



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO. 11 OF 2012**

**IBRAHIM ANUNGO AGORO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the convict and sentence of Hon. T.Okello, Senior Principal Magistrate, Bomet dated 21st February 2012)*

**JUDGMENT**

**Ibrahim Anungo Agoro**, (the appellant) was convicted on a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and sentenced to death. He had been charged alongside **Linet Scovia Wandera**, who was acquitted at the trial for no case to answer under **Section 210** of the **Criminal Procedure Code**.

The case against them as particularised on the charge sheet, was that on 20th January 2009 at Kericho Township, jointly with others not before the court while armed with a pistol, they robbed **Geoffrey Cheruiyot Ngeno** of a motor vehicle registration no. KAY 653E Toyota Hiace valued at Kshs.1,100,000 and at the time of the robbery, threatened to use actual violence against the victim.

**Geoffrey Cheruiyot Ngeno** (P.W.1) described to the trial court how while in Sotik aboard a Kericho bound motor vehicle registration KAY 653E he was approached by two people who said they wanted to hire him to take some teachers from Kericho Teachers College to Bomet Teachers College. P.W.1 gave them his mobile phone number and in the evening, they met at Silent Hotel, Sotik, and agreed on a hire fee of Kshs.6000 departing for Kericho at 7.00am to about 9.00am the people called PW1 and requested that they meet at Silent Hotel. PW1 went to the Hotel accompanied by his conductor. The two people got into the motor vehicle and sat at the front and they all went together to Kericho while picking passengers. He is certain after dropping off all the passengers, PW1, his conductor (PW2), the appellant and another proceeded to the Teacher's College.

PW1 parked the motor vehicle, and the other who was not in court, left, saying he would get a form from the college to enable them fuel. After picking the form, the other person not before court left and returned accompanied by a lady who had two bags and who was said to be one of the persons the two men were to travel with. The lady (who was identified in court as Appellant's co-accused) got into the motor vehicle whilst the one not before court left, and returned to say the people who were to be taken to Bomet were still at a meeting.

The 2nd accused was then sent to get PW1 and his conductor soft drinks. She returned with some juice and cakes which she gave to the group which was inside the motor vehicle, PW1 placed his drink on the dashboard and started reading the newspaper. He noticed that his conductor who had drunk his "juice"

started behaving like a drunkard. The appellant then ordered PW1 to drink his juice and when he refused, the appellant produced a small black gun which he placed in the PW1 side and ordered him to drink the juice. PW1 lost consciousness and woke up in hospital. He realised that motor vehicle was missing.

On cross-examination PW1 stated that once he parked the motor vehicle, he remained inside it with the appellant who was seated next to him at the front. In fact his evidence on cross-examination was;

***“Accused and the other man sat with me at the front when we left Sotik.”***

The conductor (Leonard Kimutai Rotich) testified as P.W.2 and he told the trial court that on 20/01/08, P.W.1 told him they had been hired to go to Kericho to get some customers. The driver left him at the stage and returned accompanied by the appellant. He confirmed that while at Kericho they were joined by the 2nd accused who eventually gave them iced tea and cake. Upon consuming the snacks, he did not know what happened as he woke up three days later to find himself in hospital. On cross-examination he stated;

***“ I did not see what happened after drinking the ice tea. We were not threatened by a gun. I did not see the driver threatened with the gun. I can remember what happened.”***

**Benjamin Kipkemoi Ngeno** (PW3) the owner of motor vehicle KAY 653E only learnt from a caller on phone that his driver and conductor had been found unconscious, and his motor vehicle was missing. He made queries and learnt that motor vehicle had been spotted in Kisumu. Information was relayed to the police who intercepted the motor vehicle at a roadblock. It was handed over to Nyando DCIO. CPL Jacob Njiru (PW5) upon receiving circulation of the motor vehicle theft, was requested to rush to Kisumu-Kakamega road to see whether he could trace the said motor vehicle. While along that road, he saw and stopped the approaching motor vehicle. Inside was a man and a lady a quick search on the man for any weapon yielded nought. **CPL Mark Lokeno** (PW6) who investigated the matter told the trial court that when he went to collect the recovered motor vehicle, he came across a form for transport, which was in the lady's bag. PW1 identified that form as the one they had been given to sign for him for purposes of a college seminar. Also handed over to him as part of prisoner's property were two bags, and a wallet which contained an identity card belonging to the appellant, and his co-accused (Linet).

On cross-examination PW6 stated that inquiry at the teachers training college revealed there were no transport arrangements or an intended meeting.

Upon their arrest, an identification parade was conducted by Chief Inspector Reuben Onchoka (PW4) and the appellant and his co-accused were identified by PW1 and PW2.

The appellant in his unsworn testimony explained that on 20/01/09 he was given time off by his boss in Kisumu, where he worked as a cashier at Rakshan Autospare. He boarded a motor vehicle to travel to Kakamega, and on the way they were stopped by police, within Kibos area. The passengers in that motor vehicle including the appellant were arrested and taken to the police station where some were released and some detained (appellant being in the latter group). On the same day he was transferred to Kericho Police Station and eventually charged in court for crimes he did not commit.

The trial magistrate while placing the appellant on his defence, acquitted his co-accused on no case to answer basis and reserved his reasons which were to be included in the judgment. He held that PW1's evidence was corroborated by that of PW2, and the appellant was also identified by the two at an identification parade. He explained that accused 2 was acquitted due to issues of identification as she had been shown to PW3 at Boya Police Station before the identification parade, the members of the identification parade were different and the identification parade was not properly conducted.

The trial magistrate was satisfied that the appellant was properly identified that he had spent some time with PW1 and PW2 inside the motor vehicle during the day, so they had a good opportunity to see him. He noted that it was this same person who was found in possession of the stolen motor vehicle and he could not explain how he had gotten possession of it. The trial magistrate resolved the issue of the

different registration no. referred to by PW5 saying he was able to identify the said motor vehicle in a photograph presented to court as KAY 653E and not KAY 635E which was the registration number consistently referred to by the witnesses.

The trial magistrate observed that the appellant was in the company of more than one person, was armed with a pistol which he used to threaten PW1. The appellant's defence that after the motor vehicle was stopped, the driver and conductor fled, and he along with other passengers were arrested, was rejected as unbelievable.

At the hearing of the appeal, Mr. Motanya appeared for the appellant while Mr. Mutai acted for the respondent. Mr. Motanya urged us to ignore the grounds of appeal filed by the appellant, as well as the written submissions by the appellant. He requested us to rely on the supplementary grounds filed by himself and the oral submissions he made in court.

The findings of the trial court are challenged on grounds that the trial magistrate failed to consider that PW1, PW2 and PW5 gave contradictory evidence.

**(a) PW3 did not produce any documents to prove ownership of the motor vehicle.**

**(b) the prosecution's evidence was incredible.**

Mr. Motanya submitted that whereas PW1 claimed to have seen the appellant armed with a gun which he used to threaten him, PW2, who was in his company said he did not see anyone with a gun. He points out that whereas PW5 claimed in evidence in chief that when he stopped the motor vehicle he arrested two people, on cross-examination he said he arrested the driver of the motor vehicle, then said;

**“I did not say you were the one driving..... it is you I arrested driving that vehicle.”**

Counsel urges us to resolve these contradictions in favour of the appellant.

It is also his contention that this case was not properly investigated and the circumstances under which the 2nd appellant was acquitted were suspicious, as the evidence warranted her being placed on her defence.

In opposing the appeal, Mr. Mutai submitted that there was no contradiction between the evidence of PW1 and PW2, as what happened is that PW2 drunk the drugged liquid and lost consciousness, and therefore had no opportunity to see the appellant as he threatened PW1 with the gun in a bid to force him to consume the concoction.

We have perused the record and concur with the position as stated by Mr. Mutai, on this point, we hold that there was no contradiction between the evidence of PW1 and PW2, the sequence of events were such that PW2 could not have witnessed the threats made to PW1 as he had lost consciousness.

With regard to the evidence by PW5, Mr. Mutai concedes that the cross-examination is a bit confusing, but he urged us to consider this evidence along with what was stated by the said witness in his evidence in chief that he arrested the appellant while he was driving the stolen motor vehicle and there can be no mistake as to the people he intercepted. Further that there was cogent clear evidence, and any contradictions were not material as naturally people do not perceive events in the same manner. We have examined the trial court's record with respect to PW5's evidence in chief where he stated.

**“..... I saw the vehicle approaching. I told the driver to stop and he obeyed the orders. I arrested the driver together with one of the occupants.**

**There were two people in the vehicle, a driver and one lady. The people I arrested are the accused person on the dock.”**

We have compared this with the answers the witness gave upon cross-examination by the appellant that;

**“..... I arrested the driver of the vehicle. I did not say you were the one driving. I did not mention about the driver in the statement. Its you I arrested during that vehicle.”**

Our understanding is that the last portion which appears as a contradiction, was in answer as to whether the witness had said in his statement that the appellant was the one driving, and he had not, hence the answer;

**“I did not say that you were the one driving. I did not mention about the driver in the statement.”**

He then emphasized what actually took place at the scene by saying

**“Its you I arrested driving that vehicle.”**

We thus resolve that record in favour of the prosecution and hold that there was no contradiction.

We have also taken into consideration the reasons why the appellant's co-accused was released and hold that her release was not an inhibiting factor in relation to the finding made against the appellant. We thus hold that the conviction was safe, as the witnesses had ample time to see the appellant, whom they travelled with in the motor vehicle from Sotik to Kericho, sat with them while the motor vehicle was parked outside Kericho Teacher's College, and all these events took place during the day.

The appeal is dismissed and the sentence meted is confirmed.

**Dated, signed and delivered in open court this 17<sup>th</sup> day of July, 2014.**

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**J.K.SERGON**

**JUDGE**

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**H.A.OMONDI**

**JUDGE**