant singled out the 1st Appellant as the one who walked directly to him and punched him on the forehead.The Complainant's passenger PW3 managed to leave the vehicle safely and called police on his mobile phone who came. The Complainant was covered in blood by the time the police reached the scene. PW3 could not get his video machine on the seat where he had left it. Later on police recovered the video machine, exhibit 3, from the 1st Appellant. PW3 was unable to identify their attackers. The Complainant

lost his jacket in which Kshs.200,000/- in cash was stashed away. It was never recovered. Only the Complainant identified the 1st Appellant as among those who attacked and assaulted him and took his property. The Complainant did not identify the 2nd Appellant. PW4 who arrested both Appellants said that the 2nd Appellant was taken to him by the owner of the Matatu which blocked the Complainant's vehicle. PW4 also said that he arrested the 1st Appellant because the Complainant had given his name "Rasta" as one of those who attacked him and that he, PW4 knew him before by that name. PW4 also recovered the video machine exhibit 3 from him. Both Appellants denied the offence in their elaborate defences.

We have re-evaluated the entire evidence adduced before the trial court in this case. The Appellants have raised similar grounds of appeal which we summarize as follows. The Appellants raised the issue whether the Complainant was robbed on the material day and if so whether the thief was properly identified. Whether or not the video machine was recovered from the Appellant's home as alleged. On the 2nd Appellant's oral submission he challenged the conviction entered against him on the basis of circumstantial evidence that he may have been the driver of the vehicle which blocked the Complainant's vehicle.

MISS GATERU learned counsel for the State opposed the appeals. The learned counsel submitted that the prosecution proved their case to the required standard. Counsel submitted that the evidence of identification adduced against the 1st Appellant was safe on the basis that the 1st Appellant's name "rasta" was mentioned by members of public. PW4 the arresting officer who knew the 1st Appellant as "Rasta" owner of the name arrested him on his own. MISS GATERU submitted that it was no coincidence that the 1st Appellant had the video machine also stolen in the same incident in his house.

It did not escape our attention that there was no evidence whatsoever that implicated the 2nd Appellant to this offence. PW4 arrested the 2nd Appellant from his employer on the basis that he drover his matatu which police were looking for in connection with this incident. The fact that the 2nd Appellant drove a certain vehicle was not sufficient to prove that he was the one driving it on the material day. Even if he may have been driving it on the day in question, one very important issue was overlooked which is what was the 2nd Appellant's motive of blocking the Complainant's vehicle. The answer was given by the Complainant himself. He said that the matatu blocked him after he escaped from a traffic accident scene where he, the Complainant, had hit a pedestrian. The prosecution evidence establishes that the only motive that the matatu driver had in blocking the Complainant's path was to prevent him from escaping and we dare to add that the man succeeded in that motive.

It was the duty of the prosecution to prove that the 2nd Appellant developed a second motive, that of robbing the Complainant. No evidence was adduced to that effect. The Complainant said that he did not see the matatu driver leave his vehicle and so the prosecution did not establish a nexus between the assault and robbery on the Complainant and the 2nd Appellant. The Court misdirected itself when it entered a conviction against the 2nd Appellant on the basis of the evidence before it. That conviction is unsafe and consequently quashed and the sentence set aside.

As for the 1st Appellant, the evidence against him was that the Complainant heard his name "rasta' apparently a nick-name, being mentioned. The Complainant also said that on being blocked, the 1st Appellant walked up to his side of the vehicle and punched him on his forehead. He said that he identified the 1st Appellant because of having walked up to him and hitting him. The Complainant claimed that the 1st Appellant also held him by the collar and in the process removed his, the Complainant's jacket in which 200,000/- was kept.

Having carefully considered the totality of the evidence, we are not satisfied that the Complainant could have known who took his jacket from him. The Complainant said categorically that 10 people walked towards his vehicle and assaulted him after he had been blocked by the matatu. Apart from singling out the 1st Appellant on the basis of having heard his name called out, we believe that from the commotion which ensued at the scene after the Complainant stopped, he could not have been able to tell which of these people did what. The issue of motive also arises. The Complainant was being stopped from escaping after hitting a pedestrian and possibly committing a traffic offence. The assault he suffered

at the scene was inflicted by many people. PW3 said he saw the Complainant full of blood. The motive of the attack was not to steal from the Complainant or to retain what was stolen from him within the meaning of Section 295 of the Penal Code. It was to inflict "mob justice" for the Complainant's attempt to escape justice.

The motive of the attack is separable from the loss of the Complainant's property. Further the Complainant's evidence may prove that the 1st Appellant inflicted the first blow. However, it is a far cry from establishing that the 1st Appellant took away his jacket. The issue of identification was not well treated. The police should have conducted an identification parade for the Complainant to identify the 1st Appellant if possible.

The other issue which arises is that of the video machine. The charge sheet claims it was the Complainant's (PW1's) property. The Complainant said it belonged to PW3. Indeed PW3 even produced its documents. Quite apart from the issue of ownership which the prosecution case did not resolve in light of the particulars of the main count, another issue also begged for consideration. Where was the video machine recovered? We are very concerned with the manner in which PW4 handled the investigations into this case. He single handedly arrested the 1st Appellant. He then allegedly went with him to his house where he claims the 1st Appellant got the video machine from and gave him. He did not bother to make an inventory of the recovery or call another police officer to accompany him in the recovery. He then does not bother to conduct an identification parade. He arrested the 2nd Appellant as well and did not bother to have any identification parade conducted on him. He then charged the two for the offence. PW4's actions were quite negligent and in our view have occasioned a serious miscarriage of justice. The issue of the recovery was the word of the 1st Appellant against the officer of PW4. Bearing in mind the fact that PW4 said he knew the 1st Appellant before, the actions taken by PW4 may well have been actuated by ulterior motives. PW4's evidence therefore needed to be taken with great caution.

PW4's evidence did not disclose where in the house the video machine was. At least it shows it was not in the person of the 1st Appellant. We were also perturbed by the learned trial magistrate's admittance of inadmissible evidence. PW4's evidence of what the 1st Appellant told him before he recovered the video machine was clearly inadmissible. We are unable to find that it may not have caused prejudice to the 1st Appellant.

On the whole we find that the prosecution did not prove that the 1st Appellant had recent possession of the video machine to the required standard. It was the word of PW4 against that of the 1st Appellant. The 1st Appellant should have been given the benefit of doubt. Secondly the machine belonged to PW3 and therefore, the evidence adduced did not support the charge.Finally the ingredients for the charge of **ROBBERY WITH VIOLENCE** was not proved against the 1st Appellant on these grounds. We allow the appeal by the 1st Appellant against the main counts of **ROBBERY WITH VIOLENCE**, quash the conviction and set aside the sentence of death.

The upshot of this appeal is that both appeals are allowed and convictions quashed and sentences set aside. The Appellants should be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 13th day of October 2005.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, delivered and signed in presence of:

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE