REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 895 of 2003
(From original conviction and sentence in Criminal Case number 2095 of 2003 of the Senior Resident Magistrate's Court Limuru)

SIMON MACHARIA MWANGI ……..……..…..… APPELLANT

VERSUS

REPUBLIC ……...……...……..RESPONDENT

JUDGMENT

After a full trial before Mr. Ezra O. Awino, Senior Resident Magistrate Limuru on a charge of robbery with violence contrary to Section 296 (2) of the Penal Code, the Appellant was in the end convicted of the offence. He was, upon conviction sentenced to suffer death as by law required. The charge as filed before the magistrate was that on 16th August, 2003 at Kijabe Monkey Corner in Kiambu District within Central Province the Appellant jointly with another not before Court while armed with pistols robbed ***REUBEN MANGA KARIUKI*** a Motor Vehicle Corolla Saloon valued at Kshs.300,000/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said ***REUBEN MANGA KARIUKI.***

The Prosecution case rested on the following largely undisputed facts. the Complaint was on 16. 8. 2003 driving Motor vehicle KAK 577L Toyota Corolla Saloon along Kijabe –Mai Mahiu road in the company of his brother (PW2) and uncle, when suddenly two people wielding pistols appeared on the road and ordered them to stop whilst pointing guns at them. They obeyed and the two tool control of the motor vehicle after pushing all the three to the back seat. They drove the motor vehicle and according to PW2, the robbers told them that they were going to sell the Motor vehicle. As they drove on the Complainant and his companion attacked the robbers from the back seat. They caught hold of the driver who turned out to be the Appellant and the vehicle veered towards the escarpment and stopped as the front wheels agonisingly hanged off the edge of the escarpment.

They managed to arrest the Appellant. However his complaint managed to escape leaving his jacket and what turned out to a toy gun. The Appellants toy gun was similarly recovered. Both toy guns and the jacket were tendered in evidence.

Put on his defence, the Appellant in his sworn statement stated that the Complainant was miffed by the way he was using the road as he appeared drunk. They caught hold of him and beat him up. He thereafter found himself at the Police Station and was later charged with an offence he knew nothing about.

The Appellant was aggrieved by the conviction aforesaid and consequently lodged this Appeal. In his grounds of Appeal, the Appellant faults the trial Magistrate for convicting him on insufficient evidence and also that his defence was insufficiently considered.

In support of the above grounds of Appeal, the Appellant with the permission of the Court tendered written submission that we have duly considered. The Appeal was ofcourse opposed. Miss Nyamosi, Learned State Counsel submitted in opposing the Appeal that the Appellant was arrested at eh scene of crime. That according to the evidence of PW1 and PW2 they subdued the Appellant whilst in the motor vehicle and disarmed him. That he pistol recovered from the Appellant was found to be a try. Learned Counsel further submitted that the Appellant's accomplice managed to escape and left behind a jacket. That PW1 and PW2 later took the Appellant to Kijabe Police post. According to the Learned State Counsel the evidence supports the charge of robbery with violence and the Appeal ought to be dismissed.

In reply, the Appellant submitted that his sworn defence was not considered at and that there were other people who witnessed the incident but were never called to testify.

In the case of *OKENO VS REPUBLIC (1972) EA 32* the then court of appeal stated:-

> *"…..An Appellant on a first Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination* ***(PANDYA VS REPUBLIC) (1957) EA 336)*** *and to the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw it own conclusions.* ***(SHANTILAL M. RUWAKA VS REPUBLIC (1957) EA 570.*** *It is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court findings and conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing witnesses. See* ***PETERS VS SUNDAY POST (1958) EA 424…"***

In convicting the Appellant, the Learned trial magistrate delivered himself thus:-

> ***"……I am satisfied that he accused and his accomplice who managed to escape were all armed with what turned out to be toy pistols. I am also satisfied that they took control of the Motor vehicle and that quick reaction of the Complainant made them overpower the robbers. The two toy pistols and the jacket of the one who escaped were exhibited in Court. It is also noteworthy that this vehicle nearly titled into the escarpment during the struggle. Thereby endangering the lives of the occupants. I find the offence proven and I now enter a conviction as charged……."***

From the foregoing, it is quite clear that the Learned trial Magistrate did not at all attempt to consider the Appellant's defence. The Appellant had tendered a sworn statement of defence on which he had been cross-examined by the Prosecutor. It behoved the Learned trial Magistrate to at least consider it and made a decision. As pointed in the case of ***JUMA VS REPUBLIC (20030 EA 471:-***

> ***"…… That in charging a person under Section 296 (2) of the Penal Code the Prosecution must be extremely careful as the consequence of conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual that is at stake…."***

We would substitute the word *"Prosecutor"* with that of *"the trial Magistrate"*. In cases where the life of a citizen is at stake it does not seem right to have a 2 page Judgment wherein ¾ of the same is dedicated to summarizing the evidence tendered and in one paragraph convict the accused. This smacks of a perfunctory Judgment which ought to be discouraged. Appellants complaint's on this aspect of the Appeal is not without merit. However in view of what we will say later in this Judgment, that failure did not occasion any prejudice to the Appellant.

In a bid to prove its case, the prosecution summoned three prosecution witnesses. However there were other witnesses according to the Appellant who ought to have been called. These witnesses include the uncle to the Complainant who was also in the car, the students who allegedly came and assisted the Complainant in foiling the robbery and finally the investigating officer. We do not understand what else these witnesses could have said that was not said by the three witnesses, it should not be forgotten that the offence was committed in broad day light, at 10 a. m. to be precise. The Complainant and PW2 saw the Appellant and his accomplice all through the odyssey. The Appellant nor his accomplice were disguised in nay manner at all. They never forced the Complainant and PW2 not to look at them. All they did was o force the Complainant, PW2 and their Uncle to the back seat as they took charge of the motor vehicle. After the Appellant had been subdued, he remained with the Complainant and PW2 until he was handed over to the Police (PW3) who re-arrested. In

those circumstances, the issue if identification mistaken or otherwise does not arise. Indeed the Appellant himself does not deny the fact that he was at the scene of the alleged crime. His defence is that the Complaint caused his arrest because he did not like the way the Appellant was using the road. This explain however does not gel with us. The circumstances under which the Appellant was arrested were such that the other witnesses who could have been called but were not in our view have made any difference. The Complainant and PW2 were positive regarding the identification. Further the evidence of Appellants arrest was ably corroborated by the evidence of PW3. In any event the is no compulsion on the Prosecution to call any number of witnesses to prove a fact. Section 143 of the evidence Act states:-

> ***"…..No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact…."***

We think with respect, that there is no merit on this ground of attack and we dismiss it.

The Appellant has also taken issue with contradiction in the prosecution regarding the registration number of the motor vehicle, allegedly the subject of the robbery wand also the scene of the robbery- whether it was along the road to Kijabe Hospital or on the road from Kijabe to Mai Mahiu.

According to the Appellant PW1 testified:-

> ***"….. We took the road to Kijabe Hospital by motor vehicle KAK 577C Toyota Corolla. I was with a driver (brother) and my uncle…."***

Whereas PW2 testified:-

"……We are on the road form Kijabe to Mai Mahiu with my brother and cousin in motor vehicle KAK 577L….."

In the indictment the Motor Vehicle quoted therein was KAK 577L. To the Appellant therefore these were different vehicles and the evidence being contradictory and inconsistent, it ought not to be relied upon. he relied on the case of ***DINKERRAI RAMKRISHAN PANDYA VS REPUBLIC (1957) EA 336.*** Having perused the original record of the tidal Magistrate, we are persuaded that no such contradiction and or inconsistency exists. The original record clearly indicates both PW1 and PW2 in their testimony referred to motor vehicle KAK 577L. This is the same vehicle indicated in the charge sheet. The reference to motor vehicle KAK 577C in the evidence of PW1 was clearly a typographical error. With regard to where the crime was committed, the charge sheet is clear, it was at Kijabe Monkey Corner. It matters not whether it was the ***"road to Kijabe Hospital"*** or ***"the Road from Kijabe to Mai Mahiu."***

What is important is it happened on a road which somehow has some connection with Kijabe. In any event the Appellant did not either in his cross-examination to in his sworn statement of defence, dispute where he was allegedly arrested by the Complainant.

The Appellant has also raised the issue that the motor vehicle that was subject of the charge was not prejudiced in evidence as an exhibit, neither was it photographed and the photographs tendered in evidence. Ordinarily this is the prudent thing to do. However as we have sated the circumstances under which the Appellant was arrested renders the Appellant's complaint invalid. It would have been a valid complaint had the motor vehicle been completely stolen from the Complainant and subsequently recovered. The issue of the recovery and ownership of the same would have become relevant. In the instant case the Appellant was arrested inside the vehicle. He was taken to the Police station in the said vehicle. In his evidence he never disputed this fact. Further in his evidence in chief and cross-examination of all the witnesses, he never questioned the ownership of the motor vehicle. This ground of Appeal lacks merit and is dismissed.

On own thorough evaluation of the evidence, we are satisfied that the Appellant was properly convicted. Although he advanced a sworn statement of defence which was not considered at all by the trial Magistrate, we are satisfied on our consideration of the some what it is plausible. It cannot be a reasonable proposition that he Appellant would be arrested, beaten and taken to a Police station by the Complainant for merely walking badly on the road, and subsequently charged with a serious crime as this. what would be the motivation behind the Complaint actions against someone whom he did not know. Where would he have found the toy gun pistols and the jacket that tied the Appellant to the crime. The

Appellant did not advance any grudge between the Complainant, PW2 and himself as motivation for the two to gang up against him and frame him with the case. How come when handed over to PW3 – a Police Officer, we never protested his innocence?

We agree with the Learned State Counsel that the evidence on record overwhelmingly connected the Appellant to crime. At some pint we toyed with the idea whether the evidence on record disclosed the offence of attempted robbery with violence as charged. Since the Appellant and his cohort never managed to completely drive away with motor vehicle. However we note that form the definition of robbery in Section 295 of the Penal Code it is completely stolen before a conviction under Section 296 (2) can be founded.

All in all we find no merits in the Appeal and we dismiss the same.

Dated at Nairobi this 16th day of December, 2005.

LESIIT J

JUDGE

M.S.A. MAKHANDIA

JUDGE