



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 409 OF 2009

JAMES CHEGE KINYANJUIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 835 of 2008 of the Chief Magistrate's Court at Nairobi – E. C. Cherono on 18th September 2009)

JUDGMENT

1. This is an appeal against conviction and sentence in Cr. Case No. 835 of 2008 before Hon. E. C. Cherono, Senior Resident Magistrate. The appellant was charged jointly with another with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, and in the alternative handling stolen goods contrary to **Section 322(2)** of the same Act.
2. It had been alleged that on 15th May 2008 at Kihara village within Nairobi area, jointly with others not before the court, while armed with dangerous weapons namely AK 47 rifle they robbed Samuel Kihumba Mwangi of cash Kshs.5,000/=, a motor vehicle registration No. KAZ 066 T Toyota Corolla 110 pearl in colour, mobile phone Sony Erickson K801, K8001 S/No. 35975, one Toshiba DVD S/No. 10995, one national ID all valued at Kshs.824,000/= and at or immediately before or immediately after the time of the robbery, used personal violence to the said Samuel Kihumba Mwangi.
3. In the alternative count, it was alleged that on 23rd May 2008 at Kiambu Township, jointly otherwise than in the course of stealing, dishonestly detained motor vehicle registration No. KAZ 077T Toyota Corolla 110 pearl in colour valued at Kshs.800,000/= knowing it to be stolen or unlawfully obtained.
4. The appellant was convicted of the alternative count and sentenced to serve 14 years imprisonment without option of fine. He filed an appeal contending that the prosecution had not proved its case beyond reasonable doubt and that the court had misdirected itself in finding him guilty while there was no documentary evidence to confirm the recovery of the alleged stolen goods. He also contended that it was an error for the learned trial magistrate to disprove his defence and hand him the maximum sentence of 14 years without due consideration to the fact that he was a first offender.

5. On 28th January 2014, Mr. Kadebe learned counsel for the state observed that the two appellants filed two separate appeals and one co- appellant's appeal had already been heard and allowed. When this appeal came up for hearing, the state intimated that they would be making an application for enhancement of sentence.
6. On 12th May 2014 at the hearing of the appeal, Mr. Kanyi, learned counsel for the appellant submitted that the conviction by the trial court was unsafe because the particulars of the charge of handling stolen property were inconsistent with the charge and the evidence. He pointed out that whereas **PW4**, the arresting officer, had stated that he spotted the motor vehicle suspected to have been stolen on 23rd May 2008 at noon in Kikuyu area while on patrol duties, the charge sheet indicated that it was in Kiambu township that the appellant was arrested.
7. Counsel also contended that the appellant was wrongly charged and should not have been charged in the first place as he was just a passenger in the said motor vehicle, whereas the driver was not charged. That in his sworn defence the appellant stated that he was a fare paying passenger in the said motor vehicle which was being used as a taxi and as such was not involved in any purported crime.
8. We have perused the lower court record and note that according to the evidence of **PW4**, CPL Daniel Wambua, the appellant was arrested in Kikuyu and not Kiambu Township. He was then charged with the offence of robbery with violence together with another suspect. In the alternative they were charged with the offence of handling stolen property, for being in possession of the suspected stolen motor vehicle registration No. KAZ 077T Toyota Corolla 110 pearl in colour, which was the subject matter of this case.
9. Learned state counsel Miss Maina conceded the appeal on grounds that the appellant's defence, that he was a fare paying passenger in the said motor vehicle which was being used as a taxi and was not involved in the purported crime, was plausible and should have been accepted. That there was no other evidence to implicate the appellant in the offence.
10. The learned trial magistrate in his judgment, observed that the appellant and his co-accused were found inside the stolen motor vehicle, and that although they were not identified by the complainants, their own defence did not hold water. This would appear to be shifting the burden of proof to the defence. This being a criminal case the appellant was under no duty to explain his innocence or at all. The evidence of **PW4**, CPL Wambua however, was that when he and his colleague stopped the motor vehicle on 23rd May 2008 at noon, while on patrol duties, it had two occupants namely, Geoffrey Ng'ang'a and James Chege Kinyanjui, the appellant herein.
11. Those two suspects told the police that the motor vehicle belonged to one Oliver Mburu, and took the police to Fig Tree where they arrested the said Oliver Mburu. Oliver Mburu was the co-appellant convicted together with the appellant herein and who has since been released on appeal. It is instructive to note that the victims of the robbery never identified the appellant herein as having been involved in the robbery.
12. Having perused the lower court record, the grounds of appeal and the submissions of the learned counsel, we are satisfied that in the circumstances, learned state counsel, Miss Maina was right to concede the appeal. We agree that the appellant's defence was plausible and should have been accepted.
13. For the foregoing reasons we find that the appeal is meritorious. We quash the conviction and set aside the sentence imposed on the appellant, and order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **10th** day of **June 2014**.

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A.MBOGHOLI MSAGHA

JUDGE

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L. A. ACHODE

JUDGE