



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 26 OF 2009

MAXWELL MUCHIRI GATIMU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal arising from the judgment of Hon L.W. Gitari

Chief Magistrate in Nyeri Cr. Case No. 2989 of 2007)

JUDGMENT

1. The Appellant MAXWELL MUCHIRI GATIMU was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 20th day of September 2007 at Karatina Township in Nyeri District within Central Province jointly with others not before court being armed with dangerous offensive weapons namely AK 47 rifle robbed LUCY NJOKI MWANGI of a motor vehicle registration No. KAB 348A make Toyota Carina valued at 755,000 a mobile phone make Nokia 6120 valued at Ksh. 12,000 and cash 4000/ and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said LUCY NJOKI MWANGI.
2. He pleaded not guilty was tried convicted and sentenced to suffer death and being aggrieved by the said conviction and sentence filed this appeal and and in his home grown grounds of appeal stated that:
 - a. ***He was convicted on circumstantial evidence without the trial court warning itself on the dangers thereof.***
 - b. ***His defence was not considered and was dismissed without good reasons.***
3. When the matter came up for hearing before us the Appellant who was not represented submitted amended grounds of appeal and written submission on which he relied upon while the state was represented by Mr. Cheboi who opposed the appeal.

SUBMISSIONS

4. On behalf of the Appellant it was submitted that in convicting the Appellant the trial magistrate relied upon circumstantial evidence of photo negative recovered from the scene which turned out to be a photo of the Appellant and that rather than that there was no other evidence connecting him to the offence save for the evidence of P.W.3 who stated that she recovered a black wallet in the compound wherein the photo negative a sim card and identity card were recovered and that the development of the said negative remains doubtful as the person who developed them was never

- called to testify.
5. It was further submitted that the prosecution case against the Appellant was not proved beyond reasonable doubt since vital witnesses did not testify and further that the motor vehicle herein was never dusted for finger prints and in support thereof evidence was made upon the case of YUSUF ALI SAID v REPUBLIC HC CR APPEAL NO. 316/95.
 6. It was further submitted that the Appellant's defence was unchallenged and therefore the prosecution case was not proved beyond reasonable doubt.
 7. Mr. Cheboi for the state in opposing the appeal submitted that the Appellant was convicted on purely circumstantial evidence a wallet found at the scene of the robbery herein where a photo negative which when processed turned out to be that of the Appellant and an identity card belonging to the Appellant's brother were found and that the brother of the Appellant was in prison from 28/2/2006 while the robbery took place on 20/9/2007.
 8. He submitted that it was the evidence of P.W.1 that the robbers had lost an identity card which they tried to look for throughout the attack. It was further submitted that the photo was processed in a studio at Karatina and that whereas section 78 of the evidence Act was not complied with that is not fatal to the prosecution case as per article 159 of the constitution.
 9. This being a first appeal we are required to reevaluate the evidence tendered before the trial court and come to our own conclusion which we hereby do.
 10. The prosecution case was that P.W.1 LUCY NJOKI MWANGI was at 7.15 pm. driving motor vehicle Registration No. KAS 348A when her watchman one Kiptanui opened the gate for her and as she was parking the motor vehicle she saw her watchman being chased by people who had a gun and that two people with guns entered the motor vehicle and took control of the same and went with her around. When she received a phone call from one DENIS MAINA one of the attacker talked with him and demanded Ksh. 500,000 so that they could release P.W.1
 11. That after she was rescued and when they reached her home they recovered an identity card which one of the attackers had earlier been looking for. This evidence was corroborated by that of P.W.2 SIMON KIPTANUI KETER who confirmed how he recovered a black wallet with an identity card and sim card.
 12. P.W.4 Cpl MUSA KIPTOO stated that at 2.00 am on the material day they met the subject motor vehicle at Karumandi when the thugs in the said motor vehicle started shooting at them and in the process one of the thugs was injured and later died and that on 11th October 2007 the Appellant was arrested.
 13. P.W.7 pc BENJAMIN NGEI evidence was that when the Appellant was arrested he admitted that the photograph was his but denied knowledge of the identity card which turned out to be that of the Appellant's brother who was serving a jail sentence arising from Cr. Case No. 2805/10 Kerugoya Law courts.
 14. When put on his defence the Appellant stated that on 11th October 2007 at 3.30 pm. he saw two people one armed with a big gun and a small gun respectively. He was asked if he was a brother to Stephen Muchira the owner of the Id card found out at the scene and when he answered in the affirmative they asked him to take them to his home which he did and he showed them the house of his brother and having broken the window pane and looked inside the house he was taken to the police station and charged with the offence appealed against.
 15. Based upon the said evidence the Appellant was convicted based on the circumstantial evidence adduced and to which the court held that there was no dispute that the wallet which linked the Appellant to the crime was the recovered at the compound of the complainant and in it was found the Id Card of the Appellant's brother and a photo negative which led to the arrest of the Appellant and that the reasonable conclusion to be drawn is that it was dropped by the robbers who robbed the complainant.
 16. From the above evidence and the submission herein we have identified the following issues for determination.

a. Whether the trial court was right in convicting the Appellant on purely circumstantial evidence.

b. Whether the prosecution case was proved beyond reasonable doubt.

c. ***Whether the Appellant defence was considered by the trial court.***

1. In testing the circumstantial evidence herein we are guided by Court of Appeal decision in MUCHENE v REPUBLIC reported in [2002]2KLR at page 367. where the court had this to say.

“It is trite law that where a conviction is exclusively based on circumstantial evidence, such conviction can only be properly upheld if the court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the Appellant, but also that there exists no co-existing circumstance which be taken or destroy such inference.

2. We have analysed the evidence herein above and the conclusion drawn by the trial court and agree with the finding of the trial court in connecting the Appellant to the robbery herein. We therefore find that the Appellant defence was taken by the court and held to be a sham and that the prosecution case proved beyond reasonable doubt.
3. We therefore find that the Appellant's conviction was safe and the sentence lawful and find no merit on the appeal herein and dismiss the same.

Dated signed and delivered at Nyeri this 13th day of February 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Mr. Njue for the state.

The appellant in person

Court: Judgment read in open court the appellant has 14 days right of appeal.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE