REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 144 OF 2010

GEOFREY MUNGAI KAMAUA……....……..……APPELLANT

V E R S U S

REPUBLIC……...RESPONDENT

(Lesiit and Makau, JJ)

(An appeal against both conviction and sentence by Hon. P. Ngare Principal Magistrate in Chuka Criminal Case No. 227 of 2010 delivered on 20th

JULY, 2010).

The Appellant was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code before the Principal Magistrate's Court, Chuka. In the first count he was charged of robbing PW1 of the lorry with 346 empty gas cylinders, a mobile phone and cash. In the second count, the Appellant was charged with robbing PW2 of cash and a mobile phone. The Appellant was charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. The Appellant was convicted in both counts of robbery with violence. He was sentenced to death in the first count. In the second count the learned trial magistrate correctly left the sentence in abeyance. Being aggrieved by the conviction and sentence, the Appellant filed this appeal.

The Petition of Appeal cites eight grounds of appeal as follows:

1. That the learned trial magistrate erred in law by shifting the burden of proof to the accused person, the Appellant herein.

2. That the learned trial magistrate erred in relying upon a worthless identification parade to convict the Appellant, the Appellant having been seen by the identifiers.

3. That the learned trial magistrate erred in relying on shaky contradictory evidence to convict the Appellant.

4. That the Appellant's constitutional right to be afforded facilities to conduct his defence were

infringed as he was not given adequate chance to summon his intended witness taking into consideration that he was in custody and the seriousness of the offence.

5. That the prosecution's case did not flow in a logical sequence and therefore the conviction was against the weight of evidence.

6. That the learned trial magistrate erred in failing to at all times indicate the language being used.

7. That the learned trial magistrate erred in law by admitting in evidence what was in the nature of a confession which was highly prejudicial to the Appellant's case.

8. That the Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 and an alternative count of handling stolen property contrary to section 322(2) of the Penal Code and convicted of the first count whereby he was sentenced to death whereas the second count was left in abeyance hence appeals against the conviction and sentence.

We have carefully considered this appeal together with the submissions by Mr. Mundia Kariuki for the Appellant and Mr. Moses Mungai learned State Counsel for the State.

The prosecution called eight witnesses. The facts of the prosecution case were that the complainant in count 1 Joshua Maina was sent by his employer to deliver 346 assorted cylinders with gas to Embu and Meru regions on the 17th February, 2010. He was in company of the complainant in count 2, Timothy Kioko, PW2. Both witnesses testified that they delivered all the gas in the two regions between 17th and 18th February, 2010. They said that on their way back to Nairobi with 346 empty gas cylinders, they were way laid by a gang of five men. It was about 11.30 am on the 18th February, 2010. They were driving along a steep place within Keria Town, in Chuka when they were stopped by a riffle brandishing gang in a salon vehicle. The two were bundled into the salon vehicle and driven away by two of the gang members, while 3 drove away in their lorry vehicle. The two complainants were forced to take 4 tablets of medicine with whisky and interrogated for half an hour before they blacked out. PW2 woke up first some minutes to 5pm and found that he and his colleague had been abandoned in a bush.

PW2 was directed by members of public to a place where he found police. He led the police to where PW1 was, still very drowsy and unstable. Eventually the two complainants identified the Appellant in an ID parade as the man who drove away their vehicle in company of two others.

There was evidence from PW4 and 5 both Police Officers that they were on mobile patrol duties along Nairobi – Nyeri Highway when they received some information that a vehicle, whose registration number they were given had been robbed from some people and was being driven along that road towards Nairobi. PW4 and 5 testified that they spotted the vehicle ahead of them. They testified that in order to stop them they created a traffic jam forcing the vehicle to stop. They exchanged fire with one man who was inside the stolen vehicle. The other two were not armed. PW4 and 5 said the gunman escaped with gunshot wounds while one of the other two was captured with gunshot wounds. The third robber was arrested unharmed. He was identified as the Appellant. PW4 and 5 stated that the Appellant was the one who was driving the vehicle when they stopped it, just before they arrested him.

The Appellant gave a sworn statement in defence. He said that he had boarded a vehicle from Umoja 2 in Nairobi and that he travelled in it to Makuyu where he alighted at a Bus Stage. He said that he found many people at the stage. He said that police surrounded him and arrested him saying that he had commandeered a vehicle, which he denied.

We are the first appellate Court. As a first appellate court we are mandated to analyze and evaluate afresh all the evidence that was adduced before the lower court, and to draw our own conclusions while bearing in mind that we neither saw nor heard any of the prosecution witnesses and therefore giving the due allowance for the same. We are guided by the Court of Appeal Case of **OKENO V. REPUBLIC [1972] EA 32** where the role of a first appellate Court is given as follows:

"An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (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 conclusion (**Shantilal M. Ruwala v. Republic [1957] EA 570**.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if 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 v. Sunday Post, [1958] EA 424**.)"**

Mr. Mundia Kariuki urged the grounds of appeal on behalf of the Appellant. In support of ground 3 of the petition Mr. Kariuki submitted that the evidence of PW1 and 2 was full of contradictions and ought not to have founded a conviction. Counsel urged that PW1 and 2 were not clear whether they were robbed by five people or by three people. Counsel also urged that PW1 was not clear whether he went to Makuyu Police Station or whether he never went to that station any time after the robbery. In regard to PW1 Mr. Kariuki submitted that he started by saying that he did not identify the occupants of the vehicle which robbed them. He said that PW1 later said that he was able to recognize the Appellant at Makuyu Police Station, but that on cross examination he changed and said that he never went to that Police Station. In regard to PW2 Mr. Kariuki urged that he contradicted his statement and also the evidence of PW1. Mr. Kariuki did not specify which aspects of the evidence of PW1 and 2 was contradictory.

Mr. Mungai for the State urged that PW1 and 2 were not present at the time of arrest and therefore any contradictions alleged regarding the arrest of the Appellant should be disregarded. Mr. Mungai urged that PW1 was clear in his evidence that he went to Makuyu Police Station to collect his vehicle and that therefore he did go to that station. Regarding the number of people who robbed the complainants Mr. Mungai urged that there were five robbers and that only two were arrested by the police. He also urged the court to find that the Appellant was arrested driving the vehicle that was stolen from PW1 and was therefore one of the robbers.

We have considered the submissions by both counsels. Regarding the number of robbers involved in the incident the evidence by PW1 and 2 is very clear. Both eye witnesses who were also the complainants in this case are clear that they were stopped by five men one of whom was brandishing an AK 47 rifle. The two complainants are very clear that the Appellant pulled them out of their vehicle and took over the driving. The two complainants are also clear that the Appellant drove away their lorry with two others, while the complainants were left with two of the robbers. It is therefore very clear that five robbers were involved in the robbery and that three drove away in the stolen vehicle leaving two with the complainants.

We have carefully analyzed the evidence adduced before the court and are convinced that the robbery against the complainant was committed in two stages. There was the first stage where all five robbers were involved which is the stage where the complainants were thrown out of their vehicle and bundled into a smaller salon car. Their vehicle was driven away by the Appellant and two others. The vehicle was loaded with 346 empty gas cylinders which were valued at Ksh.1, 121,000/-. The vehicle was a Mitsubishi Lorry valued at Ksh.2, 200,000/-. The second stage of the robbery was committed against both complainants by the two men they were left with after their vehicle was driven away. These two people drugged them and took away their mobile phones and cash which they had in their pockets. Having evaluated the evidence adduced before the court, we are satisfied that there were no material contradictions in the evidence of the two complainants. They were clear about the numbers of those who robbed them and the role each played.

Mr. Kariuki Mundia for the Appellant urged that the identification parade carried out by PW8 in this case was of no probative value. Counsel urged that both complainants saw the Appellant at the police station before the parade was conducted. Mr. Mungai, learned State Counsel on the other hand submitted that the two witnesses did not meet the Appellants before the identification parade. The learned State Counsel relied on the proceedings on the evidence of the ID Parade Officer, PW8.

We have considered the evidence of ID Parade Officer PW8. His evidence was very clear that he kept the two identifying witnesses PW1 and 2 in different offices so that they could not meet with each other and with the Appellant before the parade was conducted. PW 8 testified that he kept the two witnesses far from where the Appellant was and that they did not have an opportunity to see the Appellant before the parade. We noted that during cross examination of pW8, the Appellant did not suggest to him that he met the identifying witnesses before the ID parades were conducted.

PW8 was clear that after explaining the purpose of the parade to the Appellant, the Appellant agreed to participate in the Parade and that after the parade he said that he was satisfied with the manner in which it was conducted. We do not find any grounds to support the submission by Mr. Kariuki that the ID Parade was not properly conducted. We find that it was properly conducted and that the Forces Standing Orders were complied with.

Mr. Kariuki Mundia urged the court to find that the learned trial magistrate was wrong to admit the evidence of PW7 which was in the form of a confession. Mr. Kariuki Mundia was not clear what he meant by a confession. We have gone through the evidence of PW7 who was the investigating officer of this case. He accompanied his Senior Officer Chief Inspector Cheptoo, who later handed over the case to him for investigations. In his evidence in chief PW7 said that he interrogated the Appellant and also recorded a report with him. PW7 added that the report recorded by the Appellant was concerning the Appellant's participation in the offence. The report was not adduced in evidence neither did PW7 state specifically what the Appellant informed him. We find that whatever PW7 stated could not have prejudiced the Appellant in this case, and neither could it negatively influence the mind of court to the prejudice of the Appellant.

Mr. Kariuki urged that the learned trial magistrate shifted the burden of prove against the Appellant and that the conviction ought not to have been entered. Mr. Kariuki also urged that the language used in the proceedings was not properly indicated, and that his client does not understand Kimeru. Mr. Mungai for the State urged that the learned trial magistrate correctly convicted the Appellant on the basis of the evidence of identification by recognition and also on the basis of the recovery of the stolen vehicle from the Appellant.

We have considered the rival argument by both counsels. Regarding the language used in court, on the date of plea Mr. Ngare, the learned trial magistrate clearly indicated that the language which the Appellant said he understood was the Kiswahili language. Thereafter the record is very clear that all the prosecution witnesses testified in the Swahili language which the Appellant understood. The Appellant also gave a sworn statement in the Swahili language. He was also cross examined by the prosecution at length in the same Swahili language. We are satisfied that the Appellant understood the proceedings because they were conducted in a language he informed the court that he clearly understood. His Constitution rights to interpretation to a language he understood was therefore fully met. We did not come across any place where the Kimeru language was used.

We have perused the judgment of the learned trial magistrate in regard to Mr. Kariuki's allegation that the burden of proof was not properly weighed. We did not find anywhere where the trial magistrate shifted the burden of proof against the Appellant.

The conviction of the Appellant was founded on two grounds, the identification of the Appellant and recovery of the stolen vehicle. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

"**Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single**

witness can safely be accepted as free from the possibility of error."

The learned trial magistrate addressed the issue of identification and the recovery of stolen vehicle at length. This is what he stated in his judgment.

"The identity of accused as being in the gang that attacked the complainant and robbed them off their belongings has been challenged by accused and it is important to resolve it. At the spot where the complainants were attacked it is clear that the incident occurred in broad daylight. At the point where the robbers ordered the complainants to surrender the vehicle there was an exchange of words and the 1st complainant was hesitant. He had ample time of seeing and identifying the attackers. After accused was arrested the complainant participated in an identification parade and he picked the accused as the person who robbed him off the vehicle. The 2nd complainant was in the front cabin of the van at the time of robbery, he too saw the attackers and more particularly accused herein and named him as the one who commandeered the van. He also identified him at the parade conducted by PW8.

The other scene where accused herein is said to have been identified was at Kenol Township. PW4 and PW5 both Police Officers were alerted about the robbery and the van in question. They were clear that at the time of intercepting it, it is accused herein who alighted from the driver's seat and started running away. Their testimonies are clear and unchallenged that they never lost track of accused here."

The learned trial magistrate correctly weighed the relevant evidence adduced against the Appellant. We have on our part analyzed the evidence afresh and evaluated what the witnesses stated. The incident took place in broad day light being 11.30 in the morning. PW1 and 2 are very clear that they were pulled out of the vehicle by the Appellant. From their evidence we are satisfied that PW1 and 2 had a chance to see the Appellant as he pulled them out of the vehicle. We are also satisfied that because of the manner in which the robbery was committed PW1 and 2 must have had a lasting impression of the Appellant. The two complainants were able to identify the Appellant at the ID Parades conducted by PW8, five days after the robbery. Five days was a short time and the lapse of time was not long enough for the eye witnesses to have forgotten how their assailant whom they saw as he pulled them out of the lorry looked like. Given the role the Appellant played during the robbery, which was described by both witnesses consistently, we are satisfied that PW1 and 2 had a good chance to see and identify the Appellant. Their evidence of identification was strengthened by the fact that the two were able to identify the Appellant in an ID parade, five days after the robbery. We find the evidence of the two safe and corroborative. Their evidence of identification cannot be described as that of recognition as Mr. Mungai for the State suggested in his submissions. It was purely that of visual identification.

The evidence against the Appellant was not just that of visual identification. There was other independent evidence implicating the Appellant with the offence. There was the evidence of PW4 and 5. These were Police Officers on mobile patrol duty along Nairobi-Nyeri Highway. They intercepted the Appellant driving the stolen vehicle on the same day of the robbery, at 3 pm. That was three and a half hour after the vehicle was stolen from the complainants.

The Appellant was found driving the vehicle stolen from the complainants three and half hours after the robbery. The Appellant had a legal burden to give a reasonable explanation of how he came by the vehicle. We have considered his defence and find that he denied that he was arrested anywhere near the vehicle in question, leave alone driving it. He said the police surrounded him the moment he alighted from a public service vehicle at a stage. PW4 and 5 are total strangers to the Appellant and could not have had any reason to falsely implicate the Appellant with this offence. Both witnesses were very clear in their evidence that they had spotted the vehicle the Appellant was driving, that they followed the vehicle and ordered the Appellant to stop which he did. The two are clear that the moment the Appellant stopped the vehicle he alighted from it and started running away but they arrested him before he went any far. We noted that the Appellant did not put any question to the two arresting officers implying that he had alighted from a Public Service Vehicle. It is our view that the Appellant's defence to that effect was an afterthought. We are satisfied that the doctrine of recent possession applied to the facts in this case.

The Appellant was found in possession of the lorry, three and a half hours after it was stolen. He did not give a reasonable account of how he came by the vehicle. Under the doctrine of recent possession, it can be inferred that the Appellant was more of a thief rather than the handler of the stolen vehicle.

The Appellant has challenged the order of the learned trial magistrate to leave the sentence in count two in abeyance. There was nothing wrong with that order except the fact the learned trial magistrate should have first declared the sentence in relation to count two before holding it in abeyance. The word abeyance simply means temporary inactivity, cessation or suspension. For our purposes leaving the sentence in abeyance means that the sentence is suspended and cannot be executed. The sentence in both counts against the Appellant was death. He could not have been hanged twice thus the trial court's order to suspend the second sentence. Nothing turns on this ground.

We have carefully considered this appeal, together with the grounds raised by the Appellant in his petition, and find that the Appellant was positively identified by the two complainants in the case and that secondly, the Appellant was found in possession of, and actually driving the recently stolen vehicle. We are satisfied that the conviction against the Appellant was safe and should be allowed to stand. We find no merit in the Appellant's Appeal and accordingly dismiss it.

We uphold the conviction and confirm the sentence.

Those are our order.

DATED SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012

LESIIT, J.

JUDGE.

J. A. MAKAU
JUDGE.