REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 25 OF 2015

FORMERLY NAKURU HC.CR.A. 54 OF 2015

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 2684 of 2012)

WAITHAKA MWANGI……..APPELLANT

-VERSUS-

REPUBLIC……..……..RESPONDENT

J U D G M E N T

1. The Appellant was charged with offence of stealing a motor vehicle contrary to section 278 (A) of the Penal Code. In that on the 8th day of September 2012 along Maai-Mahiu – Naivasha road in Naivasha District within Nakuru county jointly with others not before court he stole one motor vehicle make NISSAN X-TRAIL STATION WAGON registration number KBS 784Y valued at Kshs 1.6 million the property of JAMES NDIRANGU KABOI.
2. Following a full trial, he was found guilty, convicted and sentenced to serve 3 ½ years imprisonment. He has now appealed to this court against both conviction and sentence. He raised seven grounds of appeal three of them attacking the quality of evidence supporting the conviction and the court's handling of the evidence as follows:-

   1)THAT the learned magistrate erred in law and in fact by convicting the Appellant based on scanty and insufficient evidence.

   2) THAT the learned magistrate erred in law and in fact by holding that the appellant was not carjacked despite overwhelming evidence in the contrary.

   3) The learned magistrate erred in law and in fact by holding that there was a contradiction on who called the owner "and a person can tell difference between voice of a girl and boy on the phone" Such a holding was neither based in law and fact nor by science.

3. In ground 3 the Appellant complains that the trial court shifted the burden of proof upon the Appellant. Ground 2,5 and 6 assert that the trial magistrate developed and convicted the Appellant on theories which had no basis in evidence.

4. At the hearing of the appeal, Mr. Karanja for the Appellant argued that the prosecution evidence was circumstantial and did not dislodge the Appellant's defence that he was actually carjacked and lost the vehicle to robbers. He highlighted the alleged theories developed by the court concerning

the unlikeliness of the occurrence of the robbery at 6.00pm on a busy highway, the use of a probox vehicle to block the stolen vehicle, a Nissan X-trail; and the court's ultimate conclusion that the robbery was stage-managed.

5. The Directorate of Public Prosecutions through Mr. Kibelion opposed the appeal. He pointed out that whereas the evidence tendered by the prosecution was circumstantial, it pointed to the accused in whose custody the vehicle was, as the culprit. He argued that the explanation given by the Appellant regarding the alleged carjacking was not satisfactory, nor his conduct after alleged offence consistent with that of an innocent victim of robbery. Citing the time of the alleged carjacking, Mr. Kibelion posed the question: "Did the robbery occur as stated by the accused?"

6. He highlighted the fact that the Appellant appeared to give a blow by blow account of the events which occurred in the vehicle during the carjacking episode even though he claimed to have been hooded. He also raised the improbability that the Appellant was conscious and could communicate as soon as the robbers let him off the vehicle but that he was "unconscious" within a few minutes when police arrived at the scene. He submitted that the trial court did not advance theories in its judgment but merely analysed the evidence before the trial court. He urged the court to find that the conviction was well founded and to dismiss the appeal. Reiterating his earlier submissions, Mr. Karanja urged the court to find that the Appellant had given a reasonable explanation and the prosecution did not rebut the explanation.

7. I have considered the grounds of appeal, submissions thereon and the record of proceedings in the lower court. The duty of the first Appellant court, was laid down in the oft-quoted case of **Okeno –Vs- Republic [1972] EA 32** where the predecessor of the present Court of Appeal stated:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala – Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."**

8. And in **Ogeto –Vs- Republic [2004] 2 KLR 14** the Court of Appeal stated further that:

> **"Nevertheless a Court of Appeal will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or misapprehension of the evidence or the trial judge is shown to have acted on wrong principles in reaching the decision – Chemagong -Vs- R [1984] KLR 730."**

9. In a nutshell, the prosecution case in the lower court was that the Appellant was a driver; that James Ndirangu Kaboi (PW3) a car trader who regularly used the Appellant's services instructed the Appellant to receive a motor vehicle he had imported into the country through Mombasa, on behalf of a client, one James Wahome Wanjala (PW1). The Appellant was to drive it from Mombasa to Nakuru where PW3 operates his business. An agent, Stanley Nganga Gachomba (PW2) handed over the vehicle KBS 784Y make Nissan X-trail to the Appellant on the morning of 8/9/2012.

10. In the course of the day the Appellant spoke to PW2 and PW3 updating them on his trip. However, later in the evening he called PW2 to say he had been carjacked at Naivasha. This information was relayed to PW3 at 6.30pm.

Both PW2 & 3 called and notified police. It would seem that the first police officers to arrive at the scene where the Appellant was found lying on the ground, seemingly unconscious, arrived after 7.30pm. CPL Luke Olang (PW4) was one of the officers. He told the court that the Appellant could not speak.

11. He was therefore escorted to hospital and discharged on the next day. The Appellant then narrated to the witness that he was hijacked as he approached Longonot by armed robbers who blocked his path and commandeered his vehicle. They forced him to take a substance that tasted like alcohol before abandoning him and taking his vehicle. PW4 was unconvinced.

12. In his sworn defence statement the Appellant told the court that the robbery occurred between 5.00pm – 6.00pm near Longonot, along Maai Mahiu road. That the robbers hooded him and gave him a substance that tasted like alcohol to drink after taking control of his vehicle. He stated that as soon as the robbers dropped him off, he was able to borrow a phone from strangers on the road and notify PW3 about the robbery. But he collapsed soon after only to come round at the hospital.

11. The prosecution evidence against the Appellant is circumstantial. In the case of **Muchene – Vs- Republic [2002] 2 KLR 367** the Court of Appeal held concerning such evidence:

> **"1……..where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the court is satisfied that inculpatory facts are not only inconsistent with the innocence of the Appellant but also there exists no co-existing circumstances which could weaken or destroy such inference.**
>
> **2. It is settled law that the burden of proving facts which justify the drawing of such inference from the facts to the exclusion of any other hypothesis of innocence is on the prosecution and always remains as such."**

13. Therefore, the issue to be determined in this appeal is whether the Appellant stole the vehicle in his possession and thereafter put on a charade that he had been robbed at gunpoint. In the lower court, it seems that beyond the undisputed possession, all that the prosecution had as evidence was the explanation by the Appellant regarding how the vehicle last in his custody went missing. PW4 did not buy the explanation. But rather than investigate the said explanation and adduce evidence, to counter the same, the police appeared content to merely poke holes in its plausibility. In some cases, such an approach might be sufficient to dislodge an explanation.

14. The investigating officer (PW4) stated interalia:

> **"……with my experience within this area and highway robbers his (Appellant's) explanation did not add up…….Bearing in mind how busy Nakuru-Naivasha-Maai Mahiu highway is busy around 5.00pm is busy. I fail to imagine how a small car can block X-trail without any commotion…….. Accused also confirmed (that) robbers took his sim card and left him with handset but normally all robbers on this highway they rob you off everything it did not add up. This was a stage managed offence" (sic).**

15. While the officer may have had useful experience on the modus operandi of the criminals in his area of duty, I think this should serve to inform his investigation rather than be presented as the evidence concerning a specific offence preferred; generalities cannot take the place of real evidence. The investigating officer said that members of public at the scene were reluctant to record statements but that cannot be good reason to substitute missing evidence with this own general experience in the area. The weakness of this type of evidence was demonstrated during cross-examination when PW4 was forced to concede that robbery and carjackings happen in broad daylight in Nairobi.

16. In relation to the intoxication of the Appellant, PW4 admitted the diagnosis even while questioning the fact that the

Appellant was stable soon after he was dropped off by the robbers. It is true however as submitted by Mr. Kibelion that certain aspects of Appellant's defence statement raise eyebrows, for instance how he was able to follow certain events in the vehicle while hooded, and the fact that he passed out as soon as he called to report the alleged carjacking to PW3.

17. The Appellant had no duty to prove his innocence notwithstanding these facts. The burden of proof of his guilt always lay with the prosecution. In her judgment, the learned trial magistrate also adverted to some questions raised by the explanation given by the Appellant, including the alleged identification by an alleged hooded Appellant of the person who removed the sim card from the Appellant's phone, the person whose phone the Appellant borrowed to call the vehicle owner and, the possibility of a robbery in daylight on the busy road.

18. I do not doubt that these and other questions raised are valid, but in my considered view, they merely raised suspicion against the Appellant rather than totally discrediting, in absence of evidence by the prosecution, the appellant's explanation. I however do not accept the submission that in so doing the trial magistrate shifted the burden of proof to the Appellant or that the conviction was based on theories. In my own assessment and applying the test laid down in **Muchene –Vs- Republic** one can hardly say that the prosecution endeavoured to establish inculpatory facts which could justify the inference of guilt to the required standard.

19. The prosecution did prove, and it was not disputed, that the vehicle was in the Appellant's custody when it went missing. In the circumstances, he was the only person who could be called upon explain the circumstances in which it disappeared. He explained that he was robbed thus challenging any inference that he stole the vehicle. For their part the police believed the explanation to be incredulous given their experience, and perhaps it is, but did not endeavour to show it to be false. The police did even not bother to trace the witness who allowed the Appellant to use his phone, which was possible through PW3 who received the call. Medical evidence could also have been tendered to counter the delayed alleged passing out of the Appellant and the intoxicant involved.

20. All in all, I think the trial magistrate would have reached a different conclusion had she applied the proper test on the circumstantial evidence placed before her. The conviction of the Appellant in my considered view is unsafe and cannot be allowed to stand. I do quash the same and set aside the sentence of 3 ½ years imprisonment.

Delivered and signed at Naivasha, this**__8th____**day of**___October,____2015.**

In the presence of:-

State Counsel : Mr. Koima holding brief for Mr. Kibelion

For the Appellant : N/A

C/C : Steven

Appellant : Present

C. MEOLI

JUDGE