REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CRIMINAL APPEAL NO. 215 OF 2002

(From Original Conviction and Sentence in Criminal Case No. 2752 of 2001 of the Senior Principal Magistrate's Court at Machakos: S. M. Kibunja Esq . on 18.9.2002)

MATHEW MULINGE MUTISO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G E M E N T

The appellant Mathew Mulinge Mutiso was charged in Machakos SRMCRC. 2752/01 with two counts of Robbery with violence contrary to section 296(2) of the Penal Code. ON 17.7.2001 the 2nd charge was withdrawn because the 2nd complainant could not be traced. The court found the appellant guilty of the first charge convicted him and sentenced him to the only sentence provided by the law which is death. The appellant has been aggrieved by the said conviction and sentence and filed this appeal to have the conviction quashed and sentence set aside.

In brief the case before the lower court was that the complainant (P.W.1) with several other people were travelling from Loitoktok towards Nairobi on 24.11.2001 at about 1.00 a.m. P.W.1 was the driver of the vehicle. At a place called Ngokomi they got a tyre puncture and P.W.1 stopped the vehicle to change the tyre but they were attacked by people who threw stones at them. P.W.1 was injured on the mouth. He was robbed of his property and the people ran off. P. W. 1 ran to Salama where he made a report of the robbery. He was later treated at Sultan Hamud and later at Machakos hospital. He later noticed that the tyres and a battery had been stolen from the vehicle. P.W.1 said that he noted one of the robbers wore a back jeans suit, and a whitish trouser. Later the police showed him the 2 tyres which had been recovered and the appellant who was dressed in blue jeans suit and a whitish trouser and he concluded that he was the robber that he saw. P.W.2, 3 and 4 who were passengers in the vehicle were not able to see any of the robbers. P.W.2 a passenger on the vehicle said that he saw the appellant after arrest and he was wearing the clothes he had seen one of the robbers wearing. The appellant in his unsworn defence said he was arrested by a police officer called Mutuku who had a grudge with him and another officer asked him for a bribe of 20,000/- which he did not have and he was arrested and charged for an offence he does not know about. The appellant had raised 6 grounds in his petition of appeal but at the hearing the counsel consolidated it into one ground which is that the witnesses were unable to identify the appellant as one of the robbers.

The appeal was opposed by the Learned State Counsel and we shall deal with the submissions for the appellant and the State Counsel as we review the evidence on record and consider the issues raised.

One of the issues raised is whether the trial before the lower court was a nullity because an unqualified

prosecutor took part in the prosecution of the case. We do note that on 9.11.02 one Cpl Ngala appears on record as the prosecutor. Under S. 85(2) of the Penal Code and S. 88 of the Penal Code a prosecutor may be appointed by the Attorney General from police officers of the rank of Ag. Inspector of police and above or advocates of the High Court. Cpl Ngala is none of the above. On 9.11.2002 the appellant claimed to be unwell and though Cpl. Ngala was present and said there were witnesses, the hearing did not proceed. In our considered view Cpl Ngala did not prosecute the case. The functions of the prosecutor were considered in the case of **ROY ELIREMA VS. REPUBLIC CR.APP. 67/03.** The functions include leading the witnesses when giving evidence, he decides the order of calling witnesses and decides which ones to call. None of the above was done on 9.11.2002. We do agree with the finding of the High Court in **CR.APP. 577/00 KALE AHMED KALE V. REPUBLIC** in which the court held that an appearance of an unauthorized prosecutor at a mention in a criminal matter does not render the proceedings a nullity.

The other issue raised by the appellant is that the prosecution witnesses did not duly identify the appellant as one of the robbers. We have carefully considered the evidence on record and arrive at the same conclusion. P.W.2, 3 and 4 denied having been able to identify any of the robbers. P.W.1 however said he saw the appellant by use of the vehicle's headlights at the time he was robbed. However, we note that at no time had he described any of the robbers to the police at the time of making the report. It was only after the arrest of the appellant that he talks of having seen the way one was dressed which fitted the way the appellant was dressed. Infact P.W.1 did not positively identify the appellant as one of the robbers but merely concluded from the clothing.

Similarly P.W.3 did not describe any of the robbers to the police at the time of making the report. He did not tell the court how he was able to see the robbers and yet the robbery took place at 1.00 a.m. We are satisfied that the identification of the appellant by P.W.1 and 3 was unsound. This was a case where an identification parade should have been conducted by the police. The State Counsel conceded the circumstances did not favour proper identification of the appellant and we do concur.

The Trial Magistrate also based his conviction on the fact that the appellant led to the recovery of two tyres which had been recently stolen from the complainant's vehicle. He applied Section 31 of the Evidence Act. Though the said section has since been repealed by Act 5 of 2003, by the time of the judgement in 2002, it was still the law and the court will consider whether it was correctly invoked by the court.

P.W.5 and 6 were two police constables who were sent to the scene of the robbery on the same night. They saw some suspects who ran away. P.W.6 added that on the same night they arrested one suspect who told them about the people who ran. Both of themhowever told court that on the next day at 2.00 p.m. they received information from an informer, whom P.W.5 first referred to as a good Samaritan, that the appellant was preparing to go and sell tyres at Nairobi. Acting on this information, that they arrested the appellant at Ngomoki. It was their evidence that the appellant then led them to where the tyres were hidden in a bush covered by leaves. We wish to point out that an informer will not necessarily be called as a witness unless he waived his privilege and decides to testify, or the court orders so.

The question is whether this was a confession obtained through the back door as suggested by the appellants counsel. It is on record that P.W.8 had attempted to produce a charge and caution statement but the magistrate rejected it after holding a trial within a trial because he found that at the time of plea the appellant had injuries which was a pointer to the fact that force may have been used to obtain the confession. That confession had no connection with the evidence of P.W.5 and 6 relating to recovery of tyres. After all, since the confession was never accepted by the court, the court cannot have had a chance to read the contents. Section 31 of the Evidence Act provided as follows:-

"Notwithstanding the provisions of Section 26, 28 and 29 when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession so that, as relates distinctly to the fact hereby discovered may be proved."

Sections 26 – 27 of the Evidence Act governed the taking of confessions but under Section 31 the receipt of information from an accused in an offence that may even lead to recovery, as was in this case, is not prohibited even though the rules of taking of a confession are not adhered to.

It is the appellants contention that he was framed and never led to the recovery of the tyres.

We are satisfied that a robbery took place on the night of 23 – 24th November 2001. The complainant and his companions were attacked by a group of robbers. P.W.4 sustained serious injuries as a result. The same were confirmed by the evidence of P.W.9 a Doctor. The 2 tyres which had been stolen during the robbery were recovered on 24.11.2001. P.W.5 and 6 said it was about 2.00 p.m. The appellant claimed during cross examination of P.W.5 that they had quarreled over a lady with P.W.5. However this alleged dispute over a lady was never substantiated. The court was never told the nature of the dispute, when it happened or where, or even the name of the lady. P.W.5 denied the said grudge. In court the appellant alleged that P.W.5 had threatened him while in cells. P.W.5 again denied. The court did not make any order regarding the said allegations nor was the alleged witness to the incident called to confirm whether or not it happened as alleged. In his defence the appellant repeated this very vague allegation against P.W.5. Though raised throughout the case the alleged grudge between P.W.5 and appellant is unsubstantiated. It could have been raised by anybody. The allegation was not convincing as being truthful. P.W.5 was with P.W.6 when they arrested the appellant and appellant later led to the hideout of the tyres. The evidence of the 2 was consistent. P.W.6 did not quarrel with P.W.6 and it is our finding that the appellant after arrest led to the recovery of the tyres stolen from the vehicle P.W.1 was driving some hours earlier during a robbery. Because of the short time within which the recovery was made after the robbery it is unlikely that the tyres could have changed hands. The tyres were still within he vicinity of the scene of the robbery and under Section 119 of Evidence Act the court can draw a presumption in that the appellant was one of the robbers. In the case of **GABRIEL KAMAU NJOROGE V. REPUBLIC KAR 1982 – 88** the Court of Appeal in considering the doctrine of recent possession, observed what the court should considered.

1. Whether the appellant was the man actually arrested with the stolen goods.

2. Whether it was the stolen goods

3. Whether the appellants defence raised any doubt on these matters

4. Whether the inference of theft at the time of the robbery charged was properly drawn; whether it might be a case of receiving stolen property or mistaken identity.

We have considered all the above and the defence by appellant did not offer any reasonable explanation as to how he came to know where the tyres were. We find that he was in recent possession of the tyres. Under the circumstances it was not necessary to charge the appellant with offence of handling stolen property or possession. The charge of robbery with violence was proper.

From the foregoing we come to the conclusion that the conviction was safe and there is no reason to interfere with it. We therefore confirm the sentence.

Dated, read and delivered at Machakos this 21st day of September 2004.

R. V. WENDOH

JUDGE

J. A. OCHIENG

JUDGE