



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 312 of 1997**

DISMAS RATIEL OKUMU APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 313 OF 1997

SALIM SAID OMAR..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From Original Conviction in Criminal Case No.453 of 1996 of the Snr. Principal Magistrate's Court at Mombasa - Mr. J.S.Kaburu, SPM)

JUDGEMENT

The two appellants were jointly charged with the offence of robbery with violence contrary to S.296(2) of the Penal Code. It was stated that on 22-11-95 at Kiembeni in Mombasa District within Coast Province they jointly with others not before court while armed with a pistol robbed Lumumba food of his motor vehicle Reg. No. Chassis No.Ull-00518 Engine No.066112 Nissan Blue Bird valued at 350,000/- and at or immediately before or immediately after the time of such robbery used actual violence against the Said Lumumba Sued.

They were found guilty by J.S. Kaburu, Snr. Principal Magistrate and sentenced to death on 16-10-97. PW.1 Lumumba Mohamed Sued, a car dealer from Kampala Uganda, was test driving a new vehicle towards Kiembeni on that day at about 10a.m when an unregistered vehicle with two occupants blocked him. Two people jumped out of it one carrying a pistol. They ordered him to remove whatever he had in the pockets, ordered the second occupant to lie on the ground and drove off with the car. Mohamed Sued and his companion reported this at the Bamburi Police Station. Later the vehicle was recovered. He could not identify whoever attacked him and none was injured. PW.2, IP No.21229, Mohamed Dido said they recovered the vehicle on 29-12-96 at Bondeni Area. PW.3 Dorcas Tabitha Wendo reiterated what PW.1 said showing how the robbery was committed. PW.4 Bernard Amadi said someone sought to sell to him a motor vehicle but at the trial he pointed at a wrong person as that person. PW.5 P.C. JOHN KAMAU stated how they arrested appellants one and two on 27-12-95 after a chase on foot and found the appellant SAID OMAR, accused No.2 with a Beretta pistol loaded with three live ammunition. They also recovered two firearms a Beretta No.22560, and a Cart Pistol No.96311 loaded with 5 rounds of ammunition. The two stood on either side of the complainant and on Dismas Ratin Okumu's waist. PW.6

P.C. ISAAC ABDI ALI corroborated what P.C. Kamau PW.5 said about what happened when they accosted Okumu and Omar. He found while chasing the appellants a paper bag which was carried by the appellants on the ground floor table of the hotel. They found a Number and printed car plate Number KAE 325 H, but the witness recalled that it was a number of a vehicle that was circulated as stolen. He received two pistols from Okumu.

It is worth noting here that the evidence of PW.6 No. 55252 P.C. Isaack Abdi Ali, was not challenged in cross-examination by the two counsel. PW.7 investigated the case. It is his evidence that connected the theft of the car in question with the two appellants. His evidence was recorded that on 25-12-95 he took Salim 2nd accused to Kibokoni to check on a car. Salim took him to the car and pointed it to the witness. The car had Registration No. KAE 676 S and the key accused had opened the car door and started the Engine of the same car. Police records identified the car to be the one robbed. PW.1 was robbed of on 22-11-95 and that same number belonged to the stolen car from the complainant.

In defence the first accused denied knowledge of everything connected with the case in his unsworn statement. So was accused No.2. When PW.2 I.P. Mohamed Dido was re-called on 6-10-97 to court he said in his cross-examination that accused led him to the recovery of the car and insisting that he recovered the key from the second accused and that the accused let him to the place where the car was parked. He also identified the car key he said accused handed over to him.

S.31 of the Evidence Act Cap 80 deals with the matter

where information from an accused has led to the discovery of

a fact. It says:-S:31.

"Notwithstanding the provisions of sections 26, 28 and 29 (of the Evidence Act) when any fact is discovered to as discovered in consequence of information received from a person accused of an offence, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Even had this been the stolen car, and the appellant led the police to it, it cannot be said that it was a confession by him that he stole the car.

In discussing this section SHERIDAN J. in R. v. MWACHARU WACHARU [1923] 9 (KLR 98 said

"--- The section means that the fact that while

information leading to a discovery may when looked upon as a whole amount to a confession of guilt, nevertheless such part of it as leads to the act of discovery may be given in evidence so far as it

proves corroborative circumstances."----- The words

of the section are sufficiently clear to allow of evidence of such statement being given and it is a matter for the court to sift whether in all the circumstances of the case the evidence is true or false. In short it is a matter of weight"---"

The appellant denied this so that if it were to be a confession then it, is a retracted one, but in this case it never reached that stage and we would bestow no much weight on it as proof of appellants guilt without further corroborative evidence. On this evidence however the learned Principal Magistrate found that the appellants led Dida to the recovered car. He found that one of the appellants had the car key that started the car they had. led their captors to, and the said car turned out to be the one that had been earlier on stolen. The learned Magistrate said that one appellant must have been taken to know that the other was carrying the key. He found that they were the same people who robbed the complainant of his car and therefore convicted them of robbery with violence.

The appellants appealed separately against the conviction but their appeals were consolidated and heard together.

For the original accused No.1 Dismas Ratiel Okumu, there were four grounds of appeal against the decision of the Principal Magistrate. 1st that the learned Magistrate erred in law and fact in convicting the appellant against the weight of evidence.

Secondly, that the Learned Magistrate erred in fact and law in finding that the appellant was found in joint possession of the key with the original 2nd accused.

Thirdly, that the Learned Magistrate erred in law and fact in finding that the appellant was involved in the

commission of the offence he was charged with.

Fourthly, against sentence.

Mr. Gakuhi learned counsel for the appellant argued grounds 1 and 2 together and his main submissions were that the appellant was not identified as one of the robbers neither was there evidence that he led the police to the recovery of the motor vehicle alleged to have been stolen and that it was a misdirection on the magistrate's part to find that appellant No.1 also led the police to the stolen motor vehicle, and lastly that the key was not produced in evidence. He said that the full ingredients of the offence were not shown as violence was not proved.

The second appellant Salim Said Omar had six grounds of appeal but his learned advocate Mr. Wameyo argued grounds 3 and 5 and these stated that the learned Magistrate erred in law and fact in holding that the appellant had possessed the key of motor vehicle whereas the same key was never produced in court, and ground 5 stated that the learned Magistrate erred in law and fact in relying on circumstantial uncorroborated evidence without first warning himself of the dangers of relying on such evidence. Mr. Wameyo who argued the appeal strongly attacked the learned Magistrate's finding in relation to the key, saying there was no evidence that it was ever found on the appellant No.2 neither was it produced in evidence by PW.2. He said there was no evidence connecting appellant No.2 with the key. He said this was not a

confession as it is required under S.25 of the Evidence Act.

On Ground 4 he said that long period had lapsed between the time of the offence and that of the arrest.

The State Counsel Mr. Ng'eno did not support the conviction. In this case the learned magistrate seemed to have relied on the principle of recent possession which states that if someone is found in possession of goods soon after they have been missed and he fails to give credible explanation of the manner in which he came by them the court may infer that he was either the thief or he was handling them with knowledge that they are stolen.

The learned Magistrate regarded the key as such, apparently but he [did not establish in evidence if the key was found on the appellants or not. The key itself was not produced in evidence. In this omission the learned magistrate overlooked a very important piece of evidence which served to connect the stolen vehicle with the action of the appellants, and therefore misdirected himself in finding that the two knew that the motor vehicle was a stolen one.

As regards the leading of the police to the stolen car, this is pertinent evidence against the second appellant, but there, was no evidence that first appellant also led the police to the scene of the stolen vehicle. As for the second appellant, there is uncontroverted evidence that he led the police to the stolen,

vehicle, but again when looked at in

8

totality, this evidence can only be used to support the theory as to recent possession, and we have stated our view on this. Yet a month had passed by and neither was it established that at the time the police were actually looking for the stolen car. It was always in the possession of the accused.

This evidence was unsafe to convict on looked at in totality, and it appears to us, that the charges ought well to have been against possession of the car and differently of the key.

As the state does not support the convictions, we also are of the same opinion and so we quash the conviction of robbery with violence against both the appellant and set aside the sentence of death imposed on them and set them at liberty unless they are otherwise lawfully held. Delivered this 4th Day of Sept. 1998.

A.I. HAYANGA

JUDGE

P.N. WAKI

JUDGE