



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 180 of 2002
**(From original conviction and sentence of the Chief Magistrate's
Court at Nakuru in Criminal Case No. 1547 of 2001 –S. MUKETI
–S.R.M)**

DANIEL MAINA KAMAU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The Appellant, Daniel Maina Kamau, was charged with two others (*who were acquitted during trial*) with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 19th of April 2001 at Maili Saba along Nakuru- Bahati road in Nakuru District, the appellant jointly with others not before the court whilst armed with dangerous weapons namely pistols robbed Paul Maina Ngugi of a motor vehicle registration number KAM 426H Nissan Hommy matatu and cash Kshs.15,000/- and at or immediately after the time of such robbery threatened to use actual violence to the said Paul Maina Ngugi. The appellant pleaded not guilty to the charge and after a full trial he was found guilty and convicted as charged. He was sentenced to death as is mandatorily provided by the law. Being aggrieved by his conviction and sentence, the appellant has appealed to this court against the said conviction and sentence.

The appellant has raised several grounds in his petition of appeal. He faulted the trial magistrate for convicting him on the evidence of the prosecution that was not sufficient to sustain a conviction. He was aggrieved that the trial magistrate had relied on the evidence of the prosecution to convict him yet the said evidence had not connected him with the offence charged. The appellant faulted the trial magistrate for relying on the evidence adduced by the police witnesses whose evidence raised doubt as to the circumstances under which the appellant was arrested and further the circumstances by which the stolen motor vehicle was recovered. The appellant was aggrieved that a critical witness who ought to have testified was not called to give his testimony thereby leaving gaps in the prosecution's evidence.

Finally, the appellant was aggrieved that his evidence in his defence had not been considered before the trial magistrate reached the said decision convicting him. At the hearing of the appeal, the appellant made oral submission urging this court to allow the appeal, quash the conviction and set aside the sentence imposed. Mr Koech for the State, conceded to the appeal. He submitted that the conviction of the appellant by the trial magistrate was unsafe. We shall consider the said submissions after briefly setting out the facts of this case. PW 2 Paul Maina Ngugi and PW3 Daniel Kuria were driver and conductor respectively of motor vehicle registration KAG 426H Nissan matatu. On the 9th of April 2001 at about 7.30 p.m whilst they were ferrying passengers on the Naishi-Suta-Bahati road, they were carjacked by two robbers who posed as passengers. The two robbed them of the said motor vehicle after threatening them with a pistol. They also robbed Kshs.1,500/- and a Seiko 5 watch from PW 2. They robbed the sum of Kshs.2,900/- from PW 3. Both PW 2 and PW 3 did not recognise the robbers during incident.

Three months later PW 1, James Ngugi Njuguna the owner of the said motor vehicle registration number KAG 426H received information that a friend's motor vehicle which had also been robbed from him had been recovered in Nairobi and a suspect arrested. PW 1 accompanied his friend to Nairobi to collect the said motor vehicle which had been detained by the police at the Nairobi Traffic Headquarters. The suspect, who is the appellant in this case, after his arrest was brought to Nakuru where he was detained while he was assisting the police with investigations. According to the evidence adduced by PW 5 Police Constable Irungu attached to the Flying Squad, Nakuru, the appellant volunteered information to the effect that PW 1's motor vehicle was in the possession of one Mutaiti, resident of Nyeri. PW 5 accompanied by PW 4 escorted the appellant to Nyeri whereby after investigations the said Mutaiti was found and the stolen motor vehicle recovered though its particulars had been changed.

The recovered motor vehicle was brought to Nakuru and the appellant charged with the offence of robbery with violence. The said motor vehicle, which was viewed by the trial magistrate, was found to have been vandalised and repainted to a colour other than the original colour. The person referred to as Mutaiti from whom the motor vehicle was recovered was arrested by the police but later released. He was not called as a witness by the prosecution. After the close of the prosecution's case, the appellant was put on his defence. He denied that he had been involved in the robbery nor the prosecution's assertion that he had led the police to the recovery of the said stolen motor vehicle. The appellant testified that he was arrested by the police, whilst he had visited a client at the Nairobi Traffic Headquarters who had promised to give him a contract to undertake electrical wiring. He was taken to Nakuru where he was held for a total period of two months before he was charged with the offence which he was convicted. At the period that he was in police custody, he was put on ten police identification parades. No robbery victim was able to identify him. While in custody he was taken to Mweiga police station in Nyeri where he was detained as the police were looking for the stolen motor vehicle. The appellant denied that he led the police to the recovery of the motor vehicle. He also denied having been involved in any robbery.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated to re-consider and to re-evaluate the evidence adduced by the witness in the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified. (See **Okeno –Vs- Republic [1972] E.A 32**). We have carefully considered the submissions made before us and also considered the evidence adduced by the witnesses during the trial of the appellant by the trial magistrate. The issue for determination by this court is whether on the said evidence adduced, the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt.

In the instant appeal, PW 2 and PW 3 who were robbed of the motor vehicle at gunpoint were not able to identify the robbers. They were robbed at night. Their evidence therefore did not implicate anyone, including the appellant in the robbery. Three months after the robbery, the owner of the motor vehicle (PW 1) received information that a motor vehicle belonging to his friend (*which had also been stolen*) had been recovered in Nairobi and was being held at Nairobi Traffic Headquarters. PW 1 accompanied his friend to Nairobi whereby he was informed that a suspect had been arrested. The suspect happens to be the appellant in this case. He was arrested on suspicion of having been involved in the theft of the motor vehicle belonging to the PW 1's friend. The police speculated that he could have been involved in the robbery incident that led to the theft of PW 1's motor vehicle. The appellant was brought to Nakuru by PW 5, a police officer attached to Flying Squad for further investigations. It is apparent from the evidence adduced by PW 4 and PW 5 and corroborated by the evidence of the appellant that the latter was held by the police for a period of over two months without any charge being preferred against him.

During this period that the appellant was detained he was moved from one police station to the other on the pretext that the police were still investigating the case. In the process, the appellant was put in ten identification parades where none of the victims of robberies were able to identify him. Later the appellant was taken to Mweiga police station where he was held whilst the police was looking for one Mutaiti whom they had been informed was in possession of the stolen motor vehicle. According to PW 5 the motor vehicle, which had apparently been vandalised and its colour changed was found in possession of the said Mutaiti. After the recovery of the said motor vehicle, the same was towed to Nakuru. A

decision was then made to have the appellant charged with the offence of robbery with violence. Does the above evidence support the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** against the appellant? We do not think so. The appellant was arrested on suspicion of a theft of a motor vehicle which is not the motor vehicle in the present criminal case.

There is no evidence which connects the appellant to the theft of the said motor vehicle belonging to the complainant in this case (PW 1). PW 5 claimed that it is the appellant who led the police to one Mutaiti a resident of Nyeri where the stolen motor vehicle was recovered. However in its own wisdom, the prosecution did not call the said Mutaiti who could have shed light under what circumstances he came to be in possession of the said motor vehicle, the subject matter of this criminal case. We are left with the evidence of PW 4 and PW 5 who have implicated the appellant to be the person who led them to the recovery of the said motor vehicle. The evidence of PW 4 and PW 5 taken in the context of their conduct in this case is highly doubtful. The two police officers (PW 4 and PW 5) made a decision to hold a citizen of this country (the appellant) for a period of over two months without laying any charge against him. The appellant was not charged within fourteen (14) days as required by the law, instead it appears the police illegally detained him as they sought to have him charged with an offence. To this end, the appellant was paraded in ten identification parades in a bid to have him pointed out by victims of criminal activities as a criminal. Having re-evaluated the evidence in this case, we find the conduct of the police to be highly objectionable.

Furthermore the said conduct was illegal. As a consequence of the action by the police, the appellant has been in unlawful custody for a period of over four years for no apparent reason. The submission by the appellant that the said police officers released the said Mutaiti (*who had been arrested*) under suspicious circumstances is therefore not far fetched. Having re-evaluated the evidence and putting into consideration the totality of the evidence adduced in this case, it is clear that there is no evidence whatsoever which implicates the appellant with the offence which he was charged with. Infact the evidence that emerges is the efforts that were made by the police to cover up their suspicious conduct in relation to the arrest and subsequent release of a suspect who had been found in possession of the motor vehicle is the subject matter of this case. In the circumstances of this case, there is no evidence that could have led the trial magistrate to convict the appellant. We therefore have no option but to allow the appeal filed by the appellant. We consequently quash his conviction set aside the sentence imposed. Mr Koech, the learned State Counsel, conceded to the appeal, rightly in our view. The appellant is therefore ordered set at liberty and released from Prison unless otherwise lawfully held. It is so ordered.

DATED at NAKURU this 25th day of November 2005.

M. APONDI

JUDGE

L. KIMARU

JUDGE