



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 53 OF 2007

MARCARIOUS ITUGU KANYONI alias PETER NJOGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.E.J.Osoro (S.R.M)

vide CR. No. 3904 OF 2005 at Chief Magistrate's Courts delivered on 4th April 2007)

JUDGMENT

This court has heard this appeal twice- first time before Sergon and Makhandia JJ on 6th October 2009. Judgment was delivered on 13th January 2010. The judgment was signed by Sergon J only. That anomaly was placed before the Court of Appeal who directed that the appeal be remitted back to High Court for rehearing before a two Judge bench on priority. The order was made on 29th April 2013.

On 15th October 2013 the matter came before Wakiaga and Ombwayo JJ. Judgment was delivered on 21st November 2013 signed by both Judges.

On 29th June 2016 the Court of Appeal noting that Ombwayo J had no jurisdiction to hear the appeal – declared the proceedings before the two Judges a nullity and directed that the appeal be heard before a competent bench of the High Court.

That is how the matter ended up before me.

Mr. Maragia argued the appeal for the appellant, Mr. Magoma for state.

The appellant Marcarious Itugu Kanyoni alias Peter Njogu was charged with Robbery with violence c/s 296(2) of the Penal Code. It was alleged that on 16th February 2005 at Mweiga area in Nyeri District within Central province jointly with others not before court, while armed with a dangerous weapon namely an iron bar, robbed Nahashon Kairu Ndung'u of one motor vehicle Reg No.KAP 027D Toyota Corolla valued at Kshs.500,000/- driving licence, photocopy of ID card, cash of Kshs.800/- all valued at Kshs.501,430/- and at, or immediately before ,or immediately after the time of such robbery, used actual violence against the said Nahashon Kairu Ndung'u.

On the 2nd count, it was a charge of obtaining money by false pretenses c/s 313 of the Penal Code. That on the diverse dates between 19th February 2005 and 26th February 2005 at Nanyuki Township Laikipia District within Rift Valley Province jointly with others not before court with intent to defraud obtained from Rose Kananu Makora Kshs.115,000/- by falsely pretending that they were going to sell her motor vehicle Reg. No. KAN 818T Toyota Corolla Saloon.

My duty as the 1st appellate court is settled as was held in **Okeno vs Republic (1972) EA 32** is to re-evaluate the evidence and draw my own conclusions from the same. I must be conscious of the fact that I neither saw nor heard the witnesses see **Kimeu vs Republic (2003) KLR 756**

From the record the charges against the accused person arose from three incidents.

The first one- relates to the alleged purchase of a motor vehicle by PW1- she testified that the appellant was known to her as a taxi driver at Meru stage, that he delivered the motor vehicle Reg.No.818T to her on 19th February 2005 and she paid him Kshs. 20,000/- . To corroborate her testimony prosecution called PW2 who confirmed that he saw Appellant deliver the motor vehicle and receive Kshs.20,000/-

from the PW1.

However, the testimony here is inconsistent- PW1 claims she went to the bank, KCB Bank Nanyuki in the company of her 10 years old son – CM, PW2 Kimathi, who drove them, the appellant and his brother. That she withdrew Kshs.20,000/- and gave appellant.

PW2's testimony on the other hand is that he was called by PW1 to test the motor vehicle, he found the motor vehicle grey in colour KAN 818T in the compound. He saw appellant for first time, and found when the appellant had delivered the motor vehicle. He was asked to test motor vehicle. He tested it, said it was ok. At the material time he was 23years old and had 6 years driving experience. Thereafter, he drove PW1, her husband, their child, and the appellant to town. PW1's husband withdrew money and gave to appellant who was seated in back seat. The appellant left after payment.

PW1 alleged that thereafter the appellant on 21st February 2005, came to her home with his brother and one Alfred Karimi as the trustee who could receive the money on his behalf. Kshs.35,000/- was withdrawn through the ATM and paid to Karimi as evidenced by agreement of the same date between the said Karimi and he husband totaling the amount paid as Kshs.55000/- Kshs.60000/- was paid on 26th February 2005, the balance was to e paid at Kshs.30000/ per month.

PW1 spoke of being left with a copy of log book in the name of one Alice Chebet Cheron. She noted that, and allegedly wrote to the said Alice using the address on the log book seeking transfer documents. Despite that she began to use motor vehicle. It is at this time that she allegedly discovered it had side mirrors bearing No.KAP 072D. She reported to police, at Nanyuki Police Station who checked the engine number and told her since the same had not been tampered with the same was good. According to her this was clearance.

On 17th March 2005 she realised that that was not so when the motor vehicle and her driver were detained by police. However, she was once again 'cleared' by the DCIO as the '**computer in Nairobi was not working**'. On 22nd April 2005 she was summoned by the DCIO Nanyuki as the owner of motor vehicle had surfaced.

The 2nd incident: is that on 16th February 2005 PW10 was driving motor vehicle Reg. No. KAP 072D as a taxi in Nairobi. He was hired by 2 people of whom he said in the same breath, 'I never knew the two men, however one of them was my customer twice'. It is this customer who told him the other was his friend. The appellant is that friend. In his testimony PW10 said the appellant sat at the back. They left for Nyeri at 1.30pm reaching at 3.30pm. They stopped in Nyeri near the Police station where both alighted made calls from the booth and went back to the car. They proceeded to Mweiga after negotiations. They told him they were going to pick the appellant's wife not very far from there. He was driving fast. He was told to slow down. It is at this point that his' customer' grabbed his neck and forced him to the back seat through the space between the front seats. The 'friend' came to the front and took over the driving. As per his testimony there was a 3rd man who they had picked at Mweiga. This new passenger tried to force him to swallow some drug. They beat him up and apparently stopped somewhere – opened boot of the car , found ropes, tied him up after beating him up- bound him, threw him in bushes.

He testified that he was rescued by some person from a nearby AP camp who also gave him fare of 20/- and stopped a motor vehicle for him to go to Mweiga police station. He got there, recorded his statement and rang employer PW5 who came the following day.

On 24th August 2005, he attended the ID Parade.

PW5 owner of motor vehicle called on 17th February 2005 by PW10 that he had been robbed of the motor vehicle and was at Mweiga Police Station. Upon arrival PW10 told that he was hired by 2 people to take them to Mweiga. at Mweiga they picked a 3rd person. That when they reached Solio Ranch, the three men robbed him but he was "**saved by KWS Officers and ...given lift to Mweiga police station**".

He produced a certified copy of log book for motor vehicle KAP 027D alleging that it was on loan and he was still paying loan for it.

The 3rd incident: On 27th July 2005 PW9 from Meru Central Nkubu police station received tip off from a member of public that there were suspicious characters within Nkubu township. He trailed suspects who were in Motor vehicle Reg. No.KAD 480U white – Nissan Sunny. He entered the house where the suspected characters were. He found the appellant and 2 others one of them his brother. He arrested them and handed over to Meru CID.

PW12 the investigating officer PW12 based at Nyeri CID received a file on 11th August 2005 from the DCIO of a pending case of Robbery with Violence regarding one Macarius Itugi Kanyoni alias Peter Njogu .He testified:

“Later I got a report that accused was held at Meru GK Prison in relation to 2 criminal cases at Meru Law courts namely CR.2909/04 possession of a stolen item to wit a motor vehicle and 2910/04- obtaining money by false pretences”

He obtained a production order for accused on 24th August 2005 from Meru Prison brought him before Nyeri CM's court where he was charged with Robbery with violence.

He also testified that he received the file together with documents, photos and number plates related to the motor vehicle, and the report all of which he produced as evidence.

He established that the number plates fixed on the m/v reading KAN 818T belonged to a m/v that was robbed off one Manyala PW11 from Migori. And that KAP 027D belonged to PW5.

He proceeded to produce the exhibits including Log for KAN 818T

ropes, undated letter by PW1 to Alice Chebet.

He called his witnesses and facilitated the ID Parade and proceeded to prefer the charges.

Having heard all the 12 witnesses, the trial magistrate found the appellant guilty of both counts and convicted and sentenced the appellant accordingly.

The Appellant was dissatisfied with both the convictions and sentence he lodged this appeal.

Grounds of Appeal

- 1. The learned senior Resident Magistrate erred in law and in fact in relying on identification parades and made a conclusion that the Appellant was picked out from them without considering and resolving whether or not they were flawed. A miscarriage of justice was occasioned.*
- 2. The Learned Senior Resident Magistrate erred in law and in fact in totally failing to consider the submissions made by the defence counsel. Prejudice was occasioned to the Appellant and a miscarriage of justice occasioned.*
- 3. The Learned Senior Resident Magistrate erred in law and fact in failing to consider that though PW10, stated he was assaulted, no P3 form was produced as exhibit to buttress this finding more particularly so when considering that the said iron bar as mentioned in the charge sheet was not produced in the proceedings. A miscarriage of justice was occasioned.*
- 4. The Learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that it is one Alfred Karimi who received the said money's and even wrote down two acknowledgments for them. A miscarriage of justice was occasioned.*
- 5. The Learned Senior Resident Magistrate erred in law and in fact in failing to appreciate that "falsity of an existing fact" is a requisite in a charge under section 313 of the Penal Code thus convicting the Appellant on a defective charge. A miscarriage of justice was occasioned.*
- 6. The Learned Senior Resident Magistrate erred in law and in fact in failing to consider that very vital witnesses were never called by the prosecution and no explanation was offered yet the Learned Magistrate never made any finding on this issue whether favourable or otherwise. A miscarriage of justice was occasioned.*

All these grounds can be collapsed into one whether the prosecution placed sufficient evidence before the trial court to warrant a conviction.

Did PW10 prove he had been robbed of the motor vehicle as alleged?

Is there evidence that motor vehicle was sold to PW1 by appellant or others?

It is on record that the the prosecution conceded that PW1 recorded several statements but the only one admitted by the investigating officer was one after the arrest of appellant recorded on 20th September 2005. The I.O told the court that **had he been aware of the statements by PW1 recorded on 23rd and 25th and 28th March 2003 or 2005 he would not have framed the charged against the appellant.**

He expressed concern that at some point he realized there had been a parallel investigations going on at the same time with regard to this case.. That fact throws us to PW1's testimony under cross-examination. She conceded to have been arrested over the said motor vehicle KAN 818T. She recorded a statement on 18th March 2005 at Nanyuki. She recorded another on 25th April 2005 at Mweiga police station, and on 20th September 2005 on the hearing date ' **within the court compound at the court registry**'.

This draws the picture, even if it was not true, of efforts being made to create scenarios that would rope in the appellant into the matter at all costs. The case was unfolding, even on the hearing date. Viewed in the rear mirror of the appellant's arrest, 'as a suspicious' character far away from the scene of crime, the case for the prosecution begins to buckle.

PW1 testified that she first met appellant on 1st January 2005. Next time was 8th January 2005. The next time was mid-February 2005. Met again at Paradise Hotel. It is upon the background of these chance meetings that accused told her he had another motor vehicle he wanted to sell and that he would get her motor vehicle from Eldoret. No registration number was mentioned. That he had sold another lady (unnamed) a good motor vehicle. That the next time they met was on 19th February 2005

In the statement recorded on 23rd March 2005, PW1 told the police that Appellant went to heron 10th February 2005 and not 19th February 2005, she also said she gave the appellant Kshs. 20,000/- on 19th February 2005 not 10th February 2005. Her excuse was that she was in shock that is why she made those mistakes. She also said the mistake was made by the police officer who recorded the statement.

She also recorded with the police on 23rd March 2005 that she made the agreement for payment on 12th February 2005 and not on 21st February 2005 as per the exhibits produced. She said what was recorded on 18th March 2005 was not true.

Clearly PW1 was not a truthful witness. It comes out from her evidence and that of the investigating officer that her statements were recorded to suit the scenario of the alleged robbery and the connection on the appellant and herself.

The issue of her transactions with appellant were recorded when the issue was fresh in her mind – barely a month but in September 2005- the story had changed- shocking the investigating officer to think that he had made a mistake.

The robbery: the PW10's testimony was inconsistent was he robbed by three/four persons? At what point was the alleged third robber picked? It was not in the testimony in chief. Was he rescued or he freed himself? Was an AP involved or was it KWS officers? Was he given fare by the AP or was he given a lift by KWS officers from the scene?

Was he treated for the alleged injuries or not?

The arrest of the appellant had no relationship with the robbery. The arresting officer had no idea that the appellant was wanted for robbery. The I.O did not make any effort to connect the dots between the arrest and the charging of the appellant, because by his own admission, had he done so, he would not have preferred the charges against the appellant.

He had no description from PW10 of the persons who had robbed him. The importance of this cannot be overemphasized. In **Maitanyi v R [1986] eKLR** that the court stated the importance of testing the evidence of identification.

There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters. Hence the evidence on the identity of the assailant was not conclusive.

How then could the I.O arrange for an ID parade? To make matters worse, the ID parade appears to have been done after the appellant had appeared in court. That was prejudicial to the appellant.

The ID parade was 6 months after the alleged daylight robbery. He alleged to know the persons, at least one of them, to have spent some time with the appellant. Why were there no descriptions? The investigations made no effort to explain the alias. Who was Macarius? Who was Peter Njogu? What was the relationship?

There was the alleged Sale agreement. The appellant was not a party to it and there was no evidence at all that he was paid a single cent. The contradictory evidence between PW1 and PW2 on the issue of withdrawal of the money, delivery of the motor vehicle and the persons allege to be present is telling, creating doubt as to whether these events ever happened. Why did PW1's husband not testify? Or anyone from the Paradise Hotel where some meetings allegedly took place? PW1 was herself a suspect and the police did not establish how they lifted that tag from her and placed it on the appellant. She was in possession of a stolen motor vehicle without a single convincing document of how she had acquired it. There is no evidence of her alleged clearance by the police. How could that be when it was obvious that the motor vehicle was stolen? The 'letter' addressed to the person named in the log book can only be described as a pretence to obtain documentation, a mere afterthought as there was no evidence it was ever sent out. In any event the agreement was with Karimi not Alice Chebet.

This was a case that cannot be said to have been investigated properly. The PW1 ought to have produced the lady she alleged was sold another motor vehicle by the appellant. She knew that lady. That lady was a key witness for the prosecution.

There was no evidence the relevant authority to establish that the license plates were fake.

Hence despite the fact that the prosecution has the right to determine who to call as a witness, and the number of witnesses to call as per s. 143 Evidence Act, failure to call critical witnesses begets the inference that their evidence would not have supported the case for the prosecution. See **Bukenya vs Uganda**

In conclusion, this was a case where clearly, no sufficient evidence was placed before the trial magistrate to warrant the conviction on either charges.

On the issue of the sentence, the trial magistrate was in error. Where a death sentence is accompanied by another sentence, the other sentence is held in abeyance. See **MOSES ATELA OTHIRA v REPUBLIC [2009] eKLR where the judges held:**

She ought to have directed that with the 2 counts of robbery having been proved the appellant do suffer due death sentences, beginning with one while the other was held in abeyance because no two death sentences or a death sentence plus a prison term can be served at one and the same time.

I find that the appeal has merit.

The appeal is allowed.

The conviction on each count was unsafe. The same is quashed.

The sentence on each count is set aside.

Appeal is allowed

The Appellant be set at liberty forthwith unless otherwise legally held.

Dated, signed and delivered in open court this 7th June 2019 at Nyeri.

Mumbua T.Matheka

Judge

In the presence of:-

Court Assistant: Nancy

Mrs.Ndung'u for state

Appellant-present

Appellant's counsel N/A for Maragia

Judge