



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 5,4 & 3 OF 2011

JOSEPH WAIHARU WAIYORO.....1ST APPELLANT

JAMES MUGO NJOGU.....2ND APPELLANT

KELVING MURERWA NJOROGE.....3RD APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT.

(An appeal against both conviction and sentence by Hon. M. MAUNDU Principal Magistrate in Isiolo Criminal Case No. 527 of 2011.)

The Appellants were the 1st, 2nd and 3rd accused persons respectively in the trial before the lower court. They were charged with various counts of offences. In count one they were jointly charged with robbery with violence contrary to section 296(2) of the Penal Code. They jointly faced one alternative charge of handling a stolen motor vehicle contrary to section 322(2) of the Penal Code. The 1st Appellant faced one other count of handling various personal identification documents stolen from GEORGE MUNYI WANGUI, PW1 in the case.

The Appellants had four other co-accused in this case. The co-accused were charged in count two with one count of Stealing of motor vehicle parts contrary to section 279(g) of the Penal Code from SIMON MAINA WERU, PW 2. In the alternative they were charged with handling the two stolen parts. These co-accused were however acquitted of all counts.

The Appellants were convicted of the main count of robbery with violence and sentenced to death. They were all aggrieved by the conviction and sentences and therefore filed these appeals. The appeals have

been consolidated having arisen from the same trial.

The 1st, 2nd and 3rd Appellants filed their Petitions of Appeal separately. However they all raise the same grounds of appeal which are as follows:

0. **That the trial magistrate erred in law and facts in failing to note that the evidence adduced by the witnesses in the trial case was contradictory.**
0. **That the learned trial magistrate erred in law and facts in failing to note that the prosecution failed to summon the vital witnesses mentioned in the trial case.**
0. **That the learned trial magistrate erred in law and facts in failing to observe that identification parade was conducted in a manner that fell short of the required standard.**
0. **That the learned trial magistrate erred in both law and facts in failing to note that the unsworn defence was disregarded (sic) without any cogent reasons.**
0. **That the learned trial magistrate erred in law and facts in failing to observe that the evidence tendered before him, (sic) so as to have safely relied upon it as he erroneously did.**

At the hearing of the appeal, the Appellants were represented by Mr. Basilio Gitonga. The State was represented by Mr. Mungai, learned State Counsel. We have carefully considered the submissions by both counsels. This is a first appellate court. We are mindful of our duty as the same and 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.)”

As expected of a first appellate court, we have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation and have arrived at our own conclusions while bearing in mind our limitations since we neither saw nor heard any of the witnesses and have given due allowance.

The facts of the prosecution case were as follows. PW1 was a taxi driver based at Naromoru. He drove vehicle registration number KAS 015 F Toyota Station Wagon, which belonged to PW2. PW1 testified that two people, the 2nd and 3rd Appellants hired him to take them to Kambi in Mubichiri. They paid him Ksh.350/- for the journey. He said that the 2nd Appellant sat next to him and the 3rd Appellant behind him. PW1 said that he first fueled the vehicle at a petrol station before starting on the journey. On the way he was asked to stop and they picked the 1st Appellant, who joined the 3rd Appellant at the back seat. The complainant testified that he was thereafter held and tied up and bundled to the back seat. Eventually he was abandoned when a person approached the vehicle during one of the many stops the Appellants made after taking over the vehicle.

They drove away with his passport together with the passport of his child and wife, Kshs.1700, his wallet, his driving licence, ID cards and his Equity ATM card. By the time the vehicle was recovered and identified by PW1, the complainant in count one, it was a shell, with old tyres, the new ones having been removed. It had no engine and everything else in the bonnet and in the car was missing. His driving licence Exh.1, electors card Exh.2 ID Card Exh3 drivers badge Exh.4 Equity ATM card Exh.5

and the 3 passports Exh 6 were all recovered, and according to PW6, the investigating officer, the complainant's property was in the possession of the 1st Appellant.

PW2 was a farmer at Naromoru and owner of the motor Vehicle PW1 drove on the material night. He was talking with PW1 on the evening of 16th May, 2010 at about 8 pm when PW1 was called for customers. At 10.30 pm same night PW1 called to tell him that his M/V had been stolen. PW2 said he saw his M/V again on 12th June, 2010 at Isiolo Police Station, one day after it was recovered. It had no engine, had 2 radios, four speakers, two jacks, 5 vehicle mats, seat covers, spoiler all removed and missing from the car. The four tyres he had just bought for the vehicle were also changed with old ones. PW 2 said he had no intention of selling his vehicle.

PW3 was a Councillor in Isiolo. He was at Cheleseï with the Area Assistant Chief, PW4, having development projects on 11th June, 2010 at 11.30 am when they spotted PW2's M/V. It had three people sleeping inside the Appellants in the case. PW3 called police who went armed and arrested the Appellants and towed away the vehicle. Before taking them away police officers searched the Appellants and recovered a driving licence, ATM card, Identification Card and three passports in names of other people not the Appellants. PW3 identified the recovered items as Exhibit 1 to 6.

PW4 corroborated PW3's evidence and gave similar evidence of the arrest of the Appellants and recovery of Exhibits 1 to 6.

PW5 conducted ID parades for the Appellants. He said that he kept the Appellants in the cells and the identifying witness, PW1 in the NCO's Office. He said that PW1 identified all 3 Appellants in 3 different identification parades. PW5 said that he used different people as members of the parade. PW6 testified that the Appellants were satisfied with the manner in which the parades were conducted. We have checked the parade forms and have confirmed that the Appellants were explained all their rights and every step taken by the Parade Officer and that they indicated that they were satisfied with the conduct of the parade.

PW6 Sgt Wanjala received the call from PW3, Mr. Garma and proceeded to the scene where he arrested the 3 Appellants and recovered the stolen M/V and the various identification and other cards and passports belonging to PW1, Exhibits 1 to 6. PW6 said that from the 1st Appellant he recovered PW1's driving license Exhibit 1, identification card of PW1 Exhibit 3, electors card in PW's names Exhibit 2, PSV license in PW1's names Exh 4, ATM card in PW1's names Exh.5, photocopy of PW1's Id card Exh.19 and the 3 passport photos resembling PW1, two photos one for a woman and one for a child Exh.6A, 6B and 6C. he also had a Sale Agreement for a gear box and an engine dated 4th June, 2010 between George Munyi Wangui PW1) and one Nicholas Mwirigi Kimakia. It was Exh.17.

PW6 said that the Appellants led him to a garage owned by the 4th accused in the case from whom he recovered the vehicles gear box and engine. He also recovered the Original Sale Agreement for the gear box and vehicle engine. The Agreement was unsigned. PW6 said he arrested the 5th, 6th and 7th accused because they were the witnesses in the proposed Sale Agreement, and because 6th Accused drafted the Sale Agreement.

1st Appellant stated in his unsworn defence that he was asked to look for a vehicle buyer by James Mugo, the 2nd Appellant. He said that he got one. That on 16th May, 2010, he met James Mugo, 3rd Appellant and PW1 at Wananchi Bar where the 2nd Appellant introduced PW1 to him as the one who wanted to sell the Motor Vehicle. The 1st Appellant said that all 3 of them drove to Meru where they were unable to meet the buyer as planned. PW1 left the vehicle with the 2nd Appellant. The 1st Appellant stated that when the sale fell through himself and 2nd Appellant got a person interested with the vehicle engine and gear box. That person was the 4th Accused in the lower court and that he negotiated with PW1 and bought the two parts. The 1st Appellant stated that on 5th June 2010 he, 2nd and 3rd Appellants towed the Motor Vehicle to the home of an aunt to the 3rd Appellant. The 1st Appellant

contended that on 11th June, 2010 they were inside the Motor Vehicle when PW3 and 4 called police officers who went to the scene and arrested them.

The 2nd Appellant's statement in defence was a little varied from that of the 1st Appellant. He said he was with the 3rd Appellant on 14th May, 2010 when the 3rd Appellant received a call from someone who wanted to sell his vehicle. The 2nd Appellant said that he told the 3rd Appellant that he knew a broker who could buy the vehicle. The broker was the 1st Appellant. The 2nd Appellant stated that he, the 1st and 3rd Appellant and PW1 travelled together to Meru to meet the buyer. When they could not get him, the 2nd Appellant stated that PW1 left the vehicle with the 3rd Appellant for safe keeping. The 2nd Appellant stated that he was able to get a person who bought the vehicles engine and gear box and paid PW1 for the two car parts. The 2nd Appellant stated that he and the 1st and 3rd Appellants were arrested while inside the vehicle and charged.

The 3rd Appellant gave an unsworn statement as did his co-Appellants. His defence was quite similar to that of the 2nd Appellant with a few variations and we feel it is unnecessary to repeat it here.

Mr. Basilio Gitonga for the Appellants, in his submissions raised issue with the quality of the identification of the Appellants by PW1, and with the evidential value of the identification parade carried out by PW5 in which PW1 identified all 3 Appellants. Mr. Gitonga urged that PW1 was placed among members of public and the three Appellants at the Head Office of the Police Station as they waited for the ID parade. Counsel for the Appellants urged that PW6 who conducted the parades did not conduct them properly given those circumstances. The learned counsel stated that according to the defence case PW1 had been with the Appellants and that he was the one who had given them the vehicle to sell for him and therefore they were not meeting for the first time and the ID parades were not necessary.

Mr. Mungai learned counsel for the state opposed the appeals by the Appellants. In response to the evidence of identification and that of the evidential value of the ID parades. Mr. Mungai urged that PW1's evidence was very clear that he had been hired by the 3 Appellants to take them somewhere and that the three hijacked him, and abandoned him. Mr. Mungai urged that the complainant met the Appellants for the first time on the night he was hijacked and that there was no Sale Agreement between him and them. Counsel urged that the ID parades were properly conducted and that at no time were the Appellant exposed to the complainant. Mr. Mungai urged the court to find that the complainant was able to identify the Appellants with the aid of light inside the vehicle's cabin and light at a petrol station where they had stopped to fuel before the incident. Mr. Mungai urged that the evidence of PW1 received corroboration from the evidence of PW2 and PW3.

We have considered the judgment of the lower court and find that the conviction was based on the evidence of identification by PW1, the recovery of the vehicle from the 1st, 2nd and 3rd Appellants and the recovery of PW1's personal documents, identification card and his passport and those of his wife and of his child.

We shall first deal with the evidence of identification. The evidence of identification must be considered very carefully especially where there is a single identifying witness. We are guided by the Court of Appeal case of **Peter Kimaru Maina vs Republic Nyeri CA No. 11 of 2003** where the Court of Appeal held:

“Before the court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight R. vs. Eria Sebwato [1960] EA 174; Kiarie v. Republic [1984] KLR 739. Further, visual identification must be treated with greatest care and ordinarily a dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect in a properly conducted parade (Amolo v. Republic [1988-1993])”

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.”

In this case the identifying witness, PW1 had not known the Appellants before that day according to his evidence. His evidence was that he saw the hirers of his taxi, the 2nd and 3rd Appellants, on two occasions. The first time was when they opened the vehicle to enter and the cabin lights went on and illuminated them. The second time was at the petrol station as he fueled the vehicle under the station’s bright lights. As for the 1st Appellant, he said he saw him as he boarded the vehicle 10 KM from where the 2nd and 3rd Appellants had boarded.

The complainant PW1 had short period of time to see and identify the assailants given his evidence that it was night when he was hired, around 8pm, and the fact he saw them briefly by cabin lights and petrol station lights. It is important and we noted that by the time PW1 saw these people they had not declared their intentions to robbing him. There was no reason for serious scrutiny of their identity at the time.

We find that the circumstances of identification were difficult and that in the circumstances what was required was other material evidence to corroborate the evidence of PW1. We have looked at the evidence adduced before the court. We find sufficient corroboration in the evidence before the court. The first such evidence is the complainants ability to identify the Appellants in the ID parades.

Regarding the ID parades Mr. Gitonga for the Appellants urged that the parades were not properly conducted because the complainant was kept with the Appellants before the parades were conducted. We did not find merit in that complaint because the defence case was the complainant gave them the subject vehicle to sell for him and that they met several times in Naromoru and Isiolo. They cannot be heard to complain that they were exposed to the complainant before the parades. We have also perused the ID parade forms which were exhibits in the case. When asked whether they objected to the parade, none of them did. When asked whether they were satisfied with the manner in which the ID parades were conducted, each of them answered in the affirmative. We are of the view that the issue is being raised is an afterthought and has no merit.

The other evidence which in our view corroborates the complainant’s testimony is the recovery of the complainant PW1’s property with the 1st Appellant and the arrest of the three Appellants together in the subject motor vehicle. The evidence of PW6 was that the complainant’s documents and those of the complainant’s wife and child were found with the 1st Appellant. The 1st Appellant did not deny he was found with the complainant’s properties. His explanation was that the complainant left them with him in order to facilitate the sale of the vehicle. That explanation is not plausible. Why would the complainant leave his electors card, ATM card, passports both his and those of his wife and child, his drivers license and such documents. Of what role would his wife’s and child’s passport play in the sale? The only explanation is that the 1st Appellant obtained the documents as a result of the robbery.

Regarding the Appellants being found in the stolen vehicle, the Appellants all claim that it was PW1 who gave them the motor vehicle to sell. The learned trial magistrate found that the Appellants did not deny they were in possession of the vehicle. He however dismissed their defence that they were given it by PW1 to sell. The learned trial magistrate found the defence untenable on grounds the 4th, 5th, 6th and 7th accused implicated the 1st Appellant as the only one who negotiated and sold the engine and gear box to the 4th accused. We agree with the learned trial magistrate’s finding. The Appellants contention that PW1 was selling the subject M/V or its engine and gear box was not supported by the purchaser, the 4th

accused. The 4th accused said that he did not know PW1 and never met him at the time the three Appellants offered and sold the engine and gear box to him. The 5th, 6th and 7th accused supported the 4th accused evidence.

The Appellants were found with the vehicle about one month after it was stolen from PW1. They had sold the engine and gear box to the 4th accused. Their conduct to dismantle the M/V and to sell parts of it was consistent with that of persons trying to disguise and dispose of stolen property. The state of the vehicle when PW1 and 2 saw it, they described it as a shell.

Mr. Gitonga urged that key witnesses were not called as witnesses. These were given as Macharia who took the complainant home after the ordeal. The evidence of PW1 was that he was carried out of the vehicle by his assailants headed to a tree after he was threatened with death. It was dark. PW1 said that when he saw an approaching torch, he screamed for help and many people responded. PW1 said that as a result of the big response the assailants abandoned him and drove away in the vehicle. PW1 said that one Macharia took him home after picking him at the scene. PW1 also said he called one Kariuki and requested him to report the incident to the police which he did. Mr. Mungai submitted that PW1 could not report to the police immediately as he had been abandoned. Mr Mungai urged us to find that PW1 participated in the investigation as he went to the police the next day and also attended the ID parades.

We do not find the evidence of Macharia and Kariuki important to the prosecution case as to justify an adverse inference that the prosecution failed to call the two for reason their evidence would have tended to be adverse to its case. The general rule where the prosecution fails to avail witnesses was set out in the case of **BUKENYA & OTHERS VS REP**, [1972] E A, where LUTTA Ag. VICE PRESIDENT held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

We find that the evidence adduced by the prosecution was adequate to sustain its case. Nothing turns on this point.

Mr. Gitonga for the Appellants submitted that neither PW1 nor PW2 reported the alleged theft of the M/V to the Police. Counsel urged the court to find that the failure to report was because the two were selling of the vehicle through the help of the Appellants and had not lost the vehicle through the alleged robbery.

We think that this issue touches on the earlier on on inadequate witnesses. The complainant PW1 said he went to the police the next day but had asked a friend to report to the police. The police did have PW1's contacts and report and that is how he was called to identify suspects at Isiolo, several KM from where the robbery took place. We are not persuaded that PW1 had any ulterior motives in the manner in which he handled the robbery report or the investigations.

We noted that the exhibits, that is the motor vehicle and the gear box and engine were not produced in court as exhibits. Police should produce all exhibits recovered by them at any stage of the investigations. If that is difficult reasonable explanations should be given to the court. We say no more because we are satisfied that the Appellants did not deny that the said exhibits were recovered.

We have carefully considered this appeal and have come to the conclusion that it has no merit. We agree with the learned trial magistrate that based on the evidence adduced before the court the prosecution proved that the Appellants robbed the complainant PW1 of the vehicle on the day in question and that they threatened to use force. The ingredients of the robbery with violence were fully proved.

Accordingly we dismiss the appeals by all three Appellants, uphold the convictions and confirm the sentences.

Those are our orders.

Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012

**LESITT, J.
JUDGE.**

**J. A. MAKAU
JUDGE.8**