REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 954 OF 2001

(From original conviction(s) and Sentence(s) in Criminal case No. 31 of 2000 of the Senior Principal Magistrate's Court at Kiambu (G.M. Njuguna – S.R.M.

JOSEPH KARANJA MBUGUA..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..…...RESPONDENT

J U D G M E N T

The Appellant **JOSEPH KARANJA MBUGUA** was found guilty and convicted of one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2**) of **Penal Code** and one count of **BEING IN POSSESSION OF FIREARM WITHOUT A FIREARM CERTIFICATE** contrary to **Section 4(2) (a)** of the **Firearms Act**. He was aggrieved by the conviction and, by implication, the sentence and so lodged this Appeal.

The brief facts of the case are that PW1, the Complainant was driving on a Murram road in motor vehicle KAL 876 D Toyota Hilux at 2.30 p.m. on the 25th of March 2000. As he took a corner at a slow speed, he saw two people standing, one of whom pointed a revolver at him ordering him to stop. The Complainant was driving to Limuru at the time. The Complainant stopped and the man identified as the Appellant took over the driving seat. The Complainant was sandwiched between the Appellant and other man. The Complainant's car was then driven towards the same direction he had been driving. After a short distance, the Appellant made a U-turn and changed direction and started driving towards Githunguri which is the same direction that the Complainant had driven from. As the Appellant continued driving, the Complainant suddenly grabbed the revolver which the Appellant's accomplice was holding. The Complainant held on to the revolver as people at a nearby bus stage, who knew the Complainant, started screaming and saying that he had been robbed. As the Complainant and the man with the gun struggled in the driver's cabin, the Complainant was pushed to the driver's side. As a result, the vehicle lost control, and hit a tree before overturning.Upon the vehicle overturning, the Complainant's leg broke. The two accomplices moved out of the vehicle through the window leaving the Complainant with the gun. The man who had been driving the Complainant's vehicle was however arrested by police and members of public at the locus in quo.

This Appeal was opposed. **MISS MWENJE,** learned counsel for the State represented the Respondent.

The first issue argued by the Appellant was the inconsistency in the evidence of the Prosecution revolving around the registration number of the Complainant's vehicle. He submitted that many versions

were given. He stated that PW1 gave the vehicle number as KAL 876 D. That PW4 referred to it as KAC 876 D while PW5 referred to it as KAD 876 C and at some point as KAD 876D. He also submitted that the charge sheet described the Complainants vehicle as KAL 876. The Appellant further took issue with the trial court's failure to physically inspect the vehicle when it was taken to court by the Complainant.

MISS MWENJE did not agree that the inconsistency in the Prosecution evidence was of any material importance. It was her view that since only one vehicle was involved in the case, and its log book was adduced in evidence, the inconsistency in the evidence was curable.

We have re-evaluated the record of the trial court. The issue of the inconsistency in the evidence of the Prosecution that touches on the registration number of the vehicle stolen was not noted by the learned trial magistrate. In fact that issue was never raised before the learned trial magistrate.

We had the opportunity to read the handwritten notes of the trial court's record. According to that draft, PW4 described the Complainant's vehicle as KAL 876D. PW4 was the Police Officer who saw the accident involving the Complainant's vehicle happen right in front of his eyes as he drove another vehicle. After the Complainant's vehicle rested on its roof with the tyres facing up, he proceeded to the scene, which was 50 meters away. As he approached the scene, two men came out of the vehicle. He went up to the vehicle and saw the Complainant.

He recovered the revolver left behind by the robbers and upon the Complainant saying that the two who left the vehicle were the thieves, he decided to chase them. As far as the vehicle is concerned, PW4 saw it personally and from the original court record, he described it in line with the description given in the charge sheet and in the Complainant's evidence.

As for PW5, he was a Police Officer attached to Kiambu Police Station at the time. The registration number of the vehicle he gave in his evidence was given to him over the Police radio while on duty at Kiambu CID office. Eventually he saw the vehicle lying on its roof and had it towed to the Police Station in Kiambu. He also produced the vehicle as an exhibit (1) in the case. The second number referred to in the proceedings was not from PW5 but from the court. The court was recording the vehicle identified to it outside the court room and whose log book was also given to it. The original record of the court is not clear as it seems as if the number reads KND 876D.We have however, confirmed that the registration number of the vehicle described by the learned trial magistrate as the one stolen, in the body of the judgment was KAL 876D. It is our view that the issue of the inconsistency noted by the Appellant can be ascribed to typographical errors at the time the proceedings were being typed. The only genuine error in evidence is to be found in PW5's evidence. PW5 produced the vehicle and the vehicles log book as exhibit 1 and 3 respectfully. The log book describes the Complainant's vehicle clearly as KAL 876D, which is in line with the charge sheet and the evidence of PW1 and 4. We find that the error in PW5's evidence was minor in the circumstances and that it did not affect the tenor and substance of the Prosecution case. We are fortified on this point by the fact that the registration number in the log book was the correct one. The vehicle was before the court and further the Appellant did not at the time of trial raise any issue with PW5 over the registration number of the vehicle. We find the error or mistake was curable under Section 382 of the Criminal Procedure Code.

Before we leave this point, we must discuss the manner in which the court handled the identification of the Complainant's vehicle in court. It is on record at page 17 of the proceedings that the learned trial magistrate looked at the vehicle from the court room chair where he was seated and without going near, merely noted on the proceedings that the court had seen the vehicle. We find the method adopted by the learned trial magistrate rather unorthodox. The learned trial magistrate did not describe on the record how far the vehicle was from where he sat. The proper procedure to follow was for the court to arise and proceed to the scene where the vehicle was parked, and view it. While at the scene, the prosecution and the accused would have been allowed to put questions to the witness identifying the vehicle. If need be, an examination of the chasis and engine number could also be made. This procedure would remove any doubts as to the description or other particulars of a vehicle or other exhibit under scrutiny.

The situation in this case is different since the vehicle was involved in an accident and was immediately

taken over by the Police. The police had custody of the vehicle from the day of incident. It is not disclosed in evidence, at what point in time, the vehicle was restored to the Complainant. However, since the vehicle was not recovered from the Appellant per se but at the scene of accident, there is no doubt whatsoever as to which vehicle is alleged to have been stolen. We find that issue is of no substance at all in the Appeal.

The other issue canvassed by the Appellant touches on his arrest. He contended that PW1 did not describe him to PW4 and that since PW4 had gone as a good Samaritan to rescue PW1, it is not clear how he connected the Appellant to the scene. MISS MWENJE did not agree with those submissions. She submitted that in fact PW4 saw the Appellant and his accomplice coming out of the vehicle and he then chased them. That PW4 did not loose sight of the Appellant form the time he left the vehicle to the place where he arrested him. The learned trial magistrate also found, in his judgment, that PW4 did not loose sight of the Appellant from the time he left the vehicle to the place he arrested him.

We have examined PW4's evidence very closely. He describes that he ran to the Complainant's vehicle soon after the accident. He saw the Appellant and his accomplice come out and start running from the vehicle. At same time he saw the Complainant inside saying that the two people who were running away were thieves. We have noted that PW4 was a Police Officer. True to his profession, he first recovered the revolver he saw with the Complainant. It was exhibit 4. He then ran after the two men whom he says were still running. He was able to apprehend one. PW4 said that he was in company with his brother. He was certain that the Appellant, whom he says he arrested 5 metres from the vehicle, was the same person he saw coming out of it.

The evidence of PW4 as to the identity of those who attacked and robbed the Complainant has to be taken in conjunction with the Complainant's evidence of identification. Whereas the Appellant claims that he was taken back to the scene to be seen by the Complainant, PW4 said that he left the Appellant in the care of his brothers. By the time he took the Appellant back to the scene, a crowd gathered who unleashed 'mob justice' on him. The Complainant had suffered lost teeth from the blow he received by the Appellant's accomplice, and a fractured left femur from the accident. Taking into consideration the evidence of the severity of his injuries and the fact that a crowd gathered around the Appellant to beat him, we are not satisfied that the circumstances were conducive for the complainant to see the Appellant as the Appellant alleged. Eventually a week or so later, the Appellant was identified in an identification parade by the Complainant.

On the issue of identification of the Appellant and the nexus between the perpetrators of this offence and the Appellant, we find that the Prosecution in its evidence ably provides a nexus between the two. The robbery took place at 2.30 p.m. It was in broad day light. The Appellant drove the Complaint's vehicle for a distance. Neither the Appellant nor his colleague concealed their identity or disguised themselves. The two even spoke with him asking him for money in order to fuel the vehicle. There was even a moment of struggle before the accident occurred. All these circumstances in our view, created a very good time and opportunity for the Complainant to see the Appellant clearly enough to identify him. In addition, the struggle that ensued gave the Complainant a good opportunity to see his attackers clearly. His ability to identity the Appellant a week later confirmed his ability to identify him as the one who took over the driving of his vehicle after he and his accomplice stopped him at gun point. The identification in this case was watertight and creates no doubt in our minds that the Appellant was one of two men who committed the offence.

That brings us to the other issue raised about the recovery of the revolver. We do not see any problem with the recovery of the revolver in this case. PW4 said that he recovered it inside the Complainant's vehicle soon after the accident. We do not think that it is of any material importance whether the Complainant handed it over to PW4 or whether PW4 picked it up from the vehicle.

The last issue raised by the Appellant was that his defence was not considered. **MISS MWENJE** said that it was fully analysed at page J4 of the judgment. She submitted that the court also analysed the evidence of the defence witnesses called, and correctly dismissed it.

We have re-assessed the defence evidence. The Appellant alleged that he was going to school in order to get the certificate to enable him procure a job. He was arrested after alighting from a vehicle that had given him a lift, and as he used a short cut to school. His witness was the Headmaster of the school but who denied knowing him. He also denied that the Appellant had any school fees balance in his school.

The Headmaster was even sent back in order to present the list of fees defaulters which he did. He maintained that the Appellant's name did not appear in the school record.

The learned trial magistrate dismissed the Appellant's defence as a lie that he had gone or was to go to the Githinga High School that day as he had alleged in evidence. He also found as a fact that the Appellant's name was not in the school record and so was not a student there as he alleged. We find no reason to fault the learned trial magistrate in his finding of fact.

Finally, we must state that even though the Appellant did not abandon the Complainant's vehicle at some point, the fact that he took over the vehicle and drove it constituted the offence of ROBBERY as charged. The Prosecution established in evidence that the Appellant was in company with another and that they were armed with a gun. The charge was therefore properly proved. The same goes for the second count. The Appellant was in company of another who had the gun in question. That other used it for the purpose of obtaining the Complainant's vehicle. Even though the Appellant did not have actual possession of the gun, his accomplice had possession of it, and they used it in concert, for a common intention.

We find this Appeal has no merit and dismiss it accordingly. We uphold the conviction and confirm the sentence in both counts.

Dated at Nairobi this 9th day of December 2004.

J LESIIT **F. A. OCHIENG'**

JUDGE **Ag. JUDGE**