REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.280 OF 2000

(From Original Conviction and Sentence in Criminal Case No.691 of 1999 of the Resident Magistrate's Court at Kilifi – P.M. Mutani, Esq., - S.R.M.)

EMMANUEL MWACHIO MUNYASYA……..APPELLANT

=V e r s u s=

REPUBLIC……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.285 OF 2000

JULIUS MUTUNGA MUTHOKA……....APPELLANT

=V e r s u s=

REPUBLIC……..RESPONDENT

J U D G M E N T

These Appeals were consolidated without objection from the Appellants as they arose from the same trial before Kilifi Senior Resident Magistrate. Before that court were Five (5) Accused persons, four whom were jointly charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The Appellant, **Emmanuel Mwachio Munyasya** (Munyasya) in Cr.A.280/00 was the 2nd Accused in that Court while the Appellant **Julius Mutunga Muthoka** (Muthoka) in Cr.A.285/00 was the Fourth (4th) Accused. There were two other counts of being in possession of a Firearm and Ammunition contrary to Section 4(2)(a) of the Firearms Act, Cap.114, Laws of Kenya relating to the Appellant Muthoka. Muthoka was however acquitted on the two counts under S.210 of the Criminal Procedure Code since no evidence was offered by the prosecution in that regard. The 5th Accused dissappeared after being granted bail but was acquitted in absentia when no evidence was offered on the only count he was charged with. In passing I express my doubts on the validity of that order but that matter is not before me. Accused No.1 was acquitted after the trial as was Accused No.3. As for the two Appellants, they were not convicted on the main charge either. Instead the learned Trial Magistrate delivered himself thus:-

> ***"Returning to, accused 2 and accused 4, I found they were named by a police informer as having participated in the robbery. In the house of accused 4, a pistol was recovered by police. Though the informer was n ot called as a witness, I believe the evidence of PW.2, that accused 2, and accused 4, were so named and I believe they had knowledge of the car found in the home of accused 3. PW.1 told the court that the car was stolen from him using a pistol and a pist ol was***

found in the house of accused 4. In the circumstances of this case, I hold accused 2 and accused 4, having knowledge of the car, KAJ 969T being in possession of accused 3 were in my view in constructive possession of the same. I therefore find ac cused 3 and accused 4 guilty of handling suspected stolen property under section 322(2) of the Penal Code in accordance with section 179 of the Criminal Procedure Code. I therefore convict accused 2 and accused 4 accordingly with handling contrary to sect ion 322(2) of the Penal Code."

The particulars of the offence charged were that on 30.3.1998 at Chaani Mombasa, while armed with pistols the Four Accused with others not before Court, robbed one Julius Irungu Mwangi of a Motor Vehicle Registration KAJ 969J, a Toyota Corolla, together with money and other personal items, all valued at shs.420,000/- and threatened to shoot the said Julius Mwangi.

Mwangi testified as PW.1 and narrated how at about 7.45 p.m. on that day he was driving his car from town towards his residence at Chaani. He stopped at some shop in Mikindani to buy medicine but on returning to the car someone confronted him with a pistol and ordered him to surrender the car keys. He was pushed into the passenger seat as two other persons jumped into the back seat. They drove off with him dropping him at P.N. Mashru Transporters before driving on towards Port Reitz. Before dropping him they had taken away his money and other personal items. He never looked at or recognised any of them. He reported to the Police. Three weeks later some items from the car were found and taken to the Police. The car itself was also recovered some three months later on 7.7.1998 and Mwangi identified it as the one stolen from him.

The only other witness who testified was the arresting officer who also said he recovered the stolen vehicle. He was Pc Samwel of Coast Provincial C.I.D. On 4.7.1998 at about 11 a.m. he was driving around Bombolulu area with an informer and one Pc Langat. The informer pointed (A4) Muthoka who was arrested. Nothing was found on his person upon search but Pc Samwel said they went to Muthoka's house and recovered a gun and ammunition from under his bed. As stated above Muthoka was acquitted of those charges. Neither the informer nor Pc Langat who were said to have accompanied Pc Samwel were called to testify.

(A2) Munyasya was arrested on 5.7.98 on information. Pc Samwel said in xxn:-

"I arrested you through an informer. I received particulars informations (sic) about you from th e informer. I interrogatedlyou in our offices. It was a team of investigators. You led me to the place of Accused 1. I never found you in possession of anything".

Accused 1 is then said to have mentioned Accused 3 as the person who had the vehicle. Accused 3 said he bought it from Accused 1 and led the Police to Mtwapa where the vehicle had been kept in custody of other people. Those other people who had actual possession of the vehicle were not arrested or called to give evidence. The team of investigators mentioned by Pc Samwel was also not called to testify. Indeed no investigating officer was called to testify. As stated above Accused 1 and Accused 3 were acquitted of the offence. They had in their defences denied any knowledge of the offence or the stolen vehicle. The Police just pounced on them and charged them with the offence. The Appellants also denied knowing the two co-Accused or knowing each other and complained that the Police arrested them without cause and tortured them to confess to a crime they did not commit.

Before this Court in a Petition of Appeal drawn and argued in person, Munyasya contended that there was no evidence to sustain the charge laid. He submitted that the Trial Magistrate erred in law and fact in convicting him for the offence of possession of the stolen Motor Vehicle when there was evidence that it was in possession of other co-Accused whom the Trial Magistrate acquitted for unexplained reasons. Finally, he submitted that he was convicted for an offence for which he was not charged.

In his own Petition and arguments, Muthoka submitted that he was convicted on a charge that was neither before the Court nor proved in evidence. His conviction was on non-existent and hearsay evidence. I have anxiously considered this matter and I am amazed at the casual manner in which the Learned Trial Magistrate appears to have conducted the trial and assessed the evidence. It is no wonder

that State Counsel Mr. Ogoti joined the Appellants in castigating the decision arrived at and the manner of evaluation of the evidence on record. Mr. Ogoti submitted that there was indeed no judgment as required under S.169 of the Criminal Procedure Code. The evidence was not analysed and evaluated. If it was, there could not have been contradictory findings on the matter of possession of the stolen vehicle. Worse still a conviction was made for a different offence without giving reasons for so doing. The main actor in the whole affair (A1) was acquitted without assigning any reasons therefor. Mr. Ogoti called for a retrial as there was miscarriage of justice.

Quite plainly there was no evidence to connect the two Appellants with the offence charged. The complainant made no pretentions that he identified any of them. The only other witness for the prosecution identified himself as the arresting officer and referred to other officers as investigating officers. They were not called as witnesses since the trial ended after several adjournments were granted to await further evidence but the prosecution produced none. That some Accused persons mentioned others is not evidence without corroboration against other co-Accused. No statement was produced at any rate to show that any of the Accused persons incriminated the others. The court was only treated to hearsay evidence which cannot substitute the requirement for corroboration.

The amazing part is the finding made by the Learned Trial Magistrate that the stolen vehicle was found in possession of one of the co-Accused and then in an apparent about-face, found that it was the Appellants who had possession. His reasoning was that the Appellants knew that the co-Accused had the vehicle and that knowledge constituted “constructive possession”. No authority was cited for such profound proposition of law, but the Trial Magistrate went ahead and convicted them for handling suspected stolen property under S.322(2) of the Penal Code. In doing so he invoked S.179 Criminal Procedure Code which states:-

> ***“179.(1) When a person is charged with an offen ce consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”***

It is not clear which of sub-sections (1) or (2) was invoked. Either way it was not, with respect, open for the Learned Trial Magistrate to grope around for some offence on which to convict when there was plainly no evidence on record to support either the main charge of the lesser offence.

I have said enough to show that the Appeals on conviction must succeed. The justice of the matter will not be served by ordering a retrial. The Appellants had been brought before Mombasa Law Courts on their first arrest in July 1998. One year later the case was withdrawn and taken to Kilifi Law Courts. The prosecution there stalled for another year waiting for witnesses who never turned up and they closed their case. Some of the witnesses were Police Officers said to have subsequently been involved as Accused persons in other Criminal trials. Acquitals have been recorded on some of the counts charged in this case. I think in all the circumstances, the prosecution case is beyond redemption and I see no point in continuing the incarceration of the Appellants any longer.

I quash the conviction and set aside the sentence of 4 years imposed by the Trial Magistrate. The Appellants shall be set at liberty unless they are otherwise lawfully held.

Dated this 22nd day of March, 2001.

P.N. WAKI

J U D G E