



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 815 OF 1997

**(From Original Conviction and Sentence in Criminal Case
No.15558 of 1995 of the Principal Magistrate's Court at Kibera).**

MWANGI MUNGAI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

22/1/02

Before V.V. Patel, J

Tuiyot, J

Appellant present

Monda, State Counsel for State

J U D G M E N T

The appellant was convicted of Robbery with Violence, contrary to section 296(2), P.C. and sentenced to death on 11th July, 1997. His appeal is against the same.

The evidence in the court below established that the complainant was robbed of the property worth over Sh.500,000/- on the night of 28th/29th November, 1995 and that the watchman guarding the premises at the material time was killed in the course of the robbery. The appellant does not dispute this fact.

In his lengthy written submissions in support of the appeal he, inter alia, referred to the evidence of the two brothers, Johnson and Isaac (P.W.7) and 8 respectively but described by the appellant as P.W.8 and 9 due to the error) in details. He accused them of telling lies and stated that the Magistrate erred in relying on it to convict him.

The appellant argued that the house at Mathare North in which some of the goods the complainant was robbed of were recovered was not his house as the two brothers, Johnson and Isaac claimed.

Briefly the evidence for the prosecution was that Johnson, P.W.7 had employed the appellant on 28th November, 1995 on contractual basis as a driver of his motor vehicle Reg. No.KRF 027, pick up Datsun

1500. The appellant was to pay him (Johnson) 10% commission for all the goods he (appellant) ferried. His brother, Isaac (P.W.8) was to be with the appellant. Thereafter on the material night at about 10 p.m. the appellant went to Isaac with two men and informed him that he (appellant) was hired to carry luggage at 4 a.m. He asked him what type of the luggage it was. The appellant refused to tell him and when further asked by him (Isaac) if he (appellant) knew the two men the appellant asked him to stop treating him like a child and he remained silent. As arranged the appellant drove the motor vehicle in the early morning with the two men and Isaac (P.W.8) in it.

According to Isaac the appellant drove the motor vehicle into a compound at Westlands (the scene of the robbery) where some three men started loading the luggage (some of goods the complainant was robbed of) into the vehicle.

Isaac further testified that thereafter the appellant drove the vehicle upto a house in Mathare North. The appellant told him that it was his (appellant's) house. Thereupon he asked the appellant why the goods were taken to his house as the men had hired the vehicle. The appellant simply asked him to assist them in the unloading. It was about 5 a.m. He refused as his duty was only to know how much the appellant was paid for the hiring of the pickup. He (Isaac) then asked one of the men to show him the toilet and it was done. The toilet was about 50 yards away and when he was relieving himself he heard people shouting, "Thieves, they are running away....." He got shocked. He sat in the toilet. He did not know where would he go, where the thieves were and he did not know the area. He went to where the vehicle was parked but it was not there, nor was the appellant. The report was made and later he saw the vehicle, the goods and the appellant at the police station.

During cross-examination by the appellant he (Isaac) repeatedly said that he (appellant) had told him that the house where the goods were unloaded was his. He further said that Huruma corner is next to Mathare North.

It be noted that on the issue of the house where the goods were unloaded at Huruma the further evidence was that Johnson (P.W.7) did testify that when he rushed at Kileleshwa police station he found the goods, the motor vehicle and the appellant there and he (appellant) told him that he was arrested at his house at Huruma with the motor vehicle. Indeed he further added that he had dropped the appellant's wife there at Huruma on a day they met at the police station.

The appellant said in his further defence that two people hired him to go and ferry luggage. He was taken to Chiromo bus stage, where he found the luggage kept by the roadside which was then loaded in the motor vehicle and they went to Huruma corner where he was shown a house and the people started unloading the luggage when his customers saw police on patrol and the customers ran away. The police arrested him. He denied participating in the robbery. He claimed that the house where the goods were unloaded belonged to one of the persons who had hired him.

Isaac (P.W.8) said that the appellant drove the motor vehicle in the compound with two gates (the scene of the robbery) at Westlands where the goods were loaded into the vehicle. The Magistrate believed him. The Rajdip Housing Department Ltd where the robbery occurred is in the Westlands – see the evidence of Paul, P.W.3. The robbers would not have carried such a lot of goods to Chiromo bus stage. Further the appellant did not cross-examine Isaac (P.W.8) on this part of his evidence.

We have carefully looked up the evidence on the record together with judgment and the grounds of the appellant's appeal plus the submissions.

The learned lady Magistrate accepted the evidence for the Prosecution as true and having considered the defence rejected the defence as false. She gave her reasons for the decision she arrived at.

The evidence of Johnson and Isaac was straight forward. The Magistrate had the advantage of seeing them give evidence. She described Isaac as simple soul. The evidence taken as a whole no doubt established that the appellant went with the vehicle in the compound at the Westlands the scene of the robbery together with his cronies (who later escaped), loaded the goods in the vehicle and later unloaded

them in his house. We see no good reason to upset the findings of facts arrived at by the learned Magistrate. The appellant's arrest was in dispute and the failure to call the arresting officer did not dent the prosecution case.

We have considered the points raised on appeal and find no substance in any of them.

In result, we uphold the conviction and sentence. The appeal stands dismissed.

DATED and DELIVERED at NAIROBI this 22nd January, 2002.

V.V. PATEL

JUDGE

W.K. TUIYOT

JUDGE