REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 178 OF 2010

SAMUEL MWANGI GITAHI..... 1ST APPELLANT

STANLEY NJUGUNA NDUTA.....2ND APPELLANT

Versus

REPUBLIC….....RESPONDENT

(Appeal from conviction and sentence in Nyeri Chief Magistrate's Court (Hon. M. Nyakundi) delivered on 16th July, 2010)

JUDGMENT

1. The appellants were jointly charge with the offence of Robbery with violence contrary to Section 295 and 296(2) of the Penal Code and an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code.

2. The particulars of the offence were that on the 10th day of September 2008 at Ichuga village in Nyeri North District within Central Province jointly with another not before court while armed with offensive weapons namely guns, pangas and knives robbed Samuel Muthee Githui of one motor vehicle Toyota Corolla DX white in colour registration number KAT 112 Engine number 5E-1119712, one phone Nokia 1100 and cash Kshs. 3,300 all valued at Kshs.457,000 the property of the said Samuel Muthee Githui.

3. The particulars on the alternative count was that on the 16th September 2008 at Kimason farm in Trans-Nzoia East District within Rift Valley Province otherwise in the course of stealing, dishonestly received or detained motor vehicle registration number KAT 112T Toyota Corolla DX station wagon knowing or having reasons to believe it to be stolen.

4. The prosecution called a total of (9) nine witnesses to testify on its behalf at the conclusion of which the trial Magistrate sentenced the appellants to suffer death as provided by law.

5. It is this conviction and sentence that the appellants now appeal against on the main grounds that:

    a) The learned magistrate erred in both points of law and fact in failing to resolve the inconsistency and shoddy manner in which the arrest was made from suspicious basis.

    b) The learned trial magistrate erred in law in failing to approach the alleged possession and circumstantial evidence with due care and circumspection.

    c) The learned trial Magistrate erred in both law and fact in treating the co-accused

statement as evidence giving credence to or corroboration to the prosecution's evidence.

6. The 2nd appellant on his part attacked his conviction on the following grounds:

   a) The learned trial magistrate erred in law and in fact when he relied on the evidence of purported visual identification yet failed to find the same was not free from error and was not fastened on a properly conducted identification parade.

   b) The trial magistrate erred when he convicted the appellant yet there was lack of testimony from vital witnesses.

   c) The learned magistrate erred when he dismissed the defence case which was formidable and plausible.

7. In his written submissions, the 1st appellant contends that his identification amounted to a dock identification since no identification parade was conducted. Regarding the manner of arrest, he submits that the boy to whom he was allegedly talking and complaining at the time PW5 and his colleague laid ambush, why the vehicle was released to the police ought to have been called as a witness. According to him, there was no evidence suggesting that the boy in question was present when he allegedly left the motor vehicle in question. He further contends that at least one member of the public who was alleged to have assisted in his arrest ought to have been called to testify.
8. Regarding the motor vehicle, he contended that it did not make sense for the police to tow away the vehicle and later lay ambush since how were they sure the appellant and his colleague would come back? According to him it was illogical that the thugs would go for the vehicle after learning it had been towed by the police. He contends further that if it be true that he was chased for 3 kilometres, was it possible to keep an eye on him and in a maize plantation? According to him this was impossible. He questions the manner in which he could have been identified in those circumstances to the members of the public for him to have been arrested. To this extent, he submits that an identification parade ought to have been conducted after his arrest. Further, nothing incriminating was found on him such as the car keys or a tyre. He concludes therefore that his arrest was purely on suspicion.

9. Concerning the recovery of the vehicle, he submits that the same was not found in his legal possession and that upon his arrest, nothing was recovered that connected him with the motor vehicle in issue.

10. Concerning the robbery, he submits that it was not established that PW1, 3, 4 and 8 whose evidence the trial court relied on were clear in their minds that the robbers who robbed PW1 are the same people who left the vehicle at PW3's premises.

11. Concerning the evidence of the 2nd appellant, the 1st appellant submitted that his allegations that the appellant was the owner of the motor vehicle KAU 242T had no basis because there was no evidence showing or suggesting that and that the allegations were only calculated to mislead the court and save the 2nd appellant from the wrath of the law. Further that the 2nd appellant could not tell the court how long he had known the 1st appellant or what business they were carrying on together.

12. The 2nd appellant for his part submitted that there was no positive identification at the time of the alleged robbery since when PW1, the victim of the robbery, when he effected his report he never gave the description of his assailants as required in the case of identification of total strangers. He urged the court to find that PW1's evidence is that of a single witness made in difficult circumstances that was not tested in an identification parade and that the purported visual identification was dock identification which was worthless.

13. Regarding section 151 of the CPC he submitted that when PW1 was recalled he was never re-sworn or reminded he was still on oath hence urged the court to find his testimony unreliable and

incredible. He further submitted that the prosecution failed to call very vital witnesses. These included the police officers who advised PW1 to go to hospital, the taxi driver and one Etabor who was allegedly arrested in the company of the appellant but later released on condition that he becomes prosecution's witness.

14. Concerning his statement under inquiry, the appellant stated that the accused accepted having the vehicle when he wrote his statement under inquiry and he also stated that the motor vehicle belonged to the 1st appellant. It was therefore his submission that it was erroneous for the trail magistrate not to consider this plausible defence.

15. Mr. Njue for DPP who appeared before us conceded that conviction on primary count and alternative count was improper. He however supported the conviction on the issue of identification and recent possession. It was his submission that PW1, 2, 3 and 4 identified the appellants when the vehicle was hijacked and later recovered. Pw1 described how the appellants hijacked him, robbed him. According to counsel, although the offence took place at night, conditions were suitable for identification.

16. Concerning recovery of the stolen vehicle, counsel submitted that although the appellants were not at the place where the vehicle was recovered, PW3 and 4 confirmed that it was the appellants who abandoned the vehicle in front of PW3's kiosk. The appellants were therefore in constructive possession of the stolen vehicle. According to counsel, the vehicle was recovered 5 days after the robbery and the appellants failed to offer any proper explanation how they came to be in possession of the same.

17. Regarding complaint that PW2 was stood down but never re-sworn when he resumed, counsel submitted that the witness was stood down and when he resumed he merely identified the vehicle and added nothing more.

18. This appeal turns on two common but most important issues in criminal law namely identification by a single witness and doctrine of recent possession. The issue of identification by a single witness will concern count 1 on robbery with violence while the doctrine of recent possession will concern the second and third counts.
19. The star witness in count 1 is PW 1 so what was his evidence in the Court below? He states:

> "...On 10/9/08 around 7.30 p.m my sister Joyce called me on phone from Ichuka but we could not communicate well. So I asked Mr. Ndegwa to give me his motor vehicle so that I could see Joyce. When I got to the house of Joyce I stopped by the gate and two people stepped sandwiching me in the motor vehicle as another emerged from ahead of me. One man pointed a gun on my head as they threw me into the back seat and drove it with me...I was put down under the seats and kept down. The motor vehicle drove off...was driven around to a place when a parcel was put on top of me. The motor vehicle moved on. On the way I was asked to sit up. I did so and I was sandwiched between two men and the inner light was still on as the threatened to kill me but I kept pleading with them to spare me. The men drove me to a bushy place. I was taken into that bush to a clearing where one man who is here (pointing at the accused 2) ordered me to lie down. I became reluctant as I stared at him. Accused drew a sword and cut me on head, left thigh and right pelvis. I heard a motor vehicle pull out by our motor vehicle. Accused 1 was asked to finish me up as they dashed to the road...the men who attacked me that day are here in court except for another. I saw them as they threatened to me and I pleaded for mercy...The motor vehicle was lit by inner light." **In cross-examination by the 1st Appellant he stated**: "I made my statement to the police. You are one of my attackers. I stayed with you that night for a long time. At one point you had the inner lights of the motor vehicle on as you threatened to kill me and I pleaded with you to spare my life. The gun you had scared me. When I made my statement to the police I stated I could identify my attackers. You had no special mark. You were the one who cut me...where you took me into a bush and got to a clearing the place was well lit by moonlight and I could see you properly. I did not attend an

identification parade in your respect because I saw you properly that night."

20. Whereas as an appellate court we have power to re-evaluate evidence and testimony of witnesses before the trial court and reach our on conclusion thereon, we are disadvantaged since we did not have opportunity to listen to testimony and watch the demeanour of witnesses.

21. One of the appellants' quarrels, particularly the 2nd appellant, with the trial court's finding was on the issue of identification by a single witness. He submitted that the identification by PW1 amounted to dock identification hence worthless.

22. The Court of Appeal has stated in the case of **Muiruri & 2 Others v. R [2002] 1KLR 274** with regard to probative value of a single witness identification as follows:

"It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep [1953] 20 EACA 166, Roria v Republic [1967] EA 583 and Charles Maitanyi v R [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.

23. In his judgment the trial magistrate observed as follows:

> "...I have also considered the issue of the identification parade...that notwithstanding I have carefully cautioned myself on the same...the court has taken all caution...I find the prosecution have proved their case beyond reasonable doubt."

24. Although the trial court did not make any reference to the nature and scope of the caution, there is the evidence of possession of the motor vehicle 5 days after the robbery. This is the evidence of PW 3 and 4.

25. The evidence of PW3 and 4 in this respect is as follows:

> "...on 15/9/08 at 7.30 am I was in my shop selling. I then saw a motor vehicle passing in front of my shop. It then stopped. I had customers. I finished with them. I went to see it because I thought they were my visitors...I talked to the first accused and he told me that the vehicle had a puncture and they did not have a spare. They told me to allow them leave it at my premises. My son came also. He found me talking to the 1st accused. They were going to Kitale. I told them to give me their particulars before they left...the two wrote the note and left... became suspicious when they delayed to come from Kitale. **In cross-examination by 1st accused he responded:** "...I saw you at the cells of Maili Saba and I recognized you." **In cross-examination by 2nd accused he responded:** " I recognized you by appearance when you came with first accused waiting to keep the motor vehicle at my premises.

26. PW3 testified in cross-examination by 1st accused as follows:

> "... I saw you and the second accused at my father's kiosk. The 1st accused was talking to

my father. PW3 is the one who requested for your phone number and all other particulars...I am the one who added that even your phone number should be taken."

27. The appellants had taken issue with their identification and association and with the stolen motor vehicle. The 1st appellant particularly faulted the trial magistrate for failing to find that it was illogical for them to go for the vehicle after learning it had been towed away by the police. He further questioned how he was connected with the stolen vehicle yet upon arrest nothing was found in his possession that linked him with the vehicle such as the car keys or tyre. According to the appellant therefore, the doctrine of recent possession had not been established.

28. The doctrine of recent possession has been considered in several cases by this court and the court of appeal. For instance in the case of **Odhiambo v. Republic [2002] 1 KLR 241** the Court of Appeal has held as follows:

"...it is settled law that the evidence of recent possession is circumstantial evidence which depending on the facts of each case, may support any charge, however penal.

29. Circumstantial evidence may be loosely defined as such evidence that is inexplicable on no other theory than that the accused must be the person who committed the offence. The Court of Appeal in the case of **Kimeu v. Republic [2002]1KLR 756 at page 763** held that:

"...to act on circumstantial evidence to support the conviction of an accused person, the evidence must point irresistibly at the accused's guilt to the exclusion of everybody else."

30. In **Musoke v. R [1958] EA 715** it was stated that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

31. PW1 was violently robbed and his car forcefully taken from him on 10/9/08, the vehicle was found 5 days later in the possession of the appellants who parked it in front of PW3's kiosk in the pretext that it had a puncture and since they had no spare wheel, wanted to leave it there as they proceed to Kitale. PW3 insisted that as a condition for leaving the car the appellants must leave their particulars which the 1st appellant did. The conversation between the appellants and PW3 and 4 in the circumstances must have been a cordial one and under circumstances that did not impair identification at all. It was 7.30 am in the morning. In this regard it was immaterial that the appellants were arrested around the stolen vehicle or far from it. In other words, it did not matter from where the appellants were arrested provided PW3 and 4 could sufficiently identify them as the persons who left the vehicle at PW3's premises. The fact of PW3 and 4 having interacted with the appellants earlier while leaving the vehicle was enough to associate the appellants with the stolen vehicle. All that was required was for it to be established that the vehicle belonged to PW2 and that it was unlawfully taken from PW1. In any event failure by the appellants to sufficiently account for how they came into possession of the vehicle 5 days after it was violently robbed from PW1, reasonably led to the presumption that they were either those who robbed PW1 of the vehicle or they came into possession of it knowing or having reason to believe it was unlawfully obtained. To this extent were are persuaded that the trial magistrate was right in convicting the appellants of the offence of robbery with violence and we refuse to disturb the conviction.

32. There is the final issue concerning section 151 of the CPC. The second appellant complained that PW1 was recalled but was never re-sworn or reminded he was still on oath hence urged the court to find his testimony unreliable and incredible. In the case of Yusuf Jilo Godana v. Republic Criminal Appeal No. 1 of 2006 (Malindi), Justice Ouko held that although it is mandatory under section 151 of the CPC to administer oath to witnesses testifying in criminal cases, he was satisfied that PW1 was examined upon oath. He was stood down for twenty minutes and there was no need to reswear him. We would add that the purpose of administering oath is to remind the witness of the solemnity of the trial process hence the duty to tell the truth at the pain of prosecution for perjury in the event that it is established that such witness lied while on oath. Once

the oath is administered the witness is deemed to have so bound himself and there is no need to reswear such witness while still giving evidence in the same case no matter how long he is stood down. That is to say the oath once taken is binding on the witness for as long as the issue in respect of which he took oath remain in existence. In other words, the issue is not the number times the oath is taken but the solemnity and integrity of such oath. It is however good practice to remind a witness previously stood down after being sworn of his oath but failure to do so is of no consequence to his resumed testimony. To this extent we find no merit on this ground of appeal.

33. Finally the appellants raised the issue of the prosecution omitting to call certain witnesses they (appellants) deemed useful in the case. To this we can only say that the prosecution, being the party primarily bearing the burden of proof in criminal cases, has absolute discretion in deciding which witnesses to call. In the event of failure to do so the court may in appropriate cases infer that the omission to call such witnesses was that their testimony would have been injurious to the prosecution case. In any event section 143 of the Evidence Act provides that no particular number of witnesses shall, in absence of any provision of law to the contrary, be required for the proof of any fact. This disposes of this ground of appeal.

34. From what we have said above, we have come to the conclusion the appeals by both appellants are disallowed and the conviction of the lower court with regard to the main count of robbery with violence is hereby upheld. The conviction on the alternative count is hereby quashed and in substitution thereof we order that it be left in abeyance.

35. It is so ordered.

Dated and delivered at Nyeri this 6th day of November, 2013.

OUGO R. E

JUDGE

ABUODHA N. J

JUDGE