



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 309 OF 2012

PETER MAINA JOHN Alias

HUSSEIN ALI Alias HASSAN ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence by P. Achieng, Ag. PM dated 4/12/2012 in Kakamega CM's Court Criminal Case No. 962 of 2012)

JUDGMENT

1. The appellant was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to suffer death. He was dissatisfied with the conviction and the sentence and filed the present appeal. The grounds of appeal are:-

1. That the identification parade was not watertight;
2. That there were material discrepancies in the trial process.
3. That Article 50 (h) and (p) of the Constitution was breached.
4. That the conviction is against the weight of the evidence.
5. That no exhibits were recovered which could connect the appellant with the offence.
6. That the prosecution did not call crucial witnesses in the case.
7. That the trial magistrate did not give tangible reasons for dismissing the appellant's defence.

2. The grounds of appeal were expounded by written submissions of the appellant. The prosecution counsel did not make any submissions in the appeal but instead relied on the record of the lower court.

3. The particulars of the offence against the appellant were that on the 27th day of April, 2012 at Cherovani forest in Kakamega East district within Western Province, jointly with others not before court while armed with offensive weapons namely crude weapons robbed Hillary Ochieng Nyamunga of motor vehicle registration number KBR 671E silver in colour make Toyota Succeed valued at Ksh. 800,000/=, the property of Francis Nzaiywa Miheso and immediately after the time of such robbery murdered the said Hillary Ochieng Nyamunga (herein referred to as the deceased).

Prosecution Case -

4. The case for the prosecution was that the deceased was employed by Francis Miheso PW1 as a taxi driver of PW1's motor vehicle registration number KBR 671E, Toyota Succeed. That on morning of 27/4/2012 at 8 a.m. PW1 handed over the vehicle to the deceased in Kakamega town. Later the deceased was seen by a fellow taxi driver Victor PW2 with 3 people in the vehicle. A person called Harun Amugamwa PW3 knew the vehicle of PW1. At 11 a.m. PW3 was at Kambiri area along Kakamega-Eldoret highway. He saw PW1's vehicle at a petrol station. He approached the driver of the vehicle who wanted to fuel the vehicle. He peeped inside the vehicle. He did not see the owner in the vehicle. He saw 3 people in the vehicle. He asked them where the owner was. They initially did not answer him. The driver then answered that the owner had remained behind. Before the vehicle was fueled it took off at high speed and damaged the front bumper. PW3 called PW1 and informed him. PW1 called the deceased. The call was received by a certain person who said that the phone

was being charged. By evening the deceased had not returned the vehicle and his phone could not go through. PW1 reported the matter at Kakamega Police Station.

5. Meanwhile Cpl. Justine Mangeni PW4 of Eldoret Police Flying Squad Unit was on patrol in Eldoret town. At 7.30 p.m. he received a report from a colleague that a vehicle registration number KBR 671E make Succeed had been stolen at Kakamega and that it was being driven towards Eldoret. He and colleagues went to Baharini area. At 9.30 p.m. they saw the vehicle going towards Eldoret. They followed it. They challenged the driver to stop. The occupants of the vehicle fired at them. The driver of the vehicle slowed down. He opened the door and jumped out. He ran away. They shot him dead. The vehicle continued to move. A person alighted from the back seat and ran away. He was shot dead. He saw a person leaving the vehicle from the side of the co-driver and was shot at but he managed to escape with gun shots. They inspected the vehicle. They found some identity cards in the vehicle. Photocopies of the deceased's driving licence and identity card were also found in the vehicle.

6. After about 1 hour PW4 received a report that there was a person who had gone to Moi Teaching & Referral Hospital Eldoret with gunshot wounds. He went to the hospital. He met the person, the appellant. He was admitted under the name of Hussein Ali. He concluded that the appellant is the person who had escaped from the co-driver's seat during the shooting. He found a wallet in the person of the appellant in which there was the appellant's waiting card for identity card in the name of Peter Maina John.

7. Michael Kiprono PW7 of Kakamega CID Office investigated the case. He mobilized taxi drivers in search of the deceased. On 1/5/2012 they found the body of the deceased inside Kakamega forest. The mouth was covered with cellotape. The hands were tied at the back. The scenes of crime officers went to the place and took photographs. The body was taken to Kakamega Provincial General Hospital mortuary. A postmortem was done on the body by Dr. Muchana PW6 at Kakamega Provincial General Hospital. He concluded that the cause of death was due to strangulation.

8. The appellant was discharged from hospital on 12/5/2012. PC Kiprono PW7 went and picked him. On the following day IP Nicholas Kasyula PW5 of Kakamega Police Station conducted an identification parade on the appellant. The appellant was identified by Harun Amugamwa PW3 as the person whom PW3 had seen in the vehicle at Kambiri Petrol Station while seated at the co-driver's seat. On 14/5/2012 the appellant was presented before Resident Magistrate Joy Wesonga PW8 who recorded a confession from him. The appellant was charged with the offence. During the hearing Dr. Muchana produced the postmortem report as exhibit, P.Ex 8. The parade officer PW5 produced the parade forms as exhibit, P.Ex 14. The Magistrate PW8 produced the confession as exhibit, P.Ex. 22. The investigating officer produced the appellant's hospital file and identity card as exhibits, Exhibit 15 and 16 respectively.

9. In his defence the appellant stated that he used to live in Mombasa. That he was working with Bayusuf Clearing and Forwarding Company. That on 27/4/2012 he was at Malaba. He was given a lift to Mombasa by a certain driver. They were to sleep at Eldoret town. They reached Huruma Estate in Eldoret town at 8.30 p.m. He alighted from the vehicle. The driver went to pack the vehicle. He decided to cross the road so as to hire a motorcycle to take him to Eldoret town. As he did so he saw two vehicles following each other. He heard gunshots. After a short while he heard another sound. He did not know what happened after that. He found himself in hospital. After one day policemen went to the hospital and kept guard over him. On 11/5/2012 he was discharged and taken to Eldoret Police Station. On 12/5/2012 CID officers from Kakamega went and picked him. He was taken to Kakamega CID office. He was interrogated on issues he did not know. He was tortured and injured on his private parts and toes. On 13/5/12 an identification parade was organized. He was in hospital clothes. He was forced to sign the parade forms. On 14/5/12 he was taken to court and charged.

10. In cross-examination the appellant denied that his name is peter Maina John. He said that his name is Martin Mwendu Kamau. He said that he did not know who gave his name at the hospital as Ali Hussein. He said that he was forced to sign the confession, P.Ex 22, by CID officers.

11. In his judgment the trial magistrate declined to consider the evidence on confession taken by the magistrate in reliance of **High Court decision in Republic –Vs- Godana & Another (2006) 2KLR, 524** where the court said that it was illegal for a magistrate to record a confession on a matter yet to be taken to court. The trial magistrate all the same found sufficient evidence to sustain a conviction. He held that the appellant was properly identified by pW3 in the identification parade. That it was difficult to believe that the appellant could have left hospital in hospital attire. That PW3 had talked to the people who were in the vehicle. That the conditions for positive identification of the people were favourable. That the parade was properly conducted. That the appellant was seen in deceased's vehicle. That the appellant had given false names at the hospital so as to disguise his identity. That the appellant was shot at at the scene of the shooting and managed to escape with gunshot wounds.

12. The appellant submitted that there was no evidence as to the amount of time that PW3 peeped into the vehicle and saw the occupants. That PW4 in his evidence stated that he did not see the person who was controlling the vehicle after the vehicle's driver was shot. That he was told by his colleague that the person had been shot. That they checked around and they saw blood. The concluded that the person had escaped. Therefore that there was no evidence that the appellant was among the people who were in the vehicle. Further that PW4 said that there were some trucks at the scene of the shooting. That the person who came out of the back seat was shot at as he wanted to enter into a bar. That that means that the shooting occurred at a place where there were people. That PW4 stated that the report received from Moi Referral Hospital was that a person had been taken there with gunshot wounds. That this is in line with the appellant's defence that he was taken to hospital by unknown people. Therefore that there is high likelihood that the appellant was shot by mistake.

13. The appellant submitted that there was no evidence that PW3 gave a description of the occupants of the vehicle to the police before he identified the appellant in a parade. That there was no reason for the trial magistrate to disbelief his defence that he was wearing hospital clothes when the parade was conducted. That PW3 said that there were 10 people in the identification parade while PW5 said that there were 9 members of the parade. That PW5 said that the parade was conducted on 13/5/12 while PW3 said that it was on 27/5/2012. This shows that the witnesses were not credible.

14. It was submitted that the ballistic report was not produced. That the prosecution did not call the people who took the appellant to hospital. That the witnesses would have told the court where they picked him. That failure to call the witnesses meant that the police were hiding something. That the evidence that the appellant was found with the documents alleged was a fabrication to cover up the fact that the

police shot at an innocent person.

15. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing witnesses testify – See **Okeno –Vs- Republic (1972) EA 32**.

16. The evidence against the appellant was that he was seen by PW3 in possession of the deceased's motor vehicle a few hours after the motor vehicle was stolen. That he was in the deceased's motor vehicle at the scene of the shooting at Baharini. That he received gunshot wounds during the shooting and was admitted at Moi Teaching and Referral Hospital under a false name.

17. The prosecution evidence did establish that PW1 was the owner of the stolen motor vehicle in issue. Documents were produced that proved ownership of the vehicle. It was proved that the motor vehicle was stolen from the driver, the deceased, the deceased killed and his body dumped in Kakamega forest. The main issue for determination is whether the trial court was right in making a finding that the appellant was one of the robbers.

18. The appellant contended that there was no sufficient evidence that PW3 identified the people that he saw in the vehicle at Kambiri. That he did not give the description of the people to the police before he identified the appellant in an identification parade.

19. The purpose of an identification parade is to test whether a person can identify a person that he alleges he saw during the time of commission of an offence. It is important for a witness to have given a description of the suspect to the police before the witness participates in an identification parade. That however does not mean that where this is not done the evidence of the witness ought to be dismissed. In **Nathan Kamau Mugreru –Vs- republic, Criminal Appeal No. 63 of 2008** the Court of Appeal in a similar argument as submitted by the appellant held that:-

“..... the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

20. It is clear from the evidence that PW3 peeped into the vehicle. He saw the people inside the vehicle. They were strangers to him. He asked the people where the owner of the vehicle was. The driver of the vehicle answered him that he had been left behind. I am in agreement with the trial court that the conditions for positive identification of the people by PW3 were favourable. It was during day time. PW3 had sufficient time to see the people when he talked to them.

21. The appellant was discharged from hospital on 12/5/2012. The identification parade was conducted on the following day. The parade officer PW5 denied that the appellant was in hospital clothes when the parade was conducted. The appellant signed the parade form. It is indicated in the parade form that the appellant did not have a complaint on the manner the parade was conducted. The trial magistrate dismissed the evidence that the appellant was in hospital clothes when the parade was conducted. The parade was properly conducted. PW3 identified the appellant during the parade. He had sufficient time to see the appellant when he talked to the occupants of the vehicle. He said that the appellant is the one who was seated at the co-driver's seat when he saw the people. The identification of the appellant by PW3 was credible and beyond doubt.

22. The Flying Squad officer PW4 said that the person who was seated at the co-driver's seat was shot at and escaped with gunshot wounds. The appellant was within one hour of the shooting admitted at Moi Teaching and Referral Hospital with gunshot wounds. The appellant was found with a waiting card for identity card in the name of Peter Maina John. He was admitted in hospital under a false name of Hussein Ali. The appellant must have used a false name to disguise himself. I am satisfied that he was shot at at the scene of the shooting with the police. He was one of the people who were seen by PW3 at Kambiri in the deceased's stolen motor vehicle. He was one of the people who was in the deceased motor vehicle when it was shot at by the police and managed to escape with gunshot wounds. This aspect of circumstantial evidence unerringly pointed at the appellant as one of the people who robbed the deceased of his motor vehicle and killed him. There was no truth in the appellant's defence. When the appellant cross-examined the police officer PW4 he never alluded that the policemen shot towards members of the public. There is no evidence that the people who took the appellant to hospital were known to the police. The appellant himself did not state that he knew the people. Failure by the police to call the people as witnesses was therefore not deliberate.

23. In the foregoing I find that the appellant was convicted on sound evidence. The charge against him was proved beyond all reasonable doubt. The appeal on conviction is thereby dismissed.

24. The appellant was sentenced to suffer death. His sentence took place before the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** wherein the mandatory sentence for murder under Section 204 of the Penal Code was declared to be unconstitutional. As a corollary the Court of Appeal in **William Okungu Kittiny –Vs- Republic (2019) eKLR** declared the mandatory sentence for robbery with violence under Section 296 (2) of the Penal Code to be unconstitutional. In the premises the court can impose a lesser sentence other than a mandatory one in an appropriate case.

25. The appellant mitigated at the lower court that he had one child and two small brothers who were dependent on him. He pleaded for a non-custodial sentence.

26. In **Peter Wanyutu Kahiga & Another –Vs- Republic (2018) eKLR** the applicants had killed their victim during a robbery and were sentenced by the lower court to suffer death. In an application for re-sentencing, Mulwa J. substituted the death sentence with life imprisonment upon considering the gravity of the offence. In **Onesmus Kali Mulandi –Vs- Republic (2020) eKLR**, two Judges of the High Court had on appeal substituted the death sentence with life imprisonment in a case where the victim of the robbery had died.

27. The appellant herein killed his victim in a very macabre manner just so as to steal his vehicle. This portrayed callousness and complete contempt for human life. Though I do not consider the death sentence to be warranted, I am of the view that a stiff sentence should be meted out in such cases. I consider a sentence of life imprisonment to be appropriate for the offence committed. In the premises I substitute the sentence of death imposed on the appellant with a sentence of life imprisonment.

28. The upshot is that the conviction is upheld but the sentence of death imposed by the lower court is substituted with one of life imprisonment.

Delivered, dated and signed at Kakamega this 14th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mutua for State/Respondent

Appellant – present through video link to Kisumu Maximum Prison

Court Assistant - Polycap

14 days right of appeal.