



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.170 OF 2018

(As consolidated with Appeal Nos.128 & 189 of 2018)

(An Appeal arising out of the conviction and sentence of Hon. A. R. Kithinji SPM delivered on 22nd August 2018 in Nairobi CM. CR. Case No.228 of 2013)

SHADRACK WAFULA WANJALA.....1ST APPELLANT

ALEXANDER MWENDWA MUTUKU.....2ND APPELLANT

JOSEPH MAGIGE MAROA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Shadrack Wafula Wanjala (1st Appellant), Alexander Mwendwa Mutuku (2nd Appellant) and Joseph Magige Maroa (3rd Appellant) were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 10th January 2013 at Jua Kali Area in Embakasi within Nairobi County, the Appellants, jointly with other not before court, robbed James Mburu Wainaina of a motor vehicle registration number KBJ 518M Toyota NZE valued at Ksh.700,000/- and one Nokia mobile phone valued Ksh.5,000/-, all valued at Ksh.705,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said James Mburu Wainaina.

In the alternative charge, the Appellants were charged with the offence of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 11th January 2013 at Pipeline Area within Nakuru County, the Appellants jointly, otherwise than in the course of stealing, dishonestly retained one motor vehicle registration number KBJ 518M Toyota NZE, knowing or having reason to believe the same to be stolen or unlawfully obtained. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged on the main charge. The Appellants were each sentenced to serve fifteen (15) years imprisonment. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions of Appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that the prosecution failed to discharge its burden of proof to the required standard of proof beyond any reasonable doubt. They were aggrieved that the trial magistrate convicted them on the basis of a defective charge sheet. They complained that the trial court relied on the prosecution evidence which was inconsistent and full of contradictions. They took issue with the fact that the trial court failed to observe the provisions of **Section 111** of the **Evidence Act** and **Section 322(3)(b)** of the **Penal Code**. They asserted that the trial magistrate improperly shifted the burden of proof to the accused persons. They faulted the trial court for convicting them on the basis of dock identification. They pointed out that the prosecution failed to avail crucial witnesses to adduce evidence in court. They were aggrieved that the trial court failed to consider their respective defence statements in reaching its decision. In the premises, the Appellants urged this court to allow their respective appeals.

The three separate appeals were consolidated and heard together as one for the purpose of the hearing of this appeal. During the hearing of the appeal, the Appellants presented to court written submissions in support of their appeals. They urged the court to allow their respective appeals. Ms. Nyauncho for the State opposed the appeals. She made oral submissions to the effect that the prosecution had established its case on the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt. She submitted that the Appellants robbed the complainant of his motor vehicle in Embakasi at about 8.30 pm. The Appellants shoved the complainant at the back of the car, drove around for about an hour before finally abandoning him at Muthangari area. The vehicle was tracked and located in Nakuru.

The Appellants were arrested in Nakuru inside the complainant's vehicle which at the time was being towed by another vehicle. Learned State Counsel averred that the complainant identified the 1st Appellant. He was however not able to identify the 2nd and 3rd Appellants. She submitted that the 2nd and 3rd Appellants were accomplices by virtue of **Section 20** of the **Penal Code**. She asserted that all the Appellants were from Embakasi. She was of the view that the doctrine of recent possession applied in this case. The vehicle was recovered from the Appellants approximately seven (7) hours after it was stolen from the complainant. In the premises, she urged the court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: PW1, James Mburu Wainaina, is the complainant. He told the court that on 10th January 2013, he was driving his son's (Peter Wainaina Mburu) car, a white Toyota NZE registration number KBJ 518M. He produced a copy of the log book in evidence. He dropped his friend at a bus stop in Embakasi at about 8.30 p.m. He got lost on his way back to Donholm. He stopped the car so that he could make a turn. He had lowered the window on the driver's door. As he was about to make the turn, a man suddenly grabbed the car keys in the ignition and switched of the car. A second man entered the car and sat on the front passenger seat while a third man entered and sat at the rear passenger seat. The three men threatened to kill him if he failed to cooperate. They pushed him to the rear passenger seat. The man who was sitting at the rear passenger seat sat on him. The man who grabbed the car keys took over the driver's seat. The assailants drove the car around for about one hour. They later ordered him out the car and abandoned him at Muthangari area. He came across a night guard who lent him a phone which he used to call his son. He informed him that his vehicle had been stolen. He also reported the robbery incident at Muthangari Police Station. Luckily, the vehicle had an installed car tracking system. When they tracked the vehicle, they discovered that it was being driven to Muguga, Naivasha and was at the time in Nakuru. The vehicle was recovered in Nakuru. PW1 testified that he was able to identify the 1st Appellant when the assailants accosted him since the vehicle's headlights had been switched on. He identified the 1st Appellant in an identification parade conducted at Embakasi Police Station after the Appellants had been arrested.

PW2, PC Stanley Serim, was the arresting officer. At the material time, he was attached to Nakuru Police Station. He stated that he was on night patrol duty in Nakuru on 10th January 2013. At about 3.00 a.m., he received a report regarding a stolen vehicle registration number KBJ 518M Toyota NZE white in colour that was being driven from Nairobi heading towards Nakuru direction. PW2 started driving towards Nairobi using the Nakuru-Nairobi Highway. When he approached Nass Petrol Station, he spotted the said vehicle on the road. The stolen vehicle was being towed by another vehicle make Toyota Fielder registration number KBS 315R. PW2 intercepted both vehicles and arrested the three Appellants who were found inside the two vehicles. He took them to Nakuru Police Station. The Appellants were later picked up by police officers from Embakasi Police Station.

PW3, Corporal Erastus Ogenia, investigated the present case. He was attached at the DCIO in Embakasi. He stated that on 11th January 2013, he was instructed by the DCIO to collect three suspects who had been arrested in Nakuru on suspicion of robbery of a motor vehicle. He proceeded to Nakuru accompanied by PC Cheruiyot. He reported to the DCIO in Nakuru who handed over the three Appellants to him. He also handed over two motor vehicles registration number KBJ 518M and KBS 315R which were recovered from the Appellants when they were arrested. He took the Appellants and the said vehicles to Embakasi Police Station. He interrogated PW1 on 12th January 2013. PW1 informed him that he was car jacked by four men while driving at Embakasi. He had gone to drop a friend at Johari Estate. The assailants took control of the vehicle and abandoned him at Muthangari area. He reported the incident at Muthangari Police Station. He was later informed that the vehicle had been recovered in Nakuru.

PW3 also interrogated the Appellants. The 1st Appellant told him that he had been called by a client to go and repair a motor vehicle. He in turn asked the 2nd Appellant to accompany him. The two of them called the 3rd Appellant who was a taxi driver and asked him to take them to where the motor vehicle was. When they got there, they asked the 3rd Appellant to tow the motor vehicle they were supposed to repair to Nakuru Town. PW3 testified that he was not able to arrest the person who the 1st Appellant stated instructed him to go and tow the vehicle to Nakuru. He proceeded to charge the three Appellants in the present case.

When the 1st Appellant was put on his defence, he testified that he lived in Embakasi. He operated a taxi and car hire business. On 10th January 2013, he was going home from work when his client called him and informed him that his car had broken down at Mai Mahiu. He hired a taxi and proceeded to Mai Mahiu accompanied by the 2nd Appellant. When he got to the scene, he discovered that the vehicle required an electrical wiring expert. His client left to go and get the said expert. The client later called him and asked him to tow the vehicle to Nakuru. The taxi driver he came with to Mai Mahiu agreed to tow the vehicle. Soon thereafter police officers arrived and arrested them. They were taken to Nakuru Police Station and later transferred to Embakasi Police Station.

The 2nd Appellant was put on his defence. He told the court he lived in Pipeline, Embakasi. On the material day, he received a call from the 1st Appellant asking him to accompany him to Mai Mahiu. The 1st Appellant needed to attend to a client there. When they got to Mai Mahiu, they found a vehicle parked on the side of the road. A man got out of the said vehicle and talked to the 1st Appellant. The 1st Appellant afterwards informed him that the vehicle had an electrical problem. The 1st Appellant's client left to look for an electrical wiring expert. The said man called them later and asked them to tow the vehicle to Nakuru. The taxi driver agreed to tow the said vehicle. They made a stop at a petrol station on their way to Nakuru. The 2nd Appellant stated that he fell asleep in the vehicle. Shortly thereafter police officers arrived and arrested them.

The 3rd Appellant was also put on his defence. He said that he lived in Embakasi. He worked as a taxi driver. He operated motor vehicle registration number KBS 315R. On 10th January 2013, he was at home when he received a call from the 1st Appellant. The 1st Appellant informed him that his client's vehicle had broken down at Mai Mahiu. He hired him to drive him to Mai Mahiu. They agreed on a fee of Ksh.5,000/-. When he went to pick up the 1st Appellant, he found him with the 2nd Appellant. He drove them to Mai Mahiu junction. They found a vehicle parked on the side of the road. A man came from the said vehicle. The 1st Appellant got out of the car and went to speak to him. The said man later left to look for an electrical wiring expert. After some time, the 1st Appellant informed him that his client was requesting that they tow his vehicle to Nakuru. On the way, they stopped at a petrol station. Police officers arrived and arrested them. They were later transferred to Embakasi Police Station. An identification parade was conducted where the complainant identified the 2nd Appellant. The 3rd Appellant denied being involved in the robbery incident.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** brought against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also had the benefit of considering the grounds of appeal and the rival submission made by the parties to this appeal. It was clear from the evidence that the Appellants were convicted on the basis of the evidence of identification and that of application of the doctrine of recent possession. The evidence of identification relied on by the trial court was that of a single identifying witness *i.e.* the complainant (PW1). It is trite that the evidence of a single identifying witness must be examined carefully to ensure that it is watertight before a conviction can be founded on it. In the case of **Abdala bin Wendo & Another vs. Republic [1953] 20 EACA 166** the Court of Appeal stated thus:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

The complainant (PW1) stated that the robbery occurred at about 8.30 p.m. He was driving within Embakasi area. He stopped the car to make a turn. He had lowered the window on the driver's seat side. Suddenly he saw a hand grab the car keys in the ignition and stop car. As he was turning to stop the said person, a second man entered the car through the front passenger door, and a third man through the rear passenger door. The assailants threatened to kill him if he failed to cooperate with them. He was shoved into the back seat and one of the assailants sat on him. He struggled with the assailant who was sitting on him as he was trying to get out of the vehicle. PW1 testified that he was able to identify the said assailant since the car headlights had been switched on. He stated that the assailant he identified was the 1st Appellant. He identified the 1st Appellant during an identification parade conducted at Embakasi Police Station. He was however not able to identify the 2nd and 3rd Appellants.

This court is not persuaded that in such hectic circumstances, the complainant was able to positively identify and memorize the physical features of the assailant who was at the back seat, especially since he stated that the assailant sat on him. The position of the vehicle headlights to the suspects was not favourable for one to make a positive identification. This court was also not informed whether the complainant gave a description of the assailant in the first report that was made to the police. In addition, while PW1 and PW3 testified that the 1st Appellant was identified in an identification parade conducted at Embakasi Police Station, there was absolutely no evidence adduced by the prosecution to prove that such a parade was actually conducted. The 1st Appellant was not known to the complainant prior to the robbery incident. Therefore, in the absence of evidence of an identification parade as well as evidence that the complainant gave a description of the assailant in the first report to the police, the subsequent identification of the 1st Appellant in court amounts to dock identification. It was worthless and had no probative value. The dock identification was done approximately two years after the robbery incident. On re-evaluation of this evidence of identification, this court is of the view that the same was not watertight to sustain a conviction.

The prosecution adduced other circumstantial evidence against the Appellants. The complainant's vehicle had a car tracking device which indicated that the vehicle was being driven towards the Nakuru direction. PW2 was on night patrol duties in Nakuru on the material day of 10th January 2013. He stated that he received a report at about 3.00 a.m. that the complainant's vehicle was being driven towards the Nakuru direction. PW2 intercepted the complainant's vehicle at Nass Petrol Station along Nakuru-Nairobi Highway. The vehicle was being towed by another motor vehicle registration number KBS 315R. He arrested the three Appellants who were occupants of the said vehicles. The trial court in convicting the Appellants relied on the doctrine of recent possession.

The principle on the application of the doctrine of recent possession was enunciated in **Malingi –Vs- Republic [1989] KLR 225 at P.227** (Bosire J as he was then):

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

In the present appeal, the 1st Appellant in his defence told the court that he received a call from a client informing him that his vehicle had broken down at Mai Mahiu. The said client asked him to go to Mai Mahiu. Since it was late, he hired the 3rd Appellant who was a taxi driver to take him to Mai Mahiu. He also asked the 2nd Appellant to accompany them. They drove to Mai Mahiu. They found the said client had parked his car on the road side. After assessing the vehicle, he discovered that it had an electrical wiring problem. The client left the scene and went to look for a wiring expert. Shortly after, the said client called the 1st Appellant and requested him to tow the vehicle to Nakuru. They used the 3rd Appellant's taxi to tow the client's vehicle. They were intercepted by police officers on their way to Nakuru and arrested. He stated that the client called him after they were arrested. The police officers picked up the phone. The client told the police officers that the Appellants were thieves. The 1st Appellants testimony was corroborated by the 2nd and 3rd Appellants. The Appellants stated that they did not know the complainant. They denied being involved in the robbery.

The investigating officer (PW3) testified that he interrogated the Appellants after they were arrested. The Appellants gave him the same explanation they gave before the trial court. PW3 stated that he was not able to arrest the '*client*' who had called the 1st Appellant. On cross-examination by the court, PW3 testified that he was able to locate the owner of the motor vehicle registration number KBS 315R that was used to tow the complainant's vehicle. The owner confirmed that the said vehicle was a taxi that operated in Embakasi and that the same was not stolen. This evidence corroborated the 3rd Appellant's assertion that he was a taxi driver. The 3rd Appellant corroborated the evidence that the 1st Appellant had hired him to be driven to Mai Mahiu.

This court is of the view that proper investigations were not conducted in the present case. There were several loop holes in the prosecution's case. PW3 admitted that the said '*client*' who called the 1st Appellant actually existed. However, PW3 failed to locate him/her for interrogation. The evidence by the Appellants was plausible and it cast doubt on whether they were involved in the robbery. The circumstantial evidence in the present appeal was not sufficient to sustain the Appellant's conviction. There were other co-existing circumstances which weakened the inference of the Appellants' guilt. It was not ruled out by the prosecution whether the client who called the 1st Appellant to repair the vehicle may have stolen the vehicle from the complainant. The accused person always benefits from any doubt raised. The Court in the case of **Philip Muiruri Ndaruga v. Republic [2016] eKLR** held as follows:

“The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt...To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him...”

For the above reasons, this court holds that the prosecution failed to establish its case in the present appeal to the required standard of proof beyond any reasonable doubt. No other evidence, apart from their arrest while in possession of the stolen motor vehicle was adduced before court connecting the Appellants to the robbery. The Appellants in their defence denied being involved in the robbery. As stated earlier in this judgment, the evidence of identification on its own, is not watertight and free of error to support the conviction of the Appellants.

This court therefore finds merit in the appeal lodged by the Appellants. The Appellants' appeals are hereby allowed. The trial court's conviction of the Appellants is hereby quashed and their sentences are set aside. The Appellants are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2019

L. KIMARU

JUDGE